

European Community  
competition policy



1998



# European Community competition policy

XXVIII<sup>th</sup> Report on competition policy



1998

European Commission  
Directorate-General IV — Competition

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Luxembourg: Office for Official Publications of the European Communities, 1999

ISBN 92-828-6765-X

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*Printed in Italy*

PRINTED ON WHITE CHLORINE-FREE PAPER

**FOREWORD BY MR KAREL VAN MIERT,**  
Member of the Commission with special responsibility  
for competition policy



Last year's Competition Report ushered in a new form of introduction which afforded me the opportunity of raising issues that transcended present-day concerns and turned competition policy towards broader horizons. This innovation was, I know, well received and I have decided to continue in the same vein. Heeding the oft-repeated call of the European Parliament and the Economic and Social Committee, I propose this year to turn the spotlight on to our international activities because of the increasing importance of the international dimension to the competition rules that the Commission is enforcing.

I would like, in particular, to highlight the desirability of enhanced international cooperation between competition law enforcement authorities. To date, such cooperation has been largely confined to bilateral arrangements, many of which are proving very effective. In the long run, however, I believe that the desirability, even the necessity, of also putting in place a multilateral framework ensuring the observance of certain basic competition principles will be widely recognised. This would guarantee that the impressive progress which has been made in trade liberalisation over the past few decades is not undermined by a failure to deal effectively with anticompetitive behaviour by firms competing in the global economy.

**Globalisation and the threat posed  
by anticompetitive practices**

The ever-increasing integration of the world economy is creating an unprecedented inter-dependence between countries. Over the past decade, with the successful conclusion of the Uruguay Round, we have seen an acceleration in the progressive dismantling of trade barriers. Business is taking advantage of this openness, and there has been a huge growth in the volume of trade. In many industries, companies are competing in worldwide markets, and are becoming larger and multinational as a result. The past year has seen a series of so-called 'mega-mergers' between companies based

in different parts of the world, creating new corporations of truly global dimensions. Where companies are not already present in several countries, they often form strategic alliances which enable them to penetrate foreign markets together with international partners. This is particularly true in high-technology sectors such as the telecommunications, information technology, entertainment, air transport and pharmaceutical industries. The Commission has had to keep pace with the increasing globalisation of markets and, to an increasing extent, its analyses of competition problems take into account market data from outside the European Union.

It is not surprising to find that, in these circumstances, competition problems are also taking on global dimensions. Anticompetitive behaviour, including restrictive arrangements between companies and abuses of market dominance, does not respect borders. The emergence of ever-larger multinational companies, with the technological means and resources to do business on a global level, brings with it the danger that they may be tempted to take measures — either unilaterally or in collusion with other firms — which restrict competition or abuse their market power on these global markets. If such anticompetitive behaviour is allowed to go unchecked, it is no exaggeration to say that many of the benefits that have been achieved in terms of opening markets across the globe could be negated. The enhanced opportunities which trade liberalisation has provided for the interpenetration of markets around the world could very well be seriously undermined by restrictive commercial behaviour. Such practices may be resorted to by companies seeking to protect their traditional, often national, markets from foreign competitors.

**The need for cooperation in  
enforcement**

The removal of barriers to market integration resulting from anticompetitive commercial practices is nothing new for the European Union.

Since 1958, the Community's competition rules have served as an indispensable tool in carrying out the task of creating a single European market, and in helping to ensure that it becomes and remains a reality. In the absence of such control over restrictive and abusive behaviour by companies, or without merger control, national markets would remain much more difficult for newcomers from both inside and outside the Community to penetrate. Where such practices are carried on outside the Community, however, combating them is much more complicated.

National or regional competition authorities are ill-equipped to grapple with the problems posed by commercial behaviour occurring beyond their borders. Information may be difficult to obtain, and decisions, once taken, may be impossible to enforce. Although new competition legislation has been introduced in many countries in recent years, some behaviour might not be unlawful in the country where it is being carried out, or the authorities there may be unwilling to condemn it. Alternatively, incoherent or even directly contradictory conclusions might be reached by different enforcement authorities, both of which may claim jurisdiction over the same subject matter. Such divergent treatment not only entails the risk of precipitating a dispute between countries or trading blocks, as was illustrated by the initial disagreement between the US and the EU over the proposed Boeing/MDD merger last year, but is also a source of considerable uncertainty and cost for companies engaging in global transactions.

It is clear, therefore, that cooperation is necessary in order to deal effectively with competition problems which have transnational characteristics. There is already a degree of bilateral cooperation between authorities and there is reason for optimism that this will continue apace. In order for such cooperation to be effective, however, I am convinced that it is necessary not only to put in place arrangements regarding the logistics for cooperation, but also that there should be some common agreement at the international level regarding the content of a basic set of substantive principles of competition law.

In my view, the advantages of such cooperation will not accrue to the industrialised countries of the world alone. Indeed, I believe that developing countries can benefit substantially from enhanced cooperation of this kind. 1998 has been

a year of turmoil and uncertainty for many of the world's 'emerging' economies, particularly in Asia. It is generally accepted that one of the main causes of the problems experienced by these economies is the lack of genuine market openness. So-called 'crony capitalism' meant that competition between firms was very often foregone in favour of opaque arrangements which have little to do with market forces. I am convinced that the pursuit of a robust competition policy, at both the national and the international level, would provide an important antidote to such tendencies by promoting the competitiveness of industry, decentralising commercial decision-making, fostering innovation and maximising consumer welfare.

These issues were considered in 1994 by a group including three independent experts who, at my request, made a number of recommendations regarding the European Union's competition policy objectives in the post-Uruguay Round era. They compiled a report which recommended that efforts should in the future be made on two parallel fronts: firstly, to further extend the Commission's bilateral cooperation with third countries; and, secondly, to develop a multilateral framework ensuring compliance with certain basic competition rules by all countries involved.

### **Bilateral cooperation with the United States and Canada**

The European Union has in recent years been actively advancing bilateral cooperation in the field of competition with its main trading partners. The best example of such cooperation is provided by the agreements concluded with the USA, the first of which was concluded in 1991 and entered into force in 1995. When this first agreement was conceived, the EU and the USA were witnessing a rapid growth in the number and importance of transatlantic commercial transactions and, at the same time, coming to recognise the dangers posed by the emergence of cross-border anticompetitive practices. There was consequently a common recognition of the importance of avoiding conflicting decisions, and of coordinating enforcement activities to the extent that this would be mutually beneficial.

In substance, the agreement was designed to facilitate logistical cooperation between the Commission, on the one hand, and the US Department of

Justice or Federal Trade Commission, on the other. It provides for: the reciprocal notification of cases under investigation by either authority, where those cases may affect the important interests of the other party; the exchange of non-confidential information between the authorities; the possibility of coordination by the two authorities of their enforcement activities, and of rendering assistance to each other; and, finally, the possibility for one authority to request the other to take enforcement action (positive comity), and for one authority to take into account the important interests of the other party in the course of its enforcement activities (traditional comity).

This amounts to a commitment by the EU and the USA to cooperate with respect to antitrust enforcement, and not to act unilaterally and extraterritorially unless the avenues provided by comity have been exhausted. This commitment has been strengthened by the positive comity agreement concluded with the US in 1998, which further reinforced the provisions contained in the 1991 accord. The new agreement provides that each party's respective authority will normally defer or suspend its enforcement activities in respect of anticompetitive practices which occur principally in, and are directed principally towards, the other party's territory, where that other party is prepared to deal with the matter.

The Commission's experience in operating the agreement with the US since 1991 has demonstrated that such cooperation can be highly effective, substantially reducing the risk of divergent or incoherent rulings. Cooperation to date has helped to build confidence between the Commission and the US competition authorities, and has facilitated an increasingly convergent approach towards the analysis of markets and regarding appropriate remedies. The year 1998 saw an intensification of this transatlantic cooperation including, for example, the closely coordinated parallel investigations of the WorldCom/MCI and Dresser/Haliburton mergers.

The Commission has finalised a bilateral agreement with the Canadian Government which is closely analogous to the 1991 EU-US agreement. It is expected that it will be adopted during the course of 1999. It is also worth noting that similar cooperative arrangements also exist between some other countries, for example between the USA and Canada, and between Australia and New Zealand.

### **Bilateral cooperation with a view to enlargement**

The EU has entered into bilateral arrangements regarding competition of a somewhat different kind with the countries of central and eastern Europe. The demise of the eastern bloc has provided us with an unprecedented opportunity to heal the wounds of our continent and to assist in the transition from command to market economies, an essential aspect of which process involves the introduction of a functional competition policy. The Community has since developed close relationships with the central and east European countries, including the Baltic States, and the so-called 'Europe agreements' are aimed at paving the way for future membership of the EU. The same applies to Cyprus and Malta, candidates for membership with which the Community has concluded association agreements. The harmonisation of competition rules — including those governing State aid — is an important feature of these agreements, and hence of the Community's pre-accession strategy with respect to these countries. Enforcement bodies are also expected to be put in place. In line with the same logic as applies within the Community, the competition rules are considered necessary to ensure that the elimination of trade barriers between countries should not be circumvented by anti-competitive commercial conduct and State measures producing the same effects.

Progress in relation to the adoption of antitrust rules and the establishment of appropriate competition enforcement authorities is, in my view, promising. There still remains considerable work to be done, however, in relation to the introduction of adequate frameworks for the control of State aid. Detailed arrangements have also been put in place for cooperation between the Commission and the various enforcement authorities. Formal accession negotiations have now begun with Poland, Hungary, the Czech Republic, Estonia, Slovenia and Cyprus.

### **Bilateral cooperation with other countries**

The 1995 Customs Union Agreement with Turkey is one of the best examples in recent years of a bilateral agreement containing detailed provisions dealing with competition and State aid. Free trade agreements concluded between the

Community and third countries, such as the association agreements concluded over the last few years with several Mediterranean countries, have also usually included such provisions. The Community has recently concluded a series of so-called partnership and cooperation agreements (PCAs) with Russia, Ukraine, and several of the other ex-Soviet States. These agreements, while less ambitious than the Europe agreements, none the less involve a commitment by these countries to move progressively towards an approximation of their competition and State aid legislation with that of the Community. There is as yet no formal bilateral framework for the Community's cooperation in the field of competition with its other principal trading partners, most notably Japan. Notwithstanding this, regular contacts — including an annual high-level bilateral meeting and the reciprocal notification of cases affecting each other's important interests — take place between the Commission and the Japanese Fair Trade Commission.

#### **Multilateral cooperation — the need for a new worldwide framework**

In spite of the considerable progress that has been made at the bilateral level, however, the fact must be faced that arrangements for international cooperation in competition policy based solely on a bilateral approach entail major shortcomings. In particular, it is evident that bilateral cooperation will inevitably only take into account the interests of the countries involved and, as a result, the interests of third countries are likely to be neglected. Moreover, many countries still have no competition legislation at all. Despite a marked increase in enthusiasm for introducing competition rules over the past decade, still only about half the World Trade Organisation's member countries have competition laws. The substance of these rules, and the zeal with which they are enforced in the various countries, also show considerable divergence.

The OECD's 1995 recommendation concerning competition cooperation, and the recommendation on 'hardcore' cartels which it adopted earlier this year, represent important guidelines for the shape which bilateral cooperation should take, particularly when several member countries are grappling with the threat posed by an international cartel. The recommendations are addressed only to OECD member countries,

however, and are not binding even on them. Nor are the current WTO rules adequate for dealing with competition problems. The WTO panel's ruling in April 1998 on the dispute between the USA and Japan, which involved allegations of anticompetitive behaviour by Fuji aimed at denying its US rival Kodak access to the Japanese market for photographic film and paper, provided a clear illustration of this inadequacy.

I am therefore convinced that a comprehensive worldwide multilateral framework, providing for the application of a basic set of common competition rules, needs to be established as a necessary complement to trade liberalisation. Because of this complementary relationship between trade and competition policy, the WTO would appear to be the multilateral organisation best suited to house such a framework. The idea of creating a supranational structure of this kind was the subject of a Commission communication to the Council in 1996, which proposed that the WTO should set up a working group with a remit to explore the desirability of going down that path. This proposal, which was endorsed by the Council, provided the principal inspiration for the ministerial decision, taken in Singapore in December 1996, to establish a WTO working group to study the interaction between trade and competition policy. This group has already met on a number of occasions and will continue its deliberations in 1999. Although the degree of interest shown by both the industrialised and the developing countries (including some countries which have no domestic competition rules) in the discussions is very encouraging, it is too early to say whether they will ultimately lead to the launching of formal negotiations between the members of the WTO. It is very much my hope that they will, as part of the next round of multilateral negotiations.

Such negotiations could focus on the following four proposals for possible agreement: firstly, the members could agree to each adopt domestic competition rules, and to the establishment of appropriate enforcement bodies. This would mean the adoption of basic rules for dealing with restrictive business practices, abuse of market power and mergers, together with adequate enforcement provisions, and a right of access for companies to the enforcement authorities and courts. Secondly, the members could at the same time agree on a common set of core principles for addressing anticompetitive practices with an international dimension. Initially, it would seem reasonable to concentrate

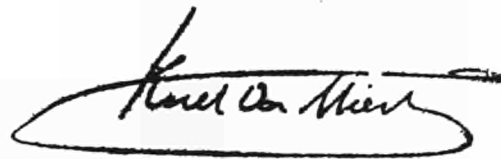


## FOREWORD BY MR KAREL VAN MIERT

on practices whose harmful nature is generally recognised — in particular horizontal restrictions such as price and output fixing, market sharing, bid rigging and export cartels. Agreement on other practices, such as abuse of market power and vertical restraints may prove more difficult, but could be envisaged in the longer term. Thirdly, the elements of an instrument for multilateral cooperation could also be developed. This would be designed to facilitate cooperation between enforcement authorities, and could include provision for consultation, avoidance of conflicts, exchanges of non-confidential information, reciprocal notification and comity. Finally, it would also seem logical to provide for a mechanism to enable the settlement of disputes in clearly specified circumstances. This could involve the adaptation of the present dispute mechanism of the WTO to that purpose by, for example, ensuring that patterns of

failure to enforce competition law affecting trade between member countries are dealt with. To extend such a mechanism to settlement in individual cases, however, would not be appropriate.

These proposals should not be interpreted as a call for the establishment of a new international organisation, with its own powers of investigation and enforcement. Rather, they are intended to form a basis for the creation of a new multilateral framework whose purpose would be to strengthen the world trading system by ensuring that liberalisation and market access are not circumvented by anticompetitive commercial practices. With that objective in mind, I believe that the proposals are modest, but reasonable and coherent, and likely to prove effective in grappling with one of the most important challenges faced by the economies of the world as the new millennium approaches.





## XXVIIIth Report on competition policy 1998

(Published in conjunction with the '*General Report on the Activities of the European Union — 1998*')

SEC(1999) 743 final

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**Notice to the reader:**

The Treaty of Amsterdam entered into force on 1 May 1999. This Treaty provides for the renumbering of the articles of both the Treaty on European Union and the Treaty establishing the European Community. While dealing primarily with the year 1998, this report adopts the new numbering system. Nevertheless, reference is made to the old numeration, when quoting from the titles of legislative acts adopted prior to the alteration in numbering or when quoting from the content of documents written prior to 1 May 1999. To draw the attention of readers to these changes, all quotations using the old numbering appear in italics.

In order to facilitate the reading of the XXVIIIth Competition Report, the corresponding old and new numbers of the articles cited in this report are set out in the following table:

<i>Old number</i>	<i>New number</i>
Article 37	Article 31
Article 85	Article 81
Article 86	Article 82
Article 89	Article 85
Article 90	Article 86
Article 92	Article 87
Article 93	Article 88
Article 100A	Article 95
Article 173	Article 230
Article 175	Article 232
Article 77	Article 234
Article 190	Article 253

## CONTENTS

Introduction .....	13
1. Competition policy: defending and facilitating the single market .....	13
2. Modernisation of competition law .....	14
3. The liberalisation process .....	16
<i>Box 1: The euro and competition</i> .....	17
I — Antitrust: Articles 81 and 82	
State monopolies and monopoly rights: Articles 31 and 86 .....	19
A — Modernisation of the legislative and interpretative rules .....	19
1. Assessment of the first measures to refocus efforts .....	19
2. Communication on the application of the Community competition rules to vertical restraints .....	20
3. Review of the policy on horizontal agreements .....	23
4. Review of procedural regulations .....	24
B — Consolidating the single market .....	25
1. Cartels .....	25
2. Opening-up of markets .....	26
<i>Box 2: Motor vehicle distribution — a consumer-oriented policy</i> .....	27
3. Undertakings in a dominant position .....	28
C — Sector-based policies .....	29
1. Telecommunications .....	29
<i>Box 3: Commission policy on fines</i> .....	30
2. Postal services .....	34
3. Media .....	34
4. Transport .....	35
<i>Box 4: European competition policy and airports</i> .....	37
5. Insurance .....	38
6. Energy .....	39
7. Competition and the environment .....	41
<i>Box 5: Globalisation of markets and competition analysis</i> .....	43
D — Statistics .....	45
II — Merger control .....	47
A — Introduction .....	47
B. — New developments .....	48
1. Market definition .....	48
<i>Box 6: Merger review</i> .....	49
2. Dominance assessment .....	51
3. Remedies .....	54
4. Referrals to Member States .....	56
5. Rules and procedures .....	57
<i>Box 7: Implementation of the new Article 2(4) of the merger regulation</i> .....	60

*NB:* In the interests of readability, the Competition Report contains a number of boxes in which stock is taken of matters of general interest or of specific points arising in the competition field. It should be noted that the equivalents of currency amounts are expressed in ecu for 1998 inasmuch as the euro exists only as from 1 January 1999.

C — Statistics .....	62
III — State aid .....	65
A — General policy .....	65
1. Improving the efficiency of State aid monitoring .....	65
2. Block exemptions for State aid .....	65
3. Procedural regulation .....	66
4. State aid contained in tax systems .....	67
B — Concept of aid .....	67
1. Advantage to a firm or firms .....	67
2. Origin of resources .....	69
3. Specificity criterion .....	69
4. Distortion of competition and effect on intra-Community trade .....	70
C — Assessing the compatibility of aid with the common market .....	71
1. Horizontal aid .....	71
2. Regional aid .....	73
3. Aid to outward foreign direct investment .....	73
4. Sectoral aid .....	74
D — Procedures .....	82
1. Rights of third parties .....	82
2. Recovery of aid .....	84
3. Consequences of a judgment annulling a decision .....	84
4. Application of the State aid rules by national courts .....	85
E — Statistics .....	86
IV — International activities .....	89
A — Enlargement .....	89
1. Pre-accession .....	89
2. Accession negotiations .....	91
B — Bilateral cooperation .....	91
1. North America .....	91
2. Other countries .....	93
C — Multilateral cooperation .....	94
1. WTO: Trade and competition policy .....	94
2. OECD, Unctad .....	95
V — Outlook for 1999 .....	97
1. Legislative and regulatory activities .....	97
2. International field .....	97
3. Supervisory activities .....	97
Annex — Cases discussed in the Competition Report .....	99

## INTRODUCTION

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1. In 1998, the last year before the Union changed over to the single currency, the Commission naturally had to make every effort to ensure that the economic environment into which the euro was born was a healthy and vigorous one. Competition policy contributed to this process within its own sphere and within the limits of its own resources. The Commission worked in two main directions here. First, it sought to underpin and consolidate the operation of the single market, by improving market structures and taking firm action against anticompetitive practices, so as to provide a sound and healthy basis for economic and monetary union. Second, it took decisive steps towards the modernisation of Community competition law. Thus at the end of September it issued a communication on the application of the Community competition rules to vertical restraints. At the end of November the new procedural regulation for State aid secured agreement in principle from the Council, and this should clear the way for its adoption in the course of 1999. Throughout the year the Commission sought to strengthen links with competition authorities outside the Union; the international dimension has now become a constant in its work <sup>(1)</sup>.

