EUROPEAN COAL AND STEEL COMMUNITY
EUROPEAN ECONOMIC COMMUNITY
EUROPEAN ATOMIC ENERGY COMMUNITY

COMMISSION

Third Report on Competition Policy

(Addendum to the 'Seventh General Report on the Activities of the Communities')

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Introduction

In what has become an essential and regular part of the dialogue between the European Parliament and the Commission, this report sums up developments in competition policy in 1973.

This was a year when three new Member States joined the Community; as a result not only was the field of application of the competition rules extended to countries in which major firms are established but also, as a result of recruiting new officials from those Member States, the Commission's experience was considerably broadened.

The report is inevitably of a somewhat fragmentary nature, since it simply sets out the results of a single year whereas the main lines of our competition policy have been developing more progressively and continuously than that, particularly as the Commission only gradually outlines new approaches through its decisions in individual cases.

The Commission proposal on merger control has already provoked extensive discussion between the various European institutions (especially with the European Parliament and the Economic and Social Committee) and with trade associations and trade unions represented at Community level.

Although the need for merger control has been recognized and the broad lines of the Commission proposal have been approved in principle, certain objections have nevertheless been raised. Criticisms are directed particularly at the fact that advance control of mergers is proposed, at the effects of the regulation on other Community objectives, in particular as regards employment and industrial policy, and at the social protection of workers.

The Commission is convinced that the process which has been set in train will produce balanced legal rules which will help to maintain effective competition in the general interest of the Community.

The Commission will remain as active as ever in applying Article 86 to mergers which constitute abuses of dominant positions; in this it was encouraged by the Council in the Resolution on economic and monetary union adopted on 3/4 December, where the Member States were invited to assist the Commission in carrying out the economic and commercial research required for the systematic implementation of Article 86 of the Treaty. Likewise, in order to put a brake on rising prices

in the Community, the Council has invited the Member States to apply the provisions of their national law providing for checks on abuses resulting from market dominance more strictly and more vigorously. Furthermore the Member States and the Commission will regularly exchange information—general and specific—on comparative price movements in the Member States.

On the steel market, the trend towards larger production units is leading to the formation of joint ventures and to diversification into areas other than primary processing, thus cutting down the risks involved in fluctuations in economic activity. This has prompted the Commission, when giving prior authorizations under Article 66 of the ECSC Treaty, to take account also of Article 86 of the EEC Treaty. In its Mannesmann/Demag and Thyssen/Rheinstahl decisions, the Commission considered whether the extent of diversification and intra-group consumption would place the firms in question into positions to pursue strategies without regard to market conditions.

The Thyssen/Rheinstahl merger was authorized only subject to certain conditions designed to ensure that, in an industry which was already highly concentrated, the various groups would remain independent and would not interfere in each other's affairs—a need that is the greater the more powerful the groups.

In view of developments on the oil products market, the Commission has decided to investigate whether Articles 85 and 86 of the EEC Treaty should be applied. The investigations will continue in 1974.

The Commission has stepped up its activities relating to restrictive and abusive practices by firms and has endeavoured especially to extend its guidelines on the approach to be adopted in selective distribution cases, where it is necessary to make a very detailed examination of the pros and cons for consumers so that the only restrictions on competition allowed will be those which are necessary for the attainment of other Community objectives.

Decisions giving exemption from the ban on restrictive agreements will tend to encourage desirable forms of transnational cooperation between firms. For instance, the decision in favour of an association of marine paint manufacturers, for whom a suitable and essential means of increasing supply and improving sales outlets was to enter into an association and to coordinate the individual sales networks of the members, will enable them to compete more actively with major world producers.

Special attention is still being paid to auto-limitation agreements concluded with private firms outside the Community, whose direct or indirect effect is often to make imports more expensive. Proceedings have been initiated in respect of an

agreement concluded by manufacturers of a product which is widely used as a component by industry in Europe.

Policy on State aids will also have been affected by the accession of the three new Member States in 1973. Among other things it was necessary to broaden the Community approach to regional aids, originally established for the Six, and to implement Article 154 of the Act of Accession, under which the principles concerning the general arrangements were to be applied to the new Member States as part of the Community system. Acting under Articles 92 to 94 of the EEC Treaty, the Commission has taken the initiative in amending and extending the principles already accepted by the Member States so as to bring them closer into line with problems in the various regions and to give greater consideration to the priorities determined by the Member States for their own regional aid schemes.

When dealing with aid to particular industries, the Commission has endeavoured to give them a Community orientation and framework so that they can be used as the effective basis for a real Community industrial policy. This can be seen particularly in the proposals on shipbuilding sent by the Commission to the Council, the object of which, by means of temporary measures coordinated at Community level, is to replace the aids hitherto granted by Member States to shipbuilding by incentives designed to make the industry competitive in the long term.

Part one

Competition Policy towards Enterprises

Chapter I

Main Developments in the Community's Policy

Section 1

The Control of Mergers and Restrictive Practices

§ 1 — The Control of Mergers

1. The year has seen a move towards the control and regulation of mergers.

In February the Court of Justice confirmed the Commission's interpretation in the *Continental Can* case[1] on the applicability of Article 86 of the EEC Treaty to the control of concentrations, although the Court reversed the Commission's decision against Continental Can on grounds of insufficient proof. Apart from the effect of the ruling in relation to mergers, its importance lies in the demonstration by the Court of its practice of interpreting the Treaty. The Court declined to confine its construction to a narrow reading of the text of one Article in isolation from other Treaty provisions, since this could have negated the clearly expressed aims of the Treaty as a whole. In the judgment of the Court, the acquisition of a competitor by a dominant firm, with the result that only undertakings remain in the market which are dependent on the dominant firm and which do not constitute an adequate counterweight, amounts to an abusive exploitation of dominance. The Court read Article 86 in the light also of the prohibition against distortions of competition in Article 85 and refused to admit a paradox. It accordingly rejected that Article 86 could permit a strengthening of dominance which was capable of eliminating effective competition completely.

It is therefore clearly established that Article 86 enables the Commission to intervene *post hoc* in cases of concentrations which result from a strengthening of market dominance and which substantially impair competition. As foreshadowed in the Second Report on Competition Policy, the Commission is now seeking powers pursuant to Articles 87 and 235 of the Treaty by way of a Regulation which is to give opportunity for the assessment of mergers prior to their consummation, regardless of whether they arise from a previously existing dominance of one of

[1] Europemballage Corp. and Continental Can Company Inc. v. EEC Commission. Case 6/72, Judgment of 21.2.1973, OJ C 68 of 21.9.1973, p. 33; Reports 1973, p. 215.

the merging enterprises.[1] Subject to certain exceptions in favour of relatively small mergers, any proposed concentration which will exceed an aggregate turnover threshold of 1 000 million units of account must be notified to the Commission before it may be put into effect.

The duty to notify an intended concentration by virtue of its turnover raises absolutely no presumption of condemnation. The threshold for notification simply provides a mechanism which entails analysis by the Commission. As such, it must be certain, objective and simple in its operation. Once this mechanism has been engaged, qualitative judgments are relevant to determine whether the proposed concentration threatens effective competition.

The proposed Regulation recognizes that, in exceptional cases and on grounds of overriding Community policy, the adverse impact on effective competition of some larger concentrations may need to be accepted, and accordingly it makes provision for exemptions on these grounds. In the interests of preserving future flexibility for possibly changing Community needs, the Commission has resisted requests to specify in advance in what circumstances such exemptions will be granted.

2. In the steel sector, the Commission approved under Article 66 of the ECSC Treaty, the acquisition by August-Thyssen-Hütte AG of a majority of shares in Rheinstahl AG.[2] The approval was granted subject to far-reaching conditions intended to enable the new grouping and other existing producers in the industry to maintain their independence of each other. The conditions were designed to secure disengagement by Thyssen from certain of its other involvements in the sector and included undertakings by Thyssen (i) to reduce its holdings in a company jointly held with another group (Mannesmann) to 25 per cent or less, so as to lose minority-vote blocking rights, and to dissociate itself from management agreements in respect of the joint company; (ii) not to maintain interlocking directorships with other steel groups; (iii) to withdraw from German steel rationalization groups and (iv) to apply for prior consent to the Commission before acquiring 10 per cent or more in any steel producing or dealing undertaking or in any undertaking with a specified minimum steel consumption.

§ 2 — Decisions on Restrictive Agreements

3. The cases which the Commission has decided during the year illustrate several different aspects of Community competition policy in the field of restrictive agreements.

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[1] Proposal by the Council of a Regulation for the Control of Mergers, OJ C 92 of 31.10 1973.

[2] See point 15.

The Commission took two decisions[1] to prohibit the coordination of distribution of potash fertilizers. The two cases involved major producers in a highly concentrated sector.

In its ruling relating to marketing arrangements for water heaters[2] in Belgium, the Commission condemned an aggregated rebate scheme which covered purchases from suppliers outside the scheme.

The Commission approved a cooperation agreement[3] between manufacturers of sewing machine needles under which one of the parties agreed to cease production and to transfer manufacture to the other party.

An extension was granted for a further period to an exemption previously given to a cooperation agreement between medium-sized enterprises for the sale of marine paints under a joint trademark.[4] It was the objective of the agreement to increase the competitive position of the parties vis-à-vis larger international groups. The Commission made its decision subject to the abandonment by the parties of certain territorial limitations which had been sanctioned by the previous exemption.

The Commission fined Deutsche Philips GmbH[5] for having failed to eliminate a ban on exports of electric razors to other EEC countries. Arising out of previous proceedings in 1967, Deutsche Philips' parent company had then declared its willingness to lift all export bans in respect of EEC member countries. Only a relatively small fine was imposed on Deutsche Philips, since the Commission was able to regard the retention of the export ban as a negligent oversight rather than deliberate policy.

The Commission's decision in the case of Du Pont de Nemours (Deutschland) GmbH[6] underlines that the imposition by manufacturers on dealers of conditions of sale involving restrictions in respect of resale price maintenance and inter-dealer sales is within the prohibition of Article 85 (1) if trade between member countries is affected.

An abuse of a dominant position was called into question in relation to tenders for a development contract issued by a prospective purchaser, under which the purchaser claimed excessive rights in the development results.[7] This matter was settled on

[1] See points 47 and 49.
[2] See point 53.
[3] See point 58.
[4] See point 61.
[5] See point 65.
[6] See point 64.
[7] See point 68.

terms which involved a relaxation of those rights and, although a formal Commission decision was not called for, the case is notable since it is the first to have been raised with the Commission in which a purchaser was able to influence market behaviour from a position of dominance. The case is also likely to be of interest in relation to many thousands of development contracts which are regularly placed by substantial users of high-technology equipment, particularly in the public sector.

4. A number of cases were settled during the year, so that formal decisions were not called for. There is also some evidence that numerous previously existing restrictive agreements, involving market sharing, price and quota limitations to which enterprises in the acceding countries were parties and which would have called for notification to, and consequently for examination and decision by, the Commission were voluntarily abandoned or modified by informal settlements so as to conform to the Treaty and to the applicable block exemption rules. It is plausible to conclude that the jurisdiction which has so far been evolved by the Commission and the Court of Justice in applying Article 85 of the Treaty to agreements in these fields is resulting in some measure in a reasonably clear understanding of what is permissible.

§ 3 — Nullity of prohibited Agreements

5. In a judgment given on 6 February 1973[1] the Court of Justice held that the nullity provided for in Article 85 (2) is of retroactive effect. This means that 'new' agreements, whether or not notified, cannot be considered to be 'temporarily valid'. This judgment is therefore extremely important for the Community's competition policy and as regards compliance by firms operating in the Community.

The Court confirmed the absolute nature of the automatic nullity provided for by Article 85 (2), citing Article 1 of Regulation No 17, which reads: 'Without prejudice to Articles 6, 7 and 23 of this Regulation, agreements, decisions and concerted practices of the kind described in Article 85 (1) of the Treaty and the abuse of a dominant position in the market, within the meaning of Article 86 of the Treaty, shall be prohibited, no prior decision to that effect being required.'

The decision distinguished as to the way in which Article 85 (2) should be applied with due regard for the general principle of certainty in the law, between old

[1] Case 48/72: Brasserie de Haecht. v. the spouses Wilkin-Janssen, OJ C 45 of 23.6.1973, p. 28; Reports, 1973-2, p. 77.

agreements, i.e. those existing before Article 85 was implemented by Regulation No 17 (13 March 1962), and new agreements, i.e. those concluded after that date:

(a) For old agreements duly notified, the Court ruled that the general need for certainty in contracts required that a national judge could rescind such contracts only after the Commission had taken a decision under Regulation No 17. However, this rule only concerns a continuously diminishing number of agreements. Although the Court did not come to a decision on this question in its judgment, the Commission feels that the principles applicable to old agreements could also be applied by analogy to agreements which became subject to Article 85 following the Accession of the new Member States, provided they were already in force before the date of accession (1 January 1973) and were notified before the end of the six-month period following accession.[1]

(b) On the other hand, for new agreements, whether or not notifiable, whose number and economic importance are greater, the Court stated that, as long as the Commission has not given a decision, the implementation of such agreements was at the risk of the parties; and that notification under Article 4 (1) of Regulation No 17 would not have a suspensory effect. For the purpose of the prohibition in Article 85, the Court explicitly stated that the principle of certainty in the law for undertakings was of less importance than the absolute nature of the nullity provided for in Article 85 (2).

The Court went on to say that, in the case of a new agreement, a national judge could decide whether proceedings should be suspended to enable the parties to obtain a decision from the Commission. However, in the case of a new agreement which is, beyond doubt, incompatible with Article 85 as a whole, as judge may, without waiting for a Commission decision, hold such agreement void under Article 85 (2).

This principle is likely to be applied where, having regard to reported cases of the Court and to the administrative practice of the Commission, there is no good reason for expecting an exemption to be applicable.[2]

§ 4 — Relationship between the competition rules in Community law and in the laws of the Member States

6. Until provisions to the contrary are adopted pursuant to Article 87 (2) (e) of the Treaty, it must be expected that the Treaty rules on competition can be applied in parallel with national rules to restrictive agreements and abusive practices

[1] Annex to the Act concerning the Conditions of Accession and the Adjustments to the Treaties, Section V, Competition: OJ L 73 of 27.3.1972, p. 92.

[2] First Report on Competition Policy, sec. 1.

by dominant firms. This is the result of the coexistence of two legal systems, each based on its own considerations, and each pursuing objectives which can to some extent differ.

In a judgment given on 13 February 1969[2] the Court of Justice expressly recognized this principle, while limiting its application, when it held that 'the national authorities may take steps against an agreement in accordance with municipal law, even if the compatibility of the agreement with the Community rules is at the same time being examined by the Commission. This is, however, subject to the condition that the implementation of municipal law must neither prejudice the full and uniform application of Community law, nor be in conflict with measures taken in pursuance of such application;'.

This general principle contained in a Court of Justice ruling, which confirms the primacy of Community law, nevertheless needs to be expressed in more practical terms. A whole series of complex legal problems can arise from formal definition of the relationship between municipal law and the competition rules of Community law as also from any measures which are adopted in order to reconcile possibly conflicting rules. These problems will be discussed this year at a meeting with national experts on restrictive practices.

It is quite possible that, as a first step, conflicts arising from the parallel application of two legal systems could be averted simply by laying down procedural rules to be followed by the relevant authorities. This is why the Commission is now examining, among other measures, the possibility of intensifying the exchange of information between national authorities and Community authorities which have responsibility for competition and improving existing consultation procedures, so that close cooperation between national authorities and the Commission can be ensured where national law and Community law could be applied at the same time.

§ 5 — Selective Distribution

7. The Commission is currently considering cases which raise questions of compatibility of certain selective distribution systems with the Community rules on competition. In view of the importance of these questions, the Commission consulted government experts of Member States at a Restrictive Practices Conference in November 1973. A selective distribution system limits the sale of products at the distribution stage to selectively authorized dealers only. This has the effect that dealers outside the selectively authorized network cannot

[1] Case 14/68 (Walt Wilhelm *et al.* v. Bundeskartellamt), OJ C 30 of 7.3.1969, p. 2; Recueil 1969, 1, p. 1.

normally deal in the products in question. Such limitations are sought to be enforced through appropriate contractual obligations in agreements by which main and sub-dealers are appointed.

The qualification criteria by which dealers may be admitted to the authorized network can rest on qualitative and/or quantitative tests.

It is recalled that the Commission has had previous opportunities to express its views on the applicability of Article 85 (1) of the Rome Treaty to limitations placed on dealerships.

8. In the *Kodak* case[1] the Commission gave a negative clearance to terms of trading which required that the products should only be sold 'by trained personnel and on premises where storage and display facilities and business arrangements are satisfactory'. The Commission approved this provision because 'neither the Kodak companies nor their wholesalers can refuse to supply retailers who meet these conditions' and because there was no reason to think that the terms of trading were being applied for the purpose of restricting exports through refusal by Kodak to make supplies to exporting dealers.

9. In the *Convention Faïence* case,[2] a multi-party agreement between a manufacturers' association and an association of dealers concerning collective limitations of supply, the Commission had refused to approve a restriction under which the goods in question were to be supplied only to 'approved customers' since some customers (as, for example, general contractors and public authorities) were expressly debarred from approval by general description. In this case the Commission condemned the restriction as discriminatory, in that it touched upon entire classes of customers.

10. A decision to similar effect was taken in the *Gas Waterheaters* case,[3] which concerned a sales agreement between producers and importers in Belgium under which the participating firms were to supply only certain groups of customers.

Selection of purchasers on the basis of qualitative criteria can only escape from the ban of Article 85 (1) if such criteria are applied uniformly and without discrimination to all potential purchasers for the purpose of determining their suitability as customers.

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[1] OJ L 147 of 7.7.1970.
[2] Bull. EC 5-1964, p. 46.
[3] OJ L 217 of 6.8.1973.

11. In the *Omega* case,[1] in which both qualitative and quantitative restrictions were involved, the Commission ruled that a limitation of dealers amounted to a restraint on competition, not because such limitation was applied to dealers who satisfied certain objective requirements as to their professional qualifications, but because the main distributors were empowered to limit retailers to a number to correspond to the presumed purchasing power for the products in particular areas. Nevertheless, the Commission granted an exemption on the grounds that, in this particular case, removal of the restriction would have resulted in such a small turn-over of Omega watches per dealer that individual dealers would no longer have been interested in actively promoting sales and in stocking a sufficiently wide range of models.[2] The Commission in this case particularly stressed that its decision rested on special circumstances and did not establish a general principle.

12. Reasons which have been typically advanced to justify selective distribution systems include:

(a) the need through a highly trained dealership network to provide pre- and post-sales services, as well as the need for close and continuous collaboration between manufacturers, dealers and customers, in relation to technically complex or more than ordinarily expensive products. This applies particularly to potentially dangerous goods and to products the efficiency of which depends on regular and skilled maintenance;

(b) to preserve the exclusivity of a minority market for luxury or prestige-brand products or to conserve products with a limited shelf life which is dependent on expert attendance.

Decisions in such situations require a balancing of the probable advantages to consumers against the extent of the specific restrictions involved, having regard to the market environment of the parties and their products. Approval of selective distribution systems could in certain cases inhibit advantageous sales to consumers through recently developed low-price 'supermarket' marketing and methods based on 'discount' schemes.

It is clear from the administrative practice of the Commission that selective distribution systems cannot be set up on a territorial basis which conflicts with the objectives of the Common Market. In the Commission's view, any limitations on sales between main distributors and retailers and between retailers and ulimate customers are justifiable only if they result in a downward alignment of prices in the various Member States.[3]

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[1] OJ L 242 of 5.11.1970.

[2] See analysis of prices applied after decision.

[3] First Report on Competition Policy, sec. 56.

A survey of price trends for the most popular models of Omega watches in the EEC since the Commission decision of 28 October 1970 has shown a clear movement towards a progressive alignment of retail prices in each country. The differences between the lowest and highest prices of different models which in 1970, as was pointed out in the Court decision, lay between 33% and 50%, dropped to between 4% and 21% in 1973.

§ 6 — Licensing agreements

13. One of the most important current tasks of competition policy is the scrutiny of patent licensing and knowhow agreements. The Commission has had previous opportunity to express its views on a number of aspects of this subject.[1] The main problems arising from an analysis of cases now under review concern assessment, in the light of Article 85 (1) and (3), of the various aspects of the allocation of markets and production between parties to agreements. The points at issue include:

(a) the territory or technical application which the holder of the patent may reserve to himself as against his licensees;
(b) the territory or technical application which each licensee can protect as against the patent holder and the other licensees;
(c) the mutual protection of the parties which may be provided for under cross-licences.

The foregoing may be achieved by export bans, restrictions on the sale of the protected products for given uses or measures having similar effect.

In order to centralize and speed up the examination of agreements of this type, a special Industrial Property Rights Division has been set up within the Directorate-General for Competition. Its first job was to undertake an initial analysis of newly notified patent licensing and knowhow agreements. These make up the largest single category of notifications received under Regulation No 17 following the accession of the new Member States.

Section 2

Competition Policy and Current Problems

§ 1 — The Oil Industry

14. Although, in 1972, it did not consider that an inquiry into the oil industry under Article 12 or investigations into undertakings or associations of undertakings

[1] First Report on Competition Policy, secs. 69 *et seq.*
Second Report on Competition Policy, secs. 45 *et seq.*

under Articles 13 and 14 of Regulation 17 were necessary, the Commission nevertheless stated that it would remain vigilant and investigate any circumstance suggesting that competition was being restricted or distorted in the industry.[1]

The shortfall in crude oil supply in 1973 affected the quantities available on the market, and the price of oil products on the world market rose substantially.

Most Member States have rules governing oil prices the effect of which has been to slow down the tendency of prices to follow international trends. Applied fragmentarily, this policy is likely, if public authorities do not pay close attention to what is going on, to encourage refiners to release their products only to their own distribution networks or to find markets which are more profitable than those which are controlled.

The shortage of supply and the existence of national rules have led to a situation in which supplies to independent distributors have been jeopardized and in which substantial price disparities have been found between purchasers and between national markets.

Indeed, the disparity between world prices and national controlled prices has made imports virtually impossible for those independent suppliers who hitherto always imported their products and who do not have long-term contracts with refiners in the Community.

Moreover, the fact that certain markets are not regulated has made it possible for ex-refinery prices to vary considerably depending on the destination of supplies.

15. In view of this trend, the Commission has concluded that the maintenance of competition on this market as between the various types of firm which have traditionally supplied it, was likely to be jeopardized, and that it was necessary to prevent present circumstances from causing the disappearance of independent dealers or their absorption by the majors. In response to a parliamentary question on the situation of independent firms, the Commission stressed that it could, among other things, use its powers under Articles 85 and 86 if the majors resorted to concerted practices with the effect of eliminating independent competition or if it was found that they were abusing a dominant position. If the majors refused to supply independent distributors fairly, they might be caught by the competition rules of the Treaty, in particular Article 86. This could also be the case where the majors apply differing terms to equivalent transactions with other

[1] Second Report on Competition Policy, sec. 62.

trading parties or make the conclusion of contracts subject to the other parties accepting supplementary obligations.

For these reasons the Commission decided to open the necessary investigations into producer companies and dealers in the oil industry.[1]

§ 2 — Multinational Companies

16. In a Communication to the Council, the Commission has proposed measures for solving problems arising from the rapid development of multinational companies.[2]

The principle of full, uniform and non-discriminatory application of Community law on competition within the Common Market to all restrictive or abusive practices by firms, regardless of where their head office is situated, is clear from some fifteen Commission decisions concerning a number of firms which could be regarded as multinational, with establishments respectively in, and also outside, Community countries.

Up to date, Commission experience shows that:[3]

(a) No practical difficulties in applying Community competition rules have arisen in the past from the fact that a firm is multinational.

(b) The Commission cannot exclude the possibility that in some future cases the formal service of official documents or the enforcement of Commission decisions could raise problems, in particular as regards companies whose main decision-making centres are outside the Community. The Commission believes that, to ensure effectiveness of the official steps and decisions adopted by it in anti-trust matters under Community law it is necessary to draw up and implement, through international conventions or under trade agreements, rules governing the effects in other countries of decisions taken in Community competition matters.

In addition to adopting such rules on procedural matters, the Commission is also supporting international cooperation on the control of restrictive trade practices and dominant market positions. It recalls that it is in favour of continuing and

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1 Information for Press (1P 226/73) of 21.12.1973.

2 Multinational Undertakings and Community Regulations (Commission Communication to the Council, 7 November 1973); OJ C 114 of 27.12.1973, p. 28; Supplement 15/73 - Bull. EC.

3 This was the conclusion reached when the Commission was invited to inform the United Nations expert group appointed to study the rôle of multinational corporations and their impact on the development process of the experience it had acquired in this field, in particular in applying competition law.

intensifying contacts with the appropriate authorities in non-member countries so that views can be exchanged on cases currently being considered and on foreseeable developments of individual national competition policies. With this in mind also, it has continued taking part in the work of the OECD, which, following consideration of the possibility of studying restrictive practices by multinational firms, has drawn up a set of rules on their conduct as in the competition field.[1]

§ 3 — Influence of Competition on Prices

17. In line with the Council Resolution of 14 September 1973, the fight against inflation, which requires the simultaneous use of all the Community's economic policy instruments, must be backed up by, among other measures, an active policy on competition.[2] Apart from the price policies applied in various member countries in accordance with their own requirements, competition policy pursued at both national and Community level would appear to be an important means of supervising markets on which competition on its own is not effective enough to regulate prices, especially in a strongly inflationary situation. It facilitates intervention where there is reason to believe that high prices are the result of restrictive practices or abuses, in particular where firms in dominant market positions carry through concerted or abusive price increases, or where price strategies are discriminatory according to the market, as a result of restrictive practices or in order to buttress dominant positions.

On 4 December 1973, with a view to strengthening existing provisions in this matter, the Council adopted a Resolution[3] on measures to be taken against rising prices and the maintenance of a high level of employment in the Community which, in addition to national measures on prices, invited the Member States and the Commission to organize as soon as possible regular exchanges of necessary and specific information on price movements and price comparisons in the member countries.

'Member States will aid the Commission in the economic and commercial research required for the systematic application of Article 86 of the EEC Treaty.'

