

European Community
competition policy



1997



European Community competition policy

XXVIIth Report
on competition policy



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The annual Competition Report always provides an opportunity to take stock of the Commission's activities on the competition policy front and to sketch out plans for the future. This year's report follows on in this more than a quarter century old tradition. I shall not dwell here on the traditional objectives pursued by the Commission through its competition policy (improving the competitiveness of businesses both large and small, opening up markets, improving the allocation of resources, increasing consumer choice, etc.), as readers are doubtless familiar with them. Nor shall I hark back to matters already expounded in previous reports such as the increasing globalisation of the world economy or the gathering pace of technological progress. I intend instead to address issues which are impacting the policy for which I am responsible and turning it towards horizons beyond those of the present-day concerns outlined in the body of the report: economic and monetary union (EMU), employment and enlargement of the Union. These three topics are so many challenges to be faced by competition policy in the years ahead.

**Economic and monetary union
and greater competition**

One of the major events of the next few years will undoubtedly be the completion of economic and monetary union, which I am certain will provide the best of frameworks for the most effective possible interplay of competitive forces. The adoption of a single currency in an increasingly integrated market will generate factors that will intensify the competitive process.

Monetary union will enable European businesses to eliminate the risks and costs inherent in currency fluctuations which still influence their investment decisions or their decisions to enter non-domestic markets and which, indirectly, contribute to a partitioning of those markets. It will also help considerably to bring

down the overall cost of intra-Community trade by reducing the transaction charges that are still included in exchange costs. European businesses will be encouraged as a result to trade more within the Union. Competition will be greatly stimulated by this trend towards more closely integrated markets.

This development is likely to trigger much-needed restructuring in certain economic sectors. The Commission will have to keep a particularly watchful eye on the inevitable increase in merger activity and on the State aid measures that will accompany the restructuring drive.

There is likely to be an increase in the number of mergers in the years ahead, just as there was when the single market was created. There were already signs of this happening in 1997. The Commission will be especially vigilant when it comes to monitoring the formation of tight oligopolies in the Community market as these may lead, in certain market situations, to anticompetitive parallel behaviour.

Those economic sectors which are suffering from chronic structural problems and which will have to restructure in order to meet the challenge of stronger competition will doubtless be tempted to seek government support in order to ease the immediate constraints stemming from the completion of EMU. Clearly, the Commission will have to monitor scrupulously compliance with the Treaty rules on State aid inasmuch as the resulting distortions of competition will necessarily be amplified in a bigger, more integrated market.

The single currency will lead to greater price transparency throughout the European Union. It will make it possible to compare the prices charged in each Member State using a common yardstick, the euro. This new transparency will facilitate and stimulate trade between Member States, including parallel trade between distribution networks, because pur-

chasers will be able, for one and the same product, to base their choice on the price differentials between European producers without worrying about the impact on the final price of currency movements or transaction costs. This will necessarily lead to a downward convergence of prices. Such a sharpening of competition might provoke a defensive reaction on the part of certain traders, who may be tempted to delay or slow down the process rather than make the necessary effort to adapt to the new situation. It will be for the Commission to act against such traders and the Member States protecting them and to take a particularly strict stance in such matters inasmuch as their anticompetitive behaviour or the aid they receive will, in a highly integrated market, have a very strong impact in terms of economic inefficiency.

As a harmonising factor, the single currency will highlight the differences between national tax and social security systems. This new transparency will weigh heavily in decisions to allocate capital and hence on the economic efficiency of such decisions. A number of Member States have accordingly asked the Commission to review its policy on State aid in the form of tax concessions in order to combat 'fiscal' distortions of competition injurious to monetary union. Others are calling for a minimum of harmonisation in the social security field.

A policy in support of employment

At an extraordinary European Council meeting on employment (the first European summit entirely devoted to the subject), which was held in Luxembourg on 20 and 21 November, the Member States agreed on 'guidelines' to back the European Union's activities in support of employment. One is struck when reading the guidelines by the many forms the struggle against unemployment takes and by the many remedies that are needed to relieve it. Several of the priority measures identified involve competition policy, either implicitly as in the case of that tool of growth, a 'genuine internal market', to which the policy regarding the opening-up of markets and the drive to reduce administrative costs for small and medium-sized enterprises (SMEs) — in which we have participated by applying to SMEs a more favourable regulatory regime — actively contribute, or explicitly as in the section entitled 'Community policies in support of

employment', of which competition is one. The Luxembourg summit clearly assigns a role in the employment sphere to competition policy, especially as it relates to State aid. Paragraph 27 of the guidelines states that 'it is important to focus on aid arrangements which favour economic efficiency and employment without causing distortions of competition'. In my view, the scope for action on the competition policy front in support of employment is wider.

Competition policy can contribute to the success of an overall employment policy. Through its effect on the structure of markets, it directly influences the competitiveness of the European economy and its rate of growth and hence helps to orient the Union's macro-economic framework towards employment. The Commission's endeavours through its competition policy to open up markets in the Union are making a major contribution to the completion of the single market, that guarantees more trade and faster growth. The control of State aid, as paragraph 27 of the guidelines underscores, makes it possible to ensure that such aid helps to create businesses and lasting jobs while safeguarding fair competition. Competition policy is clearly one of the keys to winning the struggle against unemployment in Europe.

The policy regarding the liberalisation of the energy, transport and telecommunications markets (which the Commission is pursuing with restraint as services are involved which are of general economic interest), is likewise helping to support employment policy. The exposing of former monopoly operators to competition and the introduction of new entrants to these markets leads almost immediately to an increase in productivity and a reduction in running costs, leading in turn to lower charges for users and final consumers. This downward trend in the cost of utility services is a decisive factor in the competitiveness of European industry as a whole. The general strengthening of the competitiveness of our economy is supporting growth and employment. The liberalisation process generates rivalry among businesses looking for new products and services, an effect which is likely to stimulate job creation and consumer demand. The Commission's policy on the opening-up of such markets to competition will thus ultimately have a favourable impact on employment.

Of course, more competition also leads to restructuring, with the weakest going to the wall, which inevitably results in the short term in plant closures and job losses. In such circumstances there can be no getting away from the fact that measures to promote competitiveness are in some cases, at least in the short run, job-destroying. Beyond growth-based solutions, to which competition policy can actively contribute, a social response must be found to these short-term effects because, as Mr Santer has said, Europe cannot be just an economic project. I am a firm believer in the social dialogue: not only does it meet human needs, but it fits in with a new way of thinking about economic efficiency. Involving workers in strategic decisions of this type is, to my mind, conducive to greater competitiveness. A degree of flexibility must doubtless also be introduced into the labour market, as already recommended by the Commission's White Paper on growth, competitiveness and employment and as the Luxembourg Council rightly reiterated, workers must be encouraged to be more mobile both occupationally and geographically so as to facilitate redeployment in the new job-creating markets.

There is another important area where the Commission applies the principle of economic and social cohesion, namely that of the monitoring of State aid. It is not for nothing that the conclusions of the Luxembourg summit focus on this aspect. Although Article 92 of the Treaty prohibits the granting to certain enterprises of government assistance which might distort competition in the common market, it does authorise aid to facilitate the restructuring of firms in difficulty provided such aid, being definitively limited in time, is intended, not to keep firms afloat artificially, but to re-establish their long-term viability within a reasonable period. As regards regional aid, the Commission seeks on the basis of economic criteria to determine which are the least-favoured areas of the Union and to establish for each of them the level of aid intensity so that the aid is targeted at those parts of the Union which are really experiencing difficulties. The monitoring of State aid thus makes a decisive contribution to the economic and social cohesion of the European Union as a whole.

I should lastly like to stress that the Commission pays particular attention to State aid measures for employment. Generally speaking, it tries to ensure that such measures,

which may take the form of, say, a reduction in social security contributions in one or more specific industries, do not have the effect of protecting those industries in one Member State, thereby merely exporting unemployment to other Member States. On the other hand, the Commission has shown flexibility and been favourably disposed towards employment aid for the least well-off categories of unemployed people and for deprived urban areas, while at the same time ensuring that the necessary safeguards are in place to ensure that the objective of the net creation of stable jobs is in fact attained.

Enlargement of the European Union

As the 21st century approaches, the European Union will in all probability welcome into its midst a number of new Member States formerly belonging to the central and east European bloc, the economies of which are, if not yet recovering, then at least convalescing. The Commission put forward proposals as part of its 'Agenda 2000' package with a view to preparing the ground for this new enlargement, which will not be without its difficulties. It recalled in this connection the conclusions of the Copenhagen European Council, which stated unequivocally that membership requires 'the existence of a functioning market economy'.

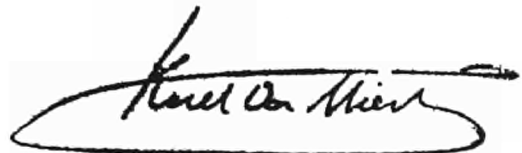
The Commission's priority task is to support the countries of central and eastern Europe in their drive to introduce and develop an attitude of competition-mindedness such as underlies any market economy. This is the objective of our cooperation with those countries, geared as it now is, following an initial phase of collaboration aimed at creating a body of legislation based largely on Community law, to providing technical assistance in the practical application of the competition rules. This provision of assistance is in my view particularly important for a number of reasons. First, there can be no liberalised economy without a competitive spirit. The adoption of a competition culture in these countries, which have lived for more than 40 years under a controlled economy system, is to my mind essential if there is to be a successful transition. Similarly, there can be no liberalised economy without safeguards to ensure that markets do function competitively. It is absolutely essential, therefore, that the authorities have at their disposal the legislative, institutional and hu-

man means of policing those markets. This holds true today when the countries concerned are liberalising their economies, but it will apply with even greater force when they actually join the Community. When they accede to the Union, the countries of central and eastern Europe will thus be in step with their partners and better placed to take up the challenges of the single market. From the existing Member States' point of view, the adoption of this competition-minded approach will ensure a level playing field.

The enlargement of the Union will inevitably lead to an increase in the number of notifications of agreements and State aid measures, and this in a tight budgetary situation which will doubtless not admit a parallel growth in the Commission's material and human resources. Mindful of the need to redirect our monitoring effort more towards cases of manifest importance to the Community as a whole, I have embarked upon a reshaping of policy on the notification of agreements of minor importance, approached national competition authorities about decentralising the application of Articles 85 and 86 of the Treaty in cases of a purely national nature, launched a wide-

ranging debate on vertical restraints and adopted a Green Paper on the subject, some of the proposals of which seek to establish thresholds below which there is a presumption of exemptability. This modernisation of Community law and practice in the competition sphere would no doubt have been needed anyway, but the prospect of eastward enlargement of the Union has speeded up the process and made it a top priority.

This review of the main challenges facing the Community institutions bears out my view that competition policy can be expected to play a federating role in the years ahead. To the extent that, as I have just explained, the policy can contribute to the successful attainment of the Union's principal objectives, I believe it is our duty to act in a spirit of even closer cooperation with other Community policies. The coordination of the Commission's various areas of activity is already highly developed, but it must do more than just ensure a necessary degree of administrative efficiency, being given instead the force of a political principle. In the discharge of my responsibilities, I undertake to contribute actively to the achievement of this principle.



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INTRODUCTION

1. In European competition policy 1997 was a landmark year. The signing of the Treaty of Amsterdam confirmed the Commission's role as a competition authority, efforts to modernise competition legislation were stepped up, and the Commission again demonstrated its intention of applying the European competition rules with measure and determination.

1. The Amsterdam summit confirms the Commission's role⁽¹⁾

2. The Amsterdam summit reaffirmed the Commission's role as the authority responsible for enforcing the competition rules, despite a proposal to quite the opposite effect which had been put forward at the Intergovernmental Conference; the Treaty likewise acknowledged the compatibility of the principles of free competition and services of general economic interest. This positive outcome should be interpreted as a recognition on the part of the Member States of the work done by the Commission and the policy it has striven reasonably but firmly to pursue.

3. Some Member States sought to question the application of Article 90 of the EC Treaty, which deals with tasks of general economic interest, and prohibits restrictions of competition going beyond what is indispensable to the performance of such tasks. They advocated 'balancing' the provisions of the Treaty on this point, which they felt gave the concept of free competition too great a primacy over the concept of public service.

4. The Commission has always taken the view that the Treaty does strike a balance between the two concepts, as it explained in its communication 'Services of general interest in Europe' of 11 September 1996. The compatibility between liberalisation and the maintenance of high-quality public services is guaranteed by the wording of the Treaty itself.

5. The debate ended with the inclusion in the Amsterdam Treaty of a new Article 7d dealing with services of general economic interest, accompanied by a declaration following the final act. The new article spells out the Community's attachment to the general economic interest more explicitly, by saying that public

services must be able to operate 'on the basis of principles and conditions which enable them to fulfil their missions', without prejudice to Articles 77, 90 and 92 of the EC Treaty.

6. Other items concerning public services were also approved at the Intergovernmental Conference. These were a protocol on public broadcasting and a declaration on public credit institutions in Germany.

7. The outcome of the conference is thus a satisfactory one from the point of view of competition policy, as the great institutional and legal balances of the Treaty have been preserved, and are given fresh legitimacy in the Treaty of Amsterdam, and especially the new Article 7d.

2. The modernisation of competition law

8. To prepare itself for the next century, competition policy must adapt to the economic realities of the contemporary world, including such factors as the single market, technological progress, and globalisation. Present legislation and practice are still rooted in the early years of the common market in the 1960s. Despite periodic alterations it seems clear that the legislation is out of step with the requirements of an effective policy, which has to consider the needs not only of businesses but also of a public authority responsible for protecting competition in a single market, with 15 Member States, a market that is moving towards an economic and monetary union which will increase the comparability of prices and intensify trade, and preparing for enlargement towards central and eastern Europe. A huge effort to modernise Community competition law is consequently under way.

2.1. Antitrust policy

9. In the antitrust sphere there were six legislative initiatives completed or launched in 1997. The Council adopted the revised Merger Regulation. The Commission adopted a new *de minimis* notice; a notice on cooperation between Community and national competition authorities; and a notice on the definition of the relevant market. A review of the Commission's policy on vertical restraints, where a Green Paper has been followed by a process of consultation, should culminate in a formal

⁽¹⁾ Karel Van Miert, 'La conférence intergouvernementale et la politique communautaire de concurrence', in *Competition policy newsletter*, Number 2, Volume 3, summer 1997.

proposal in 1998, and a similar review of horizontal restraints has just begun. The objectives being pursued in the modernisation process are threefold: to adapt the legislation to market realities, and consequently to make it more effective both for the authorities and for the business community; to ensure dialogue and openness; and to apply the principle of subsidiarity.

10. On 30 June the Council adopted a regulation amending Regulation (EEC) No 4064/89 on the control of concentrations between undertakings (the 'Merger Regulation'); the proposal had been put forward by the Commission in 1996. The amended regulation entered into force on 1 March 1998. It simplifies the vetting procedure for most of the mergers which hitherto had to be notified in several Member States, and harmonises the treatment of full-function joint ventures⁽¹⁾.

Looking beyond the procedural improvements which were needed, the Commission wanted to resolve the major problem facing firms which were required to notify one and the same merger to the competition authorities of several countries unless the planned transaction reached the turnover thresholds necessary to qualify as a transaction with a Community dimension. The Commission proposed to lower the thresholds across the board, but the Council did not accept this. The original thresholds have been maintained, but the scope of the regulation has been extended to include certain cross-border transactions between firms with turnovers below the thresholds, which would not otherwise be caught by the regulation. Four special thresholds are laid down for such cases, all of which must be met. The Commission believes that this new framework will allow most of the problems of multiple notification to be resolved.

The second major point in this review is the extension of the scope of the regulation to include all full-function joint ventures. Business people wanted to see the treatment of joint ventures simplified and harmonised, and the Council, acting on a proposal from the Commission, has here decided to make no further distinctions among full-function joint ventures, which will all be subject to the procedures and deadlines laid down in the Merger Regulation. If there is coordination

between the parents of a joint venture, the Commission, as well as considering the question as to whether a dominant position is being created or strengthened, will also examine the transaction under Article 85 of the EC Treaty, but will do so in accordance with the procedures laid down in the Merger Regulation.

11. In order to lighten the administrative constraints on firms, and consequently to improve the effectiveness of its own supervisory function, the Commission adopted a new notice defining agreements of minor importance, known as *de minimis* agreements⁽²⁾; these are agreements that are not caught by Article 85(1) of the EC Treaty because they have no appreciable effect on competition or trade between Member States. The notice is in line with the policy of helping small and medium-sized enterprises in that it provides for a form of favourable treatment for such firms. It also makes for more openness in Commission practice as regards the application of Article 85 of the EC Treaty.

The main changes made to the earlier versions of the notice concern the thresholds below which any effect on competition or trade between Member States is not considered to be appreciable. The turnover threshold is done away with, and the market share thresholds are differentiated depending on whether the agreement is between firms at the same level of distribution or marketing (a 'horizontal' agreement) or between firms at different levels (a 'vertical' agreement). There was previously a turnover threshold of ECU 300 million. Removing it means that the notice will now apply to large enterprises with small shares of the relevant market. The market share threshold stays at 5 % for horizontal agreements, and goes up to 10 % for vertical agreements. It may be that Article 85(1) will apply even below these thresholds, however, if the agreement comprises any of a number of listed restrictions of competition which are contrary to the objectives of competition policy on account of their gravity, such as price fixing, production quotas, or market sharing. But as long as the effect of these agreements is felt at domestic rather than Community level, the Commission considers that in the first place it is for the authorities and courts of the Member States to take action. The Commission will intervene only when it considers that the

⁽¹⁾ Council Regulation (EC) No 1310/97 of 30 June 1997, OJ L 180, 9.7.1997.

⁽²⁾ Commission notice on agreements of minor importance, OJ C 372, 9.12.1997.

interest of the Community so demands, and in particular if the agreement impairs the proper functioning of the single market. Thus the notice is once again applying the principle of subsidiarity in the competition sphere.

12. On 10 October the Commission adopted a notice on cooperation between national competition authorities and the Commission in handling cases falling within the scope of Articles 85 or 86 of the EC Treaty⁽¹⁾. The notice pursues the goals of sound administration and subsidiarity.

The notice is aimed at ensuring that where a case falls within the scope of Community law the enforcement of the Community rules will be the responsibility of just one competition authority. A one-stop shop has the advantage of simplifying the administrative process that firms have to go through, and improving legal certainty by removing the danger of contradictory decisions. This division of labour will also make for more effective policing by the separate authorities. The Commission will be able to concentrate on cases with a real Community interest, while the national authorities, with their more thorough knowledge of domestic markets, will be able to take more appropriate decisions at that level.

To achieve this, the national authorities will have to be prepared to apply Community law themselves, or failing that to apply their own domestic law in such a way as to achieve a result similar to what would have been done under Community rules. It is desirable that the same substantive law should be applied, or that case-law be aligned, to prevent the development of divergent interpretations of the competition rules; this would bring with it the danger of forum shopping, with firms seeking out the jurisdiction of the authority they feel will be most favourable to their interests. The notice accordingly calls on those Member States which have not already done so to adopt legislation enabling their competition authority to implement Articles 85(1) and 86 of the EC Treaty effectively.

The notice outlines an acceptable division of labour between the Commission and the national authorities. As a general rule the national authorities should handle cases whose

main effects are felt inside their jurisdiction and which do not appear *prima facie* to qualify for exemption under Article 85(3) of the EC Treaty; the Commission continues to have exclusive power to grant such exemption.

13. The Commission adopted a notice on the definition of the relevant market for the purposes of Community competition law⁽²⁾, and in particular Council Regulation No 17, which implements Articles 85 and 86, and Council Regulation (EEC) No 4064/89, the Merger Regulation. The notice is based on existing case-law and practice; it increases the transparency of Commission policy in this complex area, and makes it easier for companies to anticipate its approach. The definition of the relevant market is a very important step in the analysis of cases, since it provides the frame of reference against which competition between the firms concerned has to be assessed.

The relevant product market and the relevant geographic market form the basis for the measurement of market shares that convey meaningful information regarding market power for use in assessing dominance or applying Articles 85 and 86. The Commission generally bases its analysis on demand substitutability: in other words, the relevant market comprises the products or services which are regarded as interchangeable by the consumer in a given geographic area, by reason for example of their prices and intended use. But the Commission does not rule out the possibility of referring to supply-side substitutability in certain circumstances.

14. Last year the Commission invited debate on the review of its policy on 'vertical restraints', or agreements between producers and distributors. The Commission wants the best possible machinery for combating anti-competitive restrictions of this kind, which can act as an obstacle to the achievement of a dynamic and efficient single market, and wherever possible would like to lighten the administrative burdens imposed by the present system.

The Commission published a Green Paper on the subject on 22 January⁽³⁾. It sets out four options: maintaining the current system; wider

⁽¹⁾ Commission notice on cooperation between national competition authorities and the Commission in handling cases falling within the scope of Articles 85 or 86 of the EC Treaty, OJ C 313, 15.10.1997.

⁽²⁾ Commission notice on the definition of relevant market for the purposes of Community competition law, OJ C 372, 9.12.1997.
⁽³⁾ COM(96) 721.

block exemptions; more focused block exemptions; and the introduction of a rebuttable presumption of compatibility with Article 85(1)⁽¹⁾.

In the course of the consultation process which followed the publication of the Green Paper, the Commission received over 200 written submissions; it also consulted the Community institutions and the authorities in the Member States. It organised hearings at which companies could put forward their views. Certain tendencies have come to the fore, but no consensus has yet emerged. Member States appear to favour a thoroughgoing reform of the present system. Business likewise wants change, but emphasises that any new system would have to guarantee legal certainty. On the basis of these consultations the Commission hopes to put forward a proposal in 1998.

15. The Commission has decided to undertake a comparable exercise with respect to 'horizontal' agreements. The objective here would be the same, namely to adapt the existing law and practice, especially the block exemptions for research and development agreements and specialisation agreements, whose validity has been extended for three years pending a possible review. In the course of the year the Commission sent a questionnaire to a broad sample of European businesses in order to assemble information on the nature of horizontal cooperation, and to evaluate the relevance of current law and practice.

2.2. State aid

16. The Commission regularly has to adapt its policy on State aid to take account of developments arising out of the growing integration of markets following the establishment of the single market. It frequently revises the competition rules in this respect. In its 'Fifth survey on State aid' the Commission observed that the volume of public aid continued at high levels; in the 'Action plan for the single market' it undertook to present new guidelines for regional aid, to tighten its guidelines on rescue and restructuring aid, and to carry out a more detailed examination of major cases, using a set of cross-industry guidelines or a 'multisectoral framework' which would require notification of all individual cases in

which fairly substantial aid was to be granted under regional schemes⁽²⁾. The Commission reached decisions on regional aid and the multisectoral framework in 1997.

17. The Commission makes constant efforts to improve openness or transparency, and to simplify the rules in force. It presented a proposal for a Council regulation, to be adopted under Article 94, which would empower the Commission to exempt certain categories of horizontal aid from the notification requirement, subject to certain conditions. It will shortly be presenting another proposal under Article 94 for a procedural regulation codifying all the procedures applying to State aid measures.

18. As part of the work in progress on measures to limit harmful tax competition, the Commission considers that some clarification is needed of the application of Article 92 of the EC treaty to tax measures. In a communication to the Council entitled 'Towards tax coordination in the European Union' the Commission undertook to present 'a communication that clarifies and refines its policy on the application of the State aid rules to fiscal measures in the light of developments in the single market.'⁽³⁾

3. Statistics on Commission activity in applying Community law in 1997

19. The Commission continued to demonstrate its determination to apply the Community competition rules with firmness. Once again there was very intense activity in all areas within the Commission's competence. The total number of new cases was 1 338, comprising 500 cases under Articles 85, 86 or 90, 182 mergers, and 656 State aid cases⁽⁴⁾; this is an appreciable increase over 1996, being 92 cases more. The increase is not spread evenly over the three categories: the number of new State aid cases was steady, while new merger cases grew substantially (up 31 %). The number of cases closed was 1 165: there were 517 Articles 85 and 86 cases, 146 mergers, and 502 State aid cases, which is an increase of about 104 by comparison with the previous year.

⁽²⁾ ECS(97) 1 final, 4.6.1997.

⁽³⁾ COM(97) 495 final.

⁽⁴⁾ Including 10 ECSC mergers.

⁽¹⁾ 1996 Competition Report, points 46 to 50.

20. In the antitrust sphere the Commission dealt with more than 500 cases. It took one decision under Article 65 of the ECSC Treaty, finding against an exchange of sensitive information, and one decision under Article 86 of the EC Treaty condemning the abuse of a dominant position. In many cases it granted exemption under Article 85(3) of the EC Treaty, or terminated Article 86 proceedings after the firms involved changed their agreements or showed that they had put an end to the offending practices so as to resolve the competition problems identified by the Commission departments.

21. The Commission took 146 formal decisions in merger cases⁽¹⁾, including one prohibition decision and seven conditional authorisations granted on a second-stage inquiry, after the notifying parties had given undertakings which resolved the competition problems identified. There were particularly tough negotiations in some delicate cases, an example being *Boeing/McDonnell Douglas*.

22. Turning to compliance with the competition rules on the part of public enterprises and State monopolies, the Commission adopted three decisions finding conduct to be incompatible with the EC Treaty under Article 90: two were against port authorities in Italy, and one against the Flemish authorities in Belgium, who had given a private television channel the exclusive right to broadcast advertising aimed at Dutch-speaking viewers in the country.

23. The number of State aid cases being dealt with continues to be high; the total number of Commission decisions increased slightly in 1997. The year was marked by an increase in the number of decisions to initiate more detailed inquiry proceedings. Given a steady volume of new cases, this implied a further burden of work for the Commission departments. The increase in the number of cases in which inquiry proceedings were initiated is also symptomatic of the growing complexity of the cases the Commission has to consider.

4. The liberalisation process

24. In accordance with the principle of access for all Union citizens to services of

general economic interest, the Commission actively supports a policy of liberalisation of public monopoly network industries such as telecommunications, energy and transport, because it is convinced that liberalisation of these markets brings benefits in terms of improved productivity, lower operating costs, and lower consumer prices. It is in transport and in telecommunications that the process has advanced furthest. The liberalisation of air transport took effect on 1 April 1997, and the liberalisation of voice telephony services on 1 January 1998.

25. Following on from a Council resolution of 22 December 1994, a Commission directive of 13 March 1996⁽²⁾ provided that competition was to be introduced in voice telephony and the provision of infrastructures on 1 January 1998⁽³⁾. This liberalisation programme was boosted by the signature of the World Trade Organisation (WTO) agreement on basic telecommunications services, which provided for a gradual liberalisation of the telecommunications markets of most of the European Union's trading partners.

26. To ensure the success of this liberalisation drive the Commission took a number of measures. It wanted to be sure that the Member States had satisfied their obligations under Community law, and transposed the directive into their domestic law in time to ensure that the regulatory framework was ready by 1 January 1998. On 29 May the Commission approved an initial report finding that most Member States had transposed the whole of the regulatory framework, or would have done so by the end of the year. But there were also countries where only the main principles would have been transposed by then. The Commission would strive to ensure that the measures adopted were completed and properly applied. The Commission also observed that in some Member States the domestic regulatory framework was very advanced and went beyond the requirements of the directive. Bearing in mind the different levels of network development in the Union, the Commission wanted to pursue a balanced liberalisation policy; it thus acknowledged the need to give some Member States (Ireland, Portugal, Greece, Spain and Luxembourg) more time, so as to allow for the state and dimensions of

⁽¹⁾ Including 10 ECSC decisions.

⁽²⁾ Commission Directive 96/19/EC amending Directive 90/388/EEC with regard to the implementation of full competition in telecommunications markets, OJ L 74, 22.3.1996.

⁽³⁾ An extension has been granted to five Member States.

their networks. None of the dates for liberalisation is beyond the year 2000.

27. The Commission likewise believes that the absence of a single liberalised market in energy is a serious competitive disadvantage for European businesses as compared with those of its main trading partners, who generally enjoy lower costs. At the end of 1996 the Council adopted the directive the Commission had proposed regarding common rules on the single market in electricity, which, once it enters into force in 1999, should lead to more than 50 % of the market being opened up on average⁽¹⁾. The central ideas here are the liberalisation of production and access to the market by outsiders, which will allow some electricity buyers to exploit price competition between power generators. From an operational point of view the directive proposes an alternative: either direct access to infrastructures, or access to the market via the operator of the network, who would become the sole buyer and seller of electricity. The Commission has also put forward proposals for common rules governing the single market in natural gas⁽²⁾. The Council meeting on energy held in December signalled the Council's agreement to the Commission proposals.

28. In addition to its legislative activities, the Commission plays a watchdog role in that it supervises the liberalisation process by initiating infringement proceedings against Member States under Article 169 of the EC Treaty. In 1997, for example, it initiated proceedings against seven Member States for failure to implement the liberalisation of telecommunications.

5. International relations

29. The Commission's competition policy would be less effective if the Commission were not also active at international level. The increasing globalisation of markets has necessarily led the Commission to interest itself in extra-Community trade. This is reflected in bilateral cooperation with non-Community countries, and in active collaboration on the part of the Community authorities in multilateral organisations dealing with competition questions.

30. Central and eastern Europe offers enormous scope for bilateral action on the part of the Commission in the competition sphere, particularly with a view to future enlargements of the Union to take in these countries. The association agreements between the Union and the countries of the former eastern bloc call on the eastern countries to adopt the principles of Articles 85 and 86 of the Treaty and the State aid rules in their own legislation. The Commission is to monitor this, and to help with the introduction of the new rules. An annual conference at which all the competition authorities of these countries are represented allows a regular stocktaking, which is particularly important ahead of forthcoming accessions.

31. In the year under review the conference took place in Sofia in Bulgaria. The Commission expressed satisfaction at the enactment of new antitrust legislation in Hungary and Romania, and the preparation of competition legislation in Estonia and Slovenia. New needs are being felt with respect to the application of this legislation, and the Commission said it was ready to provide the necessary assistance.

But State aid policy is nowhere near as developed in the associated States. The authorities responsible for supervising State aid have, as a rule, been set up only recently. One of their greatest difficulties is the lack of transparency and of an inventory of State aid measures. The Commission is encouraging its partners to continue with their reforms, and undertakes to help them to introduce State aid guidelines which take account of the special circumstances of these economies in transition.

32. Cooperation between the Commission and non-Community competition authorities takes place under bilateral agreements aimed at combating anticompetitive practices with a global dimension and those that national and regional systems cannot deal with. This is the case with the agreement between the European Community and the United States concluded in 1991 and approved by the Council in 1995. This type of agreement essentially provides for coordination between authorities, rules of international comity, and an exchange of information regarding operations affecting the markets of the two partners, always subject of course to the obligation of confidentiality. The agreement does not prevent differences of view, but it has proved a useful way of improving the effectiveness of the competition

⁽¹⁾ Parliament and Council Directive (EC) No 96/92 of 19 December 1996, OJ L 27, 30.1.1997.

⁽²⁾ COM(91) 548 final and COM(93) 643 final.

machinery on both sides of the Atlantic. Negotiations have recently been going on with a view to improving Euro-American cooperation. The draft of a new agreement provides that under rules of international comity one of the parties is to adjourn or to stay its own supervisory activity in respect of an anticompetitive practice which primarily affects the territory of the other, provided the other is disposed to act. If adopted the draft should reduce the extraterritorial application of competition rules. The Commission hopes that the draft agreement can be approved shortly.

33. In the past the two parties' competition authorities have had fruitful exchanges on the basis of the existing agreement, sometimes in quite sensitive cases, such as *Sprint/Sandoz-Geigy*, without encountering major difficulties. There was satisfactory cooperation this year too, in cases such as *Santa Cruz/Microsoft* and *Guinness/Grand Metropolitan*. In *Guinness/Grand Metropolitan*, the Community and US authorities had identical views on the solutions to the competition problems they had identified on the spirits markets in the United States and Europe. *Boeing/McDonnell Douglas* is the only case in which the two authorities did not adopt the same point of view. The Commission's inquiries led it to the conclusion that the merger might help to strengthen a dominant position already held by Boeing on the world market in large commercial jet aircraft. The only remaining competitor would be Airbus. After tough negotiations with the companies, the Commission considered that the undertak-

ings offered by Boeing were enough to remove the competition concerns. The case shows that the Commission is capable of ensuring compliance with the Community competition rules on markets with a global dimension. It also shows that the European Union and the United States can take divergent views of some transactions. Here the Commission showed its willingness to apply the European competition rules without calling into question the principle of close and frank cooperation with the US competition authorities.

34. A similar cooperation agreement between the Community authorities and the Canadian authorities was finalised at the beginning of the summer. It has to be adopted jointly by the Commission and the Council after Parliament has first delivered its opinion.

35. The Commission's international activities in the competition sphere are not confined to these bilateral relations. The Commission is also active in multilateral matters; in particular, it participates in meetings of the WTO and the Organisation for Economic Cooperation and Development (OECD). The Ministerial Conference of the WTO, which met in Singapore in December, set up a working party to study problems arising in trade and cooperation policy. The working party has held several meetings in Geneva, and has shown that there is growing interest in competition questions among developing countries.



A — Changes in the legislative and interpretative rules

1. Revision of the 'de minimis' notice

36. To reduce the administrative constraints encumbering firms, particularly as regards the notification of agreements, the Commission adopted in 1970 a notice on agreements of minor importance⁽¹⁾. Such agreements have no significant effect either on competition or on intra-Community trade and, consequently, are not caught by Article 85(1), which prohibits agreements between undertakings. The instrument was subsequently revised in 1977⁽²⁾, 1986⁽³⁾ and 1994⁽⁴⁾. It was clear, however, that the arrangements did not meet firms' requirements: agreements of minor importance continued to be notified to the Commission and to burden the monitoring departments unnecessarily, to the detriment of the principle of sound administration. This is why a new notice⁽⁵⁾ was adopted on 15 October 1997, with the threefold purpose of clarifying the Commission's interpretation of what constitutes an agreement of minor importance, easing the burden of administrative constraints while providing legal certainty for undertakings and, hence, making monitoring more effective by concentrating efforts on cases with a definite impact on the single market. The notice is also part of the policy of assisting small and medium-sized firms by giving them a number of specific advantages. Lastly, the instrument helps to make the Commission's practice concerning the application of Article 85 more transparent.

37. The major change compared with the 1986 and 1994 instruments concerns the level of the thresholds below which Article 85 is not applied. Two alterations have been made: the turnover criterion has been abolished, and a distinction has been drawn in terms of market-share thresholds between horizontal and vertical agreements. The earlier, turnover-based threshold of ECU 300 million has been abolished. Large undertakings which easily met this first threshold but which had modest

market shares on a given market were systematically and improperly excluded from the benefit of the previous notice. From now on, therefore, they can enjoy the advantages conferred by the new notice. The market-share threshold, for its part, is differentiated. For horizontal agreements, the ceiling remains fixed at 5 % of the total market, but for vertical agreements the ceiling is raised to 10 %. This distinction between horizontal and vertical agreements, which involves raising the threshold of non-applicability for the latter, is based on the presumption that an anti-competitive practice committed within vertically linked companies has a less serious impact on markets.

38. Below these thresholds, Article 85 will, however, still be applied to agreements leading to restrictions of competition that are by their nature incompatible with the objectives of the Treaty. Such restrictions are 'black-listed' in the notice, which is an innovation. They comprise horizontal agreements which have as their object to fix prices or to limit production or sales, and to share markets or sources of supply; they also comprise vertical agreements designed to fix resale prices or containing territorial protection clauses.

39. Below the thresholds, and taking account of the market shares in question, such reprehensible agreements will probably have a national rather than a Community impact. This is why the Commission considers that, below the thresholds, it is the courts and competition authorities of the Member States which should act first, either under Article 85(1) or under national law. The Commission will examine such agreements only where it believes that the Community interest so requires and in particular if they adversely affect the functioning of the single market.

40. Lastly, new provisions beneficial to independent small and medium-sized undertakings, as defined in the Commission's recommendation of 1996⁽⁶⁾, have been inserted in the new instrument. Agreements entered into by independent SMEs whose annual turnover and balance-sheet total do not exceed ECU 40 million and 27 million respectively and which have a maximum of 250 employees will not, in principle, be investigated by the Commission. The latter reserves the right to intervene,

⁽¹⁾ Commission notice on agreements of minor importance, OJ C 64, 2.6.1970.

⁽²⁾ Commission notice on agreements of minor importance, OJ C 313, 29.12.1977.

⁽³⁾ Commission notice on agreements of minor importance, OJ C 231, 12.9.1986.

⁽⁴⁾ Revised Commission notice on agreements of minor importance, OJ C 368, 23.12.1994.

⁽⁵⁾ Commission notice on agreements of minor importance, OJ C 372, 9.12.1997.

⁽⁶⁾ Commission recommendation concerning the definition of SMEs, OJ L 107, 30.4.1996.

however, where such agreements significantly impede competition in a substantial part of the relevant market or where competition is restricted by the cumulative effect of parallel networks of similar agreements made between several producers or dealers.

2. Notice on cooperation between Community and national competition authorities

41. The Commission had already expressed its wish to decentralise the application of Community competition law when, in 1993, it adopted a notice intended to provide the ground rules for cooperation between its departments and national courts⁽¹⁾. So as to strengthen the incentive to decentralise, it adopted, on 10 October 1997, a notice intended to clarify the conditions for cooperation between itself and the Member States' competition authorities in handling cases caught by Articles 85 and 86⁽²⁾. The notice is the result of wide consultations with all the Community institutions, the Member States and business representatives⁽³⁾.

42. Its purpose, mainly, is to decentralise the application of the Community competition rules so as to make them more effective. To this end, it provides that each competition authority in the Member States will handle the cases whose effects are basically felt on its territory, though without calling into question the Commission's exclusive power to grant exemptions.

It describes the practical cooperation sought between the competition authorities of the Member States and the Commission. The arrangements are designed to ensure the establishment of a one-stop shop for monitoring cases which are covered by Community competition law, so as to reduce the risk of contradictory decisions and to simplify, as much as possible, the administrative formalities with which firms must comply.

For this objective to be achieved, the Commission believes it is desirable for the national

authorities themselves to apply Community law direct or, failing that, to reach, pursuant to their national law, a result similar to that of applying Community law. Such harmonisation will make it possible to prevent divergent solutions to common problems from arising and firms from being tempted to seek out whichever authority seems to them to be the most favourable to their interests. This is why the notice invites those Member States which have not already done so to acquire their own legislation enabling their competition authority to implement Articles 85(1) and 86 effectively.

The notice lays down the guidelines for an appropriate allocation of tasks between the Commission and the national supervisory authorities, which most of the Member States now have. Generally speaking, the national authorities will handle cases the effects of which are felt in their territory and which appear, upon preliminary examination, unlikely to qualify for exemption under Article 85(3), for which the Commission has exclusive competence. The Commission cannot therefore decentralise cases which are notified to it with a view to exemption under Article 85(3).

43. The notice is intended to facilitate cooperation and consequently provides for specific implementing arrangements. A distinction is drawn between cases which the Commission deals with first and those which go first to a national authority. In the former category, the Commission decentralises complaint-based cases only if it alone can handle the own-initiative procedures and notifications. If the national authority agrees to handle the complaint — rejected for lack of Community interest — the Commission will hand over to that authority the documents in its possession. In the latter category, the Commission recommends that the Member States inform it of the proceedings which they initiate, in particular in cases of special interest for the Community. Cooperation between them, therefore, may take the form of suspension of a decision by the national authority or of a formal consultation of the Commission. The Commission emphasises that it will regard dilatory notifications, made in order primarily to obstruct national proceedings, as not having priority.

The application of the notice will be reviewed annually. Provision is also made for the notice

⁽¹⁾ Notice on cooperation between national courts and the Commission in applying Articles 85 and 86 of the EEC Treaty, OJ C 39, 13.2.1993.

⁽²⁾ Notice on cooperation between national competition authorities and the Commission in handling cases falling within the scope of Articles 85 or 86 of the EC Treaty, OJ C 313, 15.10.1997.

⁽³⁾ 1996 Competition Report, points 30 to 33.

itself to be completely reviewed by the end of the fourth year after its adoption.

3. Notice on the definition of relevant market

44. To improve the transparency of its competition policy, both for business and the legal community, the Commission adopted, on 15 October 1997, a notice on the relevant market for the purposes of Community competition law⁽¹⁾ and, in particular, of Regulation No 17⁽²⁾ and Regulation (EEC) No 4064/89⁽³⁾, the Merger Regulation. Such clarification is evidence of the Commission's willingness to increase the predictability of its market analyses for practitioners of Community competition law. The definition of the relevant market is a very important stage in competition analysis, since it provides the context in which the degree of competition between firms will be assessed.

The main purpose of market definition is systematically to identify the competitive constraints on the firms involved. The objective, as regards both the product and geographic dimensions, is to identify those actual competitors of the firms involved that are capable of constraining the firms' behaviour and of preventing them from behaving independently of effective competitive pressure. Accordingly, the relevant market is an analytical tool which makes it possible, in particular, to calculate firms' market shares. These will provide a preliminary indication of their market power, for the purposes of assessing dominance or applying Article 85.

The Commission, as a general rule, bases its analysis on the substitutability of demand. In other words, the relevant market is made up of those products or services which the consumer considers to be mutually interchangeable in a given geographic area, in particular as regards use and price. This means that the relevant market, defined as the products or services sold in a given geographic area by the firms involved in the proceedings, comprises the

products or services and the marketing areas which are likely to affect or sufficiently limit the competitive behaviour of the firms in question. Supply-side substitutability may also be taken into account when defining markets in situations where its impact is equivalent to that of demand substitution in terms of effectiveness and immediacy.

The notice is intended to be as empirical as possible and is based on the Commission's previous case-law. It tries to set out in coherent, readable fashion the economic principles on which the Commission bases its approach to the definition of relevant markets. Thus it lists the types of evidence which make definition possible. With regard to the product market, the Commission takes account in particular of actual substitutions in the recent past, the results of econometric estimates, the views of customers and competitors, market research and the degree of resistance to change shown by users. To establish the geographic dimension of the relevant market, it uses *inter alia* the movements associated with price variations, the socio-cultural characteristics of demand, customer and competitor behaviour, trade flows and the various barriers to entry, such as transport costs. The combination of all these factors results in the identification of the relevant market.

4. Review of the policy on vertical restraints

45. Last year the Commission began a review of its policy on vertical restraints. This was given firmer shape with the publication of a Green Paper, adopted on 22 January 1997⁽⁴⁾. The discussion paper triggered wide debate on the effects of vertical restraints and on the need to review the instruments and the Commission's current practices in this field. The Community institutions, the Member States, business and the legal community all took part in the debate, which also attracted the attention of our trading partners. The Commission's paper contemplates four options: maintaining the current system; widening the scope of block exemptions; limiting the scope of current block exemptions; and a rebuttable presumption that Article 85(1) does not apply⁽⁵⁾.

⁽¹⁾ Commission notice on the definition of relevant market for the purposes of Community competition law, OJ C 372, 9.12.1997.

⁽²⁾ Council Regulation No 17 of 6 February 1962, OJ L 13, 21.2.1962.

⁽³⁾ Council Regulation (EEC) No 4064/89 of 21 December 1989, OJ L 395, 30.12.1989, corrected in OJ L 257, 21.9.1990, and Commission Regulation (EEC) No 2367/90 of 25 July 1990, OJ L 219, 14.8.1990, as amended by Commission Regulation (EC) No 3666/93 of 15 December 1993, OJ L 336, 31.12.1993.

⁽⁴⁾ COM(96) 721.

⁽⁵⁾ 1996 Competition Report, points 46 to 50.

During the consultation process, the Commission received more than two hundred contributions from the various parties involved. Hearings were held with the representatives of the Member States and with those of business. These fruitful exchanges made it possible to identify trends, though not yet to say what the consensus is. The Member States appear to favour replacing the current framework with a new system of exemption or negative clearance, up to a certain threshold of market power. Business, for its part, is willing to change, but stresses that any new system should be based on legal certainty.

The Commission must now draw together the information and ideas it has gathered and put forward a proposal that reflects the concerns of business and the public authorities. It should be able to present a proposal in 1998.

5. Review of the policy on horizontal agreements

46. The Commission decided this year to begin assessing its policy on horizontal agreements. It is resolved, if necessary, to revise and adapt the texts and its current practices, in particular the exemption regulations relating to research and development agreements and specialisation agreements, whose validity has been extended for three years⁽¹⁾ with a view to possible revision.

47. The first stage of this exercise was a thorough examination of the Commission's policy in this field. As well as carrying out an internal study within DG IV, the Commission consulted the business world. In July it sent 150 questionnaires to a cross-section of firms (120) and trade associations (30) to gather information on the objectives, forms and patterns of horizontal cooperation and to assess the relevance of the regulations and notices in force. The Commission considers itself satisfied with the results. It received 94 replies. The survey reveals a major trend towards more cooperation between undertakings in recent years, in order in particular to respond to the challenges of globalisation, the rapid development of advanced technologies and fiercer competition. The majority of the undertakings replying seem to consider that the current instruments meet their real requirements only imperfectly. A need to review the

Commission's policy on horizontal cooperation has therefore emerged.

The Commission also contacted the competition authorities of the Member States to request their assistance in carrying out a comparative study of the various systems of supervising horizontal agreements in the Member States.

6. Guidelines on setting fines

48. On 3 December the Commission took note of the guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty, drawn up by DG IV and presented to the College of Commissioners by Mr Van Miert. The publication of the guidelines⁽²⁾ is intended to improve the transparency and effectiveness of the Commission's decision-taking practice. It is directed both at firms and their legal advisers and at the Communities' judicial institutions. The application of the principles set out in the guidelines will also help to make the Commission's policy on fines more coherent and to strengthen the deterrence of the financial penalties.

49. The method of calculating the fine is now based on the determination of a basic amount expressed in ecus. This is increased to take account of possible aggravating circumstances or reduced to reflect possible attenuating circumstances. The basic amount is determined according to the gravity and duration of the infringement. The guidelines provide an indicative list within the limits set by Article 15(2) of Regulation No 17 or Article 65(5) of the ECSC Treaty. Aggravating circumstances include repeated infringement, refusal to cooperate or the role of leader in the infringement; attenuating circumstances include an exclusively passive role in the infringement or termination of the infringement as soon as the Commission intervenes. Under the heading 'General comments', the document states that, where possible, objective factors such as any economic or financial benefit derived by the offenders or the ability of the firms in question to pay should also be taken into account.

50. The guidelines supplement the arrangements provided for in the Commission notice of 18 July 1996 on the non-imposition or

⁽¹⁾ OJ L 306, 11.11.1997.

⁽²⁾ OJ C 9, 14.1.1998.

reduction of fines where an undertaking cooperates effectively in the proceedings⁽¹⁾. The two instruments form a whole, which the Commission considers will make its policy in this field more effective, more coherent and more clear.

B — Applying the competition rules to support market integration

1. Exchanges of information

51. On 26 November 1997, the Commission adopted, under Article 65 of the ECSC Treaty, a decision prohibiting an information exchange system, which was notified by the association of German steel undertakings *Wirtschaftsvereinigung Stahl* and which was meant to group together the main German producers. The agreement, which was not implemented, provided for the exchange of sensitive, recent and individualised data on about 40 steel products, covering all the Member States. Such an exchange of information in mature and highly concentrated markets is a serious restriction of competition, since it heightens the market transparency to the point where any attempt at independent, pro-competitive behaviour would be exposed to retaliatory measures by competitors, who can easily determine its origin.

2. Action to promote the creation of the single market: combating the partitioning of markets

52. Competition policy contributes to the Community objective of creating a single market and plays a crucial role in bringing it about, in particular by promoting the opening-up of markets. Articles 85 and 86 provide the Commission with effective means to this end. They apply both to horizontal agreements between undertakings, which are designed to divide up national or interregional markets, and to vertical relationships between manufacturers and distributors, which may isolate those markets so that integration is slowed down or seriously impeded.

53. As the Green Paper on the subject indicates, the Commission is particularly alert to

the effects of agreements and restrictive practices in distribution networks which impede intra-Community trade. Some exclusive distribution agreements lead to the introduction of distribution systems based on national territory and to the foreclosure of each of the markets thus isolated, in particular by prohibiting each distributor from supplying customers established in another contract territory. Such restrictions are particularly intolerable where there are price differences between Member States and where consumers in the Union cannot have access to the markets with the lowest prices. They are intolerable since they limit competition and prevent the convergence of prices within the Union. The damaging effects of such a situation will be even more striking when economic and monetary union is implemented.

54. As in previous years, the Commission has spared no effort in combating horizontal agreements which result in the partitioning of markets. Thus it sent the United Kingdom association of manufacturers and distributors of dental equipment, the British Dental Trade Association (BDTA), a comfort letter regarding the latter's rules and regulations on fairs and exhibitions, once it had ascertained that there was no provision or practice which discriminated against undertakings from third countries wishing to display equipment at fairs and exhibitions organised by the BDTA. Similarly, when joint control of *Costa Crociere*, an undertaking specialising in Mediterranean cruises, was acquired by Carnival Corporation and Airtours (operating in North America and northern Europe respectively), the Commission considered that the agreements setting up the joint venture were caught by Article 85(1), since they limited the growth of the acquirers on their joint venture's markets (they were reserving the Mediterranean market for *Costa Crociere*). However, the Commission granted this agreement an exemption, given the expected improvement for the consumer in terms of commercial services and moderate prices. Lastly, in another case concerning the creation of a joint venture, for the production of lubricants between the undertakings *Hydro Texaco Holdings A/S* (Texaco) and *Preem*, both active in the oil industry, the Commission agreed to exempt the agreement only after the parties had changed the clauses which isolated the Swedish market for the distribution of lubricants through an exclusive distribution licence granted to *Preem* by *Texaco*. When the agreements have been changed, the parties will be

⁽¹⁾ Commission notice on the non-imposition or reduction of fines in cartel cases, OJ C 207, 18.7.1996 and 1996 Competition Report, points 34 and 35.

free to obtain lubricants from the supplier of their choice wherever situated.

55. The Commission has shown similar willingness with regard to vertical links. It has attempted in particular to check that the setting-up of a joint venture, often justified at the production stage on grounds relating to the cost of investment in the research and development of new products or to the achievement of economies of scale, does not result in anticompetitive behaviour at the distribution stage. Thus the Commission authorised the creation of a joint venture in the tyre sector between Michelin and Continental after ascertaining that the changes to the agreements made by the parties had the effect of removing doubts about possible cooperation between the founders in the marketing of the joint venture's products on their respective distribution networks. It also took account of the fact that a joint franchising project had been abandoned. The Commission warned the parties that their marketing practices would continue to be supervised. Similarly, when a joint venture was set up between Sanofi and Bristol-Myers Squibb, which was designed to develop, produce and market new active molecules against cardiovascular disease, the Commission took an active interest in the conditions for marketing the new products in the Member States. Given the complementary nature of the founders' businesses and the pro-competitive situation on the markets in question, where generic products play an important role, the new entity is not considered to restrict competition significantly.

3. Distribution of motor vehicles

56. The Commission's monitoring of the block exemption regulation relating to the distribution and servicing of motor vehicles⁽¹⁾ continues to be of great importance in the automobile sector. The Commission has had to deal with a great number of submissions from consumers and individuals in this connection regarding various aspects of car distribution in the European Union.

⁽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. See also 1996 Competition Report, points 54 to 56.

57. In its biannual reports on car prices⁽²⁾, which are made widely available to the public, the Commission has found that car prices within the Community still differ substantially, thus providing strong incentives for parallel trade. As a result of this increased price transparency, the Commission has continued to receive letters from final consumers and intermediaries acting on their behalf who have encountered obstacles in buying cars outside their own Member State, in particular in Finland, Denmark, and the Netherlands. In these countries, dealers have often refused to sell to non-residents or requested a price supplement. As a result of the strength of the pound sterling, residents from the United Kingdom have increasingly been seeking to acquire right-hand drive cars on the continent. In many cases, a solution has been found following informal intervention by the Commission.

58. Manufacturers and/or their suppliers must not restrict the freedom of final consumers and/or their authorised intermediaries to buy in the Member State of their choice, which is one of the fundamental achievements of the European Community. Although the consumer's right is not accompanied by an obligation imposed on dealers to sell, a dealer may not reject a consumer's offer to buy, or ask for a higher price, simply because the consumer is a resident of another Member State. On the other hand, a manufacturer may take measures against sales by its dealership to so-called 'non-authorised' or grey market dealers acting as resellers.

59. Contractual provisions in the dealer contract and/or behaviour which restrict this freedom are blacklisted, and their use results in the automatic loss of the benefit of exemption for the manufacturer and/or supplier. Where such infringements take place, consumers can appeal to their national authorities or courts which are competent to apply European competition rules, particularly in cases where a block exemption regulation exists.

60. Other submissions concerned the termination of dealer contracts, notably in Germany. In one case, the Commission decided to reject the complainant's application. The Commission considers that matters whose effects are mainly limited to one Member State and which merit no Community interest can

⁽²⁾ Press release IP/97/113, 14.2.1997, and press release IP/97/640, 11.7.1997.

be dealt with equally well on a national level. This approach complies with the *Automec* judgment⁽¹⁾.

61. As regards compliance with the block exemption regulation, the Commission dealt with two important notifications. These concerned the standard distribution agreements for the Smart car and for Ford service outlets. In the first of the two cases, having checked the conformity of the latest version of the agreement with Regulation (EC) No 1475/95 (in particular, the ability of dealers to market other makes or their freedom to seek, through advertising, customers outside the contract territory), the Commission sent the parties a comfort letter. In the second case, it found that the agreement did not fall within the scope of Regulation (EC) No 1475/95 and recognised the advantages for consumers, especially with regard to having services near to hand.

C — Undertakings in a dominant position

62. Article 86 of the EC Treaty prohibits anticompetitive practices committed by one or more undertakings in a dominant position on a given market. Such abuses may consist in limiting production, charging excessive prices, discriminatory or predatory pricing, tied sales or other commercial practices not guided by the principle of economic efficiency. Such practices have a negative impact on competition and are consequently unsound, since they are carried out by undertakings whose market power enables them to isolate themselves from competitive pressure and eliminate their competitors without significant damage to themselves or to block market access by new entrants to a significant degree.

63. Conventional competition law censures such behaviour, which limits, or indeed destroys, the ability of competitors or new entrants to affect the dynamics of the market. In the Commission's eyes, such practices are particularly damaging, since they lead to market partitioning and delay the integration of the Member States' economies. This is why the Commission is particularly alert to the effects of abuses of a dominant position on that integration. The cases which it has had to examine this year show that such behaviour is not confined to specific sectors, even if the

sectors where liberalisation is in progress are the high-risk ones.

64. As far as proceedings are concerned, the Commission ultimately imposed fines in only one case this year. In the remainder, it was able, after the complaint-notification stage, to accept from the undertakings involved commitments or changes to agreements which put an end to the offending practices. The attitude of undertakings reveals a genuine willingness to accept the principles of competition, but the approach must not be relaxed in future. This is why the Commission will continue to see that proposed commitments are honoured.

65. The Commission censured and inflicted a fine of ECU 8.8 million on Irish Sugar. The undertaking, which is the sole sugar producer in Ireland and has a 90 % share of the Irish sugar retailing market, was found to have abused a dominant position not only on account of its repeated attempts to impede competition from small Irish sugar-packing companies but also of its ploys to limit competition from imports from France and Northern Ireland. For instance, the company offered discriminatory prices or discounts to customers of an importer of French sugar and proposed discriminatory discounts to industrial customers exporting part of their production to other Member States. Such practices led to the erection of artificial barriers between Member States and to the disruption of market fluidity.

66. Similarly, in *Swedish Match Sverige/Skandinavisk Tobakskompagni*, the Commission expressed doubts as to the compatibility of the agreement signed between the two companies with Article 86⁽²⁾. Swedish Match, the sole manufacturer and distributor of cigarettes in Sweden, has held an exclusive licence since 1961 for the manufacture, distribution and sale of the Prince brand of cigarette, which belongs to the Danish company Skandinavisk Tobakskompagni and which has a strong position on the Swedish market. An exclusive licensing agreement of such a duration and scope concluded between two undertakings in a dominant position on neighbouring markets was regarded as likely to be caught by Article 86, in particular since Swedish Match fixed the selling price of Prince cigarettes unilaterally. The agreement therefore had the effect of isolating the Swedish

⁽¹⁾ Case T-24/90 [1992] ECR II-2223.

⁽²⁾ The Commission also raised the question of the compatibility of the agreement with Article 85 of the Treaty.

market, on which Swedish Match could act independently of any competitive constraint. The Commission approved the licensing agreement following amendments whereby most of the marketing of the Prince brand is placed under the supervision of Skandinavisk Tobakompagni, which will be able in particular to determine the price of the cigarettes. The change in the agreement resulted immediately in the appearance of a major competitor on the Swedish market.

67. The case in which the Commission took action against Belgacom, following a complaint from ITT Promedia in 1995 about the abuse of a dominant position, was brought to a positive conclusion this year. ITT Promedia, which is the Belgian subsidiary of the US telephone directory publisher, ITT World Directories Company, had accused Belgacom, the Belgian telecommunications operator, of applying discriminatory and excessive prices for access to the data on its subscribers for voice telephony services. The Commission considered that, since directory publishers were dependent on telecommunications operators, access to the data should be allowed on non-discriminatory terms, at prices calculated on the basis of the operator's own costs. Belgacom had a price structure which took account, in particular, of the turnover of the publisher, in this case ITT Promedia. There was no justification for this, except the market power associated with Belgacom's dominant position. Following the Commission's intervention, Belgacom agreed to abolish the turnover price component and adopt a method of calculation based on the ratio of total annual costs to the number of publishers, which is more consistent with Community law. Prices have fallen as a result, and the logic of the system introduced creates a link between the fall in prices and the appearance of new entrants. The Commission has therefore halted proceedings against Belgacom.

68. On 24 March 1997, the Commission initiated formal proceedings against SWIFT (Society for Worldwide International Financial Telecommunications sc), a cooperative owned by 2 000 banks which manages an international telecommunications network specialising in the supply of data transmission and processing services to financial institutions around the world. Further to a complaint from La Poste, a French public undertaking which had been refused access to the network, the Commission considered, in a statement of

objections, that SWIFT had infringed Article 86. SWIFT holds a dominant position of a monopolistic nature, since it is the only operator on the international networks for transferring payment messages and the only network to supply connections for banking establishments anywhere in the world. It therefore constitutes a basic infrastructure in its own right, since to refuse any entity access to such a network is tantamount to a *de facto* exclusion from the market for international transfers. Lastly, SWIFT has manifestly abused its dominant position by laying down unjustified admission criteria relating to the general conditions for the exercise of the financial activities of its members and by applying these criteria in the case of La Poste in a discriminatory manner.

Willing to settle the matter amicably, even though it had challenged the Commission's arguments, SWIFT formally undertook to grant complete access to any entity which meets the criteria laid down by the European Monetary Institute for admission to domestic payment systems, whereas hitherto such access was reserved for shareholder members only. This commitment was published in the *Official Journal of the European Communities*⁽¹⁾. Consequently, the Commission decided to suspend the proceedings initiated against SWIFT and declared its intention to ensure that the commitment was honoured.

69. Following complaints lodged by suppliers of maintenance services in the information technology sector against the commercial practices of Digital Equipment Corporation (Digital) and on the basis of the investigations which it carried out, the Commission initiated proceedings against the company for infringing Article 86⁽²⁾. In its statement of objections, the Commission found that Digital had a dominant position on the European markets for Digital software maintenance services and other hardware services for Digital computers. The Commission considered that Digital had abused its dominant position by developing a commercial policy typified by discriminatory practices and tied sales. All these commercial practices revealed a clear desire to obstruct the ability of independent service suppliers to compete with Digital on the markets for main-

⁽¹⁾ Case No IV/36.120-*La Poste/SWIFT + GUF*, OJ C 335, 6.11.1997.

⁽²⁾ The Commission also raised the question of the compatibility of certain Digital distribution agreements with Article 85 of the Treaty.

tenance services and other, hardware services for Digital computers. Having received the objections and challenged them, Digital presented the Commission with proposed formal commitments designed to alter its commercial and pricing policy in the field of software maintenance services and other, hardware services.

D — Information society

70. In the year preceding full liberalisation of telecommunications services in the European Union, scheduled for 1 January 1998, the Commission stepped up its action to stimulate competition on information society markets; it took a number of measures to back up the liberalisation process⁽¹⁾ and kept developments under close scrutiny to ensure that operators did not set in place agreements or structures⁽²⁾ that would reduce its impact.

1. Alliances between operators

71. The forthcoming full liberalisation of telecommunications markets⁽³⁾, which will trigger competition between operators across the full range of services, swifter technological progress, and growing interpenetration of world markets, has prompted restructuring operations and alliances of all kinds in this sector whereby firms are endeavouring to put themselves in a position to take up the challenges inherent in these far-reaching changes. The Commission has repeatedly had occasion in recent years to comment on the compatibility of agreements and operations of this nature with the Community competition rules⁽⁴⁾, and 1997 was no exception. The approach it takes here is to ensure that national telecommunications operators who still dominate their domestic markets do not use such alliances, which are necessary from a technical or economic standpoint, in order to hold on to positions they acquired through their monopoly power and restrict competition.

72. On 29 October, the Commission gave the go-ahead to two international alliances between telecommunications operators, namely

Unisource and *Uniworld*⁽⁵⁾. Unisource groups together Sweden's Telia, the Dutch operator PTT Telecom and Switzerland's Swiss Telecom, the Spanish operator Telefónica having decided to withdraw. Uniworld is a joint venture between Unisource and AT&T. The aims of these groupings are twofold: to achieve critical mass and extensive geographical coverage, which in this industry means entering into a transatlantic partnership. The alliances previously established, between British Telecom and MCI (Concert), on the one hand, and France Télécom, Deutsche Telekom and Sprint (Atlas/Global One), on the other, bear witness to this. The agreements creating the two alliances were assessed in the light of Article 85 of the Treaty and were approved by means of an individual exemption granted for a period of five years following amendments to the agreements and subject to conditions relating to the structure and behaviour of the parties.

Unisource offers a range of telecommunications services: mobile telephony, satellite services, data transmission services and corporate voice telephony, which are supplied to users via operational subsidiaries. After satisfying itself that the three shareholders in Unisource would not strengthen their pre-existing dominant positions on their respective domestic markets, the Commission exempted the agreements subject to compliance with undertakings designed in particular to prevent any discrimination by the parent companies in network operation, any transfer of confidential information from one entity to another, any cross-subsidisation between Unisource and its parent companies, or any attempt to engage in tied service provision. The Commission also took note of the undertakings given by the Dutch and Swiss authorities to liberalise their telecommunications markets by 1 January 1998 (liberalisation had already taken place in Sweden).

Uniworld offers similar telecommunications services, with coverage extended to the United States. Undertakings of the same nature enabled the Commission to exempt the agreements creating Uniworld for a period of five years. AT&T also proposed an additional undertaking not to discriminate between Unisource shareholders and other European operators as regards the rates it charges for international calls from Europe to the United States.

⁽¹⁾ See Chapter II below.

⁽²⁾ See Chapter III below.

⁽³⁾ Liberalisation aspects which have to do with the prerogatives of public authority are discussed in Chapter II, which deals with the application of Articles 37 and 90 of the EC Treaty.

⁽⁴⁾ 1995 Competition Report, points 54 to 59; 1996 Competition Report, points 66 to 83.

⁽⁵⁾ 1996 Competition Report, point 68.

73. The Commission finalised its analysis of the *GEN (Global European network)* agreement, which groups together the largest telecommunications operators in the Union. The agreement provides for the creation of a high-quality, heavy-capacity optical fibre telecommunications network which will enhance the quality of trans-European telecommunications network services. The Commission deemed certain clauses of the agreement incompatible with the Community competition rules, in particular those which provided for the joint setting of prices and exclusion of third parties from access to the network. In response to the Commission's observations, the notifying parties amended the agreement such that each operator which is a signatory will negotiate with third parties, individually and in a non-discriminatory manner, the terms on which it offers access to the network, and in particular prices. On that basis, the Commission allowed the system to be set up. This case provides a clear illustration of the policy pursued by the Community authorities: the Commission welcomes technological progress but makes sure that it is not used by operators in a dominant position in order to deprive competitors of the benefits of such progress through discriminatory practices.

2. Mobile communications

74. The Commission noted with satisfaction the growth of competition in mobile telephony and the knock-on effects this was having on the telecommunications industry as a whole. New services, lower prices, greater network coverage, stronger demand, and creation of new jobs are the unmistakable signs of this dynamism, which the Commission is supporting through its competition policy. It will remain vigilant in order to facilitate access to the market for competitors and protect the interests of consumers by safeguarding their freedom of choice between operators and their services⁽¹⁾.

75. The Commission gave its approval to the *agreement between mobile telephone operators using the GSM standard*, who are grouped together in an international association of over 200 members. The aim of the agreement is to

draw up a standard form to be used on a voluntary basis to facilitate bilateral negotiations between operators wishing to conclude 'roaming' agreements. Such agreements are necessary in order to coordinate GSM networks and offer subscribers maximum use of their mobile telephone wherever they happen to be at any point in time.

Operators of GSM networks in the European Union have to comply with national rules, in particular those governing the award of operating licences, which means that their network cannot extend beyond national borders. For the 35 million subscribers in the 15 Member States, it is essential that these limitations should not undermine the advantages flowing from the GSM standard. Thus, when a subscriber leaves the territory of the Member State in which he took out his subscription, he should be able to make and receive calls in another Member State; for this to be possible, operators in different Member States must coordinate their activities.

The Commission takes the view that the existence of a standard form facilitating such coordination offers a number of advantages. For operators, it cuts costs and negotiating times and also guarantees transparency, thereby reducing the risks of discrimination. For consumers, it offers the certainty of being able more rapidly to use their mobile telephone over a wide area. The Commission also noted that amendments made to the agreement had ruled out some potential competition problems, such as the risk of limitations being placed on a consumer's freedom to take out, under more favourable tariff conditions, a subscription with an operator in a country in which he is not himself resident. Discussions are continuing with a view to finding a solution to the prices charged by operators themselves for roaming services, which are not determined on the basis of real costs.

3. Telecommunications tariffs

76. In cases where national telecommunications operators still enjoy dominant positions on their domestic markets, particularly as far as infrastructures are concerned, it is particularly important, given the logic of liberalisation, that these operators should not misuse their market power to the detriment of their competitors. The Commission consequently sees to it that those competing with national

⁽¹⁾ In this connection, the Commission investigated two cases concerning the award of concessions for the second GSM operator in Spain and Italy. These are described in Chapter II, which discusses the application of Articles 37 and 90 of the Treaty.

operators enjoy access to the latter's infrastructures on fair and non-discriminatory terms, particularly as far as prices are concerned.

77. The Commission accordingly initiated proceedings against *Deutsche Telekom AG (DT)*, the German telecommunications operator, following a complaint made in 1996 against the conditions imposed on third parties for access to DT's infrastructures⁽¹⁾. After DT had submitted a draft new contract offering network access to competitors, the Commission had a price survey carried out by an international accountancy firm which demonstrated DT's inability to prove that its prices were cost-orientated and found the price level to be 100 % higher than on comparable competitive markets. Although the Commission is not and does not wish to act as a price regulator, DT was invited to adjust the tariffs it charges to real economic conditions so that they cannot constitute an abuse of a dominant position. DT finally agreed to lower its network access tariffs, in particular for providers of business services, by 38 % for access to the local network and 78 % for access to the long-distance network, and the Commission decided to terminate the proceedings.

78. The Commission has also started proceedings to investigate charges for international telephone calls paid by dominant telephone operators. A large proportion of the price paid for these international telephone calls is made up by the accounting rates, which amount to transfer prices between operators located in different countries. At present, as a result of technological changes and consequent reductions in costs, it is believed that these charges no longer reflect the true cost of calls. The Commission will therefore scrutinise the current accounting rate arrangements with a view to furthering the goal of cost orientation. Requests for information have been sent to all dominant telecommunication operators in the EU in order to assess the competition aspects of the accounting rates arrangements.

4. Information technology

79. The case which pitted the US firm *Santa Cruz Operation Inc* (Santa Cruz) against *Microsoft* is an example of a fairly sophisticated

anticompetitive practice involving the use of intellectual property rights in order to limit the ability of a competitor to innovate.

Santa Cruz took over AT&T's activities in relation to the UNIX system for powerful microcomputers and also inherited a contract signed 10 years earlier between Microsoft and AT&T, under which Microsoft was to produce a single version of the UNIX system, then manufactured by both parties. The contract required the parties to design any new version of the UNIX system on the basis of Microsoft's original version and to make it compatible with programs developed by Microsoft and AT&T prior to 1987. This forced Santa Cruz to use the obsolete Microsoft technology for any new product; however, on the market for UNIX systems, Santa Cruz and Microsoft are competitors.

Contractual clauses of this kind have therefore been regarded as anticompetitive insofar as they restrict the ability of a competitor to innovate. After receiving the Commission's objections, Microsoft decided unilaterally and irrevocably to release Santa Cruz from its contractual obligations concerning the use of the original version of the UNIX system. As a result, Santa Cruz withdrew its complaint.

80. The Commission also takes an interest in derived products such as computer games and their method of distribution. It thus had occasion to scrutinise licensing agreements concluded by *Sega* and *Nintendo*, two of the leading manufacturers of video games consoles. The two firms had set in place a licensing system enabling independent firms to develop and distribute games that were compatible with their consoles. Under the agreements, Sega and Nintendo had the right to vet any game developed by a licensee before it was marketed; licensees also had to subcontract production of the games they had developed to the licensors or to a limited number of approved manufacturers.

The Commission regarded the agreements as anticompetitive insofar as they enabled Sega and Nintendo to control competition in the markets for games that were compatible with their consoles; one of their effects was to limit the ability of licensee firms to compete with the licensors. The Commission therefore notified the firms concerned of its objections, whereupon Sega and Nintendo decided to amend their agreements by deleting the dis-

⁽¹⁾ 1996 Competition Report, point 71.

puted clauses. Finding that the new agreements no longer contained any restriction of competition, the Commission terminated the proceedings.

E — Transport

1. Maritime transport

1.1. Liner shipping consortia

81. The Commission applied, on several occasions, the provisions of the regulation granting a block exemption to liner shipping consortia⁽¹⁾. The conditions and obligations attached to exemption ensure that Article 85(3) of the Treaty is observed and that consortia remain subject to effective competition so as to enable shippers to obtain a fair share of the benefits resulting from these agreements.

Articles 5 to 9 of Regulation (EC) No 870/95 lay down the conditions in which consortia can qualify for block exemption. Exemption is granted automatically to consortia which hold a share of less than 30 or 35 % of the trade depending on whether or not they operate as part of a liner conference. A consortium whose share of the trade exceeds the 30 or 35 % limit but does not, however, exceed 50 % of the direct trade may also qualify for block exemption, once it has been notified, provided that it fulfils the other conditions laid down in the regulation. Where a consortium holds more than 50 % of the trade or where it does not fulfil the other conditions for block exemption, the parties must notify the agreement to the Commission with a view to obtaining an individual exemption under Article 85(3) of the Treaty. During the year, the Commission examined cases which came under each of the exemption categories.

82. The Commission granted block exemptions to four liner shipping consortia under a simplified non-opposition procedure pursuant to Regulation (EC) No 870/95.

On 5 March, the Joint operational service agreement (JOS), signed between four ship-

ping companies⁽²⁾, and the West Coast/Mediterranean agreement (WC/Med), concluded between three of the above four companies⁽³⁾, were exempted. On 6 October, block exemptions were granted to two shipping consortia, New Caribbean Services and Eurosal III. The Commission's analyses of these agreements were similar. Having established that the market shares of the consortia amounted to between 40 and 50 %, that remaining competition was still effective on the lines in question, and having secured certain amendments in the case of the latter agreement, the Commission concluded that the conditions for exemption as laid down in Regulation No 870/95 were fulfilled.

83. Three consortium agreements which did not fall within the scope of Regulation (EC) No 870/95 were nevertheless granted individual exemptions under Article 85(3) of the Treaty⁽⁴⁾.

84. On 3 September, the Commission granted an individual exemption under Article 85(3) of the Treaty to consortium agreements concluded between four transatlantic shipping companies⁽⁵⁾. The Vessel sharing agreements (VSA) consortium, set up in 1988 by Sea-Land, P&O and Nedlloyd to organise the joint operation of shipping lines between northern Europe and the United States, on the one hand, and between the Mediterranean and the United States, on the other, entered into agreements with OOCL and Maersk on the swapping of slots. Since the parties' shares of the relevant trades exceeded the 30 % threshold and certain clauses of the agreements failed to satisfy one or more of the exemption conditions laid down in Regulation (EC) No 870/95, the agreements fell outside its scope. Under the opposition procedure, the Commission published a notice⁽⁶⁾ seeking the views of interested third parties.

The Commission's analysis found that the first three conditions laid down in Article 85(3) of the Treaty were met, among other things because the agreements resulted in major investments and in capacity reductions. It also found that the fourth condition was satisfied because,

⁽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 (EC) No 479/92, OJ L 89, 21.4.1995. See also 1995 Competition Report, points 68 to 70, and 1996 Competition Report, points 84 to 87.

⁽²⁾ Andrew Weir Shipping Ltd, Iscont Lines Ltd, KNSM Kroonburgh BV and Zim Israeli Navigation Ltd.

⁽³⁾ Andrew Weir Shipping Ltd, KNSM Kroonburgh BV and Zim Israeli Navigation Ltd.

⁽⁴⁾ 1996 Competition Report, point 87.

⁽⁵⁾ Sea-Land, P&O Nedlloyd, Maersk and OOCL.

⁽⁶⁾ OJ C 185, 18.6.1997.

with total market shares of less than 40 %, the parties were not in a position to eliminate competition. The Commission nevertheless pointed out that certain clauses of the agreements could not qualify for an individual exemption, and the parties undertook to refrain from applying them in geographical areas covered by the EC Treaty. On the basis of those undertakings, the Commission considered that it could grant an individual exemption to those restrictive clauses. The exemption is for six years in the case of activities covered by Regulation (EEC) No 4056/86 and three years in the case of those covered by Regulation (EEC) No 1017/68.

1.2. P&O Stena Line

85. On 31 October 1996, the shipping companies P&O and Stena notified the setting-up of a joint venture, P&O Stena Line, in which they intended to pool their cross-Channel ferry business. Since the operation did not constitute a concentration within the meaning of the Merger Regulation, it had to be examined in the light of Article 85 of the Treaty. The same operation was, however, regarded by the French and United Kingdom authorities as a merger under their respective national laws and was notified to the competent authorities of each country. Three sets of proceedings were therefore initiated in parallel. The Commission's concern here was to cooperate fully and frankly with the national authorities and to prevent conflicting decisions being adopted.

On 10 June 1997, after receiving comments from interested third parties concerning the planned joint venture, the Commission sent P&O and Stena a letter expressing serious doubts as to the compatibility of the operation with the Community competition rules. The Commission's main misgiving was that the last criterion laid down in Article 85(3) of the Treaty might not be fulfilled insofar as there was a risk of an oligopolistic dominant position being created on the cross-Channel passenger transport market between the new joint venture and its main competitor, Eurotunnel.

After investigating the case and discussing it with the national authorities concerned, and subject to completion of the procedure in hand, the Commission announced its intention of granting P&O Stena Line an individual exemption for a limited period. The validity of the exemption will be limited as the Commission wishes to reserve the right to reconsider

its position before long given the great difficulty of assessing all the parameters involved on this specific market, in particular the impact which the abolition, in mid-1999, of duty-free sales will have on competition.

2. Air transport

2.1. Application of the competition rules to routes between the Community and non-member countries

86. The globalisation of air transport markets is being reflected in the proliferation of alliances between airlines on routes linking the Community to non-member countries. In order to adjust its competition policy instruments to this situation, which is set to continue, the Commission adopted on 16 May a memorandum accompanied by two proposals for Council regulations on the application of the competition rules to air transport, and in particular routes between the Community and non-member countries⁽¹⁾. One of the proposals would extend the scope of Council Regulation (EEC) No 3975/87⁽²⁾, which currently covers only air transport between airports in the Community, so as to include all routes between Community airports and airports in non-member countries. The other proposal would supplement the arrangements by empowering the Commission to grant block exemptions for certain categories of agreement restricting competition on those routes.

87. The Commission currently has powers, under Regulation (EEC) No 3975/87, to apply Articles 85 and 86 of the EC Treaty directly to intra-Community routes only. It can therefore take action against restrictive practices on extra-Community routes only under Article 89 of the Treaty, which allows it to introduce monitoring provisions in the absence of any specific implementing regulation. These arrangements, which were intended to be transitional, do not enable the Commission to act with all the necessary effectiveness. The Member States are furthermore entitled to initiate parallel proceedings under Article 88. If the Commission is to be seen as a credible partner in international negotiations, it must have at its disposal adequate legal instruments for guar-

⁽¹⁾ COM(97) 218 final; OJ C 165, 31.5.1997.

⁽²⁾ Council Regulation (EEC) No 3975/87, OJ L 374, 31.12.1987, as amended by Regulation (EEC) No 2410/92, OJ L 240, 24.8.1992.

anteeing the application of its competition rules both within the Community and in relations with non-member countries. These are the reasons which prompted the Commission to propose that its powers be extended to cover air transport routes between the Community and non-member countries. This desire for harmonisation is not new: it already sent the Council an unsuccessful proposal for a similar extension of its powers in 1989⁽¹⁾.

88. The Commission's new proposals take account of the changes that have taken place in the industry since 1989 and reflect the present configuration of the air transport market. The key features of the new situation are the full liberalisation of air transport services within the Union, which has been effective since 1 January 1997, and the development of alliances between airlines on routes between the Community and non-member countries, particularly transatlantic routes.

89. The disappearance of regulatory constraints within the European Economic Area is also increasing competition between market players and the risks of anticompetitive behaviour on routes between the EEA and third countries. That liberalisation is furthermore insufficient in a context of rapid globalisation. The Commission therefore obtained negotiating briefs from the Council enabling it to conclude agreements on the gradual liberalisation of air transport services with certain non-member countries, e.g. Switzerland, the CEECs and the United States⁽²⁾. These agreements should deal with competition issues and ensure that there is no discrimination between Community airlines in terms of access to the relevant routes.

90. The proliferation of a new generation of alliances between air carriers, on transatlantic routes in particular, which are having a major impact on competitive conditions in the Community market likewise militates in favour of the early adoption of a new legal framework that would avoid recourse to Articles 88 and 89 of the EC Treaty. Reliance on those two articles makes for procedural unwieldiness and legal uncertainty. For example, the Commission initiated Article 89 proceedings in six cases in 1996, while two Member States decided to open parallel proceedings under

Article 88 in respect of two of the six alliances concerned. In those two cases, the companies which were parties to the agreements had to contend with problems caused by the concurrent examination of the same agreement by different authorities: multiple procedures, extra costs, risk of contradictory decisions.

91. It is therefore in the interests of making enforcement more efficient, increasing legal certainty and reducing the administrative burden on businesses that the Commission has put forward its proposals designed to safeguard more effectively the operation of a single market which is fully open to international competition.

2.2. Transatlantic air agreements

92. The Commission continued to investigate in parallel a number of alliance agreements that were concluded between European airlines and US airlines⁽³⁾, namely between *British Airways and American Airlines*, *Lufthansa and United Airlines*, *SAS and United Airlines*, *Swissair/Sabena/Austrian Airlines and Delta Air Lines*, and *KLM and Northwest*⁽⁴⁾.

A hearing took place on 3 and 4 February in *British Airways/American Airlines*, during which the parties to the agreement and a number of third parties elaborated on points addressed in connection with the case. In view of the complexity of the case and the Commission's obligation to cooperate with the Member States under Article 89 of the Treaty, it was decided to hold an informal exchange of information on 17 July between national experts on agreements and dominant positions in air transport and the Commission. This information exchange was followed by several meetings between *British Airways/American Airlines* and Commission officials in order to discuss the competition issues arising from the alliance agreement.

The agreements between *Lufthansa and United Airlines*, *SAS and United Airlines*, *Swissair/Sabena/Austrian Airlines* and *Delta Air Lines*, and *KLM and Northwest* continued to be investigated in parallel.

⁽¹⁾ COM(89) 417; OJ C 248, 29.9.1989.

⁽²⁾ The negotiating brief concerning the United States at present covers only certain issues.

⁽³⁾ 1996 Competition Report, points 99 to 101.

⁽⁴⁾ OJ C 117, 15.4.1997.

The Commission intends to adopt a proposal on the basis of Article 89(1) of the Treaty in the course of the first half of 1998 for at least three of these alliances.

F — Energy

93. In the electricity sector, the Commission kept a watchful eye to ensure that the aim of the liberalisation directive was being fulfilled by preventing undertakings, and especially former monopolists, which still enjoy a dominant position on their domestic market from abusing that position in order to foreclose the market. In its action, the Commission was careful to adopt a measured and responsible attitude so that the necessary security of supply remained guaranteed.

94. In the case in which the Commission investigated *Electrabel*, a private producer holding more than a 90 % market share of electricity production in Belgium, and *Intermixt*, the representative of the communes having an interest in semi-public corporations which distribute electricity to users in Belgium, the new 'statutes' linking Electrabel to these corporations would have foreclosed the Belgian market. The new 'statutes' established, in particular, a partnership lasting between 20 and 30 years and granted Electrabel an exclusive right to supply primary electricity to the communes for the same period. These provisions would therefore have delayed any evolution of the Belgian electricity market for an extremely long time; under these circumstances, users would not have been able to benefit from the advantages of the sector being opened up to competition.

The Commission accordingly envisaged initiating proceedings under Articles 85 and 86 of the Treaty, which would have led to the new statutes being banned. After consultations with the parties concerned the Commission decided, in the light of proposals to amend the statutes, to suspend its investigation of the case. Under the new statutes, the exclusive supply clause in favour of Electrabel was to lapse from the year 2011, and from the year 2006 onwards the exclusivity was to concern no more than 75 % of the requirements of each grouping of municipalities. In addition, in order to facilitate a change of supplier, the new statutes provide that from 2011 onwards, Electrabel will not oppose the dissolution of

such a corporation, provided that it receives fair compensation.

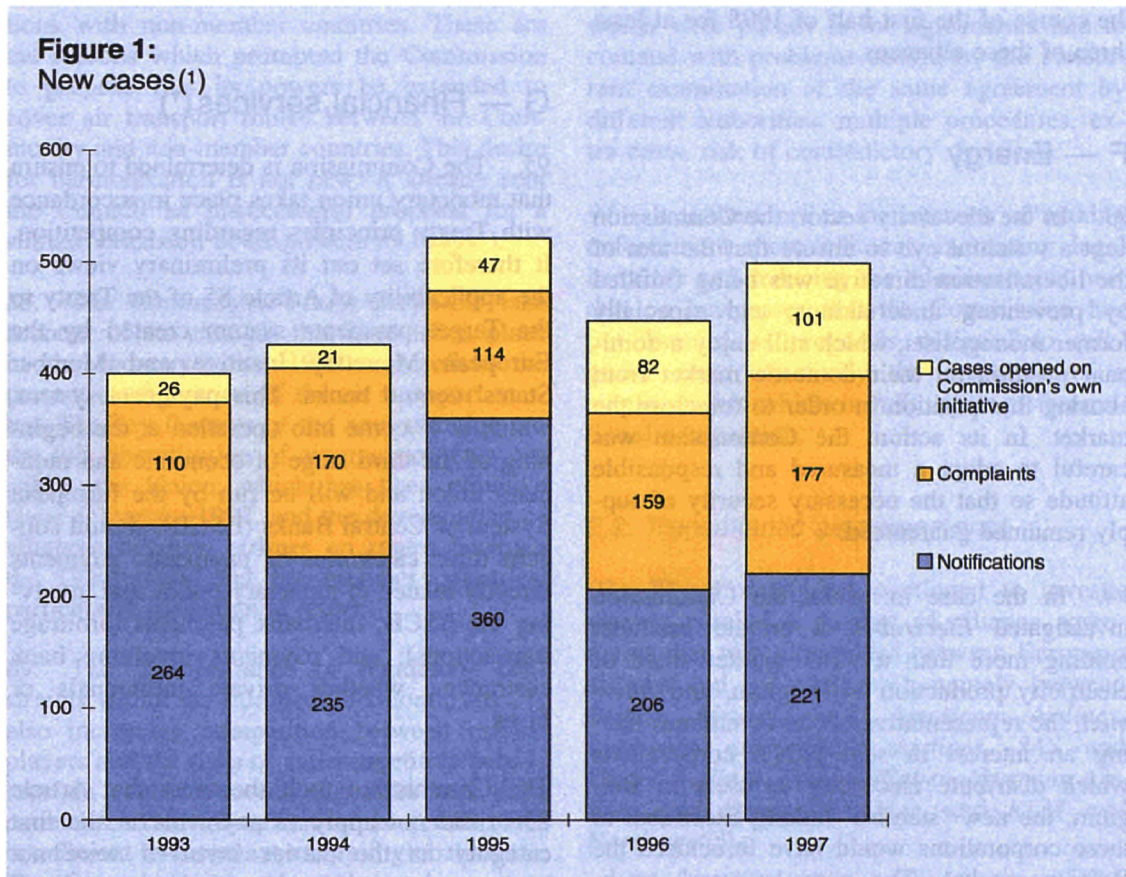
G — Financial services⁽¹⁾

95. The Commission is determined to ensure that monetary union takes place in accordance with Treaty principles regarding competition. It therefore set out its preliminary views on the applicability of Article 85 of the Treaty to the Target payments system created by the European Monetary Institute and Member States' central banks. This payments system, which is to come into operation at the beginning of the third stage of economic and monetary union and will be run by the European System of Central Banks (ESCB), should concern three categories of payments: payments directly related to monetary policy and involving the ESCB; interbank payments (arbitrage transactions); and payments involving bank customers, whether private individuals or firms.

The Commission took the view that Article 85(1) did not apply to payments in the first category as the parties involved were not businesses, but did apply to the second and third categories since the parties involved in the transactions were economic operators, and other privately operated payments systems were also present on the market. The Commission had two reservations about the scheme: the first concerned the plan to charge all parties involved in a given transaction a standard rate for payments effected through the Target system; here the Commission acknowledged that the system will help to create an effective tool for managing cross-border arbitrage transactions which is likely to bolster the reliability of the money market within the euro zone. The second reservation focused on the level of the standard charge: the Commission reminded the European Monetary Institute that the rates charged had to cover all costs, including operating costs. The EMI undertook to inform the Commission of any further developments.

⁽¹⁾ The reader is referred to the section on undertakings in a dominant position, in which the *SWIFT* case is discussed.

H — Statistics



⁽¹⁾ Commission staff have introduced a new method for registering cases opened under Articles 85 and 86 which produces statistics that reflect more faithfully the different stages in the procedure. Cases are now registered on the date when the request or the notification takes effect. Statistics for previous years have been revised on the basis of the new method, which explains why data presented in earlier reports have changed.

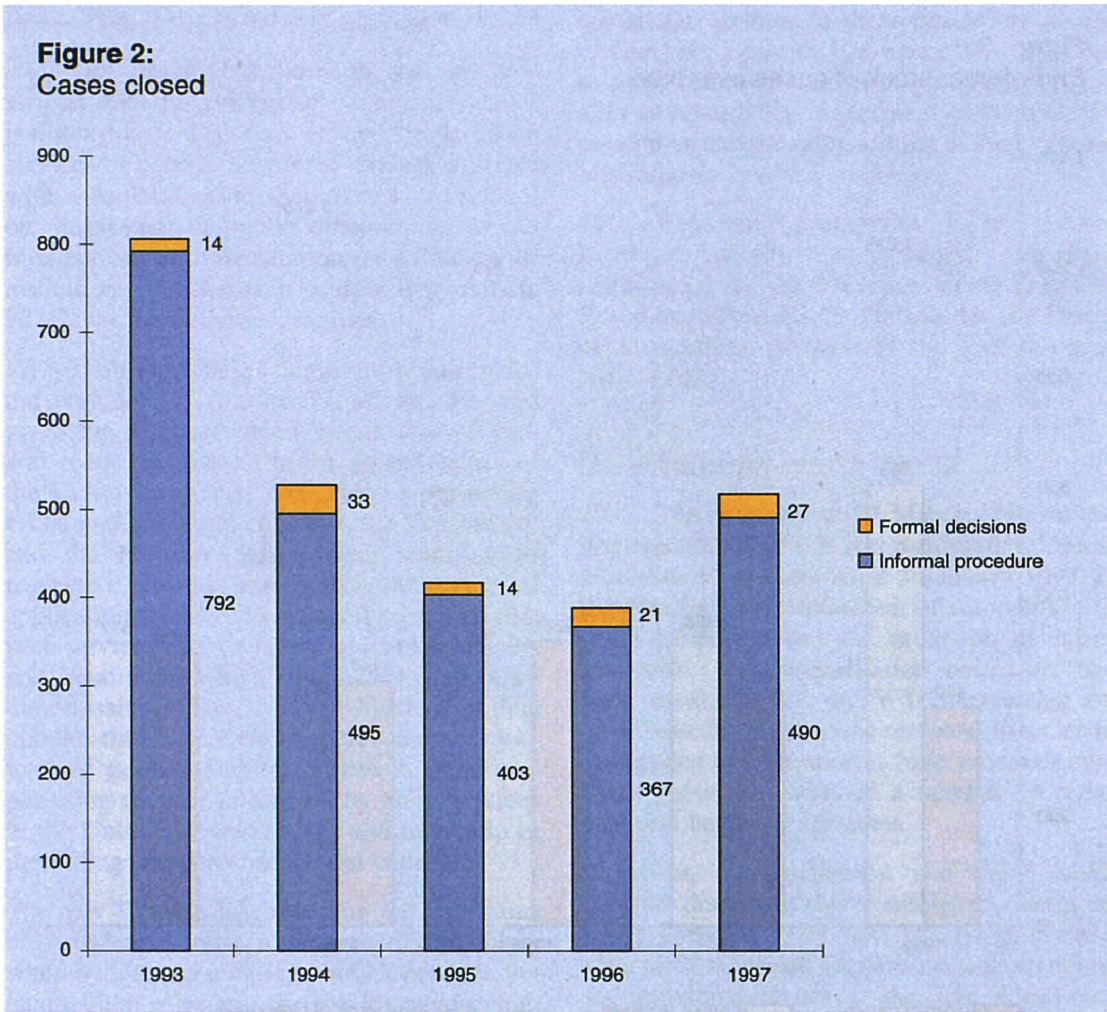
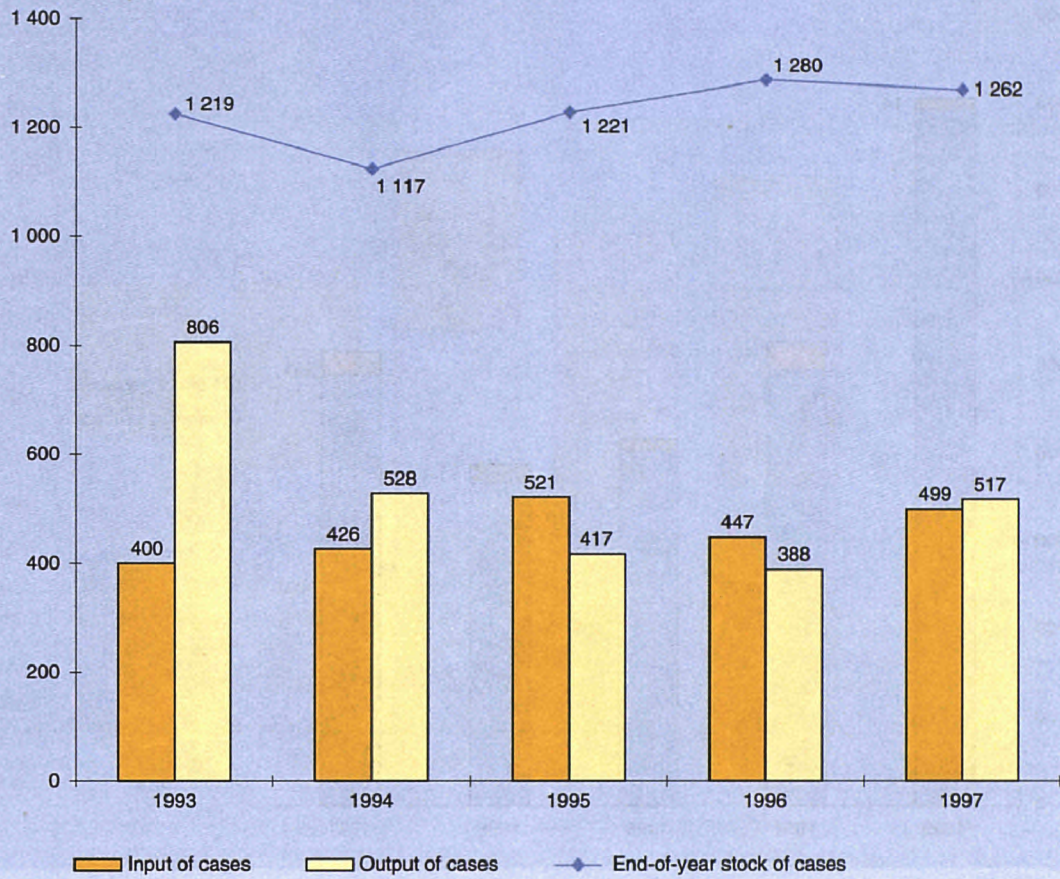


Figure 3:
End-of-year stock of cases over time



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

A — The Treaty of Amsterdam

96. The Treaty of Amsterdam contains provisions directly concerning Community competition policy. These are a new Article 7d on services of general economic interest, together with a declaration on that subject, a protocol on the system of public broadcasting in the Member States, a declaration on public credit institutions in Germany and a new Article 227(2) on the outermost regions.

97. The new Article 7d lays down that ‘without prejudice to Articles 77, 90 and 92, and given the place occupied by services of general economic interest in the shared values of the Union as well as their role in promoting social and territorial cohesion, the Community and the Member States, each within their respective powers and within the scope of application of this Treaty, shall take care that such services operate on the basis of principles and conditions which enable them to fulfil their missions’. The Treaty of Amsterdam thus upholds the Community’s attachment to objectives of general economic interest while emphasising the place occupied by these services in the Union’s shared values and their role in promoting social and territorial cohesion.

The new Treaty, while retaining the provisions of Article 90, thus reinforces the principle whereby a balance must be struck between the competition rules and the fulfilment of public services’ missions.

This new provision is in accordance with the policy proposed by the Commission in its communication of 11 September 1996 on services of general interest in Europe, i.e. that of introducing into Article 3 of the Treaty of Rome a paragraph which would confirm the Community’s role in contributing to the promotion of services of general interest while not calling into question the allocation of powers between the Commission and the Member States.

98. The European Parliament, in its resolution of 17 December on the Commission communication, which emphasises the importance of public services for economic and social cohesion, welcomed the introduction of the new Article 7d into the Treaty.

99. Several other texts dealing with public services issues have also been adopted: a protocol on the system of public broadcasting in the Member States, which emphasises the specific nature of this system in view of its cultural and political dimension; a declaration on public credit institutions in Germany, which links the

advantages granted to these institutions to the discharge of a mission in the general interest and to compliance with the principle of proportionality as regards the impairment of competitive conditions and the safeguarding of the Community interest.

100. Regarding competition policy, a new legitimacy has thus been conferred on the main institutional and legal balances in the Treaty of Rome by the provisions contained in the Treaty of Amsterdam, particularly those of the new Article 7d.

B — Telecommunications

101. The directive of 13 March 1996 on the implementation of full competition in telecommunications markets fixed 1 January 1998 as the date for the introduction of competition in voice telephony and the provision of infrastructures. This liberalisation obligation has been reinforced by the WTO agreement on basic telecommunications services. In order to ensure that liberalisation is fully successful the Commission has adopted a number of stringent and balanced measures.

Moreover, the Parliament and the Council adopted three new harmonising directives in 1997: Directive 97/13/EC of 10 April on a common framework for general authorisations and individual licences in the field of telecommunications services⁽¹⁾, Directive 97/33/EC of 30 June concerning interconnection and the financing of universal services⁽²⁾, and Directive 97/51/EC of 6 October amending Directive 90/387/EEC (ONP framework) and 92/44/EEC (leased lines) for the purpose of adapting them to a competitive environment in the telecommunications sector⁽³⁾. Member States had to transpose the directives by 31 December 1997 at the latest.

1. Monitoring the implementation of the directives

102. The Commission wished first of all to verify that Member States were meeting their obligations under Community law in relation to liberalisation so that the regulatory framework could be in place by 1 January 1998. In order to carry out a coordinated control of specific competition directives and harmonisation directives

⁽¹⁾ OJ L 117, 7.5.1997.

⁽²⁾ OJ L 199, 26.7.1997.

⁽³⁾ OJ L 295, 29.10.1997.

and, where necessary, speed up the initiation of infringement proceedings against Member States failing to comply with the timetable which has been fixed, the Commission has decided to set up a joint team with the task of implementing the Community telecommunications legislation, the '1998 Joint Team', bringing together officials drawn from the directorates-general for competition and telecommunications, and with the collaboration of the Commission's Legal Service. The team prepared a progress report for the Council on the transposition of the directives, which was adopted by the Commission on 29 May and updated on 8 October, on the basis of information provided in bilateral meetings with Member States.

103. The 29 May report established that some Member States were behind in their transposition of the directives and that considerable work remained outstanding. The 8 October report showed that progress had been made but established that some Member States were still not keeping to the timetable for the liberalisation of telecommunications laid down in Commission Directive 90/388/EEC.

104. On 5 November, the Commission decided to initiate infringement proceedings under Article 169 of the Treaty against seven Member States (Denmark, Germany, Greece, Italy, Luxembourg, Portugal and Belgium). As at 1 July, Denmark had failed to ensure that its public operator, TeleDanmark, had published its standard procedures and conditions for interconnection. Publication of this information is crucial to enable new entrants to conduct swift negotiations, on the basis of standard conditions, for the interconnection of their new network with the network already in place. Greece had not yet permitted the two private Greek GSM operators to interconnect their networks directly with foreign networks without passing through the public operator. Nor had it, as at 1 October, liberalised the establishment of a new infrastructure for the supply of liberalised services (i.e. all services other than voice telephony). Italy had not yet liberalised its infrastructure or specified the contribution of new entrants to the net cost incurred by Telecom Italia for the universal service. As at 1 July, Luxembourg had not liberalised the establishment of new infrastructures to supply liberalised services. Germany had not ensured that Deutsche Telekom publish an interconnection catalogue specifying the prices of services offered. As at 1 July, Portugal had failed to liberalise the establishment of new infrastructures for the supply of liberalised services.

Belgium had only liberalised the use of existing infrastructures, not the establishment of new infrastructures, for the supply of liberalised services and had failed to enact legislation fixing new entrants' financial contribution to the net cost of the universal service.

A series of meetings with Member States was programmed for the beginning of 1998 to reassess the situation in each country.

2. Communications by telephony on the Internet

105. On 2 May, the Commission published for comment a notice on the application of Directive 90/388/EEC to telephony services on the Internet. The Commission's position is that the services in question cannot for the moment be considered voice telephony because a number of criteria have not yet been met. In view of technical developments those criteria may shortly be met and the Commission may accordingly alter its position. The Commission intends to issue a final version of the notice in early 1998, which will take account of the numerous comments which have been received.

3. The grant of additional periods for the liberalisation of telecommunications

106. Mindful that networks in the Union are at different stages of development and wishing to pursue a balanced liberalisation policy, the Commission recognised the need to grant some Member States additional periods for implementing liberalisation, having regard to the conditions and size of their networks. Acting under the appropriate provisions in Commission Directives 96/2/EC liberalising mobile communications and 96/19/EC on the implementation of full competition, it decided to grant additional implementation periods on the following dates: 12 February 1997 for Portugal⁽¹⁾, 7 May for Luxembourg⁽²⁾, 10 June for Spain⁽³⁾ and 18 June for Greece⁽⁴⁾. None of the extensions granted falls after 2000. The table set out below shows the position for each Member State⁽⁵⁾.

⁽¹⁾ OJ L 133, 24.5.1997.

⁽²⁾ OJ L 234, 26.8.1977.

⁽³⁾ OJ L 243, 5.9.1997.

⁽⁴⁾ OJ L 245, 9.9.1997.

⁽⁵⁾ On 27 November 1996, the Commission also granted Ireland a supplementary transitional period for liberalisation of telecommunications, 1996 Competition Report, points 121 and 122.

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

Member State	Obligation under the directive	Date in the directive	Asked for	Granted
Greece	Liberalisation of voice telephony and public telecommunications networks	1.1.1998	1.1.2003	31.12.2000
	Abolition of restrictions on the offer of alternative infrastructures	1.7.1996	1.7.2001	1.10.1997
Spain	Liberalisation of voice telephony and public telecommunications networks	1.1.1998	1.12.1998	1.12.1998
Luxembourg	Liberalisation of voice telephony and public telecommunications networks	1.1.1998	1.1.2000	31.3.1998
	Abolition of restrictions on the offer of alternative infrastructures	1.7.1996	1.7.1998	1.7.1997
Portugal	Liberalisation of voice telephony and public telecommunications networks	1.1.1998	1.1. 2000	1.1.2000
	Abolition of restrictions on the offer of alternative infrastructures	1.7.1996	1.1.1999	1.7.1997
	Authorisation of infrastructures for own mobile networks	2.1996	1.1.1998	Refused
	Authorisation of international interconnection of mobile networks	2.1996	1.1.1999	1.1.1999

4. Application of the Commission decision concerning discrimination in the grant of GSM concessions in Spain⁽¹⁾

107. On 18 December 1996, the Commission adopted a decision requiring Spain to terminate the distortion of competition created by requiring the second GSM operator, Airtel Móvil, to make an initial payment of ESP 85 billion while the first operator, Telefónica, was granted its licence without an initial fee. On 30 April the Commission approved a package of corrective measures proposed by the Spanish Government to terminate the distortion. The principal elements in the package are the second operator's right to interconnect to Telefónica's fixed network free of charge up to an amount of ESP 15 billion, the extension of Airtel Móvil's licence from 15 to 25 years, early provision of frequencies, the allocation to Airtel Móvil of an additional 4.5 MHz in the 900 MHz frequency band and the extension of Airtel Móvil's licence without an additional payment, allowing it to operate mobile services in the DCS-1800 frequency band as well.

⁽¹⁾ 1996 Competition Report, point 120.

5. Termination of infringement proceedings initiated against Italy concerning conditions for granting the GSM licence

108. In 1994, the Commission decided to initiate infringement proceedings against Italy concerning the conditions for granting the second GSM licence. Those conditions were more burdensome than those imposed on the first operator, the State enterprise SIP (now Telecom Italia Mobile), thereby strengthening the latter's dominant position in the new market for mobile cellular digital communications. On 4 October 1995, it adopted a decision requesting the Italian Government to correct the situation⁽²⁾. In January 1996, the Italian Government undertook to put together a package of remedial measures. In the course of 1997, it notified all of these measures to the Commission, which decided, on 10 December, to terminate the infringement proceedings. However, on determining that certain remedial measures agreed with the Italian Government had not been implemented, it decided to initiate a new procedure.

⁽²⁾ 1995 Competition Report, point 109.

6. Draft directive under Article 90(3) concerning the legal separation of cable and telecommunications activities

109. On 16 December, the Commission approved a draft directive under Article 90(3) aimed at preventing former telecommunications monopolies from delaying the emergence of new, more advanced telecommunications services over the cable network, thereby hampering technical progress at the expense of consumers. Under the draft directive Member States must ensure that cable operators and telecommunications enterprises are legally separated by requiring each of the two types of network to be run by separate enterprises. It also empowers the Commission to require a telecommunications enterprise to give up its activities in the cable sector if this is necessary for the limitation of the anticompetitive effects of the position of a former monopoly-holder on the market.

110. The aim is to allow new entrants to have access to the local part of networks after liberalisation of the telecommunications sector on 1 January 1998. At the basis of liberalisation is an overview of developments on the market following the adoption of two directives in 1995 and 1996. The Commission is concerned that, if telecommunications infrastructures and cable television networks are provided by the same enterprise, competition may be impaired because new entrants will only have access to the local loop through the operator holding a dominant position. In that situation the former monopoly-holder does not have an incentive to improve cable networks so that multimedia services can be offered; the accounting separation required under the existing directive on cable networks is insufficient to encourage competition.

111. The new directive will amend the existing directive on cable television networks and will be adopted by the Commission under Article 90(3) after the consultations on the draft have been concluded.

C — Media

112. On 26 June, the Commission adopted a decision in the VTM case, declaring incompatible with the Treaty the exclusive right to broadcast television advertising granted by the

Flemish Government to the private television company, VTM.

113. In its decision the Commission considers that the grant to VTM of the exclusive right to broadcast television advertising from Flanders to the Flemish Community infringes Article 90, read in conjunction with Article 52 of the Treaty since the exclusive right amounts to excluding any operator from another Member State wishing to set up in Belgium with a view to broadcasting televised advertising to the Flemish public via the Belgian cable network. The fact that these measures apply without distinction both to Belgian operators other than VTM and to enterprises from other Member States cannot prevent VTM's preferential treatment being caught by Article 52 of the Treaty since it constitutes a form of discrimination whose effects are protectionist.

114. The Commission considers that in this case there are no compelling reasons of general interest within the meaning of the case-law of the Court of Justice which could justify VTM's monopoly. Although the Commission concedes that cultural policy and the maintenance of pluralism can constitute overriding objectives in the public interest, in this case there is no necessary relationship between the purported cultural policy objective of preserving pluralism in the Flemish press and the grant in Flanders of a private commercial television monopoly to VTM.

D — Energy

1. Judgments of the Court of Justice concerning exclusive rights to import and export electricity and natural gas

115. On 23 October, the Court of Justice delivered judgment in the actions brought by the Commission in 1994 for failure of the Netherlands, Spain, France and Italy⁽¹⁾ to fulfil their obligations concerning the exclusive rights to import and export natural gas and electricity. Regarding Article 37 of the Treaty, the Court ruled that exclusive rights give rise to discrimination against operators established in other Member States, contrary

⁽¹⁾ Case C-157/94 *Commission v Netherlands*, Case C-158/94 *Commission v Italy*, Case C-159/94 *Commission v France* and Case C-160/94 *Commission v Spain*. In the last-mentioned case the Court considered that there were no exclusive rights involved.

to that article⁽¹⁾. The Court did not pronounce on the issue of whether the derogation in Article 90(2), which was invoked on by the Member States, justified the maintenance of the exclusive rights in those particular cases. Pointing to the basic principle that the burden of proof rests primarily on those seeking to rely on the derogation, it considered that the Commission had failed to adduce persuasive evidence, in particular of an economic nature, which might have enabled it to pronounce on the pleas put forward by the Member States.

116. The Commission will naturally take account of the Court's remarks in its future activity. More specifically, as regards the exclusive rights at issue in those cases, court proceedings no longer seem necessary in view of recent legislative developments in the energy field.

2. Transposition of Directive 96/92/EC concerning common rules for the internal market in electricity

117. At the end of last year, the Council adopted the directive proposed by the Commission concerning common rules for the internal market in electricity. The main idea behind the directive is to provide third party access to the market so as to allow electricity consumers to benefit from price competition between producers. From an operational standpoint the directive makes available the following alternatives: either direct access for third parties to infrastructures or access to the market through the network operator, in which the operator becomes the sole buyer and seller of electricity.

118. The directive must be transposed by the Member States not later than 19 February 1999 except for Belgium, Greece and Ireland, which have been granted an extra period for transposition. The Member States' transposition measures are to be monitored by the Commission. Projects giving priority to renewable sources of energy, district heating systems and indigenous energy sources will be scrutinised to ensure that they are compatible with the Treaty's competition rules. The Commission will also make sure that the procedures adopted for access to the network and

the arrangements for, and level of, tariffs do not entail a *de facto* limitation on the trade in electricity envisaged by the application of the directive.

3. Proposal for a directive on common rules for the internal market in gas

119. The Council meeting on energy held on 8 December resulted in agreement to the proposal for a directive on the Community market in natural gas. The Commission welcomes the agreement. The directive establishes common rules for the transmission, distribution, supply and storage of natural gas; it lays down rules on access to the market, the use of networks, and the criteria and procedures applicable to the granting of authorisations for the transmission, distribution, supply and storage of natural gas. Although distribution of gas is covered by the directive, Member States are allowed, subject to certain conditions, to refrain from applying certain provisions concerning distribution if the fulfilment of obligations imposed in the general economic interest would be jeopardised. The directive lays down that, where Member States rely on the principle of general economic interest, the Commission must appraise the relevant cases individually.

120. As a Community average, the actual liberalisation of national markets will represent about 30 % of annual gas consumption on the entry into force of the directive, with 20 % being the minimum. The minimum percentage will be increased to 28 % after five years and 33 % after 10 years. Likewise, the category of eligible customers (consumers of natural gas authorised to negotiate their supply contracts independently with suppliers other than their usual supplier) is to be gradually extended: when the directive comes into force it will extend to all customers consuming more than 25 million cubic metres of gas annually on a consumption site basis, dropping to an annual consumption of 15 million cubic metres after five years and to 5 million cubic metres after 10 years. Gas-fired electric power stations are to be treated as eligible customers irrespective of their level of consumption. Member States may also decide to apply a maximum limit for liberalisation of the market, which has been set at 30, 38 or 43 % respectively.

121. Regarding the organisation of access to the system, Member States may choose be-

⁽¹⁾ *Commission v France*, cited above, paragraphs 33, 39 and 40; *Commission v Italy*, cited above, paragraphs 23 and 32; *Commission v Netherlands*, cited above, paragraphs 15 and 17.

tween two procedures: negotiated access or regulated access. Both systems must operate in accordance with objective, transparent and non-discriminatory criteria. Upstream pipeline networks must in principle also be open, but in accordance with criteria to be fixed by the Member States.

122. The Commission can grant derogations where operators who have entered into take-or-pay contracts are encountering difficulties caused by liberalisation. The directive also creates a derogation for Member States not directly connected to the gas network of any other Member States and having only one main external supplier. Provision is also made for derogations in respect of emerging markets and regions in Greece and Portugal.

123. When the common position of the Council has been formally approved it will be presented to the European Parliament for a second reading. It is envisaged that the final text of the directive will be adopted by the Council during the first half of 1998. It should be implemented and applied by about the middle of 2000.

E — Postal services

1. European Parliament and Council directive on common rules for the development of the internal market in Community postal services and the improvement of quality of service

124. On 15 December, the European Parliament and the Council adopted, on the basis of a proposal made by the Commission in 1995 and subsequently amended, a harmonisation directive for the postal sector⁽¹⁾. The directive aims to introduce common rules for developing the postal sector and improving the quality of service, as well as gradually opening up markets in a controlled way.

It imposes on Member States a minimum harmonised standard of universal service, including a high-quality service countrywide with regular guaranteed deliveries at prices everyone can afford. This involves the collection, transport, sorting and delivery of letters as well as books, catalogues, newspapers, periodicals and parcels within certain price and weight limits. It also covers registered and

insured items and applies to both domestic and cross-border deliveries. Due regard is given to considerations of continuity, confidentiality, impartiality and equal treatment as well as adaptability. The directive harmonises the maximum scope of the sector that, if necessary, may be reserved by Member States so as to guarantee the funding of the universal service.

2. Notice on the application of the competition rules to the postal sector⁽²⁾

125. On 17 December, the Commission adopted a notice aimed at clarifying the application of the competition rules to postal services. The Commission had wanted to wait until the postal directive was definitively adopted before adopting the notice, so that the latter would take full account of all the directive's provisions. The notice provides postal operators and the Member States with guidelines setting out the principles according to which the Commission will apply the competition rules to individual cases in the sector. The Commission points out, in particular, that it will ensure that the monopoly power granted to national post offices in order to guarantee universal service is not exploited in a way which will extend their dominant position to activities that are open to competition. It will likewise ensure that there is no unwarranted discrimination in favour of large customers at the expense of small users and that the monopolies granted for cross-border services are not used as a means of engaging in unlawful restrictive pricing agreements.

F — Transport

1. Decision on Italian dock labour legislation

126. On 21 October, the Commission adopted, pursuant to Article 90(3) of the Treaty, a formal decision on Italian dock labour legislation⁽³⁾. The decision asks Italy to put an end to the port companies' monopoly of temporary labour. It follows the Court of Justice's judgment⁽⁴⁾ to the effect that certain

⁽²⁾ OJ C 39, 6.2.1998.

⁽³⁾ Decision 97/744/EC, OJ L 301, 5.11.1997.

⁽⁴⁾ Case C-179/90 *Merci Convenzionali Porto di Genova* [1991] ECR I-5889.

⁽¹⁾ OJ L 15, 21.1.1998.

provisions of the Italian dock labour regulations were incompatible with Community law. At the time, port operations were subject in every Italian port to a twofold monopoly: (a) that concerning the organisation of port operations, held indirectly by the port management body, and (b) that concerning the labour for carrying out those operations, held by the dockers' companies.

127. Following an initial warning from the Commission, Italy had reformed its port legislation in two stages (laws of 1994 and 1996). The reform led to partial liberalisation, the main features of which were the deregulation of port operations, the freedom of port firms to hire their own employees, the creation of port authorities, the compulsory removal of port managers from port operations, and the abolition of discrimination based on nationality.

128. The port reform laws introduced, however, major new distortions of competition benefiting the old dockers' companies. The main one is that the old port companies, which were converted into firms for the performance of port operations, have also been given a monopoly in two very economically important markets: the market for temporary labour and the market for subcontracting labour-intensive services. The Commission considered that the latter measure infringed Article 90(1), read in conjunction with Article 86, since it leads the old port companies to abuse their dominant position. The companies become *de facto* the exclusive suppliers of their competitors (i.e. the exclusive suppliers of temporary labour and of subcontracted labour-intensive services to their competitors in the port operations market), thereby giving rise to a conflict of interest. Moreover, the new Italian port legislation grants the said monopoly to the same undertakings which, in the Court's view, had abused their dominant position.

2. Decision on piloting tariffs in the port of Genoa

129. On 21 October, the Commission adopted another decision under Article 90(3)⁽¹⁾, this time with regard to the system of rebates in piloting tariffs introduced in the port of Genoa by a circular from the Italian Minis-

try of Transport⁽²⁾, Tourship (ex Corsica Ferries) had complained about the system, which granted a 65 % reduction on the basic piloting tariff to shipping companies whose passenger vessels made at least four calls a week on a scheduled route and according to a regular timetable and frequency. Tourship argued that there was no justification for this type of reduction, since the service supplied by the pilots was the same regardless of the owner of the vessel.

130. Having examined the complaint, the Commission considered that neither the existence of economies of scale of this order of magnitude nor the protection of the seabed could objectively justify the level of the reduction. It did recognise, though, that economies of scale could result from planning pilot services around the scheduled activities of shipping companies as opposed to their unscheduled activities. However, since the current system was not based on this criterion, the Commission considered that the measure was incompatible with Article 90(1), read in conjunction with Article 86, its effect being to apply unequal conditions to different shipping companies for equivalent services, thereby introducing distortions of competition. The Commission called on the Italian Government to put an end to the infringement within two months.

3. Groundhandling services at Athens Airport

131. The Commission terminated proceedings under Articles 90 and 86 which it had initiated following complaints from various airlines about the groundhandling services supplied on a monopoly basis by Olympic Airways at Athens Airport. The poor quality of these services (registration, baggage handling, cleaning and catering, etc.) and the lack of transparency in the charges were the result of an abuse of a dominant position.

132. Following this decision, the Greek authorities began work on improving the east terminal at Athens Airport, which caters for foreign airlines. Major works are being, or will shortly be, carried out at the other Greek tourist airports. The law on temporary work, which prevented Olympic Airways from easily

⁽¹⁾ OJ L 301, 5.11.1997.

⁽²⁾ The tariff was prompted by the judgment of the Court of Justice in Case C-18/93 *Corsica Ferries Italia* [1994] ECR I-1783 and was twice modified after the complaint was lodged, on 5 October 1994 and 4 September 1996.

hiring seasonal staff to meet traffic peaks during the tourist season, has been amended.

133. The monopoly held by Olympic Airways in the supply of groundhandling services will be abolished from 1 January 1998, the date on which a new operator, selected by tender, will start to compete. From 1 January 1999 (the date laid down by the Council directive on access to the groundhandling market⁽¹⁾), a second supplier of ramp services will start operating.

134. Olympic Airways has also introduced a system of quality control and minimum standards which it undertakes to observe at Athens, Heraklion, Chania, Rhodes, Corfu and Thessaloniki airports. Statistics on compliance with these standards will be transmitted to the airlines at the end of each season. Olympic Airways has also drawn up a new pricing structure, which is closer to the actual cost of supply. From now on, these tariffs will be published and any change will be announced and substantiated.

4. Systems of discounts on landing fees

135. Back in 1995, the Commission adopted a decision based on Article 90(3)⁽²⁾ calling on the Belgian authorities to bring to an end the system of discounts on landing fees charged at Zaventem Airport. The decision had concluded that the system constituted a State measure within the meaning of Article 90(1) which had the effect of applying to airlines unequal conditions for equivalent services (associated with landing and take-off), thereby placing some of them at a competitive disadvantage. The system therefore infringed Article 90(1), read in conjunction with Article 86. Belgium did not comply with the decision, but instead appealed to the Court of Justice requesting the decision's annulment. Under Article 185 of the Treaty, however, the appeal, which has not yet been ruled on, is not amenable to suspensive effect. In 1996, the Commission accordingly initiated the Article 169 procedure for failure to comply with the decision. Having received no reply to the reasoned opinion, or notification of the measures taken, the Commis-

sion decided on 19 March to refer the matter to the Court of Justice under Article 169.

136. Other proceedings were initiated with regard to similar systems in three other Member States. In May, letters of formal notice were sent out concerning systems of volume discounts and concerning the differentiation of landing fees in accordance with the domestic or international origin of flights.

G — Other State monopolies of a commercial character

137. The Commission continued its efforts to secure compliance with Article 37 of the EC Treaty. The adjustment of national monopolies of a commercial nature in the new Member States received particular attention.

1. Swedish and Finnish alcohol monopolies

1.1. Judgment of the Court of Justice concerning the Swedish alcohol monopoly

138. On 23 October, the Court of Justice gave a preliminary ruling concerning the compatibility of the Swedish alcohol retail monopoly with Articles 37 and 30 of the EC Treaty⁽³⁾. The Court took the opportunity to clarify the scope of the two provisions: rules relating to the operation of national monopolies of a commercial character must be assessed in the light of Article 37, while rules which are separable from the operation of the monopoly are subject to Article 30. The Court confirmed the Commission's opinion that the existence of the monopoly's exclusive right to retail alcoholic beverages is compatible with the Treaty, but reaffirmed that such an exclusive right must not lead to discrimination. The system of wholesale import and distribution licences, on the other hand, was regarded as incompatible with Article 30 of the Treaty.

139. The Commission is monitoring the activities of the Swedish and Finnish retail monopolies on the basis of the reports submitted to it by the Swedish Competition Authority and the Finnish Product Control Agency and reserves the right to initiate formal proceedings if non-discrimination is not being secured effectively.

⁽¹⁾ Council Directive 96/67/EC of 15 October 1996, OJ L 272, 25.10.96.

⁽²⁾ OJ L 216, 12.9.1995.

⁽³⁾ Case C-189/95 *Franzén*.

1.2. Norwegian alcohol monopoly

140. On 3 December, the EFTA Court issued an advisory opinion⁽¹⁾ on the compatibility of certain national provisions on the retail sale of alcoholic beverages with various articles of the EEA Agreement, and in particular with Article 16, whose terms correspond to those of Article 37 of the EC Treaty.

141. The Court came to the conclusion that Article 16 of the EEA Agreement does not preclude the application of national provisions according to which certain alcoholic beverages, i.e. red wine, white wine and rosé wine containing more than 4.75 % alcohol by volume, may only be sold at the retail level through a State alcohol retail monopoly, whereas beer with an alcoholic content of less than 4.75 % alcohol by volume (medium-strength beer) may be sold outside the State alcohol retail monopoly by parties who obtain a municipal licence.

142. The Court stated, however, that the system of maintaining two dividing lines under which wine or wine products with an alcoholic content of between 2.5 and 4.75 % alcohol by volume may only be sold through the State alcohol retail monopoly, while beer with the same alcoholic content may be sold outside the State retail monopoly, may lead to discrimination contrary to the said Article 16.

⁽¹⁾ Case E-1/97 *Fridtjof Frank Gundersen and Oslo kommune*.

143. By declaring, in this case, that provisions which define the scope of the exclusive right are to be considered in the light of Article 16 of the EEA Agreement, the Court followed the approach taken by the Court of Justice in *Franzén*.

2. Austrian tobacco monopoly

144. Austria did not comply within the prescribed time limit with the reasoned opinion sent by the Commission in May for failure to fulfil the obligation to adjust its manufactured tobacco monopoly in accordance with Article 71 of the Act of Accession and Article 37 of the Treaty. The principal objection levelled at Austria is that it has maintained in respect of any new operator trying to set up a wholesale distribution network in competition with the monopoly a general obligation to supply all retailers established on the national territory. Such an obligation is not only contrary to the applicable rules, whereby wholesalers must be free to choose their commercial partners operating at the retailing level, but would make it virtually impossible for new wholesalers to gain access to the relevant market.

In December, the Commission, in the light of the Court's recent judgment in *Franzén* (see previous point), concluded that the provisions of Austrian national law which it had objected to under Article 71 of the Act of Accession and Article 37 of the Treaty are separable from the operation of the monopoly, although they have an influence on the latter and must therefore be examined in the light of Article 30.

the 1990s, the number of people with a diagnosis of schizophrenia has increased in many countries (1).

There is a growing awareness of the need to improve the quality of life of people with schizophrenia. This has led to a focus on the development of psychosocial interventions that can help people with schizophrenia to live more independently and to participate more fully in society (2).

One of the most common psychosocial interventions is cognitive remediation. This involves teaching people with schizophrenia how to think and learn more effectively. It can help people to improve their memory, attention, and problem-solving skills. Cognitive remediation can also help people to develop social skills and to manage their symptoms (3).

Another common psychosocial intervention is social skills training. This involves teaching people with schizophrenia how to interact with others and to manage social situations. It can help people to develop communication skills, problem-solving skills, and self-management skills. Social skills training can also help people to build a support network and to live more independently (4).

There are many other psychosocial interventions that can help people with schizophrenia. These include family therapy, assertive case management, and supported employment. Each of these interventions has its own strengths and weaknesses, and it is important to choose the one that is best suited to the needs of the individual (5).

In conclusion, psychosocial interventions are an important part of the treatment of schizophrenia. They can help people to improve their quality of life and to live more independently. It is important to choose the right intervention for the individual and to provide it in a supportive and caring environment (6).

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III — MERGER CONTROL

A — Introduction

145. Since 1993, the number of mergers handled by the Commission has increased each year. A significant upturn in activity took place in 1997 (particularly during the second half of the year), with the Commission receiving 172 notifications (excluding the ECSC) as against 131 in 1996. This represents a growth rate of about 30 % and brings the total number of notifications received since the Merger Regulation was adopted seven years ago to more than 700. The number and variety of mergers with a Community dimension, but above all the substantial increase in cross-border mergers (up 36 % on 1996) concerning European companies from more than one Member State, reflect an increased momentum towards economic integration within the European Union this year. Among the wide range of markets concerned, certain business sectors proved particularly dynamic, such as financial services (15 notifications), the chemical industry (21 notifications), telecommunications (17 notifications) and retailing (11 notifications). The wide variety of operations notified in 1997 is evident from their breakdown by type of concentration: 77 notifications concerned the establishment of a joint venture or acquisition of joint control and 74 concerned acquisition of sole control or of a majority holding. Seven mergers and 14 takeovers were also notified.

146. Control of notified mergers, which resulted in the adoption of 188 decisions, including 136 final decisions (excluding the ECSC) in 1997, gave rise to the highest number of in-depth investigations recorded since 1990. The Commission decided to initiate proceedings in cases which raised serious concerns as to compatibility with the common market (as against six in 1996). But only one operation was actually declared incompatible (*Blokker/Toys 'R' Us*), as against three the previous year. Following in-depth investigations, the Commission also gave the go-ahead in eight cases (as against four in 1996), seven of which were made subject to conditions (*Anglo American/Lonrho*, *BT/MCI*, *Boeing/McDonnell Douglas*, *Coca-Cola/Carlsberg*, *Guinness/Grand Metropolitan*, *Siemens/Elektrowatt*, *Veba/Degussa*). The unconditional authorisation concerned the *Coca-Cola Entreprises/Amalgated Beverages GB* case. Seven other cases (as against three in 1996) were referred to the competent competition authorities of Member States; of those, six concerned only part of the operation.

147. Lastly, with regard to the coal and steel industries, 10 decisions were taken under Article 66 of the ECSC Treaty as against seven in 1996: this trend has been relatively stable since 1992. Three of those decisions gave the go-ahead to major restructuring operations in the steel industry. *Hoogovens*, the Dutch integrated producer, acquired control of *Usines Gustave Boël* in Belgium. The German producers Thyssen and Krupp set up a joint venture, *Thyssen Krupp Stahl*, in which they combined their flat products activities. As part of the privatisation of the Spanish nationalised company *Aceralia*, the largest producer in Spain, *Arbed* acquired a stake of 35 % and took over the company.

148. The substantial upturn in Commission merger control activity reflects the key role played by the Community rules. The year also saw the end of a wide-ranging legal review which was launched in 1995 and centred on amendments to Regulation (EEC) No 4064/89⁽¹⁾. Apart from amendments extending the scope of the regulation to cover a new category of mergers with cross-border effects, the review of all rules and procedures also enabled a number of new texts and amendments to be adopted (mostly applicable as from 2 March 1998). The result should be further improvements in the efficiency of the regulation, which has now been adapted to economic developments.

B — Merger review

1. Adoption of amendments to Regulation (EEC) No 4064/89

Stages and objectives

149. The year 1996 saw the official presentation by the Commission of proposed amendments to Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings. This followed wide-ranging consultations of Member States, the competent competition authorities and the business community and took account of reactions received after the publication of a Green Paper on the subject in January 1996. Following the adoption of Parliament and Economic and Social Committee reports welcoming the Commission proposal, work continued in the

⁽¹⁾ Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings, OJ L 395, 30.12.1989, as amended by Council Regulation (EC) No 1310/97 of 30 June 1997, OJ L 180, 9.7.1997.

first half of 1997 within the Council working party.

150. This preparatory work culminated on 24 April 1997 in a Council agreement on amendments to the Merger Regulation. The agreement was made official on 30 June 1997, at the end of the Dutch Presidency, with the adoption of Council Regulation (EEC) No 1310/97⁽¹⁾, which is scheduled to enter into force on 1 March 1998. In the interests of transparency and accessibility, the Commission has posted a consolidated version including the amendments on its Internet server.

151. The changes to the original 1989 text are in line with the Commission's objective of resolving the problems encountered since the regulation entered into force. A number of mergers with significant cross-border effects fall below the thresholds triggering Community control. Instead of being examined within the framework of a 'one-stop shop' system at Community level, such mergers are generally subject to multiple national controls of different types. Other amendments approved by the Council reflect the Commission's concern to improve control procedures in order to reduce administrative burdens on companies and to simplify the rules.

Substance of the main amendments

152. It was decided not to change the thresholds stipulated in the 1989 regulation but to add a new category of merger transaction. The Community will now be responsible for mergers meeting the following four conditions: (i) the combined worldwide turnover of all the companies concerned must be more than ECU 2.5 billion and (ii) the combined turnover of all the companies concerned must be more than ECU 100 million in each of at least three Member States. In addition, so as to ensure that mergers with cross-border effects are also included, (iii) the turnover of each of at least two of the companies concerned must be more than ECU 25 million in each of those same three Member States and (iv) the Community-wide turnover of each of at least two of the companies concerned must be more than ECU 100 million.

153. These measures will enable economic realities to be reflected more accurately and

will provide companies with greater legal certainty and increase administrative efficiency by extending the 'one-stop shop'.

154. The procedures and time limits laid down in the Merger Regulation will now apply to all operations resulting in a lasting change in the structure of the enterprises concerned, and, accordingly, to all full-function joint ventures in particular. In other words, all full-function joint ventures will henceforth be covered by the Merger Regulation, even those which hitherto were examined under the procedures of Regulation No 17. This amendment will have a significant impact which reflects concerns often raised in professional and legal circles regarding the need to harmonise and simplify the way full-function joint ventures are handled. However, the Commission will retain the option of assessing, within the framework of the Merger Regulation, the cooperative aspects of a full-function joint venture in the light of Article 85 to the extent that the merger results in the coordination of the competitive behaviour of the parent companies. It will therefore be able to initiate second-stage proceedings in the event of serious concerns arising not just as regards the risk of a dominant position being created or strengthened, but also as regards the risk of the competitive behaviour of the parent companies being coordinated in a way which is incompatible with the common market.

155. Specific provision is also made for companies to propose commitments during the first stage of proceedings with a view to clearing up any serious concerns which could constitute grounds for the Commission to initiate second-stage proceedings. For that purpose, arrangements have been laid down to extend the time limit for the first stage of proceedings so as to allow the Commission to study the commitments and to consult the Member States before, as appropriate, accepting them and authorising the merger.

156. Among the other main changes, the new regulation clarifies the circumstances in which the Commission can refer a case to the competent authorities of a Member State following a request from that State setting out the grounds on which it is based. In particular, the Commission will refer all or part of a case where a merger affects competition on a distinct national market that does not constitute a substantial part of the common market.

⁽¹⁾ OJ L 180, 9.7.1997.

157. Lastly, mention should also be made of two amendments concerning the period within which a merger cannot be effected and the basis for calculating the turnover of credit institutions and other financial institutions. To ensure effective control, the Council took the view that mergers should not be effected until a final decision has been adopted. As regards the calculation of turnover of financial institutions to determine whether a merger has a Community dimension, calculation will be based on the income items as defined in Council Directive 86/635/EEC and no longer on one-tenth of total assets.

2. Changes and improvements to the other provisions and notices relating to merger control

Implementing regulation and interpretative notices

158. Commission Regulation (EEC) No 3384/94 on notifications, time limits and hearings and the Form CO attached to it have been revised with three objectives in mind: namely to make the changes that had become necessary as a result of amendments to Regulation (EEC) No 4064/89; to introduce the improvements deemed desirable in the light of merger control experience; and to clarify a number of purely formal and linguistic points. Professional and legal circles were consulted on the changes, which were also submitted to the Member States for an opinion at two advisory committee meetings held at the year-end. For the same reasons, an in-depth review was also carried out of four interpretative notices on the concept of concentration, undertakings concerned, joint ventures and the calculation of turnover.

159. As regards the implementing regulation and the Form CO, the changes resulting from amendments to the Merger Regulation mainly concern rationalisation of the methods used to calculate the various time limits governing proceedings and implementation of the provisions on the suspension of notification and the completion of an operation (suspended pending a final decision). The changes made in the light of experience are designed to facilitate the processing of notifications, particularly by ensuring that correct and complete information is provided, and to improve hearing procedures. The redrafting of the notices was basically designed to make the changes to the

legislation easier to interpret and to update references to decisions actually taken.

Commission notice on the alignment of procedures for processing mergers under the ECSC and EC Treaties

160. In the interest of greater transparency, closer compliance with the rights of the defence and faster decision-making, the Commission notice helps to simplify merger control by aligning certain rules pursuant to Article 66 of the ECSC Treaty with those of Council Regulation (EEC) No 4064/89. In this way, the Commission hopes to meet the expectations of companies involved in merger operations covered by both sets of rules. It should be possible for ECSC companies to familiarise themselves with the procedures of ordinary merger law with a view to the forthcoming expiry of the ECSC Treaty.

161. The main changes as regards transparency concern the publication, in compliance with the requirements of business secrecy, of the fact of notification and the final decisions adopted. The protection of the rights of the defence, which is a general principle of Community law, will be reinforced by the sending of a statement of objections prior to the conditional authorisation or prohibition of a merger. Interested parties will be able to access the file and make observations at the hearing when a statement of objections has been sent. Lastly, the Commission will endeavour to apply the same time limits to the various processing stages of ECSC files as those laid down in the Merger Regulation. These new arrangements, which are harmonised with the amendments to the Merger Regulation, are scheduled to enter into force on 1 March 1998.

C — New developments

1. Product markets and geographic markets

Daily consumer goods

162. In the daily consumer goods sector, numerous criteria are used to define product markets, particularly where food products are concerned. For example, final consumers' tastes and preferences are often decisive factors in assessing whether products are substitutable from a demand viewpoint. Consumer habits result not just from products' physical

properties and generic characteristics but also from the impact of brand image and reputation, on which a company's competitive strength may rest. In three cases the Commission had to determine distinct markets for alcoholic or non-alcoholic beverages by analysing a set of factors affecting the substitutability of different product groups in the light of demand on the relevant market.

163. Accordingly, in the non-alcoholic beverages sector, the Commission drew a distinction between sparkling drinks and non-sparkling drinks such as fruit juice. Since this initial distinction proved sufficient to assess the effects of a merger in *The Coca-Cola Company/Carlsberg* case, the Commission was not obliged to determine whether finer distinctions were needed. This distinction, however, proved insufficient in another case, *Coca-Cola Enterprises/Amalgated Beverages GB*, for the purposes of which the Commission drew a finer distinction between colas and other flavoured sparkling drinks. In the case in point, the Commission concluded that there was a specific market for colas in the United Kingdom. With regard to alcoholic drinks, in the *Guinness/Grand Metropolitan* case, the Commission also had to establish a more detailed breakdown of the spirits market, which in the European Economic Area consists largely of national markets, to take account of the specific conditions prevailing on one or another of those markets, and in particular to take account of variations in consumption patterns from one country to another.

164. Price is also an important criterion in determining a product market, as was shown by the *Coca-Cola Enterprises/Amalgated Beverages GB* case. The Commission's finding that colas constituted a separate product market in the United Kingdom was based not just on consumers' taste and preferences or on the product's image and brand, but also on elements drawn from its price investigations. When asked whether consumers would switch to drinks other than colas if prices were raised by between 5 and 10 %, most competitors and distributors replied that any such switch would be limited or that substitution would not take place. The Commission also concluded from commercial documents and professional market surveys that the vast majority of market traders took account of the specific competitive environment of colas when determining commercial strategy and drawing up pricing

studies and policies. In the *Guinness/Grand Metropolitan* case, the Commission, taking price as well as other factors into account, similarly concluded that genever was not the same product market as gin in Belgium given the differences recorded in retail prices for those beverages over more than two years.

Public service infrastructure

165. With regard to sectors undergoing liberalisation, the *Siemens/Elektrowatt* case allowed the Commission to analyse recent competition trends on several capital goods markets situated upstream from general-interest service markets, such as energy supplies or the public telephone network. On the question of payphones, features specific to the universal service network prompted the Commission to identify a separate market for 'public' payphones, which are tougher and integrate sophisticated monitoring equipment given that they are located in public places out of doors and are accessible at all times. These payphones are run (not purely on the basis of profitability considerations) by operators which form a specific demand category: national telecommunications companies still within the public sector, or private operators of the public telecommunications network which have been granted authorisation as part of moves to liberalise the industry. Even after liberalisation of the telecommunications industry has been completed, the obligation to provide a public service means that it will still be necessary to maintain a network of 'public' payphones, which will continue to influence the conditions of competition on a market on which only a minority of payphone manufacturers are present.

166. Unlike 'private' payphones run by private operators, as in cafés, hotels and restaurants, which constitute a market with a European dimension, 'public' payphone markets are still heavily national, given the specifications and technical standards (particularly as regards safety) laid down by the national operators, which has resulted in an individual payphone model being developed, at least in each of the large Member States.

2. Dominance assessment

2.1. Dominance at world level

167. Within the context of the globalisation process, an increasing number of mergers in-

volving very large companies which are active on world markets are likely to have a significant effect in the common market. Since some of these mergers are taking place on global markets characterised by a small number of competitors and high entry barriers, there is a substantial risk of dominant positions being created or strengthened.

168. The application of the Merger Regulation to operations of this type may involve extraterritorial elements, particularly where the companies are based outside the common borders of the European Union and the operation (full merger, acquisition or creation of a joint venture) also takes place outside the Union. Apart from triggering the notification requirement when the turnover thresholds laid down in the regulation are reached, the critical element on which competence to act is based is the operational scope of the transaction within the common market. The matter of competence is hardly in doubt in cases where the relevant geographic market is defined as global, since the European Union forms a substantial part of that market. Accordingly, competence is then based on the impact of the operation on the conditions of competition in the common market. However, even where the relevant market has not been defined as global, the Commission's competence to examine a merger between companies which do not have a registered office, subsidiaries or branches on Community territory may be based on the operation's effect on the conditions of competition in the common market.

169. In that context, the *Boeing/McDonnell Douglas* case, which led to the creation of the largest aerospace company in the world, gave rise to an in-depth investigation in view of its impact on competition. The company resulting from the merger held a market share of more than 60 % of the world market for commercial jet aircraft with more than 100 seats. A market which is extremely concentrated since, following the operation, only one competitor, Airbus, remains. Boeing already dominated the market, and its position was strengthened by various factors, such as the immediate increase in its market share and order book. Other essential elements helped to strengthen its dominant position. The main ones identified by the Commission include the leverage effect with users of McDonnell Douglas (MDD) aircraft, the enhanced opportunity to enter into long-term exclusive supply deals with airlines, the merger of patent portfolios

and the technological 'spill-over' benefits to the company's defence and space activities resulting from public funding of R & D programmes.

170. In view of the lack of potential entrants (no other aircraft manufacturer was interested in acquiring the activities concerned), Boeing offered commitments which basically concerned the cessation of exclusive supply deals, the 'ring-fencing' of MDD's commercial aircraft activities and the licensing of patents to third parties. An annual report is also to be submitted to the Commission on R & D projects benefiting from public funding. Since this package of measures was deemed adequate to resolve the resulting competition problems, the Commission decided to give the merger a conditional go-ahead.

171. The case, which was examined simultaneously on both sides of the Atlantic, proved particularly sensitive because of the important interests involved, both in civil and military terms and because of its economic repercussions on competition. Throughout the Commission proceedings, the case received considerable attention from the media which focused on the State interests at stake. The Commission reached its decision after carrying out an analysis based on the European Union's merger control rules and in accordance with its own practice and the case-law of the European Court. Numerous contacts and consultations took place, particularly between the Member of the Commission with special responsibility for competition and the Federal Trade Commission within the framework of the bilateral agreement on cooperation in competition matters between the European Union and the US Government. During its in-depth investigation, the Commission notified the US authorities of its initial conclusions and concerns and called on the Federal Trade Commission to take account of the European Union's important interest in safeguarding competition on the large commercial jet aircraft market. After the Federal Trade Commission decided not to oppose the merger, the US Government informed the Commission of its concerns regarding a possible decision to prohibit the proposed merger, which could undermine the United States' defence interests. The Commission took its concerns into consideration to the extent consistent with EU law, and limited the scope of its action to the civil side of the operation, including the effects of the merger on the commercial jet aircraft market resulting

from the combining of Boeing and MDD's defence interests. In spite of the difficulties inherent to this case, the conditional authorisation given by the Commission on completion of its investigation was therefore a satisfactory and appropriate solution which maintained effective competition on the large commercial jet aircraft market.

172. In the *Anglo American Corporation (AAC)/Lonrho* case, the Commission also established that there was a risk of a dominant position being created on the world platinum market. This risk arose when AAC acquired a shareholding in Lonrho through a series of purchases. The dominant position resulted from the substantial combined market share of the parties and from the strong probability that it would increase further in the short term, given the very limited actual or potential competition. A sell-off was ruled out as a possible solution given that the only likely buyer would have been Gencor, the third-largest South African operator, which had itself been involved in a previous putative merger which the Commission had opposed in 1996 (*Gencor/Lonrho* case). Anglo American therefore agreed to the Commission's requirement that it reduce its shareholding in Lonrho to below a threshold giving it overall control of that company. This was the first time since the regulation entered into force that a commitment along those lines, consisting in the reduction of a shareholding in a company listed on a financial market, had been proposed, thus avoiding the risk of a dominant position being created. The decision also confirmed the Commission's consistent approach, which holds that acquisition of control may result from a qualified minority holding.

2.2. Market foreclosure effects

173. In the *BT/MCI* case, the merger between British Telecommunications and MCI Communications Corporation, the Commission's investigations showed that the operation might create or strengthen a dominant position in the market for international voice telephony services between the United Kingdom and the United States. This risk was linked to the relative capacity shortage in transmission facilities on transatlantic submarine cables between the United Kingdom and the United States which might lead to a bottleneck on the cable link, currently facing rapidly expanding demand.

174. The Commission took the view here that cable and satellite were not substitutable in the supply of telecommunications services for transatlantic links. BT and MCI already had significant cable capacity and their strength would have been further reinforced if their end-to-end international traffic capacities had been increased. As a result, the parties would have benefited from specific advantages (particularly in terms of international payments). No other competitor on the UK-US link would have enjoyed such advantages. Moreover, the new enterprise would have been in a position to oppose competition from other operators. In reply to the Commission's objections, the parties offered commitments consisting essentially of making transatlantic cable capacity available and selling matched half circuits to other operators at their request. These commitments were deemed sufficient to address the concerns raised since they facilitated access by competitors to a position similar to reciprocal correspondents. Shortly after the case was wound up, a surprise development occurred with the notification of a new proposed merger between MCI and a new telecommunications operator (WorldCom). A decision is to be taken in 1998 on the new project, which, if completed, could make the merger between BT and MCI as authorised by the Commission obsolete.

175. In the *Siemens/Elektrowatt* case, the Commission concluded that the merger would lead to foreclosure of the German market for 'public' payphones in view of the long-term contractual link between the only purchaser, Deutsche Telekom, and the sole remaining manufacturer, Siemens. This link resulted from the joint development of a new generation of payphones, for which Siemens provided the technology. Until that point, even though the parties were the only competitors capable of supplying the new payphones, the fact that competition existed meant that the telecommunications company could choose between two sources of supply. Following the merger, the option of changing supplier, and the resulting negotiating leverage, would have disappeared. Furthermore, there would have been no possibility of potential competitors bringing real pressure to bear because market entry would have entailed significant investments which would not have been feasible in view of the limited sales potential. The commitment proposed by Siemens, namely to sell off Elektrowatt/Landis & Gyr's payphone production activities to a third party, which would

also enjoy fair access to the technology in question, avoided the risk of the market being effectively foreclosed as a result of the dominant position.

2.3. Range effects

176. The question of the potential impact of range effects on competition, which is particularly important with regard to daily consumer goods, such as drinks, arises in connection with the additional benefits that may accrue to the owners of dominant brand names. These advantages may be reflected in greater pricing flexibility and in a wide range of commercial strategy options. In the *Coca-Cola/Carlsberg* and *Guinness/Grand Metropolitan* cases, the Commission considered the inclusion in a range of drinks of strong brands belonging to separate markets. It concluded that the impact of such inclusion could give each of the brands in the portfolio greater strength on the market than if they were sold individually, and strengthen the competitive position of the portfolio's owner on several markets.

177. In the second case, the consequences for potential competitors of owning a portfolio of high-profile brand names were also examined. The negotiating leverage resulting from ownership of dominant brands, which could, for instance, enable exclusive deals to be imposed, was deemed likely to raise additional obstacles to the market entry of new products.

178. Other range-related effects can also be noted in the industrial sector. For example, in the *Boeing/McDonnell Douglas* case, leaving aside the previously existing monopoly in the wide-body jet aircraft segment (Boeing 747), the merger resulted in an additional monopoly in the smaller narrow-body aircraft segment, thus making Boeing the only aircraft manufacturer offering a complete range of large commercial aircraft. This position could not be contested by new potential entrants, given the extremely high entry barriers on the market, which was highly capital-intensive.

3. Referrals to the Member States

179. The *SEHB/VIAG/PE-BEWAG* case, involving the privatisation of the Berlin-based electricity company BEWAG, is the only case where an operation notified to the Commission in 1997 was referred in its entirety to a Member State. The decision was taken follow-

ing the request by the Federal Cartels Office (Bundeskartellamt) in which it pointed out that the participation in the merger of the other energy supplier, PreussenElektra, could lead to a strengthening of a dominant position in the supply of electricity in Berlin and its surrounding area. In the new *Länder*, Preussen Elektra controls certain regional electricity supply companies whose markets surround BEWAG's supply area. Those separate markets do not constitute a substantial part of the common market and the Commission decided to refer the matter to the Federal Cartels Office. However, in line with the directive on the liberalisation of the electricity sector, the Commission took the view that the market entry of a new competitor, in the form of the presence among the buyers of the strong US company Southern, had a positive impact on competition on a market which has traditionally been partitioned.

180. Part of the *Rheinmetall/British Aerospace/STN Atlas* case was referred to the Federal Cartels Office. This concerned a limited aspect of the operation involving various branches of industry, such as marine technology, systems engineering and defence systems. The relevant market concerned equipment for armoured vehicles which was only marginally open to foreign competition.

181. The takeover bid launched by the retail group Promodès for its competitor Casino affected a number of local retail markets, including Paris and the Paris area. The Commission's decision to refer part of the operation was based on a belief that an examination by the French competition authorities would enable separate geographic markets on which the position of the group's stores entailed a risk of creating or strengthening a dominant position to be determined accurately. However, in view of the structure of the market and the position of the two groups, the Commission decided to approve the operation as regards the part for which it retained competence.

182. The diversified Preussag conglomerate acquired control of Hapag-Lloyd and Touristik Union International, both of which are active in tourism and travel services in Germany, in two separate transactions. The Federal Cartels Office took the view that the combination of those two operations and another merger, which took place at the same time in the same industry and had a national dimension, re-

sulted in the creation of a duopolistic structure given the mutual links between the two leading groups on the air travel, sea cruises and charter flights markets. In view of the circumstances of the case, the Commission referred the parts of Preussag's acquisitions concerning those markets so as to ensure that they were examined on the same basis and that their effects on competition were assessed in a consistent way. However, it decided that the other aspects of the notified mergers, which concerned several markets in the fields of transport and travel agencies, were compatible with the common market.

183. The acquisition of joint control of *Compagnie Industrielle Maritime* by a subsidiary of Elf and *Compagnie Nationale de Navigation* meant the takeover of a major oil storage company which had hitherto been independent of the large oil companies that made up its customer base, and threatened to create or reinforce dominant positions on certain separate oil storage markets. Accordingly, the Commission decided to refer that part of the case to the French authorities. Other specific aspects, such as the storage of crude oil traded on the international spot market, did not raise serious competition concerns, and were therefore approved.

184. The takeover bid for Redland launched by Lafarge provided a first opportunity, for two Member States to cooperate simultaneously with the Commission in handling certain aspects of the operation concerning aggregates and ready-mixed concrete. The French and UK authorities had informed the Commission that the proposed operation would entail a risk of creating or strengthening dominant positions in a number of distinct geographic markets. The French request identified 17 affected areas; in the request from the United Kingdom (where Lafarge's presence is much smaller) two such areas were identified. The Commission considered that the competent national authorities were best placed to examine the issues raised, given that the markets identified in the requests were local or regional in scope. By a third decision taken the same day, the Commission authorised the bulk of the operation on the basis that it would not create or strengthen dominant positions in any other markets than those which were the subject of the requests for referral.

4. Full-function joint ventures

185. With the entry into force of the amendments to the regulation, the distinction for merger control purposes between concentrative and cooperative joint ventures no longer applies, and the 'full-function' nature of a joint venture has become the sole criterion governing application of the Merger Regulation to operations of that type. Since the criterion is based on a joint venture's long-term performance of all the functions of an autonomous economic unit, it is all the more important that about half of notified operations concern joint ventures presented as being concentrative. Specific arrangements apply to a large number of such operations, particularly with regard to the trade links remaining between the parent companies and the joint venture, which must be looked at carefully when determining whether the entity is genuinely full-function.

186. Whether a joint venture is full-function or not is essentially contingent on its having all the necessary resources in terms of funding, staff and tangible and intangible assets. It was on that basis that Fuel Logistic, a nuclear forwarding joint venture between RSB Logistic Projektspedition and AO Techsnabexport in Germany (*RSB/Tenex/Fuel Logistic* case) was deemed not to be a concentration because it lacked the necessary assets such as special transportation equipment, specialised staff and appropriate premises which would enable it to provide those services on the market. Furthermore, Fuel Logistic was to supply its services mainly to one of its two parent companies and to act as an auxiliary company of RSB. By the same token, the joint venture created between Preussag Stahl AG and Voest-Alpine Stahl Linz GmbH for the production of laser welded steel sheet (*Preussag/Voest-Alpine* case) was not regarded as constituting a concentration. The Commission took the view that the joint venture would not perform all the functions normally carried out by companies operating on the same market since it would rely entirely on its parent companies for the procurement of virtually all of the pre-material it would need and would not be able freely to negotiate the price of those supplies.

187. In other operations the Commission had to determine where the dividing line lies between a full-function joint venture and a joint venture which is not full-function because of the nature of the relationship with its parent

companies. The fact that the joint venture set up by Philips and Hewlett Packard to manufacture components for lighting products will sell to its parent companies during its start-up phase does not alter the fact that it will operate on the market on a lasting basis (*Philips/Hewlett-Packard* case). Similarly, in the operation between the Swedish telecommunications companies Telia and Ericsson, whereby joint control is acquired of AU-System Group (software development and distribution of telecommunications equipment), the joint venture was to retain Telia as a major customer. However, the Commission also took into account that there were other major customers and that commercial relations concerned only one field of AU-System's activities and concluded that the company would play an active role on the market irrespective of its sales to one of its parent companies (*Telia/Ericsson* case).

188. The minor economic importance — in comparison with the operation as a whole — of the contractual links between a joint venture and one or both of its parent companies was also deemed relevant in the *BASF/Shell* case. The joint venture in which the polyethylene production and sales activities of BASF and Shell are combined is continuing to source raw materials from its parent companies. It also produces other substances on their behalf and operates facilities on the industrial sites of BASF and Shell. In spite of those links, the joint venture, which has its own plants and constitutes an upstream integrated company, was deemed to be autonomous and full-function, mainly on the basis that its polyethylene activities made up the bulk of its turnover (70 %). However, the Commission also took a careful look at the risk that the operation might lead to a larger coordination of the parent companies' activities in view of their strong positions on another polyolefins market and given the existence of numerous, complex links with the joint venture.

189. The period for which a joint venture is to operate is also taken into account: in the aforementioned case, the minimum period of 14 years laid down in the contract was deemed to constitute a lasting operational basis. Likewise, a duration of seven years does not call into question the lasting nature of a joint venture (*Go-Ahead/VIA/Thameslink* case). Indeed, although the new joint venture Merial, which was set up by Merck and Rhône-Poulenc in the field of animal health, notably

antiparasitics, will be the exclusive distributor, for a specified period, of some of Merck's finished products and sources certain basic chemical ingredients from its parent companies (*Merck/Rhône-Poulenc/Merial* case), its full-function nature was not called into question. The Commission took account of the fact that Merial would perform all the functions of an autonomous company on a lasting basis, would carry out its own R & D activities, which were of vital importance to the field in question, and would maintain its own production units and sales force. Merial would also have the power to determine the quantities and resale prices of the finished products acquired from Merck. Lastly, Merial would bring significant added value to the finished products and the basic ingredients provided by one or other of its parent companies.

5. Implementation of rules and procedures

190. In view of its objective, merger control should be implemented in such a way as to ensure optimum effectiveness while also safeguarding the rights of the parties and third parties. Various rules and procedures set out in the regulation and implementing legislation allow these two principles to be reconciled.

191. Regarding the right of third parties to be heard, for instance, the Court's judgment of 27 November 1997⁽¹⁾, which rejected the application to have the Commission decision in the *Procter & Gamble/NP Schickedanz* declared null and void, clarified a number of points relating to those rights and to the time limits for consulting third parties and the advisory committee of experts from the Member States. In particular, the Court drew a distinction between the rights, backed by guarantees, of parties to the merger to have their right of defence respected throughout the proceedings, and the right of third parties to make known their point of view on merger plans which may have a detrimental impact on them. However, the Court also recalled the principle that these rights of third parties had to be reconciled with the main aim of the regulation, which is to ensure efficient controls and legal certainty for the companies subject to its implementation. In the case in point, the implementation of those principles led the Court to take the view that the period of two days

⁽¹⁾ Case T-290/94 *Kaysersberg SA v Commission*.

within which the third party applicant had to make its observations on the amendments to the plan proposed by the buyer was not such as to show that the Commission had failed to have regard for its right to be heard. The Court pointed out that, although the legitimate interest of third parties to be heard may require them to be allowed a sufficient period for that purpose, such a requirement must, nevertheless, be adapted to the need for speed which characterises the general scheme of the regulation and which requires the Commission to comply with strict time limits for the adoption of the final decision. Accordingly, the judgment sets out the need to acknowledge the usefulness of the Commission's flexibility in respect of Community merger control and in reconciling respect for the rights of defence and efficiency.

192. The processing of a case, which must normally take place within the strict time limits laid down in the regulation, may on occasion be delayed by problems such as a lack of information required to assess the operation notified. As a result of omissions or inaccuracies in the information given on the Form CO or in its annexes, the Commission declared notifications incomplete in 16 cases, thus extending the time limits for assessment so as to ensure that control remained efficient. Omissions, inaccuracies or contradictions of that type were noted, for example, in respect of the indirect presence of the parties on a significantly affected market (*Veba/Degussa*), of estimated market shares (*Nestlé/San Pellegrino*), or of the identification of the main customers or competitors likely to be contacted (*Swedish Match/KAV*).

193. In addition, so as not to prejudice the results of merger control or to prevent the adoption of remedies where appropriate, operations must be notified rapidly and may not be carried out before a certain date (extended until the final decision by the new rules). In two cases (*Samsung/AST* and *Maersk Data/Nantec*) the Commission reserved the

right to make use of its powers to fine parties for late notification. Lastly, in the *Bertelsmann/Kirch/Premiere* case, the Commission was obliged to insist that the firms call an immediate halt to the marketing of decoders for digitally broadcast channels, which constituted partial implementation of the operation, whereas it was still subject to a legal suspension. However, in order to take account of important factors such as the major financial risks which can be associated with this obligation, firms can apply for a derogation, of which five were granted in 1997.

194. However, the effectiveness of merger control is basically contingent on its ability to maintain or re-establish real competition. With that aim in view, the Commission made use, on two occasions, of its power to demand asset separation measures or any other appropriate action where a merger operation has already taken place. In the first case, which concerned Finnish companies (*Kesko/Tuko*), and was declared incompatible at the end of 1996, the Commission took a separate decision pursuant to Article 8(4) of the regulation early in 1997 when it ordered the companies concerned to carry out their proposed divestment with a view to restoring effective competition. The *Blokker/Toys 'R' Us* merger in the Netherlands was declared incompatible with the common market but, by means of the simultaneous application of Article 8(4) of the regulation, the Commission also took appropriate measures designed to ensure that the buyer, Blokker, sold off its controlling stake in the target company. These two merger operations were carried out without the companies concerned being obliged to notify the Commission because they did not have a Community dimension. Nevertheless, the Commission examined them and took the necessary measures following requests by the Finnish and Dutch authorities respectively pursuant to Article 22 of the regulation, which provides for the Commission to examine a concentration with no Community dimension at a Member State's request.

D — Statistical overview

Figure 4:
Number of final decisions adopted each year since 1991 and number of notifications

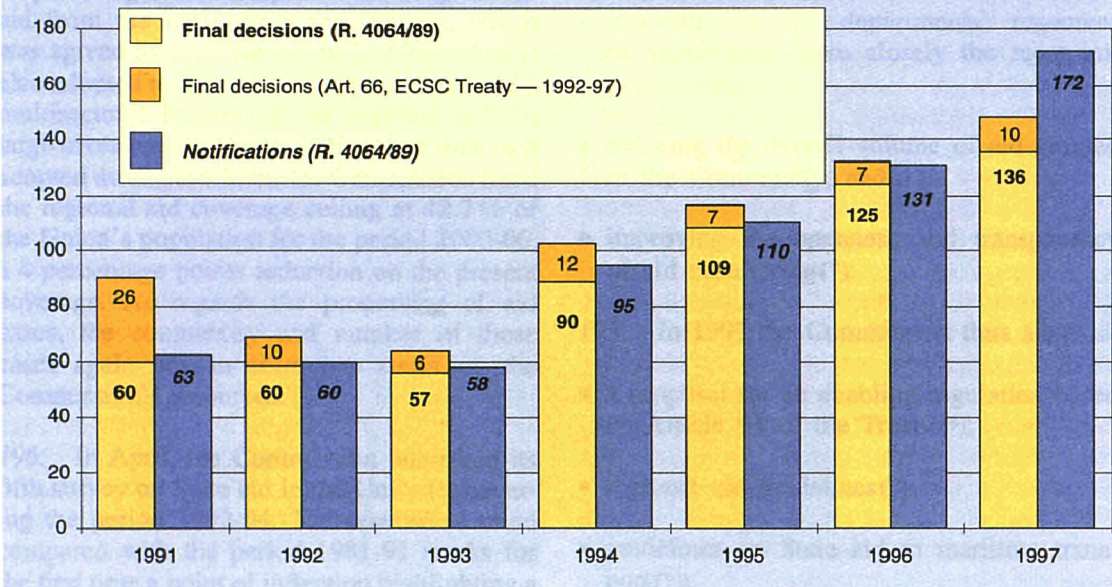
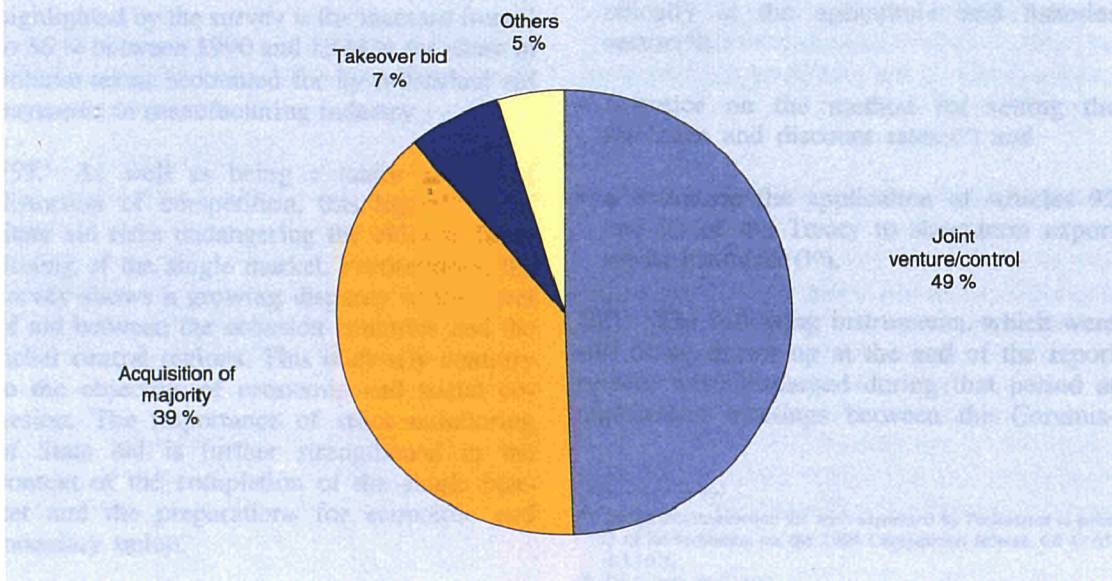


Figure 5:
Breakdown by type of operation (1991-97 total)





IV — STATE AID

A — General policy

195. A number of important objectives which the Commission had set itself for the reform of its general policy on State aid were achieved in 1997. It adopted a proposal for a regulation empowering it to exempt certain categories of aid from the notification requirement, which was agreed by the Council on 13 November. It also adopted new regional aid guidelines and a multisectoral framework on regional aid for large investment projects. At the same time as it adopted these guidelines, the Commission fixed the regional aid coverage ceiling at 42.7 % of the Union's population for the period 2000-06, a 4 percentage points reduction on the present coverage. As regards the processing of aid cases, the complexity and number of those cases again put an enormous strain on the Commission's resources.

196. In April, the Commission published its fifth survey on State aid in the Union⁽¹⁾ covering the period 1992-94. The downward trend compared with the period 1981-91 marks for the first time a point of inflection highlighting a stabilisation of the overall volume of aid. According to a widely held view⁽²⁾, this level is still too high, and if Europe is to be competitive at world level it must be reduced. The volume of aid to industry in the Twelve over the period 1992-94 came, on average, to approximately ECU 43 billion a year, or 4 % of value added and ECU 1 400 per job in the sectors concerned. The most noteworthy development highlighted by the survey is the increase from 7 to 36 % between 1990 and 1994 in the share in volume terms accounted for by individual aid payments to manufacturing industry.

197. As well as being a major source of distortion of competition, this high level of State aid risks endangering the efficient functioning of the single market. Furthermore, the survey shows a growing disparity in the level of aid between the cohesion countries and the richer central regions. This is clearly contrary to the objective of economic and social cohesion. The importance of strict monitoring of State aid is further strengthened in the context of the completion of the single market and the preparations for economic and monetary union.

198. The new instruments adopted by the Commission or being prepared by its departments pursue the following objectives:

- simplifying and clarifying the procedural rules;
- concentrating the departments' resources on monitoring more closely the most important cases;
- reducing the overall volume of aid granted in the Community; and
- improving the openness and transparency of aid monitoring⁽³⁾.

199. In 1997 the Commission thus adopted:

- a proposal for an enabling regulation based on Article 94 of the Treaty⁽⁴⁾;
- regional aid guidelines⁽⁵⁾;
- guidelines on State aid to maritime transport⁽⁶⁾;
- a new framework for State aid to the motor vehicle industry⁽⁷⁾;
- a 'multisectoral' framework on regional aid for large investment projects;
- guidelines on State aid for rescuing and restructuring firms in difficulty, aimed specifically at the agriculture and fisheries sector⁽⁸⁾;
- a notice on the method for setting the reference and discount rates;⁽⁹⁾ and
- a notice on the application of Articles 92 and 93 of the Treaty to short-term export credit insurance⁽¹⁰⁾.

200. The following instruments, which were still being drawn up at the end of the report period, were discussed during that period at multilateral meetings between the Commis-

⁽¹⁾ COM(97) 170 final.

⁽²⁾ See point 6.4 of the opinion of the Economic and Social Committee on the 1994 Competition Report, OJ C 39, 12.2.1996.

⁽³⁾ See in this connection the wish expressed by Parliament in point 7 of its resolution on the 1994 Competition Report, OJ C 65, 4.3.1996.

⁽⁴⁾ OJ C 262, 28.8.1997.

⁽⁵⁾ Not yet published in the OJ.

⁽⁶⁾ OJ C 205, 5.7.1997.

⁽⁷⁾ OJ C 279, 15.9.1997.

⁽⁸⁾ OJ C 283, 19.9.1997.

⁽⁹⁾ OJ C 273, 9.9.1997.

⁽¹⁰⁾ OJ C 281, 17.9.1997.

sion's departments and Member States' experts:

- a draft proposal for a procedural regulation based on Article 94;
- a draft review of the Community guidelines on State aid for rescuing and restructuring firms in difficulty;
- a draft framework on training aid; and
- a draft new directive on the transparency of financial relations between Member States and public undertakings.

201. The key instruments from the point of view of reducing the level of aid in the Union are the regional aid guidelines, the multisectoral framework on regional aid for large investment projects and the future Community guidelines on aid for rescuing and restructuring firms in difficulty. The draft procedural regulation, the draft new directive on transparency and the notice on reference rates will, for their part, make above all for greater transparency. As for the future exemption regulations that will be adopted on the basis of the enabling regulation, these should simplify procedures by relieving the Commission of the burden of having to investigate numerous aid cases where there is no major risk of competition being distorted. The Commission should thus be able to devote a larger part of its resources to the individual scrutiny of the most important regional aid cases, such cases having to be systematically notified to it under the new multisectoral framework.

1. Regulations based on Article 94 of the Treaty

202. The most important area of legislative activity is, by far, that relating to the drawing-up of Council regulations pursuant to Article 94 of the Treaty. The Commission received clear encouragement to carry out work on such regulations at the Council meeting on 14 November 1996, when it was invited to present proposals aimed at increasing the legal certainty, predictability and consistency of its decisions⁽¹⁾. In July, the Commission presented a

proposal for an enabling regulation to the Council.

203. The purpose of the proposal for an enabling regulation is to make it possible, under certain conditions, to exempt from the notification requirement certain types of horizontal aid measures which can be presumed from experience to be compatible with the common market provided they fulfil certain specific, pre-established criteria. This should ultimately result in the Commission being relieved of a heavy, low value-added administrative workload, allowing it to concentrate on those cases most deserving of attention. The Commission does not intend, however, to waive any rights or avoid any obligations when monitoring aid measures thus exempted from the notification requirement. Member States will have to maintain a register and inform the Commission in their yearly reports of any exempted aid awards. The Commission will, of course, investigate complaints with all due diligence and national courts may also be called upon to deal with any breaches of the rules.

204. In practice, the regulation will empower the Commission to adopt, after consulting an advisory committee, specific regulations exempting from the notification requirement, under certain conditions, aid measures falling, in particular, within the following categories:

- horizontal aid for SMEs, R & D, environmental protection, employment and training;
- regional schemes in keeping with national maps approved beforehand by the Commission.

In addition, the regulation will provide a legal basis for the *de minimis* rule⁽²⁾. On 13 November, the Council gave its agreement to the proposal for a regulation presented by the Commission. The regulation ought therefore to be formally adopted in 1998 once the Council has received the European Parliament's opinion.

205. The procedural regulation that is being drawn up will codify, within a single Council regulation, the various rules of procedure which currently exist in the State aid field and will thus improve transparency and legal certainty. It will provide a firmer legal basis for current

⁽¹⁾ Parliament has also urged the Commission to take similar action: see point 26 of its resolution on the 1994 Competition Report, OJ C 65, 4.3.1996.

⁽²⁾ See Commission notice on the *de minimis* rule for State aid, OJ C 68, 6.3.1996.

practices, most of which stem from the case-law of the Court of Justice or from the pragmatic rules which the Commission has itself developed.

A preliminary draft proposal for a procedural regulation prepared by the Commission's departments was submitted to the Member States' experts at a multilateral meeting on 3 and 4 November. The Commission proposal should be ready for transmission to the Council early in 1998.

2. New regional aid guidelines

206. On 16 December, the Commission adopted new regional aid guidelines⁽¹⁾ unifying the criteria used to assess regional aid and replacing with a single text all the existing provisions, which involve different time frames and the nature of which is to some extent heterogeneous. The guidelines accordingly contain, firstly, those elements of the earlier instruments which are still operational and, secondly, new elements based on changes in Commission practice to reflect the socio-economic situation and the speeding-up of the process of the integration of the Union's economies. The Commission thus intends to meet the need for more effective control of State aid in the European Union by concentrating the effort to reduce regional disparities more on the less-favoured regions. The guidelines should also make it possible to introduce, as from 1 January 2000, a regional aid system which is both transparent and the same for all Member States, being based on full compliance with the Treaty provisions. Successive drafts of the guidelines were presented to Member States' experts at multilateral meetings on 15 May 1996 and 23 May and 1 July 1997.

207. Of the new elements introduced by the guidelines, the reduction in permissible aid intensities for large firms is of particular importance. The reduction in intensities meets the concern to lessen the distortions of competition caused by aid while maintaining the necessary consistency. It seeks, moreover, to reduce the potential for regional aid to act as an incentive to firms to relocate. In addition to the overall reduction in intensities, the Commission has introduced specific rules on tailor-

ing maximum aid intensities to the seriousness and scale of regional problems.

New rules on investment-linked employment aid have also been introduced to enable Member States to provide more support for labour-intensive investments and thus to contribute to the objective of stimulating employment. In view of the increasing pace of technical progress, certain categories of intangible investment which did not previously qualify for investment aid can now be financed within certain limits.

In the interests of softening the negative impact of any company relocations supported by regional aid, the guidelines stipulate that the aided investments and jobs must remain in the region concerned for at least five years⁽²⁾.

208. As in the past, regions having a per capita gross domestic product of less than 75 % of the Community average will qualify for exemption under Article 92(3)(a). The guidelines contain an amendment, however, to the method for choosing regions coming under Article 92(3)(c), which will henceforth consist of two stages:

- the fixing by the Commission of a ceiling on the population covered by the exemptions in Article 92(3)(a) and (c) of the Treaty at Union level and its distribution among Member States;
- notification by Member States of the methods and indicators they wish to use in choosing the eligible regions and of the list of regions they propose for exemption under Article 92(3)(c).

In laying down this method, the Commission took account of the need both to ensure stricter monitoring of aid and to leave Member States sufficient scope in determining their regional policy. Against this background, the guidelines should help to increase further the mutual consistency with the Structural Funds, eligibility for fund assistance being henceforth an additional criterion for determining eligibility for national aid. The timetables for national aid maps (consisting, for each Member State,

⁽²⁾ In its resolution of 13 November 1996 on industrial restructuring and relocation in the European Union (OJ C 362, 2.12.1996), Parliament underscored, in connection with the Structural Funds, 'the need for regional and local authorities to demand from incoming investment added value and self-sustaining linkages to the existing economy ensuring relocation is less vulnerable to easy delocation in future.'

⁽¹⁾ Not yet published in the OJ.

of a ceiling on coverage in terms of percentage of population, the regions eligible for regional aid and the maximum intensities of investment or employment aid for each eligible region) and that for the Structural Funds are also to be aligned. The strengthening of the mutual consistency between national maps of regions eligible for aid and the maps of future regional assistance from the Structural Funds formed the subject matter of a specific communication to Member States⁽¹⁾.

Ceiling on the coverage of regional aid in terms of population concerned

209. At the same time as it adopted the guidelines, the Commission fixed the ceiling of coverage of regional aid at 42.7 % of the population of the Union for the period 2000-06, a 4 percentage points reduction on the current coverage. This Community ceiling was apportioned between Article 92(3)(a) and (c) regions and between the various Member States in the light of regional disparities in terms of per capita income and unemployment in both the national and the Community context. The different national ceilings, which constitute the upper limit to the amount of regional aid that may be granted by Member States during the period 2000-06, may be revised before the end of 1998 in the light of the latest available statistics.

3. Multisectoral framework on regional aid for large investment projects

210. On 16 December, the Commission adopted a multisectoral framework on regional aid for large investment projects⁽²⁾. The framework will be applicable from 1 September 1998 for a period of three years, at the end of which the Commission will decide either to prolong, amend or abolish it. The framework is intended to limit the — often excessive — amounts of regional aid for large investment projects. It fits into the Commission's broader objective of ultimately putting an end to the various existing sectoral rules on State aid with a view to adopting a single approach to major awards under regional aid schemes re-

gardless of the sector involved, except in the case of coal and steel, which will remain subject to the ECSC Treaty until July 2002. The new framework generalises, in all sectors not covered by sectoral rules on State aid, the obligation to notify individually any aid planned for large-scale projects under regional aid schemes where one of the following two criteria is met:

- (i) the total project cost comes to more than ECU 50 million⁽³⁾ and the aid intensity is more than 50 % of the relevant allowable ceiling and the aid per job created or safeguarded exceeds ECU 40 000⁽⁴⁾;
- (ii) the aid amount exceeds ECU 50 million.

For large-scale projects thus defined, the framework lays down rules aimed at reducing any competition-distorting effects by lowering the aid ceiling compared with the maximum ceiling of intensity authorised in the region concerned, and this on the basis of three criteria:

- the capital-labour ratio;
- the degree of competition in the relevant market; and
- the impact on regional development.

211. These three criteria are each translated into a coefficient the value of which varies with the project's characteristics. To obtain the theoretical ceiling of permissible aid for a large-scale project, the maximum intensity authorised in the region concerned must be multiplied by the three coefficients obtained, provided the product of these coefficients is less than one. Most of the time this is likely to be the case, especially where capital-intensive projects are concerned. Here, the intensity of the aid authorised for large-scale projects will therefore be well below the allowable ceiling for the region in question, which remains applicable, however, to all projects not fulfilling criteria (i) and (ii) mentioned above.

212. A discussion paper on the draft multisectoral framework was the subject of an exchange of views between Commission officials and Member States' experts at a multilateral meeting on 15 January, and the instrument

⁽¹⁾ SEC(97) 2293 final: communication of 16 December 1997 on the links between regional and competition policy: reinforcing concentration and mutual consistency (not yet published in the OJ).

⁽²⁾ Not yet published in the OJ.

⁽³⁾ Reduced to ECU 15 million for projects in the textile and clothing industry.

⁽⁴⁾ Reduced to ECU 30 000 for projects in the textile and clothing industry.

was finalised in the course of numerous bilateral meetings.

4. Directive on transparency

213. At a multilateral meeting on 1 July the Commission's departments presented a draft new directive amending the directive on the transparency of financial relations between Member States and public undertakings⁽¹⁾. The planned amendments are due essentially to the need to draw up separate accounts for operations connected with a service of general economic interest within the meaning of Article 90(2) or benefiting from exclusive rights and for those within the commercial sector. The aim is to highlight the existence of any cross-subsidisation between the two types of activity. The directive should be adopted by the Commission in 1998.

B — Concept of aid

214. The way aid is defined is of fundamental importance when it comes to applying the State aid rules, as only measures constituting aid within the meaning of Article 92(1) must be notified to the Commission. To create legal certainty for aid recipients Member States should also notify measures which might constitute aid. The concept of State aid under Article 92(1) is conveniently divided into four separate criteria which must all be fulfilled for State aid to exist and which are described below. Commission decisions and Court of Justice judgments have helped clarify these criteria. Developments in 1997 are described below.

1. Advantage to a firm or firms

215. It has consistently been held by the Court and the Commission that advantages granted by public authorities which lighten the charges normally included in an undertaking's budget constitute State aid⁽²⁾. In its *La Poste* (French Post Office) judgment⁽³⁾ the Court of First Instance upheld the Commission decision but found, contrary to the Commission deci-

sion, that tax concessions to the French public-law undertaking La Poste did constitute State aid which could benefit from exemption under Article 90(2) as the tax concessions were not greater than was necessary to ensure the performance of the public-interest tasks assigned to La Poste. Moreover, the Court of First Instance confirmed that the Commission has a wide discretion in evaluating under Article 90(2) the additional public service costs, this discretion being comparable to that exercised by the Commission when applying Article 92(3) of the Treaty.

216. In 1997, the market investor principle was applied on several occasions by the Commission. This instrument makes it possible for the Commission to determine whether the transfer of public funds to public or private undertakings partially owned by the State constitutes State aid. This is the case if a private investor operating under normal market conditions would provide the funds on less favourable terms or would not provide them at all.

217. The purchase by the State from an undertaking of some of its shareholdings at more than the market price thus constitutes aid. This point was illustrated by the negative decision on the purchase by the French Government of Crédit Lyonnais preference shares held by Thomson SA⁽⁴⁾. In this connection the Commission would welcome greater transparency on the part of Member States in transactions involving the capital of undertakings which they own.

218. The '*Technolease*' case⁽⁵⁾ illustrates just how complex the measures supporting certain firms can be. In the case in point, Philips leased know-how through one of its subsidiaries to Rabobank. This enabled Philips to make a profit of NLG 600 million and Rabobank in all likelihood to amortise its purchase more quickly than Philips could have done, amortisation periods varying from one sector to another. In authorising this book transfer, the Dutch tax authorities appear to have allowed Philips and Rabobank to pay less tax. As no further information was forthcoming from the Dutch authorities, in April the Commission initiated Article 93(2) proceedings in respect of the measure.

⁽¹⁾ Commission Directive 93/84/EEC of 30 September 1993 amending Directive 80/723/EEC on the transparency of financial relations between Member States and public undertakings, OJ L 254, 12.10.1993.

⁽²⁾ See Case C-241/94 *France v Commission* [1996] ECR I-4551.

⁽³⁾ Case T-106/95 *Fédération Française des Sociétés d'Assurances and Others v Commission* [1997] ECR II-229.

⁽⁴⁾ Case C 62/96, aid for Thomson SA-Thomson Multimédia, not yet published in the OJ.

⁽⁵⁾ Case C 28/97, ex NN 38/97, *Technolease Philips-Rabobank*, OJ C 338, 8.11.1997.

219. The advantage conferred on a firm may take the form of a guarantee given by the public authorities to cover part of its liabilities. A system of guarantees set up by the State but financed entirely by premiums paid by the beneficiaries does not, however, constitute State aid as it does not consume any State resources. The Commission accordingly terminated the proceedings it had initiated in respect of the *Regeling Bijzondere Financiering* (special financing scheme)⁽¹⁾, which was open to any financially sound business, on the ground that no aid was involved inasmuch as the Dutch authorities had undertaken to adjust the premiums should the scheme fall into deficit in future. Similarly, it concluded that there was no aid element in a scheme of guarantees for small and medium-sized enterprises which encouraged the provision of risk capital in Finland⁽²⁾. On the other hand, State guarantee schemes which are not financed by premiums paid by beneficiaries have been considered by the Commission to contain aid elements.

Reference rates

220. Calculating the financial advantage to be gained from an aid measure in the case of staggered payments or the granting of soft loans calls for the setting of a reference rate in order to update the value of the financial flows involved. In July, the Commission laid down the rules it will henceforth apply in determining the reference rate for each country when it calculates the financial benefit flowing from a soft loan or a grant disbursed in several instalments⁽³⁾.

221. The reference rates are used to measure the grant equivalent of aid so disbursed and to calculate the aid element resulting from interest subsidy schemes for loans. They are thus useful in determining whether an aid measure is covered by the *de minimis* rule⁽⁴⁾, and they establish the interest rates applicable to the repayment of illegal aid⁽⁵⁾. The rates are supposed to reflect the average level of interest rates charged, in the various Member States, on medium and long-term loans (five to 10 years) backed by normal security.

⁽¹⁾ Case C 49/91, OJ C 202, 2.7.1997.

⁽²⁾ Case N 124/97, OJ C 250, 15.8.1997.

⁽³⁾ Notice on the method for setting the reference and discount rates, OJ C 273, 9.9.1997.

⁽⁴⁾ See the Commission notice on the *de minimis* rule for State aid, OJ C 68, 6.3.1996.

⁽⁵⁾ See OJ C 156, 22.6.1995.

In the past, the rates were set on the basis of definitions agreed bilaterally with each Member State. This method resulted in the Commission adopting heterogeneous definitions for the rates. What is more, the rates were communicated to the Commission spasmodically, which made it difficult to update them. Against this background, the Commission had an independent study carried out of the method for setting the reference rates applicable to the various aid schemes for businesses in the Union. The study was effected on the basis of a survey of over 70 banks in the 15 Member States. In the light of the study, the Commission decided to align the reference rate definitions and to automate the system of gathering and updating the rates.

2. Origin of resources

222. Only aid 'granted by a Member State or through State resources in any form whatsoever' can constitute State aid under Article 92(1). In many cases it is obvious that State resources are being used. This is the case, for example, with grants, capital injections, soft loans and tax exemptions⁽⁶⁾. In other cases the State resources element may be less clear.

223. One typical situation where the State resources criterion is closely investigated is when a Member State gives certain undertakings advantages directly through legislation. This issue arose in the *PMU* case, where a formal investigation was opened with regard to aid allegedly granted by France to racecourse undertakings⁽⁷⁾. Part of the alleged aid was not considered State aid by the Commission. The advantage resulted from legislation providing for an upward adjustment of the income share of the racecourse undertakings. Changing the distribution of the income from bets between betters and racecourse undertakings in favour of the latter did not involve any allocation of State resources. Hence no State aid was involved here.

224. A related situation arises where a Member State refrains from enforcing legislation on undertakings. The Commission decided that a failure by the Spanish authorities to enforce environmental regulations did not in itself constitute State aid within the meaning of

⁽⁶⁾ For non-recovery of taxes and contributions owed, see Case C 7/97, OJ C 192, 24.6.1997.

⁽⁷⁾ Case C 4/97, OJ C 163, 30.5.1997.

Article 92(1) since it did not involve any transfer of State resources⁽¹⁾. Consequently, the complainants' allegation that State aid was involved because the Spanish State would have to cover costs for environmental damage due to the undertaking's non-compliance was rejected.

225. The State resources criterion is often highlighted when an undertaking controlled by a Member State grants aid. This was the case in *Riedel-de Haën AG*, where the Commission decided to launch a formal investigation into aid granted by a German incorporated foundation⁽²⁾. The legal objective of the foundation, which was established by a Federal law, was to offer aid for environmental projects. Its resources derived from the privatisation of a former State-owned company. The German Government appointed each member of the management board and the foundation was audited by the Federal Court of Auditors. Consequently, the Commission considered the foundation to be a State body and its resources to be State resources. Aid granted by the foundation thus constituted State aid.

226. Cross-subsidies between the reserved activities and the competitive activities within an undertaking can involve a transfer of public resources. In the *La Poste* case, the Court of First Instance held the possibility of such cross-subsidies between the reserved postal activities and the insurance activities of La Poste to be excluded to the extent that the aid remained lower than the additional costs generated by the performance of the particular tasks of general public interest referred to in Article 90(2) and assigned to La Poste⁽³⁾.

3. Specificity criterion

227. The specificity criterion is often the most difficult one to establish. It helps to distinguish general measures, which are a matter for harmonisation, from specific measures, which may come within the scope of Articles 92 to 94 of the Treaty.

228. The specificity criterion is met, for example, where tax measures or measures relating to social security contributions introduce a difference of treatment in favour of one or

more sectors of industry without that difference being justified by the nature or purpose of the levy system. The Commission thus launched a formal investigation into section 52.8 of the German 1996 income tax act⁽⁴⁾, which provides for reductions in taxable income for natural or legal persons investing in companies in the eastern *Länder* or west Berlin. Being justified neither by the nature nor by the purpose of taxation in Germany, the measure was considered by the Commission to constitute State aid.

229. In *Maribel quater* the Commission decided that a Belgian scheme providing for a reduction in social security contributions for all firms employing manual workers constituted a general measure⁽⁵⁾. The scheme was of a general nature, applied automatically and did not appear *prima facie* to discriminate between sectors. The Maribel quater scheme replaced the Maribel bis/ter scheme⁽⁶⁾, which was not considered a general measure since an additional reduction in social security contributions was granted to firms operating in those industries most involved in international competition.

4. Distortion of competition and effect on intra-Community trade

230. An aid measure which has no effect on trade between Member States is not subject to the principle of incompatibility with the common market. The concept of effect on trade must be interpreted, however, in the light of the well-established case-law of the Court of Justice. For the condition to be met, it is enough, say, for the aided firm to carry on, even partially, an activity involving significant trade between Member States.

In particular, the Commission considers that measures to help firms expand in non-Community countries affect trade between Member States because Community firms are in competition with one another when it comes to doing more business outside the common market. Aid for direct investment abroad is thus deemed to be caught by Article 92⁽⁷⁾. Where such measures help to promote the international growth of small and medium-sized enterprises which would not have ex-

⁽¹⁾ Case NN 118/97, aid for *SNIACE SA*, not yet published in the OJ.

⁽²⁾ Case C 63/97, ex NN 104/97, OJ C 385, 12.12.1997.

⁽³⁾ Case T-106/95, referred to above.

⁽⁴⁾ Case C 16/97, ex NN 9/96.

⁽⁵⁾ Case N 132/97, OJ C 201, 1.7.1997.

⁽⁶⁾ Case C 14/96, OJ L 95, 10.4.1997.

⁽⁷⁾ 1996 Competition Report, point 224.

panded unaided, they may be considered compatible with the common market. On the other hand, the Commission takes a stricter view of aid for international expansion by large enterprises as these should normally themselves bear the cost and risk of their international development. It thus decided to open a formal investigation into such aid for the Austrian firm *LiftgmbH*⁽¹⁾ on the ground that the latter was already well established in several parts of the world where its competitors did not receive any aid to help them expand internationally.

C — Assessing the compatibility of aid with the common market

231. In 1997, the Commission maintained a strict approach to determining whether State aid is compatible with the common market and endeavoured to strike a balance between compliance with a system of undistorted competition and the contribution made by some aid to other Community policy objectives. Certain aid, especially operating aid provided through the tax system, may lead to considerable distortions of competition without significantly contributing to such Community objectives. The Commission undertook, in parallel with the adoption on 1 December by the Council (Economic Affairs and Finance)⁽²⁾ of a code of conduct on direct taxation, to adopt in 1998 guidelines for this type of aid and to review the tax arrangements in force in the Member States.

As regards excise duties on mineral oils, the Commission may, at the request of the Member States, ask the Council to adopt derogations from the tax harmonisation measures in this area⁽³⁾. Following a recent Council decision⁽⁴⁾, the Commission has undertaken to review the derogations posing problems and, in particular, to ensure that the latter comply with the competition rules on State aid.

232. In *Siemens*⁽⁵⁾, the Court was able to further define the concept of operating aid. It upheld the Commission's argument, confirmed by the Court of First Instance, that aid for use in the marketing of a firm's products, consti-

tuting one of its day-to-day activities, cannot be regarded as investment aid but must be treated as operating aid, which is in general considered incompatible with the common market. It is authorised only exceptionally:

- where it is intended to offset additional transport costs in the outermost regions or in regions qualifying for exemption under Article 92(3)(c) with low population densities and, exceptionally and temporarily, Article 92(3)(a) regions suffering from particular handicaps⁽⁶⁾;
- where it compensates for the extra costs of environmental protection in the fields of waste management and relief from environmental taxes⁽⁷⁾;
- in certain sectors such as shipbuilding where it meets very specific rules or thresholds.

1. Sectoral aid

1.1. Sectors subject to specific rules

1.1.1. Shipbuilding

233. The Commission continued its close monitoring of aid to shipbuilding under the seventh Council directive, which has remained in force since the OECD agreements. The United States had still not ratified these, so they were not yet applicable. In December, on the basis of a Commission proposal, the Council decided to extend the seventh directive to 31 December 1998, unless the OECD agreement was ratified and implemented in the meantime. At the same time, the Commission also put forward a proposal to replace the existing directive in the event of the agreement being finally ratified.

234. The most important cases examined concerned the aid intended for completion of the privatisation of the nationalised shipyards in Spain and the former East German shipyards *MTW* and *Volkswerft*. Part of the aid necessitated a derogation from the rules in force in the form of an *ad hoc* Council regulation⁽⁸⁾.

⁽¹⁾ Case C-77/97, ex N 99/97, direct investment abroad by *LiftgmbH*, not yet published in the OJ.

⁽²⁾ Council resolution of 1 December 1997, OJ C 2/2, 6.1.1998.

⁽³⁾ Directive 92/81/EEC.

⁽⁴⁾ Council Decision 97/425/EC, OJ L 182, 10.7.1997.

⁽⁵⁾ Case C-278/95 P *Siemens SA v Commission* [1997] ECR I-2507.

⁽⁶⁾ See points 4.16 to 4.18 of the guidelines on national regional aid.

⁽⁷⁾ See paragraph 3.4 of the Community guidelines on State aid for environmental protection, OJ C 72, 10.3.1994.

⁽⁸⁾ Council Regulation No 1013/97.

235. The aid recipients are subjected to rigorous scrutiny by the Commission. In particular, they undergo regular on-site inspections and are required to provide the Commission with quarterly reports on the status of the restructuring plan. The Commission noted that MTW's output in 1996 slightly exceeded the limit set at 100 000 tonnes. Thus when the Commission approved the first tranche of restructuring aid in July 1997⁽¹⁾, it required a compensatory reduction in output for 1997 and a cut of DEM 720 000 in operating aid.

1.1.2. Steel

236. The sixth steel aid code⁽²⁾ entered into force on 1 January and is to run until the expiry of the ECSC Treaty on 22 July 2002. Under the new code, State aid is allowed only for research and development and environmental protection, under basically the same rules as those applicable to other industry sectors, and for closures. A new feature of the sixth code is that it allows aid for partial closures, with strict rules to prevent any spill-over of aid to the remaining activities of the enterprise in question, and gives the Commission more effective powers to combat illegal unnotified aid. The year saw the adoption of two decisions by the Commission in which it initiated proceedings to suspend aid granted without prior approval to MCR Gesellschaft für metallurgisches Recycling⁽³⁾ and ESF Feralpi GmbH⁽⁴⁾. The Commission did not raise any objection in respect of the acquisition by the Walloon region of a 25 % minority shareholding in Clabecq since the region had behaved like a private investor.

The Commission continued its monitoring of the eight ECSC cases which were approved under Article 95 of the ECSC Treaty.

1.1.3. Coal

237. Decision No 3632/93/ECSC⁽⁵⁾ of 28 December 1993 establishes the Community rules for State aid to the coal industry covering the period from 1994 to 2002.

238. On 18 December 1996, the Commission authorised⁽⁶⁾ the United Kingdom to grant financial assistance for the 1997/98 financial year totalling ECU 500.7 million (GBP 347 million) and an additional amount of ECU 29.5 million (GBP 24 million) for the 1996/97 financial year to cover inherited liabilities.

239. On 30 April, the Commission authorised⁽⁷⁾ the United Kingdom to grant financial assistance, by way of budgetary provisions for the financial year 1998/99 to be disbursed over the period until the expiry of the ECSC Treaty in July 2002, totalling ECU 1 285.6 million (GBP 891 million), to cover inherited liabilities.

240. On 3 May, the Commission published in the *Official Journal of the European Communities*⁽⁸⁾ a letter of formal notice to Spain concerning the provision of insufficient information with respect to a notification concerning supplementary aid proposed for 1994, 1995 and 1996.

241. On 23 August, the Commission published in the *Official Journal of the European Communities*⁽⁹⁾ a letter of formal notice to Germany concerning the alleged irregular use of State aid following a complaint lodged at the end of 1996 by a British anthracite producer.

1.1.4. Motor vehicle industry

(a) Motor vehicle framework

242. The Commission adopted a new Community framework for State aid to the motor vehicle industry for the period 1998-2000. It follows the series of motor vehicle frameworks that have been adopted since 1989 and has been adjusted to take account of the consequences of the main economic and industrial trends in the industry. In 1996, the Commission carried out a detailed study, with the help of independent consultants, into the current motor vehicle framework. The conclusions pointed to the overall efficacy of the framework and recommended several adjustments, notably as regards the definition of the motor vehicle sector, the notification

⁽¹⁾ Cases N 31/97 and C 90/97, OJ C 344, 14.11.1997.

⁽²⁾ Commission Decision 2496/96/ECSC establishing Community rules for State aid to the steel industry, OJ L 338, 28.12.1996.

⁽³⁾ Case C 85/97, ex N 301/97, environmental aid for MCR Gesellschaft für metallurgisches Recycling, not yet published.

⁽⁴⁾ Case C 75/97, ex NN 108/97, aid for ESF Feralpi GmbH, not yet published.

⁽⁵⁾ OJ L 329, 30.12.1993.

⁽⁶⁾ Decision 97/376/ECSC, OJ L 158, 17.6.1997.

⁽⁷⁾ Decision 97/577/ECSC, OJ L 237, 28.8.1997.

⁽⁸⁾ Notice 97/C137/06, OJ C 137, 3.5.1997.

⁽⁹⁾ Notice 97/C258/02, OJ C 258, 23.8.1997.

thresholds and certain components of the cost-benefit analysis.

243. The new framework broadens the definition of the industry to include first-tier component suppliers producing modules or sub-systems where these are produced in the car manufacturer's plant or on one or more industrial sites in the vicinity. The new framework also stipulates that specific cases must be notified where project costs exceed ECU 50 million (compared with ECU 17 million before) or where the amount of aid envisaged exceeds ECU 5 million (no threshold in the preceding framework). As regards cost-benefit analysis, the emphasis is placed on proving that there is a clear need for the aid; also, the comparator plant for assessing the extra cost of locating in an assisted area can, from now on, be located in the EEA, in the central and east European countries (CEECs), and, in some cases, on another continent. Lastly, excess capacity in the industry has led to the introduction of a mechanism which gradually adjusts the eligible aid intensity.

244. All the Member States eventually informed the Commission of their approval of the new framework, proposed as an appropriate measure. It enters into force on 1 January 1998.

(b) Court judgment on action brought by Spain

245. On 1 September 1995, Spain applied to the Court for an annulment of the Commission decision backdating for one year to 1 January 1995 the framework for State aid to the motor vehicle industry. In its judgment of 15 April 1997, the Court found that the Commission had not sought the approval of the Member States before adopting the contested decision and that, although this omission was due to exceptional circumstances, it meant that the decision was null and void.

The validity of the framework for the period 1996-97 is not affected.

(c) Assessment of cases

246. In 1997, the Commission took decisions in 19 specific cases in the motor vehicle industry involving total aid of ECU 276 million.

247. The *Volkswagen (VW) Sachsen* case reached a positive outcome in 1997. In July 1996, in breach of a Commission decision of 26 June 1996, the authorities of the *Land* of Saxony granted VW some DEM 90 million more than had been approved by the Commission for investment in the Mosel II and Chemnitz II sites.

248. At the Commission's request, Germany undertook on 4 September 1996 to freeze the payment to VW of a sum equal to the amount paid unlawfully by Saxony so as to neutralise the effects, especially the economic effects, of the transaction. On the same day, the Commission brought an action challenging the aid measure before the Court of Justice, but decided not to ask the Court for an interim ruling as long as Bonn continued to fulfil its undertaking.

249. In a letter dated 3 November, the German Government stated that it had taken all the steps to comply fully with the Commission decision of 26 June 1996. In essence, the German authorities certified that the amount granted unlawfully had been repaid by VW and had been placed in a trust account (*Anderkonto*) to which only the German authorities had access. Furthermore, the sum would not under any circumstances be used to finance VW investments in Saxony.

250. The favourable outcome prompted the Commission to withdraw its action for infringement against Germany brought before the Court of Justice for failure to comply with the decision of 26 June 1996. The proceedings instituted by Saxony and VW (to which an action by Germany is joined) against the Commission are still being examined by the Court of First Instance.

Lastly, from a more technical standpoint, after carrying out on-site inspections at the VW plants in Saxony, the Commission obtained an assurance that VW would comply with the capacities imposed in the Commission decision of June 1996.

251. The Commission approved a number of low-intensity aid measures in the motor vehicle industry without carrying out a cost-benefit analysis. It does not believe such an analysis is necessary when the aid intensity is below 10 % of the admissible regional ceiling, plus a top-up if needed. Thus no analysis was required in the cases concerning aid to

Sovab⁽¹⁾ in France, a Renault subsidiary, and to Mitsubishi Motors in the Netherlands⁽²⁾.

1.1.5. Synthetic fibres industry

252. Since 1977, the conditions under which aid may be awarded to this industry have been laid down in a code whose terms and scope have been revised periodically. The current code came into force on 1 April 1996 with a period of validity of three years⁽³⁾.

253. It requires the notification of any proposal to award aid, in whatever form, irrespective of whether the Commission has authorised the scheme concerned, (except where the aid would satisfy the *de minimis* rule) to synthetic fibres producers by way of direct support for:

- extrusion/texturisation of all generic types of fibre and yarn based on polyester, polyamide, acrylic or polypropylene, irrespective of their end-uses; or
- polymerisation (including polycondensation) where it is integrated with extrusion in terms of the machinery used; or
- any ancillary process linked to the contemporaneous installation of extrusion/texturization capacity by the prospective beneficiary or by another company in the group to which it belongs and which, in the specific business activity concerned, is normally integrated with such capacity in terms of the machinery used.

254. The only exceptions to the notification requirement relate to aid for vocational training or retraining awarded under schemes that have been authorised by the Commission or aid awarded under schemes that have been authorised by the Commission and fall within the scope of either the Community guidelines on State aid for environmental protection or the Community framework for State aid for research and development.

255. In 1997, the Commission continued to be vigilant in applying the code and in actively following up enquiries brought to its attention regarding possible breaches.

256. The Commission limited the intensity of the aid to the German polyester yarn producer Ernst Michalke GmbH (a Hoechst subsidiary) to 50 % of the aid ceiling, as required by the current code. The aid was also approved on the basis that the investment would take place in parallel with a significant reduction in capacity at group level.

257. The Commission decided to initiate Article 93(2) proceedings against proposed aid to the Portuguese cord and rope producer Cordex SA. While the company used its entire output of polypropylene filament yarn in-house to produce the final products which it places on the market, the Commission takes the view that by contributing *inter alia* to an increase in capacity, and irrespective of the market opportunities for the company's end product, the investment would be to the detriment of other producers of polypropylene filament yarn which had responded to a surge in demand by increasing their capacity without the benefit of aid.

1.1.6. Textiles and clothing

258. The industry was previously covered by guidelines adopted in 1971 and modified in 1977. The Commission considers, following a 1995 Court judgment⁽⁴⁾, that the guidelines are no longer legally valid as the obligation on the Commission, in cooperation with the Member States, to examine existing schemes has not been complied with in the present case in the textile and clothing industry.

259. Nevertheless, in view of the specific nature of the industry, the threshold from which aid grants must be notified as soon as the multisectoral framework enters into force is ECU 15 million instead of the ECU 50 million for other sectors, where the intensity exceeds 50 % of the eligible ceiling in the region in question and the ratio per job created or maintained exceeds ECU 30 000⁽⁵⁾.

1.1.7. Transport

260. In 1997, the Commission took 31 decisions on transport aid. The number of cases ending in a Commission decision thus fell to 1994 levels, i.e. a reduction of almost 40 %

⁽¹⁾ Case N 683/97, not yet published in the OJ.

⁽²⁾ Case N 149/97, not yet published in the OJ.

⁽³⁾ Code on aid to the synthetic fibres industry, OJ C 94, 30.3.1996.

⁽⁴⁾ Case C-135/93 *Spain v Commission* [1995] ECR I-1673.

⁽⁵⁾ See paragraph IV-A-2 of this report concerning the multisectoral framework.

compared with the peaks recorded in 1995 and 1996. Within these figures, however, are variations according to mode of transport: in sea transport, for example, the number of cases has increased. The Commission took two negative decisions imposing the recovery of unlawful aid.

261. In the field of air transport, the Commission continued to examine the implementation of the plans to restructure national airlines, verifying compliance with all the conditions laid down in the decisions authorising aid for the restructuring of the airlines, in particular:

- on 16 April, the Commission raised no objections in respect of the incorporation into Air France's equity of FRF 1 billion, representing the balance of the third and last instalment of the FRF 20 billion aid to the French national airline. The Commission took the view that this sum, placed in a blocked account in accordance with the decision of 24 July 1996, could now be freed in view of compliance with the conditions of the decision of 27 July 1994 and the undertakings given by the French authorities concerning, in particular, the company's tariffs within the EEA, the measures taken in agreement with the Commission concerning the airports of Orly Sud and Orly Ouest and the terms of the merger between *Air France* and *Air France Europe*;
- on the same day, the Commission authorised the payment to the Portuguese national airline TAP of the fourth and last instalment of the capital increase of PTE 180 billion, initially authorised by decision of 6 July 1994. The Commission made certain first that the conditions laid down in the decision had been complied with and that the firm's restructuring plan was, on the whole, following the timetable fixed. The Commission pointed out, however, that it was necessary to pursue the effort to ensure the long-term viability of the firm, in particular through agreements with the two sides of industry and by increasing revenue;
- on 15 July, the Commission authorised the payment to Alitalia, subject to certain conditions, of aid totalling ITL 2 750 billion in the form of a capital grant, payable in three instalments; the first instalment of ITL 2 000 billion would be granted immediately. The aid accompanies a restructuring plan

aimed at restoring the competitiveness and viability of the airline in the new liberalised Community market. The Commission took the view, in the light of the restructuring plan and the undertakings given by the Italian authorities, that the aid would facilitate the development of the air transport sector without affecting trade to an extent contrary to the common interest. The Commission's authorisation was subject to compliance with a number of conditions, including full implementation of the restructuring plan, management of the airline in accordance with commercial principles, a guarantee not to discriminate in favour of Alitalia, a limitation on seat capacity, the absence of 'price leadership', the divesting of certain Alitalia holdings in other firms, and transparent aid that can be monitored. In November, Alitalia brought an action before the Court of First Instance for a declaration that the Commission decision is void.

262. In the field of maritime transport, the Commission was in favour of the new Community guidelines on State aid for maritime transport becoming applicable to existing aid schemes within a reasonable period⁽¹⁾. That is why it proposed appropriate measures under Article 93(1) to all Member States in order to bring existing schemes into line with the new guidelines by 5 January 1999 at the latest.

The new guidelines comprise a certain number of changes and clarifications in relation to those adopted by the Commission on 3 August 1989⁽²⁾. Thus:

- reductions are possible in the social and tax contributions relating to seafarers providing they are Community seafarers sailing on vessels registered in a Member State. No other form of operating aid is authorised. The Commission therefore decided, on 17 December, to initiate proceedings in respect of an Irish aid scheme since the reduction in wage costs was not limited only to vessels flying the flag of a Member State;
- the new guidelines take the same restrictive approach adopted in the other modes of transport as regards aid to fleet renewal. No aid is authorised solely to acquire new or second-hand vessels. In accordance with

⁽¹⁾ OJ C 205, 5.7.1997.

⁽²⁾ 'Financial and fiscal measures concerning shipping operations with ships registered in the Community', SEC(89) 921 final.

this approach, the Commission decided on 21 October to initiate proceedings against a Sardinian scheme of aid for the purchase of vessels. However, investment aid intended to bring Community vessels into line with stricter standards than the mandatory safety and environmental standards may be authorised, provided it does not exceed the amount strictly necessary to cover additional costs;

- grants which are intended to compensate for public service obligations and which comply with the criteria of the new Community guidelines on State aid for maritime transport are not regarded as aid and do not therefore have to be notified. The obligation to notify, however, is still applicable to grants which do not comply with the new guidelines.

On 21 October, again in the field of sea transport, the Commission adopted a negative final decision on aid granted by the Sardinian Region from 1988 to 1996 for the acquisition, conversion and repair of ships intended for passenger and goods transport and required Italy to recover the aid granted unlawfully.

263. In its Green Paper on seaports and maritime infrastructure⁽¹⁾, adopted on 10 December, the Commission notes that certain arrangements relating to the financing of ports and fixing of port fees create increasing distortions of competition. The Commission's current policy is to consider that the public financing of infrastructure, in principle, constitutes a general economic policy measure not covered by the rules on State aid, provided that access to the infrastructure is open to all potential users in a non-discriminatory manner. The Commission will review this matter in a communication it intends to prepare in 1998 on financing and charging for the infrastructure.

264. In the rail transport sector, the Commission authorised, on 19 November, under Article 92(3)(c), aid granted by the UK authorities for the sale and restructuring of Railfreight Distribution. The Commission took the view that the restructuring plan should eventually allow the firm to regain viability and took account of the fact that to a large extent the aid was intended to offset the infrastructure utilisation charges due to Eurotunnel.

265. As regards road transport, the Commission adopted on 30 July a partially negative decision concerning unnotified aid in the Friuli-Venezia-Giulia region, and ordered Italy to abolish and recover the unlawful aid. The decision is currently the subject of an action for annulment brought by the Italian Government, the region concerned and 117 road hauliers. At the same time, the Commission brought an action against Italy for failure to comply with the negative final decision adopted in 1993 concerning tax arrangements for the purchase of road fuel.

266. With regard to combined transport, the Commission decided on 20 January to initiate proceedings under Article 93(2) against a Dutch aid scheme aimed at covering the losses incurred through the introduction of intermodal shuttle links to and from the Netherlands in view of its doubts concerning the eligibility of the measures under Article 92(3)(c).

On the other hand, on 22 October it authorised an extension for the period 1997-2001 of the Dutch aid scheme for combined transport facilities, on the ground that the measures made a significant contribution to transferring a part of road traffic to other less-polluting modes of transport. In view of the expiry on 31 December 1997 of the exemption relating to certain combined transport aid measures provided for in Article 3(1)(e) of Regulation (EEC) No 1107/70, as amended by Regulation (EC) No 543/97, the Commission based its positive decision, for the period 1998-2001, on Article 77 of the Treaty.

267. With regard to inland waterways, the Commission authorised the measures adopted by Germany and France granting aid to small waterway firms and extending existing aid schemes to the end of 1999. The measures are intended to support the restructuring of the sector pursuant to Council Regulation (EEC) No 1101/89, as amended by Regulation (EC) No 2254/96.

The Commission also authorised aid granted by the Luxembourg authorities to Luxport for the acquisition of equipment to handle containers for waterway transport. This is the first case under Council Regulation (EC) No 2255/96 which, under certain conditions, authorises until 1999 aid for investment in waterway terminal infrastructures or in the fixed and mobile equipment needed to transfer goods to and from the waterway.

⁽¹⁾ COM(97) 678 final.

1.1.8. Agriculture

268. In July, the Commission adopted a new version of the Community guidelines for rescue and restructuring aid to agricultural undertakings. The new rules entered into force on 1 January 1998 for new aid.

The new guidelines involve a substantive change of policy. Until now, the Commission has considered compatible with the common market, rescue and restructuring aid fulfilling the following specific criteria: financial difficulties should result from past investment; difficulties should be caused by external factors and total investment aid must remain below certain ceilings. In the past, Member States had been entitled, as an alternative, to use the Community guidelines applicable to all sectors⁽¹⁾.

The specific criteria for the agricultural sector have now been replaced by criteria similar to those contained in the guidelines applicable to all sectors, i.e. a quid pro quo for the aid is needed in the surplus sectors in the form of an irreversible reduction or closure of capacity (5 to 16 %). In order to take account of the special features of the agricultural sector, for small agricultural enterprises (defined as operators having no more than 10 annual work units) the requirement of irreversibly reducing or closing capacity may be considered to be achieved at the relevant market level rather than that of the enterprise concerned.

In recognition of the practical problems associated with capacity reduction, the Commission will waive the capacity reduction requirement where the aid concerns only a minimum amount of output such that trade distortion is at most only very minor. This derogation can be applied when the production concerned by the aid in a given year does not exceed 3 % (if the measures are focused on certain products or producers) or 1.5 % (if the measures are general) of the total annual value of products concerned in a given Member State.

269. After publication at the beginning of 1996 of a new framework for research and development concerning all sectors, including agriculture⁽²⁾, the Commission adopted an amendment to that document which clarifies and redefines its policy on such aid in the

agricultural sector. The amendment was due to the fact that the framework did not make any provision for aid for R & D work, in accordance with Article 92(1) of the Treaty, to exceed 75 %. This 75 % limitation constituted a more restrictive approach than had previously been applied in agriculture. After the entry into force of the amendment on 1 February 1998 the framework will, in specific circumstances, allow aid of up to 100 % in the agricultural sector. Four conditions are imposed: the research must be of general interest to the sector concerned, it must be published, its results must be made available for exploitation by interested parties on an equal basis and it must fulfil the conditions in Annex 2 to the GATT agreement on agriculture. Cases which do not satisfy these conditions will be examined under the other rules of the framework.

270. In 1995, the Commission adopted guidelines regarding State aid policy in the form of short-term reduced interest loans in agriculture ('operating loans')⁽³⁾. The main objective of the guidelines was to strengthen Commission policy concerning such types of operating aid. In the guidelines, the Commission recognises that specificities in the agricultural sector may result in disadvantages in the form of higher interest rates on short-term loans than in other sectors of the economy. Member States are thus allowed to compensate for that difference between sectors, on condition they notify the calculation method they intend to apply and demonstrate that there is no overcompensation.

During 1997, several Member States (Italy, Portugal, Spain) submitted their proposals for the methods of calculating the disadvantage. Detailed examination of their proposals revealed a number of practical problems in the application of the guidelines. Solving those problems would have required, firstly, the suspension of the application of the guidelines in order to allow the Commission to carry out a thorough examination of all the implications of the problems and, secondly, the adoption of a new communication⁽⁴⁾ clarifying the interpretation to be given to point C of the guidelines. The criteria provided for in the guidelines (to be interpreted according to the principles set out in the new communication) will enter into force on 30 June 1998.

⁽¹⁾ OJ C 368, 23.12.1994.

⁽²⁾ OJ C 45, 17.2.1996.

⁽³⁾ OJ C 44, 16.2.1996.

⁽⁴⁾ Commission Decision of 3.12.1997.

1.1.9. Fisheries

271. The guidelines for the examination of State aid to fisheries and aquaculture form the basis which allowed the Commission to assess both aid proposals and aid measures in force since 1985. The guidelines were based to a large extent on the structural rules, currently Council Regulation (EC) No 3699/93 of 21 December 1993 laying down the criteria and arrangements regarding Community structural assistance in the fisheries and aquaculture sector and the processing and marketing of its products.

272. The Commission approved the most recent amendment to the guidelines in 1997. It had proved necessary to bring them into line with the spirit of the abovementioned initial regulation, amended on several occasions, and with other Community guidelines for State aid in the fisheries sector which had themselves been amended or freshly implemented. The most significant changes to the guidelines in 1997 are as follows: introduction of a provision specifying that the building of fisheries vessels for the Community fleet qualify for aid only under the structural rules and prohibiting aid to shipyards for the building of fishing vessels; clarification of the provision concerning aid financed from parafiscal charges; introduction of a provision regulating aid for the early retirement of fishermen and the granting of individual flat-rate premiums.

273. The Commission was also strict in its application of the principle of banning aid for the temporary cessation of fishing activities granted repeatedly and when the events underlying temporary cessation are not exceptional. It carried out a review of all approved aid for temporary cessation and initiated proceedings under Article 93(2) in respect of one aid measure of this type notified in 1997.

1.2. Specific sectors not subject to special rules

1.2.1. Financial sector

274. At the Amsterdam summit in June the Heads of State or Government adopted a declaration on public law credit institutions in Germany. The declaration notes the Commission's opinion 'that the Community's existing competition rules allow services of general economic interest provided by public credit institutions existing in Germany and the facili-

ties granted to them to compensate for the costs connected with such services to be taken into account in full'.

275. No declaration can grant exemption from the rules of the Treaty. The text therefore also clearly states that such public services must be provided within the framework of Community law. That means in particular that the State aid rules and the rules about possible exceptions for 'services of general economic interest' under Article 90(2) must be complied with.

276. In a supplementary text, the Heads of State or Government asked the Commission to carry out a study into possible services of general economic interest in the banking sector and to inform the Council (Economic Affairs and Finance) of the findings. The Commission accordingly sent letters to all Member States requesting appropriate information. It has to be determined to what extent public tasks actually exist in the field of financial services and how their provision is secured by individual Member States. On the basis of the results of this exercise, the Commission will have to decide how best to ensure fair and equal conditions for all credit institutions within the Community, which is even more important in the lead-up to monetary union.

277. A large number of cases under examination have been in the financial sector. This fact reflects the process of restructuring in the banking sector underway in certain Member States. The Commission has continued to apply the general rules concerning State aid to the financial sector⁽¹⁾, taking account of its specificities⁽²⁾. Thus, in the cases covered by the guidelines on aid for rescuing and restructuring firms in difficulty, the Commission sought to achieve a fair balance regarding the scale of the concessions required to offset the effects of distortion. In its final decision on GAN⁽³⁾ following a review of the case, the Commission approved the aid already granted or proposed on condition that the French State sell the banking subsidiary CIC and the insurance branch of the group and reduce the turnover of GAN's international insurance business by 50 %. In the *Crédit Lyonnais* case, which had been the subject of general pro-

⁽¹⁾ 1996 Competition Report, points 210 and 211.

⁽²⁾ 1995 Competition Report, point 197.

⁽³⁾ Cases C 19/97 and 20/97, restructuring of the financial firm GAN, not yet published.

ceedings initiated when rescue aid was approved in 1996, the Commission is currently carrying out an in-depth examination of the new aid proposal and the restructuring plan submitted in July by the French authorities⁽¹⁾.

278. The Commission also kept a close watch on indirect State support for certain banks. In particular, it decided to initiate proceedings under Article 93(2) against the French 'Dépôt des notaires' and 'Livret bleu' schemes, the former likely to favour Crédit Agricole and the latter to favour Crédit Mutuel. Following a complaint, the Commission also initiated proceedings under Article 93(2) in respect of the transfer of the *Wohnungsbauförderungsanstalt* (WfA), a welfare housing body, to *Westdeutsche Landesbank* (West LB)⁽²⁾. It would seem, according to the information supplied by the complainant, that the *Land* of North Rhine-Westphalia, which owns WfA, did not require any compensatory benefit from West LB in the form of shares or appropriate remuneration for the transfer of ownership of the real estate portfolio and that the operation is essentially intended to restore the solvency ratio of West LB.

1.2.2. The audiovisual sector

279. The audiovisual sector was an important topic for discussion at preparations for the Amsterdam summit meeting. The summit provided an opportunity for emphasising in a specific protocol the importance of public audiovisual services in the EU, as the end of this decade is seeing a booming market for television, due in part to the digital revolution. The financing of public television channels has been the focus of complaints from private operators.

280. In principle, the Amsterdam summit recognised the importance of public broadcasting to the democratic and social needs of the Union and the right of Member States to define the scope and financing of public broadcasting services. However, the rights of Member States must be exercised, according to the protocol, in full compliance with the Community rules, in particular with the proportionality principle as far as the financing of the public broadcasters is concerned.

281. In accordance with the guidelines, the Commission started to define its general policy with regard to the broadcasting sector, taking into account the need to safeguard general interest objectives, such as pluralism, and to provide a 'level playing field' where both public and private operators can fully exploit the possibilities offered by the new technologies.

282. In the *Société Française de Production* case⁽³⁾, the Commission applied the guidelines for rescue and restructuring aid for firms in difficulty and, in February, did not hesitate in the absence of sufficient information to initiate proceedings under Article 93(2) in respect of restructuring aid of FRF 2 500 million.

283. With regard to the promotion of culture, the Commission used Article 92(3)(d), introduced by the Maastricht Treaty, as the ground for authorising an aid scheme to promote the Irish film industry⁽⁴⁾.

1.2.3. Postal sector

284. As stated above⁽⁵⁾, the notice on postal services adopted by the Commission on 16 December reaffirms the applicability of Articles 92 and 93 to such services, without prejudice to Article 90(2), and reiterates that competition must not be distorted by cross-subsidisation between postal activities that are reserved and those that are open to competition.

The Commission therefore decided that the commercial and logistic assistance provided by La Poste to its subsidiary Chronopost and the other financial transactions between the two did not constitute aid under Article 92 as they were subject to normal market conditions⁽⁶⁾.

⁽¹⁾ 1996 Competition Report, point 211.

⁽²⁾ Case C 64/97, ex N 175/95, banking aid to *Westdeutsche Landesbank/Girozentrale*, not yet published.

⁽³⁾ Case C 13/97 (ex NN 12/97), aid to the acquisition of SFP, OJ C 126, 23.4.1997.

⁽⁴⁾ Case N 32/97, Film Board production loans scheme funded under the operational programme for industrial development, not yet published in the OJ.

⁽⁵⁾ See Part II — State monopolies and monopoly rights: Articles 37 and 90.

⁽⁶⁾ See also paragraph IV-B-1 of this report on the aid content of compensation granted by public authorities for the operation of services of general economic interest.

1.2.4. Energy sector

285. The Commission is dealing with an increasing number of cases in the energy sector. They now generally concern the development of renewable energy sources, the cost of which is still sufficiently high to require support from the public authorities. In the year under review, the Commission first approved aid to the Tyrol to promote the use of the biomass as a source of heat or electricity. It approved a similar scheme set up by Bavaria, and did not raise any objections to a scheme in Lower Saxony intended for both individuals and companies and consisting in subsidised loans for the installation of solar panels and combined heat and power units using the biomass. It also approved investment aid to Baden-Württemberg, for which both public and private bodies are eligible, for heat production plants using wood shavings. As regards energy research, the Commission decided not to object to the fourth energy research programme in Germany aimed at eventually reducing the climatic and environmental problems caused by the utilisation of energy. The largest investment aid scheme approved by the Commission was set up by the Swedish Government following the closure of the 'Barsebäck' nuclear power plant. The budget amounts to ECU 105 million over five years to compensate for the loss of electricity production using renewable energies. The Commission approved it after checking that the intensities and eligible expenditure complied with the Community guidelines on environmental aid⁽¹⁾.

286. An obligation imposed on a distributor to purchase at minimum prices electricity produced with renewable energy resources constitutes State aid. Even if a State does not make direct use of its budget to assist producers using renewable energy, the purchase obligation is tantamount to a compulsory levy on distributors' incomes. The levy is paid directly to producers using renewable forms of energy⁽²⁾. The Commission had taken the view in a decision of 1990 on the *Stromeinspeisungsgesetz* case⁽³⁾ that obligations to purchase at a predetermined price imposed on distributors could constitute State aid. It reaffirmed this position in its decision on the obligation imposed by Denmark on public distribution

companies to buy electricity produced by co-generation at a price based on the cost of producing it⁽⁴⁾.

2. Horizontal aid

2.1. Research and development

287. The Commission pursued its rigorous implementation of the Community framework for State aid for research and development⁽⁵⁾. In 1996, it had initiated Article 93(2) proceedings in respect of several R & D projects concerning the development of a medicine for obesity (*Hoffmann-La Roche*), portable micro-computers (*Olivetti*), power semiconductors (*SGS-Thomson*), semiconductors for multimedia applications (*Philips Semiconductors*) and digital photocopiers (*Océ*)⁽⁶⁾.

288. The Commission had had doubts in all those cases concerning the pre-competitive nature of the subsidised development and whether the aid acted as an incentive. In the *Hoffmann-La Roche* case, the Commission took a negative decision regarding the part of the aid intended for R & D because the research phase concerned by the aid was too close to the marketing stage of the medicine. In addition, the research in question was, if not the main activity of the pharmaceutical company concerned, then at least an essential activity. Nor was any evidence produced that the proposed aid would encourage the firm to undertake research activities which it would not have undertaken or carried out as fully or as speedily without the aid.

In the *Olivetti* and *SGS-Thomson* cases, the Italian authorities preferred to withdraw their notification in the course of the year and abandon their aid plans. The cases involving *Philips Semiconductors* and *Océ* are still being examined by the Commission.

289. With the exception of a procedure initiated in December against a proposal to grant aid to *Siemens Bauelemente OHG* for the production of power semiconductors, the remainder of the R & D aid cases dealt with by the Commission (about 120 in the year covered by the report) did not pose any particular difficulties.

⁽¹⁾ OJ C 72, 10.3.1994.

⁽²⁾ See also paragraph IV.C.2.3. of this report.

⁽³⁾ 1990 Competition Report, point 219.

⁽⁴⁾ Case N 305/96, measures to assist centralised combined heat and power plants, not yet published in the OJ.

⁽⁵⁾ OJ C 45, 17.2.1996.

⁽⁶⁾ 1996 Competition Report, point 215.

2.2. Employment and training

290. Employment has become the Commission's major concern at a time when the Member States, with one or two exceptions, are experiencing unparalleled levels of unemployment. Public opinion in the Community is finding it increasingly difficult to share the objectives of the European Union as long as there are no effective solutions to structural unemployment in Europe. It must be said, however, that the employment aid to which Member States sometimes have recourse in order to improve the job situation is often not an appropriate instrument. Indeed, the problems are liable to be displaced to other Member States. The point of controlling aid is particularly to avoid this effect which, in the long term, affects the competitiveness of European industry and, therefore, employment. The Commission will accordingly ensure that aid to employment does not jeopardise the Community objectives.

291. Following the extraordinary European Council on employment held in Luxembourg on 20 and 21 November, the 15 Member States adopted guidelines to reinforce action by the Union to promote employment. In particular, Article 27 of the guidelines recommends, with regard to the competition rules and State aid, focusing on 'aid arrangements which favour economic efficiency and employment without causing distortions of competition'.

292. One of the instruments used by Member States to combat unemployment is the reduction of labour costs. In order to clarify the circumstances in which such measures are covered by the State aid rules, the Commission published a notice in January on monitoring of State aid and reduction of labour costs⁽¹⁾. It explains the distinction it makes between general labour cost reduction measures and sectoral measures, the latter coming under Article 92 of the Treaty. Whilst the former do not constitute State aid, the latter must be regarded as aid⁽²⁾. In general, the Commission encourages the Member States to opt for a reduction in labour costs in the form of general measures rather than in the form of aid. For example, the Belgian scheme known

as 'Maribel quater'⁽³⁾ was regarded by the Commission as a general measure, since it varies social security contributions in all sectors according to the percentage of manual workers among the total workforce, which is an objective and transparent parameter. The measure does not *prima facie* discriminate between firms or sectors. Conversely, the French textile plan which reduces labour costs in a specific sector at the expense of other sectors was regarded as State aid. As it constituted operating aid, the Commission decided it was incompatible with the common market and should be repaid⁽⁴⁾.

293. The Commission is aware that workforce training is absolutely essential to maintaining employment and developing the competitiveness of the Union. It therefore encourages firms and Member States to invest in training. However, when a Member State takes action in the form of State aid, the Commission, although in favour of training, must ensure that the aid does not unjustifiably distort competition. In order to clarify the circumstances in which State measures constituting training aid may be regarded as compatible with the common market, the Commission has drafted a preliminary framework for State aid on the basis of past experience.

294. The draft framework was presented to Member States' experts at a multilateral meeting on 4 November. The Commission hopes to adopt it in 1998 following further consultations with the experts at the beginning of the year.

2.3. Environment

295. Environmental protection is one of the Commission's principal concerns. It has approved a number of environmental aid schemes.

296. At a multilateral meeting on 15 January, a consensus was reached on the effectiveness of the guidelines on State aid for environmental protection⁽⁵⁾, which entered into force at the beginning of 1994 and were to be reviewed by the Commission before the end of

⁽¹⁾ OJ C 1, 3.1.1997.

⁽²⁾ The guidelines for employment aid adopted by the Commission in 1995 (OJ C 344, 12.12.1995) define the criteria used by the Commission to assess compatibility of the aid with the common market.

⁽³⁾ Case N 132/97, reduction in social security contributions for firms employing manual workers, OJ C 201, 1.7.1997.

⁽⁴⁾ Case C 18/96, experimental reductions in social security contributions in the textile and footwear industries (not yet published in the OJ).

⁽⁵⁾ OJ C 72, 10.3.1994.

1996. It was agreed to continue to apply the guidelines until the end of 1999, as originally planned. The discussion paper drawn up at the meeting also resulted in a more detailed definition of the type of investment eligible for environmental aid.

297. In 1997, the Commission clarified certain aspects of the environment guidelines, notably with regard to operating aid. The Commission does not normally approve operating aid which relieves firms of costs resulting from the pollution or nuisance they cause. However, the guidelines provide for an exception to this principle in certain well-defined circumstances. Experience acquired to date has shown that operating aid for renewable forms of energy, which the Commission assesses on its merits, must, where it is not tapered, be granted for no more than five or six years.

298. The Commission approved aid to combined heat and power production in Denmark on the basis of the environmental aid guidelines. The scheme requires electricity distribution companies to purchase the electricity produced in combination with heat by 15 production units if the cost of producing the combined electricity and heat exceeds the market price. The aid is limited in time (to 2006), is degressive and encourages the continuation of such operations in an electricity market undergoing liberalisation. When it approved the scheme, the Commission gave an undertaking that, if similar State aid projects were notified, it would adopt the same approach.

2.4. Small and medium-sized enterprises

299. Following the publication of the Community definition of a small and medium-sized enterprise⁽¹⁾ (SME) and the introduction of this definition into the new guidelines on aid for SMEs⁽²⁾, the Commission asked the Member States by letter of 15 January 1997 to bring their SME aid schemes into line with the Community definition. By the end of the year covered by this report, most of the Member States had complied.

⁽¹⁾ Commission recommendation of 3 April 1996 concerning the definition of small and medium-sized enterprises, OJ L 107, 30.4.1996.

⁽²⁾ Community guidelines on State aid for small and medium-sized enterprises, OJ C 213, 23.7.1996.

2.5. Rescue and restructuring aid

300. The sharp increase in this type of aid is of concern to the Commission in view of the advanced development of the common market. The fifth Commission survey on State aid in the EU in the period 1992-94⁽³⁾ highlighted a marked increase in the number of individual aid awards. These chiefly include restructuring aid for firms in difficulty. In its action plan for the single market⁽⁴⁾ presented to the Amsterdam European Council, the Commission gave an undertaking to the Council that it would further tighten the rules on rescue and restructuring aid for firms in difficulty. Several amendments reaffirming certain principles or defining certain points, in particular the application of 'one time, last time'⁽⁵⁾, were put forward at the multilateral meeting of Member States' experts on State aid held on 4 November.

301. The Commission attaches considerable importance to the need for counter-concessions to compensate for the distortion created by restructuring aid, in particular where a firm operates on a market with surplus capacity. It recommends that the counter-concessions should be in proportion to the size of the distortion caused. As in the past, the Commission will be less strict regarding the counter-concession requirements in the case of restructuring aid for SMEs where the latter have only a small share of their markets or, in particular, if they are located in assisted regions.

302. If a Member State undertakes to privatise a public undertaking which it is restructuring with State aid, the Commission takes note of the commitment in its decision since (a) it may constitute an additional guarantee of a rapid return to viability, and (b) it may be possible to eliminate the distortions of competition by privatising through open bidding⁽⁶⁾. In its decision on *GAN*, the Commission's approval was conditional on the French authorities honouring their commitment to sell,

⁽³⁾ COM(97) 170 final, 16.4.1997.

⁽⁴⁾ COM(97) 184 final, 6.5.1997.

⁽⁵⁾ In its judgment of 5 November 1997 in Case T-149/95 *Ducros v Commission*, not yet reported, the Court of First Instance concluded that the existing guidelines, in particular point 3.2.2.1, did not point to the incompatibility of restructuring aid paid in several instalments. Thus, according to the Court, the 'one time, last time' principle as currently defined is for guidance rather than being mandatory (see paragraph 66 of the judgment).

⁽⁶⁾ The latter point was upheld in the abovementioned judgment of the Court of First Instance (paragraph 68 of the judgment).

together or separately, GAN and its banking subsidiary, CIC.

2.6. Export aid

303. According to well-established case-law⁽¹⁾, aid for the export of goods or services to EU or EEA countries is, in general, incompatible with the common market. By export aid, the Commission means all aid connected with the volume or turnover of sales abroad.

304. On 18 June, the Commission adopted a communication on short-term export credit insurance, applicable from 1 January 1998 for a period of five years. Although it has not until now monitored aid for export credits and export credit insurance, the conclusions of the Council working party on export credits highlighted the need for Commission action in the area of State aid, as it emerged that export credits were creating distortions of competition at two levels:

- between exporters in the various Member States with regard to trade inside and outside the Community;
- between export credit insurers offering cover for trade with Member States and certain third countries. The schemes have thus stirred up opposition between public insurers or insurers with public support and private insurers.

305. The communication identifies the risks that can be insured on the market and to which the competition rules apply. Member States are therefore requested, as an appropriate measure, to put an end to the export credit insurance aid schemes concerned by the communication within one year from the date of its publication. If public or publicly assisted bodies operate in this sector, they will have to keep separate accounts for the activities covered by the communication and those that are not.

3. Regional aid

306. The Commission concluded its efforts to codify the rules and ensure equal treatment between all Member States in its approach to

regional aid. Furthermore, recent case-law has upheld the Commission in its wish to monitor the sectoral impact of all regional aid above a given ceiling⁽²⁾. In its *Pyrsa* judgment⁽³⁾, the Court of Justice held that the location of an assisted firm, even in an Article 92(3)(a) region, cannot prevent the Commission from assessing the impact of the aid on the relevant market. The fact that Article 92(3)(a) does not contain the condition included in subparagraph (c) of the same paragraph, namely that, for aid to be compatible, it must not 'adversely affect trading conditions to an extent contrary to the common interest', is not sufficient reason not to take account of the aid's impact on the market or markets concerned, as the compatibility assessment must be carried out in a Community context.

The Commission will have an opportunity to spell out an important criterion of the eligibility of regional aid in a German scheme to grant aid for distance-working to employers located in certain assisted regions. In view of its considerable doubts that the eligibility of any regional aid can be determined by the employer's place of business rather than by the place of residence of the distance worker, the Commission initiated formal proceedings against the scheme.

3.1. Approval of new maps

307. The Commission pursued its revision of the maps of regions eligible for regional aid and relevant aid intensity rates. Approval was given for new regional aid maps in Italy (concerning only Article 92(3)(c) regions), Denmark and Finland for the period 1997-99. In all cases, the percentage of population covered by regional aid has remained basically the same, in accordance with Commission policy not to increase the coverage of regional aid.

3.2. The new German Länder

308. Measures to assist firms in the new *Länder* consist for the most part in investment aid, which is subject to the rules on regional and restructuring aid. However, assessment of the latter takes account of a regional specificity that stems from the difficulties caused by

⁽¹⁾ See, in particular, Joined Cases 6/69 and 11/69 *France v Commission* [1969] ECR 523.

⁽²⁾ See paragraph IV-A-1.2. of this report concerning the multi-sectoral guidelines.

⁽³⁾ Case C-169/95 *Spain v Commission* [1997] ECR I-135.

the transition from a planned to a market economy. The decisions taken by the Commission in 1997 concerning firms in the former GDR undergoing restructuring indicate, however, that the ordinary rules on State aid also apply to the new German *Länder*. The Commission initiated proceedings under Article 93(2) in respect of 20 aid proposals about which it had doubts concerning their compatibility with the common market. The proceedings reflect the Commission's determination, whilst taking account of the specific conditions in the eastern *Länder*, to take the same strict approach to State aid in all the Community regions.

309. However, the Commission considers that aid granted before the end of 1995 cannot be taken into account for the application of the 'one time, last time' principle resulting from the guidelines on rescue and restructuring aid for firms in difficulty, as the aid was not intended to restructure firms in difficulty located in a competitive environment but to help firms in the former East Germany to move from a planned to a market economy.

310. The fifth survey on State aid in manufacturing industry in the EU⁽¹⁾ also highlighted the strong increase in aid in the new *Länder* in the periods 1990-92 and 1992-94.

D — Procedures

311. As in previous years, in 1997, the Commission took several decisions ordering Member States to recover aid which had been granted without prior notification to the Commission and which was incompatible with the common market. By systematically ordering recovery of unlawful aid, the Commission also safeguards the rights of competitors to operate in a market with undistorted competition.

312. The Court of Justice confirmed that the abolition of unlawful aid is the logical consequence of a finding that it is unlawful, thus recovery of aid unlawfully granted, for the purpose of restoring the previously existing situation, cannot in principle be regarded as disproportionate to the objectives of the Treaty. It was also reiterated that a diligent businessman should normally be able to determine whether the procedural rules in Article

93 have been complied with⁽²⁾. Thus, undertakings to which aid has been granted cannot, in principle, entertain a legitimate expectation that the aid is lawful unless it has been granted in compliance with the procedure laid down in Article 93. The Court added that even the fact that the Commission initially decided not to raise objections to the aid in issue cannot be regarded as capable of having caused the recipient undertaking to entertain any legitimate expectation since that decision was challenged in due time before the Court, which annulled it⁽³⁾.

313. Furthermore, the Court has consistently held that procedures of internal law should not prevent the repayment of unlawful and incompatible aid. The point was again illustrated by the Court, notably in *Alcan Deutschland GmbH*⁽⁴⁾, which states that the competent national authorities are required under Community law to withdraw the decision granting unlawful aid, in accordance with a final Commission decision declaring the aid incompatible and requiring it to be recovered, and are not entitled to reach any other finding. This remains an obligation even if the national authority has allowed the time-limit laid down for that purpose under national law to elapse or if national law excludes recovery because the gain no longer exists, in the absence of bad faith on the part of the recipient of the aid, or if the competent authority is responsible for the illegality of the aid decision to such a degree that revocation would be tantamount to a breach of good faith towards the recipient, where the latter could not have had a legitimate expectation that the act was lawful because the procedure laid down in Article 93 had not been followed.

314. By consolidating the Court's strict approach on recovery of unlawful aid it is made clear to Member States and aid recipients that new aid must be approved by the Commission in order not to risk reimbursement. Recovery of aid which is granted without permission from the Commission can have severe consequences for the recipient. The fact that a company must wind up due to the repayment is not in itself sufficient to avoid repayment.

⁽²⁾ Case C-169/95 *Spain v Commission* [1997] ECR I-135; Case C-24/95 *Land Rheinland-Pfalz v Alcan Deutschland GmbH* [1997] ECR I-1591.

⁽³⁾ Case C-169/95 *Spain v Commission* [1997] ECR I-135.

⁽⁴⁾ Case C-24/95 *Land Rheinland-Pfalz v Alcan Deutschland GmbH* [1997] ECR I-1591.

⁽¹⁾ COM(97) 170 final, Table 3.

315. Furthermore, in *Textilwerke Deggen-dorf*, the Court of Justice recognised the power of the Commission to consider new aid to an enterprise incompatible with the common market, as long as a prior decision of the Commission ordering recovery of unlawful aid to the same enterprise had not been complied with, since the cumulative effect of the aid was to distort competition in the common market to a significant extent⁽¹⁾. In fact, when examining the compatibility of aid, the Commission must take all the relevant factors into account including, where appropriate, the circumstances already considered in a previous decision and the obligations which that decision may have imposed on a Member State.

316. In Case C-169/95⁽²⁾ it was held that individual aid granted without prior notification, even if it could be linked *ex post facto* to national rules subsequently authorised as a regional aid scheme by the Commission, could not in any event be regarded as having been granted under the latter scheme. This ruling highlights the importance of notifying the Commission before any aid is granted.

317. As regards the admissibility of actions against Commission decisions under the ECSC Treaty, the Court of First Instance found, in two orders of 29 September⁽³⁾, that a physical or legal person other than undertakings or associations of undertakings may not institute proceedings under Article 33 of the ECSC Treaty. The Court of First Instance held that Article 173 of the EC Treaty was not applicable to proceedings for annulment of a decision under the ECSC Treaty.

318. With regard to complaints concerning the granting of alleged unlawful aid, the Court of First Instance upheld the Commission's position in a judgment of 18 December⁽⁴⁾ in which it found that, in regard to State aid, there was no category of autonomous decisions rejecting complaints. A decision which ends the assessment of aid for compatibility with the Treaty is always addressed to the

Member State concerned. The letter in which the Commission informs the complainant that no further action will be taken regarding the complaint is thus only a reflection of the content of a decision addressed to the Member State concerned. An individual may seek legal redress before a Community court only if the conditions of the fourth indent of Article 173 of the Treaty are met.

319. Finally, the Court of First Instance judgment of 27 February⁽⁵⁾ has helped to clarify the relationship between Articles 92 and 93 and Article 90(2). The Court decided that the Commission's power to assess the compatibility of aid under Article 93 also covered State aid granted to undertakings referred to in Article 90(2), in particular those which the Member States have entrusted with the operation of services of general economic interest. Article 90(2) contains a provision which allows aid to escape from the prohibition in Article 92, provided that the sole purpose of the aid in question is to offset the additional costs incurred in performing the particular tasks assigned to the undertaking entrusted with the operation of the service of general economic interest and that the grant of the aid is necessary in order for that undertaking to be able to perform its public service obligations under conditions of economic equilibrium.

E — Statistics

320. Over the year, the Commission registered 516 notifications of new aid measures or assessments of existing aid measures and 140 cases of unnotified aid in all sectors other than agriculture, fisheries, transport and coal. In the same year, it decided in 385 cases not to raise objections. In 68 cases it decided to initiate proceedings under Article 93(2) of the EC Treaty or under Article 6(5) of Decision 2496/96/ECSC. The detailed analysis involved resulted *inter alia* in 18 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 three existing aid measures.

⁽¹⁾ Case C-355/95 P. *Textilwerke Deggen-dorf v Commission* [1997] ECR I-2549.

⁽²⁾ *Spain v Commission* [1997] ECR I-135.

⁽³⁾ Case T-70/97 *Walloon Region v Commission*, not yet reported, and Case T-4/97, not yet reported.

⁽⁴⁾ Case T-178/94 *Asociación Telefónica de Mutualistas v Commission*, not yet reported.

⁽⁵⁾ Case T-106/95 *Fédération française des sociétés d'assurances and Others v Commission* [1997] ECR II-229.

Figure 6:
Cases registered in 1997 by sector

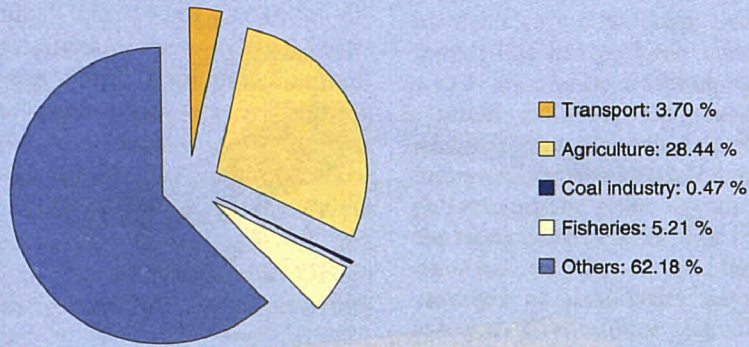


Figure 7:
Trend in the number of aid cases registered
(other than in agriculture, fisheries, transport and coal) between 1993 and 1997)

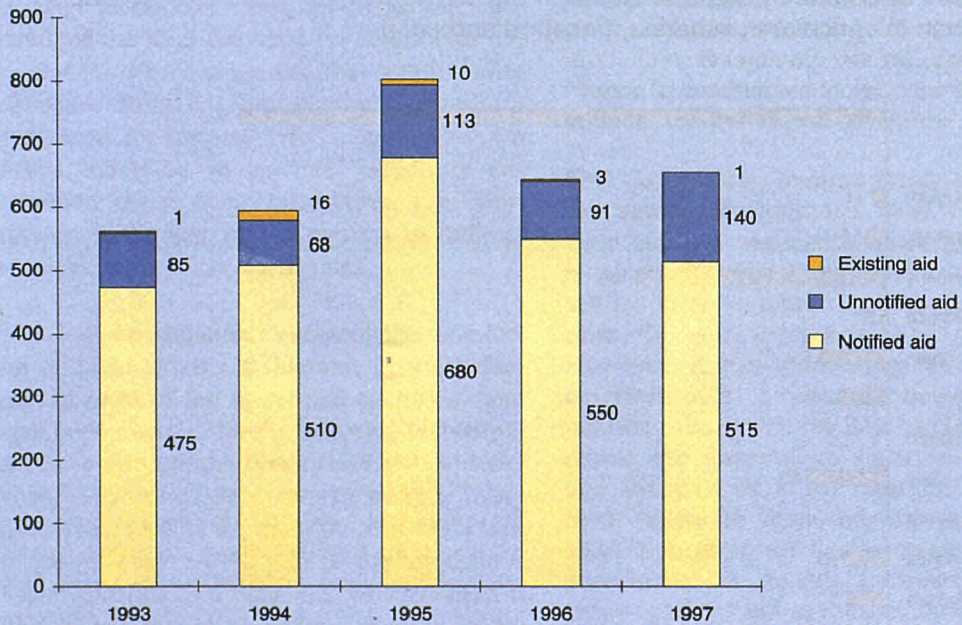


Figure 8:
Trend in the number of decisions taken by the Commission
(other than in agriculture, fisheries, transport and coal) between 1993 and 1997

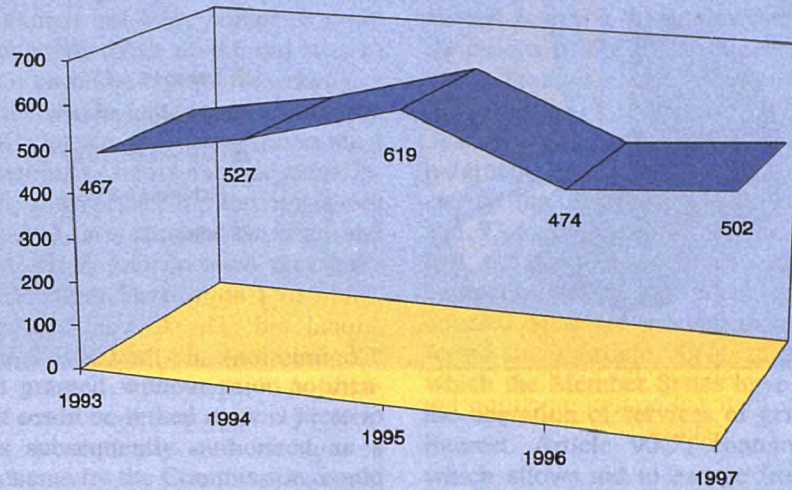
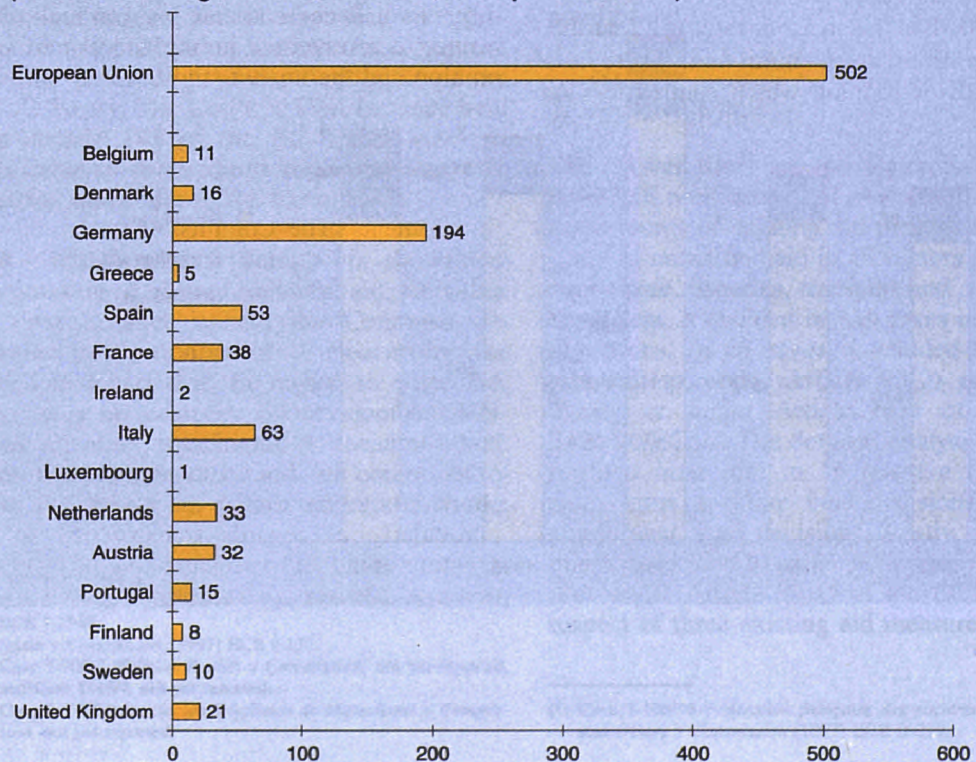


Figure 9:
Number of decisions by Member State
(other than in agriculture, fisheries, transport and coal)



V — INTERNATIONAL COOPERATION

A — Central and eastern Europe

1. Sofia Conference

321. The annual conference between the competition authorities of the associated countries (Poland, the Czech Republic, Hungary, Slovakia, Slovenia, Bulgaria, Romania, Lithuania, Latvia and Estonia) and the Commission was held in Sofia, Bulgaria, on 12 and 13 May. The results of the conference are set out in a declaration which assesses the progress made by the associated countries in adopting the main principles of Community competition law.

Some of the associated countries have carried out a review of their national competition law with the aim of making it more effective. Hungary and Romania adopted new competition laws which entered into force on 1 January and 1 February.

Generally speaking, the Sofia Conference showed that the competition authorities are now fully operational in most of the associated countries and that they are handling an increasing number of cases involving infringements of the kind provided for in Articles 85, 86 and 90. For that reason, they need further assistance from the Commission. There is a clear need for training which centres less on theory and more on practical aspects of enforcement of the competition rules. The Commission has stated its willingness to redirect its cooperation along those lines.

However, the situation as regards the monitoring of State aid is considerably less satisfactory. In most of the associated countries there have been major delays in adopting legislation and in setting up supervisory authorities. Even where they exist, these authorities face many difficulties. One of the main problems is a lack of transparency on the part of the institutions responsible for awarding aid, which makes it difficult to compile a precise inventory of aid granted. Reforms are in the pipeline in most of the associated countries and the Commission has given them its full backing. Lastly, the Commission has undertaken to draw up State aid guidelines in conjunction with the associated countries which will take into account the specific situation of the economies in transition.

2. Implementing rules

322. An agreement in principle on the implementing rules for competition aspects of State aid in the Czech Republic was reached by the Council working party, the European Parliament having been consulted. The rules, which should be adopted by the Association Council in 1998, are based on the general principle that State aid is incompatible with the operation of market forces. However, derogations may be given for some kinds of aid on the basis of Article 92. For a given period, aid awarded by the Czech Republic is to be assessed in accordance with the rules applicable to Community regions eligible for regional aid. The Community authorities (the Commission) and the Czech authorities (Ministry of Finance) will assess the compatibility with the Europe Agreement of State aid granted in the Community and in the Czech Republic respectively. Specific arrangements have been made for cooperation, assistance and transparency.

3. Enlargement and competition policy

323. On 15 July, the Commission adopted a series of documents on the accession of the 10 associated countries to the European Community. Two documents are of particular relevance to competition policy: the Commission opinion and the impact study.

The Commission opinion states that most of the associated countries have ensured that their antitrust legislation meets convergence requirements. The Commission welcomes the setting-up of competition authorities which, in principle, are independent of government. However, it has reservations as regards the enforcement by those authorities of the competition rules, given the lack of practical experience, the dispersal of supervisory activities and the lack of a real competition culture. With regard to State aid, the opinion notes shortcomings in all the associated countries, particularly as regards transparency in the granting of aid and as regards the effectiveness of the supervisory authorities.

In its impact study, the Commission focuses on the practical difficulties that enlargement of the Union to 25 countries and 21 languages will entail for its supervisory machinery. In spite of efforts to decentralise and streamline procedures, there can be no doubt that the accession of the associated countries will gen-

erate substantial new staffing requirements, even if procedural rules are simplified. In addition, from the legal viewpoint, enlargement represents a challenge for the decentralisation policy of the Commission, which must ensure that Community competition law is enforced in a uniform fashion throughout the Union. While the bringing-into-line with Community law of the associated countries' legislation bodes well for the future, the authorities responsible for enforcement still lack the experience necessary to put competition law into practice efficiently, and the Commission has some concerns on that score. Lastly, enlargement will have a very significant impact on the Community's policy on State aid for regional purposes. Regions qualifying for regional aid (Article 92(3)(a) and (c)) already account for almost 50 % of the Union's population, which is regarded as the ceiling. Clearly, given the generally lower standard of living in the associated countries, the overall percentage of the population living in assisted regions will increase when those countries accede. Since, in mathematical terms, average living standards in the Union will fall as a result of enlargement, some of the regions which are currently eligible under Article 92(3)(a) might lose their entitlement to aid.

B — North America

1. United States

1.1. Implementation of the cooperation agreement ⁽¹⁾

324. On 4 July, the Commission adopted the second report on the implementation of the 1991 Agreement between the European Communities and the Government of the United States of America regarding the application of their competition laws ('the Agreement') for the period from 1 July 1996 to 31 December 1996⁽²⁾. This report complements the first report on the implementation of the Agreement, which covered the period from 10 April 1995 to 30 June 1996⁽³⁾. It was decided to report on this relatively short period of six months so that, in subsequent years, it would

be possible to report on the same calendar year as the annual Report on Competition Policy.

The third report covers the period from 1 January 1997 to 31 December 1997⁽⁴⁾. During the period under review, cooperation between the Commission and its counterparts in the United States has continued to be positive and has contributed to the effective resolution of a number of cases.

The Agreement continues to provide a framework for meaningful and useful cooperation between the Commission and the United States. The cooperation which was described in the first and the second report to the Council and the European Parliament has continued to bring benefits on both sides of the Atlantic, not only to the competition authorities but also to the companies involved, as it is in everyone's interest for compatible solutions to be found.

325. The *Boeing/MDD* merger was the subject of intensive cooperation between the Commission and the US Federal Trade Commission (FTC)⁽⁵⁾. The case was particularly important not just because of the economic and political issues involved, but also because of the divergent conclusions reached by the Commission, which was concerned by the competition situation in the large commercial jet aircraft market, and the US authorities (Federal Trade Commission), which decided not to oppose the merger.

326. Cooperation was particularly close and fruitful in the *Guinness/Grand Metropolitan* case⁽⁶⁾. There was a good deal of contact between Commission officials and their opposite numbers in the United States throughout the course of their respective investigations. The Federal Trade Commission sent observers to the public hearings held under the Merger Regulation procedure. Although the EC and US regulators used different product and geographic market definitions for their respective assessments, their mutual contacts enabled each party to understand the other's thinking, and to refine its analyses accordingly. Once negotiations had reached a certain point, the parties were prepared to allow discussion to

⁽¹⁾ Agreement between the United States of America and the European Commission regarding the application of their competition laws, OJ L 95, 27.4.1995, as amended by OJ L 131, 15.6.1995.

⁽²⁾ COM(97) 346 final, see 1996 Competition Report, pages 312 to 318.

⁽³⁾ Adopted on 8 October 1996, COM(96) 479 final, see 1996 Competition Report, pages 299 to 311.

⁽⁴⁾ See report on the application of the competition rules in the European Union.

⁽⁵⁾ A detailed study of the case and its implications for Europe-US relations is set out in Part III of this report.

⁽⁶⁾ For more details of the case see Part III of this report.

take place between the regulators on the proposed remedies. This was valuable in that it ensured an element of coordination which might not otherwise have been possible. In particular, it ensured that the remedies finally agreed upon in each of the jurisdictions were consistent with one another as regards both content and timing.

327. Cooperation between the Commission and the US Department of Justice (DoJ) was also intensive in a number of alliance agreements concluded between European and US airlines, namely between *British Airways and American Airlines*, *Lufthansa and United Airlines*, *SAS and United Airlines*, *Swissair/Sabena/Austrian Airlines and Delta Air Lines* and *KLM and Northwest*. Representatives of the US DoJ participated in the oral hearing which took place on 3 and 4 February in the *British Airways/American Airlines* case.

1.2. The draft agreement between the European Communities and the United States on positive comity rules

328. On 18 June, the Commission adopted a proposal to be approved jointly by the Council and the Commission after consulting the Parliament with a view to concluding an agreement between the European Communities and the Government of the United States of America on the application of the principle of positive comity in the enforcement of their competition law. This principle provides that a party to the agreement adversely affected by anticompetitive behaviour carried out in the territory of the other party may request that other party to take enforcement action⁽¹⁾.

This new draft agreement is based on the positive results of cooperation between the Community and US competition authorities, which was introduced by the 1991 agreement, Article V of which made provision for the application of the principle of positive comity. The new agreement consolidates it by defining the circumstances in which the parties should apply these principles. Provision is made for one of the parties to defer or suspend its own enforcement activities concerning anticompetitive practices which are directed principally towards the other party's territory, assuming that it is willing to deal with the

matter. In contrast to the first agreement, this draft agreement does not cover mergers, given that neither Community law nor US legislation would allow public proceedings to be deferred or suspended.

The proposed positive comity agreement is an important development in relations with the US and represents a commitment on the part of the US and the EC to cooperate on antitrust enforcement rather than seeking to apply their antitrust laws extraterritorially.

2. Cooperation agreement with Canada

329. A draft agreement between the European Communities and the Canadian Government on the enforcement of their competition laws was finalised in July and is still being discussed by the institutions. The agreement is to be adopted jointly by the Council and Commission after Parliament has been consulted.

The cooperation agreement has become necessary as a result of the growing number of cases involving the competition authorities of the contracting parties. It is designed to avoid contradictory decisions being taken, particularly as regards solutions to identified competition problems. The draft agreement is very similar to the agreement between the Communities and the United States.

The main features of the EC-Canadian draft agreement are as follows:

- notification of pending cases involving the interests of the other party;
- cooperation and coordination procedures between competition authorities;
- provisions on positive and traditional comity;
- compliance with confidentiality rules in exchanges of information.

C — WTO

1. Trade and competition

330. The Singapore Conference decided on 11 December 1996 to 'establish a working group to study issues ... relating to the interaction between trade and competition policy,

⁽¹⁾ COM(97) 233 final.

including anticompetitive behaviour, in order to identify any areas that may merit consideration in the WTO framework.'

331. Professor Jenny, the Vice-Chairman of the French competition council, was chosen by consensus to head the group. It met three times in 1997 and decided to meet at least four times in 1998 before reporting to the General Council in accordance with its terms of reference.

332. Positive results were achieved right from the outset. First, the working group adopted a schedule, which enabled it to plan its work and to make progress on matters of substance without major problems. The discussions, held as stipulated in the group's terms of reference in conjunction with Unctad, showed that few countries had serious doubts as to the usefulness of competition rules. At most, some of them called for a gradualist approach which took account of local characteristics in view of the social impact of introducing a competition policy. Only the Asian countries, particularly Hong Kong/China and Singapore, expressed strong reservations.

2. Telecommunications

333. On 15 February, the members of the WTO reached an agreement on access to the market for basic telecommunications services ('GBT agreement'). Under the agreement, which covers more than 93 % of the world telecommunications market, 69 governments will open up their respective telecommunications markets to foreign competition. Most of the parties have agreed on governing principles designed to prevent anticompetitive behaviour: appropriate measures are to be adopted to prevent major suppliers, acting either alone or in conjunction with other suppliers, from initiating or maintaining anticompetitive practices. These include cross-subsidisation, the use of information obtained from competitors and failing to provide competitors in due time with technical information on essential equipment or relevant commercial information necessary for supplying services. The agreement, currently in the process of being ratified, extends the process of liberalising telecommunications under way within the European Union to the rest of the world as from the same key date of 1 January 1998.

D — Other developments in international relations

1. Mediterranean countries

334. Following the agreements signed with Israel, Tunisia and Morocco, negotiations between the European Union, Jordan and the Palestinian Authority were concluded with the signing of association agreements which require the principles of a market economy to be put into effect⁽¹⁾. Discussions with Egypt, Lebanon, Syria and Algeria are still under way. The Commission examined the new Jordanian competition law to ensure that it is in line with the EU-Jordan association agreement. An exploratory visit was made to Syria in connection with competition policy.

Following requests for technical assistance on competition from Tunisia and Algeria, cooperation programmes are being set up with those countries.

2. Latin America

335. It has not escaped the Commission's notice that trade between the European Union and Latin America has intensified in recent years. Between 1993 and 1995, Latin America's share of the EU's total foreign trade growth amounted to about 10.4 %, whereas its share of the EU's foreign trade total is less than half of that figure. The European Union has established a network of framework cooperation agreements⁽²⁾ with the Latin American countries which Mexico rejoined in 1997. Accordingly, the Commission is taking a greater interest in the legal environment within which trade takes place and, in particular, in regional competition law.

336. Although no competition cooperation programme comparable to the one set up for central and eastern Europe has been devised for Latin America, the Commission continued to develop its relations with Latin America

⁽¹⁾ Association agreements between the European Union and Tunisia (17.7.1995), Israel (22.12.1995), Morocco (30.1.1996), Jordan (24.11.1997) and the Palestinian Authority (2.6.1997).

⁽²⁾ Interregional framework cooperation agreement with Mercosur, signed on 15 December 1995 (OJ L 69, 19.3.1996); framework agreement for cooperation with the member countries of the Andean Pact (OJ C 25, 21.1.1993); framework agreement with the Central American republics (OJ C 177, 18.3.1993); framework cooperation agreement with Argentina, signed on 2 April 1990 (OJ L 295, 26.10.1990), with Brazil, signed on 29 June 1995 (OJ L 262, 1.11.1995) and Chile, signed on 26 April 1996 (OJ L 209, 19.8.1996).

and the Caribbean by arranging study visits and responding to numerous requests for information from the competition authorities. As a result, the Commission has had dealings with officials from Argentina, Brazil, Mexico, Colombia, Peru, Uruguay, Costa Rica and Jamaica. Lastly, a number of specific cooperation actions were carried out, including a compendium of Latin American competition law, a list of national supervisory authorities, the joint publication with the competition authorities of all the countries of the region

of the Latin American competition bulletin, which is posted on the Internet, and a list of the technical cooperation needs of each Latin American country and of the various regional organisations (Mercosur, Andean Pact).

The Commission, and DG IB in particular, has prepared a biennial programme of technical assistance for the regional organisation Mercosur comprising a section on competition which is to be presented to the Member States.



OUTLOOK FOR 1998

337. In accordance with the commitment entered into before the European Parliament, it is customary for the Commission to set out its competition objectives for the coming year in its annual report.

1. Legislative activities

338. After a relatively intensive year of legislative and regulatory activity, 1998 will be marked by the enforcement and monitoring of the numerous enactments during 1997.

339. The Commission will have to implement the texts adopted in 1997, particularly the new Merger Regulation. The Commission will also be responsible for implementing the new provisions on agreements of minor importance and on cooperation with the authorities of the Member States, with the dual aim of reducing the administrative burden on companies and of focusing the efforts of its supervisory departments on cases with a real impact on the internal market. Lastly, it will continue the work begun on reshaping policy on vertical restraints and horizontal agreements. The Green Paper on vertical restraints in EC competition policy and the resulting consultations will be followed in 1998 by a formal proposal designed to modernise the treatment of vertical restrictions on competition. This proposal and the ensuing discussions will be an important event in 1998. As regards horizontal agreements, the Commission is considering carrying out in-depth discussions in the light of its preliminary findings.

340. Apart from the formal proposal on vertical restraints, the Commission is not planning any major new measures for 1998. However, the new notice on ancillary restrictions, which is to replace the 1990 notice, should be completed. Work has begun within the Commission on the necessary simplification of some procedural aspects, which might involve amendment of Regulation No 99/63/EEC, and should also give rise to consultations in 1998. Lastly, the Commission will ensure that certain instruments relating to the telecommunications sector, and in particular the cable directive, are finalised.

341. The Commission is to carry out major work in 1998 on Community State aid provisions. It has undertaken to prepare and adopt guidelines on the application of the State aid rules to measures relating to the direct taxation of companies. It is also to adopt in 1998

provisions which were drawn up in 1997, in particular new guidelines on aid for rescuing and restructuring firms in difficulty, guidelines on training aid and a new Commission directive on the transparency of financial relations between Member States and public undertakings.

342. The Council is to adopt a regulation setting out new rules on aid to shipbuilding in the event of the OECD agreements not being implemented in 1998. As regards regulations based on Article 94 of the Treaty, as soon as Parliament has prepared its opinion on the draft authorising regulation, the Council will be able formally to adopt it. An agreement in principle was reached on the proposal in November 1997. For its part, the Commission should be able to transmit a draft procedural regulation to the Council. In accordance with Article 94, the Parliament is also to be consulted.

2. International field

343. In the international field the Commission will continue its policy of bilateral and multilateral cooperation with competition authorities.

With a view to future enlargement and in accordance with the objectives set out in Agenda 2000, the Commission is to concentrate on fostering a competition culture in central and eastern Europe. Helping the countries concerned to enforce competition law will be a priority. The Commission will renew calls for an efficient supervisory system for State aid to be set up as rapidly as possible.

The Commission also plans to ensure that its proposals on the draft EU-US agreement on comity rules and the draft cooperation agreement with Canada can be adopted by the Council during the course of 1998.

3. Supervisory activities

344. The competition rules must be rigorously enforced if the single market is to function in optimal fashion. For that reason the Commission is determined to pursue its resolute drive against anticompetitive behaviour. Important files, like those concerning transatlantic airline alliance agreements, should be closed during 1998. Some 20 cartels were being examined in January 1998 and

finances are likely to be levied in several cases. The Commission will also continue with its work of eliminating abuses of dominant positions, which proved particularly successful in 1997.

345. The Commission expects the number of merger notifications to increase further, partly in view of the trend over the last four years and as businesses anticipate the effects of EMU, and partly as a result of the impact of amendments to the Merger Regulation regarding eligibility thresholds and the regulation's extension to include all full-function joint ventures.

346. The success of liberalisation depends on rigorous enforcement of Community competition law. The Commission will therefore focus, in 1998, on introducing full competition for voice telephony services, working in cooperation with national regulatory bodies and, where appropriate, with the national competition authorities. It will also take a close look at the behaviour of dominant operators on their national markets and at alliance agreements in the telecommunications sector. The Commission will also examine the action taken by the

Member States pursuant to the directive on common rules for the internal market in electricity, which has to be transposed into national law by 19 February 1999 at the latest.

347. In the aid field, the Commission will step up its supervisory activities to ensure that the conditions laid down in its decisions have been correctly implemented by the Member States. It has already carried out checks on all major aid schemes in the automobile, synthetic fibres, steel and shipbuilding industries. Checks will be extended to all aid measures coming under the multisectoral framework as soon as it is introduced. The Commission will also follow up the implementation of restructuring plans by companies awarded restructuring aid in the past.

348. In view of the specific role assigned to competition policy at the extraordinary European Council meeting on employment held in Luxembourg, the Commission intends to step up its supervision of State aid and to ensure, when carrying out assessments, that aid arrangements 'favour economic efficiency and employment without causing distortions of competition.'

ANNEX — CASES DISCUSSED IN THE REPORT

1. Articles 85 and 86

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Sanofi and Bristol-Myers Squibb	OJ C 242, 8.8.1997	55
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Ford service outlets	IP/97/740, 4.8.1997	61
Irish Sugar plc.	OJ L 258, 22.9.1997, p. 1	65
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SWIFT/ La Poste	OJ C 335, 6.11.1997, p. 3	68
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Unisource	OJ L 318, 20.11.1997, p.1	72
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2. Article 90

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Case	Publication	Paragraph numbers
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Maribel quater	OJ C 201, 1.7.1997	229, 292
Siemens	not yet published	232, 289
MTW and Volkswerft	Council Regulation 1013/97	234, 235
MCR Gesellschaft für metallurgisches Recycling	not yet published	236
ESF Feralpi GmbH	not yet published	236

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