European Community competition policy

1995

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XXVth Report on competition policy

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INTRODUCTION BY KAREL VAN MIERT,
the Commissioner with special responsibility for competition policy

European competition policy in 1995 was marked by a sharp increase in the number of cases submitted to the Commission and in the number of decisions taken. Looking at the whole range of areas covered (restrictive agreements and concerted practices, mergers and State aid), the number of new cases submitted to the Commission was more than one third higher than the previous year.

A large part of this increase is due to the fact that three new member countries joined the European Union on 1 January 1995. However, the figures also show that businesses are increasingly aware that their playing field is Europe as a whole. In addition, the pressure of competition gives firms an incentive to cooperate or merge so as to remain competitive.

Competition policy plays a key role in creating an environment that is favourable to businesses, this being crucial to lasting growth in the European economy and to job creation.

Another crucial competition policy objective is consumer protection. The single market must first and foremost serve people. It must be ensured, through strict application of the competition rules, that consumers have freedom of choice between quality products at competitive prices.

Let me illustrate Commission efforts in pursuit of these two competition policy objectives in 1995 by highlighting a few of the most significant examples.

The Commission took action against business practices blocking parallel imports and preventing consumers from taking advantage of price differences between Member States. With the same end in view, the new Regulation on motor vehicle distribution in Europe, while allowing structured networks that provide after-sales service, ensures that individual consumers are free to carry out parallel imports. The Commission is similarly on its guard against firms that restrict market access for new competitors.

The application of the competition rules to the information society has continued to be a priority. Major progress has been achieved on legislative provisions liberalizing telecommunication services: such liberalization has applied to mobile telephones since 1995 and will apply to alternative networks on 1 July 1996 and to voice telephony on 1 January 1998. In several Member States (Belgium, Ireland and Italy), new entrants to the mobile-telephone market are treated on an equal footing with the established operator.

However, the Commission's role does not stop there: operators must be prevented from concluding agreements or engaging in practices which have the same foreclosure effect as the statutory protection that existed previously. For this reason, strategic alliances, which are an increasingly frequent phenomenon, can be authorized only if they do not shut off national markets.

The Commission also prohibited two operations in the audiovisual sector, which is a sensitive and rapidly developing sector, so as to safeguard the scope for competition.

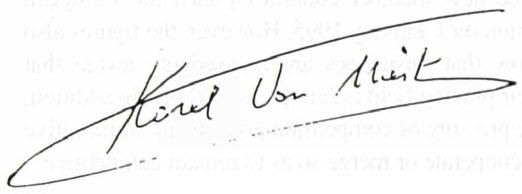
Let me emphasize that the policy of liberalization takes full account of the needs of the public services, whose performance it aims to improve while maintaining quality and prices that consumers can afford.

The same consideration applies to the competition rules as a whole, including those governing State aid. The Commission accordingly agreed that a tax measure in support of the French Post Office should not be deemed to be aid, since it merely counterbalanced certain public-service constraints imposed upon the Post Office. On the State aid front, the Commission endeavoured to pursue a strict policy, authorizing aid only on the basis of precise and uniform rules for priority objectives (for example, research and development). One of the most important and most widely remarked decisions, that on

Crédit Lyonnais, shows how this concern for strict enforcement of the rules is combined with awareness of the specific features of individual sectors.

I am aware that it is crucial for firms to have competition policy cases dealt with within the tightest possible deadlines. Most mergers are cleared by the Commission, on a one-stop-shop basis, within one month of notification. This represents a considerable advantage for firms. I would also like to speed up procedures in other types of cases, particularly those involving joint ventures.

It is my intention that European competition policy should continue to adjust to the needs and priorities of individuals and of the European economy. Discussions will accordingly be entered into or pursued with all those concerned on the following subjects: cooperation with the national competition authorities, fines to be imposed on cartels, the Green Paper on mergers, the Green Paper on vertical restrictions in distribution, and changes to the *de minimis* rule, the aim being to reduce as far as possible the constraints imposed on enterprises while at the same time focusing Commission action on essentials.



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INTRODUCTION

1. A competitive environment as a prerequisite for competitiveness

1. It is widely recognized that competition policy has a key role to play in ensuring that EU industry remains competitive.

Competition policy serves as an instrument to achieve the optimal allocation of resources, technical progress and the flexibility to adjust to a changing environment. In that respect, competition and competitiveness belong together. Experience shows that only those companies which are used to strong competition and perform well in open and dynamic markets will be able to function effectively on a wider scale be it in other geographic areas or in a more global economy in general.

Competition policy and competitiveness policy are thus not contradictory but rather serve the same goals of creating the essential conditions for the development and maintenance of an efficient and competitive Community industry, bringing better products and services to European citizens, and providing a stable economic environment.

2. Internal market and competition policy

2. The complementarity between those two policies is also clearly shown by the Community's objective of creating an internal market. On the one hand, the internal market is an essential condition for the development of an efficient and competitive industry. On the other hand, competition policy is an important tool for achieving the goal of, and maintaining, an internal market, in particular via the enforcement of rules ensuring that the regulatory barriers to trade which have been removed are not replaced by private or other public restrictions having the same effect.

2.1. Factors affecting competition in the internal market

3. While the legislative steps spelt out in the 1985 Commission White Paper on the internal market have almost all been adopted and transposed at national level, preliminary evidence suggests that some product and service markets remain fragmented.[1]

Internal market integration, in tandem with the progressive globalization of markets, is expected to widen geographic markets (not necessarily to Community level — relevant geographic markets may contain a distinct set of regional or national areas). It may therefore redefine the structural parameters of the market within which the implications of actions of public or private-sector operators for competition must be judged. No definitive judgment can be made at this early stage as to whether the pro-competitive impact of the internal market has manifested itself. In some markets, there is tentative evidence that competition is increasingly defined at a supranational level, while in others there is reason to believe that markets remain segmented along national lines. The latter can be explained by reference to a range of factors which must be taken into account when assessing the consequences of internal market integration in terms of the geographical expansion of 'relevant markets'.

4. A first factor relates to the effectiveness of legislative action (and ancillary measures such as European standardization) in dismantling legal and administrative barriers to cross-border transactions. Where the legislative framework is incomplete or inadequate, the Commission intends to press for its reinforcement. There may also be situations where there are no entry barriers but where discrepancies in national arrangements result in differences in economic conditions that are capable of distorting trade and competition (e.g. pharmaceutical pricing, taxation, monetary fluctuations). Where these factors result in differences in economic conditions between national markets, leading operators to distinguish between them, this may need to be taken into account in defining the relevant market for competition. 'Natural barriers' such as language, taste and habits, or structural characteristics which reduce the tradability of products or services, may also require that national markets be regarded as separate entities. These issues have arisen in the context of the Commission's investigation of mergers in TV broadcasting and the media sector, where linguistic and cultural factors require that the EU market be regarded as consisting of a series

[1] During 1996, the Commission intends to present the findings of an overall analysis of the impact and effectiveness of the internal market programme pursuant to Council Resolution 92/1218 of 7 December 1992.

of distinct national markets. This cultural diversity contributes to the richness of our shared European heritage and must be taken into account in the analysis of cases by the Commission, even if cases of dominance are more frequently encountered as a result (*Nordic Satellite; RTL/Veronica/Endemol*).

2.2. Role of competition policy

5. While internal market integration shapes the economic context within which Community competition policy must be applied, it is also the case that the application of Community competition policy will help to reinforce the functioning of a single market. Three main areas of activity can be identified: anti-competitive agreements and practices, the regulated or monopolized sectors and State aid. It is an essential consideration here that the Commission has at its disposal a set of interdependent competition policy instruments. The anti-trust rules, merger control, the policing of State aid and the rules on liberalization all serve the same objective of ensuring that competition in the internal market is not distorted.

6. The Commission is vigilant in applying Community competition rules where firms attempt to stifle the pro-competitive effects emanating from internal market integration through anti-competitive behavior designed to sustain market segmentation. Examples of behaviour which give rise to such concern are restrictions on parallel trade, certain types of vertical agreements and/or distribution systems and unjustified refusal to provide (non-discriminatory) access to facilities which third parties require in order to compete.

7. The liberalization of traditionally monopolized markets, such as utilities, is an essential step in the establishment of an internal market. It is strongly believed that, without a stronger and more competitive base in the fields of energy, public transport and telecommunications, the European economy, including consumers and medium-sized enterprises, will be at a disadvantage.[1] The Madrid European Council in December 1995 concluded that it was essential to introduce increased competition in different sectors in order to enhance competitiveness and so create new jobs. The ommission has therefore pursued its efforts to open up these markets to competition and intra-Community trade while ensuring that the measures proposed or adopted are compatible with the performance by public services of tasks of general economic interest, such as the provision of a universal service to all citizens at affordable prices.

8. Telecommunications is a strategic area of considerable interest for the European Union.[2] Ongoing liberalization of this sector has forced telecom operators to launch new services and to reduce prices. Both industry and consumers benefit from the opening-up of telecom markets. The introduction of competition in this sector is also vital to facilitate the transition to the information society and thus for our ability to survive in an increasingly competitive and global market. In this context, cultural diversity and equal access to the new services are essential objectives that need to be addressed.

Much of the legislation at Community level has either been adopted or is well under way for complete liberalization by 1998. This must of course be transposed into national legislation and effectively applied in order to ensure the introduction of real competition. The role of the Commission will not be reduced once the legislative acts are in place. On the contrary, the Commission must ensure that, once removed, the legal barriers will not be replaced by agreements or practices of a similar nature, such as anti-competitive mergers, market-sharing agreements, abusive behaviour of the incumbents against newcomers — for example, by denying non-discriminatory access to essential facilities — or by illegal State aid. Where exclusive rights are maintained in reserved areas, cross-subsidization of the operator's non-reserved areas should be avoided.

In the meantime, industry moves on to anticipate new emerging markets. New alliances having global implications have been submitted to

[1] Competitiveness Advisory Group, 'Enhancing European competitiveness' second report to the President of the European Commission, the Prime Ministers and Heads of State, December 1995 ('Ciampi Report'). In the same context, it is argued that 'what matters most is not so much that the ownership — and management — of public utilities moves from the State to the private sector, as that competition is introduced and extended wherever possible'.

[2] Green Paper on the liberalization of telecommunications infrastructure and cable television networks: Part One (COM(94) 440, 25.10.1994) and Part Two (COM(94) 682, 25.01.1995).

the Commission for scrutiny. The Commission's assessment of these cases demonstrates how the existing competition rules, when applied realistically, are capable of grasping the dynamics of innovation and globalization. But newly emerging markets is not a password for approval. While alliances should be allowed, or even encouraged when pro-competitive, they cannot be accepted where they thwart or threaten the demonopolization process. Where big players join forces, the Commission should aim to prevent market foreclosure.

9. To an even greater degree than the telecoms sector, the air transport sector, where full liberalization will be completed by the end of 1997, demonstrates that legislation is necessary but not sufficient to achieve a fully competitive environment. In this sector, where airlines fight to secure or retain a sufficient share of a modestly growing and competitive market, there is an ever-present danger that the incumbents might use unfair methods to protect their interests. Strict application of competition rules, mainly in the field of State aid and control of abusive behaviour, is absolutely necessary. In particular, State aid is seen as a counter-productive measure which tends to protect the inefficient against the efficient, simply delaying the necessary restructuring. State aid might even be used to fight new competitors by means of predatory pricing and other measures. While restructuring is necessary to achieve efficiency gains and competitiveness in a growing market, the Commission has to make sure that a high degree of concentration does not foreclose routes and slots, thereby re-erecting legally removed barriers.

10. Energy is another key factor for industry and was mentioned as such in the Ciampi Report. However, this year has not produced any real progress in the liberalization of this sector.

11. According to the fourth survey on State aid in the European Union, published in 1995, the total amount of national aid in the period 1990-92 has decreased, but — at around ECU 94 billion on average per year for the Community as a whole — is still too high for the Commission's objectives to be attained, notably with respect to the richer Member States. Vast amounts of State aid are not the way to achieve competitiveness. They delay necessary restructuring, distort competition between the companies and regions and are a burden on public budgets.

However, it would be unrealistic to suggest that all State aid be simply eliminated and this has never been envisaged by the authors of the Treaty or by the Commission. Market forces alone, in a market which is not perfect, do not allow the attainment of certain fundamental objectives of the Member States and the European Union, such as economic and social cohesion, a sufficient degree of R&D and environmental protection, the development of SMEs and the necessity of allowing time for structural adjustment, in particular for social reasons. For the Commission, it is essential to ensure that, where State aid is allowed by derogation, the negative effects on competition and trade between Member States are limited to what is strictly necessary and that they are offset by the realization of objectives of general Community interest.

3. International cooperation

12. The increasing globalization of the world economy and the changing pattern of modern trade makes international cooperation between competition authorities inevitable.

First, companies operating worldwide must be aware of, and must comply with, differing competition laws and practices in different jurisdictions. This necessarily entails a cost for the companies concerned. Moreover, when transactions fall within the jurisdiction of multiple competition authorities, there is an increased risk of conflicting measures being imposed. Competition authorities, for their part, may have difficulties in gaining access to information evidencing an anti-trust violation located outside their jurisdiction. Alternatively, competition rules aimed at preserving effective competition on the home market may be less effective in dealing with anti-competitive conduct at the global level. Finally, it is widely recognized that greater application of competition rules must accompany trade liberalization if it is to be effective; private barriers must not replace dismantled public barriers.

For all these reasons, greater cooperation at international level is clearly in the interests of industry and consumers.

13. On a bilateral level, the agreement with the United States (confirmed in April 1995 by the Council) already offers scope for cooperation and its provisions on coordination of enforcement activities to some extent allow the parties to work together to tackle anti-competitive situations affecting the EU and US markets.

In a report on competition policy in the new trade order drafted at the request of Mr Van Miert, an independent group of experts recommends as a 'priority' the deepening of the current EC/US agreement. It also formulates recommendations in relation to plurilateral cooperation as it believes that bilateral agreements cannot of themselves adequately address all the problems which could arise at international level.

4. Role of the Commission in applying the competition rules

14. It is fair to say that the development phase of Community competition policy is completed. Policy and law are now well established through the Commission's administrative practice and the principles developed by the European Courts. On the other hand, the Commission has at its disposal limited resources to deal with an ever-increasing number of cases. In 1995 in particular, the number of new cases, especially State aid and Articles 85 and 86 cases, increased significantly as a result of the accession of three new Member States.

15. Accordingly, the Commission has been considering how to focus on those arrangements which have a significant effect on competition and are likely to affect trade between Member States appreciably. For this purpose, several instruments and concepts have already been developed. Preparatory work is under way to broaden and refine them further. Particularly relevant in this respect are the application of the *de minimis* principle (in the fields of both antitrust and State aid), group exemptions (which allow firms to make agreements without notifying them to the Commission so as to obtain legal certainty) and the notion of Community interest in the case of complaints.

16. Where the Commission must deal as a priority with cases having an appreciable effect on intra-Community competition, the role of national authorities and courts in competition cases becomes more important. The decentralized application of the competition rules is often a quicker and more efficient way to bring infringements to an end. More frequent application by national courts and authorities reminds the Community citizen that these rules are part of the 'living law' of each Member State and are aimed at protecting their rights.

17. The Commission therefore continued to encourage the decentralized application of Community competition rules, in particular as far as cases falling within the scope of Articles 85 and 86 are concerned. Its aim is to establish effective cooperation between the national courts, competition authorities and itself. In this respect, the preparatory work for a new notice on cooperation between the Commission and national competition authorities is well advanced and will complement the existing notice on cooperation with the national courts.

This policy of decentralization should however be implemented gradually and with care. The actual decentralization process goes hand in hand with a continuing effort on the part of the Commission to clarify and simplify the rules of substance in order to enable the Member States to use the same concepts when applying the Community competition rules.

18. The principle of subsidiarity dictates that the most appropriate authority should take action. Therefore, certain cases which fall within the jurisdiction of several national authorities should be handled by the Commission. Thus, in the case of mergers, it is preferable for firms to have their proposed mergers examined by the Commission alone rather than having to submit them to a number of national authorities. In 1995, the Commission embarked on a new review of the Merger Regulation, *inter alia* to consider whether the turnover-based criterion for determining those cases which must be submitted to the Commission and those which fall within the exclusive jurisdiction of the Member States is still appropriate.

19. In the field of State aid, the subsidiarity principle dictates that the Community must have exclusive competence because Member States cannot be asked to control their own State aid expenditures in a fair way *vis-à-vis*

their neighbours. However, one aspect can be handled at national level: national courts may act upon complaints by the competitors of the firm receiving State aid, and in particular it may control whether the necessary notification and approval procedures have been followed by the Member State. The Commission has published a new notice in this area which has a threefold purpose: to strengthen and decentralize enforcement of State aid rules, to clarify the legal position for the benefit of all interested parties and to offer assistance to judges.

5. Transparency

20. Competition rules are often complex because the economic, legal and political context in which they operate is complicated and constantly evolving. This does not mean that there is no room left for more transparency and simplification. The Commission has indeed found several ways to increase information about its policy and to simplify the legal framework. They include: the newly adopted group exemption for technology transfer agreements, which will replace the two regulations concerning know-how and patent licensing; the use of notices and communications to provide guidelines on the application of the competition rules in certain sectors (cross-border credit transfers; postal services); the use of Green Papers for the purpose of public consultation (i.e. the planned Green Papers on vertical restraints and merger review to be published in 1996); and the publication of explanatory brochures (new car distribution regulation). In the field of State aid, the obligation to notify, which is laid down in the Treaty, is central to ensuring transparency. The Commission has indicated in a communication that it intends to utilize all the powers which the Treaty confers on it to ensure that Member States respect this obligation. It has also started working on a revised and consolidated regional aid framework and has adopted a new framework for aid for research and development. Lastly, it pursued its active campaign to inform the public of competition policy matters: press releases and conferences, DG IV's Information Service, publications, the *Competition Policy Newsletter* and, last but not least, the Annual Report on Competition Policy, all of which serve the same purpose, namely to enhance transparency, legal certainty and predictability.

6. Democratic accountability

21. Competition policy cannot simply be a technocratic or administrative exercise but has everything to gain by bringing about a wide democratic consensus. The Commission accordingly attaches great importance to a fruitful dialogue with the other institutions of the European Union on all aspects of its competition policy.

22. The Annual Report on Competition Policy serves as a basic instrument of communication and information to the other institutions of the European Union, in particular the European Parliament, the Council and the Economic and Social Committee. The fruitful exchanges of view and discussions concerning the previous report were clearly of help to the Commission in implementing its tasks and contributed to better information on, and comprehension of, European competition policy. Moreover, where appropriate, the Commission takes the initiative of consulting the other institutions on newly proposed provisions or on other policy documents. In particular, in the context of the adoption of Article 90 liberalization directives, it has carefully considered the observations made by the European Parliament, the Council, the Economic and Social Committee, and the Committee of the Regions.

23. The Commission has also collaborated closely with the Council on various aspects of its policy, in particular as regards the relationship between competition policy and competitiveness.

24. Member States are closely involved in the Commission's decision-making process through the Advisory Committee on Restrictive Practices and Dominant Positions, the Advisory Committee on Concentrations and the Conference of national government experts. Moreover, Commission officials have regular and constructive informal contacts with their colleagues at national level.

25. On 3 and 4 April, the Commission organized the first European Competition Forum in

Brussels on the issue of vertical restraints.[1] More than 260 participants, including competition authorities and judges from 35 European countries, attended. The purpose of such a forum is to promote exchanges of experience and discussions among Community and Member State officials whose responsibility is to enforce competition law and to encourage decentralized application of competition law. A second Forum is planned in 1996.

26. The Commission's XXVth Annual Report on Competition Policy (1995) differs in presentation from the previous annual reports.

27. In recent years, the Commission's competition report has increased steadily in size to reach more than 600 pages in 1994. Since the Commission's separate brochure 'European Community competition policy — 1994', which summarizes the Commission's policy and decisions in a 'user-friendly' format, has been well received, the Commission has been asked, in particular by the Economic and Social Committee, to present a shorter and more readable document.

The Commission therefore decided to produce a shorter report than in the past, focusing on the main policy developments in the field of competition, which are illustrated, where applicable, by the Commission's major decisions and new legislative measures.

In addition to the present Annual Report, the Directorate-General for Competition (DG IV) of the European Commission prepared a 'Report on the application of the competition rules in the European Union — 1995', which describes the important individual cases decided by the Commission. It also contains lists of references to the new legislative provisions and notices, the Commission decisions and press releases and decisions by the Court of Justice and the Court of First Instance. It furthermore gives a description of the application of competition rules in the Member States.

7. Statistics

28. There has been a large increase in the overall number of new cases registered. The total number of new cases (anti-trust, mergers, State aid) rose from 1 081 in 1994 to 1 472 in 1995 — an increase of 36%. New Articles 85 and 86 cases increased by more than 42%, merger notifications rose by nearly 16% and the number of new State aid cases grew by 35%. A significant part of this increase, in particular in the field of anti-trust and State aid, is due to the accession of three new Member States to the European Union on 1 January 1995.

29. The total number of cases closed in 1995 remained almost at the same level as in 1994: 1 210 cases compared with 1 200.

[1] Competition Policy Newsletter, No 5, Volume 1, summer 1995, p. 7.

I — ANTI-TRUST: ARTICLES 85 AND 86

A — Ensuring the benefits of the internal market

30. An essential aim of European competition policy is to ensure that the completion of the internal market brings consumers and the European economy as a whole all the benefits of a Community-wide market.

Competition policy must create the appropriate framework allowing companies to adjust to the new possibilities opened up by the elimination of national barriers. However, where companies try to slow down the process of market integration or even obstruct cross-border trade by anti-competitive practices, it is necessary to pursue a vigilant policy, including the imposition of severe sanctions in cases of hard-core infringements of the competition rules.

Vertical arrangements between suppliers and distributors are a core element of European competition policy in this field. Some of these arrangements may be necessary to penetrate new markets, launch new products or promote efficient distribution networks and might thereby benefit consumers. Problems may, however, arise where there is not enough competition between producers or between distributors in the same markets or where the arrangements are used for anti-competitive purposes, i.e. for market-partitioning or for restricting access to the market by new entrants.

1. Car distribution

31. Because motor vehicles are consumer durables which require expert maintenance and repair, manufacturers cooperate with selected dealers and repairers in order to provide specialized distribution and servicing for the product. Such arrangements are likely to enhance efficient distribution of the products concerned and the exclusive and/or selective nature of the distribution system can be regarded as indispensable for attaining rationalization and efficiency in the motor vehicle industry.

This was and still is the basic motivation for allowing restrictive distribution and servicing agreements in the car sector. However, the new group exemption relating to the distribution and servicing of motor vehicles,[1] which the Commission adopted on 28 June 1995 to replace the existing Regulation (EEC) No 123/85,[2] contains several adjustments aimed at intensifying competition in the markets for cars and spare parts and improving the position of consumers by guaranteeing them the full benefits of the internal market.

32. In particular, the new regulation secures greater independence for dealers *vis-à-vis* car manufacturers. Most importantly, dealers are allowed to sell cars of other manufacturers provided that this is done on separate sales premises, under separate management, in the form of a distinct legal entity and in a manner which avoids confusion between brands. To ensure effective competition on the maintenance and repair markets, car manufacturers or suppliers are not allowed to impede access by independent spare part producers and distributors to the markets or to restrict the dealer's right to procure spare parts of equivalent quality from firms of his choice outside the network. Furthermore, car manufacturers must provide repairers outside the network with the technical information they need to enable them to repair and maintain cars produced by them, provided that the information is not covered by an intellectual property right.

33. Multi-dealerships, opening-up of the market in spare parts and greater competition in the field of repairs all serve the aim of increasing consumers' choice in accordance with the principles of the single market. The same objective requires that consumers are able to buy a car and to have it maintained or repaired wherever in the European Union prices or terms are most favourable.

This is all the more important in the car sector, where price differences between Member States are significant. In its latest six-monthly survey of car prices, published in July, the Commission noticed that price differentials had risen dramatically since November 1994.[3] Since the beginning of 1995, it has received an increasing number of complaints from individuals in the European Union, mostly from Austria, Germany and

[1] Commission Regulation (EC) No 1475/95 of 28 June 1995 on the application of Article 85(3) of the Treaty to certain categories of motor vehicle distribution and servicing agreements (OJ L 145, 29.6.1995, p. 25).

[2] Commission Regulation (EEC) No 123/85 of 12 December 1984 (OJ L 15, 18.1.1985).

[3] Commission press releases IP/95/50 of 19.1.1995 and IP/95/768 of 24.7.1995.

France, who have been prevented from purchasing a car in Italy and Spain, where, following currency devaluations, prices were relatively low.[1]

The new Regulation expressly bans any practices designed to prevent parallel trade.[2] Dealers must be allowed to meet demand from outside their allotted sales area and may in future undertake certain means of advertising outside their territory.

34. The Commission departments published on 26 September 1995 in all Community languages a brochure which explains the new regulatory framework for manufacturers, dealers, spare part producers and independent repairers. It also provides consumers with information on their freedom to buy a car anywhere in the Community.[3]

2. Restrictions on parallel trade

35. It is one of the most well-established principles of Community competition law that producers are forbidden to divide the internal market by private agreements and to maintain price differences by arranging anti-competitive absolute territorial protection. However, such behaviour continues to occur on the market and, where it comes to light, one can expect severe action by the Commission.

BASF/Accinauto

36. In a decision of 12 July 1995,[4] the Commission imposed a fine of ECU 2.7 million on the German car refinish paint producer BASF Lacke + Farben, a subsidiary of the BASF group, and a fine of ECU 10 000 on BASF's exclusive distributor in Belgium and Luxembourg, Accinauto S.A. The case originated with a complaint by two English parallel importers of Glasurit car refinish paint products. They alleged that Accinauto, from whom they bought the Glasurit products, had ceased deliveries to them in the summer of 1990 on the instructions of BASF. The Commission carried out investigations on the premises of BASF and Accinauto and found out that Accinauto was bound by a contractual obligation to transfer to BASF all orders from customers from outside its exclusive distribution territory. The Commission concluded that this obligation constitutes an unacceptable restriction of competition as it hinders the export by Accinauto of the relevant products from Belgium to the United Kingdom. In fact, as a result of this obligation, BASF itself, and not the exclusive distributor, decides on and controls supplies to parallel importers from other Member States.