The Commission has taken the initiative in organizing the exchanges of information on prices called for by the Council, in cooperation with the relevant national authorities.

18. It should be recalled here that when presenting its proposal for a Regulation on the control of concentrations,[4] the Commission stated that one of its justifications

[1] See point 45.
[2] OJ C 75 of 19.9.1973.
[3] OJ C 116 of 29.12.1973, p. 22.
[4] See point 27.

was that the increase in concentration on a number of markets was likely to reduce the effectiveness of measures taken against inflation by enabling dominant firms to determine prices with little regard for economic trends.

19. In the coal and steel industries, where the Treaty of Paris gives the Community exclusive jurisdiction over prices, a Commission Communication to production undertakings which come within the jurisdiction of the European Coal and Steel Community[1] declared that careful attention will be paid to developments in prices, in consultation with undertakings, so that, if necessary, immediate action can be taken as provided in the ECSC Treaty, especially in Article 61. Moreover, the Commission will intensify inspections to ascertain whether firms are complying with the Treaty rules on prices.

§ 4 — Auto-limitation Agreements

20. Consideration of the measures notified to the Commission concerning voluntary limitations by Japanese firms to the Community has shown that there are various types of measures which should be assessed differently with regard to the competition rules.[2] Voluntary restraint provisions in trade agreements between Community and non-Community countries, if they are acts of foreign trade policy which, provided that the quantities to which the restraint applies can be freely disposed of within the Community, are not as such caught by the competition rules. Likewise, Article 85 would not apply to export agreements imposed on firms in non-member countries by their governments, unless there was an agreement or concerted practice between the firms.[3] The Community should seek to solve this situation by measures of official commercial policy.

Auto-limitation agreements, whether concluded by firms in non-member countries alone or between such firms and corresponding European firms, are subject to Article 85 according to the notice published by the Commission on 21 October 1972[4] which calls for measures of competition policy.

Following that notice, the Commission received a number of notifications which are now being processed; in other cases which came to its knowledge, it has carried

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[1] OJ C 115 of 28.12.1973, p. 6.

[2] Oral Question 35/73 concerning agreements between producers of electronic equipment in the Community and in Japan. Annex to OJ 162 of May 1973, p. 31.

[3] On the other hand, where the government merely authorizes the export agreement, Article 85 may well reach the firms in question for authorization, unlike imposition, does not prevent them from refraining from entering into the agreement.

[4] OJ C 111 of 21.10.1972, p. 13.

out investigations on the subject of the terms on which Japanese products are imported into the Community.[1] In one of these cases proceedings have been initiated.

In cases where examination of these agreements—whether on the basis of the notification or, in the absence of notification, on the Commission's own initiative—leads to the conclusion that the agreements are incompatible with the Treaty's rules on competition, the Commission will take the measures provided for in Regulation No 17. It might even propose appropriate measures of official commercial policy if these appear to be in the public interest.

§ 5 — Orientation of investments

21. In two cases, concerning respectively the cement and man-made fibres industries, the Commission had an opportunity to make known its reservations on private agreements for coordination of investment which were designed to prevent excess production capacity. It was not established that the agreements in question made it possible to achieve the aims of the parties; in addition, the agreements involved serious restrictions of competition between the parties as regards production and sales.[2]

However, this does not mean that, in exceptional circumstances and under conditions designed to ensure that the interests of the Community as a whole are respected, the Commission cannot organize for certain industries an improved system for exchanging forecasts of market trends and developments in production capacity, provided individual firms retain full control of their respective decision-making powers and full responsibility over their individual investments. Certain specific measures of this kind are envisaged in the action programme on industrial and technological policy in favour of industries which are facing special problems, such as advanced-technology industries and industries in a state of crisis.[3]

Section 3

The Proposal for a Regulation on the Control of Mergers

Introduction

22. It is incontrovertible that the process of industrial concentration is on the increase. The causes lie largely in the desire and need of Community firms

[1] Commission answer to Written Question 558/72, OJ C 29 of 12.5.1973.
[2] Second Report on Competition Policy, secs. 30 and 31.
[3] Seventh General Report on the Activities of the Communities, point 328.

to adapt constantly to the new scale of their markets and to improve their competitiveness on the world market. Many mergers, as a result of the structure of the markets in which they occur, in no way lessen competition but, on the contrary, can increase it. However, the Commission cannot overlook that the EEC Treaty, in making it responsible for applying the rules on competition, requires it to preserve the unity of the Common Market, to ensure that the market remains open and ensure effective competition. *Excessive* concentration is likely to obstruct these aims.

The legal instruments in the field of competition law currently available do not give adequate means of dealing effectively with the dangers arising from excessive concentration. The Community Treaties provide for systematic control of business concentration only on the markets in coal and steel (Article 66 of the ECSC Treaty). Concentrations in other industries are covered by Community rules on competition only if they constitute abuses of dominant positions within the meaning of Article 86 of the EEC Treaty.

23. The Summit Conference held in Paris from 19 to 21 October 1972 referred to the problem of business concentration and stated:

'The Heads of State or of Government consider it necessary to seek to establish a single industrial base for the Community as a whole. This involves ... the formulation of measures to ensure that mergers affecting firms established in the Community are in harmony with the economic and social aims of the Community, and the maintenance of fair competition as much within the Common Market as in external markets in conformity with the rules laid down by the Treaties'.[1] The Heads of State or of Government further believed that it was 'desirable to make the widest possible use of all the dispositions of the Treaties, including Article 235 of the EEC Treaty'.

In its Resolution of 5 December 1972 on measures to be taken against inflation, the Council took 'note of the Commission's intention to submit, independently of the application of Article 86 in such cases, proposals aimed at setting up a more systematic control over concentrations of a certain size'.[2]

In its Resolution of 7 June 1971, based on the Berkhouwer report, the European Parliament stated its belief that there should be prior notification of mergers resulting in firms exceeding a certain size or holding more than a stated share of the market; such mergers should be regarded as authorized only if the Commission made no objection within a specified period.[3]

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[1] Final Declaration of the Conference of the Heads of State or of Government of the Member States of the enlarged Communities, point 7.

[2] OJ C 133 of 23.12.1972, p. 14.

[3] Resolution of the European Parliament on the rules of competition and the position of European firms in the common market and in the world economy: OJ C 66 of 1.7.1971, p. 12.

In its Communication to the Council of 10 May 1973 on the industrial and technological policy programme, the Commission said that 'it is desirable to provide for prior notification of combinations of a certain magnitude, regardless of the form the combination may take, in order to enable the Commission to take action before a combination is effected which it considers incompatible with the maintenance of competition in accordance with the objectives of the Common Market'.[1]

24. The Court of Justice, in the judgment given on 21 February 1973 in Case 6/72 (*Continental Can*), also refered to the aims of the Community: 'Articles 85 and 86 seek to achieve the same aim on different levels, *viz.* the maintenance of effective competition within the Common Market'. The pursuit of this aim, which is even more clearly stated in Article 3 (f), is in the Court's opinion indispensable to the achievement of the Community's tasks.

If Article 3 (f) provides for the institution of a system ensuring that competition in the Common Market is not distorted, then it requires *a fortiori* that competition must not be eliminated; the Court of Justice also stressed this.

Article 85, which prohibits agreements between undertakings which have as their object or effect the restriction of competition, and Article 86, which deals with unilateral actions by one or more undertakings, are both designed to maintain effective competition in the Common Market. As Article 85 prohibits restrictions which merely affect competition, it is hardly likely that Article 86 would allow undertakings 'to reach such a dominant position that any serious chance of competition is practically rendered impossible' (*Continental Can*).

According to the Court of Justice, any differing legal treatment of agreements and concentrations between undertakings 'would make a breach in the entire competition law which could jeopardize the proper functioning of the Common Market'.

§ 1 — The Growth of Concentration in the Common Market

25. The number of mergers in the Common Market is steadily increasing. Between 1962 and 1970, the annual number of mergers in the Community of the Six (defined as acquisitions of holdings in excess of 50%) rose from 173 to 612—an increase of three and a half times. Moreover, the rate of increase between 1966 and 1970 was nearly double that between 1962 and 1966.

Since 1965 there has also been an increase in the number of mergers in the United Kingdom, and the process is tending to speed up.

[1] Supplement 7/73 — Bull. EC.

The increasing interpenetration of capital caused the share of the hundred largest firms in total sales of manufacturing industry to rise from 26% in 1953 to 50% in 1970 in the United Kingdom and from 34% in 1954 to 50% in 1969 in Germany. In France, the degree of concentration is not so high. Industry is least concentrated in Italy.

26. The effect of the growing number of mergers on market structures in various industries is of particular importance for competition policy. In order to ascertain these effects, the Commission began a study programme in 1970-71 to analyse concentration. The results of these studies show a clear, and in some industries an alarming, increase in the degree of concentration.

In some sectors the concentration process has already gone so far that only four manufacturers in such sectors are left in the Community. In many other cases there has been a substantial reduction in the number of firms, sometimes by as much as half.

As the number of manufacturers dropped in particular sectors, so the share of the four largest firms in total sales or total employment rose. This was found to be the case throughout the Community and in all the industries investigated.

In addition to these studies, information available to the Commission as a result of continuing surveys of certain industries also shows that there are many industries with a very high degree of concentration, including some where the four largest firms in the Common Market control between 80% and 90% of sales or production.[1]

In a large number of other industries the degree of concentration has not yet reached this level. Nevertheless, here too the speed of the concentration process is increasing considerably.

§ 2 — The need to control mergers

27. This development should not continue uncontrolled. In many industries the maintenance of effective competition could be imperilled if the concentration movement persists. Through mergers, firms can reach a market position where they can avoid the pressure of competition. They no longer need to adjust the price, quantity or quality of their products to demand. The market position of such firms allows them to adopt a price strategy which is largely independent of economic developments, and this reduces the effectiveness of anti-inflation measures and may even amplify cyclical movements. Since price trends are no

[1] For comments on the results of the analytical studies on concentration, see Part 3 of the Second Report on Competition Policy and Part 3 of this Report.

longer regulated by the market, the distribution of incomes is altered to the detriment of consumers, who additionally have to accept restrictions on their freedom of choice. The freedom of workers to choose among employers is also restricted.

The effects of mergers are particularly serious because the merger brings about an irreversible alteration of the structure of the market. Once a dominant position is attained, then substantial competition from the remaining firms on the market is not as a rule to be expected, unless there are far-reaching changes in market conditions. Furthermore, dominant firms are often in a position to prevent new competitors from entering the market. This is the case especially where they operate simultaneously on several markets and thus have additional room for manoeuvre, particularly in pricing.

28. The time has come for the European Community to take powers to exercise more systematic control over mergers. Accordingly, on 20 July 1973 the Commission sent to the Council a proposal for a Regulation[1] on the Control of Concentrations between Undertakings, based on Articles 87 and 235, whose main provisions are as follows.

1. Concentrations which give the power to hinder effective competition are incompatible with the Common Market. Concentrations on a smaller scale which do not give such power are not caught by this rule as long as they do not exceed certain quantitative limits.

2. Concentrations which are indispensable to the attainment of an objective given priority treatment by the Community may be held not to be incompatible with the Common Market.

3. Concentrations involving firms with aggregate sales of 1 000 million units of account are subject to prior notification, after which the Commission has three months during which it may initiate proceedings.

4. If the Commission does not initiate proceedings, the concentration is deemed compatible with the Common Market. If proceedings are initiated, a final decision must be taken after not more than nine months.

5. Legal transactions which have taken place in connection with a concentration which is declared incompatible with the Common Market are not void.

Consideration of the essential features of the proposed regulation shows that the intention is not to have a system based, like Article 66 of the ECSC Treaty, on

[1] OJ C 92 of 31.10.1973.

prior authorization nor a *per se* prohibition, but rather a system where incompatibility with the Common Market must be established case by case after assessment by the Commission of whether the concentration is liable to hinder effective competition in the Common Market.

§ 3 — Principal Provisions

The most important provisions of the proposed regulation are Articles 1 to 5.

29. Under *Article 1,* concentrations whereby the undertakings involved acquire the power or enhance their power to hinder effective competition are incompatible with the Common Market if trade between Member States is liable to be affected.

In its *Continental Can* judgment cited above, the Court of Justice of the European Communities made particular reference to the concept of preserving effective competition in order to describe the purpose of the competition rules of the EEC Treaty. That concept can thus be considered the main test of compatibility with the Common Market.

The concentration may be incompatible with the Common Market by virtue of the market share held or of the technical knowhow, raw materials or financial resources available to the firms concerned. Consideration can also be given to the absolute size of the firms, and their relations with buyers, sellers and non-Community firms. Effective competition is, finally, assessed by reference also to the competitiveness of the remaining producers, their conduct, the structure of supply and demand, barriers to entry to the market, the rate of technical progress, the growth of the relevant industry and actual or potential international competition and competition from substitute products.

In appraising concentrations, their implications for industrial development cannot be ignored. Certain combinations may, for instance, be the only practicable way of restoring some degree of competition in a market otherwise completely dominated by a firm with a high rate of internal growth.

The transactions caught by the regulation are those which directly or indirectly bring about a concentration involving at least one undertaking established within the Common Market. This definition covers both intra-Community concentrations and concentrations involving non-Community firms. This makes it possible to act on all concentrations which are likely to hinder effective competition in the Common Market, whether horizontal, vertical or conglomerate, and whether or not they involve dominant firms.

The rule is designed to cover only such concentrations as bring together under the same control undertakings which were formerly independent. External growth by the merger route can substantially modify market structures in a short space of time. It often does not reflect the competitiveness of the firms concerned. Internal growth, on the other hand, which is not covered by the regulation, is not of itself subject to control under any country's antitrust laws.

Article 1 provides that operations which fall within its scope are incompatible with the Common Market. To ensure that a decision taken under Article 1 (1) does not lead the courts in certain Member States to annul transactions connected with the concentration, Article 3 (2) provides expressly that a decision that a given concentration is incompatible does not automatically render void the legal transactions relating to it.

Article 1 further provides for a general exception from the principle of incompatibility with the Common Market for concentrations which satisfy two requirements, namely that the aggregate sales be less than 200 million units of account and the market share no more than 25% in any one member country. This provision immunizes concentrations which are not such as to hinder effective competition in the Common Market or in a substantial part of it.

Lastly, Article 1 provides for the possibility of exempting concentrations which, although caught by that Article, are indispensable to the attainment of an objective which is given priority treatment in the common interest of the Community. This makes it possible to take into account certain requirements of industrial, technological, social or regional policy applied by the Community. For example, a firm may sometimes be obliged to link up with a large group if it is to operate profitably in an economically underdeveloped or declining region where there are particularly pressing employment problems. However, this possibility for exemption does not constitute a general exception automatically applicable but must be authorized under Article 3 (4) case by case.

30. Article 2 defines concentrations in terms largely inspired by Decision No 24-54 of 6 May 1954 laying down in implementation of Article 66 (1) of the ECSC Treaty a regulation on what constitutes control of an undertaking (OJ of the ECSC, 11 May 1954, p. 345). This decision, taken by the High Authority after consulting the Council, has shown its value over nearly twenty years of practical application, during which more than two hundred individual decisions were taken. In this Article, business concentrations are defined by reference to the concept of control — consisting, in economic terms, of the power of an undertaking to determine how another undertaking shall operate.

31. Article 3 vests powers in the Commission to enforce Article 1 and gives to the Commission exclusive jurisdiction, subject to review by the Court of Justice. Provision is made for cooperation with the authorities of the Member States.

A decision that a concentration is incompatible with the Common Market does not automatically avoid legal transactions relating to the concentration (see commentary on Article 1).

Dissolution orders may be made, either in a decision under Article 3 (1) or in a separate decision which, while based on a previous decision, may be issued later, where the circumstances of the case are such that the firms should be ordered to restore effective competition. Liability for high periodic penalty payments in the event of non-compliance is intended to reinforce such orders.

Pursuant to Article 1, Article 3 stipulates that the possibility for exemption provided for with a view to attaining a priority Community objective may be granted only by a decision giving an individual authorization which declares Article 1 (1) to be inapplicable. The conditions which may be attached to such a decision should make it possible to impose any necessary obligations consistent with the scale or nature of the concentration as authorized.

32. Article 4 provides that concentrations which reach or exceed a certain figure must be notified before they are put into effect. Under Article 6 (time limit for commencing proceedings), notification must be given at least three months before the concentration is to be effected.

Article 4 provides that concentrations must be notified in advance where they involve enterprises whose aggregate turnover in the last financial year preceding the year of the concentration was at least 1 000 million units of account. A turnover test was adopted for industrial and commercial firms because it is relatively easy to apply; market shares, which could also have been used, are more difficult to determine and therefore less suitable as a method for deciding whether the concentration should be notified.

The reference to turnover means the aggregate turnover of the firms or groups directly or indirectly involved in a concentration and is thus not restricted to turnover in the Common Market: turnover outside the Common Market is also included.

On this test, some three hundred firms—including banking and insurance companies within the provisions of Article 5 — would have had to notify their concentrations in 1971, had the turnover of the acquired firm totalled more than 30 million units of account in individual cases. This figure of three hundred does not give a full picture of all concentrations which might have been notifiable.

The obligation to notify would additionally have applied to firms with a turnover of less than 1 000 million units of account which through merger would have reached or exceeded the threshold figure.

Under Article 4, the obligation to notify does not apply where the turnover of the acquired firm is less than 30 million units of account.

Article 4 also provides for the possibility of voluntary prior notification of concentrations which do not reach the specified figure of 1 000 million units of account. This is to enable firms to benefit from the procedural rules in Article 6 and following articles.

It is noteworthy in relation to Article 4, that the obligation to notify in no way prejudges whether Article 1 is applicable. Conversely, a concentration can be within the provisions of Article 1 without having to be notified.

33. Article 5 stipulates that the aggregate turnover and market shares referred to in the proposed regulation are to take account not only of the activities of the firms or groups directly involved in the concentration, but also those of firms or groups which are indirectly involved.

Since the turnover test cannot apply to banks and insurance companies, Article 5 specifies what tests are to be used in these cases. The test for banks and financial institutions was selected after comparison between the main industrial firms and the main banks and financial institutions. It was found that the total assets of banks and finance houses represent approximately ten times the turnover of the corresponding industrial firms. For insurance companies, total premium income was adopted.

34. Article 6 contains procedural provisions.

It concerns all concentrations which are likely to be caught by Article 1, regardless of whether notification is mandatory. The institution of proceedings by the Commission, notice of which must be given to the relevant firms and to the authorities in the Member States, is an important part of the procedure, but does not have the force of a decision. It is an essential step in the examination of a case, and it marks the beginning of the nine-month period within which all decisions must be taken under Article 3 (see Article 17).

There are special arrangements for notifiable concentrations. Any proceedings must be instituted within not more than three months of notification. Otherwise, at the end of the three months, the concentration as notified is deemed to be compatible with the Common Market. Moreover, Article 7 implies that the transaction can be carried out if the Commission informs the firms concerned before the end of that period that it does not propose to institute proceedings.

These provisions enable those concerned to know relatively quickly whether there are any objections to the proposed concentration. If there are none, the firms concerned know definitely within that period of three months that the proposed concentration is immune from attack unless they have agreed that the period be extended or have supplied incomplete, incorrect or misleading information at the time of notification. Provision is also made for optional prior notification of concentrations of which notification is not mandatory (see Article 4).

35. Article 7 provides for suspension of the concentration following prior notification, whether mandatory or optional, and this remains effective throughout the period during which the Commission may institute proceedings.

It also empowers the Commission to compel undertakings, by formal decision, to suspend the proposed concentration throughout proceedings once commenced.

36. Articles 8 to 22 govern procedural matters, requests for information and powers of investigation, fines and periodic penalty payments, professional secrecy and cooperation with the authorities of the Member States. On the whole, they have been taken over from the corresponding Articles of Council Regulation No 17 of 1962, implementing Articles 85 and 86 of the EEC Treaty. However, Article 17 should be mentioned specifically, since it fixes the period of nine months from the date on which proceedings are instituted within which the decisions provided for in Article 3 must be taken. This period can be extended if all the parties agree and if the circumstances so require. Article 17 also provides for publication of decisions taken under Article 3; such publication is to take account of the legitimate interest of firms in the protection of their trade secrets.

37. The European Parliament and the Economic and Social Committee are now being consulted. Their resolutions or opinions should be adopted early in 1974.

At its meeting of 17 and 18 December 1973 the Council set a timetable for the first stage of the action programme on industrial policy called for by the Paris Conference of October 1972. One of the items in the timetable reads: 'the Council shall by 1 January 1975 act on the proposal for a regulation on the control of concentrations'.

On 2 July 1973, before putting the proposal before the Council, the Commission convened the 24th Conference of Government Experts of Member States on Restrictive Agreements and Dominant Positions in Brussels, and held a preliminary discussion with the relevant national authorities on the draft regulation establishing more systematic control over business concentrations.

38. Before deciding on its proposal to the Council, the Commission also sought the opinions of the trade associations and unions represented at European level on the broad lines of the proposed merger regulation. The following organizations were consulted:

Industrial, Commercial and Financial: the European Centre for Public Enterprise (CEEP), the International Chamber of Commerce (ICC), the Liaison Committee of Small and Medium Businesses (Europuni), the Committee of Commercial Organizations in the EEC Countries (CCOEEC), the Permanent Conference of Chambers of Commerce and Industry of the EEC, the Union of Master-Craftsmen of the EEC (UMCEEC), and the Union of Industries of the European Community (UNICE);

Trade Unions: the European Trade Union Confederation, the Confédération générale du travail, the Confederazione Generale Italiana del Lavoro (CGT-CGIL), the European Organization of the World Federation of Labour and the International Confederation of Executive Staffs;

Consumers: the European Bureau of Consumers' Unions (EBCU), the European Communities' Committee of Family Organizations (ECCFO) and the European Community of Consumers' Cooperatives.

This gave business and labour the opportunity to give their comments on the aims of the regulation and on the main methods by which these aims were to be achieved. The Commission appreciates the experience it gained from these comments.

Section 4

Work with the OECD

39. In its Resolution[1] on the Commission's First Report on Competition Policy, the European Parliament expressed a wish that the competition rules applying on the world market be harmonized and that there be international cooperation in the fight against restrictive practices and abuses of dominant positions which were not caught by Community or national law.

For several years the Directorate-General for Competition has been taking part in the work of the OECD's Committee on Restrictive Practices and its various working parties. A large variety of topics has been discussed, in many cases

[1] OJ C 14 of 27.5.1973, p. 8.

giving rise to recommendations subsequently adopted by the OECD Council, mainly with a view to promoting international cooperation between the various authorities responsible for applying restrictive practices legislation. The need for such international cooperation is making itself felt more and more as a result both of the growing liberalization of international trade and of the difficulties sometimes met by various national authorities faced with the activities of major international companies.

40. Turning more particularly to cooperation in matters of restrictive practices affecting international trade, mention should be made of the two Recommendations adopted by the OECD Council on a report from the Committee of Experts on Restrictive Business Practices.

One is dated 10 October 1967 and the other 3 July 1973.

The first of these Recommendations is mainly designed to promote a voluntary procedure for consultation, exchange of information and coordination where member countries, acting under their national restrictive trade practices law, undertake investigations or proceedings which directly affect the major interests of another member country. The object of this to be able to take account of the views of the other member country and of any action which it may be able to take under its own national law.

The second Recommendation introduces a voluntary consultation and conciliation procedure under which a member country which considers that enterprises established in one or more other member countries are engaging in restrictive practices which substantially and adversely affect its interests can request consultation with the other country or countries concerned. This consultation is designed to enable the other member country, if it agrees that firms established in its territory are engaging in restrictive practices harmful to the interests of the requesting country, to take steps that those firms take remedial action or itself to take whatever remedial action it considers appropriate. The Recommendation also provides that the countries concerned may, if they so agree, submit the case to the Committee of Experts on Restrictive Business Practices with a view to conciliation, or that they may agree to some other means of settlement.

When the two Recommendations were adopted, it was expressly understood that they should not be construed so as to affect the legal positions of the member countries, including their obligations under the Treaty of Rome for members of the Community and under the Free Trade Agreements with the EFTA, countries which did not accede to the Community.

41. Similarly, the Directorate-General for Competition has been taking part in the work of the Committee of Experts which led to the Recommendation of the OECD Council of 14 and 15 December 1971 concerning Action against Inflation in the Field of Competition Policy.

This Recommendation provided for the adoption of immediate and long-term measures in the recognition that an effective competition policy is one important facet in the achievement of optimum economic growth and price stability and that measures to increase competition exercise a pressure on costs, prices and profits and thus contribute to the fight against inflation. The recommended immediate and longer-term measures include proposals for prohibiting or controlling resale price maintenance, provisions against damaging practices of monopolies and oligopolies, provisions against mergers which unduly restrict competition and provisions for extending restrictive practices legislation to industries hitherto covered by special rules.

42. Another working party dealt with action against restrictive practices relating to patents and licences. The work of this working party led to:

(a) the publication of a report from the Committee to the Council, describing a whole series of restrictive practices relating to patents and licences;

(b) a draft Council Recommendation which emphasizes the effect which unjustifiable restrictions can have on the dissemination of scientific and technological innovation and which invites the Member States to be particularly alert to:

  (1) unwarranted territorial restrictions on trade in, and importation of, patented products;

  (2) clauses concerning tied sales which are not justified, as for example, on technical grounds relating to the quality of the goods manufactured under licence;

  (3) grant-back clauses, unjustifiably requiring the licensee to assign or grant back to the licensor exclusively all improvements discovered in working the patent;

  (4) clauses limiting competition in industrial fields not covered by the licensed patent.

43. Considerable study has also been made of export agreements with a view to providing answers to the two following questions:

(1) Have the favourable effects which national legislatures intended to obtain from export agreements by exempting them from the prohibitions in their restrictive trade practice laws actually materialized?

(2) How do these agreements affect international trade?

The incompleteness of the available information, which is largely due to the fact that these agreements generally escape national competition laws, suggests that there is a need for procedures for notifying these agreements for information purposes and for checking whether the activities of these agreements do not in fact go beyond the exceptions for which they appear to qualify.

44. Finally, the Directorate-General for Competition is involved in work still going on in working parties to study mergers, measures to be taken against restrictive practices by multinational companies and the role of competition policy with regard to economic policy as a whole.

As regards mergers, the topics still being discussed in working parties include:

(a) levels of concentration and variations in degrees of concentration;
(b) relative significance of mergers, as distinct from internal growth, as the cause of increasing concentration;
(c) identification, measurement and assessment of the effects of mergers;
(d) principles to be adopted as a basis for merger control.

45. As regards restrictive practices by multinational companies, the work has largely concerned the legal and procedural problems facing the various national authorities, with a view to exploring possibilities of international cooperation and with a view to considering provisions for inclusion in a code of conduct for multinational companies.

This last mentioned working party proposes to assess the role of competition policy in the context of general economic policy, in particular by clarifying the scope of competition policy, measures adopted for its implementation and special measures taken in certain regulated or nationalized industries. This last mentioned matter is currently occupying the working party.

Chapter II

Main Commission Decisions

§ 1 — Elimination of agreements prohibited under Article 85

Sales coordination

46. In an important decision[1] adopted in its definitive form on 2 January 1973, the Commission had intervened on the European sugar market to put an end to concerted practices of the main producers in the Community, who had shared their respective markets and had arranged that imports should be made only to sales organizations under their control. This had considerably weakened the competitive pressure which could have resulted from unrestricted sugar imports.[2]

Similarly, sales of products by undertakings which are normally competitors can lose their competitive effect when they are carried out on the basis of the coordination and, in particular, if the distribution of products from various sources is carried out by a joint organization. This has occurred in relation to single potassic fertilizers. The Commission took several measures to reduce the restrictions on competition in this market, which is very highly concentrated and of great importance for European agriculture.

SCPA — Kali und Salz Agreement

47. The Commission intervened, under Article 85, in respect of a verbal cooperation agreement which had existed for many years between the *Société Commerciale des Potasses et de l'Azote (SCPA)*, which holds a statutory monopoly for marketing potassium salts from French mines, and the Verkaufsgemeinschaft Deutscher Kaliwerke (VDK), the sales agency of the eight German potassium producers, which was succeeded in 1970 by Kali und Salz AG[3], a *de facto* monopoly

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[1] Commission Decision of 2 January 1973, OJ L 140 of 26.5.1973, p. 17. Second Report on Competition Policy, sec. 28.

[2] This case is now pending before the Court of Justice, following an appeal by the undertakings concerned against the Commission decision.

[3] Commission Decision of 11 May 1973, OJ L 217 of 6.8.1973, p. 3.

for the sale of these products. This agency has in the Federal Republic of Germany the two companies which are the two largest producers of potassium in the Common Market, cover about 95% of the requirements of their respective domestic markets and more than 50% of the requirements of the other EEC markets, with the exception of Italy, where the proportion is smaller because there are Italian producers.

This explains why the Commission was particularly concerned about the effects of any coordination of the marketing behaviour of these undertakings on the market in the products in question. As regards commercial and industrial activity, coordination was reflected mainly in the joint fixing of the quantities and qualities of salts to be exported by each of the parties and by the coordination of the deliveries and distribution of products from both sources to export markets throughout the world, including those of the Member States of the EEC. This coordination was achieved by appointing joint distributors in the Netherlands and in Italy, which necessarily entailed their agreeing not to compete on those markets. This resulted in the coordination of the prices and sales terms of the products in each of the countries concerned. SCPA's appointment of a subsidiary of Kali und Salz to represent it in Germany was also based on a concerted practice between these undertakings. It appeared unlikely that an undertaking which was wholly controlled by another would apply a sales policy in conflict with the interests of its group or a policy not incompatible with its group's trading policy.[1]

48. Since it was evident that the conditions for exemption under Article 85 (3) were not fulfilled, the Commission ordered the undertakings to terminate their cooperation agreement and the supporting concerted practices. The size of the undertakings in question and their production capacity enabled them to supply their markets independently. Moreover, the numerous intermediaries operating on the market were in a position to adjust deliveries to the special requirements of demand.

The idea behind the decision is that if free competition is to be restored in respect of potassic fertilizers, each producer must organize the distribution of his products on an individual basis, by entrusting it to undertakings which are separate from those chosen by his competitors and not economically or financially dependent on

[1] For its part, Kali und Salz, the successor of VDK, entrusted the distribution of its products in France to SCPA, which held the legal monopoly in that country of the sale, export and import of potassic fertilizers. On the continuing adjustment of this State monopoly in accordance with Article 37 of the Treaty, following the Commission recommendation of 25 November 1969, see point 128 below.

them. For this reason, the Commission ordered SCPA and Kali und Salz to discontinue selling in the Netherlands and Italy through a joint distributor and ordered SCPA to discontinue the distribution of products in Germany by an undertaking controlled directly or indirectly by Kali und Salz. During the preparatory enquiries in this case the Commission found that the two separate companies responsible for distributing in Belgium the French and German products respectively had a close commercial relationship which precluded all competition between them. Although this was not the subject of the proceedings, those to whom the decision was addressed acknowledged the need to put an end to such a relationship between distributors of undertakings which would normally be competitors and they took the necessary steps to comply with the spirit of the decision.

In putting an end to such cooperation arrangements, the Commission also forbade the undertakings to exchange any information regarding production and distribution, because it believed this gave them an opportunity and the means to concert their production policy and to share export markets.[1]

Kali und Salz — Kali-Chemie Agreement

49. In another decision[2] adopted under Article 85, the Commission also prohibited the only two German potassium producers, Kali und Salz AG and Kali-Chemie AG, from coordinating their sales of single potassic fertilizers. Under an agreement in force since 1971, Kali-Chemie, which belongs to the Belgian Solvay group and accounts for about 13% of German production, entrusted its output of potassium salts to Kali und Salz for distribution, with the exception of those quantities processed in its own plants into complex fertilizers. Although Kali-Chemie was not obliged by the letter of the agreement to sell its potassium salts exclusively to Kali und Salz, in practice it sold to the latter its entire output of single potassic fertilizers.

The situation under the agreement which entered into force on 1 January 1971 was therefore practically the same as that existing previously within the framework of the German potassium salts producers' sales agency (Verkaufsgemeinschaft Deutscher Kaliwerke - VDK). Until 1970, the latter was alone responsible for distributing all single potassic fertilizers produced in Germany. In addition to

[1] In view of the special problems connected with the operation and location of potassium mines, the Commission, in adopting its decision implementing Article 85, reserved the right to take the appropriate steps within the framework of the social or regional policy if difficulties should arise following a reorganization of the potassium industry. (See Bull. EC 5-1973, sec. 2109.)

[2] Commission Decision of 21 December 1972, OJ L 19 of 23.1.1974, p. 22.

Kali-Chemie, it was composed of various potassium plants belonging to the Wintershall and Salzdetfurth groups, which were transferred to Kali und Salz as part of a reorganization of the BASF group's potassium interests. VDK was dissolved on 31 December 1970 and the agreement which was the subject of the decision replaced the joint sales arrangement agreed upon within the framework of the agency.

By this means, the distribution of all single potassic fertilizers produced in Germany was to be concentrated in the hands of Kali und Salz. This would have precluded all competition between the sole two German potassium producers both on the domestic and export markets. Because of its membership of the large Solvay group, and for other reasons, Kali-Chemie would have been capable of making supplies itself and without intervention by Kali und Salz, all quantities[1] it produced and sold under the agreement, and this could have considerably influenced competition in this sector.

Since the agreement in question was caught by Article 85 (1), the Commission considered, for the purposes of the possible application of Article 85 (3), whether in fact it procured advantages which justified joint sales and the decision not to use its own by Kali-Chemie marketing outlets. The Commission concluded that the agreement did not provide appreciable advantages likely to offset the disadvantages to competition arising from the centralization of sales. But in any case, exemption had to be refused because the agreement afforded to the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products in question. It gave Kali und Salz the opportunity of reinforcing the privileged position it already held in the potassium salts sector, where it accounted for 87% of German production, by becoming the sole vendor in Germany of the German output of single potassic fertilizers. Since imports of potassium were insignificant, all competition on the German market could have been ruled out in practice.

Sales agencies

50. Continuing its examination of the activities of sales agencies,[2] the Commission found that a considerable change had taken place in the structure of these agencies during recent years.

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[1] These quantities are roughly equal to the consumption of potassic fertilizers in Belgium or Denmark.

[2] First Report on Competition Policy, secs. 11 *et seq.* With particular reference to the chemical fertilizer market, see also the Commission's reply to Written Question No 163/72, OJ C 105 of 10.10.1972, p. 12.

Because of the growing trend in most sectors of industry towards concentration between undertakings, most agencies now had fewer members. Several agencies (e.g. SEIFA in Italy and CFA in France) were found to have disappeared altogether. Conversely, individual member firms were correspondingly larger and it seemed that the shares of the markets held by the agencies were also larger. The change had also led to some relaxation of the agencies' internal rules. Traditional forms and methods of cooperation between the members are now out of favour, and less formal, but equally effective, arrangements are preferred.

Thus in the case of Kali und Salz and Kali-Chemie, the Commission found that an agency which, as a result of amalgamations or mergers, had been reduced to two members had taken the form of a simple agreement between those two undertakings under which one undertook to sell the products manufactured by the other on the latter's behalf. However, the manufacturing company was not prohibited from selling its products itself and was merely obliged to deliver annually to the other company the tonnage specified in the contract. The Commission found that the agreement infringed Article 85. It did not accord importance to the fact that, unlike most joint sales agencies, the agreement did not expressly oblige the parties to use only one distribution network. The Commission felt that this was not a distinction of substance. It based its reasoning on the fact that the Kali-Chemie company in fact marketed its entire output of single potassic fertilizers through Kali und Salz AG and did not therefore appear on the market as an independent vendor of those products.

51. Continuing its investigation into other joint sales agreements of the traditional kind, the Commission intervened to bring the Belgian and Netherlands producers' agencies for sulphuric acid into line with the requirements of Article 85.

Since the beginning of the Second World War, the Belgian non-ferrous metal producers had entrusted the marketing of their output of byproduct sulphuric acid to a sales agency called Asybel SC, whose task was to resell on the Belgian market and for export. The statutes of the agency included a provision for a system of price equalization whereby at the end of each financial year all the producers received, for each tonne of sulphuric acid delivered during the year, a single price calculated on the basis of the agency's total income and deliveries.

The Commission informed the producers with shares in the agency that this arrangement, which had the effect of excluding price competition, was caught by Article 85 and did not qualify for exemption under that Article.

Following this intervention, the producers decided to terminate their joint sales agreement with Asybel.

52. In the Netherlands, the sale of sulphuric acid produced as a byproduct by the metallurgical firms, was also entrusted to a joint sales agency, the Nederlandsche Verkoopkantoor voor Chemische Producten (NVCP). Since 1970 NVCP had been responsible only for domestic sales and confined itself to selling, on behalf of the producers with shares in the agency, the products which they delivered to it without practising any price equalization between themselves.

The Commission drew the attention of these producers to the fact that, by obliging small and medium-sized Dutch retailers to procure their supplies exclusively from the agency, the latter deprived them of the right to import sulphuric acid from other EEC countries. This constituted a restriction incompatible with Article 85. Following the Commission's representations, the Dutch producers discontinued the arrangement challenged.

Agreements covering the domestic market

Agreement on gas water-heaters and bath-heaters

53. The Commission was also concerned with an agreement for the sale of gas water-heaters and bath-heaters on the Belgian market, which had been entered into in 1966 between three manufacturers and two importers of those products.[1]

The agreement established the distribution channels through which the members were to market their products and required the members and the intermediaries in the distribution channels to grant to their customers uniform discounts, rebates and other sales terms.

The agreement, caught by Article 85 (1), could not be considered to fulfil the conditions necessary for exemption under paragraph 3. Despite the arguments adduced by the notifying parties, there was no evidence that the restrictions would be likely to improve the marketing of the products in question. Apart from the fact that compliance with certain technical standards was irrelevant to the restrictions imposed, the elimination of certain categories of purchasers (including department stores, cooperatives and distribution chains) and the limited opportunities for intermediaries in the distribution channels to attract orders were more likely to hinder than to foster an improvement of marketing standards.

[1] Commission Decision of 3 July 1973, OJ L 217 of 6.8.1973, p. 34.

54. The importance of the decision adopted in this case is that it gave the Commission an opportunity to amplify its position with regard to aggregated rebate agreements, which are not uncommon within the Community.

Whereas the Commission's previous rulings on this subject had dealt with agreements under which rebates calculated solely on purchases from producers who were parties to the agreement,[1] in this case the aggregated rebate system also covered purchases from suppliers who were not party to the agreement.

Nevertheless, the Commission considered that such a system could infringe Article 85 (1) where it concerned a substantial proportion of the suppliers and purchasers on the market in question and where its effect was sufficient, because of the characteristics of the product and the conditions on the relevant market, appreciably to distort competition and to influence the trade flows between Member States.

This was true in the present case, where the products were fairly homogeneous and selling prices were uniform and where the volume of sales by the undertakings which were party to the agreement (three producers and two importers)exceeded 70% of the total volume of sales on the Belgian market (the two importers accounted for only about 20%). Moreover, the intermediaries in the distribution network, who marketed some 75% of all products sold, obtained supplies to a value of 94% of their total turnover from the parties to the agreement, to which they were linked from 1947 until 1966 (date of entry into force of the agreement under examination) by a reciprocal, exclusive collective sales and purchasing agreement.

The distinctive feature of an aggregated rebate system under which the rebates bear no relation to the services rendered individually to the suppliers by the intermediaries is, that in addition to the discount which each supplier must grant, there is an additional unjustified charge which is the greater the smaller the volume of a customer's annual purchases from a supplier in relation to his total turnover.

In the present case, the result was that importers who were party to the agreement, whose share in total sales of the relevant products on the Belgian market was considerably smaller than that of domestic manufacturers, had to grant to intermediaries a turnover discount involving a further additional discount on their selling prices, without any services being rendered in return. Manufacturers not party to the agreement, but who wished to gain a foothold on the Belgian market were at an even greater competitive disadvantage. In order to compete, on a

[1] First Report on Competition Policy, sec. 24, and Second Report on Competition Policy, sec. 34.

market where the products were fairly homogeneous, with products from different sources, manufacturers who were not party to the agreement had to grant to dealers discounts which were greater than those offered by the suppliers who were party to the agreement in respect of the bulk of their total turnover.

When extended to purchases from third parties, therefore, such aggregated rebate systems are liable to afford undue protection to domestic manufacturers by maintaining preferences in favour of traditional suppliers.

Dutch Sporting Cartridges Agreement

55. Agreements concluded between twelve Dutch suppliers and some 150 retailers of sporting cartidges were also terminated following intervention by the Commission. The provisions of the agreements involved reciprocal collective sales and exclusive supply undertakings between suppliers and the retailers. Additionally, the agreements imposed on the retailers a collective obligation to charge maintained resale prices. The suppliers had also entered into a collective commitment to notify prices, thus operating an open price system which was found to be contrary to Article 85.[1]

The group of suppliers, which controlled all imports of 22 LR calibre sporting ammunition and cartridges, comprised, in addition to the only Dutch cartridge manufacturer, NIKA Jachpatronenfabriek of Tilburg, the importers of all the major brands of sporting cartridges, in particular ICI (United Kingdom), Dynamit Nobel (Federal Republic of Germany), Fabrique Nationale and PRB (Belgium), Gévelot and Cartoucherie Francaise (France), Fiocchi (Italy), Remington (USA) and most of the export agencies of eastern European countries. The Dutch retailers were grouped in an association, Nederlandse Vereniging voor de Wapenhandel (NVW), which accounted for more than 90% of total sales of these products on the Dutch market.

As the Commission has consistently ruled since the dissolution of the 'Earthenware Agreement',[2] it is clearly established that reciprocal, exclusive collective agreements which are designed to oblige the parties to become intermediaries in trade in the products concerned in a Member State are incompatible with Article 85. It is also clear that the prohibition on retailers linked with NVW to sell cartridges at prices lower than the laid-down minimum resale prices and terms deprives them

[1] Bull. EC 7/8-1973, sec. 2111.
[2] First Report on Competition Policy, sec. 19 *et seq.*

of the opportunity of fixing their prices and sales terms as they think fit and of attracting demand for these products away from their competitors by charging lower prices or offering more favourable terms.

56. This case is therefore noteworthy because it shows that collective obligations on suppliers to notify their prices infringe Article 85.

It was found that an undertaking by suppliers to notify their individually fixed prices to a Committee was calculated to distort competition in the Common Market. Although each supplier could fix his own prices, the obligation to notify prices and price changes to a suppliers' committee had the consequence of inhibiting price changes and, generally speaking, of reducing the effects of price changes on competition.

The suppliers would be less inclined to change their prices, knowing that their major rivals would be immediately informed and could therefore react. The system of price notification could thus fully achieve its aim of ensuring, through prompt reciprocal prior notification of price changes, that any price change triggered off another, and thus of encouraging the parties to the system to maintain their prices. The effect sought was that of preventing any unilateral price changes, which made it impossible to compete with other parties to the system by altering prices. This system made prices fairly rigid, since such price changes as were made would tend to be collective in nature.

In connection with this appraisal of an open price system in the light of Article 85, it should be pointed out that in confirming the Commission's decision on the agreement between the Netherlands Cement Dealers, the main feature of which was a target price system, the Court of Justice felt that even the fixing of a price which is merely a target price affects competition since it enables all the participants to prédict fairly accurately their competitors' pricing policies.[1]

EUMAPRINT exhibition regulation

57. The Commission requested the European Committee of Printing and Papermaking Machinery Manufacturers (EUMAPRINT) to discontinue certain discriminatory practices relating to 'national' exhibitions, which had the effect of excluding from these events Community undertakings which were either located outside the organizing country or did not have a permanent connection there.[2]

[1] Second Report on Competition Policy, sec. 23.
[2] Bull. EC 10-1973, sec. 2108.

As a result, the organizing committee of GRAFITALIA '73 ('Mostra Nazionale dei Macchinari e dei Prodotti per le Industrie Cartarie, Grafiche e Trasformatrici'), held in Milan from 6 to 14 October, changed its rules in order to admit foreign firms.

The Commission had received a complaint that, following representations by EUMAPRINT, the invitation to take part in GRAFITALIA '73 addressed to undertakings in member countries of the EEC had been withdrawn and that participation was refused to undertakings located outside Italy and which did not have a permanent connection there.

The examination of this case had shown that the refusal was based on a EUMAPRINT regulation which made a distinction between 'international' and 'national' exhibitions. Only those undertakings located in the organizing countries or which had some connection there (establishment, sales agency, sole agent, etc.) were authorized to exhibit at the second type of exhibition.

The Commission considered that such restrictions were discriminatory and incompatible with the Treaty laws on competition. The applicable restrictions chosen excluded from 'national' exhibitions those Community undertakings not located in the organizing country. This affected these undertakings which were not large enough to be represented in the organizing country. Accordingly, certain small and medium-sized undertakings were not able to benefit from the opportunity of exhibiting abroad and of making their products known and of meeting prospective agents or distributors.

The Commission had already been made aware of problems raised by exhibition regulations restricting the freedom of exhibitors to take part in certain other events,[1] but this was the first time it had had to decide on a practice with protectionist effect as regards access to exhibitions.

§ 2 — Encouragement of permitted forms of cooperation

58. In adopting a block exemption regulation[2] for certain specialization agreements, the Commission's aim was to encourage the conclusion of certain agreements which satisfied the conditions set out in the regulation, since the regulation authorized such agreements without the need for notification. Agreements which do not

[1] First Report on Competition Policy, secs. 42 and 43.

[2] Regulation (EEC) No 2779/72, 21 December 1972. See Second Report on Competition Policy, sec. 8.

qualify for exemption under the regulation because they may not fulfil precisely all the requirements of the regulation, may nevertheless qualify for individual exemption where the Commission finds, following notification, that the conditions for applying Article 85(3) are met.

Prym-Beka agreement

59. Accordingly, after examining the contractual relations agreed upon between William Prym-Werke KG and SA Manufacture belge d'aiguilles Beka,concerning needles for household sewing machines, the Commission gave an exemption to agreements on a long-term exclusive supply agreement which was part of an undertaking by one of the parties to cease manufacture and transfer manufacture to the other party. Since the undertaking relating to specialisation was binding on only one of the parties, the agreement did not qualify under the block exemption regulation, although in relation to production it was likely to have certain specialisation effects.[1]

It has previously been pointed out that the instances of incompatibility with Article 85 derive not only from decisions prohibiting agreements but also from cases of negative clearance or authorization which reveal restraints of competition discontinued or altered at the Commission's initiative to enable Article 85(3) to be applied.[2] In this connection, it should be noted that in this case the parties to the agreement had to abandon the commitment to share customers within the Common Market, as originally envisaged by the the agreement. In earlier decisions on specialization agreements (concerning the rationalization groups in the German Steel Industry[3] and the agreement among French producers of light-weight paper[4]) the Commission had previously insisted upon the abandonment of provisions intended to organize among the parties the allocation of production quotas, the distribution of profits through an equalization scheme or the coordination of commercial policies within the Common Market.

The agreement under consideration resulted from the following situation. At the time it was concluded both the undertakings concerned manufactured and sold needles for household sewing machines. Prym needed its own manufacturing facilities to supplement the large range of haberdashery articles of all kinds which

1 Commission Decision of 8 October 1973; OJ L 296 of 24.10.1973, p. 24.
2 First Report on Competition Policy, sec. 1.
3 First Report on Competition Policy, sec. 30.
4 Second Report on Competition Policy, sec. 37.

it sold. Considering it necessary to rationalize production in view of the world market situation but believing that automated plant would only be fully used if a minimum turnover could be achieved, the two undertakings decided that manufacturing operations should be concentrated in a single factory, the Beka plant at Eupen, and that production at the Prym factory at Stolberg should stop. The plant and equipment involved would be transferred to Eupen.

To concolidate their collaboration, Prym acquired a 25% interest in Beka and the two parties concluded an agreement for supplies to Prym on a long-term basis and to confirm that each should retain its traditional clientele. In its statement of the matters to which it had taken objection, the Commission informed the parties that it could not grant an exemption while the customer-sharing arrangement remained in force in respect of Community trade. Finally, Prym and Beka agreed that this clause should not apply in respect of the EEC market.

The position of the undertakings concerned and the conditions on the market in question may be described as follows.

Prym manufactures, in addition to semi-finished brass products, chains and the like a whole range of haberdashery goods intended mainly for clothing, such as fastenings of all kinds, buckles and needles. It has several factories, employing about 4 500 persons.

Beka manufactures solely needles for both household and industrial sewing machines. It has one factory, at Eupen, which employs 350 persons. At present 25% of its capital is held by Prym an 75% by the Belgian Beckaert company, which is one of the major world producers of wire and wire products.

Annual world production of needles is estimated at 1 400 million, valued at approximately 50 million units of account. There are between 25 and 30 manufacturers, mainly in western Europe, North America and the Far East.

Prior to the implementation of the agreement, Beka produced 90 million needles per annum (about 6% of world production) and Prym 40 million (about 3% of world production).

Prym and Beka together account for about 10% of the EEC market. Their main rivals are in Europe (the German Schmetz company, which is three times larger than Prym and Beka combined, the needle factories of the American Singer and Torrington groups, the Dutch Musolf company) but the Japanese and Hong Kong manufacturers have also been exerting very great pressure on the market.

60. The Commission found that both the commitments entered into by Prym (the ban on the manufacture of needles and the exclusive supply obligation) as well as

into by Beka (the obligation to meet all Prym's requirements and to grant preferential selling prices) had as their object and effect an appreciable restriction of competition within the Common Market and that they could adversely affect the free flow of trade between Member States so as to prejudice the attainment of a single market.

However, the Commission also took the view that the agreement could be exempted from the ban in Article 85(1) since the rationalization of production arising from the concentration of manufacturing activity at the Beka factory would result in an improvement in the quality of the needles and a fall in their cost price, to the benefit of consumers. These advantages could not be achieved and maintained unless Prym undertook, as was the case, not only to stop its own production but also and above that to obtain supplies solely from Beka over an extended period. Moreover, in view of the strong competitive pressure from other manufactures both in the Community and in non-member countries, the agreement did not afford the partners scope for eliminating competition in respect of a substantial part of the products in question. The consent to the parties contained in the Commission decision, is valid until 31 December 1984, but can be extended. It takes account of the fact that the favourable effects of the agreement are associated with a continuing long-term cooperation between the parties.

Transocean Marine Paint Association

61. Since decisions which apply Article 85(3) are issued for limited periods, the Commission must consider at the end of such periods whether the original conditions for applying 85(3) are still germane, and whether the original decision can properly be renewed.[1] The Commission carried out such a re-examination for the first time in connection with its original *Transocean* decision.

The Transocean Marine Paint Association is an association ot twenty medium-sized marine paint manufacturers established, in as many countries both inside and outside the Community and has a 5-10% share of the EEC market in the products of its members. It had obtained an exemption from the ban in Article 85(1) by decision of 27 June 1967 in respect of the period up to 31 December 1972. The Commission has now extended the period of this exemption up to the end of 1978, subject to certain conditions.[2]

The aim of the association is to enable its members to compete effectively on the world market in marine paint. This means that standard quality paints must

[1] Article 8 of Council Regulation No 17 of 6 February 1962 (First regulation implementing Articles 85 and 86 of the Treaty).

[2] Commission Decision of 21 December 1972, OJ L 19 of 23.1.74, p. 18.

be offered for sale in as many ports as possible. Consequently, the members undertook to manufacture marine paint of identical quality, using a single formula, and to sell it under a common Transocean trademark. A territory was assigned to each member, namely, the country in which that member was established. In addition, other territories were allotted to members in which they were to concentrate their sales efforts.

On the basis of the application for extension of the original exemption, the Commission carried out a further examination of conditions on the marine paint market. It found on the whole that the cooperation arrangement which had been made between the members was still justified on economic grounds. The regrouping and coordination of members' individual sales networks still provided them with a suitable and essential means of increasing supplies, of improving sales possibilities and competing more vigorously with the major marine paint manufacturers.

62. However, the Commission also took the view that certain export restrictions on the members of Transocean could no longer be regarded as indispensable to the attainment of the association's justifiable objectives. In the earlier decision it had expressly accepted these only for an initial period in order to enable each of the members to build up operations during that period by concentrating on the territory granted to it. Under the provisions, a member of the association could sell Transocean paint in a territory granted to another member and for a vessel originating in such territory only upon payment of a commission, and could export other paint only subject to the approval of the member established in the country of destination. The maintenance of these restrictions, which at present represent a means of acquiring a privileged territorial position, was no longer considered justified on the ground of significant increases in total marine paint sales of the members of the association since the original Commission decision.

63. The Commission regarded it as necessary to examine whether certain changes in the circumstances of two of the members which had taken place since the original decision ought to affect the grant of an extension. Astral (France) and Urrozola (Spain) had in the meantime each been incorporated by two separate large groups of enterprises, AKZO and BASF respectively. In the event, and after reviewing these circumstances, the Commission nevertheless granted an extension of the period of exemption, but reserved the right to reexamine its decision in the event of any *de facto* change in the situation and required the parties to notify it of all interlocking directorships and acquisitions of holdings between the members of Transocean and with other paint manufacturers.

This kind of stipulation in exemption decisions under Article 85(3), and made for the first time in the *Henkel-Colgate* decision,[1] is intended to ensure that the autonomy of the parties is not compromised by the interplay of financial interests or personal links with outside undertakings.

§ 3 — Application of Article 85 to Distribution

Du Pont de Nemours (Deutschland) Case

64. This case is typical of the many cases concerning general sales terms which the Commission is systematically tackling with the aim of combing out provisions in conflict with Article 85(3) which adversely affect intra-Community trade.[2] These are, in particular, provisions which:

(a) prohibit purchasers from exporting or reimporting products within the EEC;
(b) oblige purchasers who export or reimport products within the Common Market to observe resale prices imposed in the country of destination;
(c) oblige wholesalers to resell only to retailers and the latter only to final consumers.

The Commission was able to grant negative clearance in respect of the general sales terms applied by Du Pont de Nemours (Deutschland) GmbH, a German subsidiary in the American Du Pont de Nemours group, for the sale of photographic products of its photographic division on the German market, products previously marketed under the Adox trademark.[3]

This company had voluntarily terminated a system of maintained prices which it had previously operated in relation to the German market and had modified its general terms of sale, in particular, by deleting export limitations which had been imposed on its German retailers. Thereafter, and on the Commission's initiative, the Company also abandoned other provisions from its general terms of sale by which it had previously put restrictions on certain inter-dealer sales of its products. The subsequent current test of the company's terms of sale no longer contained prohibited restrictions within the meaning of Article 85(1).

Deutsche Philips GmbH Case

65. The splitting up by agreement of the Common Market into submarkets amounts to a serious infringement of Article 85 and is contrary to the Treaty's fundamental objectives. This was recognized in the Commission Decision of

[1] First Report on Competition Policy, sec. 33.
[2] First Report on Competition Policy, sec. 57.
[3] Commission Decision of 14 June 1973, OJ L 194 of 16.7.1973, p. 27.

23 September 1964 in the *Grundig-Consten* case and confirmed by the judgment of the Court of Justice of 13 July 1966.[1] In 1973 the Commission imposed a fine of 60 000 u.a. to penalize a contractual ban on exports.[2]

In the proceedings which the Commission initiated in 1967 against Deutsche Philips GmbH (DPG) and other subsidiaries of NV Philips Gloeilampenfabrieken, Eindhoven (Netherlands), for having applied export bans, the parent company had declared itself ready, in 1968, to lift bans on exports to other Member States and called upon the subsidiaries concerned to amend their agreements accordingly.[3]

DPG made the necessary amendments, but not to all its agreements. It did not lift the ban on exports to EEC countries which was contained in its agreement for electric razors until after the Commission had initiated new proceedings against this export ban and against certain other obligations contained in separate price-fixing and distribution agreements.

DPG pointed out that the maintenance of the export ban in this agreement was the result of an error and that the ban applied only to non-member countries. Moreover, it was contained in the general conditions of delivery and payment which elsewhere expressly stated that exports to Member States of the Community were permitted. DPG further pointed out that it had informed German wholesalers who wished to export Philips electric razors that the export of these products to other Member States was not forbidden. DPG presented the Commission with letters from German wholesalers which stated that they had actually made deliveries of Philips electric razors to other EEC countries.

The above circumstances suggested that DPG did not commit this infringement deliberately. The company was nevertheless considered to have been negligent, since it was reasonable to expect that other traders would regard themselves as bound by the export limitation contained in the agreement and would therefore refrain from exporting to other Member States. In the Commission's opinion, DPG did not use the necessary degree of care by stating, in an amendment to the agreement, that exports to other Member States were permitted.

66. The decision is also important for having shown that agreements which impose restrictions on dealers in regard to sales to other dealers as well as resale price maintenance provisions can amount to infringements of Article 85(1) when they affect trade between Member States:

(a) Under certain DPG agreements, wholesalers were to supply only to specialized retailers. They were therefore not to supply products to other wholesalers or

[1] First Report on Competition Policy, sec. 47.
[2] Commission Decision of 5 October 1973, OJ L 293 of 20.10.1973, p. 40
[3] Bull. EC 4-1969, Part VI, sec. 5.

to other trade suppliers, whether for export or not, unless DPG had given prior consent in writing for each particular case (ban on horizontal supplies at the wholesale stage).

Retailers were to sell or supply products (even if for export) only to ultimate customers. Moreover, under the agreement, retailers were not to engage in any advertising in trade journals which were normally distributed to dealers (ban on horizontal supplies and advertising at the retail stage).

These obligations prevented wholesalers and retailers established in Germany from supplying the products to dealers at the same trading level in other Member States. Such bans on horizontal supplies can, where they affect international trade, contribute to segregating markets.

(b) Under some DPG agreements, wholesalers were not to sell to ultimate customers (ban on direct supplies) and retailers were not to sell to wholesalers (ban on reverse deliveries).

The prohibition on German wholesalers which restricted sales to ultimate customers deprived customers in other Member States of the possibility of obtaining products direct from German wholesalers. The ban on sales by German retailers to wholesalers further cut down the number of sources of supply for wholesalers in other EEC countries. This was additional to the ban on horizontal supplies in the case of international sales.

(c) Under some agreements, the products were to be offered and sold to ultimate customers only at the prices laid down by DPG (resale price maintenance (RPM)). Under this RPM arrangement, a German retailer could sell the products covered by the agreements to customers in another Member State of the EEC only at the prices fixed in Germany, although the RPM in force in Germany covered only domestic transactions. The extension of RPM to actual sales (as well as to advertized prices) in other Member States of the EEC, was a restriction of competition within the meaning of Article 85 (1).

(d) Since RPM was to apply without exception to all products covered by the agreement which German retailers had purchased from DPG direct or from domestic or foreign suppliers, the German retailers were obliged to charge the maintained prices ruling in Germany when reselling goods covered by the agreement and imported from another EEC country into Germany. This application of RPM to reimported products therefore prevented German retailers from entering into competition with other German retailers in respect of prices when reselling reimported goods in Germany.[1]

[1] The decision also amplified the position adopted by the Commission in the Agfa-Gevaert case regarding the arrangements designed to preserve the national resale price maintenance systems, which are liable to entail market fragmentation within the Community : see the First Report on Competition Policy, sec. 55.

§ 4 — Application of Article 86 to the Abuse of a Dominant Position relative to Demand.

67. In 1971 the Commission had already applied Article 86 for the first time to a case of abuse of a dominant position relative to demand (as opposed to an abuse of dominance by a supplier of goods and services). It involved the Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte (GEMA), a music copyright company which had a virtual monopoly on the German market. In a decision of 2 June 1971,[1] this company was found to have behaved improperly in its dealings, not only with music dealers, but also with music suppliers (songwriters, composers and music publishers). The decision obliged GEMA to terminate the abuses which were prejudicial to the interests of suppliers of musical works.

In 1973 the Commission examined a case involving an abusive practice on the part of a buyer. These cases show that abuses of dominant positions by buyers can also be of importance on certain markets. The Commission discontinued the proceedings without decision when the abusive practice was abandoned.[2]

Railway rolling stock

68. In mid-1972 the Commission had received a complaint against a company set up by an international convention between 16 European railway administrations. It was the purpose of the company to supply the shareholding railway managements with railway rolling stock of standard design or performance on most favoured terms. The railway managements concerned were to specify what part of their requirements they wished to cover through the company but they remained free to meet their requirements either wholly or in part through other channels.

In 1971 that company, on behalf of six national railway managements, invited tenders for the development and delivery of an initial series of European standard passenger carriages, which were gradually to replace the existing carriages in long distance travel and would be used by as many railway undertakings as possible.

The call for tenders was addressed to railway carriage manufacturers and equipment engineers irrespective of nationality. This was in line with the requirement laid down by the Commission in its directives[3] on the coordination of public procurement procedures, the aim of which was to enable undertakings from all Member States to participate on an equal footing.

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1 First Report on Competition Policy, secs. 82 *et seq.*

2 Bull .EC 4-1973, sec. 2105.

3 Directive of 15 March 1971, OJ C 50 of 22.5.1971, and Directive of 22 May 1971, OJ L 185 of 16.8.1971.

The complaint was not against the aim to standardize passenger coaches at European level nor against the form of the call for tenders but against certain of the conditions for tendering. These included a provision giving unrestricted rights to use the designs, documents, patents and other proprietary rights arising from the planning and execution of the contract to the company which had invited the tenders.

69. The Commission took the view that, as the largest customer for the type of carriage which was the subject of the call for tenders, the prospective buyer held a dominant position in the Common Market. Although the associated railway companies were not legally obliged to cover their total requirements through the buyer company the Commission considered them to be dependent on it for the construction of further series of rolling stock.

As regards the abuse of this dominant position, the Commission had to assess the interests affected by the close technical cooperation between the prospective buyer and the successful bidder following award of the development contracts.

The insistence on the right of unrestricted exploitation was solely in the interests of the prospective buyer. The close technical cooperation between the buyer and the successful contractor during the development phase should certainly have entitled the buyer to a right of exploitation for his own ends for purposes of maintenance and for the manufacture of further series. But to have insisted on being able to grant licences for future rights to third parties who had not taken part in the development work, without consulting the successful contractor and with no additional payment to him, was regarded as unjustifiable. In the interests of successful contractors, appropriate compensation should be provided for in their favour in cases in which licences were granted to other railway companies for the standardization of railway carriages. Such compensation should not be quantified in advance (for inclusion in the overall price of the development contract), but only on the particular merits of any subsequently arising proprietory rights and by agreement between the parties.

In his ultimate contract documentation, the prospective buyer abandoned his previous insistence on unrestricted exploitation rights which were limited to the justifiable needs of the railway administrations which had contributed to the development work. To encourage the standardization of the types of equipment in question, the prospective buyer could grant licences to third parties, but only with the consent of the successful bidder and in consideration of appropriate compensation to be settled in each case.

§ 5 — Authorization of Concentrations (Article 66 of th ECSC Treaty)

70. The entry of the British Steel Corporation (BSC) into the Common Market in steel has considerably modified the ratio of scale between Community steel undertakings. With an output of 22.5 million metric tons, BSC is the largest producer in the enlarged Community.

In addition, since the Commission published 'Outlines of Competition Policy on the Structures of the Iron and Steel Industry'[1] in 1970, there have been several developments in the field of competition.

There is a continuing trend towards larger production units, often established on the coast in collaboration between several steel undertakings. This restructuring process is made possible by new techniques such as oxygen converters, continuous casting and automated rolling mills and by the advantages of siting plants in port areas (lower transport costs and cheaper raw materials). The size of the investments involved and the need to make optimum use of the new capacity encourage the undertakings to seek ways in which to collaborate.

The first instances of this were Sidmar at Zelzate in 1962 and Hoesch-Hoogovens (outline agreement in 1966, merger within Estel in 1972). A recent instance is the foundation at Fos by Sacilor and Usinor of Solmer, a joint undertaking for the production of coil and other flat products.

Such cooperation arrangements, which are reflected in the foundation of joint undertakings, raise special problems as regards the maintenance of effective competition in the oligopolistic set-up of the steel industry. The Commission must see to it that, the more powerful the groups and the tighter the oligopoly, appropriate measures are taken to ensure mutual independence and non-interference in the operations of other groups.

There is a tendancy for the steel industry to diversify into sectors other than primary processing, for example wire-drawing and the manufacture of tubes. In this way the undertakings are trying, while increasing their profitability, to reduce the risks inherent in single-product operation on a market subject to sharp fluctuations in demand.

In 1973 the Commission authorized two concentrations of this kind: in the Mannesmann/Demag and Thyssen/Rheinstahl cases.

These developments forced the Commission, in addition to examining the cases in the light of Article 86 of the EEC Treaty, to consider whether their financial

[1] OJ C 12 of 30.1.1970, p. 15. First Report on Competition Policy, sec. 97.

strength and degree of diversification and self-sufficiency placed the undertakings concerned in a position to pursue independent market strategies and thus avoid the competition rules in the ECSÇ Treaty.

71. In addition to around fifteen major integrated, diversified steel undertakings, there are in the Community about 125 small and medium-sized specialized undertakings, that is to say producers of special steels, re-rolling mills and 'mini-steelworks'.

Some of the many projects for mini-steelworks which have been under study in recent years matured during 1973.

The Commission authorized the joint foundation of the Société des Aciéries de Montereau at Montereau (Seine et Marne) by the Société Métallurgique de Normandie SA, Paris, and Korf Industrie und Handel GmbH & Co KG, Baden-Baden. It was also notified of two other French projects—Iton Seine and Alpa—which did not require prior authorization under Article 66 of the ECSC Treaty.

The mini-steelworks, which generally manufacture concrete reinforcing bars and merchant rolled products, are particularly well suited to such production, both for technical reasons and because of their commercial flexibility and location, generally in the centre of a high-consumption area. Their profitability depends mainly on the availability of scrap and abundant cheap electric power.

Although the mini-steelworks at present operating in the Community produce only a small proportion of the Community's output of crude steel, they can nevertheless have a considerable influence on the market price of the relevant products. Their low costs enable them to exert pressure on the selling price of bars and rods fixed by the large companies, thus creating considerable competition on the relevant markets.

72. The most important decisions adopted in 1973 by the Commission in the light of Article 66 of the ECSC Treaty as regards steel are those relating to the Mannesman/Demag, Usinor/Solmer and Thyssen/Rheinstahl cases.[1]

Mannesman/Demag

73. In a decision of 27 June 1973, the Commission authorized the acquisition of a majority of shares in Demag AG by Mannesmann AG.[1]

The effects on the steel market of this concentration operation are of only secondary importance. Mannesman, which produces 3.18 million metric tons of crude

[1] The other decisions taken under Article 66 as regards steel and coal are listed in the Annex. See pp. 135-138.

[2] Bull. EC 6-1973, sec. 2113.

steel, or 2.5% of Community production, uses the whole of this output (in the form of tube rounds, plate and sheet, and hoop and strip) for tube-making at Mannesmannröhrenwerke AG. Mannesmann thus produces no rolled products for the market and Mannesmann and Demag must cover their steel requirements for products other than tubes by purchase elsewhere.

The operation, therefore, does not alter the position of the parties concerned on the steel market and, consequently, will not afford them the opportunity of preventing the maintenance of effective competition.

In the Commission's view, neither the group's increased financial strength nor the diversification of its output will of themselves enable the new grouping to evade the Treaty rules on competition on the market in steel products, where it will continue to operate as a purchaser only for small quantities.

Demag, however, was strongly represented in the construction of steel-making plant (e.g. blast furnaces, steelworks, rolling mills). Other steel undertakings with seats on Demag's policy boards and Committees would thus be able to obtain specific information on their rivals' investment schemes and to take this information into account, to the detriment of competition, in their own investment schemes. For this reason, the Commission attached to its authorization the condition that such interlocking directorship and other personal links should be dissolved and that no new ones should be created.

The concentration operation between Mannesmann and Demag relates essentially to the construction of machinery and equipment, a sector covered by the EEC Treaty. The activities of the two undertakings coincided, especially in the construction of steel-making machinery and eqiupment, in transport and handling technique and, to a lesser extent, in compressor and plastics techniques.

In respect of the construction of machinery and equipment, the concentration strengthens and extends the position of Mannesmann/Demag as regards production, know-how, investment and sales. In view of the conditions of competition on the market and in particular the position of the group (with 14% of total production in the Federal Republic of Germany, where it occupies fourth place) and having regard to the position of the group's competitors, both in Germany and in the Community, the concentration was held not to infringe Article 86 of the EEC Treaty.

Usinor/Solmer

74. By a Decision of 25 July 1973 the Commission also authorized the acquisition of 50% of the shares of Solmer by Usinor and approved a contract between Sollac, Usinor and Solmer.[1]

[1] Bull. EC 7/8-1973, sec. 2112.

With its 50% participation in Usinor, Solmer, which was established in 1970 following the organization and expansion of the Sacilor group in Lorraine (formerly Wendel-Sidelor), becomes a joint venture of the two major steel groups in northern and eastern France. Solmer, which is situated at Fos on the Mediterranean, will enjoy the advantages of a coastal plant producing crude steel and flats (coil as of 1974, and sheet and plate as of 1978). Planned production capacity by 1978 is estimated to be 7 million metric tons of crude steel and 6 million metric tons of coil.

Solmer is intended as a production cooperative for its shareholders and will supply them with its products at cost price in quantities proportional to their financial participation. Usinor and Salicar each market the products and also products from their own plants through their own commercial networks. Solmer does not market products.

Joint control of Solmer has the effect of a concentration between the Solmer and the Usinor groups, over and above the previously created concentration between Solmer and Sacilor. However the relationship of Usinor with Salicor in Solmer was held not to entail a concentration between the Usinor and Salicor groups. Apart from their respective holdings in Solmer, they remain independent of one another, and Solmer, though it could be regarded as a 'hinge' between them, need not (provided certain conditions are met) jeopardize their mutual freedom.

Nevertheless, the joint control of Solmer by Usinor and Salicor and the extent of their joint investment would result in each of the groups making their investment decisions in the light of investment carried out by Solmer. Consequently, the joint control of Solmer was regarded as restricting competition between both groups in respect of investment in and the production of flats.

Thyssen/Rheinstahl

75. By its Decision of 20 December 1973, the Commission authorized the acquisition of a majority of the shares of Rheinstahl AG by August Thyssen-Hütte AG.

The new group is to be one of the largest concentrations in the Community's steel industry. The undertakings within the Thyssen and Rheinstahl groups are steel producers and steel processors. Thyssen's production interests are mainly in the steel sector; of its ex-Group sales of DM 10 700 million during the 1971/72 financial

[1] OJ L 84 of 28.3.1974, p. 36 (First publication of a decision under Article 66 of the ECSC Treaty).

year, steel sales accounted for DM 6 400 million, the remainder having been attributable mainly to castings, forged items, drawn wire, cement and shipbuilding.

Rheinstahl's major activities lie in the steel-using sector, notably mechanical engineering, plant construction, shipbuilding, and manufacture of transport, construction and heating materials and equipment (which accounted for DM 4 300 million out of ex-group sales of DM 5 100 million). The turnover in the steel sector (DM 800 million) is relatively small.

The unified Thyssen/Rheinstahl group will be in a strong position on the steel market and will be a highly diversified concern with considerable economic and financial potential.

In terms of total turnover, the group will be the largest steel group in the Community.

An assessment of the planned concentration and of its effects on the market in steel products shows that Rheinstahl's contribution to the Thyssen group in the steel sector will not in itself give rise to a situation in which the size of the resulting group in the steel sector would preclude an authorization under Article 66.

After 1976 the three undertakings in question are estimated to produce around 20% of all coil, sheet and plate manufactured in the Community. Their products would however, be marketed only by Usinor and Sacilor, which may pursue independent sales and further processing policies, particularly since production in their own factories would still be higher than the supplies to be made to them by Solmer. There would, therefore be two distinct and independent decision-making centres which would treat Solmer's production as their own. Consequently, there would still be competition within the production sectors where the activities of Usinor and Salicor would overlap and the choice of coil, sheet and plate available to consumers would not be affected, since there would still be the same number of suppliers. Other important producers accounting for 20%, 15%, 12% and 10% of Community production would be present on the market; the ten leading undertakings would account for approximately 98% of Community production, which, for technological reasons, is highly concentrated. Furthermore, the requirements of the French market, which is the main outlet for the undertakings concerned, would be met to a considerable extent, by imports from the rest of the Community and from non-member countries. The Community's enlargement would be likely to result in a greater degree of interpenetration on steel markets.

Under these circumstances, the Commission held that the venture would not undermine the maintenance of effective competition on a large part of the relevant market provided that the independence of both Usinor and Salicor was not impaired

to an extent greater than that dictated by their joint control of Solmer, and provided that no agreement on restricting their commercial independence was reached and no interlocking directorships or other personal links were established between these groups. The transaction was authorized subject to conditions on the foregoing basis.

The Thyssen group's production of crude steel would rise from 11 700 000 metric tons to 13 200 000 metric tons, which would be 13.4% of production within the old Community of Six and 10.3% (Thyssen's 9.1% + Rheinstahl's 1.2%) of that in the enlarged Community.

The position of the new Thyssen group will be considerably strengthened, particularly in the plate sector, where its share of the Community market will rise from 10 to 14%, thus making it the second largest producer in the Community, and in the foundry pig sector, where its market share will rise from 4 to 14%, thus making it the Community's third largest producer. Thyssen's position in other sectors, already very strong, is hardly or not at all affected by the concentration since Rheinstahl produces few or none of these products (its market share for wire rod rose from 16 to 17%, whilst its sales of sheet remained unchanged at 12%).

The table below gives the position of the combined Thyssen-Rheinstahl group in the various sectors of the Common Market in steel as a percentage of Community production:

Product group	%	Position amongst Community producers
Foundry pig	14.0	3
Crude steel	10.3	2
Hot-rolled wide strip (total)	13.5	2
Permanent-way material	7.4	6
Wire rod	17.0	1
Merchant bars	4.2	8
Heavy angles, shapes and sections	6.9	4
Hoop and strip	3.6	8
Plate and sheet (more than 3 mm)	14.3	2
Sheet (less than 3 mm)	12.3	2
Tinplate	12.3	4

In view of the special conditions of competition on the product markets concerned and, above all, in view of the large degree of interpenetration on the Common Market in steel—almost one third of the Federal Republic's requirements are met by imports—the Commission took the view Thyssen/Rheinstahl would not be in a position to prevent effective competition on the steel market.

By its acquisition of Rheinstahl, particularly its steel-using parts, the new group's economic strength, diversification and intragroup consumption will increase but not excessively compared with other large groups in the Community such as BSC, Finsider, Usinor and Estel. Nor will the new group's position on the markets in steel and in other, non-ECSC, products enable it to act independently of normal market taxes and, thereby, circumvent the ECSC Treaty competition rules or infringe Article 86 of the EEC Treaty.

76. However, authorization for the concentration between Thyssen and Rheinstahl could only be given on special conditions since Thyssen and Mannesmann had become linked by way of their joint control exercised over Mannesmannröhren-Werke (MRW) (authorized by the Commission in its Decision of 21 January 1970).[1]

Thyssen holds one third of MRW's capital and in collaboration with Mannesmann, which holds the other two thirds, has a contract which gives it joint control over MRW. Thyssen and Mannesmann have also concluded a contract for rolling steel products under which approximately one sixth of MRW's supplies of products necessary for the manufacture of tubes is in the form of steel produced by Mannesmann and rolled under contract by Thyssen (coil, heavy plate, hoop and strip).

All these circumstances combine to give Thyssen considerable influence over the Mannesmann group. In 1970 the Commission viewed this situation as acceptable since Thyssen and Mannesmann were not competitors on the steel market since Mannesmann manufactured only products necessary for the manufacture of tubes. These circumstances however had changed through the Mannesmann takeover of Demag and the resulting diversification. At the same time, Thyssen, by taking over Rheinstahl, had also become considerably more diversified and had strengthened its position on the steel market, thus creating a new situation.

In order therefore to maintain conditions of effective competition within an industry with an oligopolistic structure, it was held to be necessary that the independence of the groups and their non-interference in the affairs of other groups should be safe-

[1] EC Bull. 3/1970, Part Two, Chap. I, sec. 5 and First Report on Competition Policy, sec. 97.

guarded, particularly since the groups in quesiton were growing more powerful within a narrowing oligopolistic sector.

Consequently, in order to ensure that the planned concentration satisfied the authorization requirements set out in Article 66(2), measures were to be taken to avoid the exercise of future Thyssen influence on the Mannesmann group in such a way as to undermine the latter's decision-making autonomy or cause both groups to coordinate their policies.

The Commission considered that this could be achieved if Thyssen's influence over the Mannesmann group became such as is normally exercised by a minority shareholder. Mannesmann would retain relations with the new group through its rolling contract. The value of this contract was not disputed but Mannesmann should be in a position to release itself from the contract if it so wished.

The Commission therefore made its decision authorizing the concentration between Thyssen and Rheinstahl conditional upon Thyssen selling to Mannesmann a proportion of MRW's capital equal to at least 8 1/3% so that its holding should not exceed 25%, so as to lose its voting rights to block decisions in general meetings. Similarly, Thyssen was barred from taking part with Mannesmann in any contract giving it control over MRW. A one-year period of grace—until 31 December 1974—was granted for compliance with these conditions.

The following additional requirements were imposed as safeguards for the independence of the undertakings:'

(i) Thyssen and Rheinstahl were required prior to 1 April 1974 to withdraw from the West and Westfalen rationalization groups, in which they participated with other German undertakings, such as Krupp and Hoesch.[1]
(ii) Thyssen would be required to submit for the Commission's prior authorization any proposal for the acquisition of a holding of 10% or more in steel undertakings, or in steel using undertakings where the latter use more than 50 000 metric tons of steel per year.
(iii) Members of the boards and other management bodies of the undertakings in the new Thyssen group may not hold similar board or management positions in other similar undertakings.

The Commission considered that the foregoing conditions and requirements would ensure the maintenance of effective competition in the Community's steel industry.

[1] Commission Decision of 27 July 1971; OJ L 201 of 5.9.1971. See First Report on Competition Policy, sec. 30.

§ 6 — Dumping

77. Article 91 of the Treaty, which lays down rules on intra-Community dumping during the transitional period for the Six, ceased to have effect on 1 January 1970.[1] For the new transitional period for the enlarged Community, Article 136 of the Act of Accession incorporates the provisions of Article 91 (1).

Article 136 reads as follows:

'1. If, before 31 December 1977, the Commission, on application by a Member State or by any other interested party, finds that dumping is being practised between the Community as originally constituted and the new Member States or between the new Member States themselves, it shall address recommendations to the person or persons with whom such practices originate for the purpose of putting an end to them.

Should the practices continue, the Commission shall authorize the injured Member State or States to take protective measures, the conditions and details of which the Commission shall determine.

2. For the application of this Article to the products listed in Annex II to the EEC Treaty, the Commission shall evaluate all relevant factors, in particular the level of prices at which these products are imported into the market in question from elsewhere, account being taken of the provisions of the EEC Treaty relating to agriculture, in particular Article 39.'

An exception to this procedure is provided for in respect of Ireland in Article 137, which is worded as follows:

'1. Notwithstanding Article 136, Ireland may, until 31 December 1977, take the necessary measures in cases of extreme urgency. It shall forthwith notify such measures to the Commission, which may decide to abolish or modify them.

2. This provision shall not apply to the products in Annex II to the EEC Treaty.'

78. The first decision relating to dumping was taken by the Commission on 30 November 1973 in a case concerning two new Member States.

One Member State had imposed temporary duties on imports into its territory, by a Common Market firm, of two types of paper product at prices which suggested dumping.

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[1] First Report on Competition Policy, sec. 106 *et seq.*

When the matter was referred to it, the Commission applied the rules laid down during the transitional period of the Community of the original Six Member States, which were inspired by Article VI of the General Agreement on Tariffs and Trade.

These rules involve determining the ex-works prices for the exported products and the 'normal value' of the same products within the exporting country. The margin of dumping, if any, is the difference between the two prices where the export price is lower than the 'normal value'.

When applying these rules, the Commission allows an exporter to pay all or part of the import duties imposed on his products upon importation into the other Member States, provided that in doing so he does not undercut prices for similar products in the importing country. This position is justified by the fact that such forms of degressive customs protection as still exist during the transitional period have the required effect by their very existence, in that they make it more difficult to export to protected countries. Such protection must not, however, hinder the development of trade between Member States should certain suppliers agree to pay all or part of the customs duties.

Applying these principles, the Commission, after a thorough investigation, concluded that there was no margin of dumping for one of the products.

For the other product, the Commission confirmed that there had been sales with a margin of dumping, but that these had ceased before the importing State took its temporary measures.

The Commission therefore decided to abolish the temporary duties on both products as from the date on which they were first introduced.

By confirming certain principles applied by the Commission in dealing with cases of dumping and by defining the respective functions of the Commission and the Member States during the transitional period, this decision clarified the thresholds for application of Articles 136 and 137 of the Act of Accession.

Part two

Competition Policy and Government Assistance to Enterprises

Chapter I

State aids

Section 1

Application of the EEC Treaty

§ 1 — General

79. The accession of the three new Member States necessitated a great deal of technical work before a list of aid systems existing in those countries could be drawn up and before their implications could be more fully understood. In a number of cases existing rules which had been formulated for a six-country Community had to be amplified.

In some instances—for example, sectoral and general aids—1973 also saw the continuation and fuller implementation of actions previously undertaken and described in the first two competition reports.

§ 2 — Regional aid systems

Principles of coordination of national regional aids

80. The principles of coordination applicable as of 1 January 1972 to regional aids granted by Member States in the central regions of the Community as originally constituted and the technical work undertaken in 1972 with a view to implementing these principles were described in the First and Second Reports on Competition Policy respectively.[1]

As a follow-up to the preparatory administrative work begun in 1972 in conjunction with each of the new Member States, the Commission organized in 1973 several multilateral meetings of national experts designed to provide a better understanding of the regional aid systems in those countries.

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[1] First Report on Competition Policy, secs. 143 to 153, Second Report, secs. 82-87.

At the same time, the Council examined the Commission's proposal for a regulation based on Article 94, the aim of which was to establish a supervisory procedure for the application of the coordination principles in the central regions of the Community.[1] Although there was a general consensus of opinion within the Council Working Party concerned in favour of this proposal, the Council has not yet adopted the regulation.

81. The problem of the designation of the central regions in the enlarged Community dominated the Commission's activities as regards the coordination of regional aids in 1973. The aim was the application of Article 154 of the Act of Accession, which stipulates that the coordination principles, being part of what the Community has already achieved, shall apply to the new Member States by 1 July 1973 at the latest. A six-month postponement was designed to permit the texts relating to the coordination principles to be supplemented (Commission Communication and Resolution of the Representatives of the Governments of the Member States meeting within the Council).[2]

Following the preparatory administrative work conducted bilaterally with each of the Member States, the Commission organized in May 1973 a multilateral meeting of the senior officials responsible for state aids within the government departments in order to ascertain the views of the Member States on the rules and conditions for implementing the principles in the three new Member States and, more particularly, on the designation of the 'central regions' and 'peripheral regions' in those States. At this meeting no agreement was reached on either of the solutions envisaged and despite the numerous political contacts made after the meeting it became clear that — in contrast with the situation in 1971, when the coordination principles had been adopted — no general agreement was to be found.

82. Under these conditions and in view of the deadline of 1 July 1973 prescribed by Article 154 of the Act of Accession, the Commission decided to supplement the coordination principles for the general regional aid systems dealt with in its Communication to the Council of 23 June 1971[3] and in the Resolution of the Member States of 20 October 1971.[4] In accordance with the procedure followed in 1971, this new decision of the Commission was notified to the Council on 28 June 1973, who began to examine it immediately.

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[1] Second Report on Competition Policy, sec 85.
[2] *Ibid*, sec. 88.
[3] OJ C 111 of 4.11.1971, pp. 7-13.
[4] OJ C 111 of 4.11.1971, pp. 1-6.

Basically, the decision deals with two main points:

(a) In the three new Member States the 'central regions' where the coordination principles have been applied since 1 July 1973 are the following:

(i) In Denmark, the central regions include the entire territory, with the exception of Greenland, the islands of Bornholm, Arø, Samsø and Langeland, and also the special development area in northern Denmark. The territories not included amongst the central areas are designated peripheral regions. At a later stage the Faroes will also be considered as peripheral regions.

(ii) In Ireland there are no central regions since the entire territory has been designated a peripheral region.

(iii) In the United Kingdom the central regions are that part of the country not receiving aid and those referred to as intermediate areas. The other areas in the United Kingdom will be classified at a later date, when aids will be coordinated throughout the enlarged Community.

(b) In order to ensure equal treatment for all Member States as regards the coordination principles, the Commission will, on the basis of these principles, adopt not later than 31 December 1974 a coordination procedure applicable to all the regions in the enlarged Community. This procedure may include a fresh classification involving several categories of regions to which different ceilings of intensity would be applicable. In any case, this new approach will take account of the problems peculiar to each of the peripheral regions.

83. When the Communication was being discussed by the Council, the Member States asked the Commission to submit a proposal permitting them to adopt, in the near future, before any precise details are decided concerning the new coordination principles announced by the Commission for the end of 1974, a resolution stressing their commitment to comply with the coordination principles for regional aids over the whole territory of the enlarged Community as of that date.

To this end, the Commission, after consulting national experts on aids, sketched the major guidelines on which the work of laying down not later than 31 December 1974 coordination principles applicable to all regions in the enlarged Community, which the Commission has undertaken in close collaboration with the national administrations, will be based.

These guidelines, which were dealt with in a further Commission Communication to the Council on 28 November 1973, are the following:

(a) The coordination principles applicable to all regions in the Community will enter into force on 1 January 1975.

(b) Regional aids will be coordinated in accordance with the principles set out in the 1971 Resolution for the various categories of regions yet to be decided and the coordination arrangements will include, in particular:
  (i) the imposition of ceilings on regional aids throughout the Community, account being taken of the problems existing in the various regions;
  (ii) detailed rules for measuring regional aids throughout the Community.

(c) Pending the implementation of the coordination principles applicable to all regions in the Community, no new opaque aids will be introduced and any renewal or modification of existing aid systems will be used as an opportunity to make them effectively transparent.

In the Communication to the Council, the Commission further expressed the wish that the Member States should adopt a resolution underlining their approval of the guidelines summarized above.

At its session of 3 and 4 December 1973, the Council discussed this matter for the first time. The Commission decided to embark in January 1974 on the initial technical work necessary for the formulation of a new solution to the matter of coordination. This work will be continued in conjunction with national experts, so as to ensure that the coordination principles applicable to all regions in the Community enter into force on 1 January 1975.

Commission comments on specific systems

84. Pursuant to Article 92 *et seq.* of the EEC Treaty and the abovementioned coordination principles, the Commission expressed its views on a number of regional aid systems.

Special British aid scheme
in favour of the transfer of service industry undertakings
to Assisted Areas

85. In June 1973, for the first time since the enlargement of the Community, the United Kingdom Government informed the Commission, pursuant to Article 93 (3), that it was considering setting up a special aid scheme intended to encourage the relocation of service industry undertakings in regional-aid areas. This scheme is planned under Section 7 of the Industry Act, as 'regional selective assistance'.

The aid scheme—assistance with the costs incurred in relocating the undertakings and office rent relief grants—is designed to enable a greater proportion of service

industry undertakings to set up in the Assisted Areas. The United Kingdom Government feels that aids already granted in these regions, which have been of most help to the development of the manufacturing sector, have not contributed sufficiently to the creation of a balanced economic structure. The new aid scheme is therefore intended to reinforce measures—so far concerned mainly with industrial development—to assist these areas.

In view of the complementary nature of the aids as compared with the regional aids provided for in the Industry Act, the Commission decided not to oppose the introduction of the scheme. However, it has reserved the right to make a final pronouncement after examining those aids from the angle of aid transparency, geographical scope, etc.

New French regional development aid system

86. The French Government submitted to the Commission[1] in draft form the modifications which it intended to make—backdated to 1 January 1972—to the geographical scope of tax concessions in favour of regional development. These modifications are complementary to the new regional grant system instituted in France in April 1972, with regard to which the Commission initiated, in June 1972, the procedure of Article 93 (2). The institution of the new grant system made the modifications necessary, for the geographical scope of the tax concessions required adaptation since part of these tax areas has always coincided with the areas in which the grants are conferred.

The Commission considered that the modifications could not be assessed separately from the final ruling which it would be making with regard to the areas in which the grants may be paid. It also noted that the regional justifications for the tax areas which did not coincide with the grant areas had not been provided. For these two reasons, it decided to extend to the modifications of the geographical scope for the tax concessions, the procedure referred to in Article 93 (2), initiated with regard to the new grant system.

Meanwhile, the French authorities have forwarded to the Commission the statistical information required to assess the regional justifications for the aid areas, and details of the modifications which they propose to make—as from 1 July 1973—to the regional development aid system.

[1] Second Report on Competition Policy, sec. 91.

Investment grants in the German coalmining regions

87. In pursuance of the second subparagraph of Article 93 (2), the Commission may, when a Member State does not comply with the decision to abolish or alter aid, refer the matter directly to the Court of Justice. The Commission used this power for the first time in respect of the system of investment grants in the German coalmining regions, taking the view that the Federal Republic of Germany had not complied with the Commission decision of 17 February 1971 enjoining it to put an immediate end to blanket investment grants in the mining regions of North Rhine Westphalia.[1]

The Commission took the view that the decision applied, in the areas in which —according to objective criteria subsequently agreed with the German authorities— aid was no longer justified, to grant applications pending, where such applications concerned investments to be made after 20 August 1970 or where they had been filed after that date with the German award authority. In fixing the date of 20 August 1970, i.e., six days after the publication in the Official Journal of the European Communities of the notification informing interested third parties of the incompatibility of the aid system, the Commission had intended to respect the legitimate interests of such third parties, who, before the publication, could not have been aware that the system conflicted with the Commission's findings.

The German authorities, for their part, had felt entitled to process all outstanding applications without distinction, as long as the investments had been begun or the applications submitted before the decision of the Commission.

In the action brought before the Court of Justice (case 70/72), the Commission therefore asked the Court:

— to declare that the Federal Republic of Germany had failed to comply with the Commission Decision of 17 February 1971,

— to order the Federal Republic of Germany to require repayment of grants paid in error.

88. By its judgment of 12 July 1973,[2] the Court dismissed the action on the following grounds:

Even if the extension of the system of aid had been notified to the Commission belatedly by the German Government, the application of the system was still equivalent to that of an existing system of aid, given that the Commission had been

[1] First Report on Competition Policy, sec. 155, and Second Report, sec. 89.

[2] OJ C 93 of 8.11.1973.

slow in initiating the procedure of Article 93 (2). Therefore, the Commission was not justified in laying down provisional measures aimed at suspending application of the system, but could only decide whether the system of aid was to be abolished or altered within a specified period.

Now, for lack of adequate instructions in the Decision as to the definition of the areas in which the maintenance of investment aid could be considered compatible with the Common Market, the nature of the obligation imposed on the German Government by this Decision remained undetermined until 16 December 1971, when, as a result of work accomplished in common with the representatives of the German Government, the Commission was able to indicate to the latter what could henceforth be the territorial scope of the aid concerned. In view of the uncertainty which thus prevailed between the date of publication of the Commission's Decision and that on which it could actually be applied, the Federal Republic of Germany could therefore not be reproached for taking into account the legitimate interests of the investors operating within the areas which were eventually to be excluded from the benefit of the aid in question.

In this connection, the Court emphasized that the publication in the Official Journal of the notification by which the Commission informed interested third parties that it had initiated the procedure of Article 93 (2) with regard to the aid in question in view of its presumed incompatibility, could not—given the purpose of the notification, which was aimed at eliciting remarks form these interested parties, and of its excessively summary character—have an effect on the rights of individual cases and that consequently the date on which this notification could have been known to the interested parties (i.e. according to the Commission, 20 August 1970) did not end the legimate interest which they will have in receiving the aid.

89. The Court dismissed the argument put forward by the Federal Republic of Germany that the Commission's action was not admissible because the decision of 17 February 1971 did not stipulate a specific period of time, as required by the first subparagraph of Article 93 (2), but requested that the aid system challenged be terminated without delay.

The Court confirmed that the Commission, in deciding that an aid system should be abolished or altered, was entitled to require, in order that this abolition or alteration have a practical effect, that the Member State concerned should proceed to recover the aid granted in violation of the Treaty; the aim of this ruling was to ensure the effective elimination of failures on the part of the Member States to comply with the law and of the past or future consequences of such inaction. Since the Commission lost this particular action, the Court's ruling had, of course, no practical implications in the case at issue.

§ 3 Aid systems for specific industries or sectors

Shipbuilding[1]

90. The second Council Directive[2] on shipbuilding aids provided that the Commission would examine the various aspects of the imbalance between supply and demand on the shipbuilding market and all State aid and intervention directly or indirectly affecting the conditions of competition and trade in this field. Using the results of the study, the Commission was to endeavour to provide solutions to the overcapacity problem which might arise and to the aids problem, by submitting to the Council proposals for action to prevent supply developing in such a way as to jeopardize the desired balance, and a new draft directive coordinating in the common interest all aid and intervention to shipbuilding and ship conversions; The Council was in theory to act upon these proposals by 31 December 1973 at the latest, the date on which the second Directive was to lapse.

91. The study made by the Commission, in collaboration with the national experts of the nine Member States and in liaison with OECD, showed that world shipbuilding capacity could well exceed, in the middle of the present decade, the expected growth of requirements, and points to a risk of excess capacity for the end of this period. It is unlikely that the currently full order books of the shipyards will be maintained, given that foreseeable requirements for sea transport are developing at a slower pace and are likely to be met without delay. The difficulties which would arise from such a situation would particularly affect Community shipbuilding, since the Community's restructuring drive is not yet completed and its competitive capacity remains generally below that of some of its competitors.

92. An industrial policy for European shipbuilding must therefore aim to close this gap in order to make the industry competitive on a world-wide basis within a maximum period of four years so that it can, in the best conditions, face the situation of surplus capacity that can be foreseen. The Commission's shipbuilding proposals sent to the Council at the end of October 1973 are directed towards attaining this objective through a policy of restructuring and of investment coordinated at Community level.

This policy would be based essentially upon support for investments in the Community shipyards with a view to boosting investment during the 1974-77 period,

[1] Second Report on Competition Policy, secs. 94 to 96.
[2] OJ L 169 of 27.7.1972, p. 28.

given that after this period, with the risk of excess capacity, action taken could come too late. The policy advocated would comprise both reconversion measures and social measures, including the intervention of the Social Fund, since it is by no means certain that some shipyards will, in future years, not have changed their activities because the cost of maintaining operations has already or is likely to become prohibitive. In addition, the policy will be supported by a research and development programme, necessitated, *inter alia*, by the deficiencies of the small- and medium-scale shipyards in this respect. Equally, these shipyards should be urged to collaborate in market research, so as to enable them to adjust their production better to demand and to increase their outlets.

93. In general, this approach is designed to substitute for the aids given so far to shipyard production incentives that will eventually render their structures competitive without any State support. This approach, underlying the two previous Council Directives concerning aid to shipbuilding, constitutes the main feature of the draft third Directive, which has been submitted by the Commission to the Council. This draft document makes the following provisions for the period 1974-1977:

Direct aids and intervention

94. The reduction in direct aids to production, i.e., those bearing a direct relation to the price of ships, would be pursued in accordance, moreover, with the guidelines of the OECD General Arrangements, which provide for the complete termination, by 1 November 1975, of aids liable to distort competition in the industry.

The second Directive fixed the ceiling of direct aid at 5% of the contractual price in 1972 and at 4% in 1973. Since this Directive allowed for a number of exemptions to these ceilings and since, in several new Member States, the level of aids was relatively high, it was proposed that the new ceilings should be fixed at 5% in 1974 and 4% in 1975, on the understanding that the new ceilings will now include some aids which had not been included in the ceiling fixed by the previous directives. Furthermore, a more detailed method for assessing the aids has been formulated, and this will enable compliance with the ceilings to be verified more accurately. The Directive, whose duration would be fixed at four years, does not lay down a specific ceiling for 1976 and 1977; it is, nevertheless, agreed that the rate of decline must be at least one point per year: the OECD general arrangement provides for the complete abolition of direct aids by the end of 1975, when the results obtained under this arrangement should be examined.

Aids for the sale of ships

95. As regards credits granted for the sale of ships, the Second Directive made reference to the OECD agreement (most favourable rate 7.5%, payment on account 20%, maximum duration 8 years) and in fact it thus confined itself to harmonizing the conditions for obtaining one of the factors of production, in this case, credit, but not the aids themselves: the latter consist of the difference between the normal cost of borrowing capital, which can vary from State to State, and the rate of preferential credit granted. The 7.5% rate would thus give a varying degree of assistance depending on the Member State. A ceiling should therefore be fixed for these aids. The maximum subsidy which the shipbuilder may receive when a ship is sold will be restricted to five percentage points in relation to the normal cost of borrowing. The Commission and the Member States will endeavour to have this limitation adopted within the OECD.

Investment aids

96. While it considers that for the reasons given above, investment in the shipyards of the Community should be facilitated, the Commission is of the opinion that the efficiency of aids conferred for this purpose must be increased, by granting them only after examination of the objectives relating to areas and industries concerned that are to be attained and of the results which may be expected in terms of increased competitiveness of the shipyards qualifying. To this end, the draft directive provides that prior notification of plans for investment aid and intervention exceeding four million u.a. will have to be given to the Commission for multilateral examination.

Emergency measures

97. Any emergency measures taken by Member States in the form of aids or interventions aimed at safeguarding the continued operations of an undertaking or the employment it provides will be taken only when they are justified by the need for avoiding acute social difficulties and in so far as they enable the competitive position of the undertaking receiving assistance to be restored within a reasonable period of time.

The draft third Directive thus covers all direct and indirect aids which Community shipyards may receive.

When these proposals were examined by the Council, it was, however, found that the problems dealt with in the Commission's proposals were too important and too

wide in scope to be dealt with by the Council before the end of the year. Adopting a proposal from the Commission to this effect, the Council therefore decided to extend the duration of the Second Directive until 30 June 1974; this will enable the Council to carry out a thorough examination of the new proposed aids Directive and of the guidelines for an industrial policy for shipbuilding submitted at the same time.

Italy

98. The Italian Government has notified the Commission of a new draft law on shipbuilding aids covering a period of 5 years (1972-1976). The aim of the law is to continue reorganization and rationalization initiated under the previous law (Law No 19 of 4 January 1968, which expired at the end of 1971), in order to bring about progressively a situation in which Italian shipbuilding will be competitive without subsidy. The draft law provides for direct aids for the construction and repair of ships and in favour of investments made in these sectors, and for the construction of marine engines.

Direct aids to shipbuilding will be degressive and will amount to 9% of the prices fixed in the contracts concluded in 1972, falling to 4% in 1976. For the conversion and repair of ships, aid will be fixed at 7% of the work undertaken in 1972 and will be lowered to 5% in 1976.

Investment aids will be granted on condition that the investments qualifying come within the plan for reorganizing shipbuilding. They will amount to 10% of the investments for shipbuilding proper and for the conversion and repair of ships. They will be 6% for the setting up of establishments for the construction of marine engines.

The reorganization and rationalization programme, whose implementation will be facilitated by the new system of aid, includes the following: coordination of production and management activities in the shipyards; an effort to increase specialization and structural adaptation within the Fincantieri groups; reduction of the number of production lines; modernization of certain shipyards.

Not wishing to encroach on the arrangements to be agreed by the Council under the third shipbuilding aids Directive, the Commission has commented on the Italian draft law only for the period covered by the second Directive. Within these limits, the Commission has made no objection, provided aids are not granted:

(i) for the construction of nautical training or scientific research ships,
(ii) for the conversion of ships other than metal-hulled, seagoing vessels with a gross registered tonnage of at least 5 000 tons.

France

99. Article 5 of the Council Directive of 20 July 1972 concerning shipbuilding aids requires Member States to refrain from any discriminatory practice calculated to favour, within their national territories, the building or conversion of ships or the manufacture of products intended to form part of such ships.

France applies an insurance scheme against exceptional cost increases resulting from changes in raw materials prices or in wage levels, by virtue of which French shipyards receive compensation equivalent to the cost increases occurring during the building of ships from the time when the order was placed to completion, whenever these increases exceed a certain level. This system, which, following the intervention of the Commission, applies only to the sale of ships in France and in outside countries excluding sales to other Member States, is financed, for the greater part, by a financial contribution from the State which is added to the insurance premiums paid by French shipbuilders.

The basis for calculating the guaranteed price payments is the selling price of the ship, but from the latter is deducted the amount for the incorporated items imported from abroad. This practice prevents, or makes more difficult, the use of imports (marine engines and various fittings) from other Member States by the French shipyards and encourages them to give preference to national products at the risk of losing part of the benefit of the guarantee.

Consequently, the Commission initiated against France the procedure provided for in Article 196 for infringements of Article 5 of the Directive of 20 July 1972. In submitting its observations under the procedure, the French Government expressed its intention to terminate this discrimination.

The Textile Industry

100. In July 1971, the Commission submitted to the Member States a Communication[1] on the coordination of State aids to the textile industry. This contained a number of criteria intended as guidelines for the Member States as regards these aids. Practical experience has brought to light the wide diversity of State aid arrangements used by the Member States for this purpose and the difficulty of assessing and comparing the ways in which the systems are actually applied. The Commission has consolidated and supplemented its 1971 initiative and in 1973 informed the Member States that it had decided to introduce the following arrangements:

(1) Any specific assistance for the textile industry (special terms or conditions concerning the granting of aids, aids granted under agreements between the

[1] First Report on Competition Policy, sec. 172.

industry and the central authority) included by Member States in aid schemes which are otherwise not specific to the industry (general aids, regional aids) will be submitted in advance to the Commission for vetting from the 'sectoral' angle;

(2) A bilateral or even multilateral consultation procedure will be organized by the Commission to consider all complaints with evidence received from the national Governments against aids granted to textile firms which are liable to have a serious effect on trade and competition; in this connection, no distinction will be made between aids granted specifically for the textile industry and aid arrangements of a wider scope.

(3) A catalogue of aids granted to the textile industry will be up-dated each year; a statistical analysis will indicate, for each year, all the investment schemes which have been assisted and all the aids which have been granted to such schemes, regardless of the arrangements under which the aids have been granted; the analysis will be broken down according to the various branches of the industry.

101. In addition, the Commission continued to implement the principles it set out in the Communication of July 1971, commenting on certain Italian aids.

During the Parliamentary procedure for the adoption of Italian Law No 1101 on the restructuring, reorganization and conversion of the textile industry, a new provision for aid to textile and garment firms was introduced without prior notification to the Commission.[1] This provision consisted of a temporary (three years) and partial (rate reduced from 15 to 10%) reduction in payments chargeable to firms in respect of their employees' family allowances. According to the Italian authorities, the measure would reduce the costs borne by the firms concerned by almost 31 thousand million lire, in other words about 0.8% of their turnover.

On completion of the proceedings which it initiated in respect of this provision under Article 93 (2) of the EEC Treaty, the Commission adopted a Decision on 25 July 1973[2] calling upon Italy to cancel these tax reliefs in respect of welfare payments. The Commission Decision was taken on the basis of the following considerations.

Because of the implications of the aids and the fact that they have a direct effect on the costs of the firms receiving the aids, they may have a substantial effect on trade and competition within the Community in an industry in which trade is on large scale and competition is keen and which, throughout the Community, is facing difficulties as regards adaptation to new conditions.

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[1] Second Report on Competition Policy, sec. 98 (b).

[2] OJ L 254 of 11.9.1973, p.14.

Furthermore, these aids, which were granted in the form of tax relief in respect of welfare payments constitute operating aids of a 'conservatory' nature which are not intended to facilitate the 'development' (within the meaning of Article 92 (3,c) of the EEC Treaty) of the undertakings receiving the aids, since they would not encourage undertakings which have problems of a structural nature to carry out the changes which must be made if their problems are to be solved. Moreover, this tax relief was granted as a blanket concession to the whole of the textile industry and no distinction was made between firms which have problems of a structural nature and firms which have no such problems and, therefore, should not qualify.

Moreover the Commission felt that it was impossible to accept the argument put forward by the Italian authorities that the tax reliefs in question were justified by the burden of welfare payments borne by these firms, which is heavier in Italy than in the other Member States. The fact that the general factors affecting firms' operations often vary from one Member State to another is no justification for isolating one particular factor (welfare costs, for example), and compensating, by means of aids, for the additional costs which this factor imposes on firms in one Member State in comparison with their competitors in the other Member States. This situation could well be quite the reverse in respect of other factors.

Aid systems financed by para-fiscal charges

102. The Commission's attitude as regards aid systems financed by para-fiscal charges was set out in the first[1] and Second[2] Reports on Competition Policy. In 1973, the Commission gave practical expression to its views, as a result of new developments concerning two French aid systems.

103. As regards 'occupational technical centres' in France which assist the clock and watch and leather and hide trades,[3] the Commission, in a Decision[4] taken on completion of the procedure provided for under Article 93 (2) of the EEC Treaty, advised the French Government that the para-fiscal charge used to finance these centres should no longer be levied on items imported from the other Member States of the Community.

The Commission considers that these centres are in fact providing State aids to the industries they are serving. As their main aim and effect is to promote technical

[1] Secs. 181 to 183.
[2] Secs. 108 to 111.
[3] Second Report on Competition Policy, sec. 109.
[4] OJ L 14 of 17 January 1974.

progress in these industries, they help to improve productivity and the quality of production of the firms, and relieve them (particulary in the case of firms which are not in a position to carry out research work themselves) of expenditure which would normally be part of their costs.

The fact that firms in the other Member States are free to avail themselves of the services provided by the centres without discrimination, and that the centres publish the results of their research work, does not alter the Commission's assessment.[1] Even if equal treatment is established on paper, the fact remains that in practice these centres base their own research work on the special features and specific needs of French industry and, because they are near at hand, it is easier for French firms to have them carry out the research work which they require. Furthermore, firms in the other Member States often undertake identical research work either directly or by making financial contributions to similar research centres in these Member States and, therefore, do not need to avail themselves of the services of the French centres. The criteria of Article 92 (1) of the EEC Treaty are met therefore in the case of these aids.

However, in view of the limited sums allocated to this French scheme, of the fact that the centres help small and medium-sized firms (most larger firms more often than not have adequate research facilities of their own), and of the fact that the Commission is usually favourably disposed towards aids which facilitate industrial development by improving technical progress, the aid system qualifies for exceptional treatment under Article 92 (3, c) of the EEC Treaty, as aids to facilitate the development of certain activities, as long as they do not 'adversely affect trading conditions to an extent contrary to the common interest'. The last condition can only be considered to be fulfilled, however, if products imported from other Member States are no longer subject to the para-fiscal charge which partly finances the technical centres in question.

104. In December 1972 the Commission took a Decision[2] regarding French aids to paper-making and reafforestation activities which were financed by a special charge on paper and board.

Pursuant to this Decision:

(a) the French Government must not resume payment of premiums for the production of paper pulp, since, as they are operating aids, these aids do not qualify as one of the exceptions provided for in the Treaty;

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[1] This attitude was confirmed by the Court of Justice, as regards the Institut textile de France, in Judgment 47/69 concerning the French aid system, mentioned above, designed to promote the restructuring of the textile industry.

[2] Second Report on Competition Policy, sec. 111.

(b) while aids to paper research and the reduction of pollution and 'nuisances' though liable to affect trade and competition within the Community, can, nevertheless, be regarded as likely to facilitate the development of the industry concerned without adversely affecting trading conditions to an extent contrary to the common interest, they cannot be financed by means of a para-fiscal charge on paper and board imported from other Member States.

In accordance with this Decision, the French Government confirmed that it would no longer pay premiums for the production of paperpulp.

It also reduced the rate of the para-fiscal charge on paper and cardboard from 0.70% to 0.30% on products imported from other Member States. The 0.40% reduction represented the part of the levy which served to finance aids to paper research and to the reduction of pollution in the paper industry; the Commission took the view that levying this part of the charge on imported products was liable to aggravate unnecessarily the impact of the aid on competition and trade within the Community. The remainder of the charge, which will be levied at the rate of 0.30% on products imported from other Member States, represented the part of the charge which financed aid to forest and reafforestation research and, as the link between the products on which the charge was levied and the products for which aid was granted was very indirect, the Commission felt that this type of financing did not have an aggravating effect, and that aids granted in this area should not be considered as adversely affecting trading conditions to an extent contrary to the common interest.

Oil refining

105. In response to the Commission's policy of examining in advance general aid schemes to be implemented by the Member States,[1] the Belgian Government submitted a draft law aimed at granting aids to certain investment projects in the oil-refining industry. The aids in question are provided for by the Belgian Law of 17 July 1959 encouraging economic growth and the creation of new industries.

The operations in question would involve extending an existing refinery in Antwerp and creating a new refinery in Kallo (in the province of East Flanders). In view of their scale, these investment projects, which are to be carried out by two large oil groups, would considerably increase refining capacity in Belgium with effect from 1976 and 1977. There would be an interest rebate of 2% for three years

[1] **Point 112 of this Report.**

on 50% of the value of the investments and certain tax advantages (three-year exemption from the 'précompte immobilier' (tax paid in advance on income from fixed assets).)

106. In October 1972 the Commission initiated the proceedings provided for under Article 93 (2) in connection with these aids, because of the following considerations:

(a) Neither the locations nor the operations involved were of a type normally justifying support. The investments concerned were outside the regions and areas for which the Commission, in its Decision of 26 April 1972 concerning the Belgian Law on economic growth[1] of 30 December 1970, had agreed that the social and economic situation justified regional aids. The refining industry in Belgium does not have any special structural problems or problems concerning its own capacity for growth; production capacities exceed domestic needs, and this difference is likely, according to reasonable forecasts, to increase.

(b) In the context of the oil-refining industry, the aids in question seemed liable to affect trading conditions to an extent contrary to the common interest. Surpluses, however small, on the market in oil products tend to force prices down sharply and could well, therefore, jeopardize the equilibrium of the Community's refining industry, in which idle capacity is particularly unwelcome, this being an industry in which the variable cost factor is a small proportion of total costs.

107. In the observations made as part of the procedure, most of the Member States endorsed the Commission's own reservations, and on 11 September 1973[2] the Commission closed the procedure by adopting a Decision ordering the Belgian Government not to grant the aids in question, as there was no specific need for them and they were contrary to the common interest.

In taking this attitude, the Commission felt that it could not accept a proposal, submitted by the Belgian Government during the proceedings provided for under Article 93 (2), to retain only the part of the proposed aids which would cover the investments in the two refineries intended for combating pollution.

The Commission takes the view that the Member States should endeavour to attain the aims of environmental protection not by means of a generalized aid policy but by making polluters defray, in various ways, the cost of eliminating the pollution for which they are responsible. As a general rule, this principle can be waived for aids only if its full application could engender special difficulties in certain regions

[1] Second Report on Competition Policy, sec.90.

[2] OJ L 270 of 27.9.1973, p. 22.

or industries, or if the aids granted allow firms to make necessary adjustments to existing investments.

The preceding analysis of the situation in the refining industry in Belgium and a consideration of the regions or areas in which the two refineries are to be located indicate no such difficulties. Furthermore, as they are new investments, it falls to the developer to take full responsibility for the cost of the installations in such a way as to allow the plant to be operated without jeopardizing the environmental objectives which the Belgian Government considers should be attained in this field.

Aids to steel-using firms located in Northern Ireland

108. The United Kingdom Government notified the Commission of a scheme to set up a system of temporary aids to steel-using manufacturing firms located in Northern Ireland. This scheme was based on the finding that, as a result of accession and the fact that British steel producers have adopted the ECSC pricing system, the supply conditions for steel products for manufacturing firms located in Northern Ireland have altered considerably.

Before accession, the British Steel Corporation and the independent steel producers charged all British purchasers of steel identical delivered prices, regardless of their location, and therefore shared out aggregated freighting costs equally among customers. Since 30 April 1973, in accordance with Article 60 of ECSC Treaty, the schedules used by British producers have been based on prices ex-basing point, these points usually being steel production centres and the freighting costs from the points being covered individually by each consumer. The result has been a new, unequal, pattern of freighting costs, which, although it has improved the supply conditions for some consumers, has had the opposite effect for consumers operating in more remote locations.

Other regions in Britain have been affected by the increases in the delivered price of steel, but Northern Ireland (where there is no basing point and where the price of all steel used includes an additional charge for the cost of sea transport from Great Britain) has been particularly affected at a time when its regional, economic and social problems are being aggravated even more by political problems.

109. The adaptation difficulties which might face manufacturing firms whose activities are based on the processing or utilization of steel might well threaten their very existence and aggravate even more the present situation. For this

reason the United Kingdom Government proposed to pay these consumers a 'steel freight equalization grant' in accordance with the following procedures:

(a) Manufacturing firms in Northern Ireland will receive a grant calculated on the basis of their purchases of steel; this grant, which will not vary according to the origin of the supply, will be paid for three years on a descending scale of £ 3.50 per metric ton of steel for the first year, £ 3.25 for the second and £ 3.00 for the third; £ 3.50 per metric ton is the approximate cost of freight between ports in Great Britain and Northern Ireland.

(b) The grant will be payable in respect of all purchases of steel originating in the ECSC, regardless of whether they are British or not; it will not be payable for the supply of a number of products whose price has not been affected by the change in steel price scales (rails, tin-plate and ship-plate).

(c) The total amount of budget appropriations to cover the three-year scheme should not exceed £ 650 000, which represents purchases of about 200 000 metric tons of steel products by firms in Northern Ireland.

110. The Commission took the view that, despite the type of financial support granted to steel processors or consumers and the fact that it is a grant intended to reduce the delivered price of one of their basic materials, it was not an operating aid as such. As it will apply for a limited period (three years) at a degressive rate, this suggests that the objective of the aid is to give a respite to the firms concerned in order to allow them to adapt themselves to the new operating conditions with which they have been confronted as a result of the changes in price scales for steel in the United Kingdom; the aid is indeed such as to encourage these firms to make structural changes.

In view of the very special economic, social and political situation in Northern Ireland and in view of the fact that the aid is temporary and will be applied at a degressive rate, the Commission did not oppose payment of the grants for a period of three years. However, the Commission made it clear to the United Kingdom Government that the grant can be paid only to manufacturing firms which were already operating in Northern Ireland on 30 April 1973 when the price scales for British steel producers were brought into line with the rules of the ECSC Treaty. This grant may be considered to be compatible with the Common Market only in so far as it allows firms to adapt themselves to a sudden change in the conditions affecting their operations. The effect attained would go further than the objective set if the grant were to be paid to new firms.

§ 4 — Aids to exports

111. Following the initiation by the Commission of the procedure provided for in Article 93 (2) of the EEC Treaty against the system of tax concessions designed to help French firms set up establishments abroad,[1] the French authorities adopted a law—within the framework of the amending Financial Law for 1972 No 72-1147 of 23 December 1972, Article 6 (5)—repealing the relevant clauses. However, this action did not entail the immediate abolition of all the tax concessions challenged. It was decided that the replacement of the concessions by a system which is neutral from the point of view of competition and compatible with the right-of-establishment rules would not come into force until 1 April 1973 and that the old arrangements would continue to apply to establishments and offices set up abroad before that date.

On 25 July 1973, the Commission therefore adopted a decision[2] prohibiting the system. This Decision, based both on the Community's right-of-establishment rules, which forbid the Member States to provide aid to help their nationals to settle in other Member States, and on those concerning aids, requires the French Republic to adopt the necessary measures to withdraw the tax concessions forthwith.

§ 5 — Systems for providing general aid

112. In its Second Report on Competition Policy[3] the Commission gave its reasons for embarking on general action with regard to general aid systems which, being subject to the discretionary powers conferred on the competent national authorities and not being of a sectoral or regional nature, may be granted to undertakings whatever their location or the industry to which they belong.

As part of this action, the Commission, while not seeking the abolition of the systems, would like the Member States to stop applying them save within the framework of programmes concerning particular industries or regions in line with the requirements as regards aid 'specificity' provided for in the Treaty, the programme to be notified to the Commission in advance. Should certain Member States feel that they could not break down their general aid systems into 'sectoral' and regional aid systems, another solution could be employed whereby all significant cases of implementation of the aids are submitted to the Commission in

[1] Second Report on Competition Policy, sec. 113.
[2] OJ L 253 of 10.9.1973.
[3] Secs. 116 to 119.

advance, such cases being defined with reference both to the size of the assisted investment and to the effect of the aids granted on the assisted investment.

During 1973, there were a number of developments in connection with this policy.

France: Economic and Social Development Fund

113. Through the Economic and Social Development Fund—a special Treasury account whose resources are determined annually by the State budget—the French Government, by granting loans on preferential terms, encourages industrial investment for the conversion and adaptation of industrial structures. Such loans are granted either to facilitate the achievement of the objectives set out in the modernization and equipment plans or to enable specific industrial modernization projects to be implemented. The State therefore contributes towards collecting the resources necessary for projects which might not have been possible if the normal financial channels had been used.

Loans from the Fund are granted on more favourable terms—from the point of view of interest rates, duration, redemption rules and the security required—than those which undertakings could obtain either on the capital market or from credit institutions. The terms are as follows:

— the duration of the Fund's loans is eight to twenty years (25 years in exceptional cases);
— redemption may be deferred for 2 to 5 years, dependent on the case;
— the interests rates, which also vary from time to time and are dependent on the industry concerned, are considerably lower than the interests rates generally in force for medium- and long-term credit.

Such aid may be granted to assist industrial investments whatever the industry, and the Commission is therefore unable—either in respect of the system itself or of its application, of which it receives no prior notification—to assess the effects on competition and trade, although the budgetary appropriations involved annually in such loans amount to almost FF 800 million.

114. The general position defined above led the Commission to initiate, at the end of 1972, the procedure provided for in Article 93 (2)[1] against this aid system. The Commission asked the French Government to subject the application of the system to one or other of the control procedures (notification of programmes for specific industries or, failing this, of significant concrete cases).

[1] Second Report on Competition Policy, sec. 119.

In response to the Decision, the French Government advised the Commission that Fund loans granted as aids to specific industries to further structural reconversion or readaptation operations would be granted in future only as part of programmes covering the entire industrial sector, and that such programmes would be communicated to the Commission, as provided in Article 93 (3), in advance.

In view of this satisfactory commitment, the Commission decided, on 20 June, to close the procedure of Article 93 (2) which it had initiated against the aid system.

Italy - Provision of supplementary funds to cover action under law No 1470

115. The Italian Government notified the Commission of its draft law No 946, which increases by Lit 15 000 million the budgetary appropriations granted to the Instituto Mobiliare Italiano (IMI) for the grant of the aid provided for in law No 1470 of 18 December 1961 to industrial undertakings which are in difficulties and which, for this reason, are unable to obtain funds through the usual channels.

Law No 1470 provides that the IMI may—acting for the State—support the following operations:

— investments made by small and medium-sized industrial undertakings which are in difficulties or which have suspended operations;
— reopening of industrial undertakings or establishments which have suspended operations.

The aids for these purposes are granted for a period of five years, at a rate of three per cent, with a ceiling of Lit 500 million for each individual case; the period of grace before redemption is also five years.

116. The system has two features which might make it incompatible with the Common Market:

(a) as a general system, it may be applied to any undertaking whatever its location or to whatever industry it belongs; the lack of a regional or sectoral 'specificity' means that the Commission is unable to ascertain the effects on trade and competition in the Community;

(b) law No 1470 is designed to forestall liquidations of firms which have run into difficulties; while agreeing that the Member States should intervene under certain circumstances to help such undertakings, the Commission nevertheless considers that the aid granted should be used to contribute towards the realization, by the undertakings concerned, of adaptation programmes aimed at

eventually restoring their ability to compete; this is not the case as regards the aid provided for in law No 1470, which is concerned purely with keeping undertakings in existence.[1]

117. The Commission did not take action earlier with regard to this aid system because the Italian Government had stated that it would discontinue the arrangements once the budgetary appropriations allocated for that purpose had been exhausted. As draft law No 946 provides that further aid may be granted under law No 1470, the situation must now be viewed in a different light. This is why the Commission decided to initiate the procedure provided for in Article 93 (2) against both draft law No 946 and law No 1470, and called upon the Italian Government:

(a) to notify it, as provided for in Article 93 (3), of 'sectoral' or regional programmes which it will be establishing for the application of such aid, or, failing this, of significant specific cases where aid is granted to undertakings;
(b) to amend the laws or regulations governing the grant of the aids provided for in law No 1470 so that they will in future be granted only within the framework of suitable reorganization, modernization or conversion programmes designed to ensure the rationalization of the industries or undertakings concerned.

Netherlands - State guarantees for operations carried out by the Nationale Investeringsbank (NIB)

118. The Bijzondere Financiering (BF) is an aid system whereby the Netherlands Government provides guarantees for financial transactions which the Nationale Investeringsbank would not otherwise undertake on account of the risks involved.

The Nationale Investeringsbank (NIB) is a bank 50.3% of whose capital is controlled by the State, the rest being controlled by various financial institutions. The principal responsibility of the NIB is the medium- and long-term financing of investments made by undertakings, either by granting them credit directly or providing guarantees for credit put up by other financial institutions.

A State guarantee may be given for such operations if they are in the interest of the economy as a whole, cannot be financed through any other channels, and entail undue risks for the NIB because:

[1] First Report on Competition Policy, sec. 184.

(a) the firms concerned dispose of insufficient resources of their own;
(b) the nature of the operations of the firms concerned is unsuitable;
(c) the NIB's involvement in the relevant industry is already excessive.

It is, in fact, as if, apart from its banking operations proper, the NIB were managing, on behalf of the State, the grant of aid in the form of guarantees for economic development. Such State guarantees are given in connection with:

(a) credit granted direct to undertakings by the NIB;
(b) guarantees given by the NIB in connection with credit granted by other financial institutions (State counter-guarantees).

Such State guarantees are granted within the framework either of 'sectoral' or regional programmes or in respect of specific programmes concerning a specific undertaking.

During the first 25 years of its life (1945-70), the NIB was covered by State guarantees in an amount of Fl 560 million. On 31 December 1970 sums outstanding covered by State guarantees totalled Fl 340 million. In 1969 and 1970 State guarantees were provided covering sums loaned of Fl 91 million and Fl 43 million respectively.

119. By guaranteeing NIB loans, the Netherlands Government in effect grants a form of official aid to those undertakings receiving support. Such guarantees constitute a benefit which enables the undertakings to make use of the normal banking channels in order to finance their investments, although the guarantees which they normally could provide would not suffice to enable them to borrow from the banks on such favourable terms, or would exclude them from banking channels altogether; a State guarantee very often enables an undertaking to obtain credit. The fact that the benefit represented by the guarantee is of a qualitative nature and cannot be quantified, save where a mishap entails actual disbursement of State funds under the guarantee, is no barrier to the application of Articles 92 *et seq.*

Furthermore, this system of guarantees, based on the value to the overall economy of certain operations, may—subject to the discretionary powers conferred on the competent national authorities and without any prior control by the Commission—be applied to operations involving the development, adaptation or reorganization of undertakings, whatever the industry.

The Commission must therefore impose the same requirements as for the general aid systems instituted by other Member States. Such requirements are all the more

indispensable in this particular case since when the guarantees in question are provided in specific cases they often cover loans to undertakings which have run into difficulties and would otherwise have to go out of business.

This is why the Commission initiated the procedure provided for in Article 93 (2) against the system. In this way it hopes to elicit from the Netherlands Government an undertaking that it would give the Commission prior notice, in accordance with Article 93 (3), of: programmes for which it intends to provide the guarantees through the Bijzondere Financiering (BF), or, failing this, specific cases for benefiting given undertakings.

Luxembourg - Law for the promotion of economic expansion

120. The Grand Duchy of Luxembourg notified the Commission of a draft law for the promotion of economic expansion to replace the former general aid system. This draft law was aimed at promoting the creation, rationalization and conversion of undertakings through the grant of various forms of aid:

(a) subsidies up to 15% of the cost of investments;
(b) interest subsidies reducing interest to be paid up to three percentage points;
(c) tax exemption for eight years for 25% of the profits of a new undertaking or of the profits accruing on a new product;
(d) State guarantees provided in exceptional cases to cover a maximum of 40% of the expenditure financed by borrowing;
(e) aid for the acquisition and development of land and buildings.

None of these forms of aid excluded any of the others, except for the interest subsidies and ordinary subsidies, which cannot both be paid at the same time.

121. The two objectives of the original draft law, which were not considered separately, were:

(a) to ensure the expansion and structural improvement of Luxembourg's economy;
(b) to promote a better geographical distribution of the economic activities of the country.

No stated preference or priority was given to either of those objectives, as the aids provided for could be used, on the same terms, for investments coming under either head.

In fact, an analysis of the scheme revealed that it was oriented more towards the first objective—the expansion and structural improvement of the economy—and that, not being concerned with any particular industry or area, it thus constituted a general aid system which was applicable to any investments made in Luxembourg, whatever the area or industry concerned. The draft law of which the Commission was notified gave rise to objections on this ground alone. But what is more, it was not in line with the 'aid transparency' requirement set out in the principles of coordination of regional aids in the central regions.[1]

122. This led the Government of the Grand Duchy to amend the draft law and to provide for a number of implementing regulations for submission to the Commission. In amending the draft, the Luxembourg Government made the necessary distinction between the fundamental objectives. Furthermore, it undertook to apply the law in question, in the initial stage, purely as a 'framework' sectoral aid system, with significant cases being submitted to the Commission in advance.

It also declared its willingness to defer the application of the law—as a form of regional intervention—until an implementing regulation had been drawn up providing sufficient regional 'specificity'; it made the necessary provisions to reduce the 'opacity' of the principal aids granted under the new system. Finally, the draft law provided that investments into existing undertakings to solve or forestall problems relating to pollution or the environment could also be assisted; the Luxembourg Government indicated that such aid would be granted only in exceptional cases and that an implementing regulation provided for the prior notification to the Commission of all cases of the grant of such aid.

123. In view of the adjustments thus made to the original draft, the Commission decided to make no comment for the time being on the application of the regional aids in question until it had received the draft concerning their application, and not to oppose implementation in respect of specific industries, while reserving the right to rule on each significant case. As regards aids connected with environmental problems, the Commission also decided to make no comment for the time being on the draft which would govern their application and which would provide that the Commission be notified of concrete cases. Nevertheless, the Commission reminded the Luxembourg Government that it was normally the responsibility of the undertakings to face the consequence of pollution which they cause and that it was up to them to provide, in each case, the information to justify a waiver of that principle for any particular industry.

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[1] First Report on Competition Policy, sec. 150.

Section 2

Application of the ECSC Treaty to State aids to the steels industries

124. In 1972[1] the Commission had to implement the infringement procedure provided for in Article 88 of the ECSC Treaty against Belgium and Italy, who had failed to provide sufficient information on the aids granted to their steel industries. As the two Member States subsequently provided the missing information, the Commission terminated the procedure.

The Commission will now be in a position to check, on the basis of information obtained from all nine Member States, whether any of the specific aids prohibited by Article 4 (c) of the ECSC Treaty have been granted to the steel industry and whether aids granted to those industries within the framework of regional aids or more general aids are liable to engender the disequilibria referred to in Article 67.

[1] Second Report on Competition Policy, sec. 126.

Chapter II

The adjustment of State monopolies of a commercial character

125. The Commission continued the work it began many years ago on State monopolies of a commercial character.[1] As it has mentioned repeatedly in its recommendations, Article 37 of the EEC Treaty is aimed at obtaining the same results at the end of the transitional period for products which are subject to a monopoly as those obtained for other products through the application of Articles 30 to 34, i.e. free movement of goods.

The Commission believes that the best way to achieve this objective would be to abolish exclusive import, export and/or marketing rights. One objective could be the mere adjustment of the monopolies, with the necessary procedures, assurances, and guarantees for the elimination of any discrimination resulting directly from the arrangements applying to the monopoly items. This objective would include the elimination of any scope for discriminatory action deriving from certain residual powers left in the hands of the monopolies. But the Commission has preferred to ensure free movement of goods at the end of the transitional period, by trying to induce the Member States to abolish the monopolies altogether in relation to the other Member States.

Such action, aimed at obtaining a result which is not explicitly provided for in Article 37, has already led France to abolish its match monopoly and its gunpowder and explosives monopoly; Italy, for its part, has put an end to its monopolies of cigarette lighters, cigarette papers, flints and salt. France and Italy have also undertaken to abolish their manufactured tobacco monopolies before the end of 1975.

126. Moreover in 1973 the Commission succeeded in obtaining the abolition of a number of discriminatory practices within the meaning of Article 37 (1) which it had noted; however, in other cases, it had to continue the infringement procedures already started or even to initiate new ones.

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1 First Report on Competition Policy, sec. 195 *et seq*, and Second Report, sec. 150 *et seq*.

Thus despite the adjustments already made by France to its manufactured tobacco monopoly, the Commission noted that certain measures restricting the introduction and marketing of foreign brands still persisted in France. Following the activation by the Commission of the procedure provided for in Article 169[1] the French Government made numerous adjustments to this monopoly.

Consequently, new foreign brands which could formerly be introduced onto the French market only once a year can now be introduced onto the market, as can France's own products, on any of several specific dates during the year. The minimum amount (FF 6 000) levied on receipts from sales of every brand imported will be replaced by a fee of FF 3 000 for certain administrative expenditures. The effect of the amendment of the tobacco price scale in 1972 was to reduce the foreign manufacturers' supply price ('prix de cession') without the foreign manufacturers being able to change these prices; as the tax system applicable to tobacco has been revised, they are now in a position to increase these prices. The rule that imported goods must pass through the general warehouse in Paris, entailing additional costs for the manufacturers, has been adjusted by the assumption by the monopolist of the transport costs from the frontier to the general warehouse.

As far as the Italian manufactured tobacco monopoly is concerned, the Commission reached the conclusion, following investigations hampered by technical difficulties, that certain aspects of this monopoly discriminated against imported items. It therefore decided to initiate against Italy the procedure provided for in Article 169. Those measures and practices which hinder the import and marketing of the imported products in question consist in the limitation of the number of new foreign brands which may be marketed and the time limits and excessive amount of information required before marketing is possible, the need for the imported tobacco to pass through the central warehouse in Bologna, the restrictions as to the amount of imported tobacco which may be stored in the monopolist's warehouses, the difficulties encountered by foreign manufacturers when they want their supply prices to be altered, and the levying of unduly high distribution costs on imported tobacco.

127. As regards matches, following the recommendation sent to the Italian Government on 22 December 1969 and the infringement procedure[2] initiated against that Government, the latter adjusted its monopoly system in part. Pursuant to a ministerial decree of 25 June 1973,[3] the import of matches from other EEC countries will henceforth be free from restrictions and importers will

[1] Second Report on Competition Policy, sec. 151.
[2] Second Report on Competition Policy, sec. 150.
[3] Gazzetta ufficiale No 171, 6 July 1973.

be able to supply the distribution network of the Amministrazione Autonoma dei Monopoli di Stato (AAMS) direct and negotiate freely with the agents in that network (warehousemen and retailers) the gross profits of the latter earned on the imported products; however, the AAMS's monopoly of the wholesale trade in matches is to be maintained until 31 December 1975, and the consortium of national producers retains the right to levy on the State's account a fiscal tax on imported products. The Commission decided to suspend the procedure provided for in Article 169 initiated against Italy in order to examine the implications of these amendments and of the new price system for matches in Italy whereby technically identical matches must be sold at the same retail prices, whether home-produced or not.

The Italian decree-law of 18 December 1972[1] put an end to the Italian monopoly of the import and sale of cigarette papers.

The law of 16 February 1973[2] put an end to the Italian monopoly in salt for food as from 1 January 1974. The import of salt for industrial uses is still subject to prior authorization from the monopolist; since the monopolist is thus in a position to refuse to allow imports at any time and can thereby limit the quantity of imports from the other Member States, the Commission ruled that this was a case of dicrimination incompatible with Article 37 (1), and decided to initiate the infringement procedure against Italy, as provided for in Article 169 of the EEC Treaty.

128. The French potash monopoly has also been adjusted. The monopoly on the import of compound fertilizers containing potash from other Member States, held by the French joint sales agency, was withdrawn by decree No 73-379 of 23 March 1973.[3] Nevertheless, imports remained subject to prior authorization from the competent French ministry. Considering this requirement to be incompatible with the Treaty, the Commission initiated the infringement procedure against France. In the case of the potassium salts monopoly, the French Government notified the Commission of a draft decree withdrawing the French joint sales agency's import monopoly and abolishing the sales monopoly. However, that decree provides that the import of potassium salts be subject to the same prior authorization system as compound fertilizers containing potash; and hence provokes the same objections.

In the case of the basic slag monopoly, the Commission delivered the reasoned opinion provided for in Article 169 and continued the infringement procedure.

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[1] Converted to a law as at 16 February 1973; Gazzetta ufficiale No 44, 17 February 1973.

[2] Gazzetta Ufficiale No 44, 17 February 1973.

[3] Journal officiel de la République française, 31 March 1973.

The French Government then notified the Commission of a draft law, approved by the French Parliament at the end of December 1973, providing for the withdrawal from the Société Nationale pour la vente des Scories Thomas (SNST), which comprises all the French producers, of the sales monopoly of both home-produced and imported basic slag on the French market. The Commission has not yet decided whether the new situation thus created is in line with the provisions of Article 37.

129. In the case of the French alcohol monopoly, in spite of having repeated its intention to end the discrimination brought about by levying a surcharge on the import of spirits and spirituous beverages from other Member States which is higher than the levy on home-produced products, the French Government has not made the necessary arrangements to end this discrimination. Consequently the Commission delivered the reasoned opinion provided for in Article 169 and continued the infringement procedure initiated earlier.

Part three

The development of concentration within the Community

§ 1 — The development of concentration in further selected industries in the Community

130. The information given below is based on studies carried out under the Commission research programme on concentration.[1] The latest results are given first. These are followed by a summary of all the studies already available and a brief description of work planned for the future.

Methods used

131. To facilitate comparison with the results published in the Second Competition Report, the same presentation will be followed. The analysis of concentration trends in further selected industries is thus also based on data concerning the number of firms, employment and sales. The statistical indices used are:

— the Herfindahl-Hirschman indices for the description of the changes in the degree of concentration of an industry over time;
— concentration ratios for comparisons of degrees of concentration from country to country and industry to industry;
— the Linda indices weighted by the number of the largest firms in an industry for determining size disparities between these firms.

Also with a view to facilitating comparisons, the data published in the Second Report are repeated in the tables for those industries on which additional reports have been received (paper and paper products industry and chemical industry).

132. Table 1 summarizes the studies already available to the Commission under its research programme on concentration. In addition to further reports on the two branches of the paper and paper products industry and on the chemical industry already studied, five branches of machinery manufacturing, two branches of the electrical engineering industry and the food industry have been studied for the first time. The studies were carried out by the following national research institutes and experts:

Federal Republic of Germany:

IFO—Institut für Wirtschaftsforschung, Munich (manufacture of machinery and electrical goods);
Kienbaum Unternehmensberatung, Gummersbach (chemical industry);

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[1] First Report on Competition Policy, secs. 204 to 216; Second Report on Competition Policy, secs. 166 to 187.

France:

GREFI of the University of Rennes, Professor G. Bertin (machinery);
BIPE—Bureau d'Informations et de Prévisions Economiques, Neuilly-sur-Seine (electrical goods);

Netherlands:

Stichting voor Economisch Onderzoek der Universiteit van Amsterdam, Prof. H.W. de Jong and A.H. Smolders;

Belgium:

STUDIA VZWD, Brussels.

TABLE 1

Studies available analysing concentration
(situation on 31 December 1973)

Industry (NICE nomenclature)	Country				
	G	F	I	N	B
23 Manufacture of textiles					
232 Wool	×	×	×		×
233 Cotton	×	×	×		×
237 Knitted and crocheted goods	×	×	×		×
27 Manufacture of paper products					
271 Manufacture of pulp, paper and paperboard	×	×	×	0	
272 Processing of paper and paperboard	×	×	×	0	
31 Chemical industry					
313.1 Pharmaceutical industry	0	0	×	×	×
313.2 Manufacture of photographic products	0	0	×	×	×
313.5 Manufacture of cleaning and maintenance products (waxes, polishes, metal polishes, etc.)			×	×	×
38 Manufacture of transport equipment					
385.1 Manufacture of motorcycles, cycles and mopeds	×[1]	×	×	×	
36 Manufacture of machinery					
361 Manufacture of agricultural machinery and tractors	0	0			
362 Manufacture of office machinery	0	0			
364.1 Manufacture of textile machinery	0	0			
366.3 Manufacture of machinery for construction and 366.4 for preparation of construction materials	0	0			
366.5 Manufacture of machanical handling equipment	0	0			

TABLE 1 (continued)

Industry (NICE nomenclature)	Country				
	G	F	I	N	B
37 Electrical engineering					
375 Manufacture of radios, televisions and sound reproduction equipment	0	0			
376 Manufacture of electrical appliances for domestic use	0	0			
20-B Food industry	0			0	

[1] In Germany the industry was subdivided into cycles on the one hand and motorcycles and mopeds on the other.
× = Given in the Second Report on Competition Policy.
0 = New studies.

Changes in the numbers of firms

133. Table 2 shows the numbers of firms for the industries chosen and the changes over the reference period (1962 = 100). For the Netherlands chemical and paper and paper products industries and for the French mechanical handling equipment industry, the reference period begins in 1963, and for the Netherlands food industry in 1964.

134. Of the thirty-five cases studied, only three show an increase in the number of firms from 1962 to 1969 (electrical engineering in Belgium, construction machinery and machinery for the manufacture of construction materials and the mechanical handling equipment industry in France). In eight cases the number of firms remained unchanged. In three industries it was already so low in 1962 that it was hardly likely to drop, the degree of concentration already being extremely high (photographic products industry with three firms in the Netherlands, two in Italy and one in Belgium). In four cases, the fact that the number of firms did not change reflected difficulties in obtaining materials. In the absence of precise figures, the research institutes assumed that the number of firms had not changed at all over the reference period (pharmaceutical industry in Germany; paper processing industry in Italy; paper and paper products production in the Netherlands; radio, television and sound reproduction equipment in Germany). In twenty cases there is a decline throughout the period in the number of firms, and in four cases the decline appears only in the years 1962-69. In all cases for which data are available for 1970 and 1971 (radio, television and sound reproduction equipment in France; food industries in Germany and the Netherlands) the number of firms has continued its decline.

135. Though the trend was by no means even from country to country or from industry to industry, the latest studies as well thus indicate, on the basis of the changes in the numbers of firms, that overall the concentration process in the Community was gathering momentum in the 1962-69 period and in some cases continued to do so in the period up to 1971.

TABLE 2

Number of firms and changes in numbers in certain industries and certain Community countries, 1962, 1966 and 1969

Industry (NICE nomenclature)	Year	G		F		I		N		B	
		Absolute	1962 =100	Absolute	1962 =100	Absolute	1962 =100	Absolute	1962 =100	Absolute	1962 =100
31											
Chemical industry											
313.1											
Pharmaceutical industry	1962	690	100	807	100	653	100	26	100	87	100
	1966	690	100	520	64	638	98	27	104	78	90
	1969	690	100	496	61	539	83	25	96	75	86
313.2											
Photographic products	1962	24	100	19	100	2	100	3	100	1	100
	1966	—	—	17	89	2	100	3	100	1	100
	1969	12	50	14	74	2	100	3	100	1	100
27											
Manufacture of paper and paper products											
271											
Manufacture of pulp, paper and paperboard	1962	253	100	280	100	598	100	19	100		
	1966	226	89	247	88	559	94	19	100		
	1969	191	76	203	73	532	89	19	100		
272											
Processing of paper and paperboard	1962	1 346	100	1 470	100	700	100	229	100		
	1966	1 183	87	1 288	88	700	100	235	103		
	1969	1 120	82	1 350	92	700	100	194	84		
37											
Electrical engineering											
375											
Radio, television, sound reproduction equipment	1962	19	100	90	100					106	100
	1966	19	100	60	67					112	106
	1969	19	100	39	43					112	106
	1970	—	—	35	40					—	—
	1971	—	—	33	37					—	—
Manufacture of electrical appliances for domestic use	1962	104	100	214	100						
	1966	103	99	185	86						
	1969	96	92	167	78						

TABLE 2 (continued)

Industry (NICE nomenclature)	Year	G		F		I		N		B	
		Absolute	1962 =100	Absolute	1962 =100	Absolute	1962 =100	Absolute	1962 =100	Absolute	1962 =100
36 Manufacture of machinery											
361 Manufacture of agricultural machinery and tractors	1962	220	100	431	100						
	1966	223	101	460	106						
	1969	217	99	433	100						
362 Manufacture of office machinery	1962	70	100	98	100						
	1966	66	94	90	92						
	1969	60	85	75	77						
364.1 Manufacture of textile machinery	1962	246	100	145	100						
	1966	238	97	130	90						
	1969	208	85	125	88						
366.3 and 366.4 Manufacture of construction machinery and machinery for preparing construction material	1962	257	100	591	100						
	1966	251	98	690	117						
	1969	238	93	—	—						
366.5 Manufacture of mechanical handling equipment	1962	215	100	170	100						
	1966	211	98	197	116						
	1969	199	92	200	118						
20-B Food industry (not including beverages)											
20-B Food industry	1962	3 308	100					1 536	100		
	1966	3 035	92					1 470	96		
	1969	2 718	82					1 407	92		
	1970	2 626	79					1 280	83		
	1971	—	—					1 231	80		

— No data available.

The number of firms fell by about 25% more between 1966 and 1969 than between 1962 and 1966.

Changes in the degree of concentration

136. The Herfindahl-Hirschman indices for the three reference years (1962, 1966 and 1969) are available for employment in twenty-nine and for sales in nineteen

out of the total of thirty-five cases (*Table 3*). The development of concentration in the industries chosen according to these indices (monopoly = 1000) can be summed up as follows:

TABLE 3

Concentration in selected industries and countries of the Community; 1962, 1966 and 1969

(Herfindahl - Hirschman indices)

(NICE nomenclature)	Year	G		F		I		N		B	
		Employment	Sales	Employment	Sales	Employment	Sales	Employment	Sales	Employment	Sales
31 Chemical industry											
313.1 Pharmaceutical industry	1962	29	36	19	—	24	25	152	108	46	46
	1966	27	35	18	—	21	24	138	115	102	103
	1969	29	33	18	—	27	35	173	142	83	83
313.2 Photographic products	1962	—	—	276	—	—	—	581	431	—	—
	1966	—	—	131	—	—	—	615	534	—	—
	1969	—	—	313	—	—	—	644	635	—	—
27 Paper industry and manufacture of paper products											
271 Manufacture of pulp, paper and paperboard	1962	26	45	14	—	21	24	279	224		
	1966	23	53	14	—	23	25	251	208		
	1969	32	68	16	—	20	25	199	187		
272 Processing of paper and paperboard	1962	14	22	2	—	4	8	16	21		
	1966	14	24	3	—	3	6	14	19		
	1969	17	29	4	—	3	5	23	29		
37 Electrical engineering											
375 Radio, television sound reproduction equipment	1962	—	—	82	82					183	181
	1966	—	—	93	92					171	172
	1969	—	—	134	123					206	200
	1970	—	—	138	149					—	—
	1971	—	—	156	152					—	—
376 Household electrical goods	1962	—	—	—	—						
	1966	—	—	—	—						
	1969	—	—	—	—						

TABLE 3 (continued)

(NICE nomenclature)	Year	G		F		I		N		B	
		Em-ploy-ment	Sales	Em-ploy-ment	Sales	Em-ploy-ment	Sales	Em-ploy-ment	Sales	Em-ploy-ment	Sales
36 Manufacture of machinery											
361 Manufacture of agricultural machinery and tractors	1962	20	38	28	—						
	1966	20	41	24	—						
	1969	15	33	24	—						
362 Manufacture of office machinery	1962	48	—	22	—						
	1966	56	168	22	—						
	1969	54	126	21	—						
364.1 Manufacture of textile machinery	1962	23	25	35	—						
	1966	23	30	41	—						
	1969	25	29	58	—						
366.3 and 366.4 Manufacture of construction machinery and machinery for preparing construction materials	1962	21	41	72	—						
	1966	21	47	70	—						
	1969	22	58	81	—						
366.5 Manufacture of mechanical handling equipment	1962	26	41	25	—						
	1966	27	48	21	—						
	1969	27	62	49	—						
20-B Food industry (not including beverages)											
20-B Food industry	1962	3	4					9	10		
	1966	3	4					10	10		
	1969	3	4					11	10		
	1970	3	4					12	15		
	1971	—	—					16	16		

During the reference period, concentration in terms of employment (i.e. the extent to which the labour force was concentrated in the largest firms) increased in twenty cases and decreased in seven. In two cases there was no change. Concentration in terms of sales (i.e. the extent to which sales are accounted for by the largest firms) increased in thirteen cases, decreased in four cases and remained unchanged in two cases. The concentration process, which had already generally

gathered momentum between 1962 and 1966, showed a substantial further acceleration between 1966 and 1969 (between 1966 and 1970/71 in cases where more recent material is available).

137. A closer analysis of the seven cases where concentration in terms of employment dropped shows that such cases are statistically significant only in three instances (the manufacture of agricultural machinery and tractors in Germany and pulp, paper and paperboard production in France and in the Netherlands). In the German and French agricultural machinery and tractor manufacturing industries, differences in size diminished as small and medium-sized firms evidently were growing faster than the larger producers, while the number of firms remained practically unchanged. On the other hand, in the Netherlands pulp, paper and paperboard production industry, the decline noted in the degree of concentration is based on findings in the nineteen largest firms in each case and thus shows only that disparities between these undertakings are being narrowed down. In three further cases where there is a tendency for concentration in terms of employment to decline (pharmaceutical and office machinery industries in France, pulp, paper and paperboard production in Italy), the cause is to be found in the disappearance of large numbers of firms from the market and the resulting narrowing of the size gap between the remaining competitors. Finally, the last case (paper and paperboard processing in Italy) is presumably connected with the fact that the number of firms remains unchanged at 700.

138. The parallel development of concentration in terms both of employment and of sales was confirmed in all but two of the nineteen comparable cases available. In the German pharmaceutical industry, concentration in terms of employment remained at the same level while concentration in terms of sales declined; in the Italian pulp, paper and paperboard production industry the slight fall in the degree of concentration calculated on the basis of numbers employed was accompanied by a slight increase in concentration calculated in terms of sales.

Most of the studies indicate that large firms have higher sales per person employed than small and medium-sized firms: in eleven cases the degree of concentration by sales in 1962, 1966 and 1969 was higher than the degree of concentration by employment. In two other cases concentration in terms of employment roughly matched concentration in terms of sales (Belgian pharmaceutical industry and electrical engineering) and in another two cases (radio, television and sound reproduction equipment in France and the Netherlands food industry) the position changed from reference year to reference year (static comparison). Only in three industries (pharmaceuticals, photographic products and pulp, paper and paperboard production in the Netherlands) was the degree of concentration in terms

of employment consistently higher than concentration measured by sales. In all these cases the number of firms is so small that the concept of small and medium-sized firms becomes inapplicable. A more important point here is that the results reflect a statistical problem. Large firms are frequently so diversified that it is impossible to calculate precisely how many persons are employed in a given industry. Persons employed in other branches are often included in the calculations and this inflates the concentration ratio measured in terms of employment.

Industry-to-industry and country-to-country differences in the degree of concentration

139. The employment and sales concentration ratios accounted for by the four or eight largest firms in the industries chosen (*Table 4*) show that concentration ratios vary appreciably from industry to industry and from Member State to Member State. This will be examined in greater detail for 1969, using, as examples, employment in the four leading firms in each case (but the leading firm in the Italian, Belgian and Netherlands photographic products industries and the eight leading firms in the German electrical engineering industry).

TABLE 4

Percentages of employment and of sales by the four or eight largest firms in selected industries and countries of the Community (concentration ratios) in 1962, 1966 and 1969

(NICE nomenclature)	Year	G				F				I				N				B			
		Employment		Sales		Employment		Sales		Employment		Sales		Employment		Sales		Employment		Sales	
31 Chemical industry																					
Pharmaceutical industry	1962	26	43	32	46	28	38	—	—	24	31	26	36	73	87	57	76	34	52	34	52
	1966	25	41	31	45	24	33	—	—	22	30	25	34	69	83	59	81	47	65	47	65
	1969	25	43	29	43	23	32	—	—	28	37	32	43	74	—	72	—	43	64	43	64
313.2										1		1		1		1		1		1	
Photographic products	1962	—	—	—	—	95	—	—	—	98	—	97	—	74	—	59	—	100	—	100	—
	1966	—	—	—	—	96	—	—	—	98	—	98	—	77	—	70	—	100	—	100	—
	1969	—	—	—	—	96	—	—	—	98	—	98	—	79	—	78	—	100	—	100	—

TABLE 4 (continued)

(NICE nomenclature)	Year	G				F				I				N				B			
		Employment		Sales		Employment		Sales		Employment		Sales		Employment		Sales		Employment		Sales	
27 Paper industry and manufacture of paper products																					
271 Manufacture of pulp, paper and paperboard	1962	23	37	30	43	20	30	—	—	20	29	25	35	82	93	71	83				
	1966	23	34	34	47	19	29	—	—	22	32	24	36	80	92	70	83				
	1969	26	37	40	54	20	31	—	—	22	32	23	37	76	88	72	86				
272 Processing of peper and paperboard	1962	18	21	20	26	26	7	13	—	—	6	10	12	19	15	25	19				
	1966	18	22	24	29	6	11	—	—	5	8	9	16	14	22	18	29				
	1969	20	25	28	34	8	14	—	—	5	8	8	15	21	32	25	39				
37 Electrical engineering																					
375 Radio, TV, sound reproduction equipment	1962	—	51	—	45	51	67	48	64									76	90	75	90
	1966	—	62	—	63	54	73	52	73									76	90	75	90
	1969	—	62	—	71	65	82	66	85									78	90	77	88
	1970	—	—	—	—	66	83	69	88									—	—	—	—
	1971	—	—	—	—	72	87	68	86									—	—	—	—
376 Household electrical goods	1962	—	61	—	57	—	—	—	—												
	1966	—	66	—	73	—	—	—	—												
	1969	—	69	—	85	—	—	—	—												
36 Manufacture of machinery																					
361 Agricultural machinery and tractors	1962	25	37	24	36	45	56	—	—												
	1966	24	36	30	42	44	57	—	—												
	1969	30	44	31	45	41	56	—	—												
362 Office machines	1962	—	—	67	—	83	92	—	—												
	1966	—	—	—	—	86	94	—	—												
	1969	—	—	69	—	86	95	—	—												
364.1 Textile machinery	1962	17	25	18	27	46	57	—	—												
	1966	19	27	32	31	47	63	—	—												
	1969	23	32	26	36	51	69	—	—												
366.3 and 366.4 Manufacture of construction machinery and machinery for preparing construction materials	1962	13	21	16	26	44	58	—	—												
	1966	11	20	17	25	48	67	—	—												
	1969	11	19	16	24	51	61	—	—												
366.5 Manufacture of mechanical handling equipment	1962	16	24	25	34	19	33	—	—												
	1966	17	26	23	32	17	29	—	—												
	1969	17	25	25	33	29	40	—	—												
20-B Food industry (not including beverages)																					
20-B Food industry	1962	5	8	5	8									13	19	14	19				
	1966	5	8	5	8									14	21	14	21				
	1969	4	7	5	8									15	21	14	22				
	1970	4	8	4	8									16	22	19	27				
	1971	—	—	—	—									17	23	19	28				

— No data available.

140. The photographic products industry is easily the most highly concentrated. It is followed by the electrical engineering and pharmaceutical industries. There is a substantial degree of concentration in the industry manufacturing textile machinery, the pulp, paper and paperboard producing industry and the agricultural machinery and tractor industry. The manufacture of construction machinery and of machinery for the preparation of construction materials and the mechanical handling equipment industry show medium concentration. The concentration ratio in the paper and paperboard processing industry and in the food industry is, on the whole, relatively low. The order of classification of industries is almost identical if relative degrees of concentration in various industries are assessed on the basis of available information concerning sales of the four leading firms: the coefficient correlating the two classifications is 0.93 (absolute identity would give a coefficient of unity).

141. The differing sizes of the Member States also exercises an indirect influence on the degrees of concentration of their respective industries, measured by means of the concentration ratios. Hence it is not surprising that the sample of industries chosen suggests that the Belgian and Netherlands economies are more highly concentrated than the German, French and Italian economies. It makes more sense to divide the member countries into the 'large' countries and the 'small' countries. Germany is the most highly concentrated of the 'large' countries followed by France and, much further behind, Italy. In the 'small' countries, Netherlands industry is more highly concentrated than Belgian industry.

Disparities between the largest firms and trends

142. Concentration processes can leave size ratios between large undertakings in a given industry untouched, can broaden them and can narrow them. These phenomena have different effects on the intensity of competition. The weighted Linda indices (*Table 5*) are used as a quantitative measurement of disparities only between the largest undertakings in each industry. Where the level of this index is high, this means that the disparity between the sizes of leading firms is wide.

TABLE 5

Disparities between the largest firms in selected industries and countries of the Community; 1962, 1966 and 1969
(Weighted Linda-indices).

(NICE nomenclature)	Year	G		F		I		N		B	
		Em-ploy-ment	Sales	Em-ploy-ment	Sales	Em-ploy-ment	Sales	Em-ploy-ment	Sales	Em-ploy-ment	Sales
31 Chemical industry											
313.1 Pharmaceutical industry	1962	0.17	0.21	0.21	—	0.24	0.21	0.48	0.54	0.20	0.20
	1966	0.17	0.21	0.19	—	0.21	0.20	0.46	0.51	0.42	0.42
	1969	0.17	0.20	0.19	—	0.21	0.20	0.63	0.45	0.36	0.36
313.2 Photographic products	1962	—	—	1.68	—	—	—	1.85	1.08	—	—
	1966	—	—	1.85	—	—	—	2.50	1.12	—	—
	1969	—	—	1.70	—	—	—	3.03	2.52	—	—
27 Paper industry and manufacture of paper products											
271 Manufacture of pulp, paper and paperboard	1962	0.24	0.34	0.54	0.38	0.34	0.28	1.04	0.92		
	1966	0.26	0.33	0.51	0.36	0.27	0.23	0.93	0.85		
	1969	0.31	0.34	0.42	0.36	0.24	0.21	0.76	0.59		
272 Processing of paper and paperboard	1962	0.44	0.44	0.10	—	0.34	0.26	0.14	0.18		
	1966	0.41	0.42	0.09	—	0.20	0.25	0.12	0.15		
	1969	0.39	0.38	0.10	—	0.17	0.20	0.17	0.17		
37 Electrical engineering											
375 Radio, television, sound reproduction equipment	1962	0.35	0.33	0.37	0.39					0.63	0.58
	1966	0.44	0.40	0.44	0.39					0.59	0.60
	1969	0.47	0.47	0.53	0.42					0.54	0.54
	1970	—	—	0.54	0.57					—	—
	1971	—	—	0.55	0.59					—	—
376 Household electrical goods	1962	0.35	0.32	—	—						
	1966	0.36	0.38	—	—						
	1969	0.49	0.72	—	—						

TABLE 5 (continued)

(NICE nomenclature)	Year	G		F		I		N		B	
		Em-ploy-ment	Sales	Em-ploy-ment	Sales	Em-ploy-ment	Sales	Em-ploy-ment	Sales	Em-ploy-ment	Sales
36 *Manufacture of machinery*											
361 Manufacture of agricultural machinery and tractors	1962 1966 1969	0.29 0.29 0.34	0.33 0.34 0.34	0.28 0.26 0.25	— — —						
362 Manufacture of office machinery	1962 1966 1969	— — —	— — —	1.15 1.31 1.25	— — —						
364.1 Manufacture of textile machinery	1962 1966 1969	0.46 0.39 0.41	0.37 0.38 0.38	0.29 0.31 0.31	— — —						
366.3 and 366.4 Manufacture of construction machinery and machinery for preparing construction materials	1962 1966 1969	0.27 0.26 0.26	0.31 0.35 0.31	0.28 0.25 0.27	— — —						
366.5 Manufacture of mechanical handling equipment	1962 1966 1969	0.39 0.37 0.37	0.48 0.46 0.48	0.11 0.12 0.11	— — —						
20-B *Food industry (not including beverages)*											
20-B Food industry	1962 1966 1969 1970 1971	0.11 0.09 0.08 0.08 —	0.09 0.08 0.07 0.07 —					0.22 0.22 0.23 0.22 0.28	0.23 0.20 0.21 0.20 0.20		

— No data available.

143. The process of concentration, which generally gathered momentum in the industries selected, did not cause large firms to change positions in relation to each other to the same extent. Although comparison of the degree of concentration in twenty-one out of a total of thirty cases in 1962 and 1969 shows that concen-

tration measured by employment increased, this is true in respect of disparities between the leading firms in thirteen cases only. Against eight cases where concentration measured by employment declined, there are fourteen cases where differences in size (same measure) between the leading firms were reduced; no change occurred during the reference period in one case as regards the degree of concentration and in three cases as regards disparities between the largest firms. On seventeen occasions (eleven increases, six decreases), changes in the degree of concentration are matched by changes in the same direction in the disparities between leading firms only. In eight cases, as the concentration ratio increased, disparities between large firms declined (paper and paperboard processing, textile machinery, construction machinery and materials, mechanical handling equipment in Germany, pulp, paper and paperboard production, construction machinery and materials in France, electrical engineering in Belgium and pharmaceuticals in Italy). In two cases a decline in the degree of concentration is accompanied by an increase in the disparities between large firms (agricultural machinery and tractors in Germany, office machinery in France).

144. It is impossible to come to any conclusion relating to individual industries or regions on the basis of these results. An important fact established, however, is that concentration processes can be associated with changes in the opposite direction in size disparities among leading firms only. In practice, this may give a first quantitative clue as to whether the intensity of competition is increasing or decreasing. To that extent, examination of the disparities between leading firms, linked with the general analysis of concentration, can provide a tool for examining the competitive situation in a given industry.

§ 2 — General results of the research programme

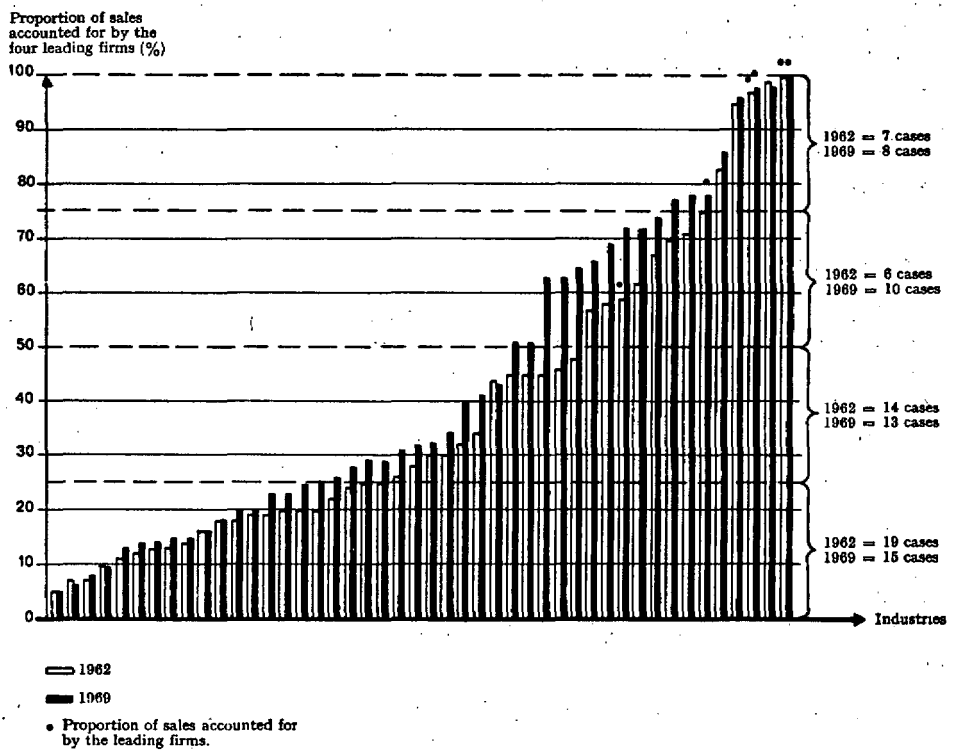
The development of concentration

145. Of the fifty-five studies carried out (*Figure 1*), forty-six individual reports give comparable information on the degree of concentration in 1962 and in 1969. The individual studies cover industries and Member States where levels of concentration are high and low. Thus they can be considered to give a representative sample of Community industry and can provide information on the development of concentration which is of general validity for purposes of statistical comparison.

146. If we set out, from smallest to largest, the sales proportions in given industries accounted for by the four leading firms in individual industries (if these figures are unavailable, then the employment shares) for the two reference years (1962

FIGURE 1

Progress of Concentration in the Community
(proportion of sales accounted for by the four leading firms in 46 case studies: 1962 and 1969)



and 1969), we obtain the pattern shown in *Figure 1*. It shows that the concentration ratios in 1969 (black columns) were substantially higher in virtually all industries than in 1962 (white columns).

While in 1962 the four largest firms already accounted in 28% of cases for 50% or more of the forty-six relevant markets, in 1969 the corresponding proportion of cover had risen to 39%. So that between 1962 and 1969, the number of less concentrated industries (where the four largest firms accounted for less than 50% of the relevant market) fell by 15%, while the number of highly concentrated industries (where the four largest firms accounted for 50% or more of the market) rose

by 38%. The largest rates of increase (67% are found in the industries where from 50% to less than 75% of the relevant markets were accounted for by the 'top four', and the sharpest decline in concentration (21%) is found in industries where less than 25% was held.

147. The decline in the number of firms, which is a general conclusion to be drawn from the studies already processed by the Commission in selected industries and countries of the Community, is accompanied by a general rise in the market shares held by the leading firms. Admittedly this does not lead directly to the conclusion that competition is becoming less intense in the Community. However, if this process were to continue uninterrupted, then the workability of competition would be jeopardized in more and more industries.

Concentration and integration

148. This section will consider whether the results of the Commission research programme on concentration can provide evidence of an interrelation between degree of concentration and degree of integration. For this purpose the degree of concentration will be measured by the proportion of sales on a given market (or, if this is not available, the proportion of total employment) of the four leading firms (CR_4) and the degree of integration will be measured by the proportion of total exports accounted for by intra-Community exports (Exports) (*Table 6*). The fact that the proportion of total exports accounted for by intra-Community exports can act as a measure of the degree of integration can be established by a simple arithmetical correlation, for intra-Community exports of a given industry from one member country are, inevitably, intra-Community imports in another member country.

149. Intra-Community trade increased substantially between 1962 and 1969. Although it accounted for only 41% of total average exports in the industries selected in 1962, this figure had risen to 53% by 1969. Of a total of thirty-one comparable cases, the degree of integration rose in twenty-eight. In three cases it fell (the manufacture of radio, television and sound reproduction equipment and woven and crocheted goods in Belgium and the wool industry in France).

150. Integration made most progress in the least concentrated industries. In industries where the four leading firms accounted for 50% or less of total sales, the degree of integration rose by 37% between 1962 and 1969, while in industries where the four largest firms accounted for 50% or more of total sales the increase was only 5%. As a result, in 1969 the less concentrated industries sold on average 55% of their exported goods within the Community (40% in 1962) while the figure for the highly concentrated industries was only 47% (45% in 1962).

TABLE 6

Shares of sales accounted for by the four leading firms (CR_4) and proportion of total exports accounted for by intra-Community trade (Exports) in selected Community industries and countries; 1962, 1966 and 1969

(NICE nomenclature)	Year	G		F		I		N		B	
		CR_4	Exports	CR_4	Exports	CR_4	Exports	CR_4	Exports	CR_4	Exports
31 Chemical industry											
313.1 Pharmaceutical industry	1962	32	18	28	—	26	17	57	43[1]	34	27
	1966	31	21	24	—	25	17	59	40	47	36
	1969	29	25	23	—	32	21	72	47[2]	43	54
313.2 Photographic products	1962	—	—	95	—	97	—	59	38[1]	100	32
	1966	—	—	96	—	98	—	70	51	100	36
	1969	—	—	96	—	98	—	78	45[2]	100	38
27 Manufacture of paper and paper products											
271 Manufacture of pulp, paper and paperboard	1962	30	44	20	18	25	26	71	—		
	1966	34	53	19	46	24	51	70	—		
	1969	40	62	20	47	23	39	72	—		
272 Processing of paper and paperboard	1962	20	37	7	—	12	34	19	66		
	1966	24	47	6	37	9	36	18	74		
	1969	28	59	8	6	8	47	25	82		
37 Electrical engineering											
375 Radio, television, sound reproduction equipment	1962	—	—	48	17						
	1966	—	—	52	28						
	1969	—	—	66	39					75	75
	1970	—	—	—	—					73	63
	1971	—	—	—	—					77	66
376 Household electrical goods	1962	—	—	—	—					—	—
	1966	—	—	—	—					—	—
	1969	—	—	—	—						

[1] 1963.
[2] 1968.

TABLE 6 (continued)

(NICE nomenclature)	Year	G		F		I		N		B	
		CR_4	Ex-ports	CR_4	Ex-ports	CR_4	Ex-ports	CR_4	Ex-ports	CR_4	Ex-ports
36 *Manufacture of machinery*											
361 Manufacture of agricultural machinery and tractors	1962 1966 1969	24 30 31	41 50 48	45 44 41	— 61 52						
362 Manufacture of office machinery	1962 1966 1969	67 — 69	33 — 42	83 86 86	— 53 50						
364.1 Manufacture of textile machinery	1962 1966 1969	18 23 26	34 33 36	46 47 51	— — —						
366.3 and 366.4 Manufacture of construction machinery and machinery for preparing construction materials	1962 1966 1969	16 17 16	— — —	44 48 51	— — —						
366.5 Manufacture of mechanical handling equipment	1962 1966 1969	25 23 25	35 38 42	19 17 20	— — —						
20-B *Food industry (not including beverages)*											
20-B Food industry	1962 1966 1969 1970 1971	5 5 5 — —	32 42 62 — —					14 14 14 — —	54 58 65 — —		
23 *Textile industry*											
232 Wool	1962 1966 1969	— — —	— — —	20 21 20	84 67 43	22 21 18	45 57 53			30 33 34	77 79 80

TABLE 6 (continued)

(NICE nomenclature)	Year	G		F		I		N		B	
		CR_4	Exports	CR_4	Exports	CR_4	Exports	CR_4	Exports	CR_4	Exports
233											
Cotton	1962	—	—	13	17	13	31			18	59
	1966	—	—	14	39	13	40			21	67
	1969	—	—	15	47	15	56			32	76
237											
Woven and	1962	—	—	11	37	7	37			10	97
Crocheted goods	1966	—	—	13	49	6	53			10	92
	1969	—	—	14	63	6	68			13	91
38											
Manufacture of vehicles											
385.1											
Cycles	1962	45	22								
	1966	54	—								
	1969	63	38	62	—	70	—	58	47		
				63	—	63	—	75	70		
Motorcycles,	1962	99	—	63	—	65	—	78	62		
Mopeds	1966	99	—								
	1969	98	—								

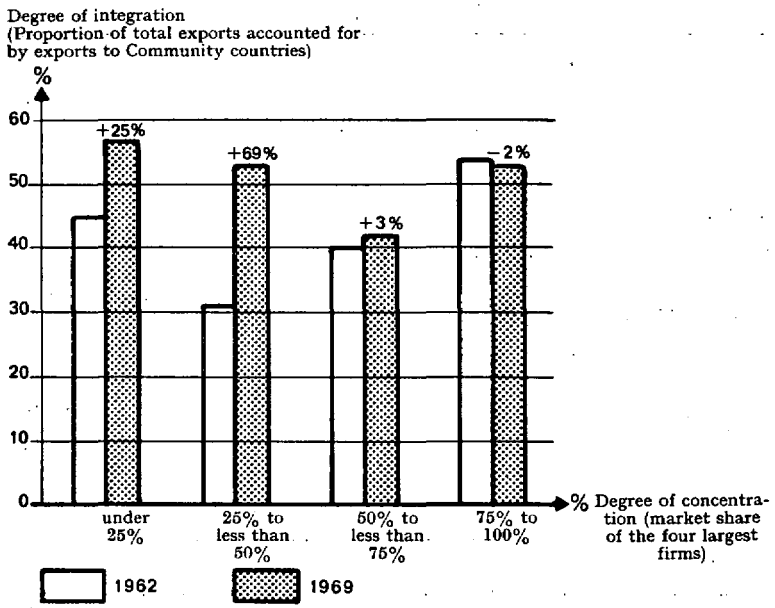
— No data available.

151. Clearer conclusions can be drawn when the degrees of integration for the two reference years are allocated among four categories of concentration (where the four leading firms account for less than 25%, 25% to 50%, 50% to 75% and 75% to 100% of the market respectively) (Figure 2). As the degree of concentration increases, integration growth at first increases also but thereafter declines, and in the most highly concentrated industries (where the four largest firms account for between 75% and 100% of the market) actually becomes negative.

152. As detailed analyses show, the relationship between degrees of concentration and of integration shown above does not seem to be based on other factors such as the size of the firm, the relative size of its export business or the extent to which the domestic market is supplied by domestic production. Thus the number of persons employed in highly concentrated industries (four leading firms accounting for 50% and more of sales) in 1969 varied between 2 200 (manufacture of cycles in Germany) and 89 586 (manufacture of office machinery in Germany), the share of export business varied between 11% (manufacture of cycles etc. in the Nether-

FIGURE 2

Degree of concentration and of integration in selected Community industries and countries: 1962 and 1969



lands) and 64% (manufacture of photographic products in Belgium), and supply of the national market by home production varied between 45% (pharmaceutical industry in the Netherlands) and 82% (manufacture of radio, television and sound reproduction equipment in France). The relationship between concentration and integration raises the question whether increasing concentration ratios give rise to greater market fragmentation coinciding with national frontiers. This will be further studied in the course of the research programme on concentration.

Cooperation agreements, financial interpenetration and market structures

153. Analysis of studies processed so far shows that the quantitative results are generally confirmed by the qualitative results, within the limits set by the reliability of the degree of concentration as calculated. However, in individual cases, as one institute has put it, 'no reliable conclusions can be drawn from data and measurements of concentration, based on unequal distributions, considered in general

terms... Any valid assessment must be based on what is often protracted research into details, many of which cannot be measured with precision'.

154. This is not the place to examine the competitive situation in individual industries in the light of available qualitative information. That kind of analysis can be found in the reports of the institutes and experts published by the Commission. However, a few examples can show clearly how the purely quantitative conclusions of these studies change and which factors influence concentration processes when information on cooperation agreements, financial interpenetration and market structures is also used for the analysis.

155. All the available information on cooperation agreements, financial interpenetration and market structures points to a substantially higher degree of concentration than the purely quantitative criteria. For example, the number of firms in the German pharmaceutical industry remained stable at 690. However, in December 1972, the eighty-five largest firms accounted for 81% of total sales by dispensing chemists. The fifty most important pharmaceutical producers were combined in eighteen groups of companies. Between them, these accounted for 77% of the market. In the German photographic products industry, production was shared out among twelve firms. However, the leading producer on the market accounted for 80% of total production. In 1972 there were only three major corporate groups manufacturing radios, televisions and sound reproduction equipment in France. In Germany, too, there were extensive reciprocal relationships between the leading firms in this industry. In German industry manufacturing electric appliances for domestic use, only three major supply groups survived by 1972. The overall conclusion is that cross-frontier interpenetration is on a sharp upward trend. In many cases the outcome of this is a heavy involvement of capital from non-member countries (especially the USA) in the Member States' industry.

156. In addition to inter-company capital arrangements at national and international levels, cooperation agreements relating to joint research and development projects on new products (German pharmaceuticals) and to production rationalization (electric appliances for domestic use in France and Germany) also became more numerous. During the period considered, cooperation agreements often foreshadowed actual mergers.

157. The picture becomes even clearer when the situation on individual markets is considered. A prime example of this is the German and Dutch food industry. Although on the whole the results of the quantitative measurements of concentration yield relatively low concentration ratios, on individual markets there are

definite market leaders. In 1971, the largest firms in Germany account, for instance, for 81% of the market in liquid spices, 60% of the market in margarine, cooking oil and cooking fat and 46% of the market in prepared soups. The situation is similar in other branches. Similarly, in 1971 the four leading firms accounted for 88% of the washing machine market in France (34% in 1962) and 99% of the refrigerator market (only 59% in 1962). It is also estimated that in 1969 some 50% of the market in storage heaters in Germany was supplied by the leading firm. These examples show that purely quantitative measurements of the degree of concentration can become substantially more revealing when industries are analysed by product sub-market.

158: Mergers and amalgamations may be undertaken for various reasons. The studies mention: the need for greater capital outlay for mass production (electrical engineering in Germany and France), technical progress (photographic products, office machinery and textile machinery in Germany), structural changes in demand (food industry and the manufacture of agricultural machinery and tractors in Germany), intensity of external trade (the manufacture of machinery and the food industry in Germany, electrical engineering in France) internal growth (food industry in the Netherlands) and legal requirements (regulations concerning the marketing of new pharmaceutical products in Germany). These incentives to amalgamation seldom occurred in isolation. The seriousness of their consequences for the concentration process increases as the number of them found together in a given case rises.

§ 3 — Summary

159. The latest results of the Commission research programme on concentration confirm and provide further evidence for the conclusions reached in the Second Competition Report:[1]

— In the Community, the degree of concentration varies widely from industry to industry and country to country.

— In the reference period, almost all industries in almost all the countries were undergoing a process of concentration that was gathering momentum. The number of competitors declined.

— There was an increase in the number of national and international cooperation agreements and interlocking arrangements.

— Dominant positions occurred more and more frequently on homogeneous sub-markets.

[1] Second Report on Competition Policy, sec. 187.

— Highly concentrated industries made a smaller contribution than less concentrated industries to the integration of the markets.

160. In order to keep its knowledge of the development of concentration in the Community up to date, the Commission is at the moment extending its research programme to the 'new' Member States and at the same time is updating its information on the 'old' Member States. Special attention will be given to analysing relatively homogeneous product markets.

Annex

LIST

of individual decisions of the Commission and rulings of the Court of Justice made in 1973 concerning the application of Articles 85 and 86 of the EEC Treaty and of Articles 60, 65 and 66 of the ECSC Treaty.

DECISIONS ON INDIVIDUAL CASES

1. *Concerning Articles 85 and 86 of the EEC Treaty*

Decision of 11 May 1973 on a proceeding under Article 85 of the EEC Treaty *'S.C.P.A.-Kali und Salz'*	OJ L 217 of 6.8.1973, p. 3 Bull. EC 5-1973, point 2109
Decision of 14 June 1973 on an application for negative clearance under Article 2 of Council Regulation No 17 *'Du Pont de Nemours Deutschland'*	OJ L 194 of 16.7.1973, p. 27 Bull. EC 6-1973, point 2111
Decision of 3 July 1973 on a proceeding under Article 85 of the EEC Treaty *'Gas water-heaters and bath-heaters'*	OJ L 217 of 6.8.1973, p. 34 Bull. EC 7/8-1973, point 2110
Decision of 5 October 1973 on a proceeding under Article 85 of the EEC Treaty *'Deutsche Philips GmbH,*	OJ L 293 of 20.10.1973, p. 40
Decision of 8 October 1973 on a proceeding under Article 85 of the EEC Treaty *'PRYM-BEKA,*	OJ L 296 of 24.10.1973, p. 24
Decision of 21 December 1973 on a proceeding under Article 85 of the EEC Treaty *'Transocean Marine Paint Association'*	OJ L 19 of 23.1.1974, p. 18 Bull. EC 12-1973, point 2118
Decision of 21 December 1973 on a proceeding under Article 85 of the EEC Treaty *'Kali und Salz/Kali-Chemie,*	OJ L 19 of 23.1.1974, p. 22 Bull. EC 12-1973, point 2117

2. *Concerning Articles 65 and 66 of the ECSC Treaty*

Decision No 73/75/ECSC of 20 March 1973 on a proceeding under Article 65 of the ECSC Treaty extending the authorization of joint fuel sales by the mining companies of the Belgian coalfields associated within the 'Comptoir Belge des Charbons, Société coopérative' (Cobéchar)	OJ L 102 of 17.4.1973, p. 19 Bull. EC 3-1973, point 2113
Decision of 26 March 1973 on a proceeding under Article 66 of the ECSC Treaty	Bull. EC 3-1973, point 2112

Decision of 8 June 1973 on a proceeding under Article 66 of the ECSC Treaty on the acquisition of all the shares of capital in the wholesale coal undertakings Gebr. Haldy Kohlenhandelsgesellschaft mbH, Karlsruhe, Gebr. Haldy Kohlenhandelsgesellschaft mbH Frankfurt, Winschermann Handelsgesellschaft mbH, Recklingshausen, Winschermann GmbH, Karlsruhe by Saarbergwerke AG, Saarbrücken	
Decision of 21 June 1973 on a proceeding under Article 66 of the ECSC Treaty concerning the merger of the Rodange mill of the SA Minière et Mètallurgique de Rodange and the Athus mill of the SA Cockerill-Ougrée-Providence-Espérance-Longdoz.	Bull. EC 6-1973, point 2112
Decision of 27 June 1973 on a proceeding under Article 66 of the ECSC Treaty authorizing Mannesmann AG to acquire the majority of the shares of DEMAG AG.	Bull. EC 6-1973, point 2112
Decision of 28 June 1973 on a proceeding under Article 66 of the ECSC Treaty on the acquisition of all the shares of capital in the wholesale coal undertaking T.P. Fuels (Holdings) Limited, Shirley, Solihull, Warwickshire by L.C.P. Fuels Limited, Brierly Hill, Staffordshire.	
Decision of 4 July 1973 on a proceeding under Article 66 of the ECSC Treaty on the acquisition of all the shares of capital in the wholesale coal undertaking Alexander Beeby & Son Limited, Peterborough, England, by the British Fuel Company, London	
Decision of 4 July 1973 on a proceeding under Article 66 of the ECSC Treaty on the acquisition of the fixed assets and goodwill of the wholesale coal undertaking, Burnley Coal Dealers Association Limited, Burnley, by the British Fuel Company, London.	
Decision of 4 July 1973 on a proceeding under Article 66 of the ECSC Treaty on the acquisition of all the shares of capital in the wholesale coal undertakings Smith and Machin Limited, Stafford and Brereton Wharves Limited, Lichfield, by the British Fuel Company, London.	

Decision of 4 July 1973 on a proceeding under Article 66 of the ECSC Treaty on the acquisition of all the shares of capital in the wholesale Coal undertaking, Barton and Company (Coal Limited, Wrexham, North Wales, by the British Fuel Company, London.	
Decision of 4 July 1973 on a proceeding under Article 66 of the ECSC Treaty on the acquisition of all the shares of capital in the wholesale coal undertaking James Monteith & Sons Limited, Alloa, Clackmannanshire, by the British Fuel Company, London.	
Decision of 20 July 1973 on a proceeding under Article 66 of the ECSC Treaty on the formation of Fisser & Van Doornum, Kindler GmbH & Co. KG, Hannover, jointly by wholesale coal undertakings.	
Decision of 25 July 1973 on a proceeding under Article 66 of the ECSC Treaty authorizing SA USINOR to acquire 50% of the shares in SA SOLMER and approving a draft contract expressed to be between SOLLAC, USINOR and SOLMER.	Bull. EC 7/8-1973, point 2112
Decision of 8 October 1973 on a proceeding under Article 66 of the ECSC Treaty approving the setting up by the British Steel Corporation and Arthur Lee & Sons Ltd. of the jointly owned company, Lee Bright Bars Ltd.	Bull. EC 10-1973, point 2110
Decision of 20 November 1973 on a proceeding under Article 66 of the ECSC Treaty authorizing the joint establishment of NAMASCOR BV by Montan Staal BV and the Mitsubishi Corporation.	Bull. EC 11-1973, point 2107
Decision of 29 November 1973 on a proceeding under Article 66 of the ECSC Treaty relating to the formation by Société Métallurgique de Normandie and Korf Industrie und Handel GmbH & Co. KG of a jointly owned company known as Société des Aciéries de Montereau.	Bull. EC 11-1973, point 2109
Decision of 29 November 1973 on a proceeding under Article 66 of the ECSC Treaty concerning the acquisition by Dunford and Elliott Ltd. of the capital of Brown Bayley Steels Ltd.	Bull. EC 11-1973, point 2108
Decision of 20 December 1973 on a proceeding under Article 66 of the ECSC Treaty approving the acquisition by August Thyssen-Hütte AG of a majority shareholding in Rheinstahl AG.	OJ L 84 of 28.3.1974, p. 36. Bull. EC 12-1973, point 2116

Decision of 21 December 1973 on a proceeding under Article 65 of the ECSC Treaty on the authorization of a joint-buying agreement between a number of Danish Steel product distributors.	OJ L 30 of 4.2.1974, p. 29 Bull. EC 1-1974, point 2115

RULINGS OF THE COURT OF JUSTICE

Ruling (6 February 1973) in case 48/73: 'Brasserie de Haecht v Wilkin-Janssen'	OJ C 45 of 23.6.1973, p. 28 Bull. EC 2-1973, point 2448
Ruling (21 February 1973) in case 6/72: ‚Continental Can Company Inc., Europemballage Corporation v Commission of the European Communities'	OJ C 69 of 21.8.1973, p. 33 Bull. EC 2-1973, points 2106 and 2443 Reports 1973-2, p. 215.