### 1. Competition policy: defending and facilitating the single market

2. This was a very satisfactory year for Commission competition policy. The Commission clearly demonstrated its determination to use competition policy to defend and facilitate the single market in the run-up to economic and monetary union. It imposed severe penalties in a number of exemplary cases. It also took the first steps in what is intended to be a series of measures aimed at focusing the supervisory work of its departments on those cases where the Community interest is manifest.

#### 1.1. *Invigorating the single market*

3. The Commission sought to consolidate the single market and to fend off attempts by firms to set artificial bounds to its development.

It exercised particular vigilance with regard to practices that tend to partition markets. It fined the motor manufacturer Volkswagen ECU 102

million for obstructing trade within the Community by preventing its Italian dealers from selling Volkswagen and Audi cars to foreign customers.

It also penalised the abuse of a dominant position by the Italian Amministrazione Autonoma dei Monopoli dello Stato, which had been favouring the cigarettes it manufactured itself over cigarettes manufactured abroad.

In the same spirit it continued the fight against price cartels, in order to counter their inflationary effects and to ensure that competition could operate efficiently. It prohibited several restrictive practices and imposed heavy fines on firms that had been taking part. There were cases of this kind in areas such as stainless steel, sugar, district heating pipes and sea transport. The fines imposed totalled ECU 178.83 million.

Discriminatory abuses of dominant positions are likewise practices which weaken the health of the single market, because they inhibit the development of firms that find themselves dependent on the dominant company and of others that might wish to enter a particular market, such as a network industry that may be in the process of liberalisation. The Commission acted against such abuse in several cases, for example in air and sea transport.

If the single market is to work properly its structures must continue to be flexible and open, so that the interplay of competitive forces can be as effective as possible. The Commission banned mergers between Bertelsmann, Kirch and Premiere and between Deutsche Telekom and BetaResearch on the grounds that they would have established structures for digital television in Germany in which the parties would have held dominant or indeed monopolistic positions on several markets. It authorised several transactions on condition that the firms involved complied with undertakings they had given which would ensure that sufficient competition was maintained on the relevant markets.

The monitoring of State aid also makes a major contribution to this effort to assist the development of the single market. The Commission takes the view that unjustified State aid leads to market distortion and inefficient resource allocation. The effect is to increase barriers to trade and hence put at risk the achievements of the single market. The continuing disparities in the levels of aid between Member States jeopardise the objective

<sup>(1)</sup> International cooperation is not discussed here as it already forms the subject matter of Mr Van Miert's foreword.

of economic and social cohesion. The Commission therefore continued the strict exercise of its responsibility to control State aid. The number of cases it had to decide decreased, but unfortunately remained high. A sizeable proportion of cases (about 20 %) were cases where Member States failed to comply with the obligation to notify new aid measures to the Commission. This confirmed the Commission in its view that it must consistently order the recovery of non-notified aid that is incompatible with the Treaty. Without such a practice, Member States would not have sufficient incentive to observe their procedural obligations. Major aid cases concerned additional aid to *Crédit Lyonnais* (between ECU 8 billion and ECU 15 billion, which is quite unprecedented) and the aid package for the construction of the Channel Tunnel rail link. This latter case is exemplary in addressing the implications of the construction and provision of transport infrastructure by private investors.

All these Commission decisions are directed towards the same objective, namely consolidating the single market, which is the foundation of economic and monetary union. But the somewhat severe picture conveyed by this brief review should not be allowed to obscure the fact that the great majority of agreements, mergers and State aid measures notified to the Commission in 1998 were the subject of positive decisions.

### *1.2. Refocusing the Commission's supervisory work*

4. One of the main aims of modernising competition law and Commission practice is to allow the Commission departments to concentrate on those cases where the Community interest is manifest. This intention was clearly announced in 1997, with the first package of initiatives, namely the *de minimis* notice and the notice on cooperation between Community and national competition authorities. At the end of 1998 the results were encouraging, but did not go far enough.

5. There was intense supervisory activity once again in 1998, in all the Commission's spheres of responsibility. The total number of new cases was 1 198, comprising 509 under Articles 81, 82 or 86, 245 mergers <sup>(1)</sup> and 444 State aid cases; this total was down substantially on 1997, by 134,

owing to a drop in the number of State aid cases. In conventional antitrust cases the number of notifications is tending to stabilise, which is an encouraging development, and is no doubt partly the result of the new *de minimis* notice. The number of complaints lodged with the Commission continues to be high. The explosion in merger notifications which the Commission had expected as a result of the revision of the merger regulation (Regulation (EEC) No 4064/89), and more especially the new powers which that regulation gives to the Commission in respect of cross-border transactions, did not in fact materialise; but the total number of transactions notified under the regulation nevertheless rose by 36 %, or 5 points more than in 1997, when the corresponding figure was 31 %. This increase has to be seen against the background of the current international environment, which tends to encourage mergers, and of the girding-up of markets for economic and monetary union. The total number of new State aid cases over the year showed a spectacular fall by comparison with 1997, down 32 %, taking it lower than it has been in the last three years. The number of cases terminated was 1 279, comprising 581 under Articles 81 and 82, 238 mergers and 460 State aid measures; this is an increase of 119 cases closed by comparison with last year. These figures bear witness to the Commission's desire to speed up the handling of cases wherever possible.

## **2. Modernisation of competition law**

6. The Commission took a further step in its policy of modernisation when it published its communication on vertical restraints. The year also saw the adoption of the regulation empowering the Commission to declare block exemptions for certain types of State aid, and the securing of agreement in principle to the procedural regulation, which came at the Council meeting on industrial affairs on 16 November.

### *2.1. Antitrust policy*

7. The communication from the Commission on the application of the Community competition rules to vertical restraints, which was approved on 30 September, is in many ways a major innovation in the Commission's approach to antitrust policy. It breaks with a method which was differentiated by industry and category of agreement, and had become extremely complex. It is based

<sup>(1)</sup> Including 10 ECSC decisions.



on the economic analysis of the effects of vertical restraints; exemption is to depend on the market power of the firms involved. Simplification of procedures, realistic analysis and greater involvement of courts and competition authorities in the Member States are the fundamental principles of the Commission's new approach, and will continue to guide it in the months ahead.

8. The general idea is that there should be a single and very broad block exemption regulation covering all vertical restrictions of competition in respect of all intermediate and finished goods and all services. A limited number of restrictions would be excluded, such as price-fixing agreements for example. These would form a 'black list' of clauses that were not exempted by the regulation. The regulation would not seek to list the clauses that were exempted, as is done in the block exemption regulations currently in force, and this would immediately remove the straitjacket effect associated with the present 'white lists', which incite firms to force their agreements into a mould provided by the relevant block exemption regulation.

9. The main objective of this wide-ranging and flexible exemption regulation would be to give a measure of freedom and legal certainty to the large number of firms that do not possess market power. Within the limits thus mapped out they would not have to be concerned for the validity of their agreements under Community law. To preserve competition on markets, and to confine the benefit of the exemption to firms with no great market power, the regulation would lay down market share thresholds beyond which the block exemption would no longer apply. The fact that these thresholds were exceeded would not mean that the agreements were necessarily unlawful, but only that they would have to be examined for compatibility on an individual basis.

10. To help firms see what sort of analysis they have to carry out in order to establish that their agreements are compatible with Article 81(1) and (3), the Commission intends to publish guidelines which would supplement the legislative provision in the new regulation.

11. To pursue this policy the Commission will have to obtain new legislative powers from the Council. The Commission has submitted a proposal for a Council regulation amending Regulation No 19/65/EEC so as to authorise the Commission to adopt a block exemption regulation of the new type. The Commission has also put for-

ward a proposal to amend Council Regulation No 17 of 6 February 1962 so as to enlarge the scope of the exemption from notification laid down in Article 4(2).

## 2.2. State aid

12. In 1998 the Commission pressed forward with the measures it had launched in autumn 1996 for the reorientation and modernisation of State aid monitoring. The aim of the initiative is to improve transparency and legal certainty by simplifying and clarifying the procedural rules, and to improve the efficiency of the State aid monitoring system for less significant cases. Given the high number of aid measures the Commission has to assess, it must inevitably concentrate on major cases involving large amounts of aid or new legal issues. This necessity is underlined notably by the growing number of individual ad hoc aid measures, where intensities are often very high.

13. As an important step in the exercise of modernising State aid monitoring, the Council reached political agreement, pending receipt of the European Parliament's opinion, on a Commission proposal for a procedural regulation. This regulation will clearly define the procedural steps to be observed by the Commission and Member States in the application of Article 88 of the Treaty, notably concerning time limits, injunctions, and recovery of incompatible aid. The Council formally adopted the proposal for a regulation enabling the Commission to exempt certain categories of horizontal State aid from the notification requirement. Exemption regulations of this kind should simplify procedures by relieving the Commission of the assessment of numerous aid cases where there is no major risk of competition being distorted.

14. The Commission also took other steps to clarify its assessment of aid measures. The multi-sectoral framework on regional aid for large investment projects entered into force on 1 September. The Commission adopted a framework on training aid. The Council adopted a regulation establishing new rules on aid to shipbuilding, replacing the seventh directive; this had become necessary because the United States had failed to ratify the OECD shipbuilding agreement. Finally, the Commission issued a notice explaining its new approach towards assessing possible aid elements in direct business taxation in the Member States. This move runs parallel to the efforts of Member States within the Code of Conduct Group to put an end to harmful tax competition.

### 3. The liberalisation process

15. Another component in the policy of consolidation of the single market is the continuing process of liberalisation in the network industries which were formerly public monopolies. The opening-up of the sectors associated with the information society or the production and distribution of energy is vital to the competitiveness of European industry and the dynamism of the single market. It provides an incentive for the development of technological innovation, and promotes the creation of new, stable and durable employment.

#### 3.1. Telecommunications

16. Telecommunications moved over to full liberalisation on 1 January, and the Commission was particularly active in this sphere.

17. In the first few months of the year the Commission supplemented the body of aids to interpretation by adopting a notice on the status of voice communication on the Internet and a notice on the application of the competition rules to access agreements in the telecommunications sector. In this latter notice the Commission among other things said it wanted to see most cases dealt with by the regulatory authorities in the Member States and, if need be, by the national competition authorities, and to have to intervene itself only where necessary.

18. The Commission has set up a joint follow-up team with representation from the Directorates-General responsible for competition and for telecommunications. In the course of the year it published two reports on the implementation by the Member States of the telecommunications liberalisation and harmonisation directives. The reports give a broadly encouraging picture of the process under way in the Union. In all Member States apart from Greece and Portugal, which benefit from derogations until 2000, new operators have been authorised to supply voice telephony services or to establish and operate public telecommunications networks in competition with the existing operator. The Commission has nevertheless observed that some shortcomings continue. At the beginning of 1998 infringement proceedings were in progress in 35 cases. But the Commission terminated several of these after the Member State concerned took appropriate steps.

19. The Commission continues to check the conformity with the Treaty of national measures governing interconnection, the concept of universal service, the methods of calculating the cost and financing of universal service, and the procedures and conditions for the granting of authorisation, in order to ensure that these measures do not place barriers in the way of new entrants.

20. All of these measures are intended to ensure the success of the process of liberalisation, which has aroused great enthusiasm among business people. Across the Community more than 500 licences for access to the local loop had been granted by the end of February. The spectacular development of mobile telephony which has been encouraged by free competition has not come to an end. The Commission will of course support it, particularly as the prospects held out by the combined effect of mobile telephony, satellite links and the Internet are promising in terms of growth.

#### 3.2. Energy

21. The Member States approved the directive opening up the Community market in natural gas at the Council meeting on energy on 11 May; this completed the process of liberalising the energy sector, which began with the directive on the single market in electricity. The new directive establishes common rules for the transmission, distribution, supply and storage of natural gas; it lays down rules on access to the market, the operation of systems, and the criteria and procedures applicable to the granting of authorisations for the construction and operation of natural gas facilities.

22. The market is to be opened up in respect of at least 20 % of the total annual gas consumption of each national gas market as soon as the directive is transposed into national law, that is to say in 2000; this minimum is to rise to 28 % within five years and 33 % within 10 years. At the same time the category of natural gas customers entitled to negotiate their own supply contracts with the supplier of their choice is to be gradually widened.

For the organisation of access to the system, Member States may choose either or both of two procedures, known as negotiated access and regulated access. Both must operate in accordance with objective, transparent and non-discrimina-

tory criteria. Upstream pipelines are as a general rule to be open too, but the procedure here is to be determined by the particular Member State.

23. The Commission may allow certain derogations where companies which have concluded 'take-or-pay' gas-supply contracts encounter diffi-

culty as a result of liberalisation. The directive also provides for derogation where a Member State is not directly connected to the system of any other Member State and has only one external supplier, for emerging markets and regions in Greece and Portugal, and for areas where the gas infrastructure is still being developed.

### Box 1: The euro and competition

In 1998, the preparations for the launch of the euro were successfully finalised. The introduction of the euro will have a profound impact on competition in Europe. In general, economic and monetary union (EMU) will intensify competition for three reasons:

First, it will reinforce the positive effects of the single market programme. The single market has had a pro-competitive impact by integrating markets effectively and making the relevant markets broader. The euro should enhance this effect because, for trade between the participating Member States, it will eliminate exchange rate risk and the transaction costs associated with converting one currency into another. As a consequence, trade flows are likely to increase. Whereas the effects of the single market programme were mainly concentrated on certain manufacturing sectors which had hitherto been protected by high non-tariff barriers, the euro is likely to affect a wide range of sectors, including notably financial services and distribution. In particular, the markets for many financial services, which are at present national because of the existence of separate currencies, will gradually be widened to cover the whole euro zone.

The broadening of geographic markets offers new opportunities to exploit economies of scale and will lead to an increase in merger and acquisition activity. This will be true especially for industries where sales networks have previously been confined largely within national boundaries, and where companies see prospects of obtaining major cost savings by enlarging these to a European scale. On the other hand, competition will expose the weaknesses of less efficient companies, which will become vulnerable to takeover bids. In general, the restructuring arising from EMU will pose no competition problems and should enhance the overall efficiency of the Community economy. Provided that market entry is easy, no major competition problems should result from the reduction in the total number of firms as inefficient firms exit and more efficient firms expand. Although the number of domestic suppliers in any local market should fall, the total number of actual or potential competitors in that market should increase after it has been incorporated into a wider geographic market.

Secondly, EMU will increase price transparency. After the introduction of the euro, the greater ease with which prices in different countries can be compared will mainly affect those sectors where price dispersion between Member States is high and not due to structural causes such as differences in consumer tastes and indirect taxation, but rather to the market-segmentation strategies of firms. Certain consumer durables sectors, such as motor vehicles, are likely to be particularly strongly affected by increased price transparency, since each purchase represents a high proportion of the consumer's total expenditure. For such products the potential savings which the consumer can achieve by cross-border purchasing can easily outweigh the additional costs which he incurs.

Thirdly, the impact of the euro on the market for corporate equity will have repercussions on competition in products and services. EMU will reduce the cost of capital, which could lead to an increase in the number of mergers. New financing techniques and markets can be put to work for a new generation of EU entrepreneurs, thus facilitating market entry. Therefore, in principle, the change in the market for capital should further increase the pro-competitive impact of EMU.

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In the context of this overall pro-competitive impact of EMU, competition policy has an important role to play in safeguarding or enhancing the flexibility of product and service markets. Companies which are able to protect themselves through anticompetitive behaviour against competitive pressures are likely to be less efficient and innovative and hence less well able to adapt in the event of macroeconomic shocks.

Some companies will inevitably experience difficulties as a result of more intense competition. Consequently, Member States are likely to experience strong pressure to protect these companies by means of State aid, notably rescue and restructuring aid. Such aid can lead to serious distortion of competition at the expense of more efficient companies.

The potential for increased competition could also lead to attempts by companies to find ways to reduce the actual level of competition. For example, increased price transparency will create further incentives for parallel trade, but will also increase the temptation for companies to create new obstacles to arbitrage. Similarly, new competitive threats arising from EMU may induce incumbents to enter into vertical or horizontal agreements with the object of foreclosing rivals' markets, or alternatively to seek State aid. Finally, in the longer run, the expected increase in mergers and acquisitions could create oligopolies in some industries. Companies in these industries could be tempted to reduce the competitive pressure either by engaging in tacit collusion or by forming cartels. This will be made easier as the increased price transparency will facilitate the monitoring of competitors' prices. It will also be more difficult to deviate from agreed prices and hide this fact behind exchange rate fluctuations.

Competition policy therefore needs to remain vigilant to ensure that the euro can deliver its full benefits. Both Community and national competition policy have a vital role to play in ensuring that product and service markets are flexible so that European consumers will truly benefit from the common currency.

## I — ANTITRUST: ARTICLES 81 AND 82 STATE MONOPOLIES AND MONOPOLY RIGHTS: ARTICLES 31 AND 86

### A — Modernisation of the legislative and interpretative rules

24. For the last two years the Commission has been modernising its competition policy to ensure that it reflects contemporary economic realities and, in particular, to prepare it for the challenges of economic and monetary union and Community enlargement <sup>(1)</sup>. One of the main aims of modernising the rules and practice is to ease the administrative burden on firms, particularly those without market power, and to refocus the Commission's efforts on cases of clear relevance to Community competition policy. In 1997, the Council adopted a revised merger regulation and the Commission adopted several notices designed to clarify and modernise its practice as regards antitrust legislation. In 1998, the Commission took a major step forward when it published its communication on vertical restraints.

#### 1. Assessment of the first measures to refocus efforts

25. In 1997 the Commission adopted two notices designed to enable its supervisory arm to focus efforts on cases with a definite impact on competition within the Union. The first was the revised notice on agreements of minor importance which are not deemed to have an appreciable effect on the functioning of the common market, and the second was the notice on cooperation between the Commission and national competition authorities which followed up the notice on cooperation with the national courts. These new provisions are designed to enable the Community's supervisory arm to focus more effectively on cases with a definite impact on competition within the single market. It is worthwhile drawing up an initial assessment now that these two notices have been in force for one year.