Pharmaceutical products: Organon

37. Prices for pharmaceutical products differ significantly between Member States. This is usually explained by the differences in national price control and health care systems. On several occasions, the Court of Justice has ruled that parallel imports should not be blocked, irrespective of the factors that determine price differences. Hence, in the pharmaceutical sector, the Commission has consistently applied the competition rules to agreements or conduct which restrict parallel trade in drugs. It is believed that the unrestricted operation of market forces in this way is likely to act as a catalyst for the gradual convergence not only of prices but also of price control mechanisms. Prices in the high-cost countries should fall, while those in the low-price countries should, if they fail to offer pharmaceutical companies a reasonable return on investment, ultimately increase in reaction to the real threat of product withdrawal. Some Member States with high drug prices even stimulate parallel imports in order to bring about a reduction in their country's overall drug bill.

38. Organon is a British subsidiary of Akzo (Netherlands) which specializes in the manufacture and marketing of contraceptive pills.

On 4 May 1994, Organon changed the price regime applicable to its contraceptive pills Mercilon and Marvelon, the latter holding substantial market shares throughout the Community.

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1 'The impact of currency fluctuations on the internal market', communication from the Commission to the European Council, 31.10.1995, point 25.

2 See also judgments of the Court of Justice of 24 October 1995 in Cases C-70/93 *Bayerische Motorenwerke AG and ALD Auto-Leasing D GmbH* and C-266/93 *Bundeskartellamt and Volkswagen AG, VAG Leasing GmbH* (not yet published).

3 'Distribution of motor vehicles', Explanatory brochure, European Commission, DG IV, IV/9509/95. More than 7 000 copies of this brochure have already been distributed.

4 OJ L 272, 15.11.1995, p. 16.

Before that date, Organon applied a discount of 12.5% on all products supplied to its customers, irrespective of their final destination. The new price regime differentiated between those pills to be sold in the UK and those intended for export. Only the former qualified for the 12.5% discount rate.

Following several complaints and Organon's notification of the new pricing system, the Commission initiated proceedings against Organon and issued a statement of objections aimed at withdrawing the immunity from fines brought about by notification. For the Commission, the new price regime, which forms part of continuous business relations between Organon and its wholesalers and therefore constitutes an agreement within the meaning of Article 85(1),[1] constituted a serious infringement of the competition rules in that it gave rise to discrimination in the prices of the products according to their geographical destination. As a result, consumers could no longer enjoy the benefits of parallel trade. In the Netherlands in particular, where the Marvelon pill of Dutch origin is not fully reimbursed by the social security scheme, whereas the price of the British pill allows it to be offered at a price equal to the Dutch social security reimbursement level, consumers were no longer able to opt for the UK-produced Marvelon and thus to benefit from not having to pay an amount over and above the reimbursement price.

Organon, however, decided to abandon the new pricing regime, which the Commission had opposed, and reintroduced the previous price conditions. The *status quo* having been restored, the Commission suspended its proceedings and reserved the right to examine the forthcoming pricing system which Organon intends to bring in.

3. Restrictions on access to the market by new entrants

39. A truly competitive internal market also implies that companies are free to enter the market to compete with existing market players. The Commission is therefore particularly keen to keep open markets and has in fact intervened where companies, be it through restrictive agreements or by unilateral action, have impeded access to the market by new entrants.

40. New competitors can be prevented from entering the market by vertical arrangements between existing suppliers and distributors. This is in particular the case where a large number of retailers on the market are tied by an obligation to sell only the products of the manufacturer with which they have a contract or arrangements having a similar exclusionary effect on third parties. The cases concerning the impulse ice cream market (*Unilever/Mars*) are examples of such arrangements.

In other cases, access by third parties to the market is impeded through a horizontal agreement or concerted practice between actual or potential competitors. This is what happened on the Dutch crane-hire market (*Van Marwijk/FNK-SCK*).

Access to the market can also be blocked through abuse by a monopoly or dominant provider of essential facilities or services. This is a problem of increasing importance in various sectors. Where a dominant company owns or controls a facility access to which is essential to enable its competitors to carry on business, it may not deny them access and it must grant access on a non-discriminatory basis. Be it in the transport sector, in particular air transport, in banking or in the telecommunications sector, the Commission applies this general principle of EU competition law[2] in order to foster new competition. The case concerning access to the port of Roscoff in France (*ICG/CCI Morlaix*) raises the same issue.

Unilever/Mars

41. Unilever is market leader in most EU Member States in 'impulse' ice cream products (i.e. single wrapped items of industrially manufactured ice cream sold for immediate consumption in places like newsagents, petrol stations, etc.).

In Ireland, it is by far the largest ice cream producer. Unilever's distribution system consisted

[1] In its judgment of 24 October 1995 in Cases C-70/93 and C-266/93 (see footnote 2 on p. 18), the Court confirmed its prior jurisprudence that a call by a company to its dealers does not constitute an unilateral act which falls outside the scope of Article 85(1) but is an agreement within the meaning of that provision if it formed part of a set of continuous business relations governed by a general agreement drawn up in advance.

[2] This general principle has found support in the judgment of the Court of Justice of 6 April 1995 in Cases C-241/91 P and C-242/91 P *Radio Telefis Eireann (RTE) and Independant Television Publications Ltd* v *Commission (Magill) [1995]* ECR I-743.

in providing freezer cabinets to retailers subject to a condition of exclusivity whereby only Unilever products could be stored in the cabinets ('freezer exclusivity'). Moreover, the cost of cabinet provision was included in the price of the ice cream charged to all retailers, irrespective of whether they had a Unilever freezer cabinet.

On a complaint from Mars, the Commission examined the distribution arrangements operated by Unilever in Ireland. It found that, where a retailer has only one or more Unilever freezer cabinets in his outlet, that outlet is in practice tied exclusively to the sale of Unilever ice cream as a result; the majority of all outlets offering impulse ice cream in Ireland fall into this category. Such outlet exclusivity has already been condemned by the Commission in 1992 with regard to the German impulse ice cream market.[1] The Unilever agreements had the cumulative effect of appreciably restricting competition by preventing third competitors' access to the market. The arrangements were also found to be an abuse of Unilever's dominant position on the market.

Unilever, however, agreed to alter its practices with the aim of freeing up the market, in particular by giving wider choice to retailers. The Commission has accordingly announced that the new arrangements appear to meet the conditions for the granting of an exemption.[2]

Van Marwijk/FNK-SCK

42. In its decision of 29 November 1995,[3] the Commission imposed fines[4] on FNK and SCK for infringements of Article 85(1) on the Dutch crane-hire market.

FNK (Federatie van Nederlandse Kraanverhuurbedrijven) is an association of Dutch firms which hire out mobile cranes. SCK (Stichting Certificatie Kraanverhuurbedrijf) was set up on the initiative of FNK in order to guarantee, through a certification system, the quality of cranes and equipment used in the crane-hire business. Most of the firms which participate in SCK are also members of FNK. They account for between 50 and 80% of the Dutch market. Crane-hirers themselves hire cranes from other crane-hirers on a large scale.

Apart from FNK's recommended prices for the hiring-out of cranes and the concerted prices applied between members of FNK, the Commission attacked the ban on SCK certificate-holders hiring cranes from firms not affiliated to SCK. It considered that the SCK hiring ban was caught by the prohibition of Article 85(1) as the SCK certification system did not fulfil the conditions of openness and acceptance of other equivalent quality guarantee systems. It concluded that the ban not only restricted the freedom of action of the affiliated firms but also considerably impeded access by third parties to the Dutch market.

In its decision, the Commission indicated that, while its policy on certification allows scope for private-law certification systems designed to provide supplementary monitoring of compliance with statutory provisions, such systems should be in accordance with the competition rules.

ICG/CCI Morlaix

43. Irish Continental Group (ICG) applied to the Chambre de Commerce et d'Industrie de Morlaix (CCI Morlaix) for access to the port of Roscoff (Brittany) for the purpose of commencing a ferry service between Ireland and Brittany in the summer of 1995. Brittany Ferries was at that time the only ferry company operating between Ireland and Brittany. Initially, an agreement in principle was reached between the parties following which ICG started to market and take bookings for its new ferry service. Negotiations were however suspended in January 1995 and no final agreement could be reached between CCI Morlaix and ICG after

[1] In 1992, the Commission took a negative decision against Langnese (Unilever) and Schöller, who are in a duopolistic position on the German impulse ice cream market. In that case, the Commission acted against 'sales outlet exclusivity' arrangements under which a retailer undertakes to sell only the products of the manufacturer with whom he has a contract. The Commission decided that the cumulative effect of the agreements in question amounted to an appreciable restriction of competition by Langnese and Schöller. This finding was appealed against by the parties but was upheld by the Court of First Instance in its judgments of 8 June 1995 in Case T-7/93 *Langnese-Iglo GmbH* v *Commission [1995]* ECR II-1533 and in Case T-9/93 *Schöller Lebensmittel GmbH & Co. KG* v *Commission [1995]* ECR II-1611.

[2] OJ C 211, 15.08.1995, p.4.

[3] OJ L 312, 23.12.1995, p.79.

[4] The immunity from fines resulting from the notifications by FNK and SCK in early 1992 was withdrawn under Article 15(6) of Regulation No 17 by Commission Decision of 13 April 1994 (OJ L 117, 7.5.1994).

ICG had complained to the Commission and further negotiations had taken place.

The Commission found that CCI Morlaix, being the operator of the port of Roscoff, which was the only port capable of providing adequate port facilities in France for ferry services between Brittany and Ireland, was *prima facie* in a dominant position. It also found that, by its unjustified refusal to give ICG access to the port facilities of Roscoff, CCI Morlaix had *prima facie* abused its dominant position. The Commission could therefore order interim measures on 16 May 1995 obliging CCI Morlaix to take the necessary steps to allow ICG access to the port of Roscoff until the end of the summer season.

After the Commission's intervention, the parties concluded a five-year contract for the use of the Roscoff port facilities by ICG; this was not only to their mutual benefit but, more importantly, to the benefit of travellers, who now have a wider choice of transport services and activities in the Roscoff area.

4. Green Paper on vertical restraints

44. Vertical arrangements between suppliers and distributors in the various Member States have always received particular attention under Community law in view of the goal of market integration. It has been a core element of Community policy to keep channels for parallel trade open and free from restrictions by private business. Even though competition policy towards vertical restraints has served the Community well to date, it is felt necessary to undertake a review in order to ascertain whether Community policy in this field is still adapted to the distribution and consumer needs of the future.

For example, the application of information technology and just-in-time methods is changing not only production methods but also the form and systems of distribution. The implications of this must be fully reflected in policy so as not to stifle the highly innovative and rapidly changing distribution techniques.

Moreover, the main block exemptions in the field of vertical restraints come up for renewal soon: exclusive selling and buying in 1997 and franchising in 1999. These renewals need to be prepared.

The review will take the form of a Green Paper which will set out different alternatives for future policy. The intention is to submit this option paper next year to a wide and in-depth public consultation of all interested political and socio-economic partners (the European Parliament, Member States, producers, distributors and consumers).

5. Cross-border credit transfers

45. The banking sector is still not characterized by a properly functioning internal market. Payments for financial transactions are an important cost factor for companies and may act as a significant impediment to the smooth operation of the internal market.

46. In September, the Commission adopted a notice on the application of the EC competition rules to cross-border credit transfers.[1]

The notice is part of a package of measures adopted by the Commission, including a proposal for a directive, with a view to improving the cross-border credit transfer services offered by banks.[2]

These systems are used by banks to transfer money on behalf of customers between different countries in the Union.

47. The notice updates and replaces competition principles published in 1992. It states that the Commission's general approach will be to view positively cooperation agreements between banks that in particular enable them to meet the requirements of the directive. This cooperation should not, however, go so far as to eliminate competition between banks. The notice therefore provides guidelines for banks as to how they can set up cooperation arrangements to handle cross-border credit transfers more efficiently without falling foul of the competition rules. It may therefore contribute to the development of payment systems which are more favourable to European citizens.

[1] OJ C 251, 27.9.1995, p. 3.

[2] Commission communication 'EU funds transfers: transparency, performance and stability', COM(94) 436, 19 October 1994; Bull. EU 9-1995, point 1.3.12.

48. The notice addresses two issues of particular importance: market entry and price competition.

As to market entry, the Commission wishes to ensure that smaller banks are not unfairly excluded from systems to which they must belong if they are, in practice, to be able to offer cross-border credit transfers to their customers. The conditions for access to such systems should be objectively justified and applied in a non-discriminatory manner. Conversely, the exclusion of newcomers from a system which is not an essential facility, e.g. a smaller system developed by groups of banks, will not normally give rise to competition concerns.

As far as price competition is concerned, the notice distinguishes between bank-customer pricing agreements and inter-bank pricing agreements.

Banks must not conclude agreements among themselves that determine the level of customer fees or the way in which they are to charge such fees.

The key issue concerning inter-bank pricing agreements is the assessment of multilaterally agreed interchange fees, i.e. collectively agreed transaction fees paid by one bank (typically the sender's bank or its correspondent bank) to another bank (the beneficiary's bank). The Commission takes the view that a multilaterally agreed interchange fee is a restriction of competition falling within the prohibition of price agreements contained in Article 85(1). Such a fee can, however, be exempted under Article 85(3) where the conditions for exemption are met. In the case of OUR cross-border credit transfers (i.e. where the sender has asked to bear the costs), a beneficiary's bank cannot charge the beneficiary an additional fee for handling a cross-border credit transfer. In such a case, banks may agree that the beneficiary's bank receive a multilaterally agreed interchange fee if that fee covers the costs actually and necessarily incurred by the bank when it handles cross-border credit transfers. The agreed fee should not exceed the average real costs incurred by the beneficiary's bank when it handles cross-border credit transfers. Furthermore, it should be expressed as a default fee, allowing bilateral agreements on amounts above or below the default.

6. Leniency programme

49. The Commission continued its active pursuit of secret cartels, involving price fixing or market sharing, which still appear to exist in major industries.

Fact-finding is accounting for an increasing share of the Commission's administrative resources for competition law enforcement. In 1995, the Commission undertook some 91 on-the-spot investigations, including 87 surprise inspections.

50. Cartels are typically operated in secrecy and considerable efforts are devoted by participants to avoid detection by the authorities, including the use of information technology.

In certain cases, the benefit which may accrue to consumers from the detection and prohibition of secret cartels outweighs the interest the Community may have in fining companies which cooperate with the Commission, thereby enabling or helping it to detect and prohibit a cartel. For this reason, the Commission is considering granting lenient treatment to companies which cooperate in the preliminary investigation or proceedings in respect of an infringement.[1] It published a draft notice which specifies the conditions under which firms cooperating with the Commission can receive immunity from fines or significant reductions in the fine which would otherwise have been imposed upon them. Before it adopts the notice, the Commission has invited all interested persons to submit their observations on its draft notice.[2]

7. Access to the file

51. The European Community's anti-trust enforcement procedures must not be arbitrary or unfair. The Commission is required to observe procedural safeguards aimed at protecting the interests of firms affected by its decisions. Take, for instance, preservation of the rights of defence, in particular the right to a fair hearing.

[1] On 10 August 1993, the US Department of Justice Antitrust Division issued its corporate leniency policy. This was followed by a leniency policy for individuals that was issued on 10 August 1994.

[2] OJ C 341, 19.12.1995, p. 13.

Addressees of formal decisions and interested parties also have the ultimate safeguard of the right of appeal to the European Courts.

52. The Court of First Instance annulled a series of Commission decisions of 19 December 1990[1] sanctioning infringements of the competition rules on the market in soda ash. One of the decisions related to a concerted practice by which Solvay and ICI divided the European market between them. In addition, the Commission found that both Solvay and ICI abused their dominant positions in western Europe, in the United Kingdom and Ireland respectively.[2]

The decision, which was based on Article 85, has been annulled on the ground that the Commission did not respect the parties' rights of defence. The Court found that the Commission should have given Solvay access, in the context of the Article 85 procedure, to certain documents contained in the Commission's file for the Article 86 case against ICI.[3] Conversely, the Court, acting on the same basis, decided in favour of ICI.[4]

The Commission is examining the exact impact of these decisions on its current practice, also in view of the new mandate of the Hearing Officer, which provides that, if a company believes that the Commission has not provided it with all the documents necessary for its defence, the Hearing Officer should examine any such claim and decide on the merits.[5]

1 OJ L 152, 15.6.1991.
2 XXth Report on Competition Policy (1990), points 92 and 113.
3 Judgment of the Court of First Instance of 29 June 1995 in Case T-30/91 Solvay v Commission [1995] ECR II-1775.
4 Judgment of the Court of First Instance of 29 June 1995 in Case T-36/91 Imperial Chemical Industries plc v Commission [1995] ECR II-1847.
5 Commission Decision of 12 December 1994 on the terms of reference of hearing officers in competition procedures before the Commission (OJ L 330, 21.12.1994, p.67).

B — Cooperation and competition in a rapidly changing and increasingly global economic environment

53. Today's economic environment is characterized by a sharp increase in competitive pressures. Several factors have contributed to this: the continuing shortening of product life-cycles; the growing globalization of industries and markets; the completion of the legislative programme for the achievement of the internal market. These economic realities must be taken into account in applying the competition rules. As a result, economic market analysis is becoming increasingly important in competition cases. The Commission has to take account of the specific economic features of a particular market in placing the relevant case in its proper context.

In an economic environment characterized by dynamic markets, innovation and globalization, cooperation between firms is often vital to enable them to remain competitive on the market by improving their R&D efforts, reducing costs and developing new products. None the less, such cooperation must not lead to anti-competitive situations which are incompatible with the competition rules of the Treaty.

1. The application of Articles 85 and 86 in the telecommunications sector

1.1. Strategic alliances

54. The ongoing liberalization of the telecommunications sector, together with the increasing convergence of telecommunications, information technologies and media, are spurring substantial commercial activity in the core sectors of the information market. Market players are now positioning themselves to take advantage of the new opportunities. This has resulted in a wave of new alliances and partnerships being announced or implemented.[1]

Strategic alliances between incumbent telecommunications operators (TOs) moving into global markets are one type of such alliances (BT/MCI; Atlas-Phoenix). Other alliances (conglomerate alliances) are set up either between companies with no prior presence in the telecommunications market but which benefit from synergies through market entry — such as electricity utilities or banks that have substantial internal networks as well as financial means and know-how — or between the latter and TOs (Cable & Wireless and Veba; BT-Viag; BT-BNL, Albacom). Large consortia are also being formed to offer mobile satellite telecommunications services on a worldwide basis (Inmarsat-P, Iridium, Globalstar and Odyssey).

55. The application of the basic competition rules to these alliances has become one of the major challenges for EU competition policy in recent years. The Commission must ensure that the current restructuring process will lead to competitive and growth-oriented market structures. The Community's policy aimed at liberalizing telecommunications is generating new services and products at competitive prices for consumers, reducing costs for the industry and creating new jobs. However, these efforts would serve little purpose if new restrictive agreements, practices or market structures were allowed to develop which prevented competition from emerging on liberalized markets or if TOs could engage in abusive behaviour aimed at preserving their position. This shows that there is a close inter-relationship between different Community policy areas and that all competition instruments must be applied together in a coherent way.

56. The concert joint venture between British Telecommunications and the US MCI Corporation was the first major telecoms strategic alliance which the Commission dealt with, and it was granted an exemption under Article 85(3).[2]

Alliances intending to offer new global services, with features sought in particular by large corporations (e.g. seamlessness, end-to-end, one-stop-shopping and billing, etc.), will in general improve the quality and the availability of advanced telecommunications services and will also contribute to the creation of trans-European networks, which is one of the objectives of the EC Treaty (Article 129b). Consumers, including large multinational companies but also innovative small and medium-sized enterprises, can

[1] A comprehensive overview of case decisions and publications in this field is given in 'Community competition policy in the telecommunications sector', European Commission, official documents, update July 1995 (IV/18571/95).

[2] Decision of 27 July 1994 (OJ L 223, 27.8.1994, p. 36); XXIVth Report on Competition Policy (1994), points 156-160.

benefit from more advanced global services and efficiency gains, thereby improving their competitive position both globally and within the European Union.

However, to the extent that alliances offer domestic as well as international services, the indispensability required under Article 85(3) and the possible elimination of competition at the national level are important elements in the Commission's analysis. Important elements in the Commission's favourable attitude to the creation of concert were the genuinely global nature of the services concerned and the fact that the markets of both parent companies are open to competition.

Atlas/Phoenix

57. The Atlas agreement, which the Commission investigated during 1995, differs from the BT-MCI alliance in two important respects: firstly, the domestic component of the services offered is much stronger than the global elements planned and, secondly, the home markets of the parties (France and Germany) are less liberalized than the home markets of BT and MCI (UK and US).

The Atlas transaction brings about a joint venture between the French and German public telecommunications operators, France Telecom (FT) and Deutsche Telekom (DT). Atlas is also the instrument of DT's and FT's participation in the second transaction, named Phoenix, with the US company Sprint Corporation.

Atlas targets two separate product markets for value-added telecommunications services, namely the market for advanced corporate telecommunications services and the market for standardized low-level packet-switched data communications services. The broader Phoenix alliance will address the same markets for value-added telecommunications network services and also the market for traveller services and the market for so-called carrier's carrier services.

The Atlas and Phoenix arrangements raised a number of concerns from a competition point of view, in particular with respect to the home markets of the EU partners to the transactions, where FT and DT hold legal and *de facto* dominant positions with respect to a number of telecommunications services and the provision of infrastructure. It was argued therefore that competition could be eliminated and the positive effects of future full liberalization endangered. In response to this, the parties to the alliances as well as the French and German Governments have undertaken certain amendments and commitments to address these concerns. They relate to the non-integration into Atlas of the domestic French and German public switched data networks, the non-discriminatory access to these networks, and the avoidance of cross-subsidization. However, the main commitment made by the governments was that the use of alternative telecommunications infrastructure for the provision of liberalized telecommunications services (i.e. not basic voice telephony) will be liberalized as of 1 July 1996. Without such liberalization, competition in the area of data communications would also be endangered or eliminated in other Member States by the alliance between the Union's largest telecommunications organizations. Full liberalization, i.e. including basic voice telephony and infrastructure, will be achieved by 1 January 1998.

On this basis, the Commission has indicated that it is ready, subject to observations from third parties, to take a favourable view of the Atlas-Phoenix agreements.[1]

58. Other strategic alliances of the same type which the Commission has begun to investigate are Unisource and its Uniworld alliance with AT&T.

Global Mobile Satellite Systems

59. The Commission has launched an in-depth and comprehensive examination of the newly emerging strategic alliances which are being formed to offer mobile satellite telecommunications services on a worldwide basis.

In this sector, which has only a few global market players, it is essential that competition is safeguarded in the downstream markets

[1] Notices pursuant to Article 19(3) of Regulation No 17 (OJ C 337, 15.12.1995, pp. 2 and 13).

involved, namely local service provision, distribution and equipment supply.

One of the systems examined, Inmarsat-P, has already been favourably viewed by the Commission.[1]

1.2. Access and interconnection agreements

60. An important problem for the application of EU competition law to the sector, and in general for the regulatory environment of the future telecommunications market, is the issue of access and interconnection agreements.[2] In fact, the post-monopoly and future multimedia environment is likely to be characterized by situations where firms singly or jointly control facilities — such as networks, conditional access systems or critical software interfaces — which may provide an essential route to customers.

Access and interconnection agreements may, in principle, be seen as pro-competitive because they are aimed at extending the range of services available to customers. However, they may also generate substantial collusive behaviour and market foreclosure, as well as abuse of dominant positions.[3] The non-discriminatory access to essential facilities on reasonable terms is of central importance in this context. The Commission therefore intends to present in 1996 a draft communication on the implementation of the competition rules in this area.

2. Globalization of markets

ATR/BAe

61. The market for regional aircraft is an example of a sector with a worldwide dimension. The main manufacturers operate in all continents.

62. On 18 August, the Commission authorized, by means of a comfort letter, the regional aircraft joint venture between Aérospatiale and Alenia, already integrated in ATR, and British Aerospace. The ultimate objective of the project is to merge the parties' regional aircraft activities. The first stage of cooperation mainly concerns services direct to customers and the joint carrying-out of feasibility studies for new aircraft in this sector.

The Commission's authorization is valid for only a limited period ending on 6 June 2000; this leaves it the option of reviewing the situation if, following the feasibility studies, the parties decide not to develop, produce or launch the programmes for new aircraft but to nonetheless maintain their cooperation in the areas of sales and after-sales service.

3. Transfer of technology

63. One of the priority tasks of the Commission with a view to developing the large internal market is to encourage innovation and the dissemination of new technology in European industry. The prime role played by technology transfer in the development of technological innovation in the economy of the European Union and in strengthening the competitiveness of enterprises operating in this area was highlighted in the Commission White Paper on growth, competitiveness and employment.

64. The Regulation on the block exemption of categories of technology transfer agreements,[4] proposed in 1994 and substantially amended in 1995 following third party hearings and the second meeting of the Advisory Committee on Restrictive Practices and Dominant Positions, is intended to promote economic growth and enhance competitiveness by simplifying the content of the two existing regulations on licensing agreements[5] and combining them in a single regulation.

65. The Regulation thus reduces the disparities between the Regulation on patent licensing and the Regulation on know-how licensing and removes several clauses preventing block exemption or transfers them to the so-called 'opposition' procedure. It also provides for new, lawful clauses which give greater contractual

[1] Notice pursuant to Article 19(3) of Regulation No 17 (OJ C 304, 15.11.1995, p. 6).

[2] G7 conclusions and telecommunications infrastructure Green Paper.

[3] Coudert Bros, 'Competition aspects of interconnection agreements in the telecommunications sector', report to the European Commission, June 1995.

[4] The Regulation was adopted by the Commission on 31 January 1996.

[5] Regulations (EEC) Nos 2349/84 of 23 July 1994 and 556/89 of 30 November 1988.

freedom to the parties. This relaxation of the rules, which will benefit most operators in the Community is, however, accompanied by a clear warning to enterprises with strong market positions: the benefit of the block exemption can be withdrawn if enterprises use their exclusive licences to monopolize the market for a product and prevent third parties from gaining access to new technologies. When assessing such cases, the Commission will pay particular attention to situations in which the market share of the licensee exceeds a threshold of 40%.

C — Transport

1. Maritime transport

66. The European Union is the largest trading bloc in the world. The bulk of its trade with the rest of the world (and a significant part of intra-Union trade) is carried out by means of maritime transport. Liner shipping, i.e. scheduled maritime transport services, is of major importance in this respect.

It is therefore essential for the European Union to have the best possible maritime transport service at the lowest possible cost. Competition policy is a tool well-adapted to help achieve this objective.

67. It should also be noted that, in the United States, a proposal to deregulate liner shipping and make it subject to a more competitive statutory regime was recently adopted by the House of Representatives and is currently before the Senate. If the proposal, the Ocean Shipping Reform Act, is passed, the US regime will more closely match the European rules.

1.1. Liner shipping consortia

68. The new Regulation granting block exemption to liner shipping consortia[1] is an important instrument for this purpose, as it will encourage shipowners to improve and rationalize their operations, thereby reducing costs and freight rates while at the same time allowing them to offer a better quality service along with greater frequency. This is the second block exemption that has been adopted in the liner shipping sector. Regulation (EEC) No 4056/86, which lays down rules for the application of Articles 85 and 86 to maritime transport, already contains a block exemption for liner conferences.[2]

69. The new block exemption entered into force on 22 April 1995 and applies for a period of five years. Liner shipping consortia are agreements between two or more shipping companies relating to the joint operation of liner transport services through cooperation in the technical, operational and/or commercial field, with the exception of price fixing. It applies only to international liner shipping services to or from one or more Community ports intended exclusively for the carriage of cargo, chiefly by container. It also covers both consortia operating within a liner conference and consortia operating outside such conferences, except that it does not cover the joint fixing of freight rates. Consortium members which wish to fix rates jointly and do not satisfy the conditions of Regulation (EEC) No 4056/86 must apply for individual exemption.

The block exemption covers the following activities: the coordination and/or joint fixing of sailing timetables and the determination of ports of call; the exchange, sale or cross-chartering of space or slots on vessels; the pooling of vessels and/or port installations; the use of one or more joint operations offices; the provision of containers, chassis and other equipment and/or rental, leasing or purchase contracts for such equipment; the use of a computerized data exchange system and/or joint documentation system; temporary capacity adjustments;[3] the joint operation or use of port terminals and related services; the participation in tonnage, revenue or net revenue pools; the joint exercise of voting rights in liner conferences; a joint marketing structure and/or joint bill of lading; and any other activity ancillary to any of these and necessary for its implementation.

70. The Commission considers that consortia generally help to improve the productivity and quality of available liner shipping services by reason of the rationalization they bring to the activities of member companies and through the economies of scale they allow in the operation of vessels and utilization of port facilities. Transport users generally obtain a fair share of the benefits resulting from consortia if there is sufficient competition in the trades in which the consortia operate.

In order to benefit from the block exemption, a consortium must possess, in respect of the ranges of ports it serves, a share of direct trade

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[1] Commission Regulation (EC) No 870/95 of 20 April 1995 on the application of Article 85(3) of the Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies (consortia) pursuant to Council Regulation (EEC) No 479/92 (OJ L 89, 21.4.1995, p. 7).

[2] Regulation (EEC) No 4056/86 of 22 December 1986 (OJ L 378, 31.12.1986, p. 4).

[3] This does not include arrangements concerning the non-utilization of existing capacity, whereby shipping line members of the consortium refrain from using a certain percentage of the capacity of vessels operated within the framework of the consortium; See Article 4 of Regulation (EC) No 870/95 and Commission Decision of 19 october 1994 concerning the Trans-Atlantic Agreement, in which the Commission prohibited an agreement for the non-utilization of capacity (OJ L 376, 1.12.1994, p. 1).

of under 30% when it operates within a conference and of under 35% when it operates outside a conference. A simplified opposition procedure applies to consortia whose share of the trade exceeds the above limit but does not exceed 50% of the direct trade.

1.2. Inland rate fixing by ship liner conferences

71. On 8 June 1994, the Commission adopted a report[1] on how it intends to apply the competition rules to liner shipping which it presented to the Transport Council. The report focuses on an analysis of the legal position with regard to price-fixing agreements concluded by shipowner members of liner conferences concerning the land section of multimodal transport services provided by them in the Community. It concluded that this practice was contrary to the Community competition rules and could not qualify for exemption as it stood. It suggested, however, that a new approach be established that was compatible with the competition rules and allowed inland container transport to be organized more efficiently and more to the advantage of shippers.

72. At the Council meeting in November 1994, Mr Van Miert, Competition Commissioner, agreed to report to the Council on the implementation of the guidelines, on the basis of the work of a wise men's committee. This committee, known as the Multimodal Group, was set up in July 1995 and would be submitting an interim report to him at the beginning of 1996 which would be presented to the Council in the first half of 1996.

73. In 1994, the Commission took two decisions prohibiting inland price fixing agreements: the TAA (Trans-Atlantic Agreement) decision[2] and the FEFC (Far Eastern Freight Conference) decision.[3] On 10 March 1995, the Court of First Instance ordered the suspension of the TAA decision in so far as it prohibited joint price fixing in respect of the inland portions within the Community of through-intermodal transport services.[4] That order was confirmed on appeal by the Court of Justice on 19 July 1995.[5]

In the meantime, a modified version of the TAA, the Trans-Atlantic Conference Agreement (TACA), was notified to the Commission. The Commission sent the parties to the TACA a statement of objections setting out the reasons why it had formed the preliminary view that it was appropriate to withdraw any immunity from fines in respect of inland price fixing which may have been brought about by the new TACA notification.[6] An application for interim measures preventing the Commission's anticipated decision to withdraw immunity from fines was dismissed by the Court of First Instance.[7]

2. Air transport

2.1. IATA tariff consultations

74. Regulation (EEC) No 1617/93 of 25 June 1993[8] states that Article 85(3) is applicable in particular to the holding of consultations on tariffs for the carriage of passengers and freight on scheduled air services between Community airports. The exemption is, however, subject to the conditions set out in Article 4 of the Regulation, notably that the exemption is applicable only if the consultations give rise to interlining.

75. According to the preliminary information obtained by the Commission in 1995, it would seem that, as a general rule, there are not many, if indeed any, interlining agreements on the carriage of goods. It is also clear that tariffs established through consultation by airlines are appreciably higher than normal market prices and therefore encourage airlines to increase their tariffs beyond the level normally set by competition.

The Commission therefore considers it desirable to amend the abovementioned Regulation in order to exclude from its scope tariff consultations relating to the carriage of freight. The Commission has published a notice[9] giving the airlines and other interested parties the oppor-

1 SEC(94) 933.
2 Decision of 19 October 1994 (OJ L 376, 31.12.1994, p. 1).
3 Decision of 21 December 1994 (OJ L 378, 31.12.1994, p. 17).
4 Case T-395/94 R *Atlantic Container Line and Others* v *Commission* [1995] ECR II-595.
5 Case C-149/95 P (R) *Commission* v *Atlantic Container Line and Others* [1995] ECR I-2165.
6 Commission press release IP/95/646, 21.6.1995.
7 Order of the President of the Court of First Instance of 22 November 1995, Case T-395/94 R II *Atlantic Container Line and others* v *Commission* (not yet published).
8 OJ L 155, 26.6.1993, p. 18.
9 OJ C 322, 2.12.1995, p. 15.

tunity to make known their views in advance. It will decide on further action in 1996.

2.2. Cooperation between airlines

76. Cooperation between airlines can facilitate the healthy restructuring of air transport in Europe and lead to an improvement in the quality of consumer services and better cost control. While the ommission does not intend to impede the restructuring of European air transport, it is monitoring operations to ensure they do not lead to restrictions of competition that are not indispensable and do not rule out opportunities for real competition from new operators on the main routes.

The conditions proposed by Swissair/Sabena which the Commission agreed when it approved the merger of the two airlines, and the conditions imposed by the Commission when it exempted the cooperation between Lufthansa and SAS, satisfy that objective.

Lufthansa/SAS

77. The general cooperation agreement between Lufthansa and SAS provides for the setting-up of an integrated air transport system between the two airlines, based on long-term relationships in the commercial and operational fields. Commercial cooperation will be particularly close on the routes between Scandinavia and Germany where the parties are considering setting up a joint venture.

78. The Commission stated[1] that, although the agreement appreciably restricted competition on the markets in question, especially on the routes between Scandinavia and Germany, it could qualify for exemption provided that certain conditions were met, allowing existing and potential competition to be maintained.

These conditions related chiefly to: a frequency freeze on certain routes operated by the two companies; the opening of frequent flyer programmes to airlines not operating such schemes; the obligation on Lufthansa and SAS to conclude, subject to certain conditions, interlining agreements with new entrants; termination of certain cooperation agreements with other airlines; transfer to new market entrants of slots in certain crowded airports.

The Commission adopted a decision granting exemption on 16 January 1996.

[1] OJ C 201, 5.8.1995, p. 2.

D — Trans-European networks and competition rules

79. In 1995, the Commission examined the question of the relationship between the private financing of trans-European networks and the application of the competition rules. Its conclusions were incorporated in the general report on trans-European networks, given a warm reception by the Madrid European Council on 15 and 16 December. In the report, the Commission set out the following guidelines on the handling of competition questions and announced that it would set up a 'one-stop help-desk' (fax: (32) 2 295 65 04) to provide project managers with additional information on the guidelines.

80. The Commission proposes to apply the following principal criteria when processing cases submitted to it: (i) where the infrastructure operator wishes to give enterprises the opportunity to reserve capacity as soon as a project is launched, the opportunity should be offered to all Community enterprises likely to be interested; (ii) capacity reserved by an enterprise must be proportional to the direct or indirect financial commitments entered into by the enterprise and correspond to planned operational requirements covering a reasonable period; (iii) new infrastructure is generally not congested when it first enters into service. Therefore, an undertaking or group of undertakings within the meaning of Article 3 of Directive 91/440/EEC should not reserve all available capacity. Some of the capacity should remain available to enable other firms to operate competing services; (iv) enterprises holding operating rights may not object to the loss of such rights if they are not used; (v) the duration of agreements reserving capacity must be reasonable and adapted to each case.

This list of criteria is not exhaustive and does not prejudge the Commission's final position, which will be defined in the light of the specific characteristics of each project.

81. The Commission will endeavour to deal rapidly with the notifications of agreements relating to the financing of trans-European networks. In particular, it is considering adopting a final decision in not more than six months' time, provided the parties have contacted the Commission before finalizing the agreements.

Gas interconnector

82. In its White Paper on growth, competitiveness and employment, the Commission highlighted the importance of new European infrastructure networks that could help overcome the fragmentation of certain markets in Europe.

On 17 May 1995, the Commission issued a comfort letter clearing a joint venture arrangement between nine leading European gas companies for the construction and operation of a UK-Belgium underwater gas interconnection, in particular a high pressure gas pipeline which will be the first connection between the United Kingdom and continental gas markets.

Given the possibility for third parties to acquire, on freely negotiated terms, access to transport capacity through the interconnector, and in view of the fact that this project will create opportunities for competition between markets which so far are quite isolated, the Commission found that the pro-competitive effects of the joint venture clearly outweigh the restrictions of competition. In its comfort letter, the Commission also ensured that the agreements will operate in practice in such a way as to effectively meet demand for any reverse flow capacity which may arise.

E — Competition and environment

83. In 1995, the Commission once again made clear how it intended to apply competition policy to environmental matters, especially voluntary agreements.[1]

84. Community environmental policy favours the 'polluter pays' principle. The effectiveness of this principle depends, in particular, on the functioning of the pricing mechanism; this must reflect, in terms of costs, the negative effects of an economic activity on the environment. For the mechanism to act correctly as an indicator, enterprises must internalize the costs of environmental protection. The 'polluter pays' principle does not preclude State aid for environmental protection, under certain conditions (see below).

Distributing resources in ways which respect the environment can take the form of direct public regulation, taxation, 'voluntary' agreements and self-regulation. Voluntary agreements are contracts between industry and public administrations which include a number of environmental objectives to be achieved by the industry in question according to a timetable. Voluntary agreements may relate both to objectives and to the means of achieving them.

The use of voluntary agreements is growing in most OECD countries in parallel with a trend towards deregulation and less intervention by the State.

Voluntary agreements and self-regulation are often regarded as a less bureaucratic and more flexible solution than more traditional approaches. Voluntary agreements or self-regulation, however, may contain restrictions of competition under Article 85(1) of the Treaty. The Commission is in fact currently examining several complaints on this matter.

85. When the Commission examines individual cases, it weighs up the restrictions of competition arising out of an agreement against the environmental objectives of the agreement and applies the principle of proportionality in accordance with Article 85(3). In particular, improving the environment is regarded as a factor which contributes to improving production or distribution or to promoting economic or technical progress.

The Commission intends, however, to remain very firm with regard to the principle of non-closure of national markets to foreign operators. It will also be very vigilant about problems of access by third parties to a system and about agreements which could result in a product being squeezed out of the market.

The Commission also takes a negative view of multilateral tariff or price fixing resulting from an agreement on the environment; its assessment will, however, be on a case-by-case basis and will look at whether any such agreement is indispensable. The aim of environmental protection is not necessarily sufficient in itself to warrant an agreement on prices being regarded as indispensable.

[1] See the document 'Competition and the environment' presented by DG IV to the Round Table on the Environment and Competition held by the OECD Committee on Law and Competition policy, Paris, May 1995.

F — Secondary product markets

86. Several complaints which the Commission received concern the alleged abuse of a dominant position in secondary product markets such as spare parts, consumables or maintenance services. These products are used in conjunction with a primary product and have to be technically compatible with it (e.g. software or hardware peripheral equipment for a computer). Thus, for these secondary products there may be no or few substitutes other than parts or services supplied by the primary product supplier. This prompts the question whether a non-dominant manufacturer of primary products can be dominant with respect to a rather small secondary product market, i.e. secondary products compatible with a certain type of that manufacturer's primary products.

The question raises many complex issues. Producers of primary equipment argue that there cannot be dominance in secondary products if there is lack of dominance in the primary product market because potential buyers would simply stop buying the primary products if the prices for parts or services were raised. This theory implies a timely reaction on the primary product market due to consumers' ability to calculate the overall life-time costs of the primary product including all spare parts, consumables, upgrades, services, etc. It furthermore implies that price dicrimination is not possible between potentially new customers and 'old' captive customers or that switching costs for the latter are low. On the other hand, complainants who produce consumables or maintenance services assume dominance in the secondary product market if market shares are high in this market, i.e. this approach focuses only on the secondary products without analysing possible effects emanating from the primary product market.

In the Commission's view, neither of these approaches reflects reality sufficiently. Dominance has always been defined by the Commission as the ability to act to an appreciable extent independently of competitors and consumers. Therefore, an in-depth fact-finding exercise and analysis on a case-by-case basis are required. In order to assess dominance in this context the Commission will take into account all important factors such as the price and life-time of the primary product, transparency of prices of secondary products, prices of secondary products as a proportion of the primary product value, information costs and other issues partly mentioned above. A similar approach was taken by the US Supreme Court in its 1992 Kodak decision.

Pelikan/Kyocera

87. The Commission took this approach when it rejected in 1995 the complaint of Pelikan, a German manufacturer of toner cartridges for printers, against Kyocera, a Japanese manufacturer of computer printers including toner cartridges for those printers. Pelikan's complaint alleged a number of practices by Kyocera to drive Pelikan out of the toner market and accused Kyocera, among others, of abusing its dominant position in the secondary market although Kyocera was clearly not dominant in the primary market. Apart from the fact that there was no evidence of behaviour that could be considered abusive, neither did the Commission find that Kyocera enjoyed a dominant position in the market for consumables. This was due to the particular features of the primary and secondary markets. Thus, purchasers were well informed about the price charged for consumables and appeared to take this into account in their decision to buy a printer. 'Total cost per page' was one of the criteria most commonly used by customers when choosing a printer. This was due to the fact that life-cycle costs of consumables (mainly toner cartridges) represented a very high proportion of the value of a printer. Therefore, if the prices of consumables of a particular brand were raised, consumers would have a strong incentive to buy another printer brand. In addition, there was no evidence of possibilities for price discrimination between 'old'/captive and new customers.

G — Liberal professions

88. The free movement of liberal professions in the Community means that certain restrictive practices in this field are increasingly likely to affect trade between Member States. One can expect a growing number of cases in this area. On several occasions, the European Parliament has called on the Commission to apply the competition rules to the liberal professions.[1]

Coapi

89. On 30 January, the Commission took a decision under Article 85 applying the competition rules in this field.

The Colegio Oficial de Agentes de la Propiedad Industrial (Coapi) is the professional association of industrial property agents in Spain. All agents practising in Spain are members. Industrial property agents give advice to the general public and assist or represent clients in proceedings involving industry property rights.

The Commission found that the fixing by the general meeting of Coapi of compulsory minimum scales of charges for the cross-border services provided by its members constitutes an infringement of Article 85(1).

In conformity with existing Community law, the Commission confirmed that the national legal framework within which such agreements or decisions by liberal professions are made, is not relevant to the application of Article 85. Even if public authorities encourage such behaviour or delegate to an association of undertakings the power to fix the prices to be applied by its members, the association's exercise of that power does not fall outside the scope of Article 85 of the Treaty.

[1] Resolution on the XIXth Report on competition policy, point 9 (iii), and Resolution on the XXth Report on Competition Policy, point 38 and the Commission's response hereto in the XXIst Report on Competition Policy, pp. 233 and 234.

H — Subsidiarity and decentralization

90. In his address to the European Parliament on the occasion of the investiture debate of the new Commission, the President of the European Commission insisted on the necessity to make a constant effort to concentrate on essentials: 'Less action, but better action'.

As far as cases falling within the scope of Articles 85 and 86 are concerned, this principle is applied by the Commission in limiting its action to those arrangements which have a significant effect on competition and which are likely to affect trade between Member States appreciably. Moreover, in view of the responsibilities incumbent on the Commission, which has the sole power to authorize certain agreements, the Commission is encouraging decentralization, in particular in cases which may lead to a prohibition decision.

1. *De minimis* agreements

91. Agreements whose effects on trade between Member States or on competition are negligible are not caught by the ban on restrictive agreements contained in Article 85(1). Only those agreements are prohibited which have an appreciable impact on market conditions. For this reason, it is essential for the Commission to make a proper analysis of the market in which those agreements operate.

The Commission's notice on agreements of minor importance sets quantitative criteria to give guidance as to the concrete meaning of the concept of 'appreciability'. Despite the recent increases in thresholds,[1] it is believed that a further review of the *de minimis* concept may be justified. The Commission has therefore started internal deliberations on this issue with a view to presenting new proposals for consultation during the course of 1996.

2. Decentralization

92. In its attempt to deal as a matter of priority with cases having a significant Community dimension, the Commission is also encouraging national enforcement of Community competition law. It considers that there is not normally a sufficient Community interest in examining a complaint when the plaintiff is able to secure adequate protection of his rights before national courts.[2] In its SACEM judgments of 24 January 1995, the Court of First Instance further specified the conditions under which the Commission has the right to reject a complaint on the ground that it lacks a significant Community interest.[3] In 1995, several cases were closed on this basis.

93. An important step forward in the decentralization effort is the Commission's notice on cooperation between national courts and the Commission in applying Articles 85 and 86.[4] In 1995, several national courts in Spain, France, Germany and Belgium have relied upon the cooperation mechanism laid down in this notice to obtain information from the Commission on competition issues.

In its preliminary ruling of 12 December 1995,[5] the Court of Justice found that the same principles of cooperation between the Commission and national courts apply in the field of agriculture, where Regulation No 26 determines the extent to which the Community competition rules apply. It is worthwhile noting that, according to the Court's judgment, the national court can, in its assessment, take into consideration the criteria established by the case-law of the Court, as well as the practice of the Commission, which practice is evidenced not only by the decisions adopted by the Commission but also from other sources, including in particular

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1 Commission notice concerning the updating of the 1986 communication on agreements of minor importance (OJ C 368, 23.12.1994).

2 The Court of First Instance endorsed this practice for the first time in its judgment of 17 September 1992 in Case T-24/90 *Automec* v *Commission* [1992] ECR II-2223, paragraphs 91 to 94.

3 Case T-114/92 *BENIM* v *Commission* [1995] ECR II-147 and Case T-5/93 *Tremblay* v *Commission* [1995] ECR II-185. The Court of First Instance, referring to the Automec II judgment, indicated that, in order to assess the Community interest, the Commission must balance the significance of the alleged infringement as regards the functioning of the common market, the probability of its being able to establish the existence of the infringement and the extent of the investigative measures required to enforce the competition rules. The fact that a national court or national competition authority is already dealing with a case concerning the compatibility of an agreement or practice with Article 85 or 86 is a factor which the Commission may take into account.

4 OJ C 39, 13.2.1993, p. 6.

5 Joined cases C-319/93, C-40/94 and C-224/94 *Dijkstra/Frico Domo, van Roessel/Campina Melkunie, de Bie/Campina Melkunie* (not yet published).

its reports on competition policy and its communications.

94. It is not only national courts, but also national competition authorities, that have an important role to play in raising the level of enforcement of Community competition law and, generally speaking, in ensuring unrestricted and fair competition in the Union. In cases where an appreciable economic effect is felt mainly in one Member State, national authorities are closer to the market and may thus be better placed to handle the case.

The Commission has pressed ahead with its preparation of a notice on cooperation between the Commission and national competition authorities,[1] pursuant to which the Commission will inform and consult the national authorities when the latter apply Article 85(1) or 86 or national competition law in cases with a Community dimension. A draft has already been submitted to the Member States for consultation. Further consultation of interested third parties will follow on the basis of a draft notice which the Commission intends to publish in 1996.

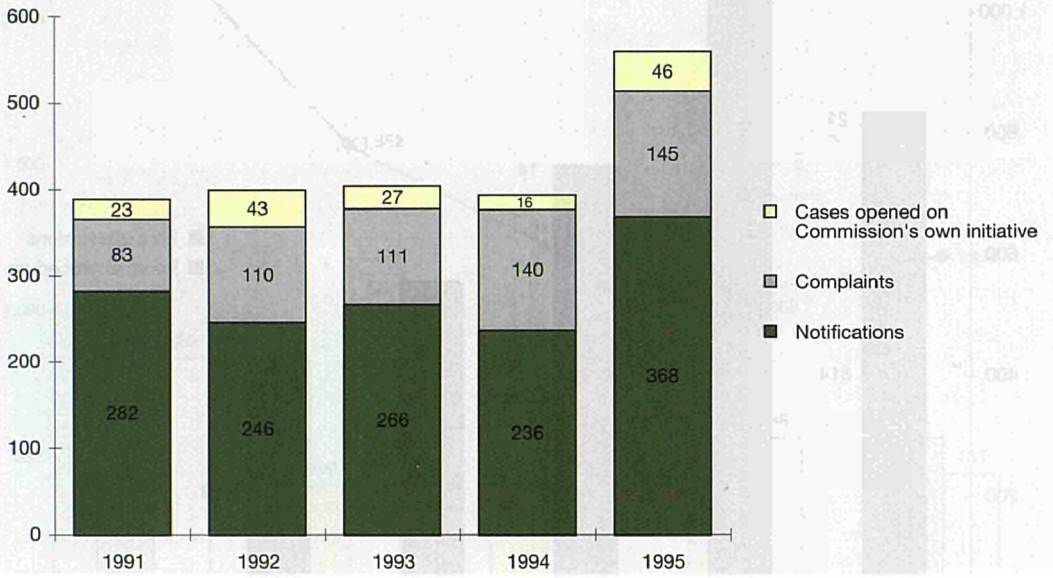
95. Decentralized enforcement should not, however, lead to differing application of competition law in the European Union. The Commission is therefore also pursuing uniformity in the substance and application of national competition laws. This is done not through any formal act of harmonization but through a continuation of, and improvement in, communication and cooperation between Community and national enforcement officials.

At present, nine Member States have competition laws with respect to restrictive agreements and abuses of a dominant position which substantially resemble those of the Community. Most of the others are considering amendments to national law aimed at bringing them into line with Community law. This process of 'soft harmonization' is a natural consequence of the integration process, which creates pressure for a level-playing field throughout the Community.

[1] The conclusions of an *ad hoc* group of representatives of national authorities and the Commission which were approved by the Directors-General for Competition in 1994 served as the basis for the Commissions's draft. See XXIVth Report on Competition Policy (1994), points 40-42.

I — Statistical overview

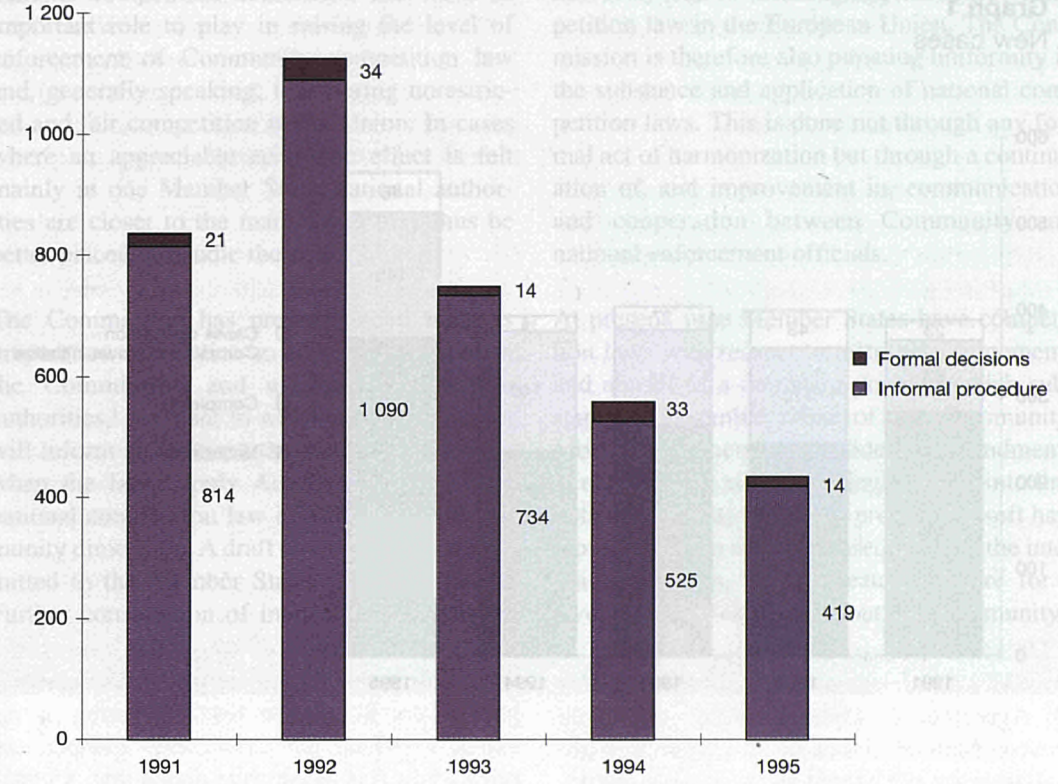
Graph 1
New cases



96. During the year, the Commission registered 559 new cases, including 368 notifications, 145 complaints and 46 cases opened on the Commission's own initiative. This represents an increase of more than 42% compared with 1994 and exceeds the average number of incoming cases over the last eight years by more than 32%.

Almost half of the increase in new cases (78 cases) is attributable to the transfer of cases pending by the EFTA Surveillance Authority following the accession of Sweden, Finland and Austria to the Union.

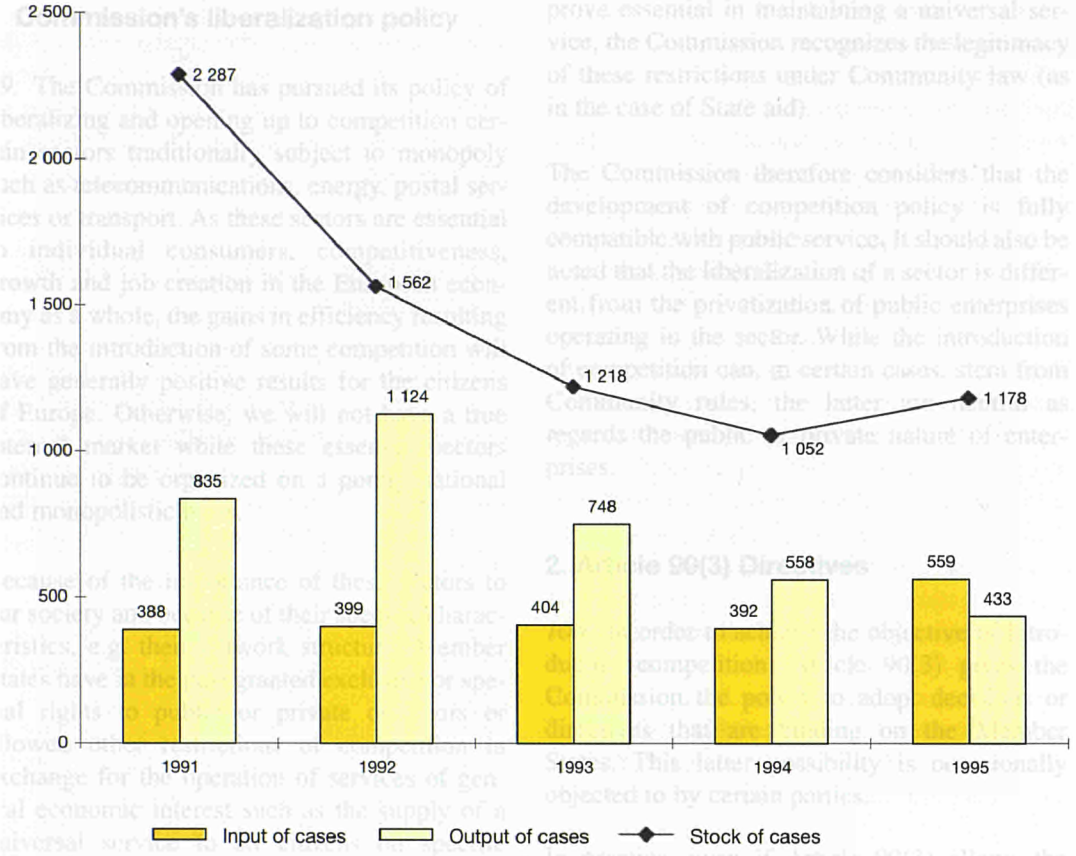
Graph 2
Cases dealt with



97. During the year, the Commission closed 433 cases in total, of which 419 through an informal procedure (including comfort letter, discomfort letter, rejection of complaint and administrative closure of the file[1] and 14 by formal decision. In 1995, the number of cases closed fell by 23.4% compared with 1994.

[1] Cases closed because agreements are no longer in force, because the impact was too slight to warrant further investigation, because complaints had become moot or had been withdrawn or because investigations had not revealed any anti-competitive practice.

Graph 3
Stock of cases over time



98. The overall net result of input and output in 1995 leads to an increase of the stock of cases remaining open at the end of the year for the first time since 1988. This increase is however rather modest; more specifically, it is less than 12% and, if the number of additional files of the new Member States are not taken into consideration, less than 5%. The actual stock of cases is still considerably lower than the more than 3 000 cases pending at the end of the 1980s and corresponds roughly to the number of cases being actively dealt with.

The Commission is nonetheless aiming at a further reduction in the existing stock of cases, to be achieved in particular by further improving the efficiency of its proceedings and by encouraging the decentralized application of the competition rules where appropriate.

II — STATE MONOPOLIES AND MONOPOLY RIGHTS: ARTICLES 37 AND 90

A — Introduction

1. Services of general economic interest at the heart of the Commission's liberalization policy

99. The Commission has pursued its policy of liberalizing and opening up to competition certain sectors traditionally subject to monopoly such as telecommunications, energy, postal services or transport. As these sectors are essential to individual consumers, competitiveness, growth and job creation in the European economy as a whole, the gains in efficiency resulting from the introduction of some competition will have generally positive results for the citizens of Europe. Otherwise, we will not have a true internal market while these essential sectors continue to be organized on a purely national and monopolistic basis.

Because of the importance of these sectors to our society and because of their specific characteristics, e.g. their network structure, Member States have in the past granted exclusive or special rights to public or private operators or allowed other restrictions of competition in exchange for the operation of services of general economic interest such as the supply of a universal service to all citizens on specific terms and at affordable prices.

The Commission has always acknowledged that these general economic interest objectives are legitimate but considers that the means traditionally used to provide them are no longer always justified, particularly in view of technological developments and the new needs of consumers and also in view of European integration itself. This is particularly true for the information society, a source of growth, new services and new jobs in the years ahead.

A thorough review is therefore needed, in the light of these new realities, of the instruments most likely to provide the public with the quality services it requires. The Commission considers that the introduction of competition can, in many cases, improve service quality, allow innovation and the creation of employment and help to cut consumer prices. The removal of obstacles to free competition is, however, only one aspect of the Commission's liberalization policy. On the one hand, the adoption of a new regulatory framework will frequently be necessary to ensure that universal service is provided in a competitive environment. On the other hand, where certain restrictions of competition prove essential in maintaining a universal service, the Commission recognizes the legitimacy of these restrictions under Community law (as in the case of State aid).

The Commission therefore considers that the development of competition policy is fully compatible with public service. It should also be noted that the liberalization of a sector is different from the privatization of public enterprises operating in the sector. While the introduction of competition can, in certain cases, stem from Community rules, the latter are neutral as regards the public or private nature of enterprises.

2. Article 90(3) Directives

100. In order to achieve the objective of introducing competition, Article 90(3) gives the Commission the power to adopt decisions or directives that are binding on the Member States. This latter possibility is occasionally objected to by certain parties.

In practice, even if Article 90(3) allows the Commission to adopt directives, the Court of Justice has stipulated that the provision empowers it only to establish general rules defining the obligations already imposed on Member States by the Treaty with regard to public undertakings or undertakings granted special or exclusive rights, or to take the necessary preventive measures to allow it to carry out its monitoring function.

The limited power conferred on the Commission by Article 90(3) is thus different from and more specific than the power of the European Parliament or the Council to adopt directives. The Commission may not impose new obligations on Member States; it may only determine, with regard to all the Member States, the specific obligations imposed on them by the Treaty. The extent of the Commission's duties and powers consequently depends on the scope of the rules that are to be complied with.

The Commission has always used this instrument with caution. Directives under Article

90(3) have been used only in situations where the existence of many infringements of the fundamental rules of the EC Treaty made them necessary to avoid a multiplicity of infringement proceedings and to give operators a minimum amount of legal certainty.[1] These initiatives have generally been taken in response to concerns expressed by the Council or Parliament. The Commission has always attached the greatest importance to the need for this instrument to be used as part of a transparent procedure involving the broadest possible dialogue with the other Union institutions, Member States and interested parties.

This is the approach normally adopted in the initial assessment stages, through the publication by the Commission of Green Papers or discussion papers intended to stimulate debate at the public consultation stage. On the basis of the results of the consultations, studies by experts and information obtained by it, the Commission adopts a draft directive which is presented for comments to Parliament, the Economic and Social Committee, the Committee of the Regions and the Member States. The draft text is also published in the *Official Journal of the European Communities* to enable other interested parties to submit their comments.

The adoption by the Commission of the final Article 90(3) Directive is in any event preceded by careful scrutiny of comments received, especially any comments from the European Parliament, the Economic and Social Committee and the Committee of the Regions.

The discussions held during the year on the Directives on cable television networks, mobile communications and the full liberalization of telecommunications are good illustrations of this approach.

3. Other instruments available to the Commission

101. Article 90(3) also enables the Commission to adopt individual decisions, where Community law is applied to specific cases; the decisions are very similar in substance to Commission decisions in other fields (aid) and their legality is also monitored by the Court of Justice.

In certain cases, the Commission may find it necessary, in order to enhance legal certainty and transparency, to explain the criteria it intends to follow in monitoring compliance of Community law by Member States and operators in a specific sector. The draft communication on the application of the Treaty rules to the postal service published in 1995 is an example of this sort of initiative.

[1] Commission Directive 80/723/EEC of 25 June 1980 on the transparency of financial relations between Member States and public undertakings (OJ L 195, 29.7.1980, p. 35), as amended by Commission Directive 85/413/EEC of 24 July 1985 (OJ L 229, 28.8.1988, p. 20) and Commission Directive 93/84/EEC of 30 September 1993 (OJ L 254, 12.10.1993, p. 16); Commission Directive 88/301/EEC of 16 May 1988 on competition in the markets in telecommunications terminal equipment (OJ L 131, 27.5.1988, p. 73); Commission Directive 90/388/EEC of 28 June 1990 on competition in the markets for telecommunications services (OJ L 192, 24.7.1990, p. 10), as amended by Commission Directives 94/46/EC of 13 October 1994 on satellite communications (OJ L 268, 19.10.1994, p. 15) and 95/51/EC of 18 October 1995 on the abolition of the restrictions on the use of cable television networks for the provision of already liberalized telecommunications services (OJ L 256, 26.10.1995, p. 49).

B — Telecommunications

1. General measures

102. The Commission continued, with the support of the Council and the European Parliament, to promote liberalization in the field of telecommunications.

On 25 January, it adopted the second part of the Green Paper on the liberalization of telecommunications infrastructures. The Green Paper examined the regulatory conditions required to ensure full competition in the telecommunications sector within the time-frame agreed by the Council.[1] After wide-ranging consultations on the Green Paper, the Commission adopted on 3 May a communication on the consultations[2] summing up the results and listing the measures necessary to complete the moves towards full liberalization and establishment of a clear regulatory framework. This includes:

(i) setting the date of 1 January 1998 for the discontinuation of all remaining exclusive and special rights for both public voice telephony and network competition by way of Article 90 Directives under EU competition law;
(ii) ensuring the financing of a universal service and clarifying the interconnection of access conditions, via further development of the legislative framework ensuring open network provision;
(iii) further development of the regulatory framework at national and European level, including discussion of future interaction of national and EU regulation in this sector.

Three Commission proposals for directives drafted in this connection under Article 90(3) were discussed and/or adopted during the year.

2. Cable TV liberalization Directive

103. On 18 October, the Commission adopted a Directive allowing cable TV infrastructure to be used to provide already liberalized telecommunications services.[3] The draft had been issued for public consultation on 21 December 1994.[4] Although not bound by specific Treaty requirements, the Commission has sought to establish a transparent and open procedure for the adoption of Article 90(3) Directives. The more than 40 written comments received expressed their broad support for the Commission draft.

The Directive provides for the abolition of restrictions on the use of transmission capacity on cable TV networks for all telecoms services, apart from public voice telephony from 1 January 1996, and ensures that cable TV networks are allowed (i) to interconnect with the national public telecoms network, and (ii) to interconnect with each other directly. It also calls on the Member States to impose accounting transparency and the separation of financial accounts between the two business activities as soon as a turnover of ECU 50 million is reached in the market for telecommunications.

This Directive is only a first step towards the objective of liberalizing the infrastructures, which will be achieved in the full competition Directive. It will also facilitate from 1 January 1996, the effective provision of already liberalized services.

3. Mobile telephony liberalization Directive

104. The second Directive concerns the liberalization of mobile and personal communications. A draft was published for public consultation by the Commission on 1 August 1995,[5] with a period of two months being allowed for comments. It was transmitted to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions. Comments were broadly in favour of the wording of the draft.

At its meeting on 20 December 1995, the Commission agreed the Article 90(3) Directive in principle. The Directive was formally adopted

[1] Council Resolution of 22 December 1994 on the principles and timetable for the liberalization of telecommunications infrastructures (OJ C 379, 31.12.1994, p. 4).
[2] COM(95) 158.
[3] Commission Directive 95/51/EC of 18 October 1995 amending Directive 90/388/EEC with regard to the abolition of the restrictions on the use of cable television networks for the provision of already liberalized telecommunications services (OJ L 256, 26.10.1995, p.49).
[4] XXIVth Report on competition policy (1994), point 220.
[5] Draft Commission Directive amending Directive 90/388 EEC with regard to mobile and personal communications (OJ C 197, 1.8.1995, p. 5).

by the Commission on 16 January 1996.[1] The Commission's aim is to ensure fair competition as regards both the granting of licences to operators and the management of mobile telephony networks in the European Union. This should help new entrants to gain access to the market and facilitate the interconnection of national networks.

The Directive seeks to achieve this by requiring Member States to abolish all exclusive or reserved rights in the field of mobile communications and to put in place, if the Member States have not already done so, authorization procedures for the granting of licences. It also calls on the Member States to allow new entrants on the market in mobile telecommunications services to offer their services via their own infrastructures or via so-called alternative infrastructures. This is indispensable if competition is to be fostered since, as the Commission noted in its communication on the 1992 review of the telecommunications sector,[2] high tariffs for and lack of availability of the basic infrastructure over which liberalized services are operated or provided to third parties have delayed the widespread development of such services.

However, the Member States who have less well-developed networks (Spain, Greece, Ireland and Portugal) may benefit, if they wish, from a five-year derogation period. Luxembourg, because of the small size of its network, may extend the deadline by two years.

The legal reasoning for the removal of the special or exclusive rights under this Directive is that they constitute a restriction on the freedom to provide services under Article 59. In addition, however, the Directive is based on Article 86, with recital 10 reading as follows:

'The exclusive rights that currently exist in the mobile communications field were generally granted to organizations which already enjoyed a dominant position in creating the terrestrial networks, or to one of their subsidiaries. In such a situation, these rights have the effect of extending the dominant position enjoyed by those organizations and therefore strengthening that position, which, according to the case-law of the Court of Justice, constitutes an abuse of a dominant position contrary to Article 90.'

4. Full competition Directive

105. In its Resolution of 22 December 1994, the Council of Ministers reaffirmed that 1 January 1998 should be the date for the liberalization of telecommunications infrastructures and public voice telephony services, subject to transitional arrangements for certain Member States (i.e. Greece, Spain, Portugal, Ireland: up to five years; Luxembourg: up to two years). The Commission responded to this by proposing a package of two measures: an Article 90(3) Commission Directive concerning the introduction of full competition into the telecommunications markets and a proposal for a Council and Parliament directive based on Article 100a of the EC Treaty with a view to harmonizing the rules for interconnection. The package thus demonstrates the need for competition policy to develop in close cooperation with the more general aspects of Community telecommunications policy.

106. As regards the Article 90(3) Directive, this was published for comments on 10 October 1995 and envisages the liberalization of all telecommunications services including voice telephony by 1 January 1998, with transitional periods for certain Member States. Restrictions on the use of alternative infrastructures must be lifted by 1996 (except for public voice telephony, which is to be liberalized in 1998), and the conditions and rules for the authorization of interconnection must be established by 1997. The Directive also lays down the fundamental principles governing authorization of new entrants on the markets for voice telephony and telecommunications infrastructures. These principles guarantee the introduction of competition into these sectors and list the measures necessary to safeguard universal service in the Member States. The Directive also provides that Member States must publish the authorization conditions and procedures, as well as the terms and conditions for interconnection.

In addition, Member States with underdeveloped or small networks can benefit from derogations of five and two years respectively.

[1] Commission Directive 96/2/EC of 16 January 1996 amending Directive 90/388/EEC with regard to mobile and personal communications, OJ L 20, 26.1.1996, p. 59.

[2] Communication of 21 October 1992 on the 1992 review of the situation in the telecommunications service sector (SEC(92) 1048).

107. In parallel with its action to establish the abovementioned regulatory framework, the Commission pursued its efforts to ensure full implementation of the existing directives in the telecommunications sector and in particular the Services Directive.[1] On 4 April, the Commission issued a communication[2] on the status and implementation of this Directive, which affirmed the Commission's intention to ensure that the problems and gaps in implementation identified in the communication are resolved.

5. Infringement proceedings under Article 90(3)

108. As well as directives of general application, the Commission is also authorized under Article 90(3) to take decisions against Member States in individual cases. It signalled its intentions to do this as regards possible discrimination against second mobile phone operators in several Member States. State operators already enjoy significant advantages over new entrants — such as the universal phone network, a dominant position on the market and an established mobile user base (often with permission to offer mobile services having been granted without any requirement of a selection process). The Commission has therefore taken care to ensure that second operators receive fair treatment from Member States. In particular, it was concerned about the auction procedure which a number of Member States included in the selection criteria for the second operator. Such an auction, critically analysed in the 1994 Green Paper on mobile and personal communications,[3] results in the award of second licences not only on the basis of a comparison of intrinsic qualitative elements but also on the basis of a financial bid above a certain set threshold.

Omnitel Pronto Italia

109. On 4 October, the Commission took a formal decision under Article 90(3)[4] in the case of Italy for discriminating against Omnitel Pronto Italia and in favour of Telecom Italia Mobile (the State operator). The discrimination which strengthened the dominant position of Telecom Italia Mobile took the form of a requirement that Omnitel Pronto Italia pay an entry fee for a GSM licence without a similar payment being required from Telecom Italia and without compensation for Omnitel in the form of an easing of the regulatory environment. The decision provided that the Italian Government must either require that Telecom Italia Mobile make an identical payment or adopt, after receiving the agreement of the Commission, corrective measures equivalent in economic terms. In addition, the measures definitively adopted must not undermine the competition introduced by the authorization of the second GSM operator.

GSM Radiotelephony services in other Member States

110. The Commission has also been taking action against a number of other countries (including Belgium, Spain and Ireland) with a view to establishing a level playing-field for the second GSM operator. For example, only after discussions with the Commission did Belgium give an undertaking to charge Belgacom (the State operator) a similar fee for its existing GSM licence as was to be paid by the second GSM provider, Mobistar. The Commission is continuing to monitor the operating conditions for second operators in the Member States.

Vebacom

111. The Commission has also taken action under Article 90 in other areas of telecommunications. In April, it received a complaint under Article 90 from Vebacom, the telecommunications subsidiary of VEBA AG, a German utilities holding company. Vebacom had made several unsuccessful attempts to obtain a licence for a broadband telecommunications network based on SDH (synchronous hierarchy)

[1] Commission Directive 90/388/EEC on competition in the markets for telecommunications services (OJ L 192, 24.7.1990, p. 10). The Services Directive provided for the removal of special and exclusive rights granted by Member States for the supply of all telecommunications services other than voice telephony; it came to be recognized as a cornerstone of the EU framework for liberalizing the European telecommunications market.

[2] Commission communication of 4 April 1995 to the European Parliament and the Council on the status and implementation of Directive 90/388/EEC on competition in the markets for telecommunications services (OJ C 275, 20.10.1995, p. 2).

[3] Towards the personal communications environment — Green Paper on a common approach in the field of mobile and personal communications in the European Community (COM(94) 145).

[4] OJ L 280, 23.11.1995, pp. 49-57.

technology which would allow the transfer of data between 36 different sites of the German public television broadcaster ARD. The Commission formed the preliminary view that the complaint was justified, in particular since Vebacom intends to offer a service based on a new technology (SDH) which was not offered by Deutsche Telekom AG, the holder of the infrastructure monopoly in Germany. After informal discussions with the Commission, the German Ministry of Post and Telecommunications agreed to grant a licence for the establishment and operation of an alternative telecommunications network.

C — Energy

112. The Council continued its in-depth examination of the amended proposals for Directives concerning common rules for the internal market in electricity and gas presented by the Commission on 7 December 1993.

113. However, it has been impossible in 1995 to make any substantial progress with the liberalization of the Community's electricity and natural gas markets, which, with a few exceptions, are still dominated by exclusive rights or monopolies. The Council of Ministers, at its meeting on 20 December, was not in a position to agree on a common position with regard to the draft Directive concerning common rules for the internal market in electricity, although the Spanish Presidency could conclude that negotiations had reached the final stage and that it should be possible to take a decision early in 1996.

114. Early in the year and at the request of the Council, the Commission examined the possibilities for coexistence between the Commission's negotiated access approach (consumers and producers negotiate access to the grid with its operator) and the so-called single buyer concept (one single entity within a system responsible for all buying and selling and for public services). In its working paper on the organization of the internal electricity market,[1] the Commission concluded that the original single buyer model was incompatible with the Treaty and would not provide equivalent economic results or reciprocity between the two systems. It also suggested a number of modalities for the single buyer model which would permit coexistence of the two systems. These modalities covered the degree of consumer choice for all eligible consumers, the possibility of imports and exports under objective conditions, measures to ensure transparency and to avoid any distortions of competition, guarantees for fair competition in generation and also its opening up to independent producers and the possibility of establishing direct lines. The Council at its meeting in June accepted the Commission's position in principle by concluding that coexistence of the two systems could take place only on the basis of modifications to the single buyer model. However, little agreement was forthcoming on the list of modalities proposed by the Commission.

115. The Spanish Presidency presented a compromise text in July which incorporated all the political agreements already reached in previous Council conclusions, including the conclusions of the Commission's March working paper, and attempted to come up with solutions to problems not yet solved. It accepted the coexistence of the negotiated access and single buyer systems, but modified the latter to take into account a number of the required changes. This compromise text was intensively discussed throughout the second half of the year.

116. The two central issues outstanding concern the degree of market opening via the definition of eligible customers and especially the question whether distributors should be among the eligible customers that would be free to contract with the most efficient producers. Furthermore, some Member States fear that the proposed solution for public-service obligations may be abused in a manner that unduly restricts competition.

117. The Commission deplores the fact that it has not been possible to reach agreement on the proposed Directive, especially in view of the importance of the subject. As stated in the Ciampi report,[2] the failure to liberalize the energy sector is having a very detrimental effect on the competitiveness of the European economy.

[1] SEC(95) 464 of 22.3.1995.
[2] See footnote 1, p. 12 above.

D — Postal services

118. On 26 July, the Commission adopted a package of measures consisting of a proposal for a European Parliament and Council Directive establishing common rules for the development of postal services and a draft Commission communication on the application of the competition rules to the postal sector. The aim of the measures is to guarantee the provision of universal service and at the same time to open up the postal market to greater competition.

The proposal,[1] based on Article 100a of the EC Treaty, provides for mandatory universal services to be provided throughout the Community to all citizens at affordable prices, with a high degree of quality, including in remote areas and peripheral regions of the Community. In order to ensure the financial viability of the universal service, the proposal defines harmonized criteria for the services which may be reserved for the universal service providers. Thus, domestic mail in the Member States weighing not more than 350 g where the tariff is less than five times the rate for a standard letter (up to 20 g), direct mail and incoming cross-border mail may continue to be reserved until 31 December 2000 (subject to review of the direct mail sector by 30 June 1999). The proposal also requires the Member States to set, in particular, universal service tariffs at affordable prices fixed in relation to the costs and to define quality standards applicable to national services which are consistent with the Community measures.

The draft communication,[2] which will be the subject of a public consultation procedure, complements the proposal for a Directive. The Commission sets out the principles governing how it intends to apply the competition rules in the Treaty to the postal sector, in order to facilitate gradual, controlled liberalization of the postal market. It describes the approach it intends to adopt to analysing State measures restricting the freedom to provide services or to compete on the postal markets in relation to the Treaty provisions. The Commission particularly raises questions of non-discrimination in access to the postal network, identifying cross-subsidies and defining the mandatory safeguards necessary to ensure fair competition.

[1] Proposal for European Parliament and Council Directive on common rules for the development of Community postal services and improved quality of service (OJ C 322, 2.12.1995, p. 22).

[2] Draft Commission communication on the application of the rules of competition to the postal sector and in particular on the assessment of certain State measures relating to postal services (OJ C 322, 2.12.1995, p. 3).

E — Transport

1. Airports

119. The Commission is pursuing its efforts to ensure that the liberalization of air transport in the European Union is not jeopardized by anti-competitive practices at airports. It continued its investigation of several complaints and took decisions aimed at improving competition at certain major airports of the European Union.

1.1. Landing fees

Brussels-National Airport

120. The Commission adopted a decision under Article 90(3)[1] concerning the system of discounts on landing fees charged at Brussels-National Airport under the Royal Decree of 22 December 1989. British Midland, the airline which lodged the complaint, considered that the system enabled the airline Sabena, its main competitor on the Brussels-London route, to benefit from a discount of 18% on its landing fees although no other airlines qualified for a reduction.

After examining the complaint, the Commission concluded that the system constituted a State measure within the meaning of Article 90(1), read in conjunction with Article 86, as it had the effect of applying to the airlines dissimilar conditions for equivalent transactions connected with landing and take-off and hence introducing distortions of competition. The Commission considered that such a system could be justified solely by economies of scale achieved by the airport operator.

This did not apply in the case in question. The Commission therefore requested the Belgian authorities to put an end to the system.

1.2. Ground handling

121. The Commission also continued its investigation of anti-competitive practices in ground handling (ramp, terminal and/or cargo handling). Positive results were achieved during the year, the Commission's approaches to the authorities of Member States having resulted either in a gradual opening-up of the market (e.g. in Ireland, where the ground handling market has been open to a second operator since 1 January 1995), or specific commitments to this end (e.g. in Greece and Spain, whose authorities notified the Commission of their plans to improve efficiency in this sector, as well as a liberalization timetable).

The Commission also continued its examination of the complaints lodged under Article 86 of the Treaty against two private airport companies responsible for operating two of the largest airports in the Union: Frankfurt and Milan.

122. A fresh development in this area was the agreement in principle, reached on 8 December, by the Transport Council, on the Directive relating to the liberalization of ground handling services in Community airports. The proposal, based on Article 84 of the Treaty, had been presented by the Commission in December 1994 and followed the Council Resolution of 24 October 1994[2] on the situation in European civil aviation and the Commission communication on 'The way forward for civil aviation in Europe'.

Ground handling is an activity related to air transport without which carriers would be unable to carry on their business. Its liberalization forms part of the completion of the single market in air transport and follows the adoption of the Community rules on slot allocation and the operation of computerized reservation systems. It is also intended to help European airlines to improve control of their operating costs and better match their services to customer requirements.

The proposal also provides for a transitional market adjustment period, fixing different deadlines for entry into force based on certain reference thresholds. Full liberalization should take place, depending on the sector and the case at issue, between 1998 and 2003.

2. Ports

123. Following the judgment of the Court of Justice in Port of Genoa,[3] Italy initiated a reform

[1] OJ L 216, 12.9.1995, p. 8.
[2] OJ C 309, 5.11.1994, p. 2.
[3] Judgment of 10 December 1991, in Case C-179/90 *Porto di Genova* v *Siderurgica Gabrielli*, [1991] ECR I-5889.

of its port system which led to the adoption in 1994 of Law No 84.

In principle, the law provides for the opening-up to competition of the market for port handling operations (loading and unloading). In practice, however, this has not proved the case as in some Italian ports, the local authorities have systematically refused to grant the necessary operating licences to potential competitors of the long-established dockers companies. As this situation was contrary to its policy of competition in ports, the Commission decided that action was necessary. The port of Genoa was selected in view of its importance to the Union as a whole and its position as the leading Italian port.

On 21 June, the Commission warned the Italian Government to issue an operating licence within 10 days to the firm that had been unlawfully denied that right by the local port authority.

On 11 July, the Italian authorities informed the Commission that the licence had been issued within the period stipulated. The licence opened up the port operations sector in the Port of Genoa to other service providers. The measure will benefit port users, a number of local enterprises, chiefly small and medium-sized firms, and generally increase the dynamism of the port with regard to international competition.

124. The Commission is also pursuing its different infringement proceedings instituted against Italy concerning aspects of port work which continue to pose problems with regard to Community law.

F — Other State monopolies of a commercial character

125. The adjustment of national monopolies of a commercial character in the new Member States was the subject of extensive discussions between the Commission and the governments concerned. The aim was to adjust the laws governing the monopolies to Community legislation and to Article 37 of the Treaty in particular.

1. Swedish and Finnish alcohol monopolies

126. The adjustment of the alcohol monopolies in Sweden and Finland was discussed by the Commission and the two new Member States with a view to adjusting the monopolies to Community law. In the light of these objectives, the two Member States agreed to abolish the exclusive rights to import, export, produce and sell wholesale, including wholesale sales to cafés and restaurants. The Commission was able to ensure that these exclusive rights, which should already have been abolished when the EEA Agreement entered into force, were finally abolished by the new laws on alcohol adopted by Sweden and Finland at the end of 1995.[1]

The Commission considers that the exclusive rights to retail alcohol may, without prejudice to future developments in the case-law of the Court of Justice, be justified under existing Community legislation, in particular in view of legitimate national concerns about alcoholism, provided that there is no discrimination between national products and products imported from other Member States. To ensure that retail monopolies conformed to these requirements, the Commission considered it necessary to be closely involved in detailed and regular monitoring of their operation.

2. Austrian alcohol monopoly

127. Austria holds a national monopoly of a commercial character in pure alcohol and certain alcoholic beverages which involves exclusive import and wholesale rights but which, unlike the exclusive retailing rights, are considered to be clearly incompatible with Article 37 of the EC Treaty without any of the abovementioned requirements being applicable. The exclusive rights should therefore have been abolished by 1 January 1995. As this had not been carried out, the Commission was compelled to initiate the infringement procedure provided for in Article 169 of the EC Treaty against Austria.

3. Austrian salt monopoly

128. With regard to the national monopoly of a commercial character in the salt sector, Austria, following action taken by the Commission, finally agreed to abolish the exclusive rights to import and sell products from other Member States wholesale; the rights should have been abolished by the start of 1995.[2]

4. Austrian manufactured tobacco monopoly

129. The Austrian monopoly of manufactured tobacco, characterized by exclusive import and marketing rights, is subject to the requirements of Article 71(1) to (3) of the Act of Accession of Austria.[3] Under that Article, Austria is required gradually to adjust its monopoly of manufactured tobacco by the progressive opening, as from the date of accession, of quotas for the import of products from Member States so that, by 31 December 1997 at the latest, no discrimination regarding the conditions under which goods are procured and marketed exists between nationals of Member States. Compliance with this obligation entails the abolition of exclusive import rights and exclusive wholesale rights. As regards retail sale of products imported under quotas, distribution of such products to consumers must be carried out in a non-discriminatory manner.

Finding that Austria had not taken the necessary measures to comply with these provisions, in particular as regards the opening of quotas as

[1] Regarding Sweden, see the Alcohol Act (1994:1738) promulgated 16.12.1994 and entered into force 1.1.1995. For Suomi-Finland, see new Alcohol Act (1143/94) adopted on 8.12.1994 and entered into force on 1.1.1995.

[2] *Bundesgesetzblatt* (Austrian Official Journal) No 518/1995, 4.8.1995.

[3] OJ C 241, 29.8.1994, p. 35.

required, the Commission was obliged to initiate the infringement procedure provided for in Article 169 of the EC Treaty.

The Commission also checks that the retail sale of products imported under quotas is carried out in a non-discriminatory manner. Thus, for instance, the Commission must ascertain that licensing and distribution agreements between Austria Tabakwerke and other European operators are not liable to jeopardize the effectiveness of adjusting the Austrian manufactured tobacco monopoly and are compatible with the Treaty competition rules.

III — MERGER CONTROL

A — Introduction

130. Concentrations falling under the Merger Regulation were even more numerous than in 1994. The Commission received 114 notifications (1994: 100) and took 109 final decisions (1994: 90). Activity in 1995 was over 24% higher than the previous year, which itself had been about 50% higher than in the three years 1991 to 1993. A total of seven second-phase investigations were begun compared with six a year earlier and two operations were prohibited compared with one in 1994.

This year marked the fifth anniversary of the entry into force of the Merger Regulation.[1] In those five years, the Commission took 382 final decisions, an average of about one decision every three and a half working days or more than 70 decisions per year. The sectoral breakdown of cases indicated a continuing significant number of notifications in telecommunications, financial services, the media and pharmaceuticals.

The revised Implementing Regulation[2] came into force on 1 March 1995. In addition, four interpretative notices which were published at the end of 1994 were applied for the first time in 1995.[3] They concern the distinction between concentrative and cooperative joint ventures, the notion of a concentration, the notion of undertakings concerned and the calculation of turnover.

These changes in the operation of the Merger Regulation were adopted by the Commission as a result of its 1993 review exercise. A new review exercise was launched during the year. The Commission carried out a wide-ranging consultation exercise on the issue of lowering the thresholds contained in the Merger Regulation as well as on other aspects of the Regulation which might need to be revised. Among those consulted were the Member States, other Community institutions, individual businesses, trade associations and legal advisers. A Green Paper on the operation of the Merger Regulation was published early in 1996[4] with a view to full public consultations on the issues involved. Legislative proposals are likely to be made later in the year.

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1 Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (OJ L 395, 30.12.1989, p. 1).

2 Commission Regulation (EC) No 3384/94 of 21 December 1994 on the notifications, time limits and hearings provided for in Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings (OJ L 377, 31.12.1994); XXIVth Report on Competition Policy (1994), points 234-235.

3 XXIVth Report on Competition Policy (1994), points 237-260.

4 COM(96)19.

B — In-depth investigations

131. A total of seven in-depth (phase two) investigations were completed under the Merger Regulation. As a result, two operations were prohibited which were both in the media sector — the Nordic Satellite Distribution (NSD) joint venture in the Nordic area and the RTL/Veronica/Endemol (Holland Media Groep-HMG) transaction in the Netherlands. The remaining five operations were all cleared, two unconditionally and three with conditions which removed the competition problems identified by the Commission during its investigation.

1. Media cases

132. The Commission has received an increasing number of notifications in the media sector which reflect the changing patterns of ownership and the convergence of previously separate technologies, e.g. telecommunications and media. The majority of these cases have presented no competition problems and have been approved after a first-phase enquiry.

The decisions in the NSD and HMG cases indicate the importance which the Commission attaches to cases in this sector. These transactions involved significant horizontal and vertical effects, with new companies being created which would restrict access to TV networks — terrestrial, satellite or cable — in the future. In 1994, the Commission had prohibited the MSG Media Service joint venture, which had been proposed by Bertelsmann, Kirch and Deutsche Telekom with a view to providing services for pay-TV in Germany. In its prohibition of the NSD operation, the Commission invited the parties to present new proposals which could be considered compatible with the common market. This emphasizes the Commission's willingness to see new companies being set up in this sector, provided that they do not create or strengthen a dominant position.

Nordic Satellite Distribution

133. NSD was designed to transmit satellite TV programmes to cable TV operators and households receiving satellite TV via their own dish. However, the Commission concluded that the establishment of NSD in its proposed form would have led to a concentration of the activities of its parents, creating a vertically integrated operation extending from production of TV programmes to retail distribution services for pay-TV channels.

NSD's parents are strong media players in the Nordic area. Norsk Telekom A/S is the largest cable operator in Norway, has pay-TV distribution activities in Norway and also controls satellite capacity suitable for Nordic viewers. TeleDanmark A/S (TD) is the dominant cable TV operator in Denmark. In addition, TD, with Kinnevik, controls most of the remaining satellite capacity suitable for Nordic viewers. Kinnevik, a Swedish conglomerate, is the most important provider of Nordic satellite TV programmes and a major pay-TV distributor in the Nordic countries and has an important stake in cable and advertising-financed TV in Sweden.

The Commission found that NSD would have resulted in the creation or strengthening of a dominant position on three markets:

(i) the provision of satellite TV transponder capacity to the Nordic region (Denmark, Norway, Sweden, and Finland);

(ii) the Danish market for operation of cable TV networks;

(iii) the market for distribution of satellite pay-TV and other encrypted TV channels to direct-to-home households.

The vertically integrated nature of the operation would have meant that the parties would have been able to foreclose the Nordic satellite TV market to competitors and obtain a 'gatekeeper' function for the Nordic market for satellite TV broadcasting. As the affected markets are currently in a transitional phase the Commission acted to ensure that these future markets would not be foreclosed.

RTL/Veronica/Endemol

134. The Commission began an examination of the *RTL/Veronica/Endemol* case following a request from the Dutch Government under Article 22 of the Merger Regulation. This Article

allows a Member State to refer a case to the Commission even if it does not have a Community dimension, provided there is an effect on trade between Member States. Although the Commission took the view that the relevant geographic market was the Netherlands, it concluded that the concentration affected trade between Member States because it would influence conditions for new entrants on the Dutch TV broadcasting market and would have an impact on the acquisition of foreign-language programmes and because the joint venture itself is based in Luxembourg, where two of its channels are 'licensed' by the Grand Duchy of Luxembourg. The examination followed the normal procedure except that the usual suspension provisions did not apply. Therefore, in this case, the parties were able to complete the operation despite the Commission's decision that the joint venture would result in a dominant position for the parties.

The case concerned a joint venture, Holland Media Groep (HMG), between RTL, Veronica and Endemol. RTL transferred its broadcasting activities in the Netherlands to HMG, in particular the two commercial TV channels RTL4 and RTL5. A third commercial channel was introduced through Veronica, which left the public broadcasting system in the Netherlands to participate in the joint venture. The other main parent, Endemol, is the largest independent producer of TV programmes in the Netherlands.

Following its investigation, the Commission concluded that the new company would have at least 40% of the market for free access TV broadcasting in the Netherlands and more than 60% of the TV advertising. In addition, Endemol's position as the largest independent TV producer in the Netherlands would be strengthened by its participation in HMG. The Commission adopted a prohibition decision and invited the parties to propose measures to restore effective competition on the Dutch TV advertising and production markets within three months. The Commission's decision has been challenged before the Court of First Instance.

2. Other in-depth investigations

135. The remaining operations in which in-depth investigations were opened were all ultimately declared compatible with the common market. *Siemens/Italtel*, a joint venture in the telecommunications equipment industry in Italy, and *Mercedes Benz/Kässbohrer,* the acquisition by Mercedes of one of the other German bus and coach manufacturers, were both cleared unconditionally. In each case, however, the parties made certain statements which were included in the decision concerning their future business conduct. However, these statements were not an integral part of the Commission's competition analysis but were offered by the parties. For example, STET, the parent company of Italtel, undertook not to influence the purchasing policy of Telecom Italia in favour of the joint venture; Mercedes announced that it would supply engines at competitive prices to third-party manufacturers who lacked their own engine production capability.

136. In *Siemens/Italtel,* Siemens and STET, the holding company for the Italian telecommunications operators, including Italtel, intended to contribute their respective telecommunications equipment manufacturing subsidiaries to a joint venture. The operation raised both horizontal and vertical issues. Horizontally, the joint venture's highest market share occurred in switching equipment where the parties' combined share was 50-60% of the Italian market and around 30% of overall EU sales (combined shares in transmission equipment were lower). Vertically, the joint venture would be partially owned by its largest customer.

In concluding that the proposed joint venture was compatible with the common market, the Commission took into account:

(i) the potential effects of new technologies which are likely to alter the telecommunications markets significantly;

(ii) the effects of standardization and public procurement directives in opening up national markets;

(iii) the further liberalization of telecommunications services and, in particular, of telecommunications infrastructure, which will lead to world markets for telecommunications equipment.

137. In the *Mercedes Benz/Kässbohrer* case, although the bus market throughout Europe would be affected, the Commission considered that the German bus market in particular required in-depth investigation. Three markets were identified with the parties combined share reaching 44% in city buses, 54% in tourist coaches and 74% in intercity buses. With a share of 57% of the entire bus market in Germany, however, the Commission concluded that there would be adequate constraints on Mercedes' freedom of action on the German market because there were two German competitors as well as potential entrants from elsewhere in Europe. According to customers, these potential entrants could be expected to provide additional leverage to German bus operators. Lastly the Commission found that public procurement Directives, which make Community-wide tendering compulsory for the main part of the market for city and intercity buses, were also leading to the development of a wider European market.

138. In the other cases, the Commission's clearance of the respective operations was conditional on undertakings given by the parties in the course of the proceedings.

139. In *ABB/Daimler Benz*, the Commission considered that the market for local trains had remained national in Germany although, in other Member States, the lack of major national rail transportation industries had already led to wider geographic markets. The proposed operation would have led to the creation of a dominant duopoly in the German market for local trains. The concentration would also have impeded market entry by foreign suppliers by eliminating independent German suppliers of electrical components. No competitive issues were identified in relation to other relevant product markets.

In order to alleviate the Commission's concerns, the parties agreed to the sale of Kiepe Elektrik GmbH, a Daimler-Benz subsidiary specializing in electrical supplies for local trains. As a result of this divestiture, a competent producer of electrical components that was independent of the parties would remain on the German market and would be able to supply or cooperate with suppliers of the mechanical components of local trains. Kiepe is an established and successful supplier and played an important role in opening up the German market through its cooperation with the Canadian firm Bombardier.

The transaction was the subject of a request for referral by the German authorities under Article 9 of the Merger Regulation. Although the competition problems were concentrated on two product markets in Germany, the proposed operation — which created the largest supplier of railway equipment in the world — had significant effects throughout Europe. The request for referral was thus refused.

140. In *Orkla/Volvo*, the acquisition was approved subject to the divestiture of Orkla's brewing company Hansa. The parties would otherwise have had a 75% share of the Norwegian beer market and neither the retail nor the hotel and catering industries were considered capable of deploying any countervailing purchasing power.

141. In *Crown Cork and Seal/Carnaud MetalBox*, following a detailed second-phase analysis of both the horizontal and vertical issues raised, the Commission determined that the only market in which the proposed concentration threatened to create a dominant position was the market for tinplate aerosol cans. In the European Economic Area (EEA), both parties produce and sell tinplate aerosol cans and food cans, as well as certain closures for beverage cans and bottles, including beverage can ends, metal crowns, and plastic and aluminium caps. Consequently, the Commission concluded that Crown's commitment to divest a specified group of tinplate aerosol can operations would be sufficient to overcome its competition concerns.

The parties agreed to divest substantial manufacturing activities for tinplate aerosol cans in five different Member States; these activities accounted for almost 22% of the EEA tinplate aerosol can market. Without the divestiture, the combined European market shares of the two parties would have been more than 60%, with the next largest competitor having a 15-20% market share and with the major share of the excess capacity in this market being held by the parties.

C — Other major cases

142. A number of major operations were cleared without in-depth investigations within one month of their notification. They included several in the pharmaceutical sector, among which were Glaxo/Wellcome, Behringwerke/Armour Pharmaceutical, Hoechst/Marion Merrell Dow, Rhone Poulenc Rohrer/Fisons and Upjohn/Pharmacia. In order to remove any possible doubts as to compatibility, Glaxo agreed to grant to a third party an exclusive licence for one of the anti-migraine compounds currently under development by either Glaxo or Wellcome. It appears that recent mergers in the pharmaceutical industry are intended to increase the range of products offered by companies, thereby making them more competitive as suppliers to the wholesalers, hospitals and pharmacy chains. As a result, the operations to date have been largely complementary in nature and have not in general led to any competition problems.

143. In *Swissair/Sabena*, the Commission secured remedies for resolving the competition problems raised by the operation which consisted of Swissair acquiring a 49.5% stake in Sabena. The transaction would have led to a monopoly in air transport between Switzerland and Belgium. Moreover, Swissair was a participant in the European Quality Alliance with SAS and Austrian Airlines, while SAS had proposed a cooperation agreement with Lufthansa. The operation, taken together with these arrangements, would have enabled the participating airlines to create an extensive route network carrying about 35% of passenger traffic within Europe, twice as much as the next largest carrier. In order to clear the operation, the Commission secured undertakings from the two airlines and from the Belgian and Swiss Governments that they would make available the necessary traffic rights and airport slots to enable competitors to operate flights between Belgium and Switzerland. Swissair and Sabena were also required to provide competitors with interlining arrangements and with the opportunity to participate in frequent flyer programmes. Lastly, Swissair was required to sever its previous links with SAS through the European Quality Alliance. This transaction was notified twice, on the second occasion following modifications to the operation. At that time, it was fully evaluated (including consultations with the Member States) without it being necessary to initiate a second phase procedure.

144. The Commission approved an operation by which the Finnish companies Repola Corporation and Kymmene Corporation entered into a full merger. Repola and Kymmene are large international companies active in the fields of printing paper and packaging materials. The operation involved, among other products, the markets for newsprint, magazine paper and paper sacks.

As regards paper sacks, the Commission's investigation led to the conclusion that there is a separate Finnish market for this product and that the concentration would lead to the creation of a dominant position on that market. The new company would be virtually the sole supplier of paper sacks to Finnish customers. The parties have given commitments involving the divestiture of some of their paper sack capacity on the Finnish market.

The markets for newsprint and magazine paper are at least Western European in scope and Repola/Kymmene, like all the other major European paper producers, transport and market their products in almost all Member States. As a result of the operation,the new company will be the major European player in newsprint and magazine paper. However, the combined market shares will not exceed some 20% in either of the two product markets; what is more, several competitors have strong market positions.

Along with five other Finnish paper producers, Repola is a member of Finnpap Marketing Association, a joint sales organization which markets the paper products of the members on a worldwide basis. Kymmene has its own sales network and is not a member of Finnpap. The parties have undertaken not to sell paper products through the Finnpap joint sales agency.

D — Legitimate interests of Member States

145. On 6 March, the United Kingdom authorities made, in the context of the proposed acquisition of Northumbrian Water by Lyonnaise des Eaux, the first application under Article 21(3) of the Merger Regulation for the recognition of a legitimate interest. The application concerned legislation which regulates the water supply industry in the United Kingdom. This legislation has specific merger provisions which are designed to enable the regulatory system to achieve its objective of safeguarding the provision of a vital service and protecting the consumer. Accordingly, whenever a merger takes place or is expected to take place, the case is referred to the Monopolies and Mergers Commission (MMC) for it to decide whether it would be expected to operate against the public interest. The criteria for the public interest test for water industry mergers include the number of independently controlled water companies among which the water regulator could make comparisons for the purpose of calculating the price regulatory formula. The United Kingdom's application covered these provisions as the reference to the MMC is automatic and not discretionary.

The Commission, in acknowledging the United Kingdom's legitimate interest, set specific limits to the MMC investigations in these circumstances. Its decision of 29 March 1995 acknowledged that the MMC could assess potential mergers on the basis of the public interest test but that the public interest in those cases was limited to those issues which were directly related to the operation of the water regulatory legislation. The United Kingdom authorities were required to inform the Commission of any measure taken under the decision so that the Commission could check that the measure was appropriate.

Soon after the Commission's decision, the United Kingdom authorities referred the proposed takeover bid to the MMC. Following the MMC report, which found the merger to be against the public interest unless substantial price reductions for consumers were achieved, OFWAT consulted Lyonnaise and Northumbrian and proposed a measure which included a price reduction formula with which Lyonnaise subsequently formally agreed. As required by the decision, the Commission was informed of the proposed measure by the United Kingdom Government and had no observations to make on it.

E — Mergers in the coal and steel industries

146. During the year, the Commission took seven decisions on concentrations under Article 66 of the ECSC Treaty. Three of these cases involved the sale to the private sector of steel companies that had previously been State-owned: the acquisition by the RIVA group of Ilva's flat products operation; a joint venture between Usinor Sacilor and Hoogovens to take over the Portuguese flat products company SN-Planos; and another joint venture between RIVA and Freire involving the takeover of SN-Longos.

F — Perrier

147. On 27 April, the Court of First Instance (CFI) ruled on two cases, one brought by the employees of Perrier and the other by the employees of Vittel and Pierval against the Commission's decision of 22 July 1992 in the case *Nestlé/Perrier*. The Commission had approved the concentration with conditions and obligations. The principal points of the judgments were as follows:

(i) while recognizing that the Merger Regulation is concerned primarily with questions of competition, the CFI concluded that this does not preclude the Commission from taking into account the social effects of a concentration if these affect the level or conditions of employment at the level of the European Community or a substantial part of it;

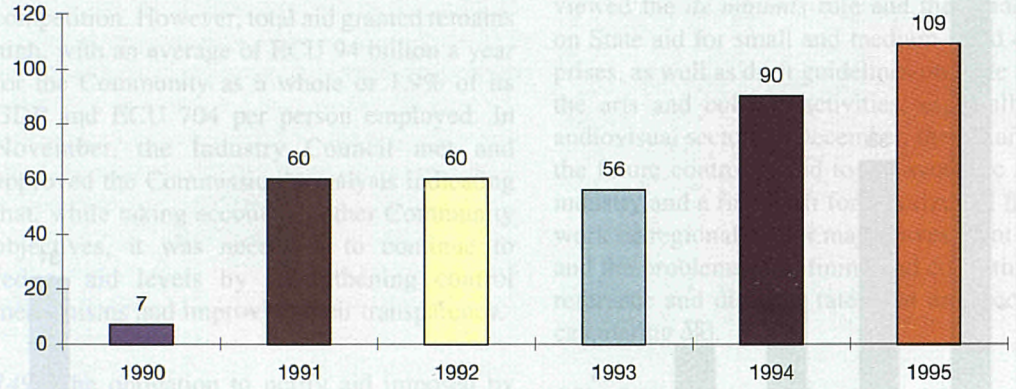
(ii) the fact that a third party has not directly intervened in the course of the administrative procedure does not in all cases exclude that third party from being entitled to challenge the decision;

(iii) the representatives of the workers of a company are not, in principle, directly concerned by a merger procedure and so are not entitled to request the annulment of a decision, except to protect their procedural rights;

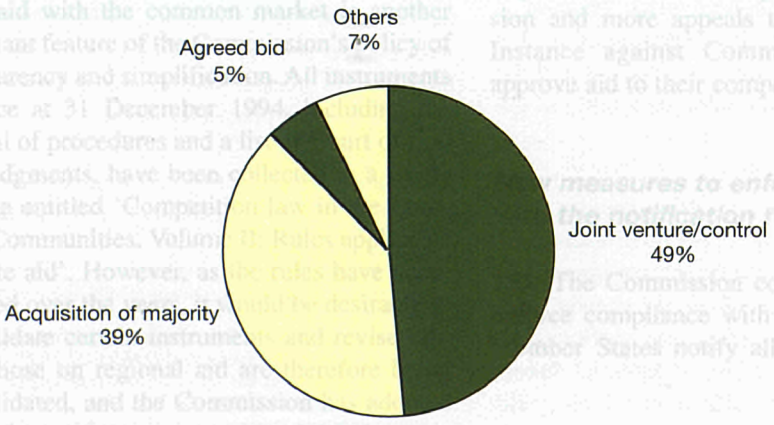
(iv) third parties do not have the right to be treated in the same way as the parties to the concentration in the administrative procedure.

G — Statistical overview

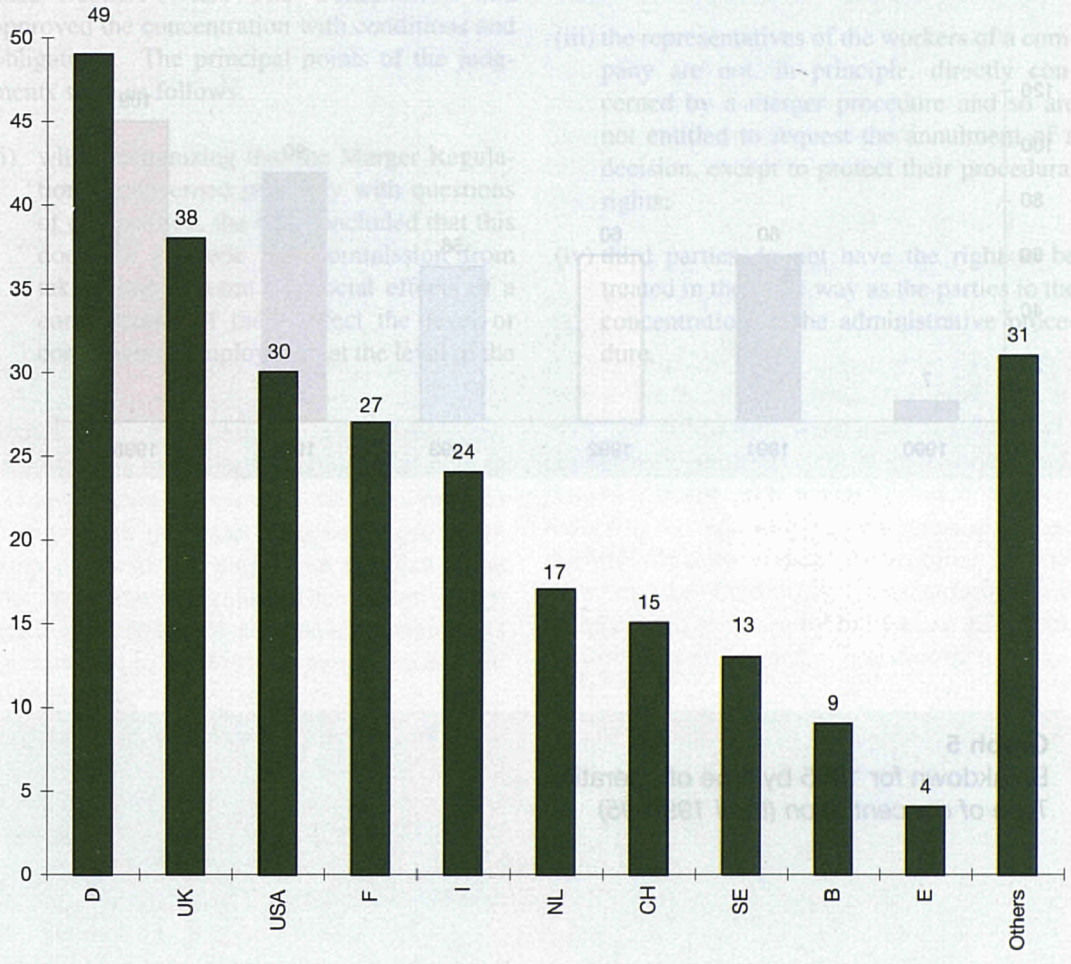
Graph 4
Number of final decisions adopted each year since 1990
Final decisions taken under the Merger Control Regulation



Graph 5
Breakdown for 1995 by type of operation
Type of concentration (total 1990-95)



Graph 6
Country of origin of the enterprise involved in the operations in 1995
Breakdown of enterprises by country of origin
(for 1995; in cases where a final decision was taken)



IV — STATE AID

A — General policy

148. In July, the Commission published its fourth survey on State aid in the Community[1] covering 1991 and 1992. The survey is an essential quantitative instrument in defining aid policy. The trend recorded in the period 1981-90 showing a slow but steady fall in total aid has continued, despite the high costs of German unification, recession and stronger international competition. However, total aid granted remains high, with an average of ECU 94 billion a year for the Community as a whole or 1.9% of its GDP and ECU 704 per person employed. In November, the Industry Council met and approved the Commission's analysis indicating that, while taking account of other Community objectives, it was necessary to continue to reduce aid levels by strengthening control mechanisms and improving their transparency.

149. The obligation to notify aid imposed by the Treaty is central to aid transparency. In a communication adopted in May, the Commission stated that it intended to use all the powers it had under the Treaty to compel Member States to comply with that obligation. By publishing a communication on cooperation between the Commission and national courts, it demonstrated its will to assist national courts in their role of protecting the rights of firms affected by illegal aid that has been granted to competitors.

150. The publication of guidelines and communications defining the criteria applied by the Commission in assessing the compatibility of State aid with the common market is another important feature of the Commission's policy of transparency and simplification. All instruments in force at 31 December 1994, including the manual of procedures and a list of Court of Justice judgments, have been collected in a single volume entitled 'Competition law in the European Communities. Volume II: Rules applicable to State aid'. However, as the rules have accumulated over the years, it would be desirable to consolidate certain instruments and revise others. Those on regional aid are therefore being consolidated, and the Commission has adopted a new framework on research and development aid, which was discussed at a multilateral meeting between the Commission and Member States' experts in April. At that meeting, there was also a discussion on the criteria for distinguishing between State aid and the 'general' measures not covered by Article 92(1), and the problems of aid granted in connection with the sale of publicly-owned land and in the form of loan guarantees. A detailed questionnaire on State guarantees was sent to all Member States.

151. Two other multilateral meetings were held in 1995. In July, Member States' experts reviewed the *de minimis* rule and the guidelines on State aid for small and medium-sized enterprises, as well as draft guidelines on State aid to the arts and cultural activities, especially the audiovisual sector. In December, they examined the future control of aid to the synthetic fibres industry and a first draft for a horizontal framework on regional aid for major investment plans and the problems of defining and collecting the reference and discount rates that are crucial to calculating aid.

152. Over the year, the Commission took a record number of State aid decisions, partly because of the accession of three new Member States. Much of the aid examined was intended to offset the social consequences of restructuring in certain sectors. The Commission is also endeavouring to increase control of aid in sectors that have traditionally been protected from international competition and less obvious forms of aid that have often escaped checks in the past. Because firms are increasingly sensitive to aid granted to their competitors and are better informed about the opportunities for fair competition afforded them by the Community competition rules has resulted in their submitting more and more complaints to the Commission and more appeals to the Court of First Instance against Commission decisions to approve aid to their competitors.

New measures to enforce compliance with the notification requirement

153. The Commission continued its efforts to enforce compliance with the requirement that Member States notify all plans to grant State

[1] Fourth Commission Survey on State aid in the European Union in the manufacturing and certain other sectors, COM(95) 365 final.

aid. Experience has shown that this obligation, provided for in Article 93(3), must, if it is to be effective, be accompanied by a package of incentives or, if necessary, penalties.

1. Recovery of illegal aid

154. Again the Commission emphasized the importance it attaches to the system of prior control of aid plans and the concrete expression of the system, i.e. the rule that prior notification must be given. Thus, in May, it adopted a communication[1] that details the principles it intends to apply in ensuring compliance with its policy on the recovery of aid granted in breach of that obligation.

The communication forms part of a wider movement aimed firstly at ensuring that Member States comply more strictly with Article 93(3) of the EC Treaty and, secondly, at encouraging economic operators to be more vigilant about the lawfulness of the aid granted to them. The Commission had already tackled the matter before when it sought the recovery of incompatible and unlawful aid,[2] a position upheld and indeed strengthened by the Court of Justice.[3] More recently, the Court of First Instance again upheld Commission policy in this area. In its judgment of 13 September in joined cases T-244/93 and T-486/93, *Textilwerke Deggendorf GmbH* v *Commission*, the CFI upheld the Commission's decision to make its authorization of a new aid package subject to a suspension of the payment of that aid, until a prior aid to the same company which had been declared incompatible had been recovered, because it was clear from the Commission's decision that the cumulation of the incompatible aid and the new aid package would render the totality of the aid incompatible.

However, in terms of its effectiveness, such temporary suspension was of limited usefulness inasmuch as it would not have any immediate effect on the part (or all) of the aid already paid. These means were therefore not sufficient to tackle and settle the problem of potential distortion of competition, the effects of which could continue until the final Commission decision. Even if they repay the aid eventually, firms benefitting from illegal aid nevertheless continue to have an edge over their competitors, either in financial terms or by having a longer period of solvency in the case of firms in crisis.

This is the problem the Commission communication seeks to tackle. It stipulates that, in certain cases, the Commission reserves the right, after having given the Member State concerned notice to submit its views and to consider rescue aid instead, to require the Member State by means of a temporary order to recover all or part of the aid granted in breach of the Treaty. Recovery must comply with the provisions of domestic law and interest must be charged from the time the aid was paid. Another new point is that interest is calculated not on the basis of the legal rate but according to the commercial rate, i.e. the reference rate used by the Commission in connection with regional aid.[4] If a Member State failed to comply with such an order, the Commission might apply to the Court of Justice for interim measures by a procedure similar to that provided for in the second subparagraph of Article 93(2) of the EC Treaty.

2. Cooperation between the Commission and national courts

155. In October, with the same aim of increasing observance of legality in the Community, the Commission adopted a notice on cooperation between national courts and the Commission in the State aid field.[5] It is not binding or limiting but seeks to give fresh impetus to relations between the Community executive and national courts and to draw courts' attention to the important role that they can play in the prompt safeguarding of the rights of third parties and securing compliance by Member States with certain procedural obligations. The notice thus clearly forms part of the general trend described in the preceding point.

The notice points out that, while the Commission is the Community body responsible for

1 OJ C 156, 27.6.1995, p. 5.

2 Commission communication on aids granted illegally (OJ C 318, 24.11.1983).

3 Judgment of 21 March 1990, in Case C 142/87 *Royaume de Belgique* v *Commission (Tubemeuse)* [1990] ECR I-959. Judgment of 14 February 1990, in Case C 301/87 *République française* v *Commission* (Boussac) [1990] ECR I-307.

4 See Commission communication to the Member States, letter SG(95) D/1971 of 22.2.1995. The Court of First Instance very recently confirmed that the Commission could seek the payment of interest on sums recovered: Judgment of 8 June 1995, in Case T 459/93 *Siemens SA*, [1995] ECR II-1675.

5 OJ C 312, 23.11.1995, p. 8.

implementing and developing competition policy in the Community's public interest, national courts do no more than preserve, until the final decision of the Commission, the rights of individuals faced with a possible breach by State authorities of the prohibition laid down by the last sentence of Article 93(3) of the EC Treaty.[1] To that end, national courts are invited to use all appropriate devices and remedies and apply all relevant provisions of national law and, in particular, to grant interim relief, by ordering the freezing or returning of monies illegally paid, or awarding damages to parties whose interests are harmed.

In order to attain these objectives more efficiently, the Commission intends to assist national courts by instituting closer cooperation, notably by:

(i) pursuing and improving its policy of transparency by publishing information on State aid;

(ii) supplying information of a procedural nature on pending cases;

(iii) supplying factual, statistical and analytical information.

[1] Judgment of 21 November 1991, Case C 354/90 *Fédération nationale du commerce extérieur des produits alimentaires et Syndicat national des négociants et transformateurs de saumon contre Etat français*, [1991] ECR I-5527, paragraph 14.

B — Concept of aid

156. Interpreting the concept of aid as set out in the Treaties is often the most difficult part of the Commission's assessment of aid measures. The criteria for determining the presence of aid in measures taken by the Member States with regard to their enterprises are of particular importance not only to the administrative authorities of the Member States responsible for notifying them but also to the national courts which may have to determine whether a contested measure should have been notified. Several Commission decisions taken in 1995 help to define the concept of aid provided for in the competition rules.

157. (a) For Article 92(1) to apply, the measure must have provided a firm with an economic advantage which it would not have received in the normal course of business. The Commission considers that this condition would be met if a company were to acquire publicly-owned land or a publicly-owned industrial site at a price lower than the market price. It therefore decided to initiate the Article 93(2) procedure in respect of the acquisition by the company Siemens Nixdorf AG/Mainz of a publicly-owned site at a price estimated to be between DM 5.5 million and 21.5 million lower than the market price. The same reasoning would apply if the State were to acquire land from a company at a price higher than the market price. As the Commission had doubts whether the price for the land sold by the Spanish steel company Tubacex to the public authorities corresponded to the market value, it decided to initiate the Article 93(2) procedure.

158. Public financing of costs inherent in the preparation of a building/industrial site and in providing connections to various (public) utility services does not fall under Article 92(1) if the company pays for the use of the infrastructure through direct or indirect charges. Since preparation of the site in Villey, Meurthe-et-Moselle, for setting-up a new production plant by the paper company Kimberly-Clark benefited this company alone, in particular because it is the owner and sole user of the installations put in place, the partial public financing provided constituted an aid to that company. In this context, the Commission also took into consideration that a private market investor would not have carried out this preparation since the selling price for the site did not even cover partial financing of it.

159. Public funds provided to a (public) undertaking on terms more favourable than those on which a private investor operating under normal market conditions would provide them to a private firm in a comparable financial and competitive position constitute State aid. In cases where the State's acquisition of a holding in a company may be combined with other types of public intervention which need to be notified to the Commission pursuant to Article 93(3), there is a presumption that State aid may be involved. In accordance with its communication on the application of Articles 92 and 93 of the EC Treaty to public authorities' holdings,[1] the Commission asked the Spanish Government to inform it in advance of any acquisition made by the Institute for the Development of Andalusia.

Because the intended capital injection by the *Land* of Bavaria to cover the accumulated losses of the steel undertakings Neue Maxhütte Stahlwerke GmbH and Lech-Stahlwerke GmbH would coincide with the sale of its shares in these companies, thereby removing any prospect of profitability from the provision of these funds even in the long term, the Commission decided that these capital injections constituted State aid. For similar reasons, it decided that the capital injections made by the Italian State through its industrial holding company ENI into the fertilizer company Enichem Agricultura S.p.A. in the period 1991-94 constituted State aid, as the capital injections were made before a restructuring plan had been set up solely to prevent the company from going bankrupt and thus without any prospect of a reasonable return. Moreover, the Commission considered that, under the circumstances, the period during which the company had suffered heavy losses, i.e. five years, was too long to have been acceptable to a private market investor who would have liquidated or thoroughly restructured the company much earlier. The capital injections to be made in the context of a restructuring plan set up at a later stage therefore also constituted State aid and the Commission considered the positive results expected from implementation

[1] See Commission communication of 1983, Bulletin EC 9-1984, points 3.4 and 4.4.

of the plan to be too low compared with the total injection of new capital.

However, if a capital injection by the State into a company is accompagnied by an injection of capital by a private investor on equal terms and if the private investor's holding in the company has real economic significance, the Commission considers that no aid is involved in the public intervention. It therefore decided that the capital injection and loans provided by the authorities of Wallonia (Belgium) to the textile company EM-Filature were based on normal commercial considerations and did not constitute State aid since this intervention went hand-in-hand with an injection of capital by private shareholders making them majority shareholders in the company and since private shareholders offered loans on similar terms. For similar reasons, the Commission considered that the injection of capital by the Portuguese State into the ship repair company Lisnave in connection with a restructuring of the company did not involve State aid under Article 92(1).

160. (b) Under Article 92(1) aid must be granted to certain undertakings (or the production of certain goods) to constitute State aid. General measures of economic, tax or social policy do not fall within Article 92(1) and competitive advantages for firms in one Member State arising from differences in such general policy measures must be addressed, if necessary, under the appropriate procedure laid down in Articles 101 and 102.

Therefore, Article 92(1) does not apply to general measures applicable to all undertakings in a Member State and satisfying objective and non-discriminatory requirements. In the light of these considerations, the Commission considered that aid granted by the German Government to employees of the firm Maschinenfabrik Sangerhausen GmbH to cover social security obligations in connection with the liquidation of the firm did not constitute State aid, since the aid is automatically available to any firm in liquidation in Germany. Similarly, it took the view that the suspension of debt repayments in favour of the Spanish steel company Tubacex did not, in itself, constitute State aid, but a general measure taken within the framework of Spanish insolvency legislation generally applicable to all companies. However, it also follows from the above criteria that, if the effect of the objective requirements under a scheme open to all firms is that only certain undertakings may benefit from the measure, the Commission considers State aid to be involved.

If a measure is applicable to all undertakings but confers discretionary power on the authorities administering the measure, State aid may also be involved. Therefore, the Commission considered that a Finnish employment aid scheme available to all firms in every sector of the industry and every region of the country nevertheless involved State aid since the labour market authorities had discretion as to the level of aid and the length of the subsidized period for each unemployed person taken on by a firm.

161. (c) The financial benefit to certain undertakings must be granted by a Member State or through State resources in order to constitute State aid under Article 92(1), which applies to aid granted by any central, regional or local authority and any public or private body established or appointed by the State to administer the aid.[1] Even if an aid is not granted through a body established or appointed by the State, State aid may be involved if the financial contribution to the recipient firm(s) is made by the State.

162. (d) The aid must be capable of affecting trade perceptibly between Member States. The Commission considered this condition to be met in respect of aid to the German company Leuna-Werke GmbH even though the company does not export goods to other Member States, since the aid may enable it to increase its production for the domestic market and thus reduce the potential market there for goods imported from other Member States.

[1] Judgment of the Court of Justice in Case 78/76 *Steinike und Weinlig* v *Bundesamt für Ernährung und Forstwirtschaft* [1977] ECR 575.

C — Assessment of compatibility of aid with the common market

1. Sectoral aid

1.1. Sectors subject to specific rules

1.1.1. Aid to shipbuilding

163. On 21 December, the Council adopted Regulation (EC) No 3094/95[1] implementing an OECD agreement with respect to normal competitive conditions in commercial shipbuilding and ship repair, including the elimination of production subsidies. The new regulation will apply as from the entry into force of the OECD agreement. This was scheduled for 1 January 1996 but, although the European Union ratified the agreement in December, entry into force was unfortunately delayed because of delays in ratification by other parties to the agreement. The Council therefore decided that the rules of the seventh Directive on aid to shipbuilding[2] should continue to apply *ad interim* but not beyond 1 October 1996. If the OECD agreement has still not entered into force by 1 June 1996, the Commission will put forward appropriate proposals to the Council so that it can decide future policy before 1 October 1996. Against this background, the Commission decided to maintain from 1 January 1996 the common production aid ceiling at 9% for large vessels and 4.5% for vessels costing less than ECU 10 million and for conversions.

1.1.2. Steel

164. During 1995, the Commission continued to be vigilant in applying the steel aid code.[3] This strict enforcement of the aid rules resulted in a number of negative decisions being taken, including ordering of the recovery of aid illegally granted.

In November and December, respectively, the Council gave its unanimous assent to special derogations under Article 95 ECSC relating to production and closure aid for iron-ore mining in Austria and the privatization of the public steel company in Ireland.

Close monitoring of six previous Article 95 ECSC cases (*Ilva* in Italy, *CSI* and *Sidenor* in Spain, *EKO Stahl* and *SEW Freital* in Germany, and *Siderurgia Nacional* in Portugal) was maintained with half-yearly reports being submitted to the Council.

In March, the Commission proposed that the provisions of the steel aid code relating to aid for environmental protection should be brought into line with the revised Community guidelines on State aid for environmental protection under the EC Treaty to ensure that the steel industry enjoyed equal treatment with other industrial sectors. The Council's assent is still awaited.

1.1.3. Coal

165. Decision No 3632/93/ECSC[4] of 28 December 1993 establishes the Community rules for State aid to the coal industry covering the period from 1994 until 2002.

On 4 April, the Commission authorized[5] financial assistance totalling ECU 3 384.2 million that had been planned by Germany for 1995 in the form of compensation to the electricity generators under the Third Law on electricity produced from Community coal, aid for maintaining the underground workforce in mines ('Bergmannsprämie'), and aid to cover the exceptional costs of a number of coal undertakings resulting from inherited liabilities.

On 19 July, the Commission delivered a positive opinion on a restructuring plan submitted by the French authorities and authorized aid[6] totalling ECU 912.8 million to cover operating losses for 1994, aid to cover inherited liabilities resulting from the modernization, rationalization and restructuring of the coal industry and aid for research and development. On the same occasion, the Commission approved additional German aid totalling ECU 196.9 million for the supply of coking coal and coke for the Community steel industry.[7]

[1] OJ L 332, 30.12.1995.
[2] Council Directive 90/684/EEC, as last amended by Directive 94/73/EC.
[3] Commission Decision 3855/91/ECSC.
[4] OJ L 329, 30.12.1993, p. 12.
[5] Decision 95/464/ECSC (OJ L 267, 9.11.1995. p. 42).
[6] Decision 95/465/ECSC (OJ L 267, 9.11.1995, p. 46).
[7] Decision 95/499/ECSC (OJ L 287, 30.11.1995, p. 53).

On 26 July, the Commission authorized[1] France to grant aid totalling ECU 668.1 million to cover operating losses for 1995, aid to cover inherited liabilities resulting from the modernization, rationalization and restructuring of the coal industry and aid for research and development.

The Commission authorization for the United Kingdom to grant aid totalling ECU 2 594.4 million for inherited liabilities in 1995 was contained in the Commission Decision of 3 November 1994.[2]

Notifications of aid for 1995 have been received from the Portuguese and Spanish authorities and an additional notification has been received from the German authorities. These are all being examined by the Commission departments to determine their compatibility or otherwise with Decision 3632/93/ECSC.

1.1.4. Motor vehicle industry

166. By its judgment of 29 June 1995,[3] the Court of Justice ruled in respect of the last Commission's decision extending the EC framework on State aid to the motor vehicle industry for an unlimited period that it had ceased to apply on 1 January 1995. To avoid any legal vacuum that the judgment might create, the Commission had to take extraordinary action and, on 5 July, decided to extend the framework retroactively from 1 January 1995 and, at the same time, proposing to the Member States that the framework be reintroduced for a two-year period starting no later than 1 January 1996.

Subsequently, the Spanish Government appealed to the Court against the Commission's decision to extend the framework retroactively and, unlike all other Member States, also refused to accept the proposal to reintroduce it for a two-year period. Following the refusal, the Commission was obliged to initiate the Article 93(2) procedure in order to examine the compatibility of all aid schemes which might benefit the motor vehicle industries in Spain. On 20 December, it adopted a final decision compelling Spain to comply — in the same way as the other Member States — with the requirements of the newly reintroduced framework.

On the basis of its decision of 5 July, the Commission continued to apply the framework during 1995. It received nine notifications on the basis of approved schemes and two notifications on the basis of *ad hoc* schemes. It adopted a decision approving notified aid in six cases. It also took an interim decision enjoining the German Government to provide within a fixed deadline all the information necessary to allow an assessment of aid to the new projects of VW Sachsen, which were not covered by a previous 1994 decision.[4]

167. In assessing individual awards based on regional aid schemes (e.g. FORD Genk), the Commission continued to apply its criterion whereby regional aid in this sector should be in proportion to the actual regional handicaps arising for an investor. However, it should be noted that, on average, it has allowed higher aid intensities for motor vehicle manufacturers carrying out investment projects in the least-developed regions of the EU.

168. As regards rescue and restructuring aid, the Commission adopted final decisions on the cases concerning DAF Belgium, DAF Netherlands and SEAT-Volkswagen. These decisions implied, pursuant to the existing regulations, a recovery of part of the aid in the case of bankrupt DAF and a significant reduction of production capacity in the case of SEAT. Furthermore, the Commission decided to initiate proceedings under Article 93(2) against aid granted by the Spanish authorities to Santana Motor S.A.

169. In assessing aid for research and development the Commission, while recognizing the potential beneficial effects of R&D activity on economic development, takes into consideration the risk of distortions of competition and ensures that such aid is granted only to projects that are genuinely innovative at a European level. It also verifies that the maximum intensities laid down in the Community framework on aid for R&D are adhered to. As these conditions were fulfilled in the *Opel Austria* and *Ford Valencia* cases, the Commission approved the aid proposed for these projects.

[1] Decision 95/519/ECSC (OJ L 299, 12.12.1995, p. 18).
[2] Decision 95/995/ECSC (OJ L 379, 31.12.1995, p. 6).
[3] Case C-135/93 *Spain* v *Commission* [1995] ECR I-1651.
[4] XXIVth Competition Report, point 367 and Annex II.E., point 2.6.

170. Both cases also involved aid for investment projects to reduce environmental pollution. In line with the motor vehicle framework and the guidelines on State aid for environmental protection, such aid can be approved only if it is to cover extra investment costs necessary to reduce or eliminate pollution or to adapt production methods in order to protect the environment and only if the limits of aid intensity specified, i.e. 15% for projects complying with new standards and 30% for projects significantly exceeding standards or for voluntary measures, are not exceeded. In both the *Opel Austria* and the *Ford Valencia* cases, as well as in the *Ford Genk* case mentioned earlier, these conditions were fulfilled with the result that the Commission approved the proposed aid.

171. In several past cases, the Commission has required the national authorities to monitor the realization of eligible investment and asked the Member States to send annual reports on the investments carried out and the aid payments made. Practice has shown the importance of such a follow-up procedure, bearing in mind that the execution of large multiannual investment projects leads to many changes which might require modification of the aid payments. In the course of 1995, this *ex post* control was exercised in the *Ford/VW Setubal* and *Fiat Mezzogiorno* cases as well as in the *Chrysler* and *SNF* cases in Austria, where the European Union had reached agreement on aid reductions with the Austrian authorities. In its *NedCar* decision, the Commission required the Dutch authorities to notify the rules on the allocation of costs between the old and new models, so that it could ensure that no aid was granted to Volvo and Mitsubishi on the basis of inadequate rules.[1] The analysis of the cost allocation rules for 1994 and 1995 showed that they did not contain elements of State aid. Finally, in the case of restructuring aid for Rover, which dates from a period prior to the establishment of the framework, and in the case of regional aid for Opel Eisenach the *ex post* monitoring was terminated after all the conditions of the decisions had been fulfilled.

1.1.5. Synthetic fibres industry

172. Since 1977, aid to this industry has been subject to supplementary control through the code on aid to the synthetic fibres industry. In April the Commission asked an independent consultant to assess the code's effects and, if supplementary control were still considered necessary, advise what form it should take. The consultant reported in October and the Commission will decide what action to take early in 1996. Also in April, the Commission extended the period of validity of the current code[2] for a further nine months to 31 March 1996.[3]

1.1.6. Transport

173. The year has seen a substantial increase in the number of aid cases in the transport sector (from 29 to 52). At the same time, cases have become increasingly complex and the scope for enforcement of Articles 92 and 93 has expanded. As the liberalization of transport markets progresses, commercial pressure increases on operators across the board. The forthcoming completion of civil aviation liberalization will include cabotage rights for European carriers from March 1997. The recently approved Directives on infrastructure charges and track access in the railway sector follow on from Directive 91/440, which is also being extended to intra-State lines in the shipping industry. These are but a few examples of the progress being made towards a single market for transport services.

174. As commercial operations move into new areas, control of financial support from the State must be stepped up to preserve a level playing-field for all enterprises, both public and private. In transport cases, no advantage that reduces the costs normally included in the cost structure of an undertaking and stems from a State measure should be authorized unless it responds to the need for coordination of transport or represents reimbursement for the discharge of public service obligations. In addition, the development of transport as an economic activity or a concrete project of common European interest might qualify for exemption.

[1] XXIVth Competition Report, points 367 and Annex II.E, point 2.6.
[2] OJ C 346, 30.12.1992.
[3] OJ C 142, 8.6.1995.

175. In the course of the year, the Commission departments were consulted on several cases (*Ferrovie dello Stato, fixed Öresund link*) by Member States in order to clarify whether public investment in infrastructure could be considered State aid. Governments have always used financial intervention as an essential tool in their policy of infrastructure development. In principle, as long as access and usage remain public and general, such intervention will not constitute aid within the meaning of Article 92(1) but will be normally regarded as being in the public interest. For there to be a distortion that might qualify as aid, the infrastructure-related advantages, should be conferred selectively, with the aim of helping specific firms: for example, a purpose-built facility for the sole use of one undertaking or discriminatory access restrictions.

In economic terms, public authorities normally provide these goods and services because of the inability of the price system to do so effectively. Goods such as infrastructures tend to be indivisible and collectively consumable by all citizens whether they pay for them or not. Such a public good provided by government benefits society in a collective manner and is not conferred upon any specific enterprise or industry (principle of non excludability). Consequently, public support for infrastructure will not normally constitute aid, but rather a general measure derived from the State's sovereignty in respect of economic policy, land planning and development.

176. Various complaints submitted during the year claimed the existence of State support for ports. The question arises whether financial backing for port activities can be examined in the context of Article 92.

177. In relation to civil aviation, the Commission based its decisions concerning State aid on the principles developed in the new guidelines adopted in November 1994.[1] These take account of the increasingly competitive nature of the market for air transport services after the entry into force of the third liberalization package in 1993. In 1994, the Commission authorized the granting of restructuring aid to be paid in instalments in favour of TAP and Air France. In both cases, the Commission's approval was made subject to the correct fulfilment of a list of commitments and restructuring plans. Then in 1995, with the assistance of independent experts, the Commission monitored compliance. In view of the satisfactory fulfilment of both elements by TAP[2] and Air France[3] no objections were raised to payment of the second tranches of the aid.

178. Also in 1994, the Commission decided that the subscription by the French public entity CDC-P to bonds issued by Air France constituted illegal aid, incompatible with the common market, and requested its reimbursement. In October 1994, France and Air France challenged the Commission decision before the Court of First Instance. The Commission then decided on 4 April 1995[4] to amend its original decision, and to request France to ensure that the aid and interest on arrears are deposited in a blocked bank account until the Court delivers a final ruling. The economic rationale of this mechanism is to deprive Air France of the use of the money corresponding to the aid, pending Court proceedings.

179. On 4 May 1995,[5] the Commission analysed the financial transactions involved in an agreement between Swissair and Sabena, aimed at the acquisition by the former of a strategic stake (49.5%) of Sabena. The operation implied the issue by Sabena of new shares for BFR 9.5 billion, BFR 6 billion being subscribed by Swissair and the remaining part by Belgium and a group of Belgian investors. The Commission recalled that when the public holding in a company is to be increased, the capital injection will not involve State aid provided that the public investment goes together with the injection of a significant amount of capital by a private shareholder. Swissair's subscription of new shares at the same price and under the same conditions as Belgium and the Belgian investors was accepted as evidence that the operation was a normal financial transaction and not State aid.

180. On 10 May 1995, the European Commission decided not to raise objections to plans by the German Government to contribute to pen-

1 XXIVth Report on competition policy, point 375.
2 OJ C 154, 21.6.1995.
3 OJ C 295, 10.11.1995.
4 OJ L 219, 15.9.1994.
5 OJ L 239, 7.10.1995 p. 19.

sion funds in favour of Lufthansa employees as part of the company's privatization programme initiated in 1992. The measures were linked to the charges imposed on Lufthansa following its compulsory withdrawal from a supplementary pension fund managed by the public entity VBL to which, as a public company, it had been obliged to belong. The Commission considered that a private investor in the same position as the German State, obliged to relinquish the control of Lufthansa, would have acted in the same way in order to maximize the final value of its stake.

181. On 19 July 1995, the Commission analysed a capital injection of FF 300 million into the company AOM by its parent State-owned company Credit Lyonnais. The Commission, having analysed the restructuring plan of the airline, reached the conclusion that AOM was likely to return to profitability in the near future and that the net present value of future cash-flows was higher than that of the investment. The operation was considered to amount to a normal financial transaction and not State aid, since a market economy private investor in the same circumstances would have made the investment in AOM.

182. On 29 November 1995, the Commission adopted a final negative decision concerning the exceptional mechanism of depreciation of aircraft registered in Germany and used for international commercial activities. In certain circumstances, the scheme allowed for an exceptional depreciation of up to 30% of the total acquisition cost. The Commission considered that the scheme amounted to an aid and that it could not fall within the second and third paragraphs of Article 92.

183. Likewise, the Commission took a number of decisions in cases involving aid to the maritime sector. The Commission's 1989 guidelines on the examination of State aid to Community shipping companies is currently under review in the context of an overall reappraisal of Community maritime transport policy. The results of this exercise will be presented by the Commission in a strategy discussion document on which the European institutions, the Member States and other interested parties will be invited to comment.

184. In particular, the Commission decided that an agreement between Spanish regional and local authorities in the Basque Country and Ferries Golfo de Viscaya, concerning a ferry service between Bilbao and Portsmouth did not contain State aid elements. The final decision, following the opening of the procedure under Article 93.2 of the Treaty, was taken on 6 June 1995.

185. Serious doubts were raised about the compatibility of aid granted to the French State-owned shipping company Compagnie Générale Maritime (CGM) with the Treaty. The Commission decided on 31 October 1995, and later on 20 December 1995, to initiate and extend respectively, the Article 93.2 procedure. The aid amounts to approximately ECU 330 million.

186. The Commission also examined several cases of State aid in the road transport sector, taking particular account of the gradual liberalization of cabotage since 1 January 1995[1] which entails the opening-up of local markets to Community competition.

187. On 18 August, the Commission brought an action before the Court of Justice against Italy for not having taken the necessary measures to comply with the Commission Decision of 9 June 1993, which declared a tax credit for professional road hauliers in Italy incompatible with the common market and ordered the Italian authorities to recover the sums paid.

In addition, the scheme, which had been deemed to be operating aid and had initially been scheduled for the 1992 tax year, was extended by the Italian authorities to 1993 and 1994, with a budget of ECU 558 million. On 4 October, the Commission decided to initiate Article 93(2) proceedings in respect of the extensions and called for the immediate suspension of the aid.

188. In the area of inland waterways, the structural reorganization aimed at reducing existing overcapacity by scrapping vessels that was begun in 1990 on the basis of Council Regula-

[1] Council Regulation No 3118/93 (OJ L 279, 12.11.1993).

tion (EEC) No 1101/89 of 27 April 1989 is still under way. In view of the amount of excess capacity, the Commission presented a proposed amendment of the abovementioned Regulation to the Council on 23 May, recommending extensive scrapping in the period 1996-98, part-financed by the Community, the Member States concerned and the trade. This action is an important measure accompanying the gradual liberalization of the waterway-transport market which was also advocated by the Commission in a proposal of 23 May 1995.

189. In the course of 1995, some operations undertaken by railway companies were examined by the Commission in the light of Articles 92 and 93. In relation to the UK sale of the railway rolling-stock companies (ROSCOs) the Commission decided on 29 November that the guarantees provided to the purchasers maximized the sale profit and therefore do not constitute State aid.

Similarly, on 18 October 1995, the Commission decided that, a State guarantee in favour of Ferrovie dello Stato S.p.A., issued by the Italian government for a loan of ECU 372 million to railway infrastructure investments in the high speed train link Brenner-Verona, did not constitute State aid.

1.1.7. Agriculture

190. The accession of three new Member States (Austria, Sweden, Finland) brought about some change in the situation regarding State aid in agriculture. The Act of Accession established a specific procedure for each new Member State for aid existing at the time of accession and for a given transitional period. In accordance with the Act of Accession, the new Member States informed the Commission by 30 April of all existing agricultural aid schemes within the meaning of Article 93(1) of the Treaty. On 13 February, the Commission adopted two decisions approving the Austrian and Finnish programmes for the implementation of Articles 138 to 140 of the Act of Accession, which provide for the granting of transitional, degressive national aid for agricultural products. The decisions were subsequently modified to take account of new factors.

191. Generally speaking, the Commission opposes any State aid relating to support measures that would be liable to upset the Community market machinery and which, as operating aid, would not have any lasting effect on the development of the sector in question.

192. As regards investment aid in the primary production sector and, in particular, pursuant to Article 12(1) of Council Regulation (EEC) No 2328/91 on improving the efficiency of agricultural structures[1] the assessment of Community and State aid should, as far as possible, be carried out in conjunction with a parallel assessment of the cases within the periods stipulated for State aid; this procedure would make it possible to send only one letter to the Member State concerned, under both Articles 92 and 93 of the Treaty and Regulation No 2328/91.

193. As regards aid to investments in improving the processing and marketing of agricultural products, Community policy is laid down by Council Regulation (EEC) No 866/90.[2] This Regulation also authorizes Member States to establish aid measures, under various conditions, in accordance with Articles 92 and 93 of the Treaty. However, this facility is limited by the selection criteria provided for in the Regulation, applied by the Commission by analogy to the assessment of State aid.

Until 1994, the selection criteria applicable to such investments, known as 'sectoral limits', were specified in Commission Decision 90/342/EEC of 7 June 1990.[3] This was amended by Commission Decision 94/183/EEC of 22 March 1994.[4] In 1994, the Commission informed Member States that it would continue to apply the sectoral State aid limits provided for in point 2 of the Annex to the 1990 Decision.[5] In 1995, the Commission altered its position in order to apply the more favourable limits provided for in the 1994 Decision.[6] Following preparatory work with the Member States, the Commission adopted[7] the principle of the

1 OJ L 218, 6.8.1991, p. 1.
2 OJ L 91, 26.4.1990, p. 1.
3 OJ L 163, 29.6.1990, p. 71.
4 OJ L 79, 23.3.1994, p. 29.
5 OJ C 189, 12.7.1994, p.5.
6 OJ C 71, 23.3.1995, p. 6.
7 OJ C 29, 2.2.1996, p. 4.

application to State aid, from 1 January 1996, of the criteria contained in its Decision of 22 March 1994 and no longer those in its Decision of 7 June 1990.

194. The Commission also adopted the principle of a review of its policy concerning subsidized operating loans in the agricultural sector.[1]

1.1.8. Fisheries

195. In 1995, the Commission registered 37 new aid schemes and 20 aid schemes that were either not notified or were only notified after their adoption, as well as three new cases of existing aid. It decided not to object to the aid in 22 cases, one of which was started in 1994. It also decided to initiate the Article 93(2) procedure in respect of two aid measures, one Italian and the other German. In the same period, the Commission decided to terminate the Article 93(2) procedure initiated in respect of an aid measure implemented in Italy and notified in 1993.

1.2. Specific sectors not subject to special rules

196. For some years Europe has been experiencing a major shift towards liberalization, privatization and the adjustment of national monopolies. This trend, together with continued harmonization of rules at Community level, prompted the Commission to study methods of applying State aid rules to certain sectors such as banking or postal services. Although they are in principle subject to the same treatment as any other sector (especially the principle of a 'private investor in a market economy'), they are nevertheless sufficiently different to warrant being taken into account by the Commission when assessing State aid.

1.2.1. Banking

197. This sector has particular characteristics that are chiefly social and statutory (protection of savers), macroeconomic and financial (necessary stability of the sector, smooth operation of the payments system), political and international (possible repercussions in the form of 'panic' in other establishments in the same country or other countries due to the considerable interdependence existing in this sector, especially in the event of a major institution failing). That is why specific authorities are in charge of monitoring the sector in the various Member States.

After the *Banesto* case in 1994, the *Crédit Lyonnais* case is an important example of the way in which State aid rules should be applied with a view to the particular sensitivity of a sector. In terms of the amounts involved, this case is the largest yet dealt with by the Commission: the total volume of aid was FF 45 billion (ECU 7.5 billion). In addition, at the end of 1993, Crédit Lyonnais was the largest European bank in terms of total balance, thus providing an example of what happens when a major bank fails, with all the downstream consequences for the entire financial and banking system in France and, indeed, Europe.

The principle adopted by the Commission, after consulting a high-level group of experts, was to apply to the banking sector substantive and procedural rules on State aid, taking account of the specificities of banking. Compliance with the rules also ensures that credit establishments enjoying the implicit or explicit support of the State, being either public establishments or too important to be allowed to go bankrupt, do not act in an imprudent manner. Such an attitude would require State assistance and hence lead to distortions of competition which could have been avoided. Even if State intervention were considered necessary to prevent undesirable effects on other financial establishments and markets, the Commission would wish to ensure that the solution chosen would produce the least possible distortion of competition. Lastly, major counter-concessions will have to be offered by a defaulting establishment in order to offset the negative effects of State assistance on other market operators. That is why the Commission eventually decided to approve the aid to Crédit Lyonnais conditional on the sale of a large part of its international network, on a contribution to

[1] OJ C 44, 16.2.1996, p. 2.

the costs of the hiving-off mechanism in the form of a better-fortunes clause, on a clear separation between Crèdit Lyonnais and the hived-off structures and on the probable privatization of the bank within five years.

1.2.2. Postal sector

198. The Commission regards this as an essential sector owing to its vital function as a vehicle for the social and economic activities of a country. However, it must also take account of the fact that the Court of Justice specified that the competition rules applied to postal services,[1] without prejudice to the principle of Article 90(2) of the EC Treaty.

Postal services, especially public or semi-public services or those granted special and exclusive rights, continue to enjoy a special relationship with the State. This is reflected in the benefit of direct financial support (grants) or indirect support (tax relief) usually lacking in transparency. On the one hand, the Commission Directive on the transparency of financial relations between Member States and public undertakings is applicable in this area,[2] which entails special accounting and financial obligations. On the other hand, such direct or indirect financial assistance constitutes State aid which the Commission has a duty to monitor, both because of the obligation on Member States to notify aid plans in advance and because of its obligation to keep under constant review all existing systems of aid in order to take account of the progressive development or functioning of the common market.

The case *Activités concurrentielles de la Poste française* is doubly interesting in this respect inasmuch as it deals both with the application of the State aid rules (Articles 92 and 93) and with the provisions on enterprises entrusted with the operation of services of general economic interest (Article 90(2)). This case constitutes the first combined application of these two provisions by the Commission. The latter considered that the tax advantages enjoyed by the postal services did not outweigh the extra costs resulting from the constraints imposed on the French post office in carrying out its public service task and did not benefit the competitive aspects of its activities (i.e. the activities not reserved to the post office under French law). The Commission therefore decided that the tax advantages did not constitute aid under Article 92(1) of the EC Treaty.

1.2.3. The audiovisual sector

199. The Commission recognizes that the European film and television industry makes an important contribution to the diversified European culture. Thus, the promotion of cultural diversity is accepted by the Commission as a justification for State aid to the film industry and the production of television programmes. However, in its assessment of State aid to the audiovisual sector, the Commission will ensure that the aid does not cause any undue distortions of competition and that there is no discrimination on grounds of nationality or any other impediment to the free flow of goods, services, people and ideas across the European Union. The Commission aims to strike a balance between the requirements of cultural and heritage promotion and the openness of trade and competition in the single market.

To clarify State aid policy in this field, the Commission is currently preparing guidelines on State aid for culture, the arts and the audiovisual sector. The guidelines were discussed with Member States at a multilateral meeting in June and met with general support.

200. In light of complaints from private TV stations alleging that public broadcasters receive State aid which distorts competition on the TV market within the EC, the Commission in 1993 appointed a firm of consultants to undertake a study on the situation, paying particular attention to the public service obligations imposed on public broadcasters, how much they cost and how much subsidy the public broadcasters receive. In October, the Commission received the final report and sent it to Member States for comments. In respect of the new Member States

[1] Judgment of 12 February 1992, Joined Cases C-48 and C-66/90 *Nederland en PTT Nederland and PTT Post* v *Commission* [1992] ECR I-565; Judgment in Case C-320 *Paul Corbeau* [1993] ECR I-2563.

[2] Commission Directive 80/723/EEC of 25 June 1980, as amended by Directive 84/413/EEC (OJ L 229, 28.8.1985, p. 20).

and the EFTA States, signatories to the EEA Agreement, it has issued an invitation to tender for a similar study. When it receives the comments of Member States on the first study and when the second study is completed, the Commission will consider the cases pending and encourage a debate on the way forward.

2. Horizontal aid

2.1. Research and development

201. On 20 December, the Commission adopted a new Community framework for State aid for research and development.

The framework in force since 1986 was amended in the light of the new competition environment both in the Community and internationally. The revised version takes account of the recommendations of the White Paper on growth, competitiveness and employment and of the consequences of the agreements resulting from the multilateral negotiations of the Uruguay Round. In addition, the text clarifies certain unwritten practices developed by the Commission since the 1986 framework entered into force.

Although as a general rule the admissible aid level is still 25% for pre-competitive development projects that are closer to the market, and 50% for basic industrial research, 'bonuses' are possible for projects involving SMEs (+10 points), assisted regions (+5 or 10 points) and projects tagged as priority in the Community R&D framework (+15 points).

Furthermore, the admissible aid intensity will also be increased by 10 points for projects meeting at least one of the following criteria: cross-frontier cooperation between independent firms, broad dissemination of research results, cooperation between universities and industry. An increase of 25 points will be allowed for priority projects under the R&D framework which also provide for cross-frontier cooperation between enterprises or between enterprises and public research bodies, and broad dissemination of results.

This system of bonuses will make it possible to adjust the amount of aid that is acceptable on the basis of the general interest and which must in any event comply with the maximum rates of the WTO Subsidies Code.

To take account of competition outside the Community and the new possibilities offered by the WTO Agreement on Subsidies and Countervailing Measures, the new framework provides that European firms are eligible for the maximum aid levels approved by the WTO (50% for precompetitive research and 75% for basic industrial research) in the following cases: overlapping State aid and Community support, important projects of common European interest (exemption under Article 92(3)(b)), projects and programmes for which similar activities are carried out by enterprises outside the European Union having benefited (in the last three years) or being about to benefit from aid having an equivalent intensity at a level accepted by the WTO for the same two types of research.

In the new framework, to lessen the bureaucratic burden on Member States and itself, the Commission believes, on the basis of experience, that it is no longer necessary to notify annual budget increases of less than 100% of the original amount and/or extensions of authorized schemes, provided that certain conditions are met.

Aid to an individual project under a research and development scheme authorized by the Commission need not in principle be notified. However, the new framework requires notification of large aid grants under existing schemes, setting the aid threshold at ECU 5 million and project costs at ECU 25 million.

The revised framework also provides for different situations in which public financing of R&D conducted by establishments of higher education or non-profit-making public research bodies, either individually or on behalf of enterprises or in collaboration with them, does or does not cope within the scope of Article 92(1) of the EC Treaty.

The framework also specifies the factors taken into account by the Commission to determine whether R&D aid proposed by a Member State encourages enterprises to carry out supplementary research and development in addition to

that which they carry out in the course of their normal work (incentive effect of R&D aid).

For SMEs, it will be assumed that the aid is necessary and acts as an incentive, while in the case of large undertakings the Commission will pay particular attention in aid cases where the research is close to the marketplace.

2.2. Employment aid and general social measures

202. In 1995, the persistently high unemployment rate within the Community was the fundamental economic and social problem facing the Community. In an attempt to remedy this grave situation, Member States introduced an increasing number of measures to promote employment and, in its White Paper on growth, competitiveness and employment, the Commission set out various ways of promoting employment in harmony with Community competition policy.

Most measures taken by Member States under their labour market policies are general in nature and do not involve aid, either because they do not favour certain undertakings or do not affect trade between Member States within the meaning of Article 92(1) of the EC Treaty. For example, under the new Danish energy package, which imposes on Danish industry new or increased energy taxes (CO_2 and SO_2 emissions), some of the proceeds of these taxes will flow back to the industry in the form of a general reduction in labour market contributions paid by the industry. As all companies automatically benefit from this reduction on the basis of objective criteria, the Commission did not consider this reduction to constitute State aid under Article 92(1).

Only measures that selectively reduce labour costs of certain firms or in certain sectors with a view to encouraging them to increase their labour force, to maintain the level of employment or to recruit certain categories of unemployed persons distort or threaten to distort competition because they favour the beneficiaries *vis-à-vis* their competitors. Accordingly, the Commission considered that a Swedish employment aid scheme available only to firms with less than 500 employees constituted State aid in favour of those firms to the detriment of competitors with more than 500 employees.

203. Given the considerable number of aid measures to promote employment, the Commission considered it appropriate to clarify State aid policy in this field by way of the employment aid guidelines.[1] As regards support measures for training, the issue will be indirectly addressed in the more general guidelines on the distinction between State aid and general measures since measures that support training can in many cases be defined as general measures. The prime objective of the employment aid guidelines is to inform Member States and interested parties of the principles the Commission will apply in determining the existence and compatibility of employment aid measures with the common market and in ensuring coherence between the competition rules and the employment policy measures advocated in the Commission's White Paper on growth, competitiveness and employment. The guidelines confirm the traditionally positive approach the Commission has taken towards State aid for job creation, in particular aid granted to SMEs or firms located in regions eligible for regional aid, provided that the aid leads to a net increase in the number of jobs in the firm concerned. Similarly, the Commission normally takes a favourable view of aid granted to firms that take on unemployed persons who have particular difficulties in finding a permanent job, such as the long-term unemployed or young people. In its assessment the Commission will also take account of possible counterparts offered by the firm for aid going beyond the employment of the unemployed, such as training. Moreover, in line with the general principles underlying State aid policy, the Commission will always examine whether or not the aid is necessary to take on an unemployed person and whether or not it is temporary.

However, not all employment aid is viewed favourably by the Commission, which considers that certain employment aid measures, given their actual or potential harmful effect on competition within the common market, are contrary to the common interest and may be approved only in a limited number of cases. Thus, the guidelines confirm the Commission's

[1] OJ C 334, 12.12.1995, p. 4.

unfavourable view on aid to maintain jobs in a firm. In fact, such aid constitutes operating aid which generally has the effect of frustrating or delaying structural changes necessary to render a firm/sector economically viable, thereby keeping unprofitable businesses artificially alive. The Commission considers that, in most cases, the negative effects of such aid outweigh the possible short-term benefits in terms of maintaining a certain level of employment. Moreover, it will normally look unfavourably on aid for job creation available to only one or more sectors that are sensitive, suffer from overcapacity or are in a crisis. The negative effects such aid might have on competing firms in the same sector in other Member States and the risk that aid would merely export unemployment to other Member States outweigh the positive effects in terms of reduction of the unemployment rate in the Member State granting the aid. The Commission thus decided to initiate the procedure provided for in Article 93(2) in respect of employment aid offered to the shoe sector in Italy under a general employment aid scheme to sectors suffering from an employment crisis.

However, aid to maintain jobs may be approved if it is granted to firms located in regions which, owing to the serious socio-economic problems they are experiencing, are eligible for regional aid under Article 92(3)(a) or if it is granted in the context of a rescue or restructuring plan.[1] Moreover, sectoral employment aid may be approved in regions with serious unemployment or if it is granted in subsectors which are experiencing economic growth and generating jobs.

204. In response to the urgent need to deal with the current unemployment crisis in the European Union and to support the promotion of structural employment policies, in particular by means of active labour market measures, the Commission is considering adopting an accelerated procedure for the notification of employment and training aid schemes. Under the accelerated procedure, the Commission will decide within 20 working days on notified aid measures.

2.3. Aid for environmental protection

205. The Community's environmental policy is based on the principle that the polluting firm should pay for the environmental damage it causes. Aid to firms for environmental protection is, in principle, not compatible with the 'polluter pays' principle. However, it must be recognized that, in certain cases, such aid may be necessary either as an incentive for companies to implement measures for the protection of the environment going beyond existing mandatory requirements or in order to preserve the competitiveness of the industry when imposing new environmental requirements. Thus, under certain circumstances, aid for environmental protection may be justified. However, it is clear that such aid is capable of distorting competition between companies within the common market and is justified only if the beneficial effects of the aid on the environment outweigh the distortive effects on competition.

206. The Community guidelines on State aid for environmental protection[2] aim to strike a balance between the abovementioned competition policy and environmental policy considerations. Thus, they confirm the 'polluter pays' principle but at the same time provide that environmental aid may be authorized under certain conditions.

In line with these principles, the guidelines stipulate that, although operating aid is normally considered to be incompatible with the common market, in exceptional cases the Commission may authorize operating aid in the form of relief from environmental taxes as well as other compensatory measures, provided that the aid is necessary to achieve the environmental objectives set. Thus, the Commission considered that the relief from new energy taxes on CO_2 and SO_2 emissions in favour of energy-intensive firms in Denmark and the Netherlands and the relief from tax on groundwater and waste in favour of certain firms in the Netherlands could be approved since they had to be regarded as the inevitable price to be paid for being among the first countries to introduce a tax beneficial for the environment. Without some relief, these taxes would so seriously damage the competitiveness of energy-intensive firms in the countries going ahead with the tax, in this case Denmark and the Netherlands, as to be impracti-

[1] Guidelines on rescuing and restructuring firms in economic difficulty (OJ C 368, 23.12.1994).
[2] OJ C 72, 10.3.1994.

cable. However, in order to ensure that these tax reliefs do not distort competition unduly and to encourage aid recipients to implement measures to reduce pollution, the Commission will always stipulate that the tax relief must be temporary and, in principle, degressive.

2.4. Aid to small and medium-sized enterprises (SMEs)

207. The Commission continued in 1995 to apply the criteria of the Community guidelines on State aid for SMEs adopted by the Commission on 20 May 1992.[1] The framework provides for a review of its application by the Commission no later than three years after publication. The Commission therefore presented experts from the Member States, at a multilateral meeting held in July, with the conclusions of the review and noted the changes it believed to be necessary. The Commission's objective continues to be to authorize aid which provides impetus and overcomes specific handicaps affecting SMEs while limiting distortions of competition to a minimum. The discussion chiefly centred on clarification and simplification of the rules, updating the *de minimis* rule and the possibility of taking account of investment expenditure relating to technology transfers.

2.5. Export aid

208. Export aid, i.e. aid linked to the quantity[2] of goods sold in other Member States/EEA States or aid closely linked to the marketing and sale of goods in those countries (such as aid for the setting-up or operation of distribution networks or sales agencies for goods and services within the Community and the EEA), is clearly at odds with the objective of an internal market. Such aid does not promote any Community objective which can justify its direct distortive effects on competition. Thus, the Commission will not authorize export aid. However, in line with the favourable view it takes of financial assistance to SMEs, in particular in view of their limited know-how and difficulties in raising external financing, the Commission may authorize soft aid in favour of SMEs related to the development of export markets, such as aid for consultancy and marketing research, provided that the aid is a one-off operation and limited to the penetration of new markets. It may, under the same circumstances, approve aid to SMEs for participation in trade fairs.

209. European companies are not only in competition within the EC/EEA but also compete for investment on foreign markets, such as Eastern Europe, Russia and South-East Asia. The Commission believes that aid to firms for investments on foreign markets may distort competition and affect trade within the Community and therefore falls under the State aid rules of the EC Treaty. It is concerned that such aid measures may lead to business relocation and be available predominantly in the central and most-developed regions of the Community, thereby negating the efforts made under the Community's cohesion policy to reduce the gap between the more prosperous and the less prosperous regions of the Community. On the other hand, these aid measures may assist countries in Eastern Europe, the Baltic States and Russia in their efforts to convert to a market economy and may, therefore, be justified in certain cases. To establish a clear policy in this field the Commission decided to open the Article 93(2) procedure in respect of a number of internationalization schemes and invited Member States and third parties to submit their comments.

210. The Commission has continued its efforts to reach an agreement with Member States on a communication on short-term export credit insurance, which will require Member States to withdraw public support from export credit insurance companies in respect of short-term commercial risks. The Commission expects that the outstanding problems will be resolved in the course of 1996 so that the communication can then be adopted.

2.6. Rescue and restructuring aid

211. The Commission continued to apply the new guidelines on rescuing and restructuring firms in economic difficulty.[3] Without strict control, rescue and restructuring aid may be used by Member States to sustain ailing companies artificially, with the risk that necessary

[1] OJ C 213, 19.8.1992, p. 2.
[2] The Commission is considering whether to include an explicit exemption to this end in the *de minimis* rule under revision.
[3] OJ C 368, 23.12.1994, p. 12.

structural adjustments in the internal market will be frustrated or unduly delayed and the burdens of such adjustments shifted onto viable companies. However, rescue and restructuring aid may be warranted, for instance, on the basis of social or regional policy considerations, and the main objective of the guidelines is to strike a reasonable balance between such considerations and the creation of a common market with free and undistorted competition.

212. The purpose of rescue aid is to maintain a firm in operation temporarily while an appropriate restructuring plan is drawn up. A rescue aid may therefore be granted for only a limited period of time, normally no more than six months. The Commission considered that the guarantee with a duration of 18 months granted by the Spanish Government to Gutierrez Asunce Corporación (Guascor) for commercial loans did not meet the conditions of rescue aid.

213. Under the guidelines, the Commission makes the approval of restructuring aid subject to strict conditions. In particular, the aid should normally be a one-off operation. It must be linked to a restructuring plan capable of restoring the long-term viability of the firm within a reasonable period of time and on the basis of realistic assumptions as to its future operating conditions, so that further aid will not be necessary. The Commission considers this to be a *sine qua non* for the approval of restructuring aid.[1] In view of the fact that certain German guarantee and soft-loan schemes for the rescue and restructuring of firms in difficulty did not, in principle, exclude the repetitive provision of aid for such operations in favour of the same firm, the Commission reserved its right to examine such repetitive aid individually. Similarly, as the restructuring plan for Santana Motor S.A., a subsidiary of Suzuki Motor Corporation Group, was vague and unconvincing and did not aim to restore the long-term viability of the firm, the Commission could not approve the aid which the Spanish Government intended to grant under that plan and decided to institute the investigative procedure of Article 93(2).

214. In order to offset as far as possible adverse effects on competitors, it is a condition for authorizing restructuring aid to firms operating in sectors suffering from structural overcapacity that the recipient firm reduce capacity in a genuine and irreversible way. In its approval of restructuring aid to the Italian fertilizer company Enichem Agricultura S.p.A., the Commission emphasized the implementation of an irreversible reduction in the company's production capacity and decided, moreover, that this condition for approval had to be respected until such time as the effects of the aid on the competitive situation in the Community were insignificant. However, it was unable to approve a State guarantee in favour of the Spanish company Guascor since the restructuring plan for the company did not seem to provide for reductions in capacity in at least one of its product sectors in which there is overcapacity in the EC.

The Commission cannot itself impose a condition of privatization on an undertaking that receives aid for restructuring purposes. However, a commitment from a Member State to privatize the recipient of aid may be a decisive element for the Commission in assessing the future viability of the company without the need for further aid. Thus, in its decision on the compatibility of the restructuring aid to the Italian fertilizer company Enichem Agricultura S.p.A., the Commission took account of the commitment made by the Italian Government to privatize the company.

2.7. Treuhandanstalt

215. In January, the Commission decided on the terms applicable for 1995 for privatization aid in the new *Länder*. Such terms had previously been defined in 1991[2] and 1992.[3] Following the dissolution of the Treuhandanstalt, the Commission decided that the procedures and assessment criteria applying to privatizations in 1995 should be more in line with those applicable for other Member States. After the transition year 1995 no special rules would exist.

The Commission investigated several individual cases of aid for the privatization of companies in the new *Länder*. By far the most important was the privatization of the petrochemical

[1] See also the Community guidelines on State aid to the aviation sector (OJ C 350, 10.12.1994, p. 5).
[2] XXIst Competition Report, point 249.
[3] XXIInd Competition Report, point 349.

plants of BSL (Buna, Sächsische Olefinwerke, Leuna) to Dow Chemical. In November, the Commission took a final decision allowing aid of ECU 5 billion (DM 9.5 billion) for the restructuring of BSL as an integrated complex.

3. Regional aid

216. The Commission continued its review of the schemes in force, their arrangements and the maps of the regions to be regarded as eligible for regional aid (in accordance with the principles of a reduction in population coverage and consistency with the Structural Fund maps). Decisions were taken for the Netherlands, Belgium (excluding Hainaut), Spain and Italy. The whole review exercise is thus almost over with only one country still having to revise its map. As regards the three new Member States (Austria, Sweden, Finland), the Commission approved and adopted the maps drawn up by the EFTA Surveillance Authority in 1994 in the context of the European Economic Area. The Commission also continued to examine, under Articles 92 and 93 of the Treaty, the compatibility of Structural Fund assistance for various Community objectives and initiatives.

D — Procedures (rights of complainants)

217. In its judgment of 28 September 1995 in Case T-95/94 *Sytraval* v *Commission,* the Court of First Instance annulled the Commission's decision of 31 December 1993 rejecting a complaint in respect of alleged State aid in favour of Sécuripost, a subsidiary of the State-owned French postal administration, which operates in competitive markets. The CFI considered that the Commission had not provided sufficient reasoning for the rejection of a series of statements by complainants alleging preferential treatment of Sécuripost.

The significance of this judgment lies in the statements made by the CFI in respect of the rights of complainants in such procedures. The CFI stated that the Commission must examine impartially and exhaustively all allegations made by complainants and cannot impose on the complainant the burden of proof concerning the existence and (in)compatibility of State aid. Otherwise, complainants would be required to obtain information in support of their allegations which in most cases they would not be able to collect without the Commission's acting as an intermediary. Therefore, the Commission cannot justify the lack of sufficient reasoning or the failure to examine certain allegations on the grounds that the complainant has not provided sufficient information. The conclusions in *Sytraval* confirm the CFI's judgment of 18 September 1995 in Case T-49/93 *SIDE* v *Commission.*

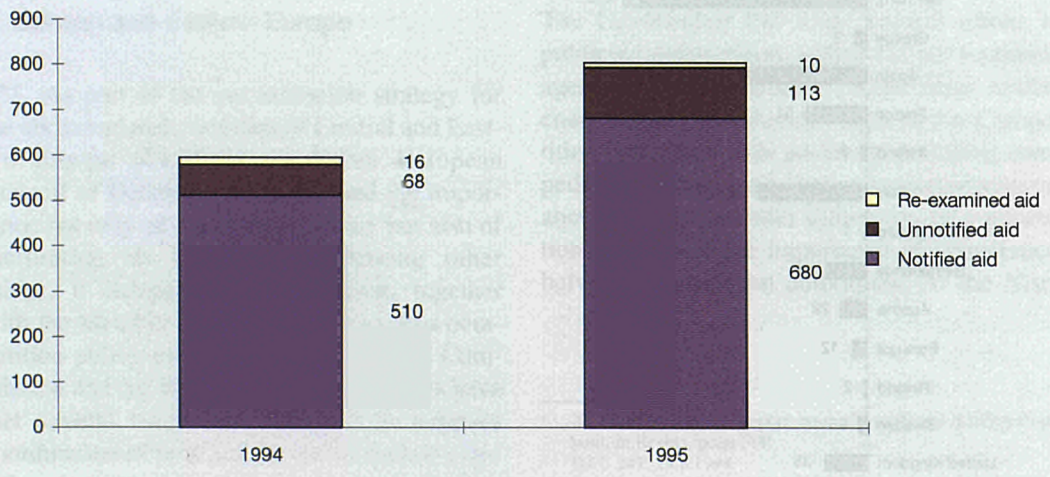
218. There are two stages in the Commission's procedure for the examination of State aid measures: the preliminary examination of the measure, and the opening of the procedure provided for in Article 93(2) EC in cases where the Commission, following the preliminary examination, still has doubts as to the compatibility of the measure with the common market. Whereas the Treaty provides for a procedure whereby third parties are invited to submit their comments in the procedure opened under Article 93(2), this is not the case in respect of the preliminary examination. When the compatibility of an aid with the common market can be established without further examination, it does not appear necessary to alert third parties before the decision of the Commission. Therefore, it has been the consistent practice of the Commission not to grant third parties, including complainants, a right to be heard during the preliminary examination. The European Court of Justice has supported this position in a number of judgments.[1] However, further to the requirement to examine impartially and exhaustively all the allegations made by the complainant and to state the reasons for its decision in *Sytraval*, the CFI imposes an obligation on the Commission, under certain circumstances, to initiate a contradictory procedure with complainants in cases involving difficult questions as to the determination of whether or not measures are State aid before the Article 93(2) procedure has been opened. The judgment seems to impose additional obligations on the Commission in its examination of complaints in cases giving rise to doubts about the existence of aid, and to go against the established case-law of the European Court of Justice. Therefore, the Commission has appealed against this judgment to the ECJ.

[1] See in particular Case 84/82 *Germany* v *Commission* [1984] ECR 1451.

E — Statistics

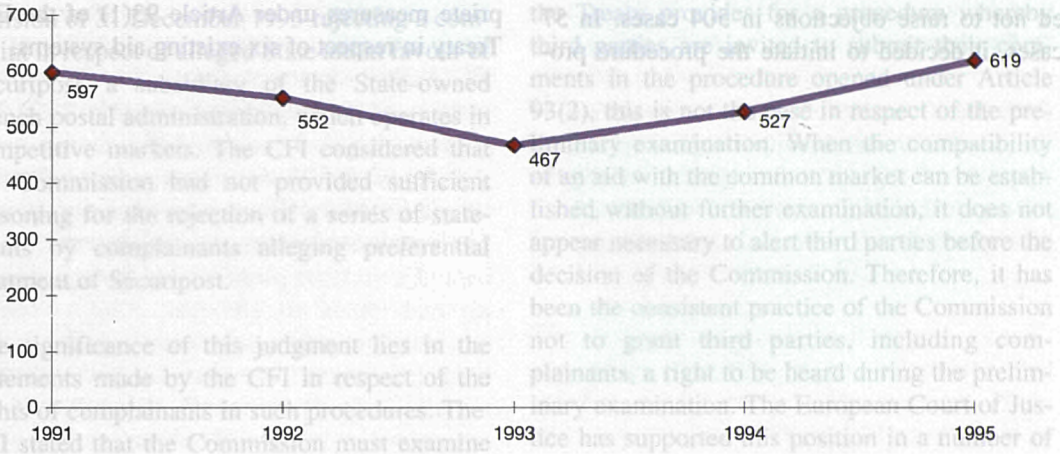
219. Over the year, the Commission registered 680 notifications of new aid measures or changes to existing aid measures, and 113 cases of unnotified aid.[1] In the same period, it decided not to raise objections in 504 cases. In 57 cases, it decided to initiate the procedure provided for in Article 93(2) of the EC Treaty or in Article 6(4) of Decision 3855/91/ECSC. This detailed analysis procedure resulted in 22 positive final decisions, nine negative final decisions and five conditional final decisions. Lastly, the Commission decided to propose appropriate measures under Article 93(1) of the EC Treaty in respect of six existing aid systems.

Graph 7
New cases in 1995

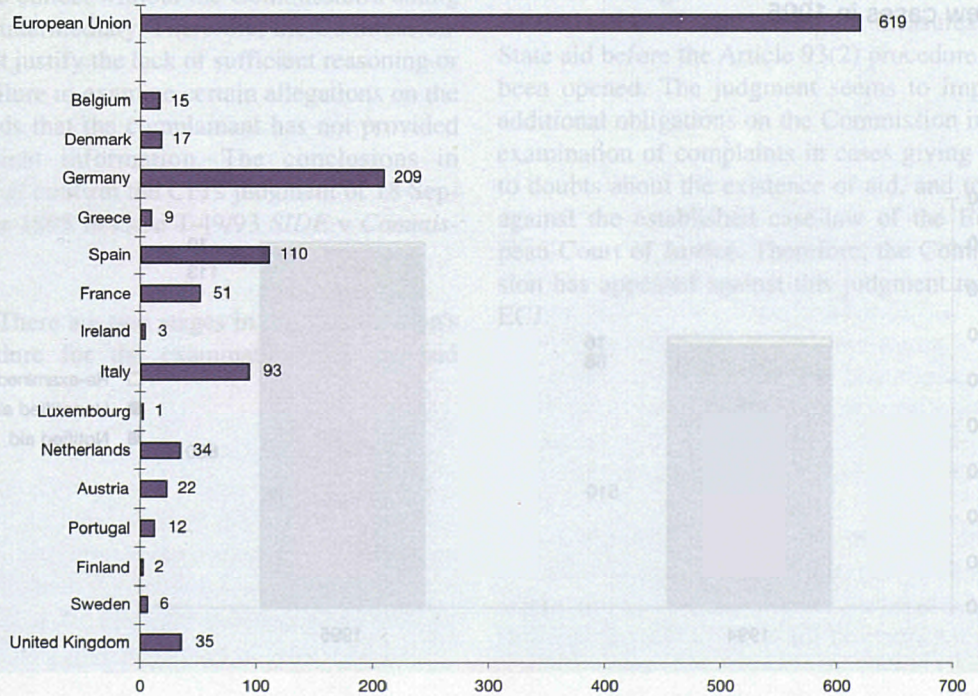


[1] These figures do not include aid cases in agriculture, fisheries, transport and coal.

Graph 8
Decisions taken by the Commission



Graph 9
Decisions by Member State



V — INTERNATIONAL ACTIVITIES

A — European Economic Area

220. After Austria, Finland and Sweden joined the European Union on 1 January 1995, Norway and Iceland were the only remaining EFTA signatories of the Agreement on the European Economic Area (EEA Agreement). On 1 May 1995, they were joined by Liechtenstein.

Cooperation in matters of competition resulting from the EEA Agreement, supplemented by informal but systematic consultation measures established by common accord between the Commission and the EFTA Surveillance Authority,[1] was maintained with the three countries.

In addition, in accordance with Article 172 of the Treaty of Accession of Austria, Finland and Sweden to the European Union,[2] the aid cases relating to the new Member States that were being processed by the EFTA Surveillance Authority were forwarded to the Commission (some 80 cases under Articles 53 and 54 of the EEA Agreement and about 400 aid cases).

B — Central and Eastern Europe, Baltic States, new independent States and Mediterranean countries

1. Central and Eastern Europe

221. As part of the pre-accession strategy for the six associated countries of Central and Eastern Europe (CEECs),[3] the Essen European Council of December 1994 stressed the importance not only of competition policy but also of facilitating its enforcement. Among other things, it charged the Commission, together with the Member States, with setting up a competition policy training programme. The Commission and the Member States' authorities have met several times and managed to improve coordination of their actions and to launch a significant joint action. Officials from the CEECs and from the Baltic States attended a two-week collective training period at DG IV in September (financed by the PHARE programme) and then individually visited a national competition authority in the EU. The action was widely acclaimed by the participants.

Technical assistance under the PHARE programme has so far centred mainly on anti-trust law aspects. In 1996, it will focus in particular on monopolies, exclusive rights and State aid, and will pay particular attention to effective enforcement of legislation.

The Commission's White Paper providing guidelines on the integration of the CEECs[4] underlines the importance of a viable competition policy for economies in transition and lays down four pillars (anti-trust, mergers, State aid and State monopolies/exclusive rights) for the approximation of legislation which the associated countries should undertake. Substantial progress has been made in this area as regards anti-trust; all but one associated country have a competition law authority. Upon accession, these countries will accept all of the Community legislation in force *(acquis communautaire)* and, in the meantime, technical assistance is being provided.

As regards the rules for implementing the Europe Agreements, those for applying the competition rules to undertakings are in the process of being adopted by the Association Councils while a proposed set of rules is being discussed for State aid. One country has agreed to the set of rules and the formal approval process is being launched. Another country has announced its agreement.

The Commission has made several efforts to publicize competition policy for all economic agents in these countries. At the Brno conference in April, the Director-General for Competition spoke to a wide audience, including competition officials and business representatives, about the international dimension of competition policy and the importance of cooperation between competition authorities. At the Vise-

[1] XXIInd Competition Report, points 85 to 89 and XXIVth Competition Report, point 399.

[2] OJ C 241, 29.8.1994.

[3] The Europe Agreements with Romania, the Czech Republic, Bulgaria and the Slovak Republic entered into force on 1 February 1995; those with Poland and Hungary entered into force on 1 February 1994, The Agreements' substantive competition rules are basically those of the Treaty of Rome; see XXIVth Report on Competition Policy, point 401.

[4] Commission White Paper on the preparation of the associated countries of Central and Eastern Europe for integration into the internal market of the Union (May 1995), endorsed by the Cannes European Council in June 1995.

grad Conference on 19-21 June, heads of the competition authorities in the CEECs and DG IV officials discussed specific competition problems of economies in transition and also the interaction of anti-trust and State aid policies; a joint action programme was agreed upon. It was agreed *inter alia* to establish a network for electronic data exchange. In the autumn, the Director-General for Competition visited Bulgaria and discussed issues relating to State aid and monopolies.

2. Baltic States, Slovenia, and new independent States

222. As part of the pre-accession strategy for the Baltic States (Estonia, Latvia and Lithuania), the Free Trade Agreements (FTAs), which contain the same competition rules as those in the Europe Agreements with the CEECs, came into force on 1 January 1995. They will soon be replaced by the Europe Agreements signed in June; these three countries now must fulfil the same conditions for inclusion in the pre-accession strategy which the EU has set for the CEECs. The same implementing rules as those for the CEECs are proposed for the Baltic States. One country has notified its basic agreement both with the rules on undertakings and with those on State aid. Negotiations with Slovenia for a Europe Agreement are under way.

Partnership and cooperation agreements have been signed with Russia, Ukraine, Belarus, Kazakhstan, Kyrgyzstan and Moldova; although the competition rules agreed upon are less stringent than those in the CEEC agreements, the agreements also include a clause on the approximation of legislation. Cooperation has begun, in particular by means of the provision of technical assistance under the TACIS programme. In this context, financing was provided for an international conference organized by the Russian competition authority in the autumn in Moscow and attended by the Deputy Director-General for Competition. A working group with Russia met in May and again in December. It reviewed ways of embarking on the practical implementation of the partnership and cooperation agreement (PCA).

3. Mediterranean countries and Mercosur

223. Association agreements have been signed with Tunisia, Morocco and Israel and similar agreements are currently being negotiated with Jordan, Egypt and Lebanon. These contain or are expected to contain competition rules as provided in the Europe Agreements. The agreement for establishing a customs union with Turkey, which has been signed and is in the process of ratification, contains extremely stringent obligations relating to the approximation of legislation, particularly competition law, which must be fulfilled within specified periods.

It is to be noted that all these bilateral agreements have triggered important moves in the direction of policy harmonization. This is compatible with the recommendations of the group of experts on competition policy in the new trade order (see below).

Negotiations with Mercosur are under way and will extend to some aspects of competition.

C — North America

224. The Agreement between the European Community and the United States on the application of their competition laws was approved by the European Council on 10 April. At the same time, the Council approved the text of a letter addressed to the United States clarifying the European Community's interpretation of certain provisions of the Agreement.[1]

This letter, reflecting the text of Commission statements made to the Council, clarified two issues.

Firstly, information covered by Article 20 of Regulation No 17 or by equivalent provisions of other regulations in the field of competition may not be communicated by the Commission to the US anti-trust authorities save with the express agreement of the source concerned.

Secondly, each party ensures the confidentiality of all information provided in confidence by the other party and will use all the legal means at its disposal to oppose the disclosure of such infor-

[1] OJ L 95, 27.4.1995, as corrected by OJ L 131, 15.6.1995.

mation. The Commission, after notifying the US competition authorities, will inform the Member State(s) whose interests are affected of notifications sent to the Commission by the US anti-trust authorities and, after consulting them will also inform the Member State(s) concerned of any cooperation or coordination of enforcement activities. In the latter regard, however, the Commission will respect a request by the US authorities not to disclose the information which they provide in cases where this is necessary to ensure confidentiality.

The approval of the Agreement by the Member States has imparted the political impetus and created the legal certainty necessary for a redoubling of cooperation efforts between the EC and the US.

Notifications from the US to the EC under the Agreement have continued regularly through the year with a total of 35 altogether (21 from the Department of Justice and 14 from the Federal Trade Commission), 21 of which were in merger cases. The notifications from the EC to the US resumed after 10 April, following the short interruption due to uncertainty about the legal position of the Agreement under Community law.[1] The EC notified the US on 43 occasions in 1995, of which 30 involved merger cases.

The biannual high-level meetings between the Commission and the US anti-trust authorities resumed on 13 November after a break of two years. The discussions concentrated on the effectiveness of current bilateral cooperation and a number of areas were identified for further study. Future bilateral and multilateral cooperation was also discussed in the context of the report of the group of experts on competition policy in the new trade order and of the adoption by the United States of the International Anti-trust Enforcement Assistance Act of 1994. A significant part of the meeting was also given over to innovation markets and their relationship with competition policy.

On 23 January, the Council authorized the Commission to open negotiations with Canada on a bilateral cooperation agreement in the area of competition.[2] A first round of negotiations under this authorization was held on 27 January, when good progress was made in defining the shape of a draft agreement. The draft agreement was discussed by the Council Group on Economic Questions on 6 March. It is expected that the negotiations will be concluded in the first part of 1996.

An informal meeting between the Commission and the Canadian Bureau of Competition Policy was held on 14 November to exchange views on recent developments in competition policy in the EU and Canada.

D — Japan

225. Relations between DG IV and the Japanese Fair Trade Commission (JFTC) remained close during the year under review.

On 22 November, the third seminar held jointly by the two competition authorities took place in Tokyo. The seminar topics concerned the role of competition policy in a globalized economy and the scope of competition policy.

The annual bilateral meeting between DG IV and the JFTC was held on 24 November. The two competition authorities discussed bilateral relations and subjects of common interest such as the liberalization and internationalization of the competition rules. They also reported on the main legislative developments in their respective areas and on the implementation of the competition rules.

Both formal and informal contacts with the Japanese authorities were intensified in 1995. DG IV was thus able, under the deregulation plan adopted in May by the Japanese Government, to put forward its requests to that Government for a broader and more rigorous application of the competition rules, the abolition of virtually all the exceptions to those rules and the strengthening of the competition authority (JFTC).

E — Australia and New Zealand

226. Bilateral contacts with Australia were pursued on a number of occasions during 1995. Topics discussed during these informal meetings included recent policy developments in the

[1] XXIVth Competition Report, point 413.
[2] XXIVth Competition Report, point 414.

EU and Australia, in particular in the area of deregulation, and the reform of the Australian Competition Act.

F — Multinational organizations and other international issues

1. OECD

227. DG IV played an active part in the work of the OECD on competition matters. The main areas of discussion were the convergence of laws, international cooperation and the relationship between competition policy and international commercial policy, in the context of the liberalization of trade. Other topics included the application of the competition rules to the liberalized sectors (telecommunications and maritime transport); lastly, particular attention was paid to certain individual or sectoral aspects of competition policy (failing firm and efficiency claims, vertical integration in the cinema industry, competition policy and environmental policy).

DG IV represents the Commission in the OECD Industry Committee's Working Party on Public Support Measures. By way of its expertise, it continued to contribute to the ongoing OECD survey on public support in the manufacturing sector.

2. World Trade Organization

228. Negotiations in the sectors where agreement could not be reached by the end of the Uruguay Round were actively pursued, especially as regards basic telecommunications services. The European Union, within the framework of the negotiations, put forward a proposal which places emphasis in particular on a timetable for external liberalization that is compatible with liberalization within the European Union, as well as guarantees in terms of the independence of regulators.

In the State aids field, all Member States agreed to the Commission's proposal for a joint notification and reporting procedure to the Commission and the World Trade Organization, thereby modifying the existing standardized system of notification and annual reporting of State aid.[1] As a result of this modification, the notification of subsidies as required by the WTO Agreement on Subsidies and Countervailing Measures and the above annual reporting is carried out in one step. The Commission is confident that this new procedure will alleviate the administrative burden on Member States and ensure a high level of transparency.

3. Unctad

229. DG IV continued to play an active part in the work of Unctad on restrictive trade practices. In particular, it took part in the third United Nations Conference which reviewed all the principles and rules agreed by Unctad in this area.

4. International cooperation

230. The group of experts convened by Mr Van Miert in 1994 to discuss the prospects for closer cooperation between competition authorities presented its report in July 1995.[2] It made a number of recommendations. Having briefly examined the possibility of establishing an international competition authority and a worldwide competition code, it put this to one side as not being realistic in the short or medium term. Instead it felt that one should commence with the introduction of an adequate set of competition rules by those countries not yet having one. In this regard the group recommended that assistance should be provided by those countries which have already acquired experience in this area.

The group proposed a dual approach. First, it recommended a strengthening of bilateral cooperation between competition authorities with, as a priority, a deepening of existing cooperation with the United States and an extension of bilateral cooperation to other partner countries.

The second but principal recommendation of the group was the elaboration of a plurilateral

[1] Commission letter D/20500 dated 2 August 1995 replacing letter SG(94) D/2484 dated 22 February 1994.

[2] Competition policy in the new trade order: strengthening international cooperation and rules (COM(95) 359 final).

cooperation framework as the group believes that, even if it is strengthened, bilateral cooperation cannot resolve all the problems facing competition authorities or create effective momentum for enforcing competition rules in third-country markets. A plurilateral agreement would include all the elements already incorporated in bilateral agreements, to which would be added a set of minimum competition rules, a binding positive comity instrument and an effective and progressive dispute-settlement mechanism.

On 17 July, the Commission authorized the presentation of the report to the Council and to Parliament with a view to launching discussions with the Union's main partners and within the international organizations concerned.

At a meeting of the Directors-General of the Member States' competition authorities on 17 October, it was agreed that a working group should be established to consider the technical aspects of some of the group's recommendations.

This report has also been presented to the European Parliament, to the Council's Article 113 Committee and to the Community's OECD partners. The initial reaction has been positive.

VI — INFORMATION POLICY

231. During 1995, the Commission continued its active public information campaign on competition policy. As in the past, press releases on competition-related issues accounted for almost one third of the total number of Commission press releases. With its limited resources, DG IV's Information Service replied during the past year to more than 1 000 questions from the public, forwarding relevant documentation or providing useful advice. Owing to a lack of resources, most information enquiries have in recent months been answered by way of standard letters containing an updated list of Community publications on competition available to the public[1] (including studies and speeches by DG IV officials). DG IV, in collaboration with the Office for Official Publications, published during 1995 several reference books on competition law, while the EC Competition Policy Newsletter, issued three times per year and with a print-run of 17 000 copies, has established itself as a leading source of information in the field. For 1996, several new publications are under preparation and DG IV plans to introduce data on Europa, the European institutions' host on the World Wide Web.[2]

[1] For more information and to obtain the latest list of Community Publications on competition available to the public, contact DG IV's Cellule Information, C150 00/158, rue de la Loi 200, B-1049 Brussels, tel. (+32-2) 295 76 20, fax (+32-2) 295 54 37, Electronic mail: X400: c=BE;a=RTT; p=CEC; o=DG4; s=INFO4, Internet: Info4@dg4.cec.be

[2] http://www.cec.lu.

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