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

COMMISSION

Fourth Report on Competition Policy

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

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Introduction

During the period covered by this report, the Commission's activities in relation to competition policy have been influenced by its concern, among others, to apply its best efforts towards a solution of the difficulties which confronted the Community as a result of inflation, of tensions affecting the markets for raw materials (especially oil), and of increasing sectoral and regional disparities. Indeed, the Community must mobilize all means available to it under Community legislation to contain inflationary pressures and to help bring about essential structural changes; in this connection, competition policy has an essential, though limited, role to play.

The Commission has accordingly been especially watchful over the behaviour of undertakings so far as restrictive agreements and abuses of dominant positions may be concerned. Its object has been to prevent additional price increases by prohibiting horizontal and vertical price-fixing agreements, market-sharing agreements and agreements which voluntarily limit imports from outside the Community.

Further, concerning state aids, the Commission has expressed its firm conviction that the Treaty provisions must be respected if national aids are to enable the Community to overcome effectively and at the lowest cost, our current economic difficulties, and also to avoid overbidding between Member States which would clearly lead to negative results.

The general approach of the Commission in the competition policy field and its individual measures and decisions should been seen in this context; and it is against this background also that the Commission, with the encouragement of the Council resolution of 17 December 1973, has undertaken its study into price variations recorded for a range of products in the different Member States.

In a number of prohibition decisions the Commission broke new ground in 1974. One case saw the first application of the views expressed in the Commission's statement published in 1972 as to the position of voluntary restraint agreements. In the case in question the Commission decided that private agreements which prevent imports from third countries into the Community or which have the effect of increasing the prices of such imports, conflict with the competition rules. Another Commission decision prohibited an agreement between undertakings with the ostensible objective of maintaining 'fair trading rules'. It was found in the case in question that under the cloak of protecting fair trading, competition between the parties was in fact restricted in respect of prices, rebates and terms of sale, to the detriment of consumers.

Questions of selective distribution were probed in detail with the Member States' experts on restrictive trade practices. In a first decision of its kind, the Commission granted an exemption in this field to a motor manufacturer on conditions and for a limited period of time. In the case of selective distribution agreements in the perfume industry a widely applicable solution has been arrived at. In the light of the special circumstances in this market which is characterized by numerous manufacturers each with a relatively small market share, the Commission can accept a situation in which dealers are appointed under objective and non-discriminatory standards of selection and in which the freedom of dealers in respect of pricing and sales to other dealers of the same distribution network remains unimpaired.

The most important of the competition problems which can arise in connection with patent licensing agreements were reviewed in consultation with restrictive trade practices experts of the Member States. Views were exchanged on a number of commonly employed contractual provisions which restrict competition and which jeopardize the free movement of goods.

The Commission for the first time issued a decision in the EEC field concerning the problem of joint enterprises, discrete economic entities, set up for the purpose of producing or distributing goods or services. Such bodies are a means through which undertakings can cooperate effectively, but the creation and management of the joint venture are of themselves likely to have the effect of encouraging the controlling undertakings to adopt a policy of mutual non-competition. When dealing with individual cases, the Commission must therefore have regard both to the positive aspects of joint subsidiaries as well as to any restrictive effects on competition.

The Commission has actively pursued its enquiry into the oil market. Numerous investigations have been carried out into multinational oil companies and their subsidiaries, as well as into independent enterprises. The next step is to examine and assess the behaviour of the oil companies in the light of the investigation results, and to reach conclusions. A report on this question will be submitted to the European Parliament.

In cases under Article 66 of the ECSC, the existing policy was continued of authorizing critical concentrations only on conditions of partial divestiture. As applied for the first time in the Thyssen/Rheinstahl case, the Commission had adopted this approach to safeguard the independence of the large steel producing groups in the Community.

The Commission's activities in the ECSC field included some notable new developments. Following the Court's decision in Miles Druce/GKN which confirmed that it was for the Commission to take all measures necessary to preserve the *status quo* pending its substantive decision, the Commission had recourse to the interim measures provided for in Article 66(5), third paragraph, in Marine-Firminy SA/Schneider SA/Denain/De Wendel and Johnson & Firth Brown Ltd./BSC/Dunford Hadfields Ltd.

These interim measures have proved to be a useful tool, because they ensure, especially in cases where a bid for the control of an undertaking is announced, that a balance can be maintained between the parties in question, until the Commission has been able to examine the applications for merger authorization in substance.

During the period under review Community legislation was extended in an important area. The Council approved Regulation EEC 2988/74 concerning limitation periods in proceedings and the enforcement of sanctions. This regulation assures a balance between the needs for legal certainty on the part of enterprises and the public interest in the prosecution of infringements.

Problem areas in the relationship between Community competition rules and national laws were closely reviewed at a conference with government experts. The Member States share the view of the Commission that it is not opportune at the present time to deal with this relationship by regulation and that double prosecutions and the dangers of conflicting decisions should be avoided through systematic consultations between the Commission and the competent national authorities.

Concerning state aids, the year 1974 was marked by continuing activity on matters already initiated while action was also taken in new fields.

As regards the general regional aid systems, of which the control and coordination constitute an essential element for the proper functioning of the Common Market, the work designed to lead to a new coordination solution was actively pursued. In spite of certain difficulties the Commission has succeeded in drafting the new solution which takes into account the individual circumstances of each of the large regions, or large groups of regions, of the Community.

The Commission also pursued the action it had begun in regard to general aid schemes in order to ensure that all applications of such schemes be sent to it for examination and so that it could eliminate the negative effects that these might have in certain cases on the Common Market.

As regards new areas, considering that protection of the environment should be considered a priority objective for the Community, the Commission, faced by a multiplication of state aids designed to facilitate the adaptation of undertakings to the new requirements demanded by this protection, has considered the guidelines it will apply to these aids in the examination that will be made in the light of Article 92 et seq. Adherence to these guidelines by Member States will allow these initiatives to achieve their objectives without distorting trade or competition within the Community in a manner contrary to the common interest.

Finally, it should be recalled once more that for some months the Community has been faced with the most serious economic and structural problems since its foundation. The Commission accepts, as it is allowed to by the Treaty, that in certain cases where grave conjunctural problems exist, temporary aids may be given to safeguard

employment. However, it is necessary to remember that in certain firms or industrial sectors these conjunctural difficulties are the result of fundamental problems which in certain cases will sooner or later call for restructuring or redeployment. For the Community rapidly to overcome these problems, the provisions of the Treaty as regards the aids that Member States grant must fulfil their task which is both to preserve an effective competition system and to encourage as far as possible an orderly evolution of industrial and commercial structures within the Community.

Part one

Competition policy towards enterprises

Chapter I

Main developments in the Community's policy

§1 — Work relating to rising prices

1. All Community countries have continued to be seriously affected by price rises. The Council Resolution of 17 December 1973[1] had in this context called for cooperation between the Commission and Member States to adopt a number of measures to curb increases in prices.

2. In the field of competition, the Commission accordingly set itself the task of examining cases of high price disparities, with the aim of applying the Treaty competition rules in appropriate situations. While it is more usual for investigations into a possible breach of rules to be triggered off by some initial evidence of infringement, the work now in progress involves an analysis of symptoms to establish inferentially, and by taking other relevant causes into account, if and to what extent high prices are partly referable to non-compliance with the competition rules. In these circumstances, it is plausible to look into branches in which enterprises tend to have a high degree of price autonomy and where privately administered prices are likely to prevail in the absence of effective competition. It is recalled that in relation to Article 86 the European Court of Justice has had occasion to rule that, while high price disparities do not necessarily permit a finding of abuse in the case of a dominant position, they can, in the absence of objectively justifiable reasons, be a decisive pointer to an abuse.[2]

3. By way of pilot survey, the Commission chose an approach of identifying, from numerous diverse types of products and services, such identical or closely similar products which are made or marketed in relatively highly concentrated product branches and which are retailed at high price disparities in different Member States. This approach has to allow for explicable and justifiably different characteristics as between Member States which may have a disparate impact on prices, such as differential tax rates, varying consumer behaviour and unlike distribution methods.

[1] OJ C 116 of 29.12.1973, p. 22; Third Report on Competition Policy, point 17.
[2] Judgments: 8.6.1971, Case 78/70, DGG/Metro and 18.2.1971, Case 40/70, SIRENA/EDA.

4. Following consultation with price experts of the Member States[1] the list of the products and services under review was reduced in successive stages to that shown in Tables 1 and 2.

5. Apart from high price disparities and relatively high concentration of product branch, the criteria of selection also included an assumed comparable demand pattern as between Member States and general strong public appeal of the products concerned.

TABLE 1

Prices of selected products sold in Member States — October 1973

A — Prices inclusive of Value Added Tax

Product	Coefficient of Variation %	Prices in Bfrs							
		G	F	I	N	B	L	UK	D
Paper tissues	32	15.57	30.05	29.90	18.85	18.40	15.44	..	..
Motor oil	35	199.48	114.59	192.67	127.62	102.50	92.00	81.75	112.36
Toothpaste	29	34.00	16.56	29.75	26.83	19.00	15.77	28.03	..
Motor batteries	14	1524.79	..	1794.79	1232.72	1604.33	1434.50	..	1808.99
Toilet soap	15	20.85	14.63	12.87	15.81	16.80	15.85	..	16.95
Electric bulbs	22	30.22	24.97	30.83	24.65	17.30	18.00	..	24.40

B — Prices without Value Added Tax

Product	Coefficient of Variation %	Prices in Bfrs							
		G	F	I	N	B	L	UK	D
Paper tissues	28	14.03	25.04	26.70	16.25	15.59	14.04	..	..
Motor oil	32	179.71	97.44	172.03	122.71	86.86	83.64	81.75	97.70
Toothpaste	29	30.63	13.80	26.56	23.13	16.10	14.34	25.48	..
Motor batteries	13	1373.68	..	1602.49	1062.69	1359.60	1304.09	..	1573.03
Toilet soap	14	18.78	12.19	12.14	15.20	15.85	14.41	..	14.74
Electric bulbs	21	27.23	20.81	27.53	21.25	14.66	16.36	..	21.22

Source: SOEC findings and calculations made by Commission staff.

[1] In particular, two meetings were held in Brussels on 19.3.1974 and 30.7.1974.

TABLE 2

Prices of selected products sold in Member States — October 1973

A — Prices inclusive of Value Added Tax

Product	In comparison with the country in which the lowest price applied (X), the prices in other Member States were higher by ... %							
	G	F	I	N	B	L	UK	D
Paper tissues	1	95	94	22	19	X	..	..
Motor oil	144	40	136	56	25	13	X	37
Toothpaste	116	5	89	70	20	X	78	..
Motor batteries	24	..	46	X	30	16	..	47
Toilet soap	62	14	X	23	31	23	..	32
Electric bulbs	75	44	78	42	X	4	..	41

B — Prices without Value Added Tax

Product	In comparison with the country in which the lowest price applied (X), the prices in other Member States were higher by ... %							
	G	F	I	N	B	L	UK	D
Paper tissues	X	78	90	16	11	0	..	..
Motor oil	120	19	110	50	6	2	X	20
Toothpaste	122	X	92	68	17	4	85	..
Motor batteries	29	..	51	X	28	23	..	48
Toilet soap	55	0	X	25	31	19	..	21
Electric bulbs	86	42	88	45	X	12	..	45

Source: Table 1(A) and (B).

6. The tables set out above contain price and price disparity data as of October 1973. The prices in Table 1 (A) and (B) were converted into Belgian francs at the unit-of-account conversion rates ruling at that time.[1] They are weighted averages which take into account different characteristics of sales outlets as between location (e.g. central urban and peripheral) and as between type (e.g. department stores and

[1] Rates of exchange: DM 0.066173; FF 0.114150; Lit 12.975300; Fl 0.068953; B(L)frs 1.000000; £ 0.008563; Dkr 0.155750. Source: General Statistics, Monthly Statistics of the SOEC, 12/74 p. 81, Table 855.

specialist shops). The coefficient of variation expresses the average of relationships (shown as a percentage) between prices in individual Member States and the average of such prices in the Community; the higher the coefficient, the higher the price differences between Member States. Table 2(A) and (B), which draws comparisons between lowest-price countries and other Member States in terms of percentages, reflects the individual disparities more clearly. The particular listed products are all of specific brands and produced by manufacturers known to the Commission.

7. While the above cases are not untypical, they are among the more striking in illustrating that some products are retailed at considerable price disparities between some Member States. Comparisons between respectively Table 1(A) and (B) and between Table 2(A) and (B) suggest that the varying impact of Value Added Tax plays no substantial part. All available information points to the conclusion that significant price disparities remain to be examined after making due allowances for different distribution systems and for different special tax rates. While, for example in the case of motor oil, the incidence of particularly uneven national excise taxes in some Member States has a magnifying effect on the coefficient of variation, this effect can be regarded as marginal (the coefficient of variation, in this case, if based on prices from which special national excise taxes are excluded, would be 28, as compared with 35 and 32 respectively, as shown in Table 1(A) and (B)).

8. Questions inevitably arise about the nature of any causes, influences or restraints which may be inhibiting inter-state trade from taking better advantage of high disparities and, specifically, about a possible persistence of market division disciplines. The Commission is examining a number of these cases further along these lines.

9. Apart from establishing a possible relevance of the Treaty competition rules to cases of the kind under review, the Commission sees a further objective of its work on prices in giving wide publicity to inter-Member State price disparities, in order to add impetus to cross-frontier buying in the Community.

10. Independently of the work outlined above, the Commission is also considering other feasible methods of creating a deeper understanding on the part of consumers within the Community of time-to-time price levels and price disparities between Member States. Accordingly, the Commission and Member States are currently examining the practicality of organizing price surveys in specially selected and limited product areas and the possible publication of survey results, with a view to giving further incentive to inter-state buying in the cheapest Community markets. Any such surveys would be conducted and results would be published following consultation and in cooperation with the authorities of affected Member States. The surveys in question would be intended to concern themselves with prices between manufacturers and dealers at different stages of production and distribution and also with actual selling prices charged to ultimate customers, and not with any other information which touches upon the internal costs or costing methods of enterprises.

§ 2 — The oil industry

11. The shortage in supplies of crude oil and the resulting reduction in the availability of oil products, which had reached an acute stage at the end of 1973, continued into the early months of 1974. Uncertainty and instability continued to dominate the supply of crude oil as groupings of both producer and consumer nations pursued their varying proposals aimed at achieving, respectively, pricing and supply policies which would accommodate the continued demands of producer nations while restoring equilibrium to the energy sectors of the economies of consumer nations.

12. The oil crisis has emphatically brought home the important role which the oil companies, and particularly the large multinational corporations, play in worldwide economies and commerce. At a national level, the governments of some Member States took the view that certain activities of some companies in the oil sector might be at variance with their respective competition policies and instituted enquiries and, in some cases, legal proceedings.

The differing attitudes of Member States to the introduction of regulations or less formal means of controlling supplies and prices rendered the situation more complex and tended to contribute to the possibility that supplies of oil products would be diverted to Member States where the absence of regulations imposing maximum prices for oil products opened up opportunities for higher profits from such transactions. This possibility gave particular concern to the Commission because of the implication that in a situation of continued shortage of supplies, such a policy could be pursued to the disadvantage of other countries where controlled prices operated and to which such redirected supplies might otherwise have been destined, thus affecting trade and discriminating between Member States of the Community.

13. Throughout the year certain parliamentary questions had reflected the concern which was being felt over the future of the smaller 'independent' oil firms and at the possibility of larger companies intentionally withholding supplies, or building up large stocks, with a view to reaping undue profits. As was announced in the Third Report on Competition Policy,[1] the Commission decided that the circumstances merited the opening of investigations into producers and dealers in the oil industry.

14. In planning their programme of investigations, the Commission aimed to include companies concerned with the handling of oil and oil products at all levels within the Community, including members of large multinational groups with refineries, independent distributors as well as small dealers. It was recognized that such a representative series of enquiries into a complex industry would necessitate many months but that this was inevitable if the enquiries were to be comprehensive. Some twenty investigations have been undertaken throughout the Member States and data obtained from these are being analysed and studied. The Commission's task is to

[1] Point 15.

examine the extent and quality of competition between the various types of firms serving the oil market within the Community and in particular to see whether the comportment of any of the companies involved, especially during the period of crisis, amounted to an infringement of the rules of competition of the Treaty.

This could occur, for example: if agreements or concerted practices were found to exist or to have existed between undertakings which fixed purchase or selling prices, limited or controlled production or shared markets; if any firm or firms enjoying a dominant position abused that dominant position in any way; if, for example, any discrimination in respect of prices or supplies had been practised as between Member States or towards different purchasers.

15. Mention was made above of 'independent' oil firms. These may be defined as firms, be they of small or medium size, whose turnover depends chiefly on the sale of oil products and who enjoy freedom of supply, outlets and prices (in conformity with any current national legislation); they have no legal links with the oil majors other than by such supply contracts as they may have concluded in the course of normal commercial practice and these will normally be of limited scope and of fixed duration. The incidence and role of such firms varies throughout the Community, and according to product. By way of indication however, independent firms are responsible for the distribution in France of about 21% of light fuel oil, in Belgium it is 55% whilst in Italy it is as high as 90%. The individual shares of particular independent distributors in other countries and in respect of other oil products are generally modest but nevertheless the aggregate share of the independents in the total oil market probably approaches 20%.

Apart from the general enquiry into the oil sector, the Commission followed up a number of specific complaints which it received from such independent firms. The tenor of these complaints was that the firms concerned, who over the years had built up their own distribution networks for oil products and had provided a valuable competitive element to the industry, had experienced extreme difficulties in obtaining supplies adequate to their needs and indeed had in some instances been refused supplies by the larger companies to whom they had turned for delivery. Moreover, where supplies of oil products had been made available to these independent firms, it was claimed that the prices asked had been so high that, taking into account the maximum retail prices which were in operation in certain Member States, no viable margin of profit remained. The independent firms concerned feared that a prolongation of such circumstances would end their existence. The Commission, after examining the details, has in one case sent statements of objections to seven large suppliers in the Netherlands on the grounds that they had abused their collective dominant position by refusing supplies of oil products to an independent network in that country and having charged prices which, in view of the maximum regulated prices in force, made it impossible for the independent complainant to carry on business in a normal fashion. This case is now pending.

16. Whether the supply of oil and oil products is stabilized for the future or whether one can expect alternating periods of shortage and of at least adequacy of supplies, in the Commission's view there remains a role for the independent distributors as well as for larger national and international firms in oil markets throughout the Community. Accordingly, the Commission will apply the means available to it under the Treaty to any restrictions on competition between these enterprises.

§ 3 — The proposed regulation on the control of mergers

17. In its Third Report on Competition Policy,[1] the Commission explained why it believed there was a need for more systematic Community control of large-scale mergers between undertakings and described the proposed regulation in detail.

Having been consulted by the Council, Parliament and the Economic and Social Committee approved the Commission's proposal of 20 July 1973[2] by large majorities on votes taken respectively on 12 February[3] and 28 February 1974.[4]

In the course of the discussions preceding the two votes, the Commission stated that it was prepared to accept the following amendments:

1. the inclusion of a provision whereby the competent authority would have to take account of competition on the world market when reviewing concentration cases (second subparagraph of Article 1 (1));
2. the inclusion under the provisions for compulsory notification of cases of the formation of joint subsidiaries by independent undertakings or groups of undertakings which would otherwise have fallen within the exemption in Article 4(2);
3. the replacement of 1 000 million units of account by 1 250 million as the threshold turnover above which mergers of undertakings in the distribution sector were to be subject to compulsory notification (Article 5(2)).

18. Discussion of the proposed regulation began within the Council Working Party on Economic Questions at its meetings on 14 June and 25 July 1974. The Council had to postpone a further meeting which was to take place towards the end of the year. The most controversial questions discussed at the meetings concerned possible problems of reconciling national industrial, social and regional policies with any decisions taken by Community authorities on individual concentrations. However, questions of consistency between national and Community measures are not confined to the area of competition policy and no insuperable difficulties have been encountered in the past. In any event, the fact that there could be possible divergences between Community policy and the individual policies of Member States does not relieve the

[1] Points 22 to 38.
[2] OJ C 92 of 31.10.1973, p. 1.
[3] OJ C 23 of 8.3.1974, p. 19.
[4] OJ C 88 of 26.7.1974, p. 19.

Community of its obligation to take whatever action may be necessary for the Community as a whole.

With regard to the specific issue of a parallel application of Community and national merger controls, a consensus of views is particularly important since significant social and other substantial interests could be at stake. The Commission's view is that while the Community should take proper account of national requirements, this should not be allowed to jeopardize the Treaty objectives of undistorted competition or of maintaining the institutional balance sought by the Treaty.

§ 4 — Patent licensing agreements

19. The assessment of patent licensing agreements under the Treaty rules calls upon a consideration of interests and issues which go beyond the field of competition policy. Patents conferred by national laws as incentives and rewards to inventors have traditionally created monopoly rights which restrict competition. Against this, the evolution of rules based on policies which underlie the establishment of the Community is designed to stimulate competition so as to achieve an integrated common market. It is the Commission's continuing concern to set standards for permitted licensing provisions which can reconcile a legitimate exercise of the monopoly rights conferred by patent grants with the requirements of a unified market.

20. On a legal plane, the Commission faces the problems of definition exposed by the Court of Justice in its distinction between the existence of nationally protected industrial property rights, which is not to be affected by Community law, and the exercise of these rights, which can be subject to the Treaty rules.[1] Accordingly, any appraisal of particular patent licensing provisions requires prior differentiation between terms which are germane to the existence, and those which relate to the exercise, of patent rights, in order to establish upon which provisions the Commission may properly rule. While the differentiation remains to be more fully worked out by future decisions of the Court, it is clear that patent licensing agreements are not automatically within Article 85(1) if the agreements simply confer rights to exploit patented inventions against payment of royalties, but that questions of applicability of Article 85(1) arise if a grant is accompanied by terms which go beyond the need to ensure the existence of an industrial property right, or where the exercise of such right is found to be the object, means or consequence of a restrictive agreement.[2]

21. At a conference held in December, the Commission and government experts of Member States exchanged views on the following common types of patent licensing provisions:

[1] Case 78/70, DGG/Metro, Recueil de la jurisprudence de la Cour (hereafter 'Recueil') 1971, p. 487.
[2] Ibid. and Case 40/70, Sirena, Recueil 1971, p. 69.

(a) Export restrictions;

(b) Field-of-use restrictions;

(c) Restrictions on duration of agreements;

(d) Non-competition restrictions;

(e) Quantitative output restrictions.

Export restrictions

22. The most controversial of the above types of restriction are those which affect exports from one or more to other Member States, in view of their apparent inconsistency with the essential character of a unified Community market.

23. The December meeting considered in particular restrictions designed to protect a licensor in his 'reserved' territory against direct imports made by one of his licensees and restrictions designed to protect a licensee in his 'reserved' territory against direct imports made by another licensee whose rights are derived from the same licensor. In this context, it should be noted that a licensor cannot in any circumstances protect his 'reserved' territory by binding his licensees to impose export restrictions upon their customers.[1]

24. The question whether a licensor should be able by contract to prohibit licensees from making direct imports into territories he wishes to reserve to himself can be approached from different premises which lead to conflicting conclusions.

Views in favour of permitting export restrictions for the protection of a licensor's territory rest mainly on grounds of preserving the attribute of patent rights as an incentive to inventiveness and to licensing. If a patentee's rewards were reduced to unacceptable levels by exposing him to competition from his foreign licensees, he could be discouraged from granting licences altogether. In particular, small and medium-sized licensors should be protected against being 'swamped' by competition from their more economically powerful licensees. Moreover, any considerable discouragements to the granting of licences could induce large enterprises to retain their innovations and enter foreign markets themselves, rather than by licensing to disseminate innovations and to help the promotion of alternative production and marketing units.

25. However, seen against the background that a licensor is in a position to choose whether to grant licences or not, that licences are subject to royalties in his favour and that a licensor normally enjoys advantages in time and in cost when competing with

[1] Case 15/74, Centrafarm/Sterling Drug Inc. See point 61.

his licensees, it is open to doubt that an export restriction should in these circumstances be regarded as essential for the protection of a licensor's property rights. Special concessions to licensors in particular circumstances could in any appropriate cases rank for consideration for exemption under Article 85(3). In principle, however, a reservation to a licensor of a defined area within the Community, possibly an area where price levels are highest, appears to create problems of conflict with the objectives of market unity.

26. Views in support of permitting contractual restrictions to protect a licensee from direct imports into his territory from other licensees are generally based on the proposition that a licensee needs sole marketing rights in his territory in order to safeguard his investment in the initial promotion of production and sale. It is argued that, in the absence of such protection, there would be a disinclination to accept licences and that patentees would therefore be in danger of losing their rewards. Any such particular situations can be considered for exemption under Article 85(3). However, in cases of some important inventions, it has been practice for licensors to grant several concurrent non-exclusive licences without restrictions as to territory. Moreover, it is improbable that export prohibitions to protect licensees *inter se* can affect the existence of patent rights, since these are vested in patentees and are not the property rights of licensees.

27. Patent infringement claims by licensors to protect their own or their licensees' reserved territories from imports of licensed products are subject to the jurisdiction of national courts on the effect of national patent rights, subject to preliminary ruling from the Court of Justice of the European Communities under Article 177 on any point of law raised in relation to such claims. Where in such cases the exercise of patent rights is not the object, means or consequence of a restrictive agreement, the competition rules do not apply. It appears however that the enforcement of such individual national patent rights may tend to promote fragmentation of the Community market, contrary to the Treaty provisions concerning the free movement of goods.

Field-of-use restrictions

28. When patented inventions are capable of use in different applications, a licensor may, in the Commission's view, normally limit a licence to a distinct field of use. In these circumstances, he may give several licences to different licensees for respectively different applications. It is, however, possible that Article 85(1) could bear on such cases in which a segregation of different fields of use is shown to be the result or means of implementing an agreement to eliminate competition between licensees or between the parties.

Restrictions on duration of agreements

29. In the view of the Commission, Article 85(1) does not in principle touch upon the contractually fixed duration of a patent licence agreement, if this is for the life of a single licensed patent or a shorter term.[1] The question whether the duration of an agreement which covers more than one patent can be fixed beyond the life of the first to expire of licensed patents is still open. This is likely to involve consideration of the nature of the conditions of the agreement and the economic and technical importance of the different licensed patents concerned.

Non-competition restrictions

30. A non-competition restriction could prevent a licensee from extending his product range and closely bind his future to that of a licensed patent. Consequently, a licensee so tied might have to go out of business when the licensed technology becomes obsolete. Non-competition prohibitions can have the effect of not only strengthening a monopoly position of a patentee, but also of weakening competition between manufacturers of substitute products. A licensee might no longer have worthwhile prospects in carrying out independent development. Accordingly, the Commission regards non-competition provisions as covered by Article 85(1). Possibilities of exemption under Article 85(3) could only arise in special situations, particularly cases relating to specialization agreements.

Quantitative output restrictions

31. In the Commission's view, Article 85(1) applies to contractual obligations imposed on a licensee which restrict his production to specified quantities, since the normal result of such restrictions would be to prevent a licensee from increasing his output and to make him less effective as a competitor. It is also possible for such restrictions, if imposed on a number of licensees, to have similar effects as export bans.

32. It appears from the foregoing that for any assessment under Article 85(1) the most problematical of provisions in patent licensing agreements concern export restrictions which affect trade between Member States. While, in the Commission's view, lasting rules are generally best evolved through decisions in individual cases, the Commission is also considering possibilities of approach by way of block exemption. For this, there remain the difficulties of arriving at appropriate criteria which are capable of reconciling some of the principal conflicting issues.

[1] In exceptional circumstances, it is, however, possible for Article 86 to apply to cases of abusively fixed short periods of duration.

§ 5 — Selective distribution

33. The main problems relating to selective distribution in the motor vehicle and perfumes industries, consideration of which had begun in 1973,[1] were on the agenda of a conference held with Government Experts on Restrictive Practices in September this year. The main lines suggested by the Commission were as follows:

34. In the motor vehicle industry, the manufacturers generally select their dealers without employing predetermined and uniformly applied quantitative criteria.

This method of selection should be regarded as a restriction of competition under Article 85(1), which however could exceptionally qualify for exemption under Article 85(3) in the light of special economic and technical factors. A case for consideration of exemption could particularly arise in circumstances in which dealers, apart from their functions as retailers, perform certain services which necessarily depend on constant close cooperation between producer and seller. A motor car is an expensive product of great technical complexity which needs repair services; constant checks are therefore necessary. The requisite after-sales service must be of high quality, not only in order to satisfy the individual interests of each driver in the proper functioning of his vehicle, but also, as a matter of general public interest, in order to ensure road safety and environmental protection. The quality of this service is best assured when manufacturer and seller have a close relationship of mutual confidence and could be difficult to achieve if manufacturers had to maintain trading relations with an excessive number of dealers. In this context the need for continuous exchanges of information is important. A dealer should be in a position to benefit from the manufacturer's most up-to-date techniques and at the same time, a manufacturer should be in a position to be informed of technical problems which come up in the course of servicing and repair, with a view to applying quick solutions. These advantages are also in some considerable measure in the interest of consumers.

Such favourable results of selective distribution might not be achieved in the same measure or with equal chances of success by means such as general servicing instructions issued by manufacturers to purchasers.

35. Examination of selective distribution systems in the luxury perfumes industry showed that most perfume manufacturers organize their distribution networks in the EEC in similar manner. The sales patterns are based, on the one hand, on exclusive franchise contracts between manufacturers and their general agents in individual EEC countries and, on the other hand, on distribution contracts entered into by the manufacturers themselves, or alternatively by their general agents, with retailers in their respective territories. In these sales patterns there is no wholesale stage and only a limited number of approved retailers. These are chosen not only on the basis of

[1] Third Report on Competition Policy, points 7 to 12.

qualitative selection criteria, such as their professional qualifications and those of their staff, the class and siting of their shops, but also on quantitative criteria whose aim is to adapt the number of approved sales outlets to the size and purchasing power of a particular town or region.

Concerning the compatibility of these selective distribution systems with Article 85, the Commission reached the conclusion that the luxury character of a product could not in itself be regarded as an adequate ground for exemption under Article 85(3). A more flexible attitude could however be considered under Article 85(1) in view of the special nature of the market in perfumes and beauty and toiletry products in the EEC, such as the large number of competing undertakings of similar size, each with a relatively small market share.

Accordingly, the Commission felt that it need not intervene in respect of the selection of sales outlets in this sector, provided that all restrictions which could result in market fragmentation were removed. Consequently, the patterns of selective distribution systems in the perfumes industry will no longer be such as to maintain state-to-state consumer price differences for the same product. As long as the relevant enterprises take this approach, a general uniform solution for the whole industry can be adopted.

36. The Commission gave practical form to these general points in a Decision on the German distribution system applied by BMW and in the settlement of the cases involving the Dior and Lancôme undertakings.[1]

§ 6 — Joint ventures

37. A joint venture is generally defined as an enterprise subject to joint control by two or more undertakings which are economically independent of each other. Joint ventures can pose problems in relation to decisions to what extent respectively the rules on restrictive practices or those on mergers apply.

Cases in which problems can arise are generally those in which joint ventures operate as genuine economic entities for the purpose of producing or distributing goods or services, with the likely effect of inducing the controlling undertakings to adopt a policy of mutual non-competition by reasons of the actual creation or management of a joint venture.

38. Article 85 is clearly applicable to joint arrangements which, however these may be referred to by the parties, amount to cooperation agreements in given areas and which take forms recognized by company law or which have the effect of creating a joint company. The Commission has so far given decisions in ten such cases: a limited company with a variable share capital under French law for the joint opening up of export markets (Alliance des constructeurs français des machines-outils); a limited company under French law for the investigation of foreign sources of supply

[1] Points 86 and 93.

of food and other products (SOCEMAS); a cooperative company under Belgian law, responsible for sales in Belgium and in non-Community countries (COBELAZ); a limited company under French law for sales in France and in non-Community countries (Comptoir français de l'azote); a limited company under Italian law responsible for sales in Italy and in non-Community countries (SEIFA); a limited company under French law responsible for exports to non-Community countries (SUPEXIE); a company under German civil law empowered to take decisions on cartel rebates (Interessengemeinschaft der deutschen Keramischen Wand- und Bodenfliessenwerke); a limited company under French law responsible for exports (SAFCO); a limited company under Swiss law for joint development (HENKEL-COLGATE); a limited company under Netherlands law responsible for joint sales (Nederlandse Cement Handelmaatschappij NV).

Numerous decisions under Article 65 of the ECSC Treaty have had the same effect where they authorized coal or steel undertakings to establish joint sales agencies.

39. In its 1966 memorandum on the problem of concentration in the common market,[1] the Commission stated, particularly in relation to joint ventures, that careful attention should be paid to whether the parties concerned were applying agreements or concerted practices, especially in cases in which economically independent undertakings remained in the market following a concentration. In other words, where the formation of a joint venture amounts to a concentration between each of the parties and the new undertaking, without the founding parties being concentrated as between each other, the latter may end up by regulating their conduct in accordance with policy lines jointly determined in the interest of the operation of the new joint venture. Even in the absence of particularized agreements or concerted practices, it can be assumed that restrictive arrangements are more likely to be made in cases in which the parties involved are in effect competitors. A restrictive effect which could in such circumstances jeopardize the economic independence of the parties is also referred to as 'group effect'.

40. When undertakings transfer all their assets to a joint venture and become management holding companies, they lose their economic independence. Such operations amount to total integration and must be regarded as concentrations. The Commission has already expressed views to this effect in relation to the Afga-Gevaert and Dunlop-Pirelli operations (formation of a series of joint ventures of different nationalities by total transfers of assets).

41. In its recent decision giving negative clearance in the case of SHV and Chevron,[2] the Commission took the same view in circumstances of a partial integration, where the parties retained their own economic activities, although not in the same fields as

[1] Competition series, Study No 3 (Brussels, 1966) Part III, paragraphs 14 and 15.
[2] Point 114.

their joint ventures. The parent companies took the form of holding companies after transferring to the joint ventures their distribution networks, that is to say, the necessary infrastructure for the supply of the relevant product. They thereby lost their economic independence on the markets concerned, where they could subsequently act only through their joint subsidiaries, which had been created through transfers of assets needed for their operations.

It will however always be difficult to assess a creation of joint ventures which effect a partial integration, and a uniform approach cannot necessarily be taken in all such cases. The importance of the relevant undertakings and of their markets, the economic significance of the integrated activity as compared with the residual activities of the founding parties, the nature of the market structures, the general context of the relations between the parties in such transactions will all have to be assessed from case to case so as to decide whether there is in fact a concentration or restrictive agreement.

42. A number of decisions have been taken under Article 66 of the ECSC Treaty in relation to undertakings which have become joint ventures following the establishment of joint control or joint formations.

From its experience in such cases, the Commission has concluded that, in heavy industries, where investment expenditure is considerable, the joint formation of a major production unit may not be covered by the rules on concentration as long as the new joint production capacity remains below the capacity of each founding party and as long as the joint production or joint products are sold separately by the sales departments of each of the parties. The recent Thyssen-Solmer decision is an illustration of this.[1]

A number of pending cases raise problems relating to joint ventures. The Commission will therefore be able to continue to develop its approach to these issues.

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

43. This question was examined in 1974 in collaboration with national experts on restrictive practices. Discussion centred on practical methods of avoiding conflict between national and Community competition law.

The danger of conflict arises from the fact that Community and national rules on restrictive practices may overlap in both their territorial and their substantive fields of application. Where both Community and national rules are applicable to the same set of circumstances, differences can arise from the way in which the law is applied. These may derive from the dissimilar ways in which matters of fact and of law are approached by the various authorities required to take decisions, and also from differences between the applicable legal systems. The fact that the different legal systems

[1] Point 121.

may in certain respects pursue different objectives is not enough of itself to preclude conflicts. In a judgment handed down on 13 February 1969 in Case 14/68[1] the Court of Justice of the European Communities confirmed this in the following terms:

'Community restrictive practices law and national restrictive practices laws do not approach these practices from the same angle. Article 85 poses the question whether a restrictive practice may affect trade between Member States, whereas each of the national sets of legal requirements is based on policy considerations which are particular to the country concerned and assesses restrictive practices on the basis of these considerations only. Yet the economic circumstances and legal situations involved in individual cases may be very closely related; thus the distinction between the Community and the national aspects of a case is not always a relevant criterion for deciding who should have jurisdiction.'

Solution to conflict situations under the law as it stands

44. Under the law as it now stands conflict situations must be resolved on the basis of the general legal principles of Community law. The judgment handed down by the Court of Justice on 13 February 1969 simplifies matters in so far as it outlines the kind of case where conflict arises and indicates possible ways of resolving it.

In the Court's view, there is a conflict where application of national law would stand in the way of the unimpeded and uniform application of Articles 85 and 86 of the EEC Treaty or would reduce the effectiveness of measures taken or to be taken for the implementation of these Articles. In such cases the conflict is resolved by application of the principle that Community law prevails. This principle, taken together with Article 5 of the EEC Treaty, means that the Member States must refrain from taking or must revoke any measures which might have the effects referred to above.

This obligation arises from the general concept of the Community legal order:

'It would not be compatible with the nature of this legal system to allow the Member States to adopt or maintain measures which might impede the practical effectiveness of the Treaty. The force of the Treaty and of implementing measures must not differ from State to State because of the varying effect on them of national measures; otherwise the operation of the Community system would be impaired and the attainment of the objectives of the Treaty would be jeopardized.'[2]

The competition rules are of particular importance for the attainment of the objectives of the Treaty:

'Article 85 of the EEC Treaty applies to all undertakings in business in the Community; it regulates their conduct partly through the prohibitions contained in it and partly by exempting, subject to specified conditions, such restrictive practices as contribute to improving the production or distribution of goods or to

[1] Recueil 1969, p. 13.

[2] Court of Justice, Recueil 1969, p. 14 (point 6); cf. Judgment of 15.7.1964 in Case 6/64, COSTA v ENEL: Recueil 1964, p. 1149.

promoting technical or economic progress. In this way the Treaty seeks, as a primary objective, to remove obstacles to the free movement of goods in the common market and to strengthen and guarantee the unity of this market; however, it also allows Community authorities to take positive although indirect action to promote harmonious development of economic life within the Community as called for by Article 2 of the Treaty.'[1]

45. It is the Commission's view that the points made in these two paragraphs should serve also as the key criteria for resolving conflicts. The scope of a Community rule or decision should therefore be examined in terms of its function. Here a distinction must be made between directly applicable prohibitions under Articles 85(1) and 86 and exemptions from the ban on restrictive practices granted under Article 85(3).

The objective of the prohibitions in Articles 85(1) and 86 is to guarantee the unity of the common market and the preservation of undistorted competition on that market. To this end, the Treaty provides for direct applicability of these clauses. They must be strictly complied with, if the functioning of the Community regime is not to be endangered. For this reason, Member States are required to abstain from any measure which might jeopardize either the full and uniform application of the prohibitions throughout the common market, or the effectiveness of measures taken or to be taken in implementation of the prohibitions.

On the other hand, national authorities are free to apply their national laws along the same lines as Community law is applied, although the application of this rule is to some extent restricted by the general equitable principle that the same offence ought not to be penalized twice. Even so, the possibility of double penalization does not prevent parallel proceedings, one by the Commission under Community law and the other by national authorities under domestic law: but it does mean that the authority taking the later decision should take account of any penalty imposed in earlier proceedings when deciding what penalty, if any, to impose itself.[2] If Community and national sanctions are dealt with in this reciprocal way, it will usually be possible to reconcile the need to avoid double sanctions with the principle of full and uniform application of Community law.

The primacy of Community law is equally valid as a principle in relation to exemptions from the ban on restrictive practices granted pursuant to Article 85(3). In the judgment of 13 February 1969, the Court rejected the argument that exemption by the Commission withdraws only the Community barrier to a restrictive practice under Article 85(1), leaving unimpaired the national authority's power to prohibit such a practice under its own law (double barrier theory).

This is in accordance with the principle that the provisions of Article 85 must be seen as a whole and therefore applied as uniformly as possible.

[1] Judgment of 13.2.1969 in Case 14/68, Recueil 1969, p. 14 (point 5).
[2] Court of Justice, Judgment of 13.2.1969 – Case 14/68, Recueil 1969, p. 15 (points 10 and 11).

Even so the Court's judgment of 13 February 1969 leaves open the question whether the primacy of Community exemptions constitutes a strict rule, or whether it should be regarded rather as a flexible principle in the application of which it is permissible to take account of the respective interests of the Community and of Member States.

Possible methods of preventing conflicts from arising

46. The Court's judgment in Case 14/68 shows how conflicts can be avoided or overcome in practice.

'— In a case where a national decision regarding a restrictive practice would be incompatible with a decision adopted by the Commission upon the conclusion of proceedings initiated by it, the national authorities are required to respect the effects of the Commission decision.

— In cases in which, during national proceedings, it appears possible that the decision whereby the Commission will put an end to proceedings in progress concerning the same restrictive practice, may conflict with the effects of the decision of the national authorities, it is for the latter to take the appropriate measures.'[1]

In the first example, the national authority must ensure that the decision to be taken under national law will not prevent the Community decision from being fully effective both in law and in practice. This does not mean that the national law may not be applied, but only that national measures which are incompatible with the Commission decision may not be taken.

In the second example, the Court of Justice assumes that proceedings in respect of a restrictive practice are being conducted in parallel under national and Community law, but that neither has yet resulted in a final decision. In such a case national authorities must 'take the appropriate measures' to avoid conflict between the decision they propose to take and the decision which the Commission is expected to take. The Court does not state what measures might be considered here; this is a question requiring an interpretation of Article 5(2) of the EEC Treaty. The following are the two most likely solutions:

— Suspension of national proceedings until the Commission has given its decision.
  This would enable the national authorities to wait until they have received the Commission's decision and then align the decision which they are to take under national law with the decision taken under Community law.

— Consultation with the Commission before adopting the national decision.
  This would establish obligations for the authorities of the Member States similar to those incumbent upon the Commission under Article 10 of Regulation No 17. An essential function of the consultation would be the mutual provision of detailed information on content and scope of the decisions which are expected to

[1] Judgment of 13.2.1969, Case 14/68, Recueil 1969, p. 14 (points 7 and 8).

be taken. The authorities of the Member States would thus be in a position to take account of the Commission's views without having to wait until the Commission had actually adopted a decision.

Both solutions would help to avoid conflict. The Member States would retain discretion to decide which of the two alternatives to select.

The legal obligation for national authorities to respect the primacy of Community law also applies, however, where an earlier decision of the national authorities subsequently turns out to be incompatible with Articles 85 or 86. Here the primacy of Community law can be upheld only at the cost of legal and practical difficulties. So long as the national proceedings have not reached a final legal conclusion, it should not be too difficult to take account of a subsequent Commission decision. If, on the other hand, the decision of the national authority has already acquired legal force, there will be considerable difficulty in overcoming the conflict.

It is for this reason that it would be desirable, where consultation with the Commission has not completely eliminated the danger of conflict, for national authorities to keep their proceedings open until the Commission has taken its decision.

47. The Commission and the Governments of the Member States feel that it is not necessary at present to adopt a resolution pursuant to Article 87(2)(e) of the EEC Treaty defining more precisely the relationship between the Community competition rules and the national legal provisions. Instead, it seems more appropriate to improve the exchange of information between the relevant national authorities and the Commission, to proceed to mutual consultation where both Community and national competition laws apply, and generally to reduce the risks of conflict in individual cases by improving harmonization of national and Community policies on competition. In collaboration with the Member States, the Commission will work out rules designed to achieve this objective.

§ 8 — Limitation periods

48. On 26 November 1974, the Council adopted Regulation (EEC) No 2988/74 concerning limitation periods in proceedings and the enforcement of sanctions under the rules of the European Economic Community relating to transport and competition.[1] This Regulation, which entered into force on 1 January 1975, fills a gap in Community law, since the EEC rules on transport and competition give the Commission the power to impose fines on undertakings and associations of undertakings for infringement of the rules, but do not provide for any limitation period. The Court of Justice, endorsing the Commission's view, held that no specific Community rules on

[1] OJ L 319 of 20.11.1974, p. 1; the text of the Regulation is given in the Annex.

limitation periods could be inferred from the legal systems of the Member States, and that the problem should be solved by Community legislation.[1]

With the adoption of Regulation (EEC) No 2988/74 the Council fulfilled this legislative task. The Regulation sets a time limit to the Commission's power to impose fines (limitation periods in proceedings). Similar limitations will apply in future to the enforced collection of fines and to periodic penalty payments (limitation period for the enforcement of sanctions). The Regulation specifies the limitation periods which are to be applied, the time when periods begin to run and the actions which interrupt or suspend the running of the periods.

49. The Council's solution meets the major requirement of ensuring legal certainty without impairing the effectiveness of actions against infringements. The provisions of the Regulation aim to achieve an appropriate balance between the individual interests of the undertakings concerned and the general interest that Community law should be complied with.

This aim is particularly reflected in the provisions governing limitation periods in proceedings:

1. The limitation periods have been fixed according to the nature and seriousness of the infringements and in accordance with the requirements of administrative practice. The Regulation provides that infringements in respect of information supply and investigations are subject to a limitation period of three years and infringements against substantive rules to a limitation period of five years.

2. The provisions governing the commencement of limitation periods are based on the general principle that the benefit of the limitation rules can be claimed only in respect of infringements which are no longer being committed. In order to take account of the differing types of infringement, the Regulation provides that the limitation period will begin to run on the day on which the infringement is committed but that, in the case of continuing or repeated infringements, the limitation period will begin to run on the day on which the infringement ceases.

3. In order to ensure the effective prosecution of infringements, the Regulation further provides that any measure taken for the purpose of preliminary investigations or proceedings in respect of infringements will interrupt the limitation period as soon as the measure is notified, at least to one of the parties concerned. The interruption of the limitation period applies to all undertakings or associations of undertakings involved in a particular infringement. However, the Commission can impose fines only within a period not exceeding twice the original limitation period. This provision is to protect undertakings from inordinately protracted proceedings, and is to be an incentive to the Commission to expedite its work.

[1] Second Report on Competition Policy, 1972, point 24.

4. The Regulation finally provides that the limitation period in proceedings will be suspended for as long as a Commission decision is the subject of proceedings pending before the Court of Justice of the European Communities. This provision is to ensure that the Commission can resume proceedings in respect of an infringement, if its original decision to impose a fine is set aside by the Court of Justice for procedural reasons. It is based on the general legal principle that the parties concerned should not benefit from prescription rules in respect of periods for which the authority responsible for instituting proceedings is prevented from taking action for justifiable reasons and on grounds beyond its control.

The rules governing limitation periods for the enforcement of sanctions follow the same principles. However, the essentials of the enforcement procedure as governed by Article 192 of the EEC Treaty are clearly set out in the Regulation:

1. The limitation period is to be five years.
2. Time begins to run on the day on which a decision becomes final.
3. The limitation period is interrupted by any decision which varies the original amount of a fine or of periodic penalty payments or which declines to grant such variation, and any action taken to enforce payment.
4. The limitation period for the enforcement of sanctions is suspended for so long as time to pay is allowed or enforcement of payment is suspended pursuant to a decision of the Court of Justice.

50. Seen as a whole, the Regulation concerning limitation periods is based on principles underlying the laws of the Member States. However, in view of the differences between national rules on limitation periods and in view of the special features of Community rules on the enforcement of decisions, the Commission and the Council had to find new solutions to some aspects of the problems. Regulation (EEC) No 2988/74 is therefore a new measure in its own right.

The Regulation will apply only in respect of EEC rules relating to transport and competition. However, the new provisions are framed in such a way that they can serve as a model for other areas of Community law. Working from the principle of Regulation (EEC) No 2988/74, the Commission is shortly to draw up rules on limitation periods in proceedings and for the enforcement of sanctions under the ECSC Treaty.

§ 9 — Court of Justice case-law[1]

51. In 1974 the Court of Justice handed down a number of important judgments on:

— the applicability of Article 85 to members of the same corporate group and to the

[1] Eighth General Report on the Activities of the European Communities, Chapter VII: Community Law, points 478 and 480 to 488.

combined effect of an exclusive dealing agreement and of national legislation relating to certificates of authenticity;
- the applicability of Article 86 to the exploitation of copyrights and to a refusal to supply, and the applicability of Article 86 within the framework of Article 90;
- the procedure to be followed in attaching conditions and obligations to exemption decisions, the powers of national courts as regards application of Articles 85 and 86, and the adoption of interim measures of protection in the case of concentrations which require the Commission's prior consent;
- the exercise of industrial property rights.

Applicability of Article 85

52. In a judgment delivered on 31 October[1] the Court stated that Article 85 is not concerned with agreements or concerted practices between undertakings belonging to the same corporate group and having the relationship of parent company and subsidiary, if the undertakings form an economic unit within which the subsidiary has no real freedom to determine its course of action on the market, and if the agreements or practices are concerned merely with the internal distribution of work as between the undertakings.

The Court thus confirmed the line already taken both by the Commission in Christiani & Nielsen and Kodak cases and by the Court itself in Béguelin (Case 22/71).[2] However, in the Commission's view, this does not exempt from the prohibition in Article 85(1) agreements concluded within a corporate group if they have wider implications, for instance agreements which restrict the scope for non-member undertakings to penetrate a given market.

53. Any assessment of exclusive dealing agreements, and particularly of their effects on parallel imports, in relation to Article 85 of the Treaty, must take account of the Community's judgment of 11 July 1974.[3] Here the Court held that the fact that an agreement merely authorizes the dealer to make use of a national law relating to certificates of authenticity in order to prevent parallel imports does not suffice in itself to render the agreement null and void. However, an exclusive dealing agreement may be caught by Article 85 if the dealer is able to prevent parallel imports by means of the combined effects of the agreement and of a national law requiring authenticity to be proved exclusively in the manner which it specifies. For this purpose it is necessary to consider not merely the terms of the agreement itself but also its legal and

[1] Case 15/74 (Centrafarm and De Peijper v Sterling Drug Inc.).
[2] Commission Decisions of 18.6.1969: OJ 165 of 5.7.1969, p. 12 (Christiani & Nielsen); and 30.6.1970, OJ L 147 of 7.7.1970, p. 24 (Kodak); Judgment of 25.11.1971 in Case 22/71 (Béguelin Import Co): Recueil 1971, p. 949. First Report on Competition Policy, point 5.
[3] Case 8/74 (Procureur du Roi v Benoît and Gustave Dassonville), European Court Reports (hereafter [E.C.R.]) 1974, p. 837.

commercial context including, in particular, the question whether there are any agreements concluded between the same manufacturer and dealers established in other Member States.

This judgment extends the Court's finding in its judgment of 25 November 1971[1] to the effect that an exclusive dealing agreement is caught by Article 85 where the dealer is in a position to prevent parallel imports from other Member States into his territory as a result of the combined effects of the agreement and of national laws relating to unfair competition.

Applicability of Article 86

54. In its judgment of 21 March 1974[2] the Court, dealing with a copyright dispute, gave an example of an abuse of a dominant position within the meaning of Article 86 of the Treaty. Such an abuse can consist in the fact that an undertaking entrusted with the exploitation of copyrights and occupying a dominant position within the meaning of Article 86 imposes on its members obligations which are not absolutely necessary for the attainment of its object and which thus encroach unfairly upon the members' freedom to exercise their copyrights. A compulsory assignment of all copyrights, both present and future, no distinction being drawn between the different generally accepted types of exploitation, may appear an unfair condition for the purposes of alternative (a) of the second paragraph of Article 86. In the same judgment the court also ruled that Belgium is a substantial part of the common market within the meaning of Article 86.

The Commission regards this judgment as confirmation of the line which it took in 1971 in relation to Gema's management of copyrights and which it maintained in 1974 as against Sacem and Sabam,[3] particularly as regards the applicability of Article 86 to internal relations between societies of this type and their members.

55. In its judgment of 6 March,[4] the Court confirmed a number of new principles established by the Commission. The Court stated that an undertaking enjoying a dominant position as regards the production of a raw material and therefore able to control its supply to producers of products manufactured from that material, cannot refuse to supply a customer which is itself a manufacturer of these products with the effect of eliminating all competition from that customer. In this case a monopoly (a company and its subsidiary regarded as a single undertaking) had decided to begin

[1] Case 22/71 (Béguelin Import Co): [1971] Recueil 949. See also First Report on Competition Policy, point 47.
[2] Case 127/74 (BRT v Sabam, BRT II): [1974] E.C.R. 313.
[3] Commission Decision of 2.6.1971: OJ L 134 of 20.6.1971, p. 15; see point 112.
[4] Cases 6 and 7/73 (Istituto Chemioterapico Italiano SpA and Commercial Solvents Corporation v Commission): [1974] E.C.R. 223.

production of the manufactured products and to become a competitor of the producer, itself a customer of the monopoly and one of the main producers in the common market of certain drugs used to treat tuberculosis. The Court held that the monopoly had abused its dominant position within the meaning of Article 86. It accepted that in relation to their customers the two companies in question were to be considered as a single economic unit and that they were jointly and severally responsible for the conduct complained of.

Further, the Court decided that as well as covering abuses which may directly prejudice consumers, Article 86 also covers abuses which indirectly prejudice them by impairing the effectiveness of a competitive structure in the common market. If an undertaking in a dominant position abuses its position in such a way that a competitor in the common market is likely to be eliminated and if that elimination will have repercussions on the competitive structure, it is immaterial (for the purpose of establishing whether trade between Member States is affected) whether the conduct relates to the competitor's exports or to its trade within the common market.

The judgment also confirmed the line taken by the Commission, which, having established that there was a refusal to supply contrary to Article 86, ordered certain quantities of products to be supplied as an immediate palliative in addition to requiring proposals to be presented for preventing the abuse from recurring. The application by the Commission of Regulation No 17 Article 3 may take various forms according to the nature of the infringement in question and may include an order to execute certain measures or provide certain advantages which have been wrongly withheld as well as prohibiting the continuation of certain actions or practices.

56. In Case 155/73,[1] the questions put by the Italian judge on the rules of competition led the Court to declare, on the basis of a joint reading of Articles 86 and 90 of the EEC Treaty, that the fact that an undertaking to which a Member State grants exclusive rights enjoys a monopoly is not as such incompatible with Article 86. In television in general, and in cable television in particular, the Member States are free to confer or extend such exclusive rights on grounds of public interest, of a non-economic nature. However such undertakings remain subject to the rules against discrimination and, as regards their commercial activities, to Article 90(1). By virtue of Article 90(2), the same rules apply in the case of television companies which Member States organize, even as regards their commercial activities and especially their advertising business, in the form of 'undertakings entrusted with the operation of services of general economic interest' within the meaning of that paragraph, unless it is shown that those rules would be incompatible with the exercise of the duties entrusted to the undertakings.

At the same time the Court noted that even within the framework of Article 90, the rules of Article 86 are directly applicable, and confer rights on firms and individuals

[1] Judgment of 30.4.1974 (Sacchi): [1974] E.C.R. 409.

which national courts must uphold; the Commission should also use its powers to remedy any abuses.

This is what the Commission is doing in monitoring the market conduct of public undertakings and undertakings on which the Member States confer exclusive or special rights within the meaning of Article 90.

Procedural matters

57. In a judgment given on 23 October 1974,[1] the Court clarified the procedure to be followed by the Commission in applying Article 85(3). The Court took the view that, in order to attach conditions or obligations to an exemption granted under Article 85(3), the Commission must, before taking its decision, notify the facts and its intentions as to the conditions or obligations and give the firms concerned the opportunity to present their views. Regulation No 99/63 applies the general rule that the addressee of a decision adopted by a public authority must, if his interests are liable to be affected to an appreciable extent by the decision, be given a proper opportunity to make his views known.

In annulling the obligation imposed upon the members of the Transocean Marine Paint Association in the Commission's Decision of 21 December 1973, which in the Court's view was in breach of procedural requirements, the Court did not simply declare the obligation null and void but explicitly severed it from the rest of the Decision, annulled it and referred the case back to the Commission.

The Commission has taken account of the Court's requirement, not only in its review of the case in question, but also in other pending cases where conditions or obligations were to be attached to exemption decisions.

58. In a judgment of 30 January 1974,[2] the Court again considered the expression 'authorities of the Member States' in Article 9(3) of Regulation No 17.[3] Articles 85 and 86 are directly applicable in relations between individuals, and these Articles therefore create rights for the individuals concerned which the national courts must uphold. So it is clear that, if this protection is to be ensured, the fact that in some of the States the expression 'authorities of the Member States' includes courts, cannot debar a court before which the direct effect of Article 86 is pleaded from giving judgment on the point; such a court may, if it considers it necessary, stay the proceedings so as to await the outcome of any action taken by the Commission. On the other hand, it should generally allow proceedings before it to continue when it finds either that the conduct in dispute is manifestly not liable to have an appreciable effect on competition or on trade between Member States, or that there is no doubt as to the incompatibility of that conduct with Article 86.

[1] Case 17/74 (Transocean Marine Paint Association v Commission).
[2] Case 127/73 (BRT v Sabam, BRT I): [1974] E.C.R. 51.
[3] The Court only recently considered this question in its judgment of 6.2.1973 in Case 48/72 (Brasserie de Haecht v Wilkin Janssen): [1973] E.C.R. 77.

This is an important judgment in that its main emphasis is on protecting the rights of individuals who seek to rely on Articles 85 and 86 before national courts. It proposes in effect that the national court should not stay proceedings pending the Commission's decision except in cases where it is doubtful whether the Community competition rules apply. Moreover, the judgment makes clear that the right of a national court in such a case to ask the Court of Justice for a preliminary ruling is not affected by Article 9 of Regulation No 17. The Court thus resolved the doubts arising from its judgment of 18 March 1970.[1]

This case-law should enable the Community rules of competition to be applied more extensively and on a more decentralized basis in all cases of restrictive agreements or abuse of dominant positions in respect of which Court rulings and the Commission's administrative practice have established clearly the present state of the law.[2]

59. In two decisions[3] on interlocutory applications for interim measures under the third paragraph of Article 39 of the ECSC Treaty, the Court provided guidance as to the cases in which this procedure is available. The applicant, Miles Druce (MD), an English firm, had asked the Commission, and then the Court, to take interim measures for its protection by ordering another firm, Guest, Keen and Nettlefolds (GKN) to desist from a particular course of action. GKN had acquired a minority shareholding in MD and had asked the Commission to authorize the concentration under Article 66 of the ECSC Treaty. The Commission refused MD's application, since GKN had undertaken not to alter the *status quo* until the Commission had given its decision. In his Order of 11 October 1973 the President of the Court confirmed the Commission's approach and dismissed MD's application. However it was clear from the Order that both the Court (under Articles 83 and 84 of the Rules of Procedure) and the Commission (under Article 66(5), third subparagraph, of the ECSC Treaty) could take interim measures to protect MD if the *status quo* appeared to be threatened.

By Order of 16 March 1974, the President ruled on a fresh application from MD. By Decision of 14 March the Commission had authorized the concentration. The same day, GKN had issued a takeover bid for the remainder of MD's shares. As MD's management could, in this way, have been prevented from bringing proceedings in the Court against the Commission's Decision, the President of the Court ordered the Commission to provide that its Decision should not enter into force until three weeks had elapsed and to take the necessary measures to ensure that the *status quo* remained unchanged until the end of the three-week period.[4]

The Order made reference to the importance of the interests at stake and to the developments which could intervene before the takeover battle was finally resolved.

[1] Case 43/69 (Bilger v Jehle): Recueil 1970, p. 127.
[2] Third Report on Competition Policy, point 5.
[3] Joined Cases 160, 161 and 170/73 R and R II: Order of 11.10.1973: [1973] E.C.R. 1049; Order of 16.3.1974: [1974] E.C.R. 281.
[4] Point 137, footnote 1.

Since then, the Commission has on a number of occasions had to take interim measures of protection under the third subparagraph of Article 66(5) in exercising its merger control powers.[1]

Industrial and commercial property rights

60. The scope of Article 36 of the EEC Treaty and the restrictions imposed on the exercise of industrial and commercial property rights by the principle of the free movement of goods were examined, in relation to trademarks, in a judgment of 3 July 1974.[2] The problem here was whether the holder of a trademark in a Member State could lawfully oppose the import into that State of products lawfully manufactured under the same trademark in another Member State. Originally the two trademarks had been held by the same person; the original holder, established in German territory, had assigned his trademark rights in Belgium to a subsidiary formed and controlled by him, but which became independent following an act of a public authority (expropriation). There was thus no link between the two existing holders so that Article 85 was not in question. The Court considered the matter in the light only of the rules on free movement of goods. The judgment follows that of 8 June 1971,[3] which had stressed that the free movement of goods is a fundamental principle.

Under Article 36 of the EEC Treaty, it is possible to prohibit or restrict imports in order to protect industrial and commercial property rights. But when the Court interprets this provision it makes, as is well established, a clear distinction between the existence of rights attaching to industrial and commercial property and the exercise of such rights. Measures permitted by virtue of Article 36 of the EEC Treaty must be justified by the need to protect the specific object of the relevant industrial or commercial property right. National laws conferring such protection may not go further by enabling the holders to segregate markets on national lines, and so impeding the creation of a single market which is one of the main objectives of the Treaty.

Thus the primary object of legislation relating to trademarks is to protect the legitimate holder of the trademark against infringement by persons lacking legal title. On the other hand, the Treaty provisions relating to the free movement of goods within the common market do not permit trademark rights to be exercised as a means of prohibiting the marketing in one Member State of goods lawfully produced under an identical trademark of the same origin. Nor does the need to inform consumers of the origin of trademarked products justify such restrictions. Although it is useful to inform consumers on this point, the information should be given by means other than such as would affect the free movement of goods.[4]

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[1] Point 141.
[2] Case 192/73 (Van Zuylen v Hag).
[3] Case 78/70 (Deutsche Grammophon Gesellschaft v Metro SG Großmärkte) [1971] Recueil 487.
[4] Point 68.

61. Two judgments of 31 October[1] confirm this case-law in relation to rights concerning patents and, again, trademarks. The first of these two judgments marks a major development in the Court's approach to exclusive rights, in this case in relation to patented goods. The judgment confirms the Commission's view that the principles laid down in the DGG/Metro judgment as regards rights akin to copyrights must also be applied to patent rights.[2]

The Court stated that, in relation to patents, a main objective of industrial property rules is to reward the creative effort of the inventor by guaranteeing to the patentee, in addition to the right to oppose infringements, the exclusive right to use an invention for the purpose of manufacturing industrial products and putting them into circulation for the first time, either directly or by the grant of licences to third parties. But the exercise by the patentee of the right he enjoys under the legislation of a Member State to prohibit the sale, in that State, of a product which is protected by the patent but which has been marketed in another State by the patentee or with his consent is incompatible with the rules of the EEC Treaty relating to the free movement of goods within the common market. If it were otherwise, the patentee, particularly where he held parallel patents, would be able to partition off national markets and thereby to restrict trade between Member States, even though no such restriction was necessary to guarantee to him the essence of the exclusive rights flowing from the parallel patents.[3]

[1] Case 15/74 (Centrafarm and de Peijper v Sterling Drug Inc.); Case 16/74 (Centrafarm and de Peijper v Winthrop).
[2] First Report on Competition Policy, point 67.
[3] Point 22.

Chapter II

Main decisions and measures taken by the Commission

The decisions and measures taken by the Commission in 1974, of which the main ones are summarized below, illustrate a number of aspects of the Commission's competition policy with regard to restrictive agreements, dominant positions and mergers.

Implementing Article 85(1), it has acted against agreements and restrictive practices involving market-sharing and price-fixing. For instance, it has stated that the establishment by business associations of rules which, although allegedly designed to prevent unfair competition, in fact gave the parties thereto the ability to take joint action against normal forms of competition, was incompatible with Article 85 (*Manufacturers of glass containers*, Chapter II, § 1, point 62). It imposed fines in respect of a collective boycott of a dealer who refused to comply with the private marketing rules set up by a producer grouping, in particular as regards prescribed prices (*Papiers peints de Belgique*, Chapter II, § 1, point 65). It also took decisions prohibiting a market-sharing agreement based on recourse to a trademark in order to prevent imports into one Member State of products lawfully marketed in another Member State (*Advocaat Zwarte Kip*, Chapter II, § 1, point 68), and took a decision against terms in an agreement which restricted the freedom of traders to obtain supplies at auction sales of imported citrus fruits in the Netherlands (*FRUBO*, Chapter II, § 1, point 71).

In an agreement between two producers, one in a member country and one in a non-member country, the Commission gave a decision following up its earlier view that private agreements between undertakings, even if their object is to promote orderly marketing, still came within the scope of Article 85. The agreement here was designed to restrict the growth of imports of products from a non-member country into a Community country, by aligning import prices on domestic prices (*Ballbearings*, Chapter II §1, point 74).

In line with its own long-standing practice, endorsed by the Court of Justice the Commission broke up a number of national market protection arrangements involving aggregated turnover rebates, collective mutually exclusive commitments, the imposition or recommendation of common prices and other collective restrictions on supply and marketing arrangements (*Records, Electrodes, Flat glass*, Chapter I, § 1, points 76, 78 and 79).

Continuing the development of its policy on cooperation between undertakings, the Commission made use of the exemption provisions in Article 85(3) to encourage transnational cooperation in advanced technology industries. For instance, it authorized an agreement for joint R & D, manufacturing and distribution between two manufacturers of precision optical equipment, after the two firms had agreed to abandon restrictions relating to the management of the parties' industrial property rights and following the establishment of a satisfactory guarantee and after-sales service system as part of the mutual exclusive concession arrangements (*Rank/Sopelem*, Chapter II, §2, point 80).

It also declared its intention of giving favourable decisions on two agreements concerning the *marketing of irradiated nuclear fuel reprocessing services* (Chapter II, §2, point 84).

Concerning the application of Article 85 to the distribution of goods, the Commission had its first opportunity to discuss the compatibility with Article 85 of a selective distribution system in the motor industry. The main ground for justification in the Commission's view was the establishment of permanent close cooperation between producer and dealer which went beyond that of a normal distribution arrangement (*Bayerische Motoren-Werke*, Chapter II, §3, point 86). This individual decision is of general relevance as regards motor vehicle distribution in that it shows how far restraints of competition, in such arrangements, can be allowed.

In the perfume industry, the Commission considered that it could withdraw its intervention in respect of the selection of sales points by two manufacturers, after the manufacturers had agreed to abandon restrictions whose effect was to partition markets at the distribution stage and to maintain major retail price differences for identical products within the common market (*Dior* and *Lancôme*, Chapter II, §3, point 93). As a result, perfume manufacturers now know what changes they may need to make to their sales arrangements to comply with Commission requirements.

The Commission also adopted two exemption decisions which made clear its interpretation of the law as to exclusive dealing agreements which are not covered by Regulation No 67/67. One of these cases concerned a contract between two companies in a single Member State for the retail sale of products within that State (*Goodyear/Euram*, Chapter II, §3, point 98) while in the other case the contract conferred exclusive selling rights throughout Community territory (*Europair/Duro-Dyne*, Chapter II, §3, point 102).

After representations from the Commission a number of other trading agreements were brought into line with Article 85 without a decision being necessary. In one of these cases the Commission confirmed that export bans imposed by one firm on another cannot be justified by country-to-country differences in safety requirements (*AEG-Telefunken*, Chapter II, §3, point 106). The Commission also continued its action against supply terms restricting sales between dealers, in cases where trade

between Member States could be affected (*Sperry Rand GmbH*, Chapter II, §3, point 107). It also considered the need to guarantee satisfactory after-sales service in a case of parallel imports so as to make such imports actually practicable (*Constructa*, Chapter II, §3, point 109).

Applying Article 86 in a new case, the Commission decided to impose a fine in respect of an infringement of this Article, which prohibits abuses of dominant positions (*General Motors Continental*, Chapter II, §4, point 110). GMC had charged an excessive price for the issue of certificates of conformity in respect of vehicles not sold through its own distribution network but brought into Belgium as parallel imports from other countries in circumstances in which GMC was the only body authorized to issue such certificates under the relevant national law. A decisive consideration in this decision was that abusive inspection charges were likely to hinder parallel imports. The Commission considers that such imports deserve special protection in the interests of competition and of consumers within the common market.

In its first decision in another area, the Commission considered that it was not necessary to intervene in relation to the formation of joint subsidiaries under a general cooperation agreement which contained a non-competition clause between the parent companies in respect of products covered by the agreement. The Commission concluded, in all relevant circumstances, that the operation did not amount to an infringement of Article 85(1) and that the market shares involved were too small for Article 86 to apply (*SHV – Chevron*, Chapter II, §5, point 114).

In exercising its prior control powers under Article 66 of the ECSC Treaty, the Commission authorized *Thyssen* to acquire not more than 25% of the share capital o *Solmer*, so that Solmer then became jointly controlled by Sacilor, Usinor and Thyssen. The transaction was authorized mainly because Solmer as a production cooperative did not itself market its flat products; and at the same time the bulk of the three groups' production was still accounted for by their own factories; in addition, they processed and marketed their production side by side with their shares in Solmer production. Conditions were attached to the authorization in order to ensure that the separate groups remain completely independent of each other, particularly in their marketing policies (Chapter II, §6, point 121).

The Commission also authorized the *British Steel Corporation* (BSC) to acquire control of *Johnson & Firth Brown Ltd.* (JFB), on condition that within one year BSC divested itself of two companies of the JFB Group. In view of BSC's position on the British market for forged ingots and blooms and wire rod, control over these two companies would have enabled it to prevent effective competition (Chapter II, §6, point 125).

The Commission also authorized the Federal German Government to acquire a majority shareholding in *Gelsenberg AG*, Essen, which it was proposed to integrate in *VEBA*, already under state control. Since other undertakings already directly or

indirectly controlled by the Federal Government were managed as independent economic enterprises, the only issues to be considered here concerned the effects on competition of integrating Gelsenberg into VEBA. In the Federal Republic, VEBA and Gelsenberg each accounted for some 33% of the wholesale coal trade. The acquisition was authorized because the relevant firms would not be in a position to determine prices for solid fuels in a substantial part of the market, nor to control or restrict production (Chapter II, §6, point 128).

In relation to the distribution of steel products, the Commission authorized a number of mergers designed to streamline and strengthen existing distribution networks (*Restructuring the Sacilor trading network*, *GKN/Miles Druce*, *BSC/Lye Trading*, Chapter II, §6, points 131, 135 and 138) or to make it easier for producers and stockholders to enter new markets within the Community (*GKN/Cassart*, *Klöckner/Perry*, Chapter II, §6, points 139 and 140).

1974 was the first year in which the Commission had to take interim measures of protection so as to ensure the maintenance of the *status quo* between enterprises, before the Commission could take its decisions on matters of substance. The cases concerned takeover bids aimed at gaining control over undertakings and the relative applications for authorization under Article 66. Interim decisions were made under the third subparagraph of Article 66(5) (*Marine-Firminy/Schneider/Dénain/De Wendel and Johnson & Firth Brown/BSC/Dunford Hadfields*) (Chapter II, §6, points 142 and 143).

The bulk of the Commission's market supervision work, aimed at verifying compliance with previous decisions, was accounted for by inquiries into *fertilizer* selling agencies and the prices situation on the *dyestuffs* market (Chapter II, §7, points and 146).

§1 — Elimination of agreements prohibited under Article 85

Pricing and market-sharing agreements

Agreements between glass container manufacturers

62. Under Article 85(1) the Commission addressed a decision[1] to the major hollow glass manufacturers in five Member States: Boussois-Souchon-Neuvesel and Saint-Gobain Emballage (France), Gerreisheimer Glas and Veba-Glas (Germany), Bouteilleries Belges Réunies and Verlica-Momignies (Belgium), Vereenigde Glasfabrieken Schiedam (Netherlands), Bordoni-Miva, Avir and Vetri (Italy). In the decision, the

[1] Commission Decision of 15.5.1974 in case IV/400: OJ L 160 of 17.6.1974, p. 1.

Commission declared illegal a series of agreements based on an underlying agreement referred to as 'Fair Trade Practice Rules',[1] or the IFTRA Rules (International Fair Trade Practice Rules Administration, Vaduz, Liechtenstein). The underlying agreement was supplemented by subsequent detailed agreements between the parties which facilitated the implementation of the IFTRA rules through exchange of information on prices, application of a common formula for calculating prices and the collective application of the delivered prices system.

63. Following investigations in 1971 and 1972, it was clearly established that, while it was claimed that certain clauses of the agreement were aimed at preventing unfair practices as between the parties, their real object was to eliminate normal competition on prices, rebates and terms of sale to the detriment of glass container buyers in the common market.

For instance, it was considered unfair to undercut a competitor's prices and that alignment with a competitor's prices in his regional market was the only 'fair' approach. The main purpose of these arrangements was to ensure that a glass manufacturer, who was a party to the agreement, and who made deliveries outside his normal business territory, did not undercut the prices of that party to the agreement who was regarded as the national or local price leader in the relevant area. This was achieved by a number of other clauses concerning publication and notification to competitors of individual gross price lists and rebates and concerning obligation not to deviate secretly from listed prices.

The Commission's investigations also revealed that a number of arrangements had been made to implement or supplement the initial agreement on trade practice rules.

For instance, by a number of procedures varying from year to year, an exchange of information system had been established between members on prices, rebates and selling terms which they applied in their respective countries. This included amendments which members were to make from given dates, and individual exceptions granted to certain customers.

[1] In a number of countries there are legally binding trade practice rules whose aim is to clarify national law and judicial decisions on unfair competition as regards individual industries. These rules are drawn up and promulgated either by a governmental agency (as is the case in the United States relative to the Trade Practice Rules of the Federal Trade Commission) or by a private organization with governmental approval, as is the case in Germany relative to the Wettbewerbsregeln which economic and trade associations can draw up for their own branches and which are registrable by the Kartellamt (Section 28 of the law against restrictions of competition).
'Unfair competition' generally means any competitive conduct which conflicts with principles of fairness, notions of honesty or professional etiquette. There is no universally acceptable definition since the law of an individual country may regard as unfair a form of competitive conduct which is not so regarded in a neighbouring country. In the case in point, the Commission decision challenged only rules which clearly had nothing to do with the concept of fairness. The decision did not attempt to answer the question whether it would be desirable to adopt certain of the rules not explicitly challenged by the decision, whether in national legislation or otherwise.

The enterprises had also prepared a joint cost calculation formula applied uniformly by the manufacturers of bottles and by some of the manufacturers of flasks. This was to enable users of the formula to produce parallel cost price curves and to fix their selling prices accordingly. Although no particular rates for calculation were incorporated, the formula, by forming part of a whole restrictive agreement, also constituted an infringement of Article 85(1). It could not be regarded as having neutral competitive effects in the light of the provisions set out in the Communication on Cooperation between Undertakings.[1]

Finally, the parties had agreed that they would all apply the delivered prices system so as to restrict the distribution area of each party and to avoid glass container purchasers from comparing prices offered by nearby and distant factories.

64. Moreover, the interrelated arrangements resulting from the rules agreement and from supplementary agreements relating to price formation, tended to perpetuate existing situations and to partition off the common market in an industry where the products supplied showed considerable consistency. The bottles, jars and flasks concerned were largely standardized and manufactured by relatively small numbers of competitors on the market in the six original Member States. It was also a characteristic of the market that a few major undertakings were price leaders in their respective branches and in their respective countries, and that a number of small firms of lesser importance followed the trade policy established by the leaders.

The Commission refrained from imposing fines since the type of restrictions in this case had not previously been dealt with by a Commission decision and it was not obvious for the relevant undertakings that their conduct infringed the Treaty.

Groupement des fabricants de papiers peints de Belgique

65. The Commission found that the internal rules of procedure governing the Groupement Belge des fabricants de papiers peints and a number of decisions by this association of undertakings constituted infringements of Article 85(1).[2] It accordingly ordered the relevant undertakings to terminate an agreement and the decisions based on it, where their effect was to restrict the free play of competition in the sale of wallpapers in Belgium.

The Groupement had notified the relevant agreement in 1962, but the notification was incomplete. Following investigations carried out in response to complaints against

[1] Rule II (d): OJ C 75 of 29.7.1968.
[2] Commission Decision of 23.7.1974 in Case IV/426: OJ L 237 of 29.8.1974, p. 3. The undertakings concerned have appealed against the Decision to the Court of Justice.

the Groupement received in 1972, it was found that the Groupement was a comprehensive marketing organization set up to cover the whole industry concerned. It included collective sales price fixing and the imposition of retail prices on dealers, and also the standardization of general selling conditions, rebates, clearance sales, etc. Apart from preventing members of the association from fixing prices and terms individually, it prevented them also from seeking competitive advantages through their own advertising or from individually making better services available to their customers. Furthermore, a resale price maintenance rule was designed to eliminate competition between wallpaper dealers.

The agreement and the decisions covered not only wallpapers produced by members of the Groupement but also imported wallpapers sold in Belgium by the members. In line with the approach taken by the Court and the Commission in earlier cases the effect of such an agreement which covered the entire territory of one Member State[1] and also contained arrangements for aggregated rebates on total turnover,[2] was to consolidate divisions between national markets and to hinder imports from other Member States.

66. The main interest of the case arises from the ban under Article 85(1) of a decision between enterprises to impose a collective boycott. This amounted to a particularly serious violation of the rules on competition, since its aim was to eliminate a troublesome competitor. In this case the Commission, considering that the collective boycott went beyond the operations described in the notification, imposed heavy fines on the undertakings involved. The collective refusal to supply originated in the desire of the Groupement to enforce its rules, and particularly its imposed prices policy. Following an individual action by one of its members, the Groupement decided on a collective boycott, from October 1971, of a Belgian wallpaper wholesaler who refused to comply with the prices imposed by the Groupement and to ensure that they were applied by his customers. The wholesaler concerned was a supplier of wallpapers to self-service shops which were retailing below the fixed prices.

67. The Commission refused to grant exemption from the ban on restrictive practices. Its grounds were the preservation of an artificially high price level for wallpaper on the Belgian market aimed at by the collective pricing agreements, and the inhibiting effect on imports of the aggregated rebate system. Not only did users fail to derive any benefit, they actually suffered loss.

[1] e.g., judgment of the Court of Justice given on 17.10.1972 in Case 8/72 (Vereniging van Cementhandelaren): Recueil 1972, p. 977.
[2] e.g., Commission Decisions of 29.12.1970 (Ceramic Tiles): OJ L 10 of 13.1.1971, p. 15; 3.7.1973 (Water heaters): OJ L 217 of 6.8.1973, p. 34.

Advocaat Zwarte Kip

68. Similarly to the Court of Justice which has recently reaffirmed that recourse to trademark rights to restrict the free movement of goods lawfully marketed within the common market is incompatible with Articles 30 and 36 of the EEC Treaty,[1] the Commission has made it clear that it will use its powers under Article 85 to oppose any attempts to partition off markets through the assignment or use of trademarks.

69. The Commission condemned an agreement to assign a trademark insofar as the trademark was used to prevent imports of products bearing the same trademark.[2] By an agreement concluded in 1938, the Dutch firm Van Olffen (currently a wholly-owned subsidiary of Heineken NV) had assigned its rights over a trademark relating to Advocaat Zwarte Kip for egg liqueurs in Belgium and Luxembourg to a firm whose rights were ultimately vested in SA Cinoco in which the Stella Artois brewing group holds more than 25% of the shares. From the terms of the initial contract and from subsequent events the agreement was found to have the effect of segregating the Benelux markets and, although this occurred before the EEC Treaty came into force, the same effect continued thereafter. This was borne out by an exchange of letters between the parties by which the assignee was assured that he would have absolute territorial protection and by an action for infringement of the trademark right brought by SA Cinoco against a Belgian wine trader who had imported from the Netherlands a quantity of advocaat manufactured and marketed under the relevant trademark by Van Olffen.

70. The Commission Decision will not prevent the Belgian assignee from using his trademark rights as a means of preventing the import and sale of products which infringe his trademark. However products manufactured by the original Dutch trademark holder and imported into Belgium and Luxembourg were not to be considered as infringing products and the existence of the trademark right was therefore not directly attacked.

Moreover, the erection of barriers between Member States on the basis of trademark law was not justified by reason of quality differences between the relevant products. Consumers would not be misled as to quality or origin of products sold under the same trademark in a single market, unless a supplier failed to indicate the origin of the product or its composition. But information for consumers on those points can be

[1] Judgment of the Court of Justice of 3.7.1974 in Case 192/73 (Van Zuylen Frères v Hag AG): OJ C 114 of 27.9.1974, p. 26. See also point 60.

[2] Commission Decision of 24.7.1974 in Case IV/28.374 (Advocaat Zwarte Kip): OJ L 237 of 29.8.1974, p. 12. An appeal against this Decision has been withdrawn.

provided by means which would not amount to barriers to the free movement of goods.[1]

This decision was made pursuant to a complaint from a parallel importer after a national court had stayed appeal proceedings in respect of infringements. The decision shows the use of the application of Article 85 in relation to trademarks, even though the exercise of trademark rights in a way which is unlawful in relation to the Treaty objectives is in itself contrary to the rules on the free movement of goods.

FRUBO

71. Restrictive provisions of an agreement which set up a system of auction sales in Rotterdam for certain types of fruit (mainly citrus fruit) imported into the Netherlands were also the subject of a Commission decision.[2] The agreement was concluded between an association of the main Dutch fruit importers (Nederlandse Vereniging voor de Fruit en Groentenimporthandel) and an association of virtually all the Dutch fruit wholesalers (Nederlandse Bond van Grossiers in Zuidvruchten en ander geimporteerd fruit 'FRUBO'). In order to be allowed to take part in auctions, through which most (roughly 80%) of the citrus fruit sold in the Netherlands is handled, dealers had to comply with the conditions imposed by the agreement. The main restriction, apart from a set of technical provisions as to the organization of auction sales, consisted of the obligation for importers and wholesalers to market citrus fruit grown in non-member countries and intended for sale in the Netherlands only through the Rotterdam auction sales.

72. As the agreement originally stood, the conditions imposed were even more restrictive, since only Dutch importers were allowed to sell at auction sales and even Community-produced citrus fruit was covered by the agreement. Following objections from the Commission and complaint from twenty-two Dutch wholesalers who took part in the Rotterdam auction sales, the associations concerned made their agreement somewhat more flexible, without however deleting the major restrictions on the freedom for Dutch wholesalers to obtain supplies. They decided to keep these wholesalers subject to the ban on direct imports from non-member countries and to submit purchases of citrus fruits from elsewhere in the Community to a major restraint,

[1] In this case Van Olffen had been manufacturing since 1973 part of the advocaat then sold by Cinoco on the Belgian and Luxembourg markets; at the latter's request, the advocaat supplied was different in composition, alcoholic strength and presentation from that commonly sold in the Netherlands.

[2] Commission Decision of 25.7.1974 in Case IV/26.602 (FRUBO): OJ L 237 of 29.8.1974, p. 16. Proceedings against the Commission decision are pending before the Court of Justice. Under an Order of the President of the Court given by summary procedure on 15.10.1974, the decision will not be implemented until the Court has ruled on the substance of the matter; however, clauses under which penalties may be imposed on the members of the agreement may not be applied during that period (OJ C 159 of 21.12.1974, p. 4).

namely customs clearance by another party, thereby compulsorily introducing an additional trading stage. Accordingly, the transactions concerned became virtually impossible. The Commission felt therefore obliged to adopt a decision requiring termination of these restrictions.

73. The Commission's Decision was not aimed at the auction sales system as such. It is quite possible that advantages may be derived from the resulting concentration of supply and demand although in certain cases such advantages may be practically eliminated by the disadvantages created by the rigidity inherent in such a distribution system. However, in order to attain the advantages which could be gained from the Rotterdam auction sales, it was not essential to prevent wholesalers from having access to possibly cheaper or better supplies, either because prices were lower on other Community import markets or because, price for price, quicker supplies or fresher fruit could be obtained. It would seem that such opportunities do occur, since a number of wholesalers subject to the agreement at times preferred to obtain supplies elsewhere, despite the penalties which they risked incurring. Moreover, even in the absence of the compulsory supply arrangements complained of, the nature and frequency of direct imports by wholesalers had not been such as to cause the disappearance of this marketing system by reducing its advantages.

Voluntary restraint agreements

Franco-Japanese ball-bearings agreement

74. Continuing the examination of Japanese measures for the voluntary restraint of exports to the Community, the Commission decided that, in 1972, the main French and Japanese ball-bearings producers had concluded an agreement which infringed Article 85(1).[1]

The agreement consisted largely of an exchange of letters between trade associations following negotiations, and revealed a consensus on the part of the parties that the price of Japanese ball-bearings imported into France should be increased so as to align such prices with bearings of French production. Since price competition was therefore neutralized the agreement amounted to a serious restriction of competition in the common market. This was particularly the case since the relevant undertakings were the largest ball-bearing producers in their respective countries. The French side was represented by SKF Compagnie d'Applications Méchaniques (more than 80% of the shares being held by the Swedish Group SKF) and SNR Société Nouvelle de Roulements (a wholly-owned Renault subsidiary), and the Japanese side by four firms: Nippon Seiko Kaisha, Koyo Seiko Ltd., Fujikoshi Ltd. and NTN Toyo Bearing Ltd.

[1] Commission Decision of 29.11.1974 in Case IV/27.085: OJ L 343 of 21.12.1974, p. 19.

The agreement was also liable to affect trade between Member States. The scope of the price increases permitted under the agreement depended on whether they could affect not only direct imports of ball-bearings from Japan into France but also indirect imports via other Member States. This serious restriction of competition covered the whole of the territory of France, so that trade between France and the other Member States was likely to take place in conditions different from those which would have obtained in the absence of the agreement.

Since the agreement had not been notified, the question of exemption under Article 85(3) could not be examined. In any event, the Commission did not feel that the agreement could have the beneficial effects referred to in Article 85(3), in particular by allowing to consumers some share of benefit.

75. This Commission decision is noteworthy in that the Commission's Opinion on the import into the Community of Japanese products has been applied for the first time. In this Opinion, published in the Official Journal in October 1972,[1] the Commission explicitly drew the attention of firms to the applicability of Article 85 of the EEC Treaty to measures designed to restrict Japanese imports into the Community or to regulate, for example, their prices or quality. The Commission recommended that such agreements, decisions and practices should be notified in good time. As stated by the Commission in its Opinion, Article 85 is fully applicable to agreements of the kind in question. The agreement was not within the category of a trade agreement between the Community and Japan; nor were the restrictions on the Japanese firms imposed by State authorities. The agreement consisted of bilateral measures of a private nature, and neither the French nor the Japanese Government had been in any way involved.[2]

In its decision the Commission found that the agreement constituted an infringement of the rules on competition. However, the Commission did not enjoin the parties to terminate the agreement, since the parties had made a formal statement that they were no longer bound by it.

The Commission did not fine the firms involved in view of the special circumstances of the case, and in particular since the agreement had been entered into before the Opinion had been published and the firms had not been in contact with each other since the publication date.

[1] OJ C 111 of 21.10.1972, p. 13.
[2] Third Report on Competition Policy, point 20.

National market protection agreements

Dutch agreement in the record industry

76. Without a decision being necessary, Commission intervention[1] brought to an end restraints of competition arising from an agreement between some twenty Dutch record manufacturers and importers, grouped in the 'Nederlandse Vereniging voor Grammofoonplaten Importeurs (NVGI)'. The agreement had established close relations with the 1 600 or so record retailers in the Netherlands, who are members of the 'Nederlandse Vereniging voor Grammofoonplaten Detailhandelaren (NVGD)'.

NVGI controls roughly 90% of the Dutch record market and takes in the main Dutch record manufacturers as well as the subsidiaries or importers of all the principal labels in the world, such as Ariola Eurodisc Benelux, Barclay Nederland, BASF Nederland, Bovema (EMI), CBS-Artone, Inelco Holland (RCA), Miller International, Phonogram (Philips), Polydor Nederland (Polygramm) and Vogue Nederland.

77. The restrictions and rules concerned constituted infringements of Article 85 on grounds consistent with principles previously established by the Court and regularly upheld by the Commission.[2] Particularly, the following provisions were affected:

- a joint reciprocal exclusive sales and supplies obligation binding upon the members both of the manufacturers' and importers' association and of the retailers' association;
- a collective price notification obligation (open price system), and a joint rebate system binding upon the members of the manufacturers' and importers' association;
- a joint recommendation to the members of the retailers' association as to compliance with minimum retail prices.

The same applied to a number of general guidelines concerning sales outlets, for instance:

- the provision prohibiting members of the manufacturers' and importers' association from selling to individuals and record libraries, and from marketing records from each other's catalogues;
- the rules prohibiting members of the retailers' association from selling records to other undertakings, including their own members.

All these restrictions, which were aimed at imposing very tight limits on outlets and supplies on the Dutch record market and at consolidating market fragmentation were discontinued so that trade flows can now develop normally and prices can be fixed individually in line with supply and demand factors.

[1] Bull. EC 2-1974, point 2114.

[2] For instance, First Report on Competition Policy, points 1, 19 et seq., and 24, and Second Report, point 23.

Belgian and Dutch agreements in the electrode sector

78. Following precedents clearly established by the Court of Justice and the Commission, agreements relating to the Belgian and Dutch markets for standard quality electrodes for arc welding were abandoned by the parties without need for formal decision from the Commission.[1] The agreements affected the main national producers as well as distributors of German electrodes and covered respectively 50% and 90% of the Dutch and Belgian markets.

The Belgian agreement had undergone some structural and operational changes. Originally more restrictive, in that its members had undertaken to respect, and to enforce upon their retailers, minimum prices established by agreement and to operate a system of aggregate rebates on total turnover, it later provided only for fixing a common, non-binding price scale. Nevertheless, as previously held by the Court in other cases, this still constituted a restraint of competition contrary to Article 85(1). The Dutch agreement was even more restrictive in its scope since, apart from the preparation of common price lists, it provided for the sharing of customers and prohibited rebates of every kind.

After these agreements had been abandoned, producers and importers once again had full freedom of action in their business relations with customers.

Relations between undertakings in the glass industry

79. The aggregated rebates agreement on flat glass products in Germany, concluded between the local subsidiaries of the two largest companies in this industry, namely St. Gobain/Pont-à-Mousson and Boussois-Souchon-Neuvesel, was abandoned with effect from 31 December 1974.[2] Because such a system naturally attracts orders,[3] it was helping to strengthen these firms' control over the market for this very important type of glass. The Commission ensured that all relevant customers were informed.

Following intervention by the Commission, the two groups also separated a number of commercial operations which they were developing jointly, mainly on the French and German markets, concerning flat glass products and insulation fibres.

A plan for divestiture of their common interests in the manufacture and sale of safety glass for the motor industry, to be put into effect in 1975, is now being reviewed by the Commission.

The Commission feels that these changes will boost competition on the glass market; this is particularly necessary as the trend towards concentration is gathering momentum in the industry which is exemplified by St. Gobain's acquisition of control over

[1] Bull. EC 11-1974, point 2111.
[2] Bull. EC 10-1974, point 2107.
[3] First Report on Competition Policy, point 24.

St. Roch and BSN's acquisition of Glaverbel-Mecaniver. Since 1969/70 the Commission has continued to survey the situation in this industry, where it had already had to break up a number of agreements and concerted practices. Their incompatibility with the rules on competition was aggravated by the high degree of concentration in this market.[1]

§ 2 — Encouragement of permitted forms of cooperation

Rank/Sopelem agreement

80. Continuing the development of its policy on cooperation between firms, the Commission exempted from the general prohibition on agreements in Article 85(1) an agreement setting up cooperation in R & D, manufacturing and distribution between two potentially competing manufacturers of precision optical equipment (lenses and lens controls for the motion picture and television industries).[2]

The agreement was entered into between Société d'Optique, Précision, Electronique et Mécanique (Sopelem), Paris, and Rank Precision Industries Ltd., London, two firms which have been leaders in research and manufacturing in this industry. Sopelem had been the first to develop ultra-high speed cine-cameras (10 million frames/sec.) used by NASA. The mutually complementary technology of the parties and Rank's worldwide sales and aftersales service network were found to provide a sound basis for coordination of the two firms' R & D, manufacturing and sales activities at a time when a number of leading producers such as Zeiss-Ikon had to give up production of amateur cine-equipment following the influx of cheap photographic equipment from certain non-member countries, especially Japan. The market concerned in this case covers technically advanced and specialized products; and sales are dependent on technical considerations as much as on prices. There are very few major producers on this market, but there is active competition between them. The products are for sale primarily to a specialized clientele, namely camera manufacturers, who are well aware of the identity and technical characteristics concerned. Since there is no intermediate dealership stage, customers are in direct contact with the manufacturers themselves of the latters' networks. Purchasers are well placed relative to the manufacturers in regard to choice of products and bargaining power. Sales by Rank and Sopelem together account for some 20% of the Community market.

81. The first version of the various contracts concluded between the parties contained provisions which the Commission was to declare incompatible with Article 85. This applied particularly to an absolute ban on lens exports by each party to the other's sales territory, to restrictions on the rights of the parties to manage their industrial

[1] Bull. EC No 8-1970, Part II, Chapter I, secs. 8 and 9.
[2] Commission Decision of 20.12.1974 in Case IV/26.603 (Rank v Sopelem) OJ L 29 of 3.2.1975, p. 20.

property rights (filing, maintenance and protection of patents) and to limitations on engaging in R & D programmes with third parties in the relevant field. The combined effect of a number of clauses, particularly the obligation for Sopelem to abandon its business name and trade marks upon expiry of the agreement, including those used prior to the agreement, entailed a not inconsiderable risk that the activities in question of Sopelem would no longer be able to continue following termination of the agreement.

82. These restrictive arrangements were no longer contained in the agreement finally adopted by the two firms after extensive modification following representation by the Commission. The current agreement provides for close cooperation between the competing producers and satisfies the preconditions for exemption. Some restrictions of competition remain, such as the specialization arrangements on research and development and manufacture and the mutual exclusive dealing rights under the market-sharing provisions of the agreement, which extend to EEC territory. However, the economies of scale obtainable by each party, the fact that each was free to use the other's sales network (particularly in the case of Sopelem, which could make use of the world-wide Rank network, whereas without the agreement it would have had to envisage extensive investments spread over a number of years), and the improvement of productivity and profitability in research and manufacture, showed that technical and economic advantages could be obtained from which consumers could benefit. The fact that the parties to the agreement were effectively competing with each other, suggested that the benefits would be maintained and that the market would not be monopolized.

83. The revised version of the agreement, which was the subject of the Commission decision, no longer contained restrictions which were not essential to the attainment of these objectives. The parties are to cooperate on research and development while retaining their individual activities; patents will be managed jointly or separately, depending upon whether the products concerned are joint products or products in which industrial property rights belong individually to either one of the parties, but always on the basis of equal rights and duties; there are no longer to be obstacles to collaboration by one or other of the parties with third parties on research and development or subcontracting. Moreover, it is provided that trademarks under which joint products and Sopelem products are to be marketed but which belong to Rank, may be purchased by Sopelem at the end of the agreement for a reasonable price. Although each party is bound by the agreement not actively to seek customers in the other party's territory, either party may meet unsolicited orders from the other party's territory within the common market on the exporting party's usual terms and at his usual prices. In any such case the exporting party will pay to the other a commission confined to the value of the 'free' after-sales service (generally included in invoices at a flat rate of 2% of selling prices) which the latter will actually have to bear in his

territory for products not originally sold by him. It is noteworthy in this connection that the Commission had also opposed the adoption of a general export commission scheme which was to replace the export ban, on the ground that the scheme itself and the amounts involved would effectively have acted as a disincentive to exports by each party to the other's territory within the common market. Each party is also bound to provide satisfactory after-sales service on identical conditions to all customers in his territories, even for products originally sold by the other party.

Taking these matters into account, the Commission decided to grant exemption for a ten-year period, which was regarded as long enough for the agreement to achieve its objectives. The Commission coupled its Decision with reporting obligations upon the parties to enable it to monitor developments of the activities under the agreement.

Agreements on the reprocessing of nuclear fuels[1]

84. The Commission also gave public notice of its intention[2] of taking favourable decisions on two agreements notified to it, which concern the marketing of reprocessing services for irradiated oxide nuclear fuels.The first agreement is between two firms which are operating or are shortly to operate large-scale oxide nuclear fuels reprocessing plants: British Nuclear Fuels Ltd. (BNFL) and the French Commissariat à l'Energie Atomique, together with a third firm Kernbrennstoff-Wiederaufarbeitungsgesellschaft mbH (KEWA), which has decided to build a reprocessing plant. The agreement provides for coordination of the parties' investments in this field and that KEWA will bring its own plant, with a capacity of something like 1 500 t/year, on stream as soon as the British plant (Windscale, 800 t/year) and the French plant (Cap de la Hague, 800 t/year) are operating at capacity, probably in 1980. The agreement also provided for the formation of a joint subsidiary which was established under the name 'United Reprocessors Gesellschaft mbH' (URG) for the joint marketing of the reprocessing services offered by the three parties and for the allocation of reprocessing work as between their plants.

The agreement related to the foregoing was entered into between four German chemical firms—Bayer, Hoechst, Gelsenberg and Nukem— for the formation of the joint subsidiary, KEWA, through which joint holdings in URG are to be acquired.

85. Before it adopts its final decision, the Commission must carefully examine the situation of the oxide fuels reprocessing market and forecasts of demand for reprocessing capacity, as well as the specific aspects of the reprocessing industry. At best, the Commission can envisage an authorization for an initial transitional period, so far as

[1] The object of reprocessing nuclear fuels is to recover the fissile material (uranium and plutonium) which these fuels still contain after irradiation in nuclear reactors; the recovered fissile material can be reused in manufacturing nuclear fuels.

[2] Notice pursuant to Article 19(3) of Regulation No 17(IV/26.940); OJ C 83 of 16.7.1974, p. 2.

this may be necessary to enable the reprocessing industry to operate under normal conditions of competition. The date of expiry of any authorization could be amended if any of the circumstances underlying the decision changed. In announcing that it intended in principle to give a favourable decision, the Commission has shown that it attaches importance to the position of URG on the European reprocessing market. The Commission is likely to make its decision subject to conditions and obligations to enable it effectively to monitor the business policy of URG in the light of Articles 85 and 86.

§ 3 — Application of Article 85 to distribution

Selective distribution

BMW sales arrangements

86. The Commission has decided to exempt from Article 85(1) the standard contracts of Bayerische Motoren-Werke AG (BMW) for the distribution of its products in Germany. This decision was taken when, following Commission representations, BMW had abandoned export prohibitions which were to have applied within the common market and after BMW had adopted certain other provisions to comply with Article 85(3).[1] The decision applies only to BMW's German sales system, since in the other Member States BMW products are marketed on somewhat different lines and the necessary adaptations have yet to be made.[2] Although the BMW decision is of a specific nature, the Commission feels it could be of general significance for the distribution of motor vehicles, in so far as manufacturers or general importers who wish to apply or establish similar distribution systems will be able to see what kind of restraints on competition may be admissible.

87. In view of the special circumstances governing motor vehicle marketing, authorization has been given to a selective distribution system intended to favour intensive sales promotion in certain contract territories and the provision of after-sales services of a given quality. BMW's German distribution network can be described as a system of the selection of dealers on the basis of several objective criteria as to qualifications and which involve certain minimum requirements imposed on all dealers and sales outlets.

[1] Commission Decision of 13.12.1974 in Case IV/14.650 (Bayerische Motoren-Werke AG) OJ L 29 of 3.2.1975, p. 1.

[2] In France, Italy and Belgium, BMW distributes its vehicles through subsidiaries; in the other Community countries it works through independent importers.

Accordingly, BMW vehicles or parts were not to be sold by firms which, although they were willing to sell them, would not undertake to provide the additional services which BMW required them to provide at the dealer stage or to set up the prescribed service infrastructure (selection on qualitative criteria: namely, firm of sufficient business standing, employment of staff trained in cooperation with BMW, after-sales service according to BMW requirements, minimum maintenance of stocks, minimum guarantees).

In addition, there is quantitative selection of retailers by the manufacturer which amounts to a further restriction of competition in BMW products. Firms may occasionally be excluded although they are willing and able to meet the qualitative requirements, should BMW decide not to increase the number of approved dealers as a matter of marketing policy (quantitative selection). There are no predetermined uniform objective criteria as to this additional form of selection.

88. Nevertheless, in this case the Commission recognized that the reasons given by BMW in support of the restrictions of competition resulting from its selective distribution system were well founded. Selection of a limited number of dealers by BMW could be accepted since it enabled BMW to ensure that its products were rationally distributed in a manner advantageous to the consumer. It could be assumed that it would be cheaper and of greater benefit to the consumer to distribute BMW vehicles under arrangements linked with the provision of services complying with minimum requirements imposed by the manufacturer and the maintenance of a full range of spare parts. The contractual arrangements concerning selection qualified for exemption under Article 85(3) since they enabled BMW to work in continuing cooperation with its dealers in the interests of road safety, of providing a minimum uniform manufacturer's guarantee and of promoting new techniques which reduce environmental pollution. These conditions necessarily entailed a limitation in the number of dealers.

89. It is noteworthy from a legal point of view that, although dealers are primarily to concentrate their efforts on their own sales territories, they are not to be prevented from meeting orders from outside. Accordingly an ultimate customer, in whatever EEC country he may be, can now buy BMW vehicles and spares from dealers other than those locally appointed. BMW dealers have the same freedom as regards obtaining supplies of BMW products from approved BMW dealers other than their contractual partners. The Commission regarded the grant of these freedoms as fundamental for ensuring adequate competition in BMW vehicles and parts at all marketing stages and thus for the elimination of unwarranted price differences within the Community.[1]

[1] A similar principle underlies the Commission's approach to its decision on the selective distribution system applied by OMEGA (First Report on Competition Policy, point 56, and Third Report, point 12).

To ensure that they concentrate on sales promotion in their own areas[1] BMW dealers are not to establish branches or supply depots nor work through intermediaries outside their own territory. But since a BMW dealer is to be able to advertise and canvass outside his own territory provided he has not defaulted on his obligation to provide intensive promotion in his own territory, consumers and other approved BMW dealers outside his territory can approach him with a view to purchasing from him, not only on their own initiative but also in response to national advertising.

90. A change was made also to the provisions under which BMW dealers were to distribute BMW products only. While BMW's consent is still required before vehicles of other makes may be sold, this consent may not be withheld provided there are reasonable grounds for the request. Non-BMW accessories may be sold freely to ultimate customers where such accessories are of no significant importance for the safety of a BMW vehicle. Where it is necessary for the repair of a BMW vehicle to use a spare part which is of significant importance for the safety of the vehicle, BMW concessionaires may use spare parts of other makes if these match BMW quality standards. As regards other spares, the dealers may use whatever parts they like.

These provisions can be regarded as concentrating BMW dealers' sales efforts primarily on BMW products, while not excluding them completely from the market as potential purchasers of spares of other makes or, in individual cases, as sales intermediaries for vehicles of other makes.

91. Furthermore, the fact that BMW has established its own after-sales service system with the help of selected dealers does not mean that independent garages cannot work on BMW vehicles since they can obtain all the spares they need for carrying out repairs from any member of the BMW network. However the ban on supplies of BMW spare parts to independent dealers was accepted, on the ground that, in its absence, approved dealers, who were obliged to maintain a comprehensive range of parts in stock, could have been at a competitive disadvantage as compared with independent dealers who were free to stock only fast-moving items which are the most profitable. Thus BMW dealers could have been prevented from meeting all their obligations, and this would have been to the detriment of the consumer.

92. The period of validity of the exemption is to expire at the end of 1977 so that the extent to which BMW's distribution system restricts competition can then be reassessed. The Commission has also lifted the ban as regards the preceding period as BMW had agreed to discontinue the export prohibitions as soon as it had become clear that such arrangements in the motor industry would not qualify for exemption. Conditions are attached to the authorization to enable the Commission to act in any case in which

[1] A similar approach provided the basis for Commission Regulation No 67/67 on the exemption of certain categories of exclusive dealing agreements (First Report on Competition Policy, point 46).

the system is abused. The Commission will thus be able to check at all times whether BMW is improperly restricting entry to the market in BMW products or the sale of competing products by BMW dealers.

Dior and Lancôme sales organizations

93. In two test cases, the Commission completed its examination whether the selective distribution system applied in the perfumes industry is compatible with Article 85.[1] These cases concern the French firms Parfums Christian Dior and Lancôme, which organized the sale of their perfumes and beauty and toiletry goods in the EEC through a selective distribution network limited to a restricted number of approved retailers.

The network is organized on the basis of exclusive franchise contracts concluded by each of the two firms with its general agents in the various EEC countries and on distribution contracts applied by the general agents in their respective territories.

94. In response to a statement of objections from the Commission, the two firms deleted a number of clauses from their agreements which imposed serious restraints on competition. This particularly concerned provisions requiring approved Dior and Lancôme retailers:

- to make supplies only to ultimate customers; this amounted to an indirect export ban;
- to obtain supplies only from the general agent for their country; this amounted to an indirect import ban;
- to charge maintained prices, even for reimported or re-exported products.

The effect of these arrangements was to make it quite impossible for Dior or Lancôme approved retailers to engage in cross-frontier trade, so that EEC markets were partitioned on national lines at the distribution stage and sometimes considerable price differences for identical products were maintained within the common market.

95. Now that the offending clauses have been abandoned, Dior and Lancôme approved retailers have acquired the freedom within their respective trade networks to sell to or purchase from any approved general agent or retailer in other EEC countries, and themselves to determine the selling prices of products sold by them whether they are reimported from or re-exported to other common market countries. Consumers will thus benefit from the new competitive situation with the Dior and Lancôme sales networks. Retail prices for the products in the various EEC Member States should from now on gradually align themselves.

[1] Bull. EC 12-1974, point 2123. In a third test case, adaptations are in progress.

96. The market for perfumes and beauty and toiletry products is characterized by the existence of a fairly large number of competing firms, none of which holds a really pre-eminent position. Dior and Lancôme account for relatively small market shares in each of the EEC countries.

In view of the changes made by Dior and Lancôme to their respective distribution systems by abandoning restrictive clauses and in view of the nature of the relevant market, the Commission decided that it had no grounds for action under Article 85(1) in respect of the selection of sales points as currently practised by these two firms.

The Commission informed Dior and Lancôme that it would check to make sure that the admission of qualified retailers to their respective distribution networks or their exclusion therefrom were not based on arbitrary decisions and were not a disguised means of cutting out competition in intra-Community trade between approved distributors in a given network.

97. These cases indicate the general lines which the Commission could apply to future similar cases in the perfumes industry.

Exclusive dealing agreements

Agreement between Goodyear Italiana and Euram Italia

98. The Commission decided that Article 85(1) was applicable to the exclusive dealing agreement concluded by Goodyear Italiana with Euram Italia for the distribution in Italy of plastic film for packing food products bearing the Vitafilm trademark.[1] An exclusive dealing agreement involving only undertakings within a single Member State and concerning the sale of products within that State cannot qualify for block exemption under Regulation No 67/67;[2] if Article 85(1) is found to apply, exemption can only be by individual decision. In this case the Commission decided to grant exemption under Article 85(3) since the current version of the agreement does not contain provisions appreciably restricting competition other than such provisions as would have been authorized by the Regulation.

99. The restrictions of competition resulting from the grant of this exclusive dealing concession, under which the dealer has to confine his active sales policy to the Italian market and to refrain from selling any competing products, were regarded as appreciable and as liable to affect intra-Community trade in view of the important position held by Euram, currently the only Italian firm offering the full range of

[1] Commission Decision of 19.12.1974 in Case IV/23.013: OJ L 38 of 12.2.1975, p. 10.
[2] Commission Regulation No 67/67/EEC of 22.3.1967 on the application of Article 85(3) of the Treaty to certain categories of exclusive dealing agreements: OJ 57 of 25.3.1967, p. 849; amended by Regulation (EEC) No 2591/72 of 8.12.1972: OJ L 276 of 9.12.1972, p. 15 (First Report on Competition Policy, point 50).

products necessary for film-packaging of food. There is growing demand for the product concerned and the exclusive dealer meets this demand through direct supplies to users (food supermarkets and self-service stores); the decision recognized that the exclusive dealing agreement has made it easier for users to obtain supplies of this form of packaging.

100. As regards the movement of these items within the common market, the original version of the agreement prohibited the dealer from exporting these products from his own territory. Following the Commission's intervention, he may now sell anywhere in the common market although he may not undertake active sales promotion in other common market countries (branches, supply depots, advertising). The Commission decision also took account of the fact that Vitafilm products manufactured elsewhere may be imported freely into Italy, both from other Community countries and from outside the Community.

101. The fact that the dealer was prohibited from exporting the relevant products outside the EEC was not regarded as an appreciable restraint of competition since, in view of other supply possibilities available to Community purchasers, it was unlikely that Vitafilm products previously sold by Goodyear Italiana to Euram and then exported from the EEC by Euram would be resold in the common market. At the moment there are no such price discrepancies between the EEC and non-member countries as would absorb the additional costs involved in such an operation nor are such discrepancies likely to develop in the forseeable future. Thus the Commission followed the line of authority it has already established in this field,[1] concentrating its appraisal of the clause on the question whether or not the restriction of competition was appreciable rather than whether intra-Community trade was liable to be affected.

Agreement between Europair and Duro-Dyne

102. The second decision in this field gave the Commission an opportunity to state its views on an agreement belonging to the other category of exclusive dealing agreements not qualifying for block exemption under Regulation No 67/67. This category concerns contracts which cover the whole EEC area, whereas the Regulation deals only with those which cover a defined area of the common market. In the case in question, the Commission granted an exemption for an agreement under which the American company, Duro-Dyne Corporation (New York) appointed the Belgian company Europair SA (Brussels) as its main exclusive dealer for the importation into the whole EEC area of a range of parts and fittings intended mainly for use in heating and air-conditioning installations.[2]

[1] Cf especially the Commission's Decision of 30.6.1970 (KODAK); OJ L 147 of 7.7.1970, p. 24.
[2] Commission's Decision of 19.12.1974 in Case IV/560 OJ L 29 of 3.2.1975, p. 11.

103. The grant of an exclusive dealership for the whole EEC area was regarded as a restriction of competition liable to affect trade between Member States, since it meant that no dealers in the EEC other than the authorized dealer could obtain supplies of the relevant products directly from the principal for resale in the other Member States. Consequently intra-Community trade will develop through channels differing from those which would have existed in the absence of the agreement.

Nevertheless, for reasons similar to those underlying Regulation No 67/67, which was designed to facilitate trade in goods between Member States, the Commission took the view that concentration by Europair of imports into the EEC of a whole range of products from a non-member country would facilitate active sales promotion, continuity of supplies and rationalization of distribution. Thus the principal no longer has to maintain a multiplicity of trading relationships in order to distribute his products. The advantage is all the greater in the present case as the relevant products can be integrated by the authorized dealer into the complex ranges of parts necessary for the various heating and air-conditioning systems available in the Community market.

104. The Commission's Decision also noted that the principal exclusive distributor did not enjoy absolute territorial protection, since his principal had not undertaken to refrain from indirect supplies to the common market. A further point was that the main distributor applied an identical price scale for all his own dealers and that the sub-dealing system set up by him permitted parallel imports as between the various territories of the common market.

Export bans and measures having equivalent effect

105. Continuing its action against export bans imposed on dealers and against terms of sale restricting dealer-to-dealer sales where, as a result of such bans or restrictions, trade between Member States may be affected,[1] the Commission caused a number of marketing policy measures to be brought into line with Article 85 without having to take a formal decision.

AEG-Telefunken

106. In response to a statement of objections from the Commission, AEG-Telefunken (Frankfurt) lifted a ban on exports to the Netherlands which had been imposed on its dealers in the Federal Republic of Germany with regard to the sale of domestic electric appliances.

[1] First Report on Competition Policy, point 57; Third Report, points 3 and 64-66.

The company regarded the ban as essential for the protection of Dutch consumers, since the AEG-Telefunken appliances intended for the German market did not conform to the safety regulations in force in the Netherlands.[1]

German dealers are now expressly authorized to export AEG-Telefunken appliances to the Netherlands, so that there will be a greater selection of appliances available on the Dutch market through German dealers. Protection of Dutch consumers will be guaranteed by virtue of the fact that all appliances offered for sale in the Netherlands, whether directly by German dealers or through Dutch dealers, will have to conform with the safety regulations or other legal standards applicable in the Netherlands, even where they have not been manufactured expressly for the Dutch market.

This case is in line with the Commission's view that foreign safety regulations cannot be used to justify bans on exports. Arrangements made to assure compliance with safety requirements must not be such as to restrict exports by being more rigorous than is actually necessary.

Sperry Rand GmbH

107. Following intervention by the Commission, a series of provisions infringing Article 85(1) were removed by Sperry Rand GmbH (Frankfurt), a Sperry Corporation subsidiary, manufacturing data processing and transmission equipment, office machines and equipment, electric razors and other electrical appliances.[1] The provisions were contained in resale price maintenance contracts and in the supply and selling conditions applied by Sperry-Rand GmbH as regards Remington electric razors, electric clocks and other electric appliances. The following obligations were involved:

- There was a general prohibition on exports or imports of the relevant products by German dealers;
- German wholesalers were not allowed to supply other wholesalers, unless Sperry-Rand GmbH had given prior written consent; nor could they supply ultimate customers;
- German retailers were allowed to sell the relevant products only to ultimate customers.

Commission practice has clearly established that arrangements restricting supplies from dealer to dealer, like direct export and import bans, can contribute to market fragmentation and infringe Article 85.

[1] Bull. EC 11-1974, point 2110.
[1] Bull. EC 1-1974, point 2113.

After-sales service

108. In the course of its work on monitoring the adaptation of distribution systems to the EEC competition rules, the Commission has extended its enquiries to the provision of after-sales service.

In order to protect consumers by ensuring that parallel imports in intra-Community trade can take place side by side with producer firms' own distribution channels, satisfactory after-sales service must also be available for parallel imports.

Constructa

109. A case in point concerned Constructa GmbH (Munich),[1] a subsidiary of the German firm Siemens-Electrogeräte GmbH, which, following the Commission's intervention, agreed with Siemens SA (Brussels) that the latter would provide after-sales service when any owners of household electrical appliances manufactured by Constructa could not obtain such service elsewhere in Belgium or Luxembourg. Henceforth, Belgian and Luxembourg consumers will be able to buy Constructa appliances in the country of their choice and from the retailer of their choice, and need fear no difficulties should repair work subsequently become necessary.

§ 4 — Abuse of a dominant position (Article 86 of the EEC Treaty)

General Motors Continental

110. Applying the prohibition in Article 86 of abuses of dominant market positions to a new type of case, the Commission imposed a fine on General Motors Continental NV (GMC), Antwerp.[2]

The reason was that it had found that, during the period from 15 March to 31 July 1973, GMC had intentionally infringed Article 86. From 15 March 1973 onwards, by virtue of Belgian law and of the authorization conferred upon it by Opel, GMC had sole power to issue certificates of conformity and typeshields establishing that new Opel vehicles and Opel vehicles registered abroad for less than six months conformed to the general approved type. In this respect GMC had a dominant position in Belgium and hence, in a substantial part of the common market. It had abused this dominant position on a number of occasions by charging an excessive price for inspecting new Opel vehicles which had not been marketed through its own distribution network in Belgium but had been brought in as parallel imports from other countries. The excessive price had actually been charged in five cases before the Commission took

[1] Bull EC 7/8–1974, point 2129.
[2] Commission Decision of 19.12.1974 in Case IV/28.851 (GMC): OJ L 29 of 3.2.1975, p. 14. GMC has appealed against the decision to the Court of Justice.

action. A number of factors went to make up the abuse, including especially the fact that GMC had indiscriminately applied the highest inspection fee applicable to American General Motors vehicles when inspecting less costly Opel vehicles.

Intra-Community trade was actually affected in the five cases where parallel importers had to bear the excessive charge. But in general, the fact of charging an excessive inspection fee was in any case likely to prevent or at least complicate the import of Opel vehicles into Belgium by users and dealers through channels other than General Motors' own distribution network.

111. The fact that the Commission had frequently stated[1] that it regarded parallel imports as particularly deserving of protection in the interests of competition and of consumers within the common market, was one of the decisive factors when the amount of the fine was decided upon. Measures which constitute barriers to parallel imports—such as the establishment of excessive charges for inspecting motor vehicles by a firm whose services individuals and dealers are compelled to use in the case of such imports—are just as reprehensible from the point of view of competition policy as contractual export bans in distribution agreements.

However the Commission took one point in GMC's favour, which was that the infringement had been only of a short duration and that GMC had already put an end to it.

SACEM and SABAM

112. The Commission also took action under Article 86 to re-establish normal conditions of competition as regards the management of authors' rights in musical works.[2]

Following the case of 'Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte' (GEMA) in Germany, both the Société des auteurs, compositeurs et éditeurs de musique (SACEM) in Paris, and the Société belge des auteurs, compositeurs et éditeurs (SABAM) in Brussels also amended their statutes and regulations in such a way as to terminate existing abuses of their dominant positions. The Commission was thus able to discontinue the proceedings it had opened against them.

In 1971,[3] the Commission had noted that GEMA practices which constituted an abuse of dominant position, prohibited by Article 86 of the EEC Treaty, had the effect of limiting the commercial freedom of composers, authors and music publishers in Germany. The principle underlying the Commission's finding has since been confirmed by a ruling of the Court of Justice.[4]

[1] e.g., First Report on Competition Policy, point 48; Second Report, points 40-43; Third Report, point 65.
[2] Bull. EC 3-1974, point 2111.
[3] Commission Decision of 2.6.1971; OJ L 134 of 20.6.1971, p. 15.
[4] Judgment of 27.3.1974 in Case 127/73 (BRT v SABAM).

As GEMA had done before, SACEM and SABAM implemented a policy of:

discrimination against the nationals of other Member States;

worldwide monopolization of their members' copyrights;

an excessively long obligation to the company for members (50 years in the case of SACEM);

a system preventing the setting up of a unified common market in music publishers' services.

113. Firstly, following the Commission's Decisions of 2 June 1971 and 6 July 1972, GEMA discontinued practices found contrary to Article 86, without appeal.

Secondly, SACEM and SABAM abolished all discrimination against nationals of other Member States and agreed to allow their members greater freedom, both as to the mode of exploitation of their copyrights and as to the choice of society to which such rights could be assigned.

The restoration of better competitive conditions with regard to the management of copyright, which the Commission has in this way obtained, will allow authors, composers, and music publishers a freer hand in deciding how their rights are to be managed, and this should, in turn entail financial advantages for them.

§ 5 — Formation of joint subsidiaries

SHV-Chevron

114. In its first decision on such a matter in the EEC sphere,[1] the Commission gave negative clearance for the formation of joint subsidiaries responsible for distributing certain petroleum products under a general cooperation agreement between Steenkolen-Handelsvereniging NV (SHV) and Chevron Oil Europe Inc. (Chevron).[2] The decision stated that on the basis of the facts in its possession, the Commission had no grounds for action under Article 85(1) in respect of the general cooperation agreement or of the specific national agreements which derive from it.[3] This decision is important as a matter of principle, in that it deals, under Articles 85 and 86, with the problem of joint subsidiaries formed under a general cooperation agreement containing clauses under which the parent companies agree not to compete in the products covered by the agreement.

[1] See also Second Report on Competition Policy, point 63.
[2] Commission Decision of 20.12.1974 in Case IV/26.872 (SHV-Chevron): OJ L 38 of 12.2.1975, p. 14.
[3] Article 2 of Council Regulation No 17 of 6.2.1962: OJ 13 of 21.2.1962, p. 204.

115. SHV is a Dutch group with diversified interests in the coal industry, chain stores and transport; although it is associated with other companies in oil exploration, it has no refineries and does not constitute a petroleum group. Under the agreements it has given up all its own activities in the distribution of certain petroleum products. Chevron Oil Europe Inc. is a subsidiary of the Standard Oil Company of California (Socal), an integrated American multinational oil group whose activities include crude oil production, oil refining and distribution, petrochemicals and manufacture of fertilizers.

Under their general agreement, Chevron and SHV have set up through a joint holding company subsidiaries, all known as Calpam, in which each party has an equal holding. The subsidiaries will sell certain petroleum products in Belgium, the Netherlands, Luxembourg, Germany and Denmark, where Chevron and SHV hitherto had independent distribution networks. The general cooperation agreement and the individual agreements forming a Calpam subsidiary for each country involve the following products (except in Germany):[1] paraffin, heating oil, industrial oil, asphalt and marine fuels and lubrication oils.

Chevron and SHV have vested in the Calpam subsidiaries for at least fifty years their distribution networks and all assets relating thereto (plant, equipment, etc.).

116. In its decision the Commission stated that most aspects of this transaction suggest that the formation of the joint subsidiaries will result in an extensive concentration of operations relating to distribution of Chevron and SHV products in the new Calpam trading structure. The agreements show that there will be a permanent modification of market structures, especially in SHV, which will no longer be in business as an independent wholesale buyer of petroleum products; SHV and Chevron, having divested themselves of their individual distribution systems, will no longer retail the relevant products separately; the fact that the joint subsidiaries have been set up for a fifty-year period is strong evidence that the assets in question are to be transferred permanently to the Calpam companies.

117. As regards distribution of the products covered by the arrangement, Chevron and SHV have each agreed not to compete with the other without that other's prior consent. But in this case it was decided that the non-competition clause involved no appreciable restriction of competition, in view of the nature of the two founder companies.

This clause provided SHV with an assurance that the transfer of its assets to the joint subsidiaries would not cause depreciation of these assets as a result of Chevron's competition with the joint subsidiaries. Indeed, none of Chevron's industrial or trade interests are such that Chevron would be likely to compete with undertakings in

[1] In Germany, the agreements for the time being cover only marine fuels and lubricating oils.

which it has a 50% interest. SHV disappears as an independent wholesaler on the petroleum product market, with no likelihood of ever being able to return.

118. The original version of the cooperation agreement contained a non-competition clause as regards petroleum products not distributed by the Calpam companies, i.e., lubricants, diesel oil and petrol in the Benelux and Denmark. The Commission decided that this clause was caught by Article 85(1), and the parent companies deleted it so as not to impede the grant of negative clearance.

The Commission also took the view that the fact that Chevron was to fix the price of asphalt sold by the Calpam companies did not constitute a restraint of competition, since asphalt was not one of the products formerly sold by SHV.

119. Accordingly, the Commission concluded that the operation did not constitute an infringement of Article 85(1).

Finally, since Chevron's and SHV's share of the relevant market in the products in question (a substantial part of the common market) did not confer a dominant position on either of the undertakings, the Commission felt that the agreement did not require investigation under Article 86.

§ 6 — Merger control (Article 66 of the ECSC Treaty)

Main mergers authorized

120. The main decisions adopted by the Commission in 1974 under Article 66 of the ECSC Treaty[1] are those authorizing:
- August Thyssen-Hütte to acquire not more than 25% of the share capital in Solmer;
- British Steel Corporation to acquire control of Johnson & Firth Brown Ltd;
- the Federal Republic of Germany to acquire a majority shareholding in Gelsenberg AG and to integrate Gelsenberg into VEBA.

Thyssen/Solmer

121. By Decision of 20 November 1974[2] the Commission authorized August Thyssen-Hütte AG (Thyssen) to acquire shares in the French steel firm Société Lorraine et Méridionale de Laminage Continu SA (Solmer), Fos-sur-Mer (Bouches du

[1] The other decisions on the coal and steel industries taken under Article 66 are listed in the Annex. See pp. 130 to 132.
[2] Commission Decision of 20.11.1974, OJ L 49 of 25.2.1975, p. 13.

Rhône), which will now be controlled by the Sacilor group (Aciéries et Laminoirs de Lorraine SA), Usinor (Union Sidérurgique du Nord et de l'Est de la France SA) and Thyssen.

Thyssen is the largest steelmaker in Germany and the second largest in the Community. Sacilor and Usinor are the top two steel producers in France, and fifth and eighth in the Community.

The agreement between Thyssen, Sollac (Société Lorraine de Laminage Continu SA – controlled by Sacilor-Usinor) and Solmer provides for Thyssen to acquire by stages 25% of the capital of Solmer, through simultaneous reductions in the 50% holdings of Sollac and Usinor.

Solmer is a producer of flat products whose production capacity by 1978 will be as follows: 3.5 million tonnes of crude steel, 3 million tonnes of coils, 1.1 million tonnes of plate and 0.5 million tonnes of sheet.

A second stage of development, after 1978, will probably double these figures. Solmer does not make steel sections.

122. In appraising the effects of Thyssen's acquisitions on competition in the common market, the Commission considered the likelihood of the three parties aligning their conduct in the flat products market.

Here the Commission bore in mind that Solmer is a production cooperative which supplies its products at cost price to its members in proportion to their shareholdings. These members—the three groups—will process the bulk of the unfinished products (coils) acquired from Solmer in their own plants, and will market the finished products through their own distribution systems, so that Solmer will not be on the market as a supplier.

Moreover the three groups will continue to manufacture in their own plants the bulk of their requirements for flat products of the types manufactured by Solmer. Thus they will be dependent on Solmer only to a limited extent.

Even at the second stage (7 million tonnes of crude steel), Solmer will account for no more than 16% of Thyssen's coil production, 11% of its plate and 4% of its sheet. Thyssen currently processes some 90% of its coils into other products, particularly sheet.

Admittedly, competition between the three groups in relation to investments and flat products will be restricted, but each group remains free to practise an independent pricing policy. The groups will be market competitors throughout their production ranges. The number of suppliers will not be changed and there will be enough producers of comparable size in the common market to ensure effective competition.

The Commission therefore concluded that a Thyssen shareholding in Solmer would not give the undertakings concerned the power to hinder effective competition on the market in flat products or to evade the rules of competition instituted under the Treaty.

123. However, to ensure that the three groups remain effectively independent of each other, the Commission has made the authorization subject to four conditions:

(i) the groups must remain fully independent of each other in their marketing operations;

(ii) except for joint decisions on investment and production by Solmer, they must refrain from concluding any further agreements, from aligning their market behaviour and from establishing interlocking directorates or other management links without the Commission's approval;

(iii) any increase in Solmer's production capacity must be approved by the Commission; this is to ensure that each group's share in Solmer's production remains below its own production;

(iv) the authorization extends only to production of flat products by Solmer.

124. Although Article 66 does not require the advantages of concentrations to be taken into consideration (e.g., rationalization), this case is nevertheless of considerable interest in relation to the Community's industrial policy.

In its Memorandum on the general objectives of the Community iron and steel industry, 1975-80,[1] the Commission forecast that the trend towards larger steel works and firms would continue, while financial problems could be expected to arise from the lengthy period required to get steel mills into production. So that the Community steel industry should not be founded on a narrow national basis, which leads to a costly dispersion of undersized production facilities, particularly where flat products are concerned, the Commission expressed the hope that transnational mergers would take place.

Solmer represents just such a case; it will enable investment to be made on the scale called for by technological developments in flat products and the firms will be able more rapidly to attain an optimum scale of operations through joint financing.

Solmer is the forth major case after Sidmar, Hoesch/Hoogovens (ESTEL) and Röchling/Burbach of transnational cooperation between Community steel producers to be authorized by the Commission under Article 66.

[1] OJ C 96 of 29.9.1971, p. 72.

British Steel Corporation/Johnson & Firth Brown Ltd.

125. By decision of 5 December 1974,[1] the Commission authorized British Steel Corporation (BSC) to acquire a majority shareholding in Johnson and Firth Brown Ltd., Sheffield. With an annual turnover of £1 775 million and an output of 23 million tonnes of crude steel, BSC is the largest steel producer in the Community.

Johnson and Firth Brown Ltd. (JFB), with a turnover of £150 million is the holding company of a group of undertakings engaged in the production and processing of steel and other products, including copper. JFB's main ECSC Treaty steel products are forging ingots and blooms, stainless and other alloy bars and wire rods.

126. Examination of BSC's application in the light of Article 66(2) of the ECSC Treaty showed that acquisition of a majority shareholding would not have significant effects on competition, provided that BSC did not retain ownership and control over two companies in the JFB group, namely William Beardmore & Co Ltd., Glasgow, and Johnson & Nephew (Mill Street) Ltd., Manchester.

Beardmore is responsible for virtually all the forging ingots and blooms made by the JFB group for sale to independent forgemasters, i.e., companies who have their own forging presses but no steel melting facilities. There are about fifteen of these independent forgemasters in the United Kingdom and they are responsible for an important part of the forgings trade. If BSC were to control Beardmore, it would have, after taking account of its own production facilities, about 84% and 100% respectively of the forging ingots and blooms marketed in the UK and would have the power to prevent effective competition.

Johnson & Nephew (Mill Street) Ltd. makes wire rods and if it were controlled by BSC there would remain only one substantial competitor of BSC on the UK wire rod market, while BSC would account for 77% of wire rod production. BSC would therefore be in a position to prevent effective competition in supplies of rod to UK wire makers.

127. Accordingly the Commission, after having received the comments of the UK Government, gave authorization under Article 66(2) of the ECSC Treaty, subject to the condition that within one year BSC should divest itself of all rights in Beardmore and in Johnson and Nephew (Mill Street) Ltd. and meanwhile should refrain from interfering in the management of the two companies and from in any way jeopardizing their commercial independence.

[1] Commission Decision of 5.12.1974; JFB's proceedings against the Decision are pending before the Court of Justice.

VEBA/Gelsenberg AG

128. On 16 December 1974,[1] the Commission authorized the Federal Republic of Germany to acquire a majority shareholding in Gelsenberg AG, Essen. The Federal Government had stated its intention of merging Gelsenberg with the Vereinigte Electrizitäts- und Bergwerks-Aktiengesellschaft (VEBA), Bonn and Berlin, over which its 40% shareholding already gives it virtual control, the rest of the shares being dispersed over a large number of small shareholders.

The merger of Gelsenberg and Veba would bring into existence a large and powerful group operating mainly in the areas of petroleum products and production of electricity. The merger would also affect their coal production and distribution activities so that there is a concentration within the meaning of Article 66(1).

Through its subsidiary Raab Karcher GmbH, Essen, and the various companies controlled by the latter, Gelsenberg has interests in the solid fuels wholesale trade. It is therefore an undertaking covered by Article 80 of the ECSC Treaty.

VEBA is also an undertaking covered by Article 80, since it controls a number of solid fuel distributing firms, including Hugo Stinnes AG, one of the largest in the Federal Republic.

129. In addition to VEBA, the Federal Republic controls other undertakings engaged in coal production or distribution within the meaning of Article 80 of the ECSC Treaty. However, as the High Authority and the Commission have noted on several occasions when considering Federal shareholdings, these undertakings are not subject to a single planning and decision-making body. In fact, they are operated as economically independent enterprises. In considering the effects of this concentration on competition, the Commission therefore confined itself to appraisal of the integration of Gelsenberg into VEBA.

On the solid fuels distribution market, the two companies together account for about 33% of wholesale trade in coal in the Federal Republic. The scheme was nevertheless authorized under Article 66(2) of the ECSC Treaty, since in particular it was found that the undertakings concerned, in view of all the economic circumstances, would not have the power to determine prices for solid fuels in a substantial part of the market, or to control or restrict distribution.

Despite this merger, which resulted in a 33% market share, the existence of seven other wholesalers with market shares of between 5% and 10% and of some 150 other firms of less importance, together with the high degree of dispersion of firms working in this field in Federal territory, ensured that consumers would still have considerable scope for choice when obtaining supplies of solid fuels.

[1] Commission Decision of 16.12.1974: OJ L 65 of 12.3.1975, p. 16.

As regards prices, effective competition on the relevant market will be ensured to an adequate extent by the fact that fuel oil is a substitute for solid fuels and that the oil companies sell these products directly, so that a solid fuels wholesaler has little opportunity to exploit a position of strength on the market.

130. Consideration of this concentration extended also to the activities of the relevant companies in relation to products and services which are subject to analysis under the EEC Treaty. In this case the principal items were light and heavy fuel oil, phtalic anhydride (chemical primary product for manufacturing flexible plastics, lacquer resins and polyester resins), electricity generating and inland waterway shipping.

The relatively large market shares as regards electricity and phtalic anhydride gave rise to the following comments:

(i) The market shares held by VEBA and the other five electricity producers controlled by the Federal Government are of very limited interest since in practice, technical requirements give producers territorial monopolies and there is no direct competition between them. Electricity users have in effect no choice of supplies. Hence the fact that Gelsenberg's low market share will be added to that held by VEBA is only of secondary importance.

(ii) The intensity of competition on the market for phtalic anhydride and its derivatives (flexible plastics, lacquer resins and polyester resins) means that competition will be unaffected by the merger of VEBA's and Gelsenberg's market shares.

The Commission therefore decided that there was no case for objecting to the concentration on the basis of Article 86 of the EEC Treaty.

131. The acquisition by the Federal German Government of a majority holding in the share capital of Gelsenberg was initially prohibited by the Bundeskartellamt under section 24(1) of the German Law against restrictions of competition (Gesetz gegen Wettbewerbsbeschränkungen) (GWB). But the German Federal Minister for Economic affairs later authorized the scheme under the waiver clause (section 24(3)) in the general interest of the economy.

The initial refusal by the Bundeskartellamt to authorize the proposed operation was based on criteria in the German law which are different from those of Article 86 of the EEC Treaty. Under the GWB, the Kartellamt can forbid mergers which create, or constitute a strengthening of, a dominant position on the market; a dominant market position is presumed to exist if the undertakings involved by themselves or together with third parties have shares of the market which exceed the limits specified in the GWB.

Rationalization and extension of distribution networks

132. Regarding the distribution of steel products, the Commission also authorized, under Article 66(2) of the ECSC Treaty, a number of mergers designed to rationalize or strengthen existing distribution networks or to enable producers and dealers to penetrate new markets within the Community more easily.

The most important decisions taken here were those authorizing:

the restructuring of the Sacilor trading network;

the Guest Keen and Nettlefolds Ltd. takeover of Miles Druce and Co Ltd.;

the acquisition of a majority shareholding in Lye Trading Co Ltd. by British Steel Corporation;

the acquisition of the Cassart Group by Guest Keen and Nettlefolds Ltd.;

the acquisition of Howard E. Perry Ltd. by Klöckner and Co.

Restructuring the Sacilor trading network

133. By Decision of 18 July 1974,[1] the Commission gave the authorization under Article 66 of the ECSC Treaty applied for by Sacilor—Aciéries et Laminoirs de Lorraine (formerly Wendel-Sidelor SA) to restructure its trading network.

Sacilor, a steel producer in eastern France, came into existence as a result of the major regrouping of firms in that area which began in 1968. The networks for distribution of its production had remained under the financial control of the founder holding companies, Compagnie Lorraine Industrielle et Financière, Compagnie de Saint Gobain Pont-à-Mousson and Marine-Firminy.

134. Once the group's industrial restructuring was complete, it became possible to reorganize its trading network in three new companies, Valor SA, Daval SA and le Fer Blanc SA under Sacilor's financial control. Now that Sacilor has full direct control over its sales networks, it will be better placed to elaborate a long-term business strategy, while by cutting down duplication as between the marketing companies it will be able to reduce distribution costs.

Examination of the transaction revealed that it entailed concentrating assets or firms from the three groups having Sacilor shareholdings, so that only the internal structures of the Sacilor group were involved and its competitive potential on the market for ECSC products was not affected.[1]

[1] Commission Decision of 18.7.1974, Bull. EC 7/8-1974, point 2125.

Guest Keen and Nettlefolds Ltd./Miles Druce and Co. Ltd.

135. In response to a request made in June 1973 by Guest, Keen and Nettlefolds Ltd., Smethwick Warley, Worcestershire, for authorization to acquire the entire capital of Miles Druce and Co. Ltd., High Wycombe, the Commission, by decision of 14 March 1974,[1] gave approval to the transaction under Article 66 of the ECSC Treaty.

GKN is a holding company controlling a group of more than 200 firms with a wide variety of activities. The major activities of the GKN group cover mechanical engineering, especially for the motor industry, industrial equipment, industrial fasteners and the production and distribution of finished steel products. By turnover, the group was then the fourteenth largest undertaking in the United Kingdom.

Miles Druce & Co. Ltd. is a holding company controlling a group consisting largely of steel stockholders. It has an Engineering Division and a Safety and Security Systems Division. In terms of sales the group in 1973 ranked 301st among United Kingdom companies.

136. Since MD is mainly concerned with steel distribution, the effects of the merger would be felt on the steel stockholder market and were covered therefore by Article 66.

The Commission nevertheless considered the possible influence of the increased tonnage of steel to be purchased by the new group on prices charged by the British Steel Corporation (BSC). In the light of the rules governing steel prices (Article 60), to which BSC is subject, this influence was not such as to give GKN/MD a substantial competitive advantage either on the steel market or on the market for steel products covered by the EEC Treaty.

The Commission also took the view, as regards the marketing of industrial fasteners, where GKN has a dominant position, that the acquisition of MD, which is a small distributor of these products, did not constitute an abuse of a dominant position within the meaning of Article 86 of the EEC Treaty.

137. In general terms the proposed acquisition made only a marginal change in GKN's position both as a producer and as a seller of steel and steel products. There was no effect on the nature and degree of vertical integration within the GKN group.

The new GKN/MD group is the largest steel distributor on the United Kingdom market. In addition to the new group, the GKN/MD merger left within the stockholder market: BSC, the largest steel producer and supplier of most of the steel consumers in the United Kingdom, and itself a steel stockholder; some ten dealers who, while individually not holding a large share of the national market, enjoy

[1] Commission Decision of 14.3.1974, OJ L 132 of 15.5.1974, p. 28.

considerable local power and account for some 40% of the UK stockholder market; some 300 medium, or, more often, small undertakings, many of whom are well established locally; and the merchants representing continental producers.[1]

British Steel Corporation/Lye Trading Co. Ltd.

138. By Decision of 14 October 1974,[2] the Commission authorized British Steel Corporation, London, under Article 66, to acquire a majority shareholding in Lye Trading Co. Ltd., Worcestershire, a small steel stockholder on the UK market. As a steel producer BSC holds a dominant position on the UK steel market. However BSC's importance as a steel stockholder is negligible, since it possesses only one small stockholder. H.F. Spencer and Co. Ltd. After acquiring Lye Trading, BSC accounts for roughly 7% of the stockholder market in the UK; it is thus of comparable size with a number of other major stockholders and producer/stockholders, but lags far behind the 20% market share held by GKN after its acquisition of Miles Druce. The Commission therefore decided that the transaction would not impede effective competition on the relevant market.

Guest Keen and Nettlefolds Ltd./Cassart group

139. Guest Keen & Nettlefolds Ltd. (GKN) was authorized to acquire the shares of the Belgian firms Produits métallurgiques Cassart SA, Brussels, Aciers Cassart SA, Marcinelle, Cassart Métaux SA, Tilleur, Auxiliaire Cassart SA, Brussels, and Cassart Plastique SA, Brussels.[3] This purchase would give GKN control over these firms; the effect of the transaction was thus a concentration within the meaning of Article 66 of the ECSC Treaty between GKN and the firms belonging to its group and the Belgian firms belonging to the Cassart group.

GKN is engaged in steel production and distribution in the United Kingdom; in 1972 its sales reached some 1.5 million tonnes of steel products. Its exports of ECSC products to Belgium were negligible, and its exports to other Community countries also ran at a low level. The Cassart group is mainly a steel stockholder operating on the Belgian market, with a 1972 throughput of approximately 100 000 tonnes of steel products. GKN and Cassart have a combined share of less than 2% of the entire steel

[1] This was the first time the Commission had to consider a contested takeover bid. Through its board of directors, MD made it clear that it was opposed to the takeover and that it proposed to bring proceedings to have any decision authorizing the transaction declared void. In the interests of fair treatment, the Commission wished to make sure that the company which was to be taken over could actually exercise the legal rights which the Treaty makes available to all concerned. It decided that the decision should take effect three weeks after notification, so that MD had an opportunity to appeal and, if it so desired, to take interlocutory proceedings before the Court of Justice (see point 59).

[2] Commission Decision of 14.10.1974, Bull. EC 10 -1974, point 2111.

[3] Commission decision of 8.7.1974, Bull. EC 7/8-1974, point 2126.

products market in the Community. In Belgium they will account for some 2.5% of the stockholder market.

The Commission decided that, as a purchaser of steel products, the Cassart group would provide GKN with a possible new outlet for its rolled products, thus giving GKN a bridgehead on the continent. In view of the intensive competition facing producers of finished rolled products, GKN's acquisition of Cassart would not impede effective competition.

Howard E. Perry & Co. Ltd./Klöckner & Co.

140. On 2 October 1974,[1] the Commission authorized, under Article 66, the acquisition of Howard E. Perry & Co. Ltd., Willenhall, Staffordshire by Klöckner & Co., Duisburg, a major steel stockholder. Perry holds only a small share of the United Kingdom steel stockholder market. However, the transaction will give Klöckner and Co. a chance to penetrate the UK market, thus intensifying competition in an area of the common market which is not yet properly integrated.

Interim measures of protection

141. During 1974 the Commission found it necessary to take interim measures of protection under the third subparagraph of Article 66(5) of the ECSC Treaty in two cases involving concentrations between undertakings. The first concerned Marine-Firminy SA, Schneider SA, Denain and the de Wendel group; and the second concerned the British company Johnson & Firth Brown Ltd., the British Steel Corporation and Dunford Hadfields Ltd.

In both of these cases the Commission took account of the Order of the President of the Court of Justice given on 11 October 1973 in Joined Cases 160/73R and 161/73R (Miles Druce/GKN), which stated that 'if... the *status quo* should appear to be threatened for any reason whatsoever, it will be for the Commission, with due notice, to make an immediate decision on the matter under Article 66 of the Treaty, or, at the very least, on the interim measures provided for by Article 66(5), third subparagraph, ...'.[2]

Marine-Firminy SA/Schneider SA/Denain/de Wendel

142. On 5 April 1974, at the request of Marine-Firminy SA (Marine), the Commission took interim measures of protection to preserve the *status quo* while it was examining the situation arising from the acquisition by Schneider of 34% of the share capital in Marine.[3] By its Decision of 27 October 1970 the Commission had authorized the

[1] Bull. EC 10-1974, point 2110.
[2] Point 59.
[3] Bull. EC 4-1974, point 2110.

establishment of common and equal control by Schneider and Marine over Creusot-Loire SA; at that time Schneider and Marine had reciprocally undertaken not to change the state of equilibrium within Creusot-Loire by buying each other's shares in that company. The purchase in November 1973 by Schneider of the 34% holding in Marine effectively changed that equilibrium, although Schneider agreed temporarily to deposit the shares with a bank and not to exercise the voting rights attaching to them. The interim measures of protection granted by the Commission on 5 April safeguarded the independence of Marine pending a decision by the Commission under Article 66. *Inter alia,* the measures prevented Schneider from purchasing Marine shares or from using the voting rights attaching to the shares which it already held in Marine.

The *status quo* was again threatened early in December 1974, when Denain Nord-Est Longwy SA (Denain) made a takeover bid for the shares of Marine. Following this move, the Wendel Group (through Compagnie Lorraine Industrielle et Financière, 'CLIF') began to make purchases of Marine shares on the open market. Also Schneider asked to be relieved from the interim prohibition on its purchase of Marine shares. On 21 December 1974, the Commission took interim measures of protection to maintain the balance between the interested parties and ordered Denain and de Wendel to suspend their moves to secure control of Marine pending definitive decisions by the Commission under Article 66 on the applications made by CLIF and Denain and the Schneider holding company.

Johnson & Firth Brown Ltd./British Steel Corporation/Dunford Hadfields Ltd.

143. On 1 November 1974, the British Steel Corporation (BSC) informed the Commission of its intention to make a bid for a controlling interest in the share capital of the British steel company Johnson & Firth Brown Ltd. (JFB). BSC undertook to take the necessary steps to prevent itself from exercising, in advance of authorization by the Commission, the control over JFB deriving from the acquisition of these shares.

However, on 18 November 1974, the board of directors of JFB requested the Commission to take interim measures of protection under Article 66(5) to prevent BSC from acquiring a controlling interest unless the Commission gave prior authority. Having regard to the request and to the dominant position of BSC in the United Kingdom steel market, the Commission granted interim measures of protection against BSC on 20 November 1974.

On 27 November 1974, at the request of BSC, the Commission granted interim measures of protection against a further British steel company, Dunford Hadfields Ltd., who had also intimated their intention of acquiring a controlling interest in JFB, for which they too would require prior authority from the Commission. This action by the Commission ensured that both BSC and Dunford Hadfields were placed on the same footing pending the Commission's ruling on the merits of BSC's application.

On 5 December 1974 the Commission authorized BSC to acquire a controlling interest in JFB, subject to certain conditions designed to preserve the competitive situation.[1] At the same time, the Commission revoked the interim measures against Dunford Hadfields to enable the latter to proceed if it wished with its own bid for a controlling interest in JFB subject to the Commission's authorization for any actual acquisition. The principle of avoiding any discrimination as between BSC and Dunford Hadfields was thus preserved.

§7 — Market surveillance following Commission decisions

144. On an earlier occasion,[2] the Commission stated that it had initiated monitoring procedures to check whether its earlier decisions were being complied with, and that it planned to do this more extensively. Recent enquiries to this end have concentrated on fertilizer sales agencies, and changes in dyestuffs prices have also occupied the Commission's attention.

Fertilizer sales agencies

145. In 1968 and 1969 the Commission gave negative clearance to three joint selling agencies for fertilizers manufactured respectively in Belgium, France and Italy.

The first two clearance decisions, dated 6 November 1968,[3] concerned the Belgian agency (Cobelaz-Usines de Synthèse et Cobelaz-Cokeries) and the French agency (Comptoir Français de l'Azote – CFA). Negative clearance in the third case was given on 3 June 1969[4] to the Italian agency SEIFA (Società per lo Sviluppo dei Consumi dei Fertilizzanti).

The agreements notified conferred powers on the agencies covering national territory, other Community countries and non-member countries.

Before granting negative clearance, the Commission had asked the agencies to abandon all responsibilities in respect of intra-Community trade; this was then done. However, when clearing the agencies, the Commission also decided that the fertilizer industry should be monitored closely and that it should check particularly whether the surviving parts of the agreements did not in fact involve market fragmentation by country.[5]

The enquiry carried out under Council Regulation No 17 yielded a certain amount of information on the selling agencies and on the general situation in this industry. The main points are as follows:

[1] Point 125.
[2] Sixth General Report on the Activities of the Communities (1972), point 86.
[3] OJ L 276 of 14.11.1968, p. 29.
[4] OJ L 173 of 15.7.1969, p. 8.
[5] First Report on Competition Policy, point 13; Third Report, point 50.

The Belgian agency — *Cobelaz*

The Cobelaz-Usines de synthèse agreement was extensively amended on 1 July 1969; since then Cobelaz has had no responsibilities for marketing synthetic nitrogenous fertilizers in Belgium. It deals exclusively with sales outside the Communities. As regards ammonium sulphate from coke ovens, Cobelaz now markets the production of only one company, and it has become, so to speak, that company's sales department.

The French agency — *Comptoir français de l'azote* (*CFA*)

On 1 June 1969, the members of this agency withdrew all its responsibilities for marketing in France. The CFA has now no activities within the nine countries, being responsible only for exports outside the Community.

The Italian Agency — *Società per lo sviluppo dei consumi* (*SEIFA*)

SEIFA gave up all sales business on 30 June 1972 and was absorbed by Montecatini-Edison SpA on 3 July of that year, when it ceased to exist as a separate legal entity.

However, although these agencies no longer operate in the Community, there does not seem to have been any substantial corresponding increase in the volume of intra-Community trade.

French producers export only 4 to 6% of their total production to other Community countries, and Italian producers less than 1%. Only Belgium exports half of its production, France and Germany taking equal shares. But here marketing policy is selective: Belgian producers steer clear of the Dutch market (which takes only 2% of their sales) for fear of a retaliatory inflow of Dutch products into Belgium.

Dyestuffs prices

146. Although a Commission Decision of 24 July 1969[1] was issued against a number of dyestuffs producers who had acted in concert to raise their prices, suspicion arose in 1972 that a concerted policy on price increases was still being pursued.

Investigations revealed that the 1972 price increases did not take place simultaneously but were spread over several months. On the other hand, the increases applied by the various producers were always identical within a given Member State:

Italy	11%
Germany	7%
France	10%
United Kingdom	11%
Belgium	11%
Netherlands	11%

[1] OJ L 195 of 7.8.1969, p. 11.

There are a few exceptions, but not enough to remove the impression that there is a concerted policy.

While these investigations were proceeding, the system for increasing prices was changed. Subsequent increases (late 1973 and early 1974) were not expressed as across-the-board percentages but as individual amounts for each product. Percentage conversion alters the figures considerably.

147. The Commission is examining the results of the enquiries in both cases with a view to possible action.

Part two

Competition policy and government assistance to enterprises

Chapter I

State aids

§ 1 — General

148. In 1974, while pursuing the measures undertaken during the preceding financial years, the Commission extended its activities to include new areas, in particular environmental aid, an area where, for obvious reasons, assistance from the Member States is tending to increase.

The Commission considers it of the greatest importance in the present situation that the rules on State aids laid down in the Treaty should be strictly observed. The development of the general economic situation presents two kinds of problems at the same time for the Community: those engendered by the serious economic slowdown, and those resulting from the new energy situation, which calls for important structural changes, some industries having to speed up their development while others must undertake certain modifications to their plans.

Only if Community rules on aids are respected will it be possible for Government assistance measures to overcome the relevant problems effectively, rapidly and with the minimum cost, avoiding mutual overbidding with all that that would entail: the neutralizing of the effects of those national policies which are most justified, the exporting of unemployment from one Member State to another and, finally, the aggravation of the Community situation as a whole. The Commission will use the powers, conferred on it by the Treaty in this area to prevent this occurring.

§ 2 — Regional aid systems

149. On regional aids, the Commission continued its efforts to formulate a new coordination arrangement which would take account of the diversity of the regional situations in the enlarged Community and whose principles would apply to all the Community regions, taking into consideration the relative seriousness of the problems in each of the regions not designated as 'central' in the Commission Communications to the Council of 23 June 1971[1] and 28 June 1973.[2]

[1] First Report on Competition Policy, point 145 et seq.
[2] Third Report on Competition Policy, point 82.

In this last Communication and in a new Communication dated 28 November1973, setting out the guidelines from which it was working,[1] the Commission undertook to define the principles of this new coordination solution by 31 December 1974 at the latest. However, the work begun with the competent national authorities was initially hampered by certain technically complex problems and certain political obstacles. These difficulties are now being overcome and the Commission hopes to be able to finalize in the near future a new coordination arrangement with the following main features:

— the terms 'central' and 'peripheral' used to determine the categories of regions in the 1971 coordination arrangement would be dropped;

— the coordination principles in force for the regions previously designated as 'central' (excepting certain regions in Italy) would be maintained;

— the principles governing aid, in particular, aid intensity would be differentiated more widely in the light of the nature and the seriousness of the problems besetting other regions.

§ 3 — Aid system for specific industries or sectors

Shipbuilding

150. The Council continued examination of the Commission's proposals on shipbuilding, presented at the end of 1973, which are directed towards the definition of a reorganization and investment policy coordinated at Community level. One of the bases of this policy will be the third Directive on shipbuilding, discussed in the Third Report on Competition Policy.[2]

Because of the complexity of the material and the doubts of some Member States regarding the system of prior examination which it lays down for large-scale investment aid projects in this sector, the Council has not yet been able to adopt the third Directive. Consequently, on proposals from the Commission, the second Directive,[3] due to lapse on 31 December 1973, was twice extended for six months. Since progress was not sufficient to allow the speedy adoption of the third Directive, the Commission proposed to the Council in December 1974 that the second Directive be extended once again until 31 June 1975, so as to avoid a legal gap in the specific Community rules on aid to shipbuilding and to allow the Council to reach agreement. The Council adopted this proposal on 19 December 1974.[4]

[1] Third Report on Competition Policy, point 83.
[2] Third Report on Competition Policy, points 90 to 99.
[3] Second Report on Competition Policy, point 95.
[4] OJ L 349 of 28.12.1974, p. 62.

Modification of the OECD arrangement on credits granted for the export of ships

151. The conditions applying to credits granted in most shipbuilding countries for the export of ships are governed by the resolution of the OECD Council of 30 May 1969. These conditions are also adopted on a Community level in the proposal for a third council Directive on aids to shipbuilding.

It had been agreed in 1971 that the maximum duration of these credits must not exceed eight years and that the annual interest rate must not be below 7.5%, while payment on account before delivery must be at least 20% of the contract price.

In view of trends on the shipbuilding market and the desire of the governments participating in the arrangement to phase out gradually all the obstacles in the way of establishing normal competitive conditions in the shipbuilding industry, the OECD Council decided, on 18 July 1974, to tighten up these rules: the maximum duration was reduced from eight to seven years, the minimum rate was increased to 8% and the minimum advance payment was raised to 30% of the contract price.

These amendments thus constitute an important step in the reduction of distortions of competition in shipbuilding.

France

152. During 1973, the Commission initiated against the French Government the procedure provided for in Article 169 on grounds of infringement of Article 5 of the second Council Directive on aids to shipbuilding,[1] which requires Member States to refrain from any discriminatory practice favouring, within their national territories, the building or conversion of ships or the manufacture of items intended to form part of such ships.

The infringement resulted from the fact that, under the insurance system applied in France against exceptional cost increases, calculation of the allowance granted to the French shipyards to compensate for cost increases did not take account of the prices of materials imported from other Member States and used in ships built in France.

This led the national shipbuilders to give preference to French materials so as not to lose the benefit of the guarantee granted to them by the insurance system.

Following an undertaking given by the French authorities to include imported materials with effect from 1 March 1974, the Commission decided to terminate the infringement procedure which it had initiated.

[1] Third Report on Competition Policy, point 99.

Textile industry

British aid to the wool industry

153. The United Kingdom notified the Commission of an aid scheme designed to promote the rationalization and reorganization of the British wool industry, in particular through the elimination of unprofitable production plant.

This aid scheme, which constitutes a sectoral aid programme within the terms of the 1972 Industry Act, makes available a total credit of £15 million and envisages four types of operation to be carried out during a four-year period ending on 31 December 1977:

— projects for the replacement of equipment may qualify for a 15% subsidy;

— projects combining rebuilding and re-equipment may qualify for a 20% subsidy;

— projects designated as 'wider-ranging and major projects' which, apart from the replacement of existing plant (which may qualify for the aids mentioned above), are intended to rationalize the production process within one or more firms, may also qualify either for loans (duration 7 years, interest rates slightly below that of the market and, possibly, interest-free for 2 years) or for interest subsidies (3% for 4 years) on loans contracted on the market;

— projects for the closure of firms or production units qualify for a subsidy of 4% of the turnover of the last year of operation or of 2.50% of turnover plus £150 per loom scrapped and £1.50 per ring-spindle equivalent scrapped.

Of the total appropriation of £15 million, £4 million will go to each of the first three categories of projects, and the remainder to the fourth.

Very tight control will be excercised to ensure that firms receiving aid do not use this to increase their production capacity; thus, in the case of combing machines, re-equipment aid is subject to the scrapping of an existing capacity equal to the new capacity; in the case of cards, spindles, looms and dying facilities, capacity equal to 90% of the new capacity must be scrapped.

154. The reasons given by the United Kingdom authorities for this assistance are of two kinds:

Over the last ten years, the competitive position of the British wool industry on the world market has steadily declined. From 1962 to 1972 British production decreased by 26% while that of the Community of Six increased by 15%. This was because industrial facilities are too widely dispersed and almost on the level of cottage industries—in 1971, out of a total of 430 firms, only 4 had assets exceeding £10 million—and this keeps profits low and therefore curtails investment.

The industry is highly concentrated geographically; of the 100 000 persons employed, 70% work in Yorkshire and 10% in Scotland. In many areas of Yorkshire, it is the only economic activity. In this region, as in Scotland, the unemployment rate is considerably higher than the national average. The healthy economic situation in 1973 therefore masked structural problems which threatened to bring severe social problems in their wake in these regions in the future.

155. The Commission raised no objection to the implementation of this aid system. Given its limited period of application, the fact that it will allow the structures of the industry concerned to be improved by modernization and regrouping of firms without an overall increase in production capacity, and the fact equally that reorganization will prevent the emergence of social difficulties in certain less well-off regions, the Commission felt that the aid system was within the limits set out in the Communication on the 'Community framework for aids to the textile industry' which it had addressed to the Member States in July 1971.[1]

However, since the 'wider-ranging and major projects' were not clearly enough defined in the aid system notified, the Commission asked the United Kindom Government to specify the criteria which those qualifying would have to meet, or to notify it in advance of all the specific cases coming under this heading. The Commission also requested that the reorganization objectives of the scheme be respected in the granting of regional aids which can be combined with the assistance provided for under the wool programme. Finally, the Commission asked that material to be scrapped and replaced by new equipment under the aid scheme be defined in such a way that there is certainty that it was in fact being used during a significant period of the year preceding its scrapping.

Italy: Temporary charging to general taxation of certain social security contributions

156. The Italian authorities introduced, without prior notification to the Commission, a temporary (three years) and partial (rate reduced from 15 to 10%) arrangement for charging to general taxation family allowance contributions paid by Italian textiles and clothing firms. On completion of the proceedings which it initiated in respect of this aid under Article 93(2) of the EEC Treaty, the Commission adopted a decision on 25 July 1973,[2] calling upon Italy to terminate the aid. The Commission based its decision on the following considerations:

[1] First Report on Competition Policy, point 172.
[2] Third Report on Competition Policy, point 101.

— because of its amount (0.8% of the turnover of the firms concerned) and its direct effect on costs, the aid may impair trade and competition within the Community in an industry which, throughout the Community, is facing difficulties as regards adaptation to new conditions;

— this aid is an operating aid of a 'conservatory' nature which is not intended to encourage the firms in need of it to carry out structural changes; it is aid of a general nature which makes no distinction between firms in structural difficulties and firms which have no such problems;

— the argument that the social security contributions chargeable to firms in respect of family allowances are higher in Italy than in other Member States does not justify the aid: while it is true that the general background to industrial operations (for example, taxation, social security contributions, cost of credit) varies from one Member State to another, there is no case for isolating one particular factor (in this case, social security contributions), and compensating, by means of aids, the addition costs which this factor imposes on firms in one Member State in comparison with their competitors in the other Member States, while failing to take into account other factors which may have an opposite effect.

157. On 9 October 1973, the Italian Government instituted proceedings before the Court of Justice for annulment of this Commission decision, on the basis of the following arguments:

— the Commission decision did not set any time-limit for the abolition of the tax relief; the EEC Treaty, however, lays down that such a time-limit must be set for the alteration or abolition of an existing aid;

— the decision encroaches on an area reserved by the Treaty to the sovereignty of the Member States, that of imposing internal taxes; in addition, the tax relief on the social security charges under dispute is a measure of a social nature which, by that fact, does not come under Articles 92 and 93;

— the tax relief is intended to rectify an imbalance existing to the detriment of an industry which, employing a majority of female workers who are not entitled to family allowances, has nevertheless to pay contributions for each employee, contributions which are higher than in the other Member States.

The Court of Justice did not accept the Italian Government's argument. In its judgment of 2 July 1974, Case 173/73, the Court dismissed the appeal, pointing out that:

— 'the spirit and general scheme of Article 93 imply that the Commission, when it establishes that an aid has been granted or altered in disregard of paragraph (3), must be able, in particular when it considers that this aid is not compatible with the common market having regard to Article 92, to decide that the State concerned

must abolish or alter it, without being bound to fix a period of time for this purpose and with the possibility of referring the matter to the Court if the State in question does not comply with the required speed';

— 'the aim of Article 92 is to prevent trade between Member States from being affected by benefits granted by the public authorities which, in various forms. distort or threaten to distort competition by favouring certain undertakings or the production of certain goods. Accordingly, Article 92 does not distinguish between the measures of State intervention concerned by reference to their causes or aims, but defines them in relation to their effects. Consequently, the alleged fiscal nature or social aim of the measure in issue cannot suffice to shield it from the application of Article 92';

— 'as to the argument that the social charges devolving upon employers in the textile sector are higher in Italy than in the other Member States, it should be observed that, in the application of Article 92 (1), the point of departure must necessarily be the competitive position existing within the common market before the adoption of the measure in issue. This position is the result of numerous factors having varying effects on production costs in the different Member States. Moreover, Articles 92 to 102 of the Treaty provide for detailed rules for the abolition of generic distortions resulting from differences between the tax and social security systems of the different Member States.... On the other hand, the unilateral modification of a particular factor of the cost production in a given sector of the economy of a Member State may have the effect of disturbing the existing equilibrium. Consequently, there is no point in comparing the relative proportions of total production costs which a particular category of costs represents, since the decisive factor is the reduction itself and not the category of costs to which it relates'.

Aid systems financed by para-fiscal charges

158. The reasons for which the Commission considers it incompatible with the common market that the Member States should finance national aids by means of para-fiscal charges imposed not only on domestic products but also on those imported from the other Member States, were set out in previous Reports.[1] The Commission continued its efforts to win acceptance for this general position, which was confirmed by the Court of Justice in its Judgment of 25 June 1970 in Case 47/69, concerning schemes of this type still existing in the industrial sphere.

[1] First Report on Competition Policy, points 181 to 183; Second Report, points 108 to 111; Third Report, points 102 to 104.

Italy: Industrial research and experimental institutes

159. Under a Decree dating from 1923, there exist in Italy 'experimental centres for industry' whose task it is to promote, by means of studies, analysis, and applied research, technological and technical progress in each of the branches of industry for which it is responsible. These centres are financed partly from the public budget, but also through a contribution from Italian industry and a tax imposed on imported products. The Commission took the view that this tax constituted a tax equivalent in effect to a customs duty and initiated the procedure provided for under Article 169 against Italy in order to obtain its abolition.

The Italian Government believed it had solved this problem by tabling in Parliament a draft law reorganizing the centres and renaming them 'institutes of research and experimentation for industry'.

The institutes will have the status of corporate bodies established in public law. They will specialize in one branch of industry and will concentrate on applied research work to meet the needs of small and medium-sized firms which do not have the necessary financial resources to carry out such work themselves. In addition to the 'centres' already existing for certain industries (skins and tanning materials, cellulose and paper, food preserves, fuels and glass), which will simply change their name, there will also be new institutes for the wood, ceramics and plastics industries. The general aim of the institutes is to promote technical progress in the various branches of the national economy so as to make them more competitive 'both within the common market and in relation to non-member countries with high levels of productivity'.

Like the 'experimental centres' they replace, the institutes will be financed half from their own resources and a financial contribution from the State, and half from contributions from national firms and importers operating in the industry concerned; however, this contribution will now be imposed on imported products at the same rate and in the same way as on domestic products.

160. The Commission took the view that as their main aim and effect was to promote technical progress in these industries, the research institutes constituted a system of aid to Italian industry within the meaning of Article 92(1) of the EEC Treaty. The fact that foreign firms are free to avail themselves of the services provided by the institutes and that the results of their research and development work are published, theoretically establishes equality of treatment, but the fact remains that in practice the institutes will base their research work on the specific work, needs and technological requirements of Italian industry, and, because they are near at hand, it will be easier for Italian firms to avail themselves of their services. Furthermore, firms in the other Member States will not derive such benefit from these services since they often undertake similar research work, either directly or by making financial contributions of their own to similar technical centres.

In view of the fact that the Commission is usually favourably disposed towards aids which facilitate industrial development (particularly of small and medium-sized firms) by improving technical progress, the aid system could qualify for exceptional treatment under Article 92(3, c) as 'aid to facilitate the development of certain economic activities', as long as it 'does not adversely affect trading conditions to an extent contrary to the common interest'. However, it is precisely the fact that the contribution to be used in financing this aid system is levied not only on domestic products but also on imported products which precludes the view that this condition has been met, the Court of Justice having held, in Case 47/69, that an aid financed by this method has the effect, whatever its amount, of adversely affecting trade to an extent contrary to the common interest.

Consequently, in order to have this tax lifted from products imported from the other Member States, the Commission initiated the procedure provided for under Article 93(2) in respect of the draft law in question, with the understanding that it would have no other objection to its implementation. The Italian Government has now informed the Commission that it will endeavour to raise from other sources the budgetary resources which will permit this exemption.

Italy: Aids to the press, the paper industry and for reafforestation

161. In Italy, the Ente Nazionale per la Cellulosa e la Carta (ENCC), which is a semi-official body, grants various aids to the press, to pulp and paper research and for reafforestation. These aids are financed by two para-fiscal charges, one of which is levied on paper and cardboard and the other on chemical pulp used in Italy, whether these products are imported or of domestic origin.

The Commission initiated the procedure provided for under Article 93(2), EEC in respect of this scheme, requesting, that the aid granted to newspapers and periodicals printed in Italy in the form of a premium calculated on the basis of the quantities of newsprint used be granted also on newsprint imported by printing firms directly from the other Member States without passing through the intermediary of the ENCC and that the aid be abolished for newspapers and periodicals published in a foreign language for export to other Member States.

In addition, it proposed that the aid granted to pulp and paper research should no longer be financed by the taxes levied on products imported from the other Member States.

The Commission conceded, on the other hand, that the aids for reafforestation were compatible with the common market, since the levying of the para-fiscal charge was not such as to aggravate their effect on competition and trade, by reason of the very indirect link between the products subject to charge and the product aided.

The Italian Government altered the system along the lines requested by the Commission, and the Commission decided to discontinue the procedure which it had initiated under Article 93(2) EEC.

France: Industrial research establishments in the clock and watch, leather and hide, and resinous products industries

162. In Decision No 74/8/EEC of 17 December 1973,[1] the Commission decided that the French Government must modify the method of financing the industrial research establishments in the clock and watch and leather and hide industries. In this case too the Commission took the view that the aid granted through the intermediary of those establishments to promote technical progress in the firms in these industries could not be considered as compatible with the common market unless the para-fiscal charge used to finance their activities was no longer levied on products imported from the other Member States.

The French Government complied with this decision and exempted products imported from the Member States from the charge. It undertook the same measure in respect of the para-fiscal charge used to finance the research establishment for resinous products.

Aid systems for the development of electricity generation based on Community coal

163. In laws adopted in 1965 and 1966 and in directives adopted in 1972, the German Government had already undertaken measures to encourage the use of coal in electricity generation. These measures had two objectives:

— to facilitate the orderly contraction of the coal industry while ensuring minimum outlets in electricity generation;

— to ensure that the energy supplies of the Federal Republic depended to a lesser degree on imports of other energy products from non-member countries.

The subsidies provided for under the 1972 directives to achieve these objectives included:

(a) a fixed subsidy intended to compensate for the additional investment costs required by coal-based power station in comparison with a power station operating on fuel oil;

(b) an annual subsidy paid over ten years and intended to compensate for the difference in production costs of a calorie by coal in comparison with one by fuel oil;

[1] OJ L 14 of 17.1.1974.

(c) an annual subsidy of DM 10 per tonne of coal equivalent over ten years intended to compensate for the additional operating costs of a coal-based power station in comparison with a fuel oil based power station.

Similar measures were implemented in France on 1 January 1972. The French Government applied an aid system to encourage the use of Community coal in electricity generation. Subject to certain guarantees by the suppliers regarding the regularity of their deliveries, the French Government grants a fixed allowance of FF 10 per tonne of solid mineral fuels intended for use in electricity generating stations.

In both case, the Commission took the view that in terms of the EEC Treaty these aids would not alter the competitive position of electricity producers using coal since they would not lower the price of electricity produced from Community coal below the price at which the electricity could be obtained from other fuels, but would only prevent or slow down the changeover to supplies of imported coal or fuel oil; that, consequently, these aids would not affect trade and competition within the Community in the industry concerned. The Commission had also noted that the objectives pursued (stabilization of markets for Community coal and contribute to ensuring reliable supplies) were in accordance with the interests of the Community.

164. In 1974, the German Government notified the Commission, in accordance with Article 93(3), of a draft law ('Drittes Verströmungsgesetz') pursuing these same objectives and intended to safeguard energy supplies by encouraging the use of Community coal, discouraging the use of fuel oil and to aid the Community coal industry by guaranteeing it a stable market of the order of 27 to 30 million tonnes per per year for electricity generation purposes up to 1980.

The new measures, which will supersede those adopted by the German Government in 1972, are as follows:

Users of coal—of whatever origin in the Community—for electricity generation will receive a subsidy to compensate for the difference in production costs between a calorie by coal and by fuel oil. This subsidy will be paid by a Federal Office specially set up for this purpose and financed by means of an equalization charge levied on all German producers of electricity. This charge will be calculated as a percentage of the value of the electricity produced. It will have the effect of increasing electricity production costs by 3% to 4%, entailing only very slight rise in consumer prices.

This new subsidy system will supersede the subsidies previously paid to compensate for the difference in production costs of a calorie by coal in comparison with fuel oil in coal-based power stations, and for the higher running costs of such power stations.

The Federal Government will also grant a subsidy to compensate for the additional investment costs required by the construction of a coal-based power station in comparison with a power station working on fuel oil. The aim is to build coal-based power stations with a total capacity of 6 000 MW by 1980.

In addition, the Federal Government has prohibited the building of new power stations or the enlargement of existing power stations of more than 10 MW capacity using only fuel oil or fuel oil and natural gas. The Federal Government's authorization is required for the building of new power stations or the enlargement of existing power stations using natural gas if their output is higher than 10 MW.

165. The Commission has not expressed any objection to the implementation by the German Government of this new system of aids.

The compensatory payments will not place German producers of electricity who use coal in a more advantageous position than they would be in if they used other fuels. Consequently, these compensatory payments will not affect competition and intra-Community trade in electric power, which is at the present time conducted on a very small scale.

The same conclusion must be drawn with regard to the subsidy intended to cover the additional investment costs required by a coal-based power station in comparison with a power station operating on fuel oil.

Furthermore, the German Government's measures are in line with the guidelines recommended by the Commission in its Communication to the Council of 26 June 1974 on a new energy strategy for the Community.[1] One of the Commission's suggestions is that measures be taken to facilitate the use of coal in electricity generation so as to diversify the Community's energy supply sources.

§ 4 — Systems for providing general aid

166. In its Second Report on Competition Policy[2] 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 advance, such cases being defined with

[1] Bull. EC 12-1974, points 1201 to 1203.
[2] Second Report on Competition Policy, points 116 to 119.

reference both to the size of the assisted investment and to the effect of the aids granted on the assisted investment.

167. The Commission had already achieved acceptance of this principle in respect of the Belgian general aid schemes set out in Article 5 of the Law of 30 December 1970,[1] the Economic and Social Development Fund (FDES) in France,[2] and the Luxembourg Law for the promotion of economic expansion.[3]

Acting under the procedures pursuant to Article 93 (2) which it had previously initiated, the Commission elicited compliance in 1974 with these procedures by the Netherlands Government, in respect of the system of State guarantees for the transactions of the Nationale Investeringsbank (NIB),[4] and by the Italian Government, in respect, firstly, of draft law No 231/72, which subsequently became Italian Law No 464[5] and, secondly, draft law No 946, which subsequently became Law No 274.[6]

168. Article 9 of Italian Law No 464 provides for aid to firms which, having run into difficulties, may have to dismiss workers or put them on short time.

This aid basically consists of interest subsidies which can bring down to 4% the rate of interest on the loans contracted by the firms to carry out their plans to avoid the total or part-unemployment of their workers. These subsidies are for a maximum period of 15 years, and there is a ceiling for each case which can be as high as 70% of the expenditure involved.

The Commission decided to initiate the procedure of Article 93(2), EEC against this aid scheme because, while sharing the Italian Government's concern to protect employment, it took the view, firstly, that the proposed aid measures were concerned purely with keeping ailing firms active and would make no effective contribution to their rationalization and, secondly, that to be able to assess the effect of these aid measures, it should be given prior notification of 'sectoral' or regional programmes which the Italian authorities would be establishing for the application of such aid or, failing this, of the more important specific cases where aid was granted.

As a result of the opening of this procedure by the Commission, the Italian Government agreed:

— that the grant of the aids under consideration should be made subject to the submission by the recipient undertakings of reorganization, restructuring or conversion schemes and that aid should be granted in respect of the investment operations carried out under these programmes; it would thus be impossible for the aid to be used simply to keep ailing firms active;

[1] Second Report on Competition Policy, point 90.
[2] Third Report on Competition Policy, point 113.
[3] *Idem*, point 120
[4] *Idem*, point 118.
[5] Second Report on Competition Policy, point 119.
[6] Third Report on Competition Policy, point 115.

— that priority should be given to the granting of this aid in the Mezzogiorno and in certain less-favoured areas in the centre and north of the country; in this latter case, the aid measures would comply with the principles of coordination adopted by the Commission in respect of regional aids in the central regions of the Community;
— lastly, that outside these development areas, prior notice should be given to the Commission of significant specific cases where aid was granted.

169. The same result was achieved in respect of draft law No 946 (now Law No 274), which posed similar problems. In this law, the Italian Government proposed to refinance, to an amount of Lit 40 000 million, aid granted under Law No 1470,[1] under which low-interest loans are granted to ensure the survival of firms which have run into difficulties or to facilitate the reopening of firms which, because of such difficulties, have already been obliged to discontinue operations.

In initiating the procedure provided for in Article 93(2) against this law, the Commission had requested the Italian Government to ensure:
— firstly, that the loans in question should in future be granted only in respect of investment programmes undertaken by firms within the framework of restructuring plans, so as to avoid this aid being used simply to keep non-competitive firms alive;
— secondly, that the loans should be used only within the context of sectoral or regional programmes of which the Commission was to be given prior notification, or, failing this, that significant specific cases where aid is granted should be notified in advance.

The Italian Government was able to satisfy the Commission on these points. It further undertook to discontinue the aid system under consideration once the funds currently appropriated under Law No 274 had been exhausted.

170. The Commission also initiated the procedure of Article 93(2) against the Belgian Law of 17 July 1959 introducing and coordinating measures to promote growth and the creation of new industrial activities.

This law provides for a number of benefits in connection with investment operations which contribute to the creation, extension, conversion or modernization of industrial undertakings and which are likely to be of 'advantage to the economy as a whole':
— interest subsidies of 2% generally granted for between three and five years; these subsidies can be increased to 4% in respect of operations integrated into the sectoral objectives of the general economic plan or to enable existing firms, by means of a large-scale investment programme, to face the new conditions of international competition; as a general rule, the loans subsidized in this way may cover 50% of the investment expenditure;

[1] Third Report on Competition Policy, points 115 to 117.

— State guarantees for bank loans having qualified for interest subsidy;

— exemption from withholding tax for a period of five years.

The criteria governing the choice of industry qualifying under the aid scheme are not spelled out in detail, so that the scheme could be used, under the discretionary powers exercised by the national authorities, to support investment in any industry and in any location.

As in the case of the aid schemes mentioned above, the Commission requested the Belgian Government to give prior notification, that is as laid down in Article 93(3):

— of the programmes for certain industries or branches of industry which it may establish, from time to time, for the application of the Law of 17 July 1959,

or, failing this,

— of the specific cases where this law is applied in respect of given undertakings where the assistance given is significant from the point of view of intra-Community trade and competition: this will be necessary, firstly, where the investment aided is not less than 2 million u.a., whatever the value of the aid itself, and, secondly, where the aid itself amounts to or exceeds 15% in net subsidy-equivalent of the amount of the investment, whatever the size of the investment.

§ 5 — Aid to encourage new technological developments

171. The German Government notified the Commission of the agreement it proposed to conclude with Wagnisfinanzierungs-AG (WFG) to participate in the risks undertaken by this firm in its financing operations. The role of the WFG, a limited-liability company to be founded by the large German banks, will be to provide financial and management assistance to small and medium-sized firms which wish to launch new products or technologies on an industrial and commercial basis. This financial assistance will take the form of participation in shareholdings and other forms of capital. The holdings will be retained only as long as is necessary to ensure a chance of commercial success for the new developments in question.

182. The support given by the Federal Government to WFG will take the form of a guarantee whereby it undertakes to re-pay 75% of any losses of the WFG up to a sum of DM 50 million; these moneys will bear interest and are intended to be repaid out of subsequent profits.

The German Government decided on this step having found that certain weaknesses in German financial structures prevented the best use being made of research and development work carried out at the instigation of the public authorities or by research workers or the firms themselves. The industrial and commercial exploitation

of this work is often hindered by the difficulties which small and medium-sized firms encounter in raising the funds they need in the form of venture capital.

In view of the fact that there was no chance of a financial undertaking corresponding to this need being set up in Germany to fill this gap and in order to encourage other bodies to take an interest in this type of financial activity, except by means of an initial financial support, the Federal Government decided, under a risk sharing contract, to assume for a limited period a proportion of this risks assumed by such a company, that is the WFG.

173. The conclusion reached by the German Government is similar to that expressed by the Commission in its 1970 memorandum on industrial policy. The Commission stressed that in the majority of the Member States existing financial structures were not well suited to the launching of new developments by small and medium-sized firms though this category of firm had an important role to play in this field.

Although the State itself plays a fairly important role in the innovation stage by giving financial support to research and development, its assistance generally ceases when the phase of industrial and commercial exploitation of the results begins. This phase requires a relatively large amount of capital, and the banking system does not always meet this need sufficiently since it is wary of the hazardous nature of industrial initiatives based on new developments. Consequently, it tends to demand excessive guarantees or a direct involvement in the management of the firm, or even actual control before providing support. As a result, self-financing often remains the only source of finance—and it is seldom adequate—for small and medium-sized firms which wish to launch a new product or process without loss of independence.

There is therefore a clear need, if the transition from innovation to industrial exploitation is to be facilitated in the Community, for a specific financing system which can supply undertakings with venture capital and management advice. This would be similar to the venture capital systems known in the USA, in Japan and in Sweden, where the banks, investment companies or industrial groups make such capital available to firms which have a new idea to exploit, participate in the rewards and risks involved in its industrial and commercial launching without assuming control of the operation, and resell their holding, generally a minority one, as soon as the operation appears to be profitable.

174. In view of the fact that this German measure promises to fill this gap in the traditional financing structures and to promote the spread of technological progress in the Community via the small and medium-sized firm, the Commission decided to raise no objection to the aid granted in the form of a guarantee by the German Government to the WFG.

Certain Member States have in fact already adopted measures of a similar type. In 1972, the Sociétés Financières d'Innovation (SFI) were set up in France with a role identical to that of the WFG. To facilitate the development of these new financial institutions, the French Government laid down that the subscriptions to the capital of a SFI may qualify for a special depreciation allowance of 50%. This systematic depreciation of the amounts subscribed is equivalent, given corporation tax liability, to a subsidy of 25% of the subscription. This incentive is designed to facilitate the collection by the SFI of loan capital to be reinvested as venture capital.

§ 6 — Aid for environmental purposes

175. Faced with the large number of measures adopted in this field by the Member States, the Commission—which had already commented on a number of these[1]—made known its general position towards specific aid measures aimed at protecting the environment. This position is consistent with the guidelines laid down by the Council and the Member States both in the Council Declaration[2] of 22 November 1973 on the programme of action of the European Communities on the environment, and in the Recommendation to the Member States[3] which the Council adopted on 7 November 1974, on a proposal from the Commission, regarding cost allocations and action by public authorities on environmental matters ('polluter pays' principle).

General considerations

176. The Commission considers environmental protection should be a priority Community objective, but feels that in the long-term the 'polluter pays' principle will have to be applied throughout the Community if the environment is to be protected efficiently without distorting trade flows or competition.

Applying this principle and the other general principles in the EEC Treaty relating to State aids, the cost of measures required to reduce nuisances and pollution to an acceptable level should be borne by the firms whose activities are responsible for them. Environmental policies both at national and at Community level should be based, not on the general grant of aids by states, which simply means that the public pays in the end, but by the imposition of obligations (standards and levies) enabling the authorities to make polluters bear the cost of protecting the environment.

The State aids should be granted only when the objectives considered essential for the environment are seriously in conflict with other social or economic objectives also of priority importance. Basically, they should be granted only when it is apparent that

[1] Third Report on Competition Policy, points 107 and 123.
[2] OJ C 112 of 20.12.1973, p. 6: Part I, Title II, para. 5.
[3] OJ C 68 of 12.6.1974, p. 1.

existing undertakings are not in a position to support the new costs facing them and where social or economic difficulties might arise in certain industries or geographical areas which only financial intervention by the State could avoid.

177. However, the Commission realizes that in the present circumstances the polluter pays principle is far from being generally or uniformly applied throughout the Community.

Because the environment problem has only very recently come to the fore, environmental 'costs' are either inadequately taken into account or not taken into account at all in the economic systems of the Member States. Thus products or production processes which cause pollution are in general use, firms have been located regardless of ecological principles, and the environment has been allowed steadily to deteriorate. It would be wrong to hold existing firms wholly responsible for this state of affairs.

Furthermore, Member States adopt differing approaches to similar environmental cost situations and impose differing requirements on polluters, so that competition and trade within the Community are seriously distorted. Finally, environmental problems in any given state will frequently have repercussions on the environment of other Member States; pollution is, of course, no respecter of national frontiers.

178. There will have to be drastic changes if the accumulated damage is to be put right:

The public authorities in all the Member States must therefore be urged to adopt quickly and apply firmly the regulations requiring polluters to defray the costs of eliminating the pollution they have caused. Alongside this, there must be a major effort on the part of businesses to adapt exsting plant.

This will not be easy, particularly in view of deeply ingrained habits and of the financial burdens which firms will have to face and which, in some cases, will threaten their survival. The necessary changes cannot be made overnight since all the Member States will have to overcome a considerable degree of inertia and at the same time try to ensure that improving the quality of the environment does not conflict with other priority objectives, particularly in the industrial, regional and social fields.

It can be assumed that the Member States will be in a position to introduce rapidly and enforce effectively national or Community regulations embodying the polluter pays principle only if they overcome these obstacles. Yet this is a matter of real urgency because the environment is steadily deteriorating, the Member States grow increasingly interdependent, and the distortions resulting from the varying degrees of strictness in their treatment of firms grow greater.

179. The Commission therefore believes that, during a transitional period, the Member States must be able to promote and facilitate the adaptation of their industries to the new requirements. This will be done by the grant of State aids and

these aids will not be restricted simply to the cases where it is considered that, in the absence of the aid, the obligations imposed on the firms would create serious difficulties in given regions or industries.

Assuming a certain degree of discipline, carefully applied State aids should enable the polluter pays principle to be introduced more uniformly and rapidly throughout the Community, while effectively protecting the environment and eliminating existing distortions of competition.

Guidelines for the application of Article 92 et seq. of the EEC Treaty in respect of specific aids to the environment

180. On the basis of these considerations, and distinguishing between:

— firstly, its attitude during the transitional period to State aids aimed at speeding up the application of regulations embodying the polluter pays principle and at adapting existing businesses to these regulations, always assuming that these aids meet certain requirements,

— and secondly, the general principles which it will apply after the transitional period, or even during the transitional period, to environmental aids not meeting the requirements,

that the Commission sent to the Member States on 7 November 1974 a memorandum setting out the 'Community approach to State aids in environmental matters', in which it informed the Member States of the general criteria which it will apply in its assessment of the aids in question.

Transitional period

181. In this memorandum, the Commission states that, for a transitional period of six years from 1 January 1975 to 31 December 1980, the State aids designed to assist existing firms in adapting to laws or regulations imposing major new burdens relating to environmental protection will qualify for exemption under Article 92(3, b) of the EEC Treaty as aids to promote the execution of an important project of common European interest.

The Commission feels that this period is long enough to enable all the Member States to implement arrangements ensuring that the polluter pays principle is applied throughout the Community on broadly similar principles.

In order to qualify for exemption foreseen, national aids will have to satisfy the following tests:

— they will have to be made necessary by new major obligations imposed by the State or by the Community on the recipient firms in relation to environmental protection;

— they will have to be granted to finance additional investment required by these firms to meet obligations relating to adaptation of plant in operation at 1 January 1975 to the level required to meet the obligations mentioned above.
  Such additional investment might consist either in acquiring new equipment to reduce or eliminate pollution or nuisances or in the adoption of new production processes having the same effect. In the latter case, aid should not be granted in respect of that part of the new investment whose effect is to increase productive capacity. The cost of replacing and operating the investments should be fully borne by the relevant firms.

— when expressed as a net after-tax subsidy-equivalent calculated by reference to the common method set out in the Commission memorandum to the Council on regional aid schemes,[1] they must not exceed:

  - 45% for investments made by firms in 1975 and 1976,
  - 30% for investments made by firms in 1977 and 1978,
  - 15% for investments made by firms in 1979 and 1980.

  This degressive scale is necessary to make the Member States clearly aware of the need to make arrangements as rapidly as possible to ensure that pollution and nuisance costs are charged to those responsible. The maximum aid is high because it must be properly related to the costs that will be incurred by managements whose production processes were adopted at a time when environmental costs were largely disregarded; it has, however, been fixed at less than 50% in order to emphasize that while for the time being the polluter pays principle cannot be fully applied, it still remains the ultimate objective.

Within these limits, the Member States will be able to implement aid schemes in favour of given industries or regions and general schemes applying to all firms in the country in question. Unless it reflects the principles of general application set out below, any scheme which does not meet the above conditions will have to be modified if it is to qualify for endorsement by the Commission.

Principles of general application

182. In dealing during the transitional period with aids exceeding the above-mentioned limits and, after the transitional period, with all specifically environmental aids, the Commission states in its memorandum that it will apply the following principles:

To enable the Commission to decide whether they supply real needs and how they affect competition and trade, any aid schemes introduced by the Member States on environmental grounds will have to specify in detail the industries or geographical areas for which aid is to be granted.

[1] OJ C 111 of 4.11.1971, p. 10.

This means that the Member States will not be able to apply aid schemes which, under the discretionary power of national authorities unsupervised by the Commission, would be able to assist any firm regardless of its geographical location or industrial context.

Furthermore, the Commission will assess whether the new obligations on firms are indeed of such a nature that, in a given industry or region, difficulties would be provoked which might disturb the equilibrium of that industry or region and which, in that case, would justify the proposed aid schemes.

The aids which are to be granted will have to be aimed at facilitating the adaptation of firms to the new obligations concerning the elimination of their pollution imposed by the public authorities. This objective should be reflected in the rules governing these aids and in the definition of those who are eligible to benefit.

The aim of the aids should be to help firms:

— either to carry out research and development programmes so that they can evolve new products or production techniques which cause less pollution or can promote the industrial exploitation of the results of such programmes (construction of pilot plants);
— or to carry out new investments involving the construction of supplementary plant so as to eliminate pollution or by the conversion of existing plant to cleaner production processes.

Aids to these investment should be justified by a sudden major change in the obligations and constraints imposed on firms in respect of environmental pollution.

Accordingly they should be granted only to going concerns and only in respect of alterations to plant in service at the time of the change. New firms and new plant commissioned by existing firms will have to be designed and set up in such a way that, without state financial support, they can meet the environmental standards in force at the time they begin production.

Exceptions from this restriction, may, however, be allowed in favour of new firms and new plant where international competition is such that certain of their activities would be seriously handicapped by being subjected to differing obligations from those imposed in given non-member countries or where non-member countries are themselves granting environmental protection aids.

Application of these guidelines to certain aid schemes

183. The Commission is currently examining on the basis of these guidelines two proposed aid schemes for environmental protection purposes which have been notified to it, one by the Belgian Government, the other by the German Government.

The proposed German scheme provides that investment operations carried out by firms for environmental protection purposes will qualify for accelerated depreciation arrangements for tax purposes amounting to a net subsidy-equivalent of approximately 10% of the investment. This facility will be available only in respect of plant in operation as of 1 January 1975 but will have no set time limit.

The Belgian proposal takes into account additional investment which firms must carry out in respect of the purification of their waste water to conform to the new obligations imposed by a law of 26 March 1971 and by the regulations arising therefrom. As in the German scheme, aid will be granted only to existing undertakings and will not cover any extension of capacity. This aid will take the form of subsidies granted on a degressive scale ranging from 60% for investments carried out in 1974 to 30% for those carried out in 1979.

Initially, the Commission opened the procedure of Article 93 (2) against these two schemes, because, since their scope was general, there was no way of checking that the aids corresponded to cases of real necessity each time they were granted. However, since they fall to a large extent within the guidelines laid down in the above-mentioned memorandum concerning aid which can be granted to existing firms to enable them to adopt over a transitional period to the new environmental protection conditions imposed on them, the Commission has since informed the Governments concerned that it would withdraw its objections to the implementation of these two systems provided certain details were amended (duration of application in the case of the German scheme, aid rates in the case of the Belgian scheme).

Chapter II

The adjustment of state monopolies of a commercial character

184. The Commission continued the work it has been engaged in since the end of the transitional period with respect to state monopolies of a commercial character.[1]

As the Commission stated in its Recommendations of 25 November and 22 December 1969, it believes that the best way to achieve its objective is to abolish the exclusive rights of monopolies. The Commission has already achieved the abolition of the French gunpowder and explosives monopolies, the match monopoly (in respect of products from the original Member States), and the manufactured tobacco monopoly is due to be abolished no later than 1 January 1976 in accordance with an undertaking given by the French Government. In addition, Italy has ended its cigarette-lighter, cigarette papers, flints and industrial salt monopolies. The importation into Italy of matches from the other Member States has already been liberalized, and the adjustment of this monopoly to comply fully with Article 37 of the EEC Treaty is to follow before 1 January 1976. An assessment of the practical effects of the adjustments made by the Italian Government has been rendered difficult by the lack of interest in the Italian market shown by the other Community manufacturers.

185. As regards the *French potash monopoly*, the French Government has complied with the Commission's reasoned opinion concerning compound fertilizers containing potash. By a decree of 22 August 1974,[2] the requirement that these products be declared prior to importation when they originate in the other Member States has been abolished. This monopoly can be considered as fully adjusted in accordance with Article 37(1). As regards straight fertilizers containing potash or potassium salts, the French Government has withdrawn the French joint sales agency's exclusive import and sales right. The requirement that the goods be declared prior to importation has nevertheless been retained until 1 May 1975 in the most recent measures adopted by the French Government,[3] and the Commission has notified the French Government that this requirement must be dropped without delay.

[1] First Report on Competition Policy, point 195 et seq. Second Report on Competition Policy, point 150 et seq. Third Report on Competition Policy, point 125 et seq.
[2] Journal Officiel de la République Française, 29.8.1974, p. 9014.
[3] Decree of 28.11.1974.

186. The reasoned opinion delivered by the Commission on the question of the *French alcohol monopoly* resulted in Decree No 74-91 of 6 February 1974 in which the French Government amended the economic arrangements within this monopoly. Under these amended arrangements, the import surcharge, which is a standard rate and higher than the levy on home-produced products, is retained only in respect of spirits and spirituous beverages from countries other than the original Member States. The products from these countries are therefore subject to a countervailing charge; when home-produced products are exempt from this duty, the products from the original Member States are also exempt from the countervailing charge.

On 31 March 1974, the French Government issued the implementing decrees laying down the amounts of the various charges. In view of the fact that these charges could be considered as non-discriminatory, the Commission was able to decide not to continue with the infringement procedure initiated earlier in accordance with Article 169 of the EEC Treaty, but reserved the right to review this position if circumstances so required, since in the Commission's view the definitive adjustment was of secondary importance compared with the replacement of the French monopoly market organization by a common organization of the market in ethyl alcohol of agricultural origin. However, the Commission feels obliged to re-examine its position in the light of the Court Judgment handed down in Case 48/74 on 10 December 1974. In this case, the Court ruled that national market organizations must comply with the provisions concerning the free movement of goods after the end of the transitional period.

The new position to be adopted by the Commission on this question will also require a change in its attitude towards the German alcohol monopoly.

187. In the case of the *basic slag monopoly*, the Commission had established that the law of 31 December 1973[1] adjusting this monopoly would be effective only when measures had been introduced for the 'mise en place économique' of basic slag, these measures to include a form of prior import licence and a mechanism for equalizing freight costs.

The Commission therefore called upon the French authorities to confirm that the freedom to import basic slag into France for marketing was effective immediately and that there was no need to wait for the end of the period necessary for the drafting of the implementing texts provided for in Article 3 of the above-mentioned law.

The Commission was assured that this was the case and a notice to importers was published in the Journal Officiel de la République Française of 25 July 1974.

188. The Italian Government made certain adjustments to its *manufactured tobacco monopoly* in the light of the procedure under Article 169 of the EEC Treaty which the Commission had initiated after establishing the existence of discriminatory measures and practices against imported items.

[1] Third Report on Competition Policy, point 128.

These adjustments were in response to a number of criticisms made by the Commission concerning *inter alia* the lower limit applied to supply prices in the tariff; the limit on the number of new foreign brands and the frequency with which these could be introduced; the machinery for changing prices and the supply of regional depots. In addition, the flat-rate distribution costs have been reduced from Lit 700 to 500 per kilogram, this amount being deemed to cover the expenses incurred after the receipt of the goods at the two points allowed by the monopoly for entry into its network, Bologna and Genoa.

An examination of the effect of these adjustments has not allayed the fears of the Commission concerning the existence of import barriers. Furthermore, following complaints from certain foreign manufacturers concerning overlong delays on the part of the monopoly in paying for imports, the Commission initiate[1] a new infringement procedure[2] since it took the view that these delays had an effect equivalent to that of quantitative restrictions.

189. In Law No 835 of 28 November 1973,[3] the Italian Government published measures concerning the establishment of a consortium for the compulsory storage of *bergamot oil.* Within the Community, bergamot oil is manufactured only in Italy and the consortium is therefore in a position to exert a considerable influence on the sales and exports of this product.

The Commission takes the view that this consortium constitutes a monopoly within the meaning of the second subparagraph of Article 37(1) of the EEC Treaty and has initiated the infringement procedure provided for in Article 169 of the EEC Treaty.

190. Since the three new Member States declared that they had no state monopolies within the meaning of Article 37 EEC, the Commission's sole task in this area was to make recommendations concerning the adjustment of the monopolies in the six original Member States *vis-à-vis* the three new states (Article 44 of the Act concerning the Conditions of Accession). Recommendations have been made in respect of the French manufactured tobacco[4] and match monopolies[5] and the Italian manufactured tobacco monopoly,[6] the Commission urging the opening of import quotas in favour of the new Member States. In accordance with Article 44, these quotas should be increased each year to reflect the progressive nature of the measures adopted pending the complete adjustment envisaged in the Act for no later than the end of 1977. As regards the French alcohol monopoly, the Commission recommended,[7] in accordance

[1] Third Report on Competition Policy, point 126.
[2] Commission decision of 20.12.1974.
[3] Gazzetta Ufficiale No 333; 28.12.1973.
[4] OJ L 237 of 29.8.1974, p. 35.
[5] OJ L 237 of 29.8.1974, p. 2.
[6] OJ L 326 of 6.12.1974, p. 29.
[7] OJ L 278 of 15. 10.1974, p. 16.

with Article 44(2) of the Act, that France should ensure that, by 31 December 1975 at the latest, spirits and spirituous beverages from the new Member States should no longer be subject to heavier taxation than that imposed on home-produced products of a similar nature. It was not considered necessary to make recommendations in respect of the French basic slag and potash monopolies or in respect of the Italian match and bergamot oil monopolies, since the legislation covering their activities makes no distinction between the new Member States and the original Member States.

Part Three

The development of concentration within the Community

Introduction

191. The Commission is now presenting for the first time information on the current degree and trend of concentration in the enlarged Community. It is true that this information will not provide a detailed picture, mainly because there is still a lack of statistical material needed for the year-to-year comparisons on which the analysis of trends and structural changes depends. Nevertheless, the following evaluations of information published in the specialized press together with the latest results of the Commission's research programme which analyses concentrations give a broad picture of the present degree of economic concentration within the Community.

192. First, the structure in 1973 of national and international mergers, participations in and formations of joint subsidiaries is examined. There follows a description of the degree and development in 1972 and 1973 of general industrial concentration. The third section deals with the trend of concentration in a few selected industries and countries of the Community between 1969 and 1972. In the last section the results are summarized.

§1 — National and international mergers, participations in and formations of joint subsidiaries in the Community in 1973

Comparison between national and international operations

193. The figures for the number and structure of corporate interpenetration operations in the Community in 1973 cannot be directly compared with the results last published in the Second Report on Competition Policy, points 153 to 165, for the period from 1966 to 1971. Both are based on an evaluation of the operations reported in the specialized press. However, the number of countries considered and the range of the contents have been altered. The figures now cover not only international transactions but also purely national ones. In addition, they no longer include the setting up of non-joint ('one-parent') subsidiaries, since these are of no relevance to the analysis of concentration in the Community.

The following figures cover only the number of operations. Since no figures are available on the economic importance of the individual cases, no direct relationship can be established between the frequency of operations and the development of the degree of concentration.

194. Table 1 shows the number of takeovers and mergers, participations in and formations of joint subsidiaries for 1973 and also the number of operations, broken down into bilateral and multilateral operations, according to the number of participants. The number of firms involved in each type of operation is also shown. The figures indicate how many firms were involved in the transactions,[1] but the firms are not necessarily different ones for each transaction. The same firm may have been involved several times in one year in mergers, participations or the formation of joint subsidiaries. Finally, Table 1 shows the percentage of all operations carried out in the Community in 1973 which took place on a purely national level.

195. The acquisition of participations, accounting for 58% of all operations, was the most frequent single type of operation. The setting up of joint subsidiaries accounted for just over a third (34%). Bilateral operations (79%) were much more common than operations involving three or more participants. On average 2.7 firms participated in the setting up of joint subsidiaries, 2.3 in takeovers or mergers and 2.1 in the acquisition of participations.

196. The number of international operations was much greater than the number of purely national transactions, accounting for 39% of operations and 43% of 'firms involved'. Takeovers and mergers were an exception to this pattern since these all

[1] In what follows the expressions 'number of firms involved' or 'firms involved' are used in this special sense.

TABLE 1

National and international operations in the Community in 1973

Operations according to type of operation						Total operations		Operations according to number of firms involved	
Takeovers and mergers		Participations		Joint subsidiaries					
No of operations	No of firms involved	No of operations	No of firms involved	No of operations	No of firms involved	No of operations	No of firms involved	Bilateral operations	Multilateral operations
138	318	952	1989	548	1476	1638	3783	1298	340
of which purely national operations (%)									
100	100	40	42	22	32	39	43	42	29

took place between firms of one and the same Member State. This is because the several company laws of the Member States are not geared to international takeovers and mergers.

Geographical breakdown of international participations and establishment of joint subsidiaries

197. Between 1966 and 1971, in all forms of international operations in the six-member Community, corporate transnational activities increased only between firms from Member States.[1] Their share in the number of operations rose from 35% in 1966, to 38% in 1970 and to 41% in 1971. This trend continued in the enlarged Community. In 1973 firms from Member States were involved in more than half (57%) of all international operations (cf. Table 2).[2]

TABLE 2

Geographical breakdown of international operations and types of operation in the European Community and non-member countries in 1973

No of operations						No of firms involved in operations					
Participations		Joint subsidiaries		Total		Participations		Joint subsidiaries		Total	
EC	NMC	EC	NMC	EC	NMC	EC	NMC	EC	NMC	EC	NMC
60	40	54	46	57	43	78	22	66	34	74	27

NB — % for each type of operation; EC = operations involving only firms from the Member States, NMC = operations in which firms from non-member countries participated.

198. In the period 1966 to 1971 there was a sharp increase in international operations in France.[3] Compared with the other Member States, France accounted for the third largest number of international operations in 1966, the second largest in 1970 and in 1971 the largest number. In 1973, in the enlarged Community, France also led all the other Member States in the number of international operations (cf. Table 3).

Belgium retained the second place which it had acquired in 1971. Germany once again occupied the third position, though sharing it with Luxembourg, which in 1971 lay in sixth position. The increase in the number of international operations in Luxembourg is a continuation of the trend already established between 1966 and 1971. The rate of growth of the number of international operations in Luxembourg was second only to that in France.

[1] Second Report on Competition Policy, point 157.
[2] The figures for the six-member Community, in contrast with those for the enlarged Community, included the setting up of 'one-parent' subsidiaries. A check has shown that the change made has not affected the results.
[3] Second Report on Competition Policy, points 160 and 161.

TABLE 3

Geographical structure of international operations in the Community in 1973

(%)

G	F	I	N	B	L	UK	IRL	D	EC
14	22	6	11	19	14	12	1	1	100

199. The figures available on the nationality of firms involved in international operations in the enlarged Community make it possible to assess the involvement of firms from non-member countries (Table 4). As in the six-member Community, American firms are in the lead before Swiss firms and firms from other non-member countries.[1] Compared to 1971, however, American influence was considerably reduced. Only Japanese firms and firms from 'other non-member countries' maintained their percentage share in the figure for the number of firms involved in international operations in the Community.

TABLE 4

Shares of non-member countries in the total number of firms involved in international operations in the Community in 1973

(%)

EC	USA	SWITZ	J	SC[1]	OC[2]	Total
73	12	6	2	2	5	100

[1] SC = Scandinavian countries.
[2] OC = Other countries.

Breakdown by industry of national and international mergers, participations and jointly established subsidiaries

200. Between 1966 and 1971, the highest growth rates in international operations in the six-member Community were in the food industry, followed by services.[2] Analysis of national and international operations in the nine-member Community reveals that the service sector was in first position in 1973 with a considerable lead over the metal industries, the other processing industries and the chemical industries (Table 5). It is possible that these results reflect the tendency in highly developed economies towards increasing concentration on the services sector. Before more precise conclusions can be drawn, however, an analysis will have to be made of the further development of the structure industry by industry of national and international mergers, participations and the setting up of joint subsidiaries in the Community.

[1] Second Report on Competition Policy, point 162.
[2] Second Report on Competition Policy, point 163.

TABLE 5

Structure industry by industry of national and international operations in the Community in 1973

(%)

Metal-using industries	Fuel and power	Chemicals	Textiles	Other manufacturing industries	Food industry	Services	Total
27	2	8	4	11	9	39	100

§ 2 — Concentration in industry within the Community in 1972 and 1973

Aims and statistical bases

201. In this first attempt to describe overall concentration in industry, the geographical distribution of large-scale industries in the Community, that is to say, the geographical concentration of industry, is first of all examined. There follows an analysis of concentration with regard to big industrial companies, and finally the role played by the big companies in industry as a whole in the Community is examined.

202. This is only a tentative approach, and the methods used do not permit of a more definitive analysis. Generalized findings on concentration in industry within the Community necessarily conceal the structural differences which exist in the degree of industrialization and in the composition and importance of the individual branches of industry in the various Member States. Further problems which international comparisons over a number of years present are those arising from changes in exchange rates and from inflation and also the difficulties arising from the nature of the statistical data.

203. The statistical source material used is the data on the sales and employment of 'Europe's 500 biggest' published by the magazine VISION[1] and also the figures supplied by the Statistical Office of the European Communities.

The Community's big industrial companies

204. On 20 July 1973, the Commission presented to the Council the 'Proposal for a Regulation on the Control of Mergers'.[2] Following the absolute quantitative criteria set out in it, European big companies in 1972 and 1973 are defined as firms with annual sales of more than 200 million u.a., with those having sales of 1 000 million u.a. shown separately. Table 6 shows the number and geographical distribution of these firms.

[1] VISION, the European Business Magazine, monthly published by SEPEG, Geneva, October 1973 and October 1974.
[2] Third Report on Competition Policy, point 22 et seq., and this Report, points 17 et seq.

205. The number of industrial firms with annual sales above 200 million u.a. rose by 4% from 1972 and 1973. British firms were the most numerous in both years, ahead of German and French firms. On the other hand, the number of industrial firms in the Community with sales exceeding 1 000 million u.a. fell by 4%. In 1972, the United Kingdom had most firms with sales exceeding 1 000 million u.a., followed by Germany, France and Italy, while in 1973 Germany led the table ahead of the United Kingdom, with the order of the other Member States unchanged.

206. Concentration processes are not the only factors affecting the development shown over a period of time in the number of big companies in Europe. VISION gives the sales in dollars. The rise in the value of the unit of account against the dollar which took place in the 1972/73 period led necessarily to a reduction in the number of big companies measured by their sales in units of account. Without the change in the conversion rate, there would have been a total of 367 firms with annual sales above 200 million u.a. in 1973, that is to say a rise of 15% as against 1972, and 86 firms with sales of 1 000 million u.a., namely, a rise of 4% compared with 1972. How far the change in the conversion rate offsets the effect of inflation, which boosts the number of big industrial companies measured according to their sales, it is impossible to say, particularly in view of the varying rates of inflation in the individual Member States. Comparisons over a period of time between the absolute values have therefore very little meaning. Structural comparisons can, however, be carried out.

207. The figures indicate that the distribution of European large-scale industry among the Member States became more even from 1972 to 1973. The variation ratio as index of this distribution fell for undertakings with annual sales of more than 200 million u.a. by 8 points and for firms with sales of more than 1 000 million u.a. by 6 points.

208. Over both years, firms with sales of more than 1 000 million u.a. were more evenly spread throughout the Member States than big firms taken as a whole. Compared to the geographical distribution of all big industrial firms, firms with sales of more than 1 000 million u.a. were disproportionately numerous in both 1972 and 1973 in Germany, Italy and Luxembourg, and in 1973 also in the Netherlands.

209. Concentration within the big industrial firms increased. Whereas in 1972 forty-five firms accounted for 50% of the sales of all big firms in the Community, in 1973 this figure was only forty-two. In 1972, thirty-eight firms employed half of all the workers employed in large-scale firms, while in 1973 the number was thirty-seven firms. The fifty largest firms increased their share in the total sales of large-scale industry from 53% in 1972 to 55% in 1973. Their total sales rose by 13%, that of all big firms by 11%.

TABLE 6

Geographical distribution of the largest industrial firms in the Community in 1972 and 1973

Country	Number of firms with sales of more than			
	200 million units of account [1]		1 000 million units of account [1]	
	1972	1973	1972	1973
United Kingdom	129	116	27	22
Germany	81	92	27	26
France	58	69	14	15
Italy	16	17	6	6
Netherlands	12	15	2	3
Belgium	14	13	2	2
Denmark	1	3	—	—
Luxembourg	1	1	1	1
United Kingdom/Italy	1	1	1	1
United Kingdom/Netherlands	2	2	2	2
Germany/Netherlands	2	2	1	1
Belgium/Germany	1	1	—	—
EC	318	332	83	79

[1] Dollars were converted into units of account (u.a.) at the following rates:
1972 — 1 u.a. = 1.08571 dollars.
1973 — 1 u.a. = 1.20635 dollars.

Sources:
1972 — VISION assessment, October 1973.
1973 — VISION assessment, October 1974.

210. The trend towards concentration within large-scale industry in Europe is also reflected in calculations of the total degree of concentration (Table 7). The indices used are those employed in the Commission research programme on concentration.[1] Rising ratios indicate an increase in concentration.

[1] Cf. Third Report on Competition Policy, point 130 et seq. and also point 214 et seq.

TABLE 7

Concentration of firms with annual sales of more than 200 million units of account in 1972 and 1973

Year	Share of the 4 largest firms (%)		Herfindahl-Hirschman Index		Disparity between the largest firms	
	Employment	Sales	Employment	Sales	Employment	Sales
1972	11.5	11.3	9.8	8.9	0.11	0.13
1973	12.0	11.4	10.1	9.2	0.12	0.13

The place occupied by big companies in Community industry

211. The lack of adequate statistics on industry as a whole within the Community makes it more difficult to draw conclusions as to the role played by big firms. Even with this proviso it is clear, however, that large-scale industry increased its already very strong position in comparison with industry as a whole between 1972 and 1973. While concentration in industry as a whole increased, concentration in large-scale industry increased more rapidly.

212. Although firms with annual sales of more than 200 million u.a. accounted for 29% of total industrial employment in 1973, compared with 30% in 1972, the fifty largest European industrial concerns increased their share of employment from 16.8% to 17.1%. The total sales of European industry as a whole, converted into u.a. and therefore considerably reduced in purely arithmetical terms by the change in the conversion rate, rose by 8% between the two reference years; those of big firms rose by 11% and those of the fifty largest European industrial firms by 13%.

213. The statistical material available does not permit exact calculation of the share of big firms in total industrial sales in the two reference years. Supplementary calculations and estimates have shown, however, that the big European companies with annual sales of more than 200 million u.a. accounted for some 50% of total industrial sales in the Community, and the fifty largest European firms for some 25%.

§ 3 — Concentration trends in further selected industries and countries in the Community between 1969 and 1972

Methods used

214. The following description is confined to an examination of the development of concentration in the industries for which results were available for at least one new Member State in the Commission research programme on concentration. This was the

TABLE 8

Studies available analysing concentration (Situation on 31 December 1974)

Industry (NICE nomenclature)	Country							
	G	F	I	N	B	UK	IRL	D
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
313.2 manufacture of photographic products	×	×	×	×	×			
313.5 manufacture of cleaning and maintenance products (waxes, polishes, metal polishes,etc.)			×	×	×			
38 Manufacture of transport equipment								
385.1 manufacture of motor cycles, cycles and mopeds	×[1]	×	×+	×				
36 Manufacture of machinery								
361 manufacture of agricultural machinery and tractors	×	×	0					
362 manufacture of office machinery	×	×	0					
364.1 manufacture of textile machinery	×	×	0					
366.3 / 364.4 manufacture of machinery for construction and for preparation of construction materials	×	×						
366.5 manufacture of mechanical handling equipment	×	×	0					
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	×	0	0	0	

[1] In Germany the industry was sub-divided into cycles on the one hand and motor cycles and mopeds on the other.
× Given in the Second Report on Competition Policy.
0 New studies.
+ Updating of available studies.

case in the food industry, the pharmaceutical industry, electrical engineering and the manufacture of paper and paper products. Only thirteen out of the total of seventy-one reports prepared for the old Member States in respect of these industries could be taken up to the year 1972. To that extent the following figures give only a preliminary indication of the development of concentration in the enlarged Community.

215. To facilitate comparison with the figures previously published by the Commission,[1] the quantitative analysis is once again based on 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;
— the Linda indices weighted by the number of the largest firms in industry for determining size disparities between these firms;
— concentration ratios for comparisons of degrees of concentration from country to country and industry to industry.

Also with a view to facilitating comparisons, the figures already published earlier for the old Member States are repeated in the tables.

216. Table 8 summarizes all the studies completed up to the present. The new studies which became available during 1974 were prepared by the following national research institutes and experts:

France:	Institut Agronomique Méditerranéen and INRA Montpellier — J.L. Rastoin, G. Ghersi, M. Castagnos, D. Boulet, J.P. Laporte (food industry);
Italy:	FIS-ATOR Consulenza Aziendale, Milan — A. Amaduzzi, R. Camagni, G. Martelli (electrical engineering and updating of the pharmaceutical industry and manufacture of transport equipment); SORIS S.p.A. Studi e richerche di Economia e Marketing, Turin — P. Balliano, G. Bertone, F. Guaschino, R. Lanzetti (manufacture of transport equipment and food industry);
Belgium:	STUDIA Vzwd, Brussels — J. Hallet (food industry);
United Kingdom:	Development Analysts Ltd., Croydon — R.W. Evely, P.E. Hart, S.J. Prais (food industry); Cranfield School of Management, Cranfield — Bedford — F. Fishwick, W. Hull, R.B. Cornu (manufacture of paper products);

[1] First Report on Competition Policy, points 204 to 216; Second Report on Competition Policy, points 166 to 187; Third Report on Competition Policy, points 130 to 160.

TABLE 9

Number of firms and changes in numbers in certain industries and certain Community countries, 1969 and 1972

20-B Food industry

Industry (NICE nomenclature)	Year	G		F		I		N		B		UK		IRL	
		Absolute	1969 = 100	Absolute	1969 = 100	Absolute	1969 = 100	Absolute	1969 = 100	Absolute	1969 = 100	Absolute	1969 = 100	Absolute	1969 = 100
20-B	1969	2718	100	4125	100	1959	100	1407	100	1059	100	110	100	575	100
Food industry	1972	—	—	3959	96	1982*	101*	1231*	87*	984	93	72	65	525	91

31 Chemical industry

Industry	Year	G		F		I		N		B		D	
313.1	1969	690	100	496	100	539	100	25	100	75	100	25	100
Pharmaceutical industry	1972	—	—	—	—	459	85	—	—	—	—	27	108

37 Electrical engineering

Industry	Year	G		F		I		B		D	
375 Radio, television, sound reproduction equipment	1969	19	100	39	100	81	100	112 (375 and 376 together)	100	19	100
	1972	—	—	33*	85*	—	—	—	—	19	100
376 Manufacture of electrical appliances for domestic use	1969	96	100	167	100	133	100			9	100
	1972	—	—	—	—	—	—			9	100

27 Manufacture of paper and paper products

Industry	Year	G		F		I		N		UK	
271 Manufacture of pulp, paper and paperboard	1969	191	100	203	100	532	100	19	100	65	100
	1972	—	—	—	—	—	—	—	—	66	102
272 Processing of paper and paperboard	1969	1120	100	1350	100	700	100	194	100	174	100
	1972	—	—	—	—	—	—	—	—	145	83

— No data available.

* Data refer to 1971.

TABLE 10

Concentration in selected industries and countries of the Community, 1969 and 1972
(Herfindahl — Hirschman indices)

20-B Food industry

Industry (NICE nomenclature)	Year	G		F		I		N		B		UK		IRL	
		Employment	Sales	Employment	Sales	Employment	Sales	Employment	Sales	Employment	Sales	Employment	Sales	Employment	Sales
20-B Food industry	1969	3	4	4	4	7	6	11	10	14	18	64	69	14	27
	1972	—	—	3	4	9*	6*	16*	16*	20	21	60	67	21	34

31 Chemical industry

Industry	Year	G		F		I		N		B		D	
313.1 Pharmaceutical industry	1969	29	33	18	—	27	35	173	142	83	83	135	129
	1972	—	—	—	—	29	33	—	—	—	—	157	138

37 Electrical engineering

Industry	Year	G		F		I		B		D	
375 Radio, television, sound reproduction equipment	1969	—	—	134	123	46	45	206	200	270	351
	1972	—	—	156*	152*	—	—	—	—	332	306
376 Household electrical goods	1969	—	—			122	91			506	437
	1972	—	—			—	—			337	306

27 Manufacture of paper and paper products

Industry	Year	G		F		I		N		UK	
271 Manufacture of pulp, paper and paperboard	1969	32	68	16	—	20	25	199	187	—	82
	1972	—	—	—	—	—	—	—	—	—	80
272 Processing of paper and paperboard	1969	17	29	4	—	3	5	23	29	—	96
	1972	—	—	—	—	—	—	—	—	—	91

— No data available.
* Data refer to 1971.

TABLE 11

Disparities between the largest firms in selected industries and countries of the Commu nity, 1969 and 1972
(Weighted Linda indices)

20-B Food industry

Industry (NICE nomenclature)	Year	G		F		I		N		B		UK		IRL	
		Employment	Sales	Employment	Sales	Employment	Sales	Employment	Sales	Employment	Sales	Employment	Sales	Employment	Sales
20-B Food industry	1969	0.08	0.07	0.12	0.13	0.17	0.13	0.23	0.21	0.22	0.29	0.23	0.28	0.43	0.38
	1972	—	—	0.11	0.13	0.18*	0.12*	0.28*	0.20*	0.25	0.25	0.26	0.26	0.32	0.34

31 Chemical industry

Industry	Year	G		F		I		N		B		D	
313.1 Pharmaceutical industry	1969	0.17	0.20	0.19	—	0.21	0.20	0.63	0.45	0.36	0.36	0.53	0.41
	1972	—	—	—	—	0.21	0.19	—	—	—	–	0.58	0.54

37 Electrical engineering

Industry	Year	G		F		I		B		D	
375 Radio, television, sound reproduction equipment	1969	0.47	0.47	0.53	0.42	0.25	0.32	0.54	0.54	0.97	1.33
	1972	—	—	0.55*	0.59*	—	—	—	—	1.28	1.17
376 Household electrical goods	1969	0.49	0.72			0.47	0.40			2.14	1.53
	1972	—	—			—	—			0.98	0.88

27 Manufacture of paper and paper products

Industry	Year	G		F		I		N		UK	
271 anufacture of pulp, paper and paperboard	1969	0.31	0.34	0.42	0.36	0.24	0.21	0.76	0.59	—	0.29
	1972	—	—	—	—	—	—	—	—	—	0.28
272 Processing of paper and paperboard	1969	0.39	0.38	0.10	—	0.17	0.20	0.17	0.17	—	0.37
	1972	—	—	—	—	—	—	—	—	—	0.34

— No data available.
* Data refer to 1971.

Ireland:	Faculty of Commerce, University College, Dublin — L. P. F. Smith (food industry);
Denmark:	Handelshøjskolen in Århus — Th. H. Nielsen, N. Jørgensen, J. Vestergaard (pharmaceutical industry and electrical engineering).

Changes in the degree of concentration

217. Reductions in the number of firms can be taken as an index of concentration processes. Table 9 shows the number of firms for the industries chosen and, the changes over the reference period (1969 = 100). Between 1969 and 1972 there was a further general reduction in the number of firms, a trend already noted for the period 1962 to 1969. Of the thirteen comparable cases, eight show a decline in the number of firms (food industries in France, the Netherlands, Belgium, United Kingdom and Ireland; pharmaceutical industry in Italy; radio, television and sound reproduction equipment in France; paper-processing industry in the United Kingdom), two show no change (radio, television and sound reproduction equipment and electrical appliances for domestic use in Denmark), and three show an increase (food industry in Italy; pharmaceutical industry in Denmark; paper and paper products production in the United Kingdom). Against these last three industries, one showed an increase of only two new firms (pharmaceutical industry in Denmark), and another an increase of only one new firm (paper and paper products production in the United Kingdom).

218. A more differentiated view of the continuing concentration process in the Community can be obtained from the general reduction in the number of firms if the analysis includes the Herfindahl–Hirschman indices (cf. Table 10). Apart from the changes in numbers, they also take account of the changes in the size structure between the firms. It is true that concentration in terms of employment indicated increases in the degree of concentration in eight out of a total of eleven comparable cases. However, concentration in terms of sales showed an increase in the degree of concentration in only five of the thirteen comparable cases, a decrease in six cases and no change in two cases.

219. The Linda indices (Table 11) give some indication of the cause of the relatively small increase in concentration in terms of sales. As indices of the disparities simply between the big firms of one industry, they show only two cases of increasing concentration between 1969 and 1972 amongst the thirteen comparable cases of concentration in terms of sales. The differences in size between the large firms are narrowing. Consequently, with this continuing decline in the number of firms, it was mainly the firms at the lower end of the scale which were active in terms of concentration.

TABLE 12

Percentages of employment and of sales by the four or eight largest firms in selected industries and countries of the Community (concentration ratios) in 1969 and 1972

20-B Food industry

Industry (NICE nomenclature)	Year	G				F				I				N				B				UK				IRL			
		Employment		Sales		Employment		Sales		Employment		Sales		Employment		Sales		Employment		Sales		Employment		Sales		Employment		Sales	
		4	8	4	8	4	8	4	8	4	8	4	8	4	8	4	8	4	8	4	8	4	8	4	8	4	8	4	8
20-B Food industry	1969	4	7	5	8	7	13	8	13	13	21	10	17	15	21	14	22	20	27	21	27	43	61	41	58	20	30	26	40
	1972	—	—	—	—	7	12	8	13	14*	22*	10*	17*	17*	23*	19*	28*	24	31	22	32	40	61	39	59	22	35	29	43

31 Chemical industry

Industry	Year	G				F				I				N				B				D			
313.1 Pharmaceutical industry	1969	25	43	29	43	23	32	—	—	28	37	32	43	74	—	72	—	43	64	43	64	64	85	66	87
	1972	—	—	—	—	—	—	—	—	28	36	31	42	—	—	—	—	—	—	—	—	68	88	65	86

37 Electrical engineering

Industry	Year	G				F				I				B				D			
375 Radio, television sound reproduction equipment	1969	—	62	—	71	65	82	66	85	35	54	31	50	78	90	77	88	65	85	66	87
	1972	—	—	—	—	72*	87*	68*	86*	—	—	—	—	—	—	—	—	68	88	65	86
376 Household electrical goods	1969	—	69	—	85					61	76	54	76					95	100	94	100
	1972	—	—	—	—					—	—	—	—					93	99	93	100

27 Manufacture of paper and paper products

Industry	Year	G				F				I				N				UK			
271 Manufacture of pulp, paper and paperboard	1969	26	37	40	54	20	31	—	—	22	32	23	37	76	88	72	86	—	—	51	67
	1972	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	49	64
272 Processing of paper and paperboard	1969	20	25	28	34	8	14	—	—	5	8	8	15	21	32	25	39	—	—	55	67
	1972	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	53	65

— No data available.
* Data refer to 1971.

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

220. The percentage employment and sales shares accounted for by the four or eight largest firms in the industries chosen (Table 12) show that in the enlarged Community as well, concentration varies appreciably from industry and from Member State to Member State.

221. The highest degree of concentration amongst the selected industries was in household electrical goods, followed by radio, television and sound reproduction equipment and the pharmaceutical industry. These were followed by pulp, paper and paperboard production and processing and the food industry.

222. Amongst the 'large' Member States, the United Kingdom had the highest concentration ratio, followed by the Federal Republic of Germany, Italy and France. Among the 'small' Membei States the order was: Denmark, the Netherlands, Belgium, Ireland.

223. No further detailed analysis can be undertaken of the industry-to-industry and country-to-country differences in degrees of concentration until further results are available.

An example of the development of concentration in selected product markets

224. General conclusions on the development of concentration in the Community can be drawn on the basis of the 71 studies which have so far been carried out as part of the Commission research programme on concentration. However, a description of trends in individual sub-markets in the various Member States cannot be included in the present report because of the wealth of detailed information in these studies. This information can be found in the reports of the institutes and experts published by the Commission. An example is given below of the development of concentration in selected product markets of the food industry in Italy and France.

225. Figures are available for 1972 which show the market shares of the four largest firms in ten submarkets of the Italian food industry. In three submarkets over 90% of demand was covered by only four suppliers (98% in baby foods and dietary foods, 93% in processed meats and 91% in deep-frozen foods). In three other cases, the four largest producers had moie than 50% of the market (75% in chocolate and other cocoa-containing foods, 53% in preserved fish and 53% again in preserved fruit and vegetables). The market shares of the four largest producers in the other markets were 40% in jams and marmalades, 28% in spaghetti, macaroni, etc., 25% in cheeses and 16% in confectionery.

226. A similar picture of highly concentrated supply structures in the submarkets of the food industry emerges from the figures available for twelve product markets in France (Table 13). In half of all cases in 1972 the four largest firms together accounted for over 50% of the market (84% in meat broths and soups, 78% in spaghetti, macaroni, etc., 71% in spices, 65% in deep frozen foods, 56% in sugar and 54% in oils and fats). Between 1969 and 1972 in the French food industry there was a fall in the number of firms and no change in the degree of concentration in terms of sales, while concentration in terms of employment decreased (see Table 10). The information available on the changes in the degree of concentration in the submarkets on the other hand shows that the market shares of the four largest firms increased in eight cases, remained unchanged in one case and declined in only three cases.

TABLE 13

Market shares of the four largest firms in selected product markets of the food industry in France 1969 and 1972

Product market	Number of firms		Market shares of the four largest firms	
	1969	1972	1969	1972
Sugar	59	60	55%	56%
Preserved fruit and vegetables	189	181	24%	26%
Preserved fish	117	112	24%	23%
Spaghetti, macaroni, etc.	35	30	72%	78%
Chocolate and sweets	279	257	33%	33%
Oils and fats	131	135	66%	54%
Mill products	464	386	27%	38%
Biscuits	322	325	27%	29%
Deep-frozen foods	48	45	47%	65%
Feeding stuffs	541	527	15%	14%
Meat broth, soups	13	12	73%	84%
Spices	70	73	70%	71%

227. In both Italy and France the same groups are frequently encountered on the various submarkets of the food industry. In Italy, Motta, which is one of the four largest producers of chocolate and other cocoa-containing foods, is also engaged in the production of biscuits through Motta Ala. The Star group, which is one of the

four largest suppliers on the market for processed meats, also produces cheese (through its interest in Prealpi), edible oil (through its interest in ITALSO) and also baby foods and dietary foods (through its interest in Mellin). In 1972 the largest French group BSN-Gervais-Danone, set up by merger on 1 January 1973, with 53% of its sales in the food sector, had a market share of 70% in baby foods, 43% in spaghetti, macaroni, etc., and 36% in cream cheese. The four largest groups on the French market (BSN-Gervais-Danone, Nestlé, Beghin-Say, Sodima) accounted for 90% of the sales in baby foods, 80% in dessert preparations, 52% in cream-type cheese and 33% in yoghourt.

228. Financial interpenetrations at both national and the international levels between the big companies mean that the degree of concentration actually arrived at should be estimated at a still higher level than that indicated in the figures on market shares. Thus in Italy the firms Alemagna, Cirio, Motta and Star belong to the State-owned group IRI-SME. In France, BSN-Gervais-Danone and Nestlé are linked through their joint subsidiary France-Glace-Findus.

229. Figures are available for 1971 which show the place occupied by multinational companies in the food industry in Italy and France. In Italy, these firms accounted for 30% of total sales in the industry and for 25% of the capital invested in it, while in France they accounted for 16% of total sales and 15% of capital. The material available indicates the growing influence of foreign firms, and in particular British firms, in France.

§ 4 — Summary

230. In summary the following conclusions can be drawn for the enlarged Community:

- International mergers, participations and the establishment of joint subsidiaries predominated in 1973 over purely national transactions, with 61% of all operations.
- More than half of all the international operations were between firms from Member States.
- In Europe, the concentration of big companies (firms with annual sales of more than 200 million units of account) in certain Member States decreased from 1972 to 1973.
- General industrial concentration increased within the Community. The sales of the fifty largest firms rose by 13% from 1972 to 1973, the sales of industry as a whole by 8%.
- Concentration within the big companies also increased. In 1972 45 firms accounted for 50% of the sales of all big firms in the Community, whereas in 1973 the figure was 42 firms.

— The latest results of the Commission research programme on concentration also indicate a general decline in the number of firms for the period 1969 to 1972. The results of the remaining studies must be awaited before further conclusions can be drawn.

— Analysis of the development of concentration in selected markets of the Italian and French food industries shows that while the degree of concentration has declined in the industry as a whole, concentration has increased, substantially in some cases, in individual submarkets. Because of extensive financial interpenetration, the actual degree of concentration arrived at should be estimated at a still higher level than that shown by the figures on market shares.

Annex

LIST

of individual decisions of the Commission and rulings of the Court of Justice made in 1974 concerning the application of Articles 85 and 86 of the EEC Treaty and of Articles 65 and 66 of the ECSC Treaty.

DECISIONS ON INDIVIDUAL CASES

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

Decision of 15 May 1974 on a proceeding under Article 85 of the EEC Treaty '*Agreements between manufacturers of glass containers*'	OJ L 160 of 17.6.1974, p. 1 IP (74) 85 of 29.5.1974 Bull. EC 5-1974, point 2109
Decision of 23 July 1974 on a proceeding under Article 85 of the EEC Treaty '*Papiers peints de Belgique*'	OJ L 237 of 29.8.1974, p. 3 IP (74) 135 of 25.7.1974 Bull. EC 7/8-1974, point 2128
Decision of 24 July 1974 on a proceeding under Article 85 of the EEC Treaty '*Advocaat Zwarte Kip*'	OJ L 237 of 29.8.1974, p. 12 IP (74) 142 of 25.7.1974 Bull. EC 7/8-1974, point 2130
Decision of 25 July 1974 on a proceeding under Article 85 of the EEC Treaty '*FRUBO*'	OJ L 237 of 29.8.1974, p. 16 IP (74) 133 of 25.7.1974 Bull. EC 7/8-1974, point 2127
Decision of 29 November 1974 on a proceeding under Article 85 of the EEC Treaty '*Franco-Japanese ball-bearings agreement*'	OJ L 343 of 21.12.1974, p. 19 IP (74) 214 of 4.12.1974 Bull. EC 12-1974, point 2121
Decision of 13 December 1974 on a proceeding under Article 85 of the EEC Treaty '*Bayerische Motorenwerke*'	OJ L 29 of 3.2.1975, p. 1 IP (74) 229 of 17.12.1974 Bull. EC 12-1974, point 2126
Decision of 19 December 1974 on a proceeding under Article 85 of the EEC Treaty '*Goodyear Italiana – Euram*'	OJ L 38 of 12.2.1975, p. 10 IP (75) 4 of 7.1.1975 Bull. EC 12-1974, point 2124
Decision of 19 December 1974 on a proceeding under Article 85 of the EEC Treaty '*Duro-Dyne – Europair*'	OJ L 29 of 3.2.1975, p. 11 IP (75) 4 of 7.1.1975 Bull. EC 12-1974, point 2124
Decision of 19 December 1974 on a proceeding under Article 86 of the EEC Treaty '*General Motors Continental*'	OJ L 23 of 3.2.1975, p. 14 IP (75) 2 of 6.1.1975 Bull. EC 12-1974, point 2122
Decision of 20 December 1974 on a proceeding under Article 85 of the EEC Treaty '*Rank/Sopelem*'	OJ L 29 of 3.2.1975, p. 20 IP (75) 3 of 6.1.1975 Bull. EC 12-1974 point 2125

Decision of 20 December 1974 on an application for negative clearance under Article 85 of the EEC Treaty '*SHV-Chevron Oil Europe*'	OJ L 38 of 12.2.1975, p. 14 Bull. EC 1-1975, point 2109

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

Decision of 9 January 1974 on a proceeding under Article 66 of the ECSC Treaty on the acquisition by Guest Keen & Nettlefolds Ltd. of the Brymbo Steelworks belonging to the British Steel Corporation.	Bull. EC 1-1974, point 2116
Decision of 9 January 1974 on a proceeding under Article 66 of the ECSC Treaty on the acquisition by the British Steel Corporation of GKN Dowlais Ltd.	Bull. EC 1-1974, point 2116
Decision 74/77/ECSC of 22 January 1974 on a proceeding under Article 65 of the ECSC Treaty authorizing an agreement between British steelmaking undertakings for the establishment of a joint buying agency for ferrous scrap and other steelmaking materials.	OJ L 52 of 23.2.1974, p. 22. Bull. EC 1-1974, point 2114
Decision of 15 February 1974 on a proceeding under Article 66 of the ECSC Treaty on the joint formation by certain coal wholesaling undertakings of Montan Brennstoffhandel und Schiffahrt GmbH & Co KG.	
Decision of 28 February 1974 on a proceeding under Article 66 of the ECSC Treaty authorizing the acquisition by Creusot-Loire SA of a majority shareholding in Cartry-Worms SA.	Bull. EC 3-1974, point 2114
Decision of 12 March 1974 on a proceeding under Article 66 of the ECSC Treaty authorizing Fiat SpA and Allis Chalmers Co. to form a joint subsidiary to produce earthmoving machines.	Bull. EC 3-1974, point 2113
Decision of 14 March 1974 on a proceeding under Article 66 of the ECSC Treaty authorizing the acquisition by Guest, Keen & Nettlefolds Ltd. of Miles Druce & Co. Ltd.	OJ L 132 of 15.5.1974, p. 28. Bull. EC 3-1974, point 2112
Decision of 22 March 1974 on a proceeding under Article 66 of the ECSC Treaty authorizing undertakings in the coal wholesale trade to found a joint undertaking to be known as Hansen Neuerburg Export-Import GmbH & Co. OHG, Essen.	Bull. EC 3-1974, point 2115
Decision 74/211/ECSC of 4 April 1974 on a proceeding under Article 65 of the ECSC Treaty extending the authorization of the joint selling of fuels from Houillères du Bassin de Lorraine and Saarbergwerke AG by Saarlor.	OJ L 113 of 26.4.1974, p. 46. Bull. EC 4-1974, point 2109
Decision of 5 April 1974 on a proceeding under Article 66 of the ECSC Treaty on interim measures of protection in respect of the companies Schneider S.A. and Marine Firminy S.A.	Bull. EC 4-1974, point 2110

Decision	Reference
Decision of 25 April 1974 on a proceeding under Article 65 of the ECSC Treaty authorizing an exception to Article 2(1) of Commission Decision No 71/315/ECSC of 27 July 1971 authorizing agreements for specialization between iron and steel undertakings in south-west Germany in the production of rolled steel and in the joint purchasing of iron ore.	
Decision of 5 July 1974 on a proceeding under Article 66 of the ECSC Treaty relating to the formation by the companies Forgeal, Creusot-Loire, Aubert et Duval and SNECMA of a company to be jointly owned and known as Interforge.	Bull. EC 7/8-1974, point 2124
Decision of 8 July 1974 on a proceeding under Article 66 of the ECSC Treaty authorizing the acquisition by Guest, Keen & Nettlefolds Ltd. of the Cassart group.	Bull. EC 7/8-1974, point 2126
Decision of 9 July 1974 on a proceeding under Article 66 of the ECSC Treaty on the acquisition of the goodwill of the wholesale coal undertakings Midland Supply (Belper) Limited, Belper, Derby, and Hall & Boon, Coventry, by the British Fuel Company, London.	
Decision of 9 July 1974 on a proceeding under Article 66 of the ECSC Treaty on the acquisition of the wholesale coal undertaking A. J. Doig & Son, Greenock, Scotland, by the British Fuel Company, London.	
Decision of 18 July 1974 on a proceeding under Article 66 of the ECSC Treaty authorizing the reorganization of the marketing network of Sacilor.	Bull. EC 7/8-1974, point 2125
Decision of 13 September 1974 on a proceeding under Article 66 of the ECSC Treaty authorizing the formation by Sacilor and Métallurgique et Minière de Rodange-Athus of a company to be jointly owned and known as Société des Laminoirs de Villerupt.	Bull. EC 9-1974, point 2109
Decision of 2 October 1974 on a proceeding under Article 66 of the ECSC Treaty authorizing the formation by Société Nouvelle des Aciéries de Pompey, Compagnie Universelle d'Acétylène, Société Française d'Electro-Métallurgie and Société Eurominas Electrometalurgia of a Groupement Européen du Manganèse.	OJ L 286 of 23.10.1974, p. 16. Bull. EC 10-1974, point 2109
Decision of 2 October 1974 on a proceeding under Article 66 of the ECSC Treaty authorizing the acquisition by Klöckner & Co. of the entire share capital of Howard E. Perry & Co. Ltd.	Bull. EC 10-1974, point 2110
Decision of 14 October 1974 on a proceeding under Article 66 of the ECSC Treaty authorizing the acquisition by the British Steel Corporation of the share capital of Lye Trading Company Ltd.	OJ L 13 of 18.1.1975, p. 45. Bull. EC 10-1974, point 2111
Decision of 20 November 1974 on a proceeding under Article 66 of the ECSC Treaty approving the acquisition by August Thyssen-Hütte of a shareholding of up to 25% in SOLMER.	OJ L 49 of 25.2.1975, p. 13 Bull. EC 11-1974, points 2112 and 2113

Decision of 20 November 1974 on a proceeding under Article 66 (5) of the ECSC Treaty on interim measures of protection against British Steel Corporation (BSC) in respect of Johnson & Firth Brown Ltd.	
Decision of 27 November 1974 on a proceeding under Article 66 (5) of the ECSC Treaty on interim measures of protection against Dunford Hadfields Ltd. (DH) in respect of Johnson & Firth Brown Ltd.	
Decision of 29 November 1974 on a proceeding under Article 66 of the ECSC Treaty authorizing Creusot-Loire SA to acquire a majority shareholding in Marrel Frères.	Bull. EC 11-1974, point 2114
Decision of 5 December 1974 on a proceeding under Article 66 of the ECSC Treaty authorizing the acquisition by the British Steel Corporation of a controlling shareholding in Johnson & Firth Brown Ltd.	Bull. EC 12-1974, point 2128
Decision of 5 December 1974 on a proceeding under Article 66 (5) of the ECSC Treaty revoking the interim measures of protection taken on 20 and 27 November 1971 in respect of British Steel Corporation and Dunford Hadfields Ltd.	
Decision of 16 December 1974 on a proceeding under Article 66 of the ECSC Treaty on the acquisition by the Federal Republic of Germany of a majority shareholding in Gelsenberg AG, Essen.	OJ L 16 of 12.3.1975, p. 16 Bull. EC 12-1974, point 2127
Decision of 19 December 1974 on a proceeding under Article 66 of the ECSC Treaty authorising amendment of the terms of business of Ruhrkohle AG, Essen.	OJ L 21 of 28.1.1975, p. 19
Decision of 21 December 1974 on a proceeding under Article 66 (5) of the ECSC Treaty on interim measures of protection in respect of Compagnie Lorraine Industrielle et Financière, Paris.	
Decision of 21 December 1974 on a proceeding under Article 66 (5) of the ECSC Treaty on interim measures of protection in respect of Denain Nord-Est Longwy.	

RULINGS OF THE COURT OF JUSTICE

Ruling (30 January 1974) Ruling (27 March 1974) in case 127/73: 'BRT v Fonior et SABAM v Fonior'	OJ C 60 of 25.5.1974, p. 27 OJ C 74 of 1.7.1974, p. 1 Bull. EC 3-1974, point 2444 Reports 1974, p. 51 Reports 1974, p. 313
Ruling (6 March 1974) in cases 6/73 and 7/73: 'ICI-CSC v Commission of the European Communities'	OJ C 69 of 14.6.1974, p. 4 Bull. EC 3-1974, point 2443 Reports 1974, p. 223

Ruling (30 April 1974) in case 155/73: 'Pubblico Ministero Italiano v Guiseppe Sacchi, Sala' (RAI-TV, Biella)	OJ C 91 of 3.8.1974, p. 4 Bull. EC 4-1974, point 2448 Reports 1974, p. 409
Ruling (14 May 1974) in case 4/73: 'Nold v Commission of the European Communities'	OJ C 114 of 27.9.1974, p. 23 Reports 1974, p. 491
Ruling (3 July 1974) in case 192/73: 'Van Zuylen Frères v Hag AG'	OJ C 114 of 27.9.1974, p. 26 Bull. EC 7/8-1974, point 2452 Reports 1974, p. 731
Ruling (11 July 1974) in case 8/74: 'Fourcroy and Breuval, v Benoît and Gustave Dassonville'	OJ C 114 of 27.9.1974, p. 27 Bull. EC 7/8-1974, point 2454 Reports 1974, p. 837
Ruling (23 October 1974) in case 17/74: 'Transocean Marine Paint Association v Commission of the European Communities'	OJ C 158 of 17.12.1974, p. 15 Bull. EC 10-1974, point 2439
Ruling (31 October 1974) in cases 15/74 and 16/74: 'Centrafarm B.V. and De Peijper v Sterling Drug Inc.' 'Centrafarm B.V. and De Peijper v Winthrop B.V.'	OJ C 158 of 17.12.1974, p. 13 and 14 Bull. EC 10-1974, point 2438
Order of 11 October 1973, Order of 16 March 1974 in Joined Cases 160, 161 and 170-73 R II: 'Miles Druce v the Commission of the European Communities'	OJ C 105 of 4 December 1973, p. 8 OJ C 52 of 7 May 1974, p. 3 Reports 1973, p. 1049 Reports 1974, p. 281
Order of 15 October 1974, in case 71-74 R and RR: 'Nederlandse Vereniging voor de Fruit en Groentenimporthandel, Nederlandse Bond van Grossiers in Zuidvruchten en Ander Geimporteerd Fruit v Commission of the European Communities'	OJ C 159 of 21 December 1974, p. 4

REGULATION (EEC) No 2988/74 OF THE COUNCIL

of 26 November 1974

concerning limitation periods in proceedings and the enforcement of sanctions under the rules of the European Economic Community relating to transport and competition[1]

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Articles 75, 79 and 87 thereof;

Having regard to the proposal from the Commission;

Having regard to the Opinion of the European Parliament;[2]

Having regard to the Opinion of the Economic and Social Committee;[3]

Whereas under the rules of the European Economic Community relating to transport and competition the Commission has the power to impose fines, penalties and periodic penalty payments on undertakings or associations of undertakings which infringe Community law relating to information or investigation, or to the prohibition on discrimination, restrictive practices and abuse of dominant position; whereas those rules make no provision for any limitation period;

Whereas it is necessary in the interests of legal certainty that the principle of limitation be introduced and that implementing rules be laid down; whereas, for the matter to be covered fully, it is necessary that provision for limitation be made not only as regards the power to impose fines or penalties, but also as regards the power to enforce decisions, imposing fines, penalties or periodic penalty payments; whereas such provisions should specify the length of limitation periods, the date on which time starts to run and the events which have the effect of interrupting or suspending the limitation period; whereas in this respect the interests of undertakings and associations of undertakings on the one hand, and the requirements imposed by administrative practice, on the other hand, should be taken into account;

Whereas this Regulation must apply to the relevant provisions of Regulation No 11 concerning the abolition of discrimination in transport rates and conditions, in implementation of Article 79(3) of the Treaty[4] establishing the European Economic Community, of Regulation No 17:[5] first Regulation implementing Articles 85 and 86 of the Treaty, and of Council Regulation (EEC) No 1017/68[6] of 19 July 1968 applying rules of competition to transport by rail, road and inland waterway; whereas it must also apply to the relevant provisions of future regulations in the fields of European Economic Community law relating to transport and competition,

(1) OJ L 319 of 29. 11. 1974, p. 1.
(2) OJ C 129 of 11. 12. 1972, p. 10.
(3) OJ C 89 of 23. 8. 1972, p. 21.
(4) OJ 52 of 16. 8, 1960, p. 1121/60.
(5) OJ 13 of 21. 2. 1962, p. 204/62.
(6) OJ L 175 of 23. 7. 1968, p. 1.

HAS ADOPTED THIS REGULATION:

Article 1

Limitation periods in proceedings

1. The power of the Commission to impose fines or penalties for infringements of the rules of the European Economic Community relating to transport or competition shall be subject to the following limitation periods:

(a) three years in the case of infringements of provisions concerning applications or notifications of undertakings or associations of undertakings, requests for information, or the carrying out of investigations;

(b) five years in the case of all other infringements.

2. Time shall begin to run upon the day on which the infringement is committed. However, in the case of continuing or repeated infringements, time shall begin to run on the day on which the infringement ceases.

Article 2

Interruption of the limitation period in proceedings

1. Any action taken by the Commission, or by any Member State, acting at the request of the Commission, for the purpose of the preliminary investigation or proceedings in respect of an infringement shall interrupt the limitation period in proceedings. The limitation period shall be interrupted with effect from the date on which the action is notified to at least one undertaking or association or undertakings which have participated in the infringement.

Actions which interrupt the running of the period shall include in particular the following:

(a) written requests for information by the Commission, or by the competent authority of a Member State acting at the request of the Commission; or a Commission decision requiring the requested information;

(b) written authorizations to carry out investigations issued to their officials by the Commission or by the competent authority of any Member State at the request of the Commission; or a Commission decision ordering an investigation;

(c) the commencement of proceedings by the Commission;

(d) notification of the Commission's statement of objections.

2. The interruption of the limitation period shall apply for all the undertakings or associations of undertakings which have participated in the infringement.

3. Each interruption shall start time running afresh. However, the limitation period shall expire at the latest on the day on which a period equal to twice the limitation period has elapsed without the Commission having imposed a fine or a penalty; that period shall be extended by the time during which limitation is suspended pursuant to Article 3.

Article 3

Suspension of the limitation period in proceedings

The limitation period in proceedings shall be suspended for as long as the decision of the Commission is the subject of proceedings pending before the Court of Justice of the European Communities.

Article 4

Limitation period for the enforcement of sanctions

1. The power of the Commission to enforce decisions imposing fines, penalties or periodic payments for infringements of the rules of the European Economic Community relating to transport or competition shall be subject to a limitation period of five years.

2. Time shall begin to run on the day on which the decision becomes final.

Article 5

Interruption of the limitation period for the enforcement of sanctions

1. The limitation period for the enforcement of sanctions shall be interrupted:

(a) by notification of a decision varying the original amount of the fine, penalty or periodic penalty payments or refusing an application for variation;
(b) by any action of the Commission, or of a Member State at the request of the Commission, for the purpose of enforcing payments of a fine, penalty or periodic penalty payment.

2. Each interruption shall start time running afresh.

Article 6

Suspension of the limitation period for the enforcement of sanctions

The limitation period for the enforcement of sanctions shall be suspended for so long as:

(a) time to pay is allowed; or
(b) enforcement of payment is suspended pursuant to a decision of the Court of Justice of the European Communities.

Article 7

Application to transitional cases

This Regulation shall also apply in respect of infringements committed before it enters into force.

Article 8

Entry into force

This Regulation shall enter into force on 1 January 1975.

This Regulation shall be binding in its entirety and directly applicable in all Member States.