26. As regards Articles 81 and 82, the situation in 1998 was virtually identical to that in 1997. The number of new cases recorded in 1998 was 509, as against 499 the previous year (447 in 1996), and therefore seems to have stabilised. The number of notifications has also tailed off, although it remains high. The situation is similar

as regards complaints and proceedings initiated by the Commission.

27. The stabilisation in the number of notifications, which fell from 221 in 1997 to 216 in 1998, can probably be attributed partly to the provisions which the Commission adopted last year, particularly the notice on agreements of minor importance. The Commission invoked this notice on only about 10 occasions in the course of the year. It will probably have encouraged a number of firms not to notify agreements of minor importance and, had it not existed, the number of notifications might well have been higher. Nevertheless, the results for the first year of implementation (a decrease of 0.2 %) are still insufficient.

28. As regards complaints, the number of which was slightly higher than in the previous year (192, as against 177 in 1997), the Commission observes that, whereas some of them are of manifest Community relevance and have given rise to major decisions like the one on Greek ferries, many of the complaints it receives are not. The number of Commission decisions rejecting a complaint because it was not of manifest interest to the Community is revealing. The *Automec* precedent, which enables the Commission to reject complaints of this type, is useful but probably insufficient. What is needed is an instrument to facilitate the rejection procedure.

29. The number of cases instituted by the Commission on its own initiative was the same in 1998 as the previous year (101). Most concern a specific sector, telecommunications, for which full liberalisation came into effect on 1 January. Hence close scrutiny by the Commission is necessary.

30. The notice on cooperation between the Commission and national competition authorities in handling cases caught by Articles 81 and 82 began to make itself felt. The Commission rejected 15 complaints for lack of Community interest; these cases were handled by the authority of the Member State most affected by the practice complained of. It should also be noted that 89 requests for information changed hands between national authorities and the Commission regarding cases handled by both bodies on a joint basis. Lastly, it should be noted that the Commission was consulted on 10 cases handled by the competition authorities acting alone and that it encountered three cases of dilatory notification as defined by the notice. This first set of instances of application of the notice reflects increased cooperation between Com-

<sup>(1)</sup> 1997 Competition Report, points 36 to 50.

munity and national authorities and illustrates their common determination to implement Community antitrust legislation on a decentralised basis. However, it is clear that even more intensive use could be made of this notice.

31. In any event, the notice on cooperation between the Commission and national competition authorities will not be fully effective until work on decentralising implementation of the Community competition rules has been completed. In 1998, in the 15 Member States, only eight authorities were in a position to apply Articles 81(1) and 82 directly, following the adoption of specific legislation by the national legislators. The countries concerned are Belgium, France, Germany, Greece, Italy, the Netherlands, Portugal and Spain. The Commission hopes that those Member States which have not to date adopted legislation for the direct implementation of those articles will do so at the earliest opportunity. However, it should be noted that, when Member States revise or adopt national competition law, they very often base their work on Community law, thereby carrying out voluntary harmonisation which can only promote the emergence of a common legal framework in the European Community. The Netherlands and the United Kingdom both recently amended their national legislation. The Dutch law is very similar to Articles 81 and 82, as are the Dutch rules on merger control <sup>(1)</sup>. The United Kingdom's new Competition Act <sup>(2)</sup> is essentially based on Articles 81 and 82. Section 60 of the Act specifies that, in implementing their national law, the United Kingdom authorities must take account of the principles and analyses resulting from Commission decisions and Court of Justice case law.

32. The number of cases closed in 1998 was 581 (the corresponding figures for 1997 and 1996 were 517 and 388 respectively). The number of formal decisions grew substantially, rising from 27 in 1997 to 42 in 1998. Of special significance, apart from decisions rejecting complaints and non-opposition decisions in the transport field, were 11 formal decisions based on Articles 81(1) and 82, most of which were coupled with fines. This increase in the number of cases closed reflects a commitment on the Commission's part

to speed up the handling of antitrust cases. However, this improvement cannot conceal the slow processing of certain cases. On the basis of the 11 formal decisions referred to above, the average length of proceedings was 4 years and 10 months, the shortest duration being 2 years and 1 month and the longest 8 years. The length of proceedings was essentially due to complex procedures which entailed delays. For that reason the Commission reviewed a number of procedural regulations during the year, including Regulation No 99/63/EEC on hearings, with a view to streamlining and speeding up the processing of cases. This streamlining is an ongoing process.

33. In view of the stabilisation in the number of notifications and the development of cooperation with national competition authorities, the impact of measures to refocus efforts may be described as encouraging, even if the results are still limited as yet. The review of the policy on vertical restraints should allow further progress to be made. Nevertheless, the Commission will continue its work on this subject and will put forward new modernisation proposals during 1999.

## **2. Communication on the application of the Community competition rules to vertical restraints**

34. On 30 September the Commission adopted a communication on the application of the Community competition rules to vertical restraints <sup>(3)</sup> setting out its proposals for reform in this field. The Commission also adopted two proposals for Council regulations amending, respectively, Council Regulation No 19/65/EEC of 2 March 1965, with a view to granting the Commission the necessary legislative powers to implement the proposed new policy, and Council Regulation No 17 of 6 February 1962, with a view to extending the waiver from notification provided for in Article 4(2) to all vertical agreements.

35. This communication and the related proposals follow the publication of the Commission's Green Paper on vertical restraints in EC competition policy <sup>(4)</sup> in January 1997, and the very wide-ranging debate that ensued. Subject to the adoption of two proposed Council regulations, the Commission intends to enact a new type of block

<sup>(1)</sup> Law of 22 May 1997, which entered into force on 1 January 1998 (*Mededingingswet*).

<sup>(2)</sup> Act of 9 November 1998, which will enter into force on 1 March 2000.

<sup>(3)</sup> COM(1998) 544 final.

<sup>(4)</sup> COM(96) 721 final.

exemption regulation for vertical restraints, complemented by a set of guidelines. New competition rules for the distribution of goods and services should be in place for the year 2000.

### 2.1. Outline of the policy proposal

#### A more economics-based approach

36. In its communication, the Commission recommends a shift from the current policy relying on form-based requirements with sector-specific rules to a system based on economic effects covering virtually all sectors of distribution <sup>(1)</sup>. It proposes to achieve this by means of one wide-ranging block exemption regulation that covers all vertical restraints concerning intermediate and final goods and services except for a limited number of hardcore restraints. It is based mainly on a 'black list' approach, i.e. defining what is not exempt under the block exemption instead of defining what is exempt. This removes the straitjacket effect, a structural flaw inherent in any system which attempts to identify the clauses which are exempt.

37. The principal objective of such a wide-ranging and flexible block exemption regulation is to grant companies which lack market power, and most do, a safe harbour within which it is no longer necessary for them to assess the validity of their agreements in the light of the EC competition rules. In order to preserve competition and to limit the benefit of this exemption to companies which do not have significant market power, the future block exemption regulation will make use of market share caps to link the exemption to market power.

38. Companies with market shares above the thresholds of the block exemption will not be covered by the safe harbour. It must, however, be stressed that, even in such circumstances, their vertical agreements will not be subject to any presumption of illegality. The market share threshold will serve only to distinguish those agreements which are presumed to be legal from those that may require individual examination. To assist companies in carrying out such an examination, the Commission intends to issue a set of guidelines basically covering two issues: the application of Articles 81(1) and 81(3) above the

market share threshold and the Commission's policy on withdrawal of the benefit of the block exemption, particularly in cumulative effect cases. In most cases, these guidelines should allow companies to make their own assessment under Articles 81(1) and 81(3). The objective is to reduce enforcement costs for industry and to eliminate, as far as possible, notifications of agreements that do not give rise to any serious competition problem.

#### Market share threshold(s)

39. A choice will have to be made between systems based on one or two thresholds, an issue which is still being discussed. In a two-threshold system, the first and main market share figure would be 20 %. Below this it would be assumed that vertical restraints had no significant net negative effects and therefore all vertical restraints and their combinations, with the exception of hardcore restraints, would be exempt. Above the 20 % threshold, there would be room to exempt certain vertical restraints up to a higher level of 40 %. This second threshold would cover vertical restraints that, on the basis of economic thinking or past policy experience, lead to less serious restrictions of competition (e.g. exclusive distribution, exclusive purchasing, non-exclusive types of arrangement such as quantity forcing on the buyer or supplier, agreements between SMEs). A two-threshold system has the advantage of providing for an economically justified graduation in the treatment of vertical restraints. The system's principal drawback is its complexity and the risk of reintroducing formalistic criteria for the identification and definition of the individual vertical restraints covered by the higher threshold.

40. In a one-threshold system all vertical restraints and their combinations, with the exception of hardcore restraints, would be automatically exempted up to the level of a single market share ceiling. The level of such a ceiling has not been proposed, but it would have to be below 40 %, the level at which single market dominance may start. It is likely to be in the 25–35 % range. The advantage of a single-threshold system lies in its simplicity, there being no necessity to define specific vertical restraints other than hardcore restraints.

#### Hardcore restraints

41. These are restrictions which always fall outside the block exemption regulation. They

<sup>(1)</sup> The block exemption regulation on car distribution, which expires in 2002, is not covered by the current proposal.

include agreements concerning minimum and fixed resale price maintenance and agreements resulting in absolute territorial protection. In addition, the Commission proposes to make wider provision for arbitrage by both intermediaries and final consumers and therefore to blacklist, more generally, resale restrictions in so far as these restrictions result from factors within the parties' control. However, the exact content of the hardcore list is still subject to further discussions. Maximum and recommended resale prices, provided that they do not amount to fixed resale prices, would as a general rule be deemed to fall outside the scope of Article 81(1).

### **No sector-specific rules**

42. It has been decided to propose one wide-ranging block exemption regulation instead of different regulations for specific forms of vertical restraints or sectors. Different forms of vertical restraints with similar effects will thus be treated in a similar way, preventing unjustified differentiation between forms or sectors. This avoids, as far as possible, a policy bias in the choices companies make concerning distribution formats. The company's choice should be based on commercial merit and not, as under the current system, on unjustified differences in exemptability.

43. Selective distribution, including quantitative selective distribution, would be covered by the proposed block exemption regulation, subject to certain conditions. In a two-threshold system, the first market share threshold of 20 % would apply. It is proposed to indicate in the guidelines that, as a general rule, qualitative selective distribution and agreements providing for service requirements fall outside the scope of Article 81(1).

44. Although franchising would be covered, it would not be given preferential treatment as it is a combination of vertical restraints. Usually franchising is a combination of selective distribution and non-compete obligations for the goods which form the subject of the franchise. Sometimes exclusive distribution obligations like a location clause or exclusive territory are also added. These combinations would be treated according to the general criteria set out in the block exemption regulation, whereby absolute territorial protection would, in any event, come under the hardcore list.

45. It is proposed that the block exemption regulation covers associations of independent retailers set up for the purpose of collectively purchas-

ing goods for resale to final customers under a common format. To benefit from the block exemption, the individual members of the association must be SMEs. It is recognised that there are horizontal aspects to these associations, and therefore the benefit of the block exemption is also subject to the proviso that the horizontal aspects do not infringe Article 81. These horizontal aspects will be examined in a manner which accords with the general approach to vertical restraints as part of the review of the Commission's policy on horizontal agreements (see below).

46. It is proposed to make non-compete agreements limited in duration in view of their potential foreclosure effects. The idea of making exclusive purchase agreements combined with quantity forcing limited in duration is also being considered, as is the possibility of dispensing with duration limits for non-compete obligations imposed by the supplier where it owns the premises from which the buyer operates. The guidelines will take account of the need for longer limits where this is justified by long-term investments.

47. For reasons of coherence and unity of policy, it is proposed that sector-specific rules for beer and petrol be withdrawn as the continuation of a special regime for these sectors is not justified on economic or legal grounds. In so far as sector-specific treatment is justified, this will be done by means of guidelines. It should be noted that the block exemption regulation on car distribution, which expires in 2002, is not covered by the current proposal.

### **Withdrawal of the benefit of the block exemption**

48. The Commission intends to maintain the withdrawal mechanism for the rare cases where a serious competition problem may arise below the market share threshold(s). The withdrawal mechanism would in particular be applied in cumulative effect cases. In order to ensure effective supervision of markets and greater decentralisation in the application of the Community competition rules, it is proposed that not only the Commission but also national authorities be empowered to withdraw the benefit of the block exemption in future.

### *2.2. The proposed Council regulations*

These proposed regulations provide for two major changes:



**(a) Extension of the Commission's powers under Council Regulation No 19/65/EEC.**

49. Council Regulation No 19/65/EEC gives the Commission the power to declare by regulation that Article 81(1) does not apply to categories of bilateral exclusive agreements concluded with a view to resale which relate to the distribution and/or exclusive purchase of goods or comprise restrictions on the acquisition or use of intellectual property rights. However, the powers thus conferred on the Commission do not allow it to implement the envisaged new policy in the field of vertical restraints.

50. The proposed Council regulation therefore extends the scope of Articles 1(1)(a) and 1(2)(b) of Council Regulation No 19/65/EEC in order to enable the Commission to cover, by block exemption regulation, all types of agreement concluded between two or more firms, each operating at a different stage of the economic process, in respect of the supply and/or purchase of goods for resale or processing or in respect of the marketing of services (i.e. vertical agreements).

51. Furthermore, in order to ensure greater decentralisation in the application of the Community competition rules, it is proposed to amend Article 7 of Regulation No 19/65/EEC so as to provide that, where the effects of vertical agreements are felt in a Member State which possesses all the characteristics of a distinct market, the competent national authority may withdraw the benefit of the block exemption in its territory and adopt a decision for the purpose of eliminating those effects.

52. Finally, in order to ensure effective control of the effects of parallel networks of similar agreements on a given market, it is proposed to amend Article 7 to allow the block exemption regulation to establish the conditions under which such networks of agreements are excluded from its application.

**(b) Relaxation of the notification procedure in Regulation No 17.**

53. The proposal is designed to extend the scope of Article 4(2) of Regulation No 17 with a view to granting dispensation from the prior notification requirement in respect of all vertical agreements. The practical advantage of the proposed amendment is to enable the Commission,

even in cases of late notification, to consider whether the agreements in question satisfy the conditions of Article 81(3) and, if so, to adopt an exemption decision taking effect on the date on which the agreement was entered into. In this way the legal certainty afforded to firms would be strengthened without jeopardising the enforcement of Article 81(1) in respect of anti-competitive agreements.

**3. Review of the policy on horizontal agreements**

54. In 1997 <sup>(1)</sup> the Commission's departments decided to begin assessing the policy on horizontal agreements. The fact-finding exercise carried out that year revealed that the existing notices and block exemption regulations in this field <sup>(2)</sup> were not much used, were partly outdated and entailed a number of notifications, and should therefore be reviewed. The Commission's departments took the view that this exercise should be seen as an important complement to the project on vertical restraints.

55. In 1998 the Commission's departments intensified their thinking on the review of the policy on horizontal agreements. Various initial conclusions were reached. The review of the current rules should take on board the need to update and improve the existing provisions in terms of both clarity and coherence. In many respects, the body of law and regulations on horizontal agreements appears to be incomplete. The aim is therefore to make it more efficient and transparent in the light of the criticisms expressed by companies in the survey. In this review exercise, the Commission's departments should propose the adoption of an approach which focuses systematically on economic analysis, in line with the way in which the vertical restraints exercise was tackled. They should propose following a course probably involving the drawing-up of guidelines, accompanied, as necessary, by revised block exemption regulations for certain types of agreement.

A consultation paper for discussion with Member States and other interested parties would be made available in 1999.

<sup>(1)</sup> 1997 Competition Report, points 46 and 47.

<sup>(2)</sup> Block exemption regulations concerning specialisation and R & D agreements and notices on cooperation between companies (1968) and cooperative joint ventures (1993).

#### 4. Review of procedural regulations

56. The Commission has a general objective of modernising and simplifying its procedures for investigating competition cases and making them more user-friendly. As part of that process, on 22 December it adopted two regulations to streamline the legislative framework. The first, Regulation (EC) No 2842/98, spells out how the Commission guarantees the right of the different parties involved in competition cases, including those in the transport sector, to be heard. It has replaced Regulation No 99/63/EEC on hearings, which served its purpose but now has to be updated to reflect case law, Commission practice and new concepts that have developed since 1963. The second regulation, Regulation (EC) No 2843/98, sets out how to lodge applications and notifications in competition cases relating to the transport sector. Both regulations enter into force on 1 February 1999 and replace five existing Commission regulations.

##### *4.1. Commission Regulation (EC) No 2842/98 of 22 December 1998 on the hearing of parties in certain proceedings under Articles 85 and 86 of the EC Treaty<sup>(1)</sup>*

57. The new regulation sets out how the Commission will safeguard the right of the various parties involved in competition cases to be heard. Parties entitled to submit comments under the regulation will in future also be able to do so in writing without prejudice to the possibility of an oral hearing. To make the provisions clearer and more user-friendly, the regulation is divided into different chapters according to the status of the party<sup>(2)</sup>.

58. To facilitate the handling of individual cases by the Commission departments, and to avoid unnecessary delays, the Commission is not obliged to take account of written comments from the addressees of a statement of objections received after the date by which they must make their views known. The addressees of a statement of objections must also indicate, by a date set by the Commission, any parts of its objections which, in their view, contain business secrets or other confidential material. The regulation also

refers to the role of the hearing officer in the hearing procedure, and to the right of access to the file without, however, pre-empting the Commission's further intentions in this field.

59. The regulation makes provision for the applicant<sup>(3)</sup> or complainant<sup>(4)</sup> to be provided with a copy of the non-confidential version of the objections and to be given a date by which it may make its views known in writing. This applies in cases where the Commission raises objections.

60. With a view to simplifying the way in which the time limit for submissions by the parties to the Commission is calculated, all submissions under the regulation must reach the Commission by a certain date set by the Commission in its written submission to the party concerned. The time allowed is at least two weeks. Setting a specific date by which the submission must reach the Commission is considered less likely to result in legal uncertainty than if the parties calculate the time limit themselves.

In order to simplify and expedite the hearing procedure, and in line with Commission practice on mergers, statements made by each person at the hearing will be recorded and the respective tape will replace the written minutes.

##### *4.2. Commission Regulation (EC) No 2843/98 of 22 December 1998 on the form, content and other details of applications and notifications provided for in Council Regulations (EEC) No 1017/68, (EEC) No 4056/86 and (EEC) No 3975/87 applying the rules on competition to the transport sector<sup>(5)</sup>*

61. In 1994 the Commission modernised the rules for notifying restrictive agreements in sectors other than transport by adopting Regulation (EC) No 3385/94 and Form A/B<sup>(6)</sup>. Commission Regulation (EC) No 2843/98 and the new Form TR (Annex I to the regulation) have introduced similar rules for companies which wish to notify restrictive agreements in the transport sector.

<sup>(1)</sup> OJ L 354, 30.12.1998.

<sup>(2)</sup> Chapter II: Hearing of parties to which the Commission has addressed objections; Chapter III: Hearing of applicants and complainants; and Chapter IV: Hearing of other third parties.

<sup>(3)</sup> Applications made under Article 3(2) of Regulation No 17.

<sup>(4)</sup> Complaints made under Article 10 of Council Regulation (EEC) No 1017/68, Article 10 of Council Regulation (EEC) No 4056/86 and Article 3(1) of Council Regulation (EEC) No 3975/87.

<sup>(5)</sup> OJ L 354, 30.12.1998.

<sup>(6)</sup> Commission Regulation (EC) No 3385/94 of 21 December 1994 on the form, content and other details of applications and notifications provided for in Council Regulation No 17 (OJ L 377, 31.12.1994).

Form TR specifies the information that must be provided by companies when applying for exemption under the three transport regulations and for negative clearance under Regulation (EEC) No 3975/87. It has replaced the previous Form II (transport by rail, road and inland waterway), Form MAR (maritime transport) and Form AER (air transport). Form TR(B) (Annex II to the regulation) has replaced Form III for crisis cartels notified under Article 14(1) of Regulation (EEC) No 1017/68.

62. The regulation differs, however, from Regulation (EC) No 3385/94 in that references to Regulation No 17 are replaced by references to the three transport regulations (EEC) No 1017/68, (EEC) No 4056/86 and (EEC) No 3975/87. The regulation provides that where an application is wrongly made under one of the transport regulations it can be examined under another regulation, as applicable. Furthermore, provision is made for the notification of awards at arbitration and recommendations by conciliators, and also for applications and notifications under the competition rules of the EEA Agreement to be made in one of the official languages of the EFTA States as well.

## B — Consolidating the single market

63. Consolidating the single market is of prime importance in ensuring that economic and monetary union is a success. Of the Community policies that help to further single market consolidation, competition policy plays a key role, not just because it strengthens structures by tackling private or public initiatives designed to prevent or delay the opening-up of markets, but also because it stimulates the operation of the single market by promoting positive cooperation between companies in areas such as R & D or environmental protection<sup>(1)</sup>, and by punishing anticompetitive conduct. The Commission believes that this action to consolidate the single market has an immediate impact on the progress of economic and monetary union.

### 1. Cartels

64. Of all restrictions of competition, restrictive practices in the form of secret agreements are

undoubtedly the most destructive. Very often, these concerted practices involve a substantial number of economic operators in a given area of activity and, as such, they have a very marked impact on the relevant markets. Furthermore, these agreements almost invariably concern prices and thus severely undermine competition. The Commission is committed to an extremely tough stance against cartels, particularly in the months immediately prior to and following completion of economic and monetary union. The positive impact of the launch of the euro, which should increase price transparency within the Union and, as a result, intensify competition to the benefit of consumers, must not be countered by restrictive agreements designed to side-step market confrontation by artificially fixing prices or other trading conditions, which in the longer term could push up inflation and undermine the foundations of economic and monetary union.

65. During 1998 the Commission demonstrated its firm commitment by its strong action against secret agreements between companies. Final decisions were issued in no less than four cases during the year, and additional sets of proceedings have been instituted.

Pursuant to Article 65 of the ECSC Treaty, the Commission prohibited a price-fixing agreement in the steel sector. Six producers of stainless-steel flat products, accounting for more than 80 % of European production of stainless-steel finished products, had decided on a concerted increase in stainless steel prices by changing the method for calculating the 'alloy surcharge'. The Commission decided to fine the members of the cartel a total of ECU 27.3 million<sup>(2)</sup>.

The Commission also prohibited an agreement between four sugar producers. British Sugar, Tate & Lyle, Napier Brown and James Budgett, which together controlled 90 % of the white granulated sugar market in the United Kingdom, had developed a collaborative strategy of higher pricing for that product on the industrial and retail markets. Fines totalling ECU 50.2 million were imposed on the participating companies, including ECU 39.6 million on British Sugar<sup>(3)</sup>.

The Commission also took action on an agreement between producers of district heating pipes

<sup>(1)</sup> Most of the cases which gave rise to a positive approach on the part of the Commission are discussed in the following section (See Section C — Sector-based policies).

<sup>(2)</sup> OJ L 100, 1.4.1998.

<sup>(3)</sup> OJ L 284, 19.10.1998.

which was characterised by the variety of competition restrictions involved: price fixing, market sharing and bid rigging. The cartel began in Denmark and soon extended throughout the Union, thus cartelising the whole of the European market. The Commission imposed fines totalling ECU 92.21 million on the 10 companies involved, including ECU 70 million on ABB. A particularly aggravating factor was that the cartel continued for nine months after the Commission had discovered its existence <sup>(1)</sup>.

Lastly, the Commission prohibited a price-fixing agreement between seven ferry companies operating services between Greece and Italy. Investigations at the offices of five Greek operators and one Italian operator revealed overwhelming evidence of an agreement in the form of regular meetings and exchanges of correspondence involving the collective readjustment of prices for passengers and vehicles. The fine of ECU 9.12 million is relatively light given the seriousness of the infringement: the Commission took account of the fact that it had had a fairly limited impact on the market.

The Commission imposed fines totalling ECU 178.83 million on the companies involved in these four cases, reflecting its determination to take vigorous action to combat anticompetitive practices of this type.

66. The Commission concluded from the above proceedings that its notice of 10 July 1996 was beginning to bear fruit <sup>(2)</sup>. The notice, which provides for fines to be reduced or even waived for firms which denounce cartels in which they have taken part, was applied in the sugar case.

67. With a view to detecting and combating cartels more effectively, the Commission has decided to reorganise part of its Directorate-General for Competition and to set up a unit within its ambit specialising in proceedings of that type. This demonstrates that the Commission has placed its anti-cartel policy among the items at the top of its agenda.

Using the limited resources at its disposal, the Directorate-General has assigned about 15 case-handlers to this new unit, which should eventually comprise about 20 officials with significant experience in investigations of this type.

By carrying out this reorganisation the Commission is again sending an important signal to companies engaged in these practices, which are particularly harmful to consumers and to the European economy in general.

## 2. Opening-up of markets

68. The Commission has always kept a close eye on distribution agreements and their restrictive effects in so far as they hindered intra-Community trade. Some exclusive distribution agreements lead to the setting-up of watertight national distribution networks. In particular, clauses which prohibit distributors from supplying customers based outside the contract territory. In this way, national markets are artificially isolated from one another. The Commission considers that measures should be taken to combat this situation, not just in order to re-establish effective competition between economic operators but also in order to promote market integration. In practice, the compartmentalisation of national markets prevents price convergence within the Union and restricts access by consumers to the markets with the lowest prices. With the creation of the single currency, price differentials will be obvious because they will be expressed in euro. They will be increasingly viewed as unjustified by ordinary people, who will want to derive full benefit from economic and monetary union.

69. In 1998 the Commission clearly demonstrated its determination to promote the opening-up of markets, a prime example of this being the *Volkswagen* case. Since 1995 the Commission had received numerous complaints from European consumers, particularly from Germany and Austria, who had been confronted with various difficulties when attempting to buy new Volkswagen and Audi cars in Italy. These consumers wanted to benefit from the price differentials between their Member State and Italy, where prices were particularly advantageous. Following a series of inspections at the offices of Volkswagen AG, Audi AG and Autogerma SpA, which is a subsidiary of Volkswagen and the official importer for both makes in Italy, and at the offices of a number of Italian dealers, the Commission concluded that Europe's largest motor-manufacturing group had been pursuing a market-partitioning policy in the Union for about 10 years. Volkswagen AG had systematically forced its dealers in Italy to refuse to sell Volkswagen

<sup>(1)</sup> OJ L 24, 30.01.1999.

<sup>(2)</sup> OJ C 207, 18.7.1996; 1996 Competition Report, points 34 and 35.

and Audi cars to foreign buyers, especially from Germany and Austria. The Commission fined Volkswagen ECU 102 million, the largest fine ever imposed on a single company.

70. The case of *Amministrazione Autonoma dei Monopoli dello Stato (AAMS)* provided a further indication of the Commission's determination to open up national markets, in this particular instance by means of Article 82. AAMS, an Italian

cigarette producer and distributor which had a dominant position on the Italian market for the wholesale distribution of cigarettes, imposed on foreign producers wholesale distribution contracts containing numerous restrictive clauses which limited the access of foreign cigarettes to the Italian market and favoured its own production. The Commission fined AAMS ECU 6 million and ordered it to put an end to the infringements.

### Box 2: Motor vehicle distribution — a consumer-oriented policy

EU competition law contains specific provisions on motor vehicle distribution. The legislation (Regulation (EC) No 1475/95) came into force on 1 October 1995. One aim of the block exemption was to reinforce the right of consumers to purchase a new car, either directly or through an authorised intermediary, wherever they wish in the European Community.

Accordingly, the regulation prohibits any direct or indirect hindrance of parallel trade, i.e.:

- refusals by dealers to supply a consumer simply because he/she is a resident of another Member State;
- charging foreign consumers higher prices or imposing longer delivery periods than for consumers based in the Member State;
- refusing to perform guarantee services or other free services for cars imported from another Member State;
- hindering the activities of intermediaries authorised by consumers by applying excessive criteria as regards their mandate;
- restricting supplies by manufacturers to dealers who sell cars to consumers resident in another Member State;
- threats by manufacturers to terminate contracts with dealers who sell cars to consumers resident in another Member State;
- any interference by manufacturers with the freedom of consumers to resell new cars, provided that the sale is not effected for commercial purposes.

Use of these 'blacklisted' measures can result in automatic loss of the benefit of the block exemption.

The regulation requires manufacturers to supply their dealers with cars produced to the specifications of consumers from other Member States — for example, right-hand drive (RHD) — if the dealers wish to sell them. However, EU competition law does not impose a legal obligation on individual car dealers to sell cars.

By its decision to fine Volkswagen/Audi for forcing its authorised dealers in Italy to refuse to sell Volkswagen and Audi cars to foreign buyers, the Commission demonstrated that it will not tolerate practices which are contrary to consumers' interests. The Commission is currently examining similar cases involving other manufacturers. In so far as infringements of Community competition rules seem likely to be proven, the Commission will investigate cases of coordinated refusals to sell and, as in the recent *Volkswagen* case, take the necessary decisions. The Commission reiterates that it will not hesitate to act against manufacturers who fail to comply with Community law.

In addition to such direct action, the Commission continues to increase price transparency by publishing twice-yearly reports on car prices in the Union. Growing consumer demand for this report — about 8 000

copies are distributed annually — illustrates that consumers are increasingly aware of the benefits that the single market can provide. The introduction of the euro, which will increase price transparency and facilitate comparisons, is expected to reinforce this behaviour within the European Community.

This heightened awareness has led to greater demand from individuals for assistance in purchasing cars abroad. This applies in particular to difficulties encountered by British citizens when trying to purchase RHD cars outside the United Kingdom. The Commission has succeeded in helping a large number of these individuals. In fact, the figures supplied by some manufacturers indicate an increase in sales of RHD cars for import into the United Kingdom. In order to provide an appropriate solution to this specific problem, most manufacturers, i.e. BMW, Fiat, Ford, Mercedes-Benz, Opel/Vauxhall, PAS (Peugeot/Citroën), Volvo, VW/Audi, Honda, Nissan and Renault have, at the Commission's suggestion, established information centres for European consumers wishing to buy a car abroad.

### 3. Undertakings in a dominant position

71. Article 82 prohibits undertakings in a dominant position on a given market from abusing this situation to the prejudice of third parties. Such abuse consists, *inter alia*, in limiting production, charging excessive prices, discriminatory or predatory pricing, tied sales or other commercial practices not based on the principle of economic efficiency. The Commission takes the view that such practices, which undermine competition, are particularly dangerous when they are carried out by undertakings with the power to shield 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. In the context of further development of the single market, these practices are particularly damaging because they lead to market partitioning and delay the integration of the Member States' economies. In addition, in recently liberalised markets there is a danger that they will wipe out the expected benefits in terms of restructuring, innovation or job creation. This is why the Commission is particularly alert to the effects of dominant positions on these processes. The number of formal decisions pursuant to Article 82 has increased steadily over the last two years. In 1998 the Commission concluded six cases <sup>(1)</sup> under that article.

72. Two cases concerned the airports at Frankfurt and Paris, which are operated by companies in a dominant position. The abuses identified by the Commission concerned groundhandling and self-handling services, which were liberalised

under a directive adopted in 1996. In addition to the direct anticompetitive effects on the suppliers involved, the Commission showed that there were repercussions on non-domestic airlines, with market partitioning occurring as a result. The abuses also slowed down the liberalisation of groundhandling services.

The *Frankfurt Airport* case concerns groundhandling. Following complaints from several airlines, the Commission found that the operator of the German airport (Flughafen Frankfurt/Main AG (FAG)) had abused its dominant position as operator by prohibiting airlines from providing self-handling services and by denying access to any independent providers of groundhandling services, thus creating on the related but separate groundhandling market a monopoly situation of which it was the beneficiary. The Commission therefore ordered FAG to bring its monopoly to an end <sup>(2)</sup>. It also found that the long-term contracts (3 to 10 years) that FAG had awarded to its best customers were contrary to Community law in that they effectively closed the groundhandling-services market to new entrants or made it less attractive to them, thus reinforcing its dominant position. FAG agreed to amend the contracts in question by granting contracting parties an annual right of withdrawal.

In the *Alpha Flight Services/Aéroports de Paris (ADP)* case, the Commission found that the operator of the two Paris airports had abused its dominant position as operator by imposing discriminatory commercial fees on suppliers or airlines providing groundhandling or self-handling services such as catering, cleaning and freight han-

<sup>(1)</sup> Including the *AMMS* case discussed under point 2.

<sup>(2)</sup> Decision 98/190/EC of 14 January 1998 (OJ L 72, 11.3.1998).

dling. ADP charged different levels of fees to the two third-party suppliers, AFS, the plaintiff, and OAT, a subsidiary of Air France. In addition, the fee charged by ADP to airlines providing catering services for passengers via specialist subsidiaries was either zero or less than that charged to companies providing similar catering services for third parties. There was no objective justification for the differences, which distorted competition between suppliers since some benefited from lower operating costs. The Commission therefore ordered Aéroports de Paris to bring its fee arrangements to an end.

73. The Commission also invoked Article 82 in another case involving the transport sector. This was the *TACA (Trans-Atlantic Conference Agreement)* case, in which the Commission fined the members of the liner conference ECU 273 million<sup>(1)</sup>.

74. In the *IRE/Nordion* and *Van den Bergh Foods* cases, both involving very different markets, the Commission devoted a great deal of attention to the effects of contracts concluded by companies in a dominant position and containing exclusivity clauses: such clauses may make the other parties involved so dependent on the dominant company that the residual competitors' ability to counter its dominant position is severely restricted.

Nordion, a Canadian company operating on the world market for the production and sale of molybdenum 99, a base product for radiopharmaceuticals used in nuclear medicine, concluded exclusive, long-term supply agreements with its customers, with the result that the main competitor, the Belgian company IRE, which was the complainant in this case, was prevented from developing and ultimately even from maintaining its presence on the market. This situation also made the entry of potential new competitors impossible. After receiving a statement of objections charging it with abusing its dominant position, Nordion undertook to renounce the exclusivity clauses in its contracts. The Commission then decided to terminate the proceedings<sup>(2)</sup>.

Van den Bergh Foods, a Unilever subsidiary, holds more than 85 % of the Irish ice cream market. The company has an extensive network of freezer cabinets which are provided to retailers free of charge on condition that they are used exclusively for the storage of Unilever's products. The Commission found that, in the circumstances of the Irish market, the provision of cabinets on exclusive terms constituted a real barrier to market entry for Unilever's competitors. Given the reluctance of Irish retailers to replace Unilever cabinets, or to install additional ones, 40 % of retail outlets in Ireland offered Unilever products only. By virtue of its dominant position on this market, Unilever had been able to encourage retailers to enter into exclusive arrangements with it. The Commission took the view that this practice constituted an abuse of a dominant position and issued a decision condemning Unilever<sup>(3)</sup>.

## C — Sector-based policies

### 1. Telecommunications<sup>(4)</sup>

#### 1.1. *The process of supervised liberalisation*

75. 1 January 1998 was the date fixed by the directive of 13 March 1996 on the implementation of full competition in telecommunications markets<sup>(5)</sup> for the abolition of the remaining monopolies for the provision of voice telephony services and the supply of telecommunications infrastructure in the Community, with the exception of certain Member States to which the Commission had granted additional implementation periods (Ireland, Portugal, Spain, Luxembourg and Greece). The additional periods granted to Luxembourg and Spain ended on 1 July and 1 December respectively. In addition, Ireland, which had been granted an additional period due to terminate on 1 January 2000, decided in June to anticipate the full liberalisation of its telecommunications market on 1 December, so as to benefit earlier from the advantages

<sup>(1)</sup> Since the *TACA* case also involved application of Article 81, see the comments on the case in the section on sector-based policies (Chapter I, Section C.4).

<sup>(2)</sup> Proceedings were also instituted against *IRE/Nordion* in Japan, with the result that the Commission cooperated with the Japanese authorities (JFTC). See Chapter IV — International cooperation.

<sup>(3)</sup> The Commission also took the view that the exclusivity condition constituted a restriction of competition which infringed Article 81.

<sup>(4)</sup> See also Box 7, Chapter II — Mergers, which discusses several decisions affecting the telecommunications sector.

<sup>(5)</sup> Directive 96/19/EC (OJ L 74, 22.3.1996).

### Box 3: Commission policy on fines

The year 1998 seems likely to go down as the strictest year of the decade, with fines totalling ECU 560 million, followed by 1994 (ECU 535 million, with *inter alia* the *Beams*, *Cartonboard* and *Cement* cases). It was also noteworthy for the variety of anticompetitive practices which were identified: four cartels but also three abuses of a dominant position. The severity of the penalties and the diversity of the practices and economic sectors involved reflect the Commission's determination to consolidate the single market with a view to completing economic and monetary union.

At the end of 1997 the Commission adopted guidelines on setting fines. The various cases concluded in 1998 reflect the implementation of these guidelines, which were designed to 'help to make the Commission's policy on fines more coherent and to strengthen the deterrence of the financial penalties.'

One of the major innovations of this new system consists in adjusting the basic amount of the fine, which is determined according to the gravity and duration of the infringement. The basic amount may be increased to take account of aggravating circumstances or reduced to reflect attenuating circumstances.

Aggravating circumstances include repeated infringements, refusal to cooperate or the role of leader in the infringement. In the *Volkswagen* case, the Commission took into account when setting the fine the fact that the company had failed to take appropriate action when instructed to put an end to a serious infringement. It took account of similar behaviour in the case concerning the *pre-insulated pipe cartel*, which continued to operate for nine months after the investigation carried out by the Commission's inspectors. In the case of the *restrictive agreement in the UK sugar industry*, the aggravating circumstance found against British Sugar was that the company was the instigator of the infringement and, throughout the relevant period, remained the driving force.

The attenuating circumstances specified in the guidelines include an exclusively passive role in the infringement, or termination of the infringement as soon as the Commission intervenes. A reduction in the amount of a fine may be justified on the basis that the company concerned cooperated in the proceedings. In the case of the *price cartel in the stainless-steel sector*, two companies which were party to the agreement cooperated, one by putting an end to the infringement following the Commission's initial investigations, and the other by providing important information in the course of the proceedings. These companies were fined a smaller amount than their partners. An attenuating circumstance which was taken into account in the case of *ferry services between Greece and Italy* was the fact that the infringement had had a fairly limited impact on the market.

Also of relevance is the notice of 10 July 1996 on the waiving or reduction of fines in cartel cases, which states that the Commission should take into account, when calculating the amount of the fine, cooperation on the part of companies which inform it of cartels in which they were involved. Accordingly, in the case involving the *British sugar industry*, the Commission substantially reduced the fine on Tate & Lyle to take account of the fact that it had submitted self-incriminating letters which provided evidence of the cartel's existence. The notice reflects a concern to make the detection of cartels more efficient, and indeed several have been detected since its adoption.

The Commission is relatively satisfied with the arrangements for calculating the amount of fines, but it takes the view that, in the light of the wealth of experience acquired during 1998, certain aspects should be reviewed after consulting the national competition authorities with a view to finalising this crucial instrument of Community competition policy.



associated with the opening-up of this market to competition.

In view of the economic importance of the telecommunications sector, which may be put at some ECU 150 billion, and its impact on job creation, the Commission continued throughout the year to monitor the implementation of this liberalisation by the Member States and the establishment of the regulatory framework in the two Member States where the additional implementation period was due to terminate.

### 1.1.1. Monitoring the implementation of the directives

76. The '1998 joint team' (the body responsible for implementing Community telecommunications legislation), comprising officials drawn from the Directorates-General for competition and telecommunications, working together with the Legal Service, continued the work it had begun in 1997 <sup>(1)</sup>. It prepared two reports on progress in implementing the directives, which were adopted by the Commission on 18 February <sup>(2)</sup> and 25 November <sup>(3)</sup>. The first was based on the results of bilateral meetings with the Member States, while the second summarised the findings of a survey carried out by the Commission among the Member States (questionnaires and contacts with the competent national authorities) and the audit findings of independent consultants on the actual implementation of the new regulatory framework in each of the Member States.

77. The report of 18 February points to considerable progress in those Member States in which, according to the report of 8 October 1997, transposal into national law was less advanced and a substantial amount of work still needed to be done. The Commission noted in the report that the bulk of the Community regulations had been transposed into national law in most of the Member States.

78. That notwithstanding, the Commission was obliged to institute new infringement proceedings against Member States which had failed to transpose the directives in full, in addition to the 35 infringement proceedings pending

at the start of the year, some of which it was able to wind up following the recent notification of measures adopted by the Member States concerned. Apart from problems associated with legislative or regulatory delays, the main difficulties concern the non-compliance of certain specific conditions for licences in some Member States (obligation to allocate a certain amount of investments or turnover to R & D, obligation to obtain a bank guarantee for the completion of business plans, etc.). In addition, some Member States had failed to ensure that operators published their standard terms and conditions governing interconnection. In some Member States (Austria and Italy), the prices put forward by the operator were approved by the regulatory authority only towards the end of the year. However, about half of the tariffs published were within the range recommended by the Commission as regards charges for call termination <sup>(4)</sup>.

### 1.1.2. Price surveys

79. Concerned at the continuing high cost of mobile communications in Europe, and in particular of calls from fixed lines to mobile phones, the Commission carried out a survey early in 1998 on the interconnection charges of fixed-line and mobile telecommunications operators in the European Community. In particular, the Commission wanted to ascertain whether operators of a certain type of network applied similar, non-discriminatory conditions to other operators, in particular as regards interconnection charges. It also examined the impact of these charges on the level of charges for calls made by users of fixed-line networks to mobile phones. Interconnection charges for call termination, which are set by operators, have a tangible impact on the level of charges for calls between fixed-line and mobile phones.

80. In the light of this survey in the 15 Member States, the Commission found that there were preliminary indications that excessive or discriminatory prices were indeed being charged and that, accordingly, in-depth investigations needed to be carried out. In five of these cases, the Commission suspended proceedings so as to allow the national supervisory authorities to take action. In the 10 others, namely 2

<sup>(1)</sup> 1997 Competition Report, point 102.

<sup>(2)</sup> COM(1998) 80.

<sup>(3)</sup> COM(1998) 594.

<sup>(4)</sup> Recommendation 98/195/EC (OJ L 73, 12.3.1998).

cases on call termination charges made by mobile telephone operators in Italy and Germany and 8 cases concerning income retained by operators of public switched telephone networks (PSTNs), namely Belgacom, Telecom Éireann, British Telecom, P&T Austria, Telefónica, KNP Telecom, Telecom Italia and Deutsche Telecom, on calls from fixed-line telephones to mobile telephones, the Commission launched an enquiry based mainly on tests to detect excessive and/or discriminatory prices. It found that four PSTN operators charged higher call termination tariffs to mobile operators than to fixed-line operators. The Commission also found anomalies in mobile operators' call termination charge structures, particularly in Italy and Germany. Lastly, it demonstrated that the income retained by PSTN operators for calls from fixed-line telephones to mobile telephones where these operators were present on both markets appeared to be significantly higher than the benchmark established by the Commission with the assistance of an external auditor as part of the enquiry.

81. Following this in-depth investigation, the Commission took note of several positive changes and closed a number of case files. The operators decided to bring the discriminatory arrangements complained of to an end and to set new tariffs at a lower level. For example, Telecom Italia began to apply identical charges to operators of mobile and fixed-line networks for call termination on its network, which led to a reduction of about 40 % in the costs paid by mobile operators. The national regulatory authorities took the necessary steps to examine the practices revealed by the Commission. In the case of Spain, for instance, the national regulator ordered Telefónica to change its charge structure.

82. Last year the Commission started proceedings against dominant telephone operators in respect of the accounting rates (transfer prices) which they charge for transferring international telephone calls <sup>(1)</sup>. Following this initial phase of the investigation, the Commission decided to focus on the charging practices of seven operators which possibly derived excessive margins from the accounting rates: OTE Greece, Post & Telekom Austria, Postes et Télécommunications Luxembourg, SONERA (formerly Telecom Fin-

land), Telecom Éireann, Telecom Italia and Telecom Portugal. The Commission invited the national regulatory authorities of the Member States concerned to investigate these charging practices.

## 1.2. Clarifying the legal framework

### 1.2.1. Notice on access agreements

83. On 31 March, after carrying out a wide-ranging consultation of interested parties, the Commission adopted a notice on the application of the competition rules to access agreements in the telecommunications sector <sup>(2)</sup>. The notice, which is addressed primarily to telecommunications companies and to the national authorities responsible for regulating the industry or competition, is designed to clarify the way in which the principles of competition law as derived from Commission decisions and Court of Justice case law are applied to agreements governing access to telecommunications infrastructure. The Commission believes that it is vital for easy, non-discriminatory access to this infrastructure to be guaranteed for new entrants to the liberalised telecommunications markets so that they can take advantage of open access and pass on the benefits to users.

84. The purpose of the notice is threefold. First, to set out access principles stemming from Community competition law in order to create greater market certainty and more stable conditions for investment and commercial initiative in the telecoms and multimedia sectors. Second, to define the relationship between competition law and sector-specific legislation adopted for harmonisation purposes under the Article 95 framework. And third, to explain how the competition rules will be applied in the sectors involved in the provision of new services.

### 1.2.2. Notice concerning the status of voice communications on the Internet

85. On 7 January the Commission adopted a notice concerning the status of voice communications on the Internet pursuant to Directive 90/388/EEC <sup>(3)</sup>. The adoption of this notice followed the publication for comment, on 2 May

<sup>(1)</sup> 1997 Competition Report, point 78.

<sup>(2)</sup> OJ C 265, 22.8.1998.

<sup>(3)</sup> Bull. 1/2 - 1998, point 1.3.55; OJ C 95, 30.3.1998.

1997, of an initial draft and a public consultation procedure <sup>(1)</sup>.

The Commission's position is that such communications do not at present constitute voice telephony within the meaning of the Community directives, since they do not yet satisfy all the criteria laid down in the definition of this service (they must be the subject of a commercial offer and the service must be provided for the public to and from public switched-network termination points). This service may, therefore, be subjected by Member States not to individual licensing procedures but, at the most, to declaration procedures.

However, suppliers of voice services between two telephone handsets connected to the PSTN via the Internet may be regarded as providers of voice telephony and will be subject to the relevant regulations once they offer a quality of service equivalent to traditional voice telephony.

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

86. Further to the adoption on first reading on 16 December 1997 <sup>(2)</sup> of a draft directive under Article 86 aimed at preventing former telecommunications monopolies from extending their dominant position to cable television networks, the Commission organised a wide-ranging consultation of interested parties. The consultation took place between March and June. Seventeen associations and companies sent in their comments, as did five national authorities. With a view to discussing these comments further, the Commission also held a hearing in October which was attended by 43 representatives of businesses and national authorities. The Council, Parliament, the Economic and Social Committee and the Committee of the Regions were also consulted.

87. Anticipating its adoption, some Member States and dominant companies have already begun to implement the principles enshrined in the draft directive. For instance, Deutsche Telekom announced in May that it would create a structural separation between its telephone network and cable networks.

### 1.3. Individual cases

#### SNCF/Cégétel <sup>(3)</sup>

88. Société nationale des chemins de fer (SNCF), the French national railway company, and Cégétel have entered into an agreement for the development, via Télécom Développement (TD), of a fixed-line telephone network using railway infrastructure which, together with electricity, gas or motorway networks, provides a means of rapidly deploying a national telecommunications network. Under the agreements, SNCF is to grant TD a 'priority right' for the deployment of its telecommunications network along railway lines and to provide a guarantee in the form of a penalty clause which will remain in force for three and a half years.

89. In cases of this type, the Commission takes the view that the main objective is to avoid, while competition is in the process of emerging, a situation in which access to physical infrastructure is restricted by exclusivity agreements or agreements resulting in de facto exclusivity. In this particular case, the Commission responded favourably to the agreement. Given the scope of TD's deployment plan, SNCF's capacity for installing telecommunications infrastructure will be close to saturation point for several years. Under the circumstances it is thus justifiable to give priority access to TD provided that this does not prevent SNCF from making any spare installation capacity available to other operators.

#### Restructuring of Inmarsat

90. Inmarsat is an intergovernmental treaty organisation set up in 1979 with over 80 member countries, normally represented by the former national telecom provider. It is currently the major international mobile satellite operator. Inmarsat has put forward a restructuring plan under which it will be converted into a public company whose shareholders will be its former signatories. After a two-year period, Inmarsat envisages a public offering of shares (IPO) which should dilute the shareholdings of the former signatories. Having been converted into a public company, Inmarsat will no longer have a privileged position on the market.

<sup>(1)</sup> 1997 Competition Report, point 105.

<sup>(2)</sup> 1997 Competition Report, point 109.

<sup>(3)</sup> Commission notice pursuant to Article 19(3) of Council Regulation No 17 (OJ C 293, 22.9.1998).

91. The Commission gave its approval to the restructuring of Inmarsat on the basis that a capital increase will take place within a short period of time. It regards this case as a model for the reform of the other intergovernmental satellite organisations.

## 2. Postal services

92. Following the adoption of the postal services directive <sup>(1)</sup> and the Commission notice <sup>(2)</sup> in late 1997, the Commission has made preparations for the second step of the liberalisation process. According to the postal services directive, the Commission should table a proposal for further liberalisation of the sector before the end of 1998, following a comprehensive review. By 1 January 2000 Parliament and the Council are to decide on the further gradual and controlled liberalisation of the postal market.

With the aim of carrying out a comprehensive review of the sector, the Commission has initiated a number of studies on different aspects of liberalisation. External consultants have been commissioned to carry out the following studies: (1) liberalisation of clearance, sorting and transport, (2) costing and financing of universal service obligations, (3) liberalisation of direct mail, (4) the impact of liberalisation of cross-border mail and (5) weight and price limits of the reserved area. A sixth study, on modelling and quantifying scenarios for liberalisation, based on the results of the first five studies, has also been commissioned.

93. The Commission also pursued its examination of the REIMS II agreement <sup>(3)</sup> on terminal dues, which is the term used for the fees that a postal operator sending cross-border mail has to pay to the receiving postal operator for delivering the mail to its final addressee. In a memorandum sent to the notifying parties, the Commission expressed its concerns regarding certain provisions in the agreement. Following a series of con-

sultations with the Commission, 12 of the parties entered into a supplementary agreement amending and clarifying the original agreement. In November the contents of the amended REIMS II agreement were published in the Official Journal <sup>(4)</sup>. In that notification, the Commission stated that it intended to take a favourable view of the agreement in the light of improvements to benefit customers. Before doing so, it invited third parties to send in their comments.

94. The public postal operators of the Netherlands and Sweden notified the Commission of a bilateral agreement on terminal dues. The Commission's examination of the agreement did not reveal any grounds for action under Article 81(1) of the EC Treaty. Consequently, the Commission closed its file by means of a comfort letter to the parties.

## 3. Media

95. The audiovisual industry is being transformed by digital technology and globalisation. Digital and interactive television are expanding rapidly and are impacting on existing market structures such as acquisition of broadcasting rights. As these developments continue into the next century, competition policy will need to evolve accordingly. The Commission aims to set out its policy in the form of various key decisions. Most of these should be published in 1999 and are expected to relate to digital platforms and broadcasting rights for sports events.

### 3.1. Digital platforms

96. In several Member States, digital platforms for television and interactive services have been set up and are being examined by the Commission. In this sector, two decisions were taken in 1998 to prohibit planned mergers in Germany, namely *Bertelsmann/Kirch/Premiere* and *Deutsche Telekom/Betaresearch* <sup>(5)</sup>. In two other cases, the United Kingdom's *British Interactive Broadcasting (BIB)* and France's *Télévision Par Satellite (TPS)*, final decisions are expected early in 1999. These will spell out how the Commission plans to support innovation and the development of new services to exploit technological

<sup>(1)</sup> European Parliament and Council Directive 97/67/EC on common rules for the development of the internal market in Community postal services and the improvement of quality of service (OJ L 15, 21.1.1998).

<sup>(2)</sup> Commission notice on the application of the competition rules to the postal sector (OJ C 39, 6.2.1998).

<sup>(3)</sup> Notification of 31 October 1997 of an Agreement for the Remuneration of Mandatory Deliveries of Cross-Border Mails (Case No IV/36.748-REIMS II). Sixteen European public postal operators have signed the agreement.

<sup>(4)</sup> OJ C 371, 1.12.1998.

<sup>(5)</sup> See Chapter II — Mergers for further details of these two cases.

advances in the sector whilst also ensuring that the competing alternatives are able to develop. The Article 19(3) notices published for both these cases outline this approach.

#### **Télévision par satellite (TPS) <sup>(1)</sup>**

97. In the case of *TPS*, the Commission has stated that it intends to take a favourable view of the creation of a new operator as it will encourage competition with established pay-TV operations in France. The satellite-based digital platform, which provides pay-TV to satellite subscribers and cable network operators, is a partnership involving four French television channels, the media group CLT-UFA, France Télécom and Suez Lyonnaise des Eaux.

In its Article 19(3) notice, the Commission proposes to adopt a favourable attitude to a number of restrictions, including one preventing TPS shareholders from participating in similar ventures and an obligation to give TPS a first option on their programmes as well as final refusal where these are offered to third parties. The Commission envisages granting a three-year exemption as regards the obligation on the four broadcasters to grant TPS exclusive distribution rights to their general interest channels.

#### **British Interactive Broadcasting (BIB) <sup>(2)</sup>**

98. The United Kingdom now has satellite, cable and terrestrial digital television platforms, the latter (BDB) benefiting from a Commission decision detailed in Part II. BIB, the satellite-based joint venture between BSkyB, BT, Midland Bank and Matsushita, aims to provide interactive shopping, services, games, etc. and interactive television programmes via a satellite signal and a telephone line linked to a set-top box. The box will initially be subsidised, the cost being recovered from content providers. Access to BIB will be controlled by conditional access systems provided by a Sky subsidiary. The viewer will navigate via a BSkyB proprietary electronic programme guide (EPG).

99. Following third-party consultations, the Commission negotiated several undertakings with the parties to guarantee the benefits of the in-

novation in interactive services whilst also ensuring that competing services are not prevented from developing by the joint venture. Structural undertakings, such as the legal separation of BIB's service and subsidy recovery arms, and the end of exclusivity for the EPG, should achieve this aim without necessitating ongoing monitoring. Behavioural undertakings were also necessary, including ensuring access to the set-top box for third parties and making information available on the subsidy recovery mechanism.

#### **3.2. Broadcasting rights for sports events**

100. The development of pay-TV services over digital networks in recent years is increasing the importance of legal and economic issues related to the rights in broadcast content. As regards the broadcasting of sports events, practice in relation to Articles 81 and 82 is being developed on a case-by-case basis. The Commission is examining several cases in this area and expects to be able to clarify its position in 1999 through a series of decisions linked to the collective buying of rights by the EBU, as well as one relating to the UEFA statute governing the broadcasting of football.

### **4. Transport**

#### **4.1. Air transport**

##### **Transatlantic airline alliances**

101. On 30 July the Commission published notices <sup>(3)</sup> concerning the alliances between British Airways and American Airlines and between Lufthansa, SAS and United Airlines. The notices set out measures that the Commission could appropriately address to the companies in a Commission proposal under Article 85(1) of the Treaty. The draft measures were designed to address infringements of EC competition rules identified by the Commission. The companies themselves, and interested third parties, were invited to submit their comments on the draft measures.

102. The carriers of the Lufthansa, SAS and United Airlines alliance asked for a hearing,

<sup>(1)</sup> Commission notice pursuant to Article 19(3) of Council Regulation No 17 (OJ C 65, 28.2.1998).

<sup>(2)</sup> Commission notice pursuant to Article 19(3) of Council Regulation No 17 (OJ C 322, 21.10.1998).

<sup>(3)</sup> OJ C 239, 30.7.1998.

which took place on 14 and 15 December. As had occurred during the hearing in the *British Airways and American Airlines* case in February, the parties took the opportunity to give an extensive presentation of their views on the Commission's legal assessment of the case, including its draft measures. A large number of third parties also submitted comments on the draft measures.

The next procedural step is a meeting of competition experts of the Member States before the Commission adopts a proposal under Article 85(1) of the Treaty.

103. British Airways and American Airlines did not ask for a hearing on the draft measures. The Commission was informed that the plans to create an alliance between the two air carriers had been put on hold at the end of the year following the breakdown of the negotiations for an open skies agreement between the United States and the United Kingdom. No indication was given of when these talks would resume.

104. The Commission also continued to investigate the alliances between Sabena/Austrian Airlines/Swissair and Delta Air Lines and between KLM and Northwest.

#### 4.2. Maritime transport

105. The highlight of 1998 as regards maritime transport was the *TACA (Trans-Atlantic Conference Agreement)* case. This culminated in a Commission decision finding an infringement of Article 81 read in conjunction with Article 82<sup>(1)</sup>.

106. The TACA agreement superseded the Trans-Atlantic Agreement, which was prohibited in 1994. It has 17 parties representing more than 60 % of the market for maritime transport services between northern Europe and the United States. The TACA parties notified the Commission of their agreement in 1994 with a view to securing an exemption.

The Commission found that several of the agreement's clauses were caught by Article 81(1). These concerned price fixing for maritime transport services between Europe and the United States, price

fixing for inland transport services supplied within the territory of the Community, agreement on the terms and conditions under which they entered into service contracts with shippers and the fixing of prices paid to freight forwarders.

The first of the agreements fell within the scope of the block exemption for liner conferences<sup>(2)</sup>. The Commission refused to grant individual exemption for the remaining three agreements.

107. The impact of these competition restrictions was heightened by the behaviour of the companies party to the TACA, which were in a joint dominant position on the market, insofar as they abused that situation by encouraging two potential market entrants to join the agreement, thus eliminating competition. The Commission noted that, between 1994 and 1996, two major Asian shipping companies entered the transatlantic market and eventually signed up to the TACA. During the same period, none of the companies party to the TACA left the conference to act as an independent shipping company. In that context, the European Shippers' Council estimated that, between 1993 and 1995, the TAA, then the TACA, imposed overall price increases of more than 80 %.

108. In the decision, the Commission noted that the companies party to the TACA were in a joint dominant position on the market for containerised cargo between northern Europe and the United States, and that they had abused this dominant position by restricting the availability to customers of service contracts with individual shipping lines and by dissuading potential competitors from entering the market. As regards the latter point, the TACA companies had encouraged two of its potential competitors to join the organisation by offering them incentives. Thus, liner shipping companies which were not party to the agreement were induced to sign up to it by being authorised to charge lower prices than the traditional members. The dual-rate service contract arrangements established by the liner conference had therefore restricted competition on the part of independent shipping companies. In addition, the founding members of the TACA had agreed, for certain contracts, not to engage in competition with shipping companies which did not form part of the first circle. In view of the significance of the potential competition on the market for liner shipping services, this infringement was regarded as especially serious. The Commission imposed a fine of ECU 273 million on the 15

<sup>(1)</sup> For Article 82 aspects, see Chapter I, B.3.

<sup>(2)</sup> Council Regulation (EEC) No 4056/86 of 22 December 1986 laying down detailed rules for the application of Articles 85 and 86 of the Treaty to maritime transport (OJ L 378, 31.12.1986).

#### **Box 4: European competition policy and airports**

The liberalisation of air transport, which has been under way for a number of years, has been reflected in price cuts on many routes, mainly for leisure travellers, rising supply and demand and the incipient restructuring of national airlines, which have chosen, in order to adapt to the new market conditions and reduce their operating costs, to form alliances. Against that background, airports now represent a vital asset for airlines faced with increased competition.

The growth of the market has created new needs in terms of airport services and has aggravated congestion at major airports. Airport access has therefore become an important factor influencing the development of airlines. The growth of hubs has increased demand for slots and is thus likely to give rise to tougher competition in airports already suffering from congestion problems. In such a context, the advantage conferred on carriers solidly established in congested airports is becoming ever bigger in view of the grandfather rights rule recognised by the code of conduct. In addition, the costs generated by airport services have become crucially important as cost-cutting intensifies. It is therefore important to ensure that these services, too, are brought into the competitive arena and that no companies are discriminated against.

The Commission, which initiated the liberalisation of air transport, has had to be vigilant to ensure that the forces of competition apply in airports, in particular by facilitating access to major congested airports by guaranteeing equality of treatment between airlines and by bringing real competitive pressure to bear on the price and quality of airport services. A series of decisions adopted in recent months reflects the Commission's determination to open up the Union's airports to competition.

As regards airport access, the main problem lies in the lack of availability of slots, a situation which has worsened since liberalisation. Lack of availability of slots effectively puts paid to any competition. For that reason, the Commission gave the green light to the alliance between Lufthansa and SAS on condition that the airlines sold off a substantial number of slots so as to facilitate the entry of new competitors on certain routes between Germany and Scandinavia.

The managing bodies of airports are often associated with the national public authorities. In some cases, such as those involving the airports of Brussels, Frankfurt and Paris, these bodies were sometimes less than impartial and tended to favour the dominant national carrier by charging discriminatory fees to new entrants, thus giving the national carrier a competitive edge. The Commission ordered the managers of the airports referred to above to put an end to these practices.

Council Directive 96/67/EC of 15 October 1996 liberalised the groundhandling market, with the result that these discriminatory fees are set to disappear. The Commission has shown its determination to enforce the objectives of this directive, in particular by making a careful analysis of applications for exemption with a view to maintaining groundhandling monopolies temporarily in cases where sufficient space is not available to accommodate the competing companies. Accordingly, the Commission adopted two decisions concerning Frankfurt Airport. In the first decision, it asked the German Government to limit the scope of this exemption, and in the second decision, which was addressed to the airport managing body, it took the view that the managing body's monopoly on the groundhandling market constituted an abuse of a dominant position since the monopoly on the market for the making-available of airport infrastructure had been extended without any objective reason to include that for the provision of groundhandling services.

The Commission also limited the scope of the exemptions granted by the German Government in the airports of Stuttgart and Hamburg, and rejected the exemption granted to Cologne/Bonn Airport <sup>(1)</sup>. However, it authorised the exemption granted to Düsseldorf Airport <sup>(2)</sup>.

<sup>(1)</sup> Decisions of 30 October 1998, not yet published in the Official Journal.

<sup>(2)</sup> Decision of 14 January 1998 (OJ L 173, 18.6.1998).

TACA parties, half of which are non-European companies.

109. This case does not call into question the Commission's policy with regard to traditional liner conferences. The Commission takes the view that the behaviour of the TACA parties deviated from the conduct authorised by the block exemption.

#### *4.3. Application of Article 86 to the transport sector*

110. Two cases on which the Commission had adopted decisions pursuant to Article 86 were satisfactorily concluded in 1998.

Following a complaint lodged by British Midland, the Commission adopted, on 28 June 1995 <sup>(1)</sup>, a decision pursuant to Article 86(3) of the Treaty, read in conjunction with Article 82, which concluded that Belgium had infringed Article 86(1), read in conjunction with Article 82, by imposing on Régie des voies aériennes/Regie der Luchtwegen, a public body responsible for operating Brussels Airport, a system of discounts on landing fees which resulted in discrimination. Since Belgium had not complied with the aforementioned decision, the Commission called on the Court of Justice on 19 March 1997 <sup>(2)</sup> to find that Belgium had failed to fulfil its obligations. By royal decree of 20 January 1998, the Belgian Government put an end to the infringement and the Commission therefore terminated the proceedings.

On 21 October 1997, the Commission adopted a formal decision pursuant to Article 86(3) of the Treaty, read in conjunction with Article 86, on the system of reductions in piloting tariffs in the port of Genoa <sup>(3)</sup>. By decree of 8 June 1998, the Italian Government put an end to the infringement.

## **5. Insurance**

### *5.1. Insurance pools: an enquiry in the aviation insurance sector*

111. In September 1997, in order to provide insurance pools with a degree of certainty as to whether the block exemption regulation (Regula-

tion (EEC) No 3932/92) applied to them and to clarify the Commission's policy regarding pools not covered by the block exemption, the Directorate-General for competition started investigating an entire segment of the insurance industry, namely aviation. Extensive requests for information were sent to 13 aviation pools in Europe. The Commission had been informed of eight of these pools pursuant to Regulation No 17; the other five had not been notified.

112. The block exemption regulation covers only pools whose members have a limited market share (10 % for co-insurance pools and 15 % for co-reinsurance pools). As to pools that exceed these thresholds, no matter how high the market share is, the view is that they cannot be considered to be anticompetitive as long as pooling is necessary to allow their members to provide a type of insurance that they could not provide alone. This is the case when the particular nature of the risks involved (e.g. catastrophic risks) requires the pooling of capacity from different insurers in order to cover them profitably.

113. The enquiry into aviation insurance pools showed that the geographic market is mainly international. Aviation pools on this market do not present any competition problem. Even if most pools count among their membership almost all insurance companies established in the Member State in question, they cover only a very minor share of the international market and, in any case, do not exceed the thresholds of the block exemption regulation.

114. None the less, for small aviation risks, a national market seems to exist. These small risks are non-catastrophic ones (i.e. risks which have a low frequency but a large volume such as product liability for aircraft manufacturers), representing a low insured value in relation to other risks of the same class. Customers are smaller aircraft owners with limited opportunities to seek better insurance conditions abroad. These risks represent a very minor volume of aviation insurance.

Most aviation pools cover large shares of these markets and do not appear to be necessary in order to allow their members to be present on these markets. It cannot be ruled out that, for some small risks for which the market is national, the pool restricts competition and is not eligible for exemption, either under Regulation (EEC) No 3932/92 or individually. Nevertheless, this potential infringement was considered not worth pursuing at

<sup>(1)</sup> OJ L 216, 12.9.1995.

<sup>(2)</sup> Case C-155/97 *Commission v Belgium*.

<sup>(3)</sup> OJ L 301, 5.11.1997.



Community level because of the very limited turnover generated in these national markets.

115. The investigation was therefore concluded by means of comfort letters addressed to those aviation pools of which the Commission had been notified indicating that they were covered either by the *de minimis* notice or by the market share thresholds set out in Regulation (EEC) No 3932/92 as regards the international market for aviation insurance. The comfort letters included a caveat concerning national markets indicating that the Community interest was not sufficient for the Commission to formally find infringements if these related only to a minimum fraction of the aviation market business, but that national authorities could, in any case, intervene against the anticompetitive structure of these pools or anticompetitive behaviour by their members where appropriate.

#### 5.2. Application of the new policy to the P&I Clubs case

116. The new policy towards insurance pools has already been applied to a claim-sharing arrangement between insurance mutuals (the equivalent of a pool in the non-profit insurance sector). In the *P&I Clubs* case, the Commission intends to adopt a formal decision in the coming months concluding that a claim-sharing agreement between mutuals covering 89 % of the world market for maritime third party and contractual liability insurance (protection and indemnity insurance) is definitely not caught by Article 81(1) because it appears to be necessary to allow its members profitably to insure some very large maritime liability risks (e.g. marine pollution).

117. A notice pursuant to Article 19(3) of Regulation No 17 was published in August indicating that the Commission intends to clear the pooling agreement concluded within the International Group of P&I Clubs. This was only possible, however, after the IG had amended the pooling agreement to ensure that it no longer contained an infringement of the competition rules. In particular, the IG lowered the level of cover offered jointly by all its members to ensure that a substantial section of demand did not remain unsatisfied, following a complaint submitted by the Greek Shipping Committee, an association of shipowners.

118. A second notice pursuant to Article 19(3) was published in October indicating that the Commission also intended to clear the International Group agreement, which lays down rules for competition between the members of the pooling agreement. This was only possible after the IG modified the original restrictions which prevented the P&I Clubs from setting rates freely. Once the new agreement enters into force, the P&I Clubs will be able to compete for the first time on the rates they charge to their members; in particular, they will be free to set the part of the rate corresponding to their administrative costs. Restrictions on the freedom to set the remaining part of the rate seem necessary to ensure the pooling agreement functions properly.

119. If adopted, the final decision on the *P&I Clubs* case would spell out the new policy towards insurance pools.

## 6. Energy

120. The process of liberalising the internal market in electricity is set to begin early in 1999. As from 19 February 1999, 25 % of consumers in at least 12 Member States will be free to opt for the supplier of their choice. This new freedom, stemming from transposal of the electricity directive into national law, will clearly have an impact on the Commission's priorities when it applies competition law in this sector.

#### *The contribution of the directive*

121. The directive formalises the existence of at least two clearly distinct markets, namely electricity sales and electricity transmission. It recognises that there is a natural monopoly in electricity transmission by regulating this area and organising a competitive market in electricity. To that end, the directive focuses on demand (freedom of choice of supplier) and on supply (arrangements for the construction of new generating capacity).

This opening-up of the market must be carried out in a way which does not undermine public service obligations in the general economic interest imposed on certain bodies. The directive acknowledges the right of the Member States to determine such obligations, which may reflect objectives associated with social cohesion or

security of supply, and to ensure that market liberalisation does not obstruct their performance.

122. First, the directive entitles certain 'eligible' customers to purchase electricity from the supplier of their choice. The initial opening-up — involving about 25 % of the market — will concern, in any event, all companies consuming more than 100 GWh per year on a consumption-site basis, and will be gradually increased to about 33 % after 2003.

The levels of market opening provided for in the directive are merely minima. Each Member State is free to proceed further or faster, and many have already done so. In response to concerns expressed by those Member States regarding the imbalances thus created — some opening up their market in full, with others limiting their action to the requisite 25 % — the directive provides for a mechanism whereby, for a transitional period, they may refuse to accept imports from those Member States which are the least open to competition.

123. The granting of a right of 'eligibility' to certain customers would only have a symbolic value if access to the network by those same customers were not organised and guaranteed. It is not surprising that half of the directive's chapters <sup>(1)</sup> deal with subjects relating to the organisation and operation of the network. The practical arrangements governing access may, according to the directive, take one of three forms <sup>(2)</sup>. The choice of one or other of these options is left to the Member State but must, in all cases, give rise to an equivalent result in terms of opening-up of the market.

There is no need to dwell on the detailed arrangements for each of the aforementioned options. It is sufficient to recall that access to transmission systems and, where appropriate, to distribution systems, must be guaranteed for all eligible customers on a non-discriminatory basis irrespective of the identity or nationality of the customers and suppliers. In particular, an integrated system operator may not give preferential treatment to a parent company or subsidiary and must maintain an independent management structure and business secrecy in respect of them.

<sup>(1)</sup> Chapters IV, V, VI and VII.

<sup>(2)</sup> Negotiated access, regulated access and single buyer procedure without purchase obligation accompanied by negotiated or regulated access.

Access to the system gives rise to a fee which is either negotiated between parties or paid by the State. The identification of a specific system access price is a recent innovation in most of the Member States. Its corollary is the establishment of separate accounts for network activities as opposed to the other activities (such as generating activities) that may be carried out by certain integrated undertakings. The objective is to guarantee transparency and to avoid the emergence of cross-subsidies between system activities — caught by the natural monopoly — and other activities, which are usually subject to competition.

124. The opening-up resulting from the directive is not limited to customers. Producers should also benefit from the creation of new generation capacity — for the purpose of own consumption or for sale — provided for by the directive. These measures, which provide, for example, for the granting of operating permits for new generating capacity on a non-discriminatory basis, should promote the development of a varied supply which makes optimal use of technological and environmental innovation.

125. These changes in generating arrangements will be accompanied in some Member States by the emergence of new operators or products: electricity brokers, spot markets and derivatives will develop as the market is opened up.

#### *A competition policy geared to liberalisation*

126. System access is an essential element of liberalisation. It should also be borne in mind that, in contrast to a sector such as telecommunications, in which technological development led to the creation of new systems, the electricity sector seems unlikely to develop in a way which undermines the essential nature of the existing systems.

There are many potential obstacles to system access, such as unfounded refusals on the part of system operators and abusive or discriminatory transmission tariffs.

It will therefore be necessary to ensure that tariffs do not result from the knock-on effect of excessive or uncontrolled costs or from the invoicing of services which have not been used. Particular attention should be paid to the latter point in cases of transmission between Member States. Transmis-

sion prices could also be fixed using a tariff method involving anticompetitive effects, such as one favouring producers with substantial, varied capacity as opposed to new producers entering the market. Lastly, it cannot be ruled out that refusals may be given because of insufficient capacity.

In cases concerning access, the Commission will analyse the situation of the system manager in terms of his independence vis-à-vis the other activities of the integrated group to which he belongs. In general, it would not necessarily be in the interest of an independent system manager to refuse to carry out a transmission. On the contrary, he should seek to make maximum use of his capacity, even to the point of creating new capacity in order to meet demand.

127. Two other questions are particularly important and are to be examined in depth.

First, electrical interconnections between the Member States will obviously play an important role in the creation of a single market in electricity. It is probable that interconnectors will make a decisive contribution to the initial phase of market opening by enabling foreign competitors to generate competition. With that in view, a careful examination of the competition aspects of the development and, in particular, the optimal use of existing interconnections should be carried out.

The second subject of concern as regards system access is known as ‘pancaking’. This refers to the sum of transmission costs resulting from the use of systems belonging to several operators. A simple illustration would be a transmission between Lille and Amsterdam: the sum total of the charges of the French, Belgian and Dutch systems could result in a very high price compared to that charged for an equivalent transmission between Lille and Paris. An initial solution to this problem has been developed in Germany, where several system operators coexist, under the so-called *Verbandsvereinbarung*. A European solution has not yet been found, but it will be essential if a genuine single market is to be created. The Commission will help to bring this about by using the full range of instruments at its disposal. For instance, it could investigate a case of combined costs resulting in double invoicing of a single service from the angle of competition law.

Work on system access should be accompanied by measures to guarantee customers’ freedom of choice, which risks being limited by the estab-

lishment of exclusive or long-term contracts between customers and suppliers. The Commission will have to examine contracts in the light of practice on the most competitive markets. For their part, the parties operating on the electricity market will have to adapt their business practice to the new framework created by the directive. The objectives which the previous contracts were designed to achieve (security of supply, return on investments, etc.) could be realised by other methods with less of a competition-restricting impact (contracts with several suppliers, risk-cover instruments, etc.).

Lastly, the guarantees to be given regarding system access and freedom of choice for customers will not serve their intended purpose unless electricity is provided by a sufficient number of suppliers. A detailed examination should therefore be made of all proposed mergers or start-ups to ensure that they do not have the effect of undermining supply.

128. Competition policy should therefore be developed in parallel with legislative work, taking account of the specific characteristics of the electricity sector — for instance, the existence of services of general economic interest.

The Commission is not the only body with a mandate to act in these fields. It can count on the support of national courts, national competition authorities and the industry regulators established when the directive was transposed into national law.

As in the telecommunications field, the Commission’s task will be to focus on cases with a definite Community interest or for which its involvement will be an essential pre-requisite for harmonisation of the antitrust approach. In particular, the Commission could focus more on structural elements of the market (such as the methods used to calculate system access prices) than on individual cases (for example, a dispute resulting from implementation of the aforementioned method).

## 7. Competition and the environment

129. At the Cardiff European Summit, the Member States recalled the provisions of the Treaty of Amsterdam <sup>(1)</sup> stipulating that Community policies should take account of environmen-

<sup>(1)</sup> Article 6 of the consolidated Treaty.

tal protection with a view to achieving sustainable development, an approach which was endorsed at the Vienna Summit. In its XXVth Report on Competition Policy, the Commission spelt out its position regarding implementation of the Community competition rules in the environmental field. In particular, it stated: 'When the Commission examines individual cases, it weighs up the restrictions of competition arising out of an agreement against the environmental objectives of the agreement, and applies the principle of proportionality in accordance with *Article 85(3)*. In particular, improving the environment is regarded as a factor which contributes to improving production or distribution or to promoting economic or technical progress.'<sup>(1)</sup> In that connection, 1998 was marked by four cases reflecting the Commission's commitment to take a positive approach to environmental issues in its competition analyses.

*130.* The Commission approved the agreement signed by the European Association of Consumer Electronics Manufacturers (EACEM) and 16 of its members, all major manufacturers of television sets and video cassette recorders. This agreement is a voluntary commitment to reduce the electricity consumption of this equipment when it is in stand-by mode. The Commission exempted the agreement under *Article 81(3)* on the ground that the energy-saving and environmental benefits of the scheme clearly represented technical and economic progress and, by their nature, would be passed on to consumers. The energy saving could amount to 3.2 TWh a year from 2005. This reduction in energy consumption will have a significant impact in terms of the management of energy resources, reductions in CO<sub>2</sub> emissions and, accordingly, measures to counter global warming. The Commission also ascertained that the scheme would not eliminate competition in the affected markets and that its restrictive effect was essential to achieving its full benefits.

*131.* The Association of European Automobile Manufacturers (ACEA) has undertaken, on behalf of its members, to reduce CO<sub>2</sub> emissions from passenger cars. This effort is in line with the Community policy of reducing CO<sub>2</sub> emissions into the atmosphere<sup>(2)</sup>. ACEA has set a reduction

target of 25 % by 2008. The Commission and the Member States will monitor the efforts made to achieve that target. The Commission also took the view that this agreement between European automobile manufacturers did not infringe the competition rules. ACEA determines an average reduction target for all its members, but each of them is free to set its own level, which will encourage them to develop and introduce new CO<sub>2</sub>-efficient technologies independently and in competition with one another. Accordingly, ACEA's voluntary agreement does not constitute a restriction of competition and is not caught by *Article 81(1)*.

*132.* In the *EUCAR* case, the Commission adopted a favourable stance on a cooperation agreement between Europe's leading motor manufacturers which is designed to boost research in the motor industry, particularly on environmental issues. Most of the projects that will be developed involve experimental research on, for example, limiting noise or emission pollution caused by motor vehicles. The products obtained from this research may not be directly usable in a specific type of vehicle. The Commission therefore took the view that the research was at the pre-competitive stage and that the agreements did not infringe Community law.

*133.* Finally, the Commission approved the membership agreements of Valpak, a non-profit-making, industry-led compliance scheme operating in the United Kingdom which has been set up to discharge the packaging waste recovery and recycling obligations of its members<sup>(3)</sup>. The legal framework set up in the United Kingdom to implement the directive provides scope for competition in the market for compliance-scheme services which seek to fulfil recovery and recycling obligations on behalf of a business. While Valpak is currently the largest compliance scheme operating in the United Kingdom, other competing schemes exist and have notified their arrangements to the Commission.

*134.* Following its examination of Valpak's membership agreements, the Commission concluded that the agreements restricted competition within the meaning of *Article 81(1)* because they

<sup>(1)</sup> 1995 Competition Report, points 83 to 85.

<sup>(2)</sup> Communication from the Commission to the Council and the European Parliament of 29.7.1998, 'Implementing the Community strategy to reduce CO<sub>2</sub> emissions from cars: an environmental agreement with the European Automobile Industry' (COM(1998) 495 final).

<sup>(3)</sup> These obligations were introduced in March 1997 by government regulations implementing the requirements of the EU directive on packaging and packaging waste (94/62/EC).

obliged businesses wishing to join the scheme to transfer the totality of their obligations in all packaging materials. This ‘all or nothing’ approach, which transposes a regulatory provision, restricts the extent to which Valpak and other schemes will be able to compete against one another on a material-specific basis. The Commission went on to consider whether the notified arrangements could benefit from exemption under Article 81(3). In view of the emerging nature of the market and the likelihood that Val-

pak and other schemes would be obliged to invest in the United Kingdom’s collection and/or reprocessing infrastructure in order to meet their members’ obligations in the future, the Commission concluded that an ‘all or nothing’ approach was necessary, at least in the short term, if schemes such as Valpak were to succeed in securing sufficient funding to allow the necessary investment to take place. The Commission informed Valpak at the same time that it reserved the right to re-examine the case after three years.

### Box 5: Globalisation of markets and competition analysis

As globalisation of markets progresses, the Commission is increasingly carrying out competition analysis on markets which are not confined to Europe. For that reason, it takes account of the geographical dimension of actual competition when defining the relevant market on which its analysis is based. It may also examine the competitive situation in geographical areas outside the relevant market when analysing potential competition.

The concept of market to which the Commission refers when assessing an agreement, a practice or proposed merger from the viewpoint of Community competition law is based on specific criteria which were laid down in 1997 in a Commission notice on the definition of relevant market for the purposes of Community competition law. Essentially, the relevant market, the place where supply and demand interact, constitutes a framework for analysis which highlights the competition constraints facing the companies concerned. In other words, the task is to identify the competitors of these companies which are genuinely able to affect their behaviour and prevent them from acting independently of all real competitive pressure.

In determining the geographical confines of the relevant market, the Commission takes account of a number of factors, such as the reactions of economic operators to relative price movements, the sociocultural characteristics of demand and the presence or absence of barriers to entry, such as transport costs. It should also be mentioned that the Commission tends to focus on demand trends in its analyses and that this has an impact on the geographical dimension of the relevant market.

As a result, the relevant market is a specific instrument of analysis and does not always reflect vaguer concerns about economic reality. An economic sector of activity does not necessarily constitute a relevant market. A product may be manufactured and sold throughout the world; supply and demand do not necessarily coincide within that area. Price differences from one geographical area to another will reflect the existence of separate geographical markets.

That notwithstanding, where appropriate and in accordance with its legislation, the Commission refers in its competition analyses to worldwide relevant markets.

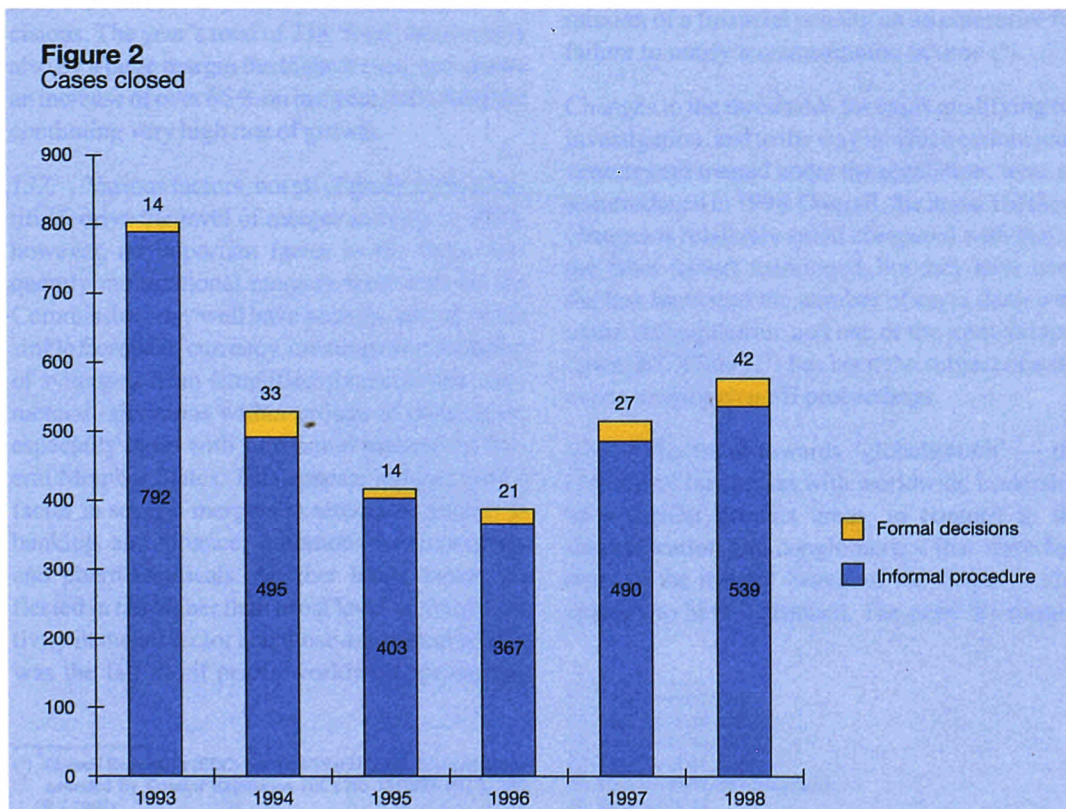
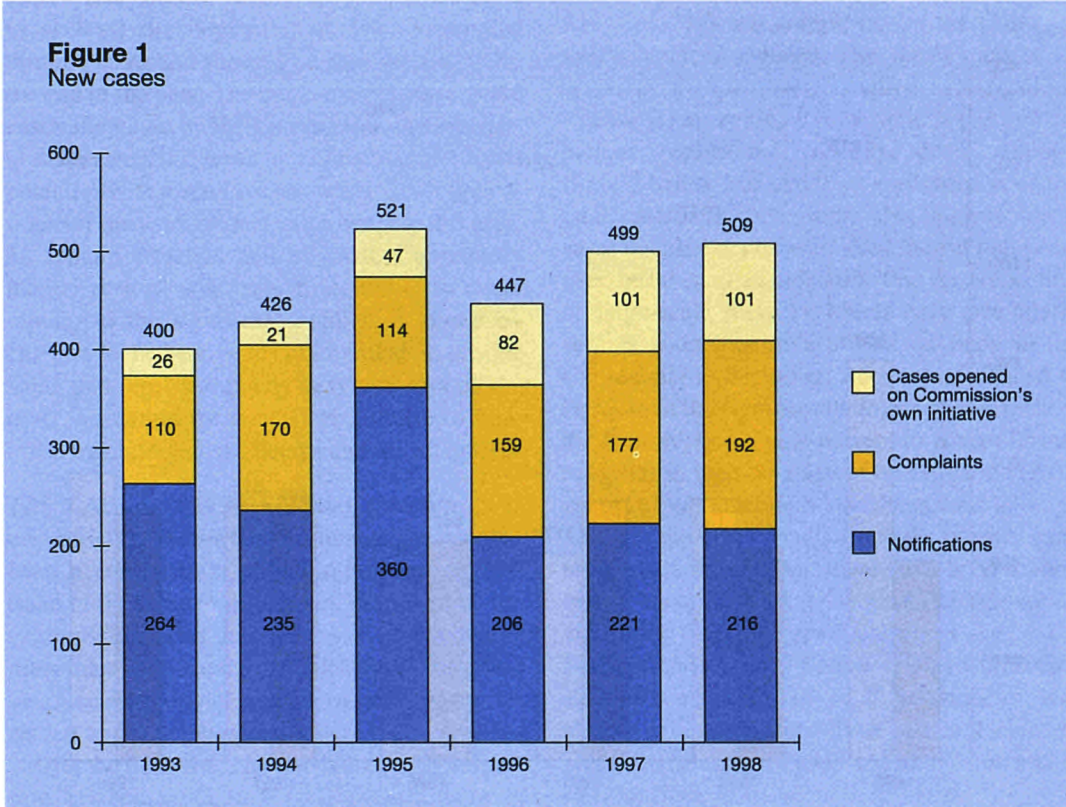
In recent years, as a result of merger controls, the Commission has increasingly identified world markets, as it did in about 20 cases in 1998. A study of merger decisions shows that the Commission has established the existence of world markets in a wide variety of economic sectors. For example, in the *Boeing/MacDonnell Douglas* case, the Commission took the view that the market for large commercial jet aircraft was a world market. Likewise, in the *Gencor/Lonrho* and *Anglo American Corporation/Lonrho* cases, the Commission acknowledged the existence of world markets in platinum and rhodium. In addition, even where the market is identified as European, the Commission may take account of potential competition from other geographical areas when assessing a transaction. In the *Saint-Gobain/Wacker-Chemie/NOM* case, for instance, while it identified two markets for silicium carbide restricted to the EEA, it also looked into potential competition from companies based in China or eastern Europe.

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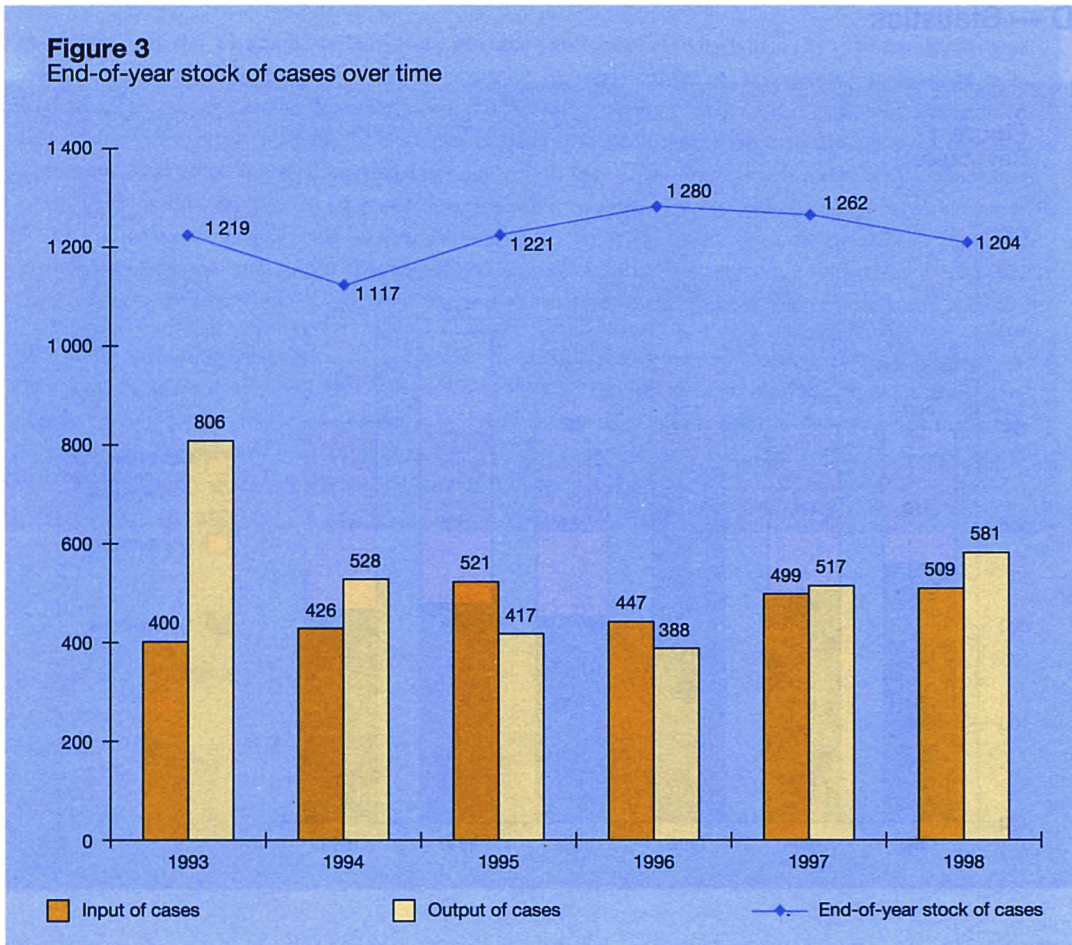
As regards Articles 81 and 82 of the Treaty, in certain sectors of activity which, by their nature, involve European and non-European parties, the Commission regularly carries out competition analyses on markets which are larger than the European Economic Area. For example, in the *TACA* case, which concerned transatlantic shipping companies, the Commission had to take account of the transatlantic dimension of the agreement and, accordingly, it imposed fines not just on European companies, but also on US and Asian ones. The Commission has similar concerns as regards transatlantic airline alliances or strategic alliances in the telecommunications sector (such as Atlas/Global One or Uniworld). In some cases, with the world dimension of the relevant market resulting from the small number of producers, coupled with worldwide demand, as in the *IRE/Nordion* case, the Commission conducts its competitive analyses on world markets.

While the relevant market concept provides the Commission with an instrument enabling it to carry out analyses and adopt decisions which take account of the world dimension of markets, it goes without saying that it may face problems when it requires information available only outside the Union or when it has to enforce its decisions or have them enforced. For that reason it has developed a policy of international cooperation in competition matters with its main trading partners.

D — Statistics



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





## II — MERGER CONTROL

### A — Introduction

135. The ‘merger wave’ that can be traced back to at least the beginning of 1997 continued through 1998 and showed no sign of abating by the end of the year. The number and nature of the cases examined by the Commission in 1998 naturally reflects this trend in merger activity. It has potentially important consequences and implications for the work of the Commission in this area. To remain effective and efficient, Community merger control will have to continue to adapt rapidly to the significant challenges posed by changes in the economic environment on the one hand, and legal and policy developments on the other, all within the context of a desire to minimise regulatory costs, delays and uncertainties.

136. Against this background, therefore, it is unsurprising that the first keynote of the year has been a continuation of the significant upward trend in the number of mergers examined by the Commission. This has grown by substantially more than 10 % in each of the last four years. This year, the annual total number of notifications received under the merger regulation <sup>(1)</sup> exceeded 200 for the first time. The year’s total of 235 represents an increase of 36 % on last year’s, a rate of growth equal to last year’s record level and well above the rate for any other year. Similarly for decisions. The year’s total of 238 ‘final’ decisions is also by a large margin the highest ever, and shows an increase of over 66 % on last year, reflecting the continuing very high rate of growth.

137. Various factors, not all of them easily identified, drive the level of merger activity. In 1998, however, an important factor in the large, frequently multinational mergers dealt with by the Commission may well have been the advent of the single European currency, creating the possibility of synergies from simplified financial and commercial operations within groups of companies, especially those with substantial interests in several Member States. This appears to have been a factor in several mergers in sectors as diverse as banking and finance, automotive components, and pharmaceuticals. Another likely factor, reflected in the higher than usual level of merger activity in the oil sector and those associated with it, was the fall in oil prices worldwide, prompting

major restructuring operations aimed at maintaining profitability in the face of lower margins.

138. Nor has the complexity of the Commission’s caseload reduced. The year’s total of 12 decisions to open more detailed investigations (‘phase II proceedings’ — Article 6(1)(c) of the merger regulation) remains stable, though slightly below last year’s as a proportion of the total caseload. There were also slightly fewer cases decided at phase II. That should not, however, be taken as an indication that the proportion of large-scale mergers which have potentially serious anticompetitive effects on trade in the Community is declining. Account needs also to be taken of the significant number of cases where the Commission’s new powers to accept formal remedies in the first stage of investigation (Article 6(1)(b) as amended) have been used — 12 in all, over the nine months since the powers were introduced. In addition, there have been several cases, including some (e.g. *KPMG/Ernst & Young* <sup>(2)</sup>, *Wienerberger/Cremer und Breuer* <sup>(3)</sup>, *Wolters Kluwer/Reed Elsevier* <sup>(4)</sup> and *LHZ/Carl Zeiss* <sup>(5)</sup>) where the phase II investigation was already under way, where the parties decided to abandon their merger plans ahead of a potentially adverse final decision.

1998 also saw the first imposition by the Commission of a financial penalty on an enterprise for failure to notify a concentration in time <sup>(6)</sup>.

Changes to the thresholds for cases qualifying for investigation, and to the way in which certain joint ventures are treated under the regulation, were also introduced in 1998. Overall, the impact of these changes is relatively small compared with that of the other factors mentioned, but they have none the less increased the number of cases dealt with under the regulation, and one of the joint-venture cases (*BT/AT&T*) <sup>(7)</sup> has been the subject of a decision to open phase II proceedings.

139. The trend towards ‘globalisation’ — the creation of businesses with worldwide leadership in particular product areas, in contrast to the diversification and conglomeracy that were features of the merger ‘wave’ of the 1980s — also appears to have continued. The need for compe-

<sup>(1)</sup> Council Regulation (EEC) No 4064/89 (OJ L 395, 30.12.1989), as amended by Council Regulation (EC) No 1310/97 (OJ L 180, 9.7.1997).

<sup>(2)</sup> Case No IV/M.1044.

<sup>(3)</sup> Case No IV/M.1047.

<sup>(4)</sup> Case No IV/M.1040.

<sup>(5)</sup> Case No IV/M.1246.

<sup>(6)</sup> Case No IV/M.920, *Samsung/Ast*.

<sup>(7)</sup> Case No JV.15.

tition authorities to be capable (whether alone or jointly) of effective action across national boundaries has likewise intensified. In the light of experience, the Commission has developed methods for ensuring that cooperation with non-member countries — in particular the USA — on merger control matters is efficient and constructive; it will continue to keep them under review.

140. Another notable consequence of the trend towards globalisation and specialisation in merger activity is the increased occurrence of mergers in markets that could be described as oligopolistic — where there are only a few large players but no single potentially dominant firm. The judgment of the European Court of Justice (ECJ) in the *Kali und Salz* case <sup>(1)</sup>, discussed further below, confirmed the application of the regulation to collective dominant positions (i.e. to oligopoly), and the Commission is reviewing its approach to such cases in the light of this judgment <sup>(2)</sup> and of other developments.

141. The year also saw final decisions on a number of other important cases, of which perhaps those dealing with the rapidly evolving markets in digital television services and the Internet should be highlighted. In the linked cases *Bertelsmann/Kirch/Premiere* and *Deutsche Telekom/Betaresearch* <sup>(3)</sup>, the Commission decided to prohibit a major German-based project in digital television services. This intervention was necessary to prevent foreclosure of the emerging markets in this sector to other suppliers of pay-TV and related systems and services — notably cable network access, set-top digital decoder technology, and films and other programming. The two mergers would create a grouping with major strengths in all the key components of the package of goods and services required to bring digital TV services onto the market, one or other of the parties having a very strong position in each of the sectors concerned, even though the horizontal overlaps produced were not, in all instances, so significant. Attempts to reach agreement with the parties on satisfactory undertakings to remedy the competition problems so that the deal could go ahead proved unsuccessful; prohibition was the only alternative. This decision underlines the Commission's determination to act where neces-

sary to ensure that newly emerging markets are not foreclosed. Only in a competitive environment can their expected potential for growth, necessary to satisfy the increasing consumer demand, be fully realised.

142. In *Worldcom/MCI* <sup>(4)</sup>, foreclosure of another relatively new product area — the Internet — was also the main issue. Here, a satisfactory solution was found, involving the divestment of MCI's Internet activities to a new entrant. This divestment was at the time the largest ever to result from antitrust action. After a full investigation the Commission found that both parties to this very large merger, covering a wide range of telecommunications activities, were significant suppliers of 'universal connectivity' — the ability to offer access throughout the Internet without having to pay others to complete the connections. They would together become dominant on that market, with the ability to dictate terms to competitors needing this important service. Another significant feature of this case was that, like a growing number of others, it involved a carefully coordinated assessment and negotiation of remedies with the US competition authorities, in this instance the Department of Justice (DoJ).

## B. — New developments

### 1. Market definition

#### *Internet infrastructure and access services*

143. The Commission dealt during the year with a number of cases concerning the supply of Internet services. Some of these cases also involved full-function joint ventures which required an examination of the possibility of substantial coordination of the activities of the parents, under the new procedures adopted as part of the review of the merger regulation. These cases are discussed in more detail in Box 7. From the viewpoint of market definition, however, Internet services raise a number of interesting issues, some of which were analysed by the Commission in the abovementioned *Worldcom/MCI* case. As a newly emerging sector, it was necessary for the Commission to construct an approach to market definition on the basis of information assembled

<sup>(1)</sup> Joined Cases C-68/94 and C-30/95 *French Republic, SCPA and EMC v Commission* (1998) ECR I-1375.

<sup>(2)</sup> See, for example, Case No IV/M.1016, *Price Waterhouse/Coopers and Lybrand*, also discussed below.

<sup>(3)</sup> Cases Nos IV/M.993 and IV/M.1027.

<sup>(4)</sup> Case No IV/M.1069.

**Box 6: Merger review**

The quickening pace of developments has been the year's second keynote. Following the completion of the review of the regulation last year, described in the XXVIIth Competition Report <sup>(1)</sup>, a package of changes was introduced with effect from the beginning of March. Probably the most significant change, in practical terms, was that regarding acceptance of undertakings in phase I, mentioned above. The formalisation of phase I undertakings has proved of interest and benefit to merging parties and the Commission alike. It enables the delay and consequent uncertainty over the outcome of a notified transaction to be reduced, and avoids the need to deploy some of the substantial extra resources (at the Commission as well as by the parties) required for a full phase II investigation and decision. Experience with the new power shows clearly that the revised system is able to deal both quickly — in a matter of weeks, rather than several months — and efficaciously with mergers where a potential dominant position may be created. However, for the new procedure to be applicable, it is essential that the issues can be clearly identified and effective — and readily implementable — remedies found and agreed within the short timescale. It is encouraging to note that in several of these cases the merging parties frankly acknowledged, from the outset, both the likely existence of competition problems, and also their willingness to offer suitably specific remedies — which generally involve the divestment of part of the existing or acquired businesses — and to cooperate fully with the Commission in the search for a solution. There will, of course, continue to be cases where, even with good will and careful preparation, a full investigation is needed in order to properly identify and assess the competition problems, and examine alternative outcomes — including prohibition. But without the positive factors just mentioned, the prospects for early resolution are bound to be severely reduced.

The supplementary turnover thresholds <sup>(2)</sup>, introduced with the aim of reducing the problem of merging parties having to notify the same transaction to several national authorities, also appear to be having the expected effect. Fourteen cases in all of this type were notified in the year, amounting to 6 % of all cases notified. This is broadly in line with the Commission's estimates. Moreover, in most of the cases in question, the parties had substantial operations in several Member States, such that an effect on competition in national or EU markets might be expected to arise, and notification to several Member States was likely to have been necessary.

Revised Commission notices on various aspects of the regime were also published in March, and work on the important task of producing a revised version of the notice on restrictions ancillary to a concentration continued throughout the year. Other changes that were introduced following the review — notably regarding the treatment of full-function joint ventures — are discussed elsewhere in this report.

The review of the regulation has also, however, highlighted the importance of the Commission continuing to strive to optimise its merger control processes, against a background of the increasing caseload on the one hand and the need to contain resource expenditure on the other. A significant issue in this area is the treatment of the substantial number of notified cases which are *prima facie* unlikely to raise competition problems. The Commission has therefore begun exploring options for streamlining and simplifying the handling of these cases.

<sup>(1)</sup> 1997 Competition Report, points 148 to 157; SEC(1998) 636 final, pp. 49–51.

<sup>(2)</sup> Regulation (EC) No 1310/97, Article 1(1)(b).

especially for the purpose. Reliable and comprehensive information on, for example, market shares was not publicly available, and — together with the US DoJ — the Commission organised the collection of information and views on the merger from the many businesses active in the sector as well as from the parties themselves. This was in itself a considerable task, albeit greatly facilitated by the ability — via the Internet — to communicate and exchange data rapidly worldwide with a large number of third parties.

144. It became clear from the phase II investigation in particular that, although superficially the Internet presented many of the characteristics of a fragmented market with low entry barriers, the basic market structure was in fact hierarchical or pyramidal, with different characteristics at different levels. Whereas at the lower levels there were generally a range of suppliers and few barriers to entry, at the top of the pyramid the industry was much more concentrated. So-called ‘universal connectivity’ — the ability to offer access to all points on the Internet, worldwide, without having to pay others to complete the connection — was found to be a vital component of any package of Internet services. Entry barriers at this level were, however, significant, enhanced by the so-called ‘network effect’, whereby subscribers will prefer to connect to the largest available network. This aspect of Internet services was accordingly found to constitute a separate — worldwide — market, in which there was only a small number of (very large) suppliers, among them the parties.

#### *Accountancy services*

145. In analysing, for the first time, two major concentrations in the sector, the Commission was required to develop an approach to market definition in the provision of accountancy services. The proposed mergers between Price Waterhouse and Coopers and Lybrand (cleared after a phase II investigation <sup>(1)</sup>) and between KPMG and Ernst & Young (subsequently abandoned) would have revealed little cause for concern if measured in terms of overall market share, whether nationally or on a wider geographic basis. However, in an assessment which bore certain similarities to that of the Internet sector just discussed, the Commission found that at the highest levels of this sector’s pyramidal structure there was a very

high degree of concentration. Third party contacts confirmed the existence of a separate market for the supply of accountancy services (and, in particular, statutory audits) to very large, usually multinational, firms. For these customers it was essential to be able to provide a comprehensive service from a worldwide network of offices and staff with the necessary locally recognised qualifications and specialist expertise. Together with the importance of choosing a firm with an established reputation in order to maintain shareholder confidence in the financial results, this meant in effect that, for many large companies, the market was restricted to the so-called ‘Big Six’ accountancy firms — which would reduce to four if the two proposed mergers went ahead.

#### *Insurance markets*

146. The insurance company sector is one in which mergers have rarely been found to give rise to competition problems, even though in recent years the sector has become more concentrated. Insurance (and reinsurance) for large risks tends to be carried out on an international basis, with customers able to choose (either on their own or with the aid of a broker) between a number of suppliers in various countries. At the level of supply to the small business or private consumer, markets remain predominantly national owing to issues of language, custom and local laws and taxation provisions. In most such markets there is, again, a satisfactory range of suppliers, large and small, and entry is not generally difficult, at least for established financial institutions such as banks. Moreover, supply-side substitution between products is generally relatively easy, so that most large insurers can offer a full product range and move into new product areas without difficulty. In *Allianz/AGF* <sup>(2)</sup>, however, the Commission found that certain products constituted distinct markets, notably so-called ‘del credere’ credit insurance (i.e. insurance against the risk that, as a result of the insolvency of the buyer, a supplier will not be paid). Del credere insurers require a detailed knowledge of the (predominantly national) markets and buyers in and for which they offer cover. This can take a long time to develop, since it can as a rule only be acquired through experience, and meanwhile the insurer is exposed to risks which, in contrast to those of many other types of insurance underwriting, can-

<sup>(1)</sup> Case No IV/M.1016.

<sup>(2)</sup> Case No IV/M.1082.

not be accurately quantified. Entry barriers were therefore found to be sufficiently high for this product area to constitute a separate market. Subsequent analysis identified a risk that the merger would create a dominant position in this market, and the parties gave undertakings to divest AGF's holding in a subsidiary active in it, in order to resolve this problem.

## 2. Dominance assessment

### *Joint/collective dominance*

147. The most significant development in the Commission's approach to this subject was the delivery, in March, of the judgment of the ECJ in the *Kali und Salz* case. The judgment, in response to applications by the French Government and the French parties to the merger, dealt with various procedural and substantive points, and concluded that the Commission's (1993) decision to allow the merger, but subject to certain undertakings, should be annulled. It was, however, also notable as the first instance in which the ECJ had had to examine the Commission's approach to the analysis of oligopoly ('collective dominance') as opposed to the more classical dominance by a single firm (or, at most, two firms). In the Court's view, to establish collective dominance in a merger situation the Commission needed to establish that the notified operation would lead to a significant reduction in competition between the parties to the merger and one or more third parties by giving them collectively the ability, as a result of the existence of 'correlative factors' amongst them, to adopt a common policy on the market(s) concerned and to act substantially independently of other competitors, customers and consumers. These correlative factors need not, it appears, include structural links, in the strict sense of cross-shareholdings, contracts etc. between the alleged dominant firms, although where such links are cited, it is necessary to show how they would lead to the elimination of competition between the firms concerned. But whatever factors are employed should at least provide for, as well as support, the existence of a typical oligopoly market structure and trading conditions, convincing evidence of the existence among the firms concerned of a common interest in not competing actively against each other. This common interest might be demonstrated by an analysis of factors such as the

degree of symmetry of the market shares, production capacities and cost structures of the alleged dominant firms. The Commission considered all these factors, to some extent, in its original decision. The Court, however, whilst recognising the difficulties of analysis and evidence-gathering posed by the short timescales for investigation under the merger regulation, found that they had not been sufficiently well established to properly motivate the decision, and accordingly annulled it. It was then necessary for the Commission to re-examine the case in the light of the judgment, and an account of that action is given elsewhere in this report (see 'Rules and procedures' below).

148. Since the decision, the Commission has been reviewing its approach to oligopoly in merger cases, and this work is continuing. Many aspects require further consideration; for example, the assessment of cost structures. However, the oligopoly issue was examined in some detail in two other phase II cases in 1998 — the accountancy case *Price Waterhouse/Coopers & Lybrand* and the Scandinavian paper and board case *Enso/Stora* <sup>(1)</sup>.

149. In *Price Waterhouse/Coopers & Lybrand*, the relevant product market, for auditing and accountancy services to large firms (see above under 'Market definition'), was found to be highly concentrated, although there was not found to be a single dominant firm. Combined market share post-merger would be below 40 % in any Member State and four other competitors would remain. To analyse the oligopoly aspects of the case, the Commission based its approach on the criteria used previously in, among others, the *Gencor/Lonrho* case of 1996 <sup>(2)</sup>, which also appear to have been broadly accepted by the Court in *Kali und Salz*. Essentially, these are that collective dominance is more likely to arise in heavily concentrated markets where there are in addition features likely to further restrict competitive behaviour — such as homogeneous products, transparent pricing, high entry barriers, mature technology, static or falling demand, links between suppliers, absence of countervailing buyer power, etc. In these conditions there are likely to be incentives for suppliers to engage in parallel pricing and other oligopolistic behaviour. The Commission found that several of these

<sup>(1)</sup> Case No IV/M.1225.

<sup>(2)</sup> Case No IV/M.619.

characteristics were present. For example, demand was static, innovation unlikely, and prices relatively transparent (in some countries, audit fees had to be published in the audited company's accounts). However, it was considered that the number of remaining competitors post-merger was relatively large to support an effective oligopoly — the larger the number of participants, the harder it becomes to maintain and, if necessary, enforce coherence of competitive behaviour among them. Customers did not consider that oligopolistic behaviour was already occurring before the merger, and there was evidence that customers were willing and able to move their business between suppliers in order to obtain improved terms, notwithstanding the long-term nature of most audit relationships.

150. In the absence of the merger between KPMG and Ernst & Young (which was abandoned earlier in the year after the Commission decided to open a phase II investigation) there was no risk of a joint dominant position arising between the two largest firms. Moreover, the market shares of the competitors would all be substantially less than that of the merged firm, and they also varied considerably between the different (national) geographic markets. This implied substantially asymmetrical cost structures, which would further increase the difficulty of sustaining anticompetitive parallel behaviour. To secure coherence across a large part of the market, it would be necessary for the merged firm to ensure parallel behaviour on the part of several of these smaller competitors, rather than just one or two of them. Accordingly the Commission decided to clear this merger.

151. In *Enso/Stora*, the oligopoly issue concerned the markets for newsprint and magazine paper. The merging parties — Enso of Finland and Stora of Sweden, together constituting the largest integrated paper and board group in the world — were two of only six significant suppliers of newsprint (accounting together for around three quarters of total capacity) in the EEA market. The combined group would become the largest of these. The market structure in magazine paper was only slightly less concentrated. The Commission's detailed investigation found that these markets displayed many of the characteristics of an anticompetitive oligopoly — low demand growth, concentrated supply side, homogeneous products, mature technology, high entry barriers, similar cost structures. The merger would signifi-

cantly increase the level of concentration in both markets. However, the Commission also found that other key oligopoly characteristics were not present: in particular, there was no market transparency — information on prices and quantities supplied was not readily available to competitors, and indeed there were secret discounts. Moreover there was evidence that customers — principally, large publishing groups — could exercise a measure of countervailing power. Accordingly the Commission concluded that this aspect of the merger would not lead to the creation or strengthening of a dominant position which would significantly impede competition in the common market or a substantial part of it.

#### *Foreclosure through ties with customers/suppliers*

152. Two phase II cases completed in the year dealt with the creation of a dominant position via ties with customers and/or suppliers. In *Hoffmann-La Roche/Boehringer Mannheim* <sup>(1)</sup>, the relevant markets were in the sector of certain clinical chemistry test products. Competition concerns arose in regard to *in vitro* diagnostics because not only would the merged company have a combined share of between 40 % and 80 % (depending on the national market involved) in the products themselves, but also it would benefit from the parties' unequalled strength in the 'installed base' of instruments on which the *in vitro* tests are performed. There was a risk that customers would become 'locked in' to supplies of the test products from the merged company — and other suppliers excluded — because of their dependence on it for service, maintenance, etc. of the instruments. Consequently the Commission accepted a remedy whereby Roche undertook to divest the majority of its clinical chemistry products business in certain Member States.

153. In *Agfa-Gevaert/Du Pont* <sup>(2)</sup>, the Commission found competition concerns to arise in the markets for negative plates for offset printing. In this EEA market, Agfa and Du Pont — each of which already had substantial market shares — also had various finance arrangements with plate manufacturers and exclusive dealing arrangements with the main distributors of its plates and related equipment. Again, the concern was that

<sup>(1)</sup> Case No IV/M.950.

<sup>(2)</sup> Case No IV/M.986.

competitors would be unable to gain access to supplies or to distribution of their products, enabling the parties to raise prices above the competitive level. To address this concern, Agfa offered to terminate its exclusive arrangements with equipment suppliers and distributors; this would allow competitors to offer their own plates to distributors and thereby develop their sales. The Commission accepted this remedy and the operation was approved on that basis.

### *Dominance in neighbouring markets*

154. In *Wolters Kluwer/Reed Elsevier*, a proposal which would have resulted in the creation of one of the world's largest publishers of professional and specialist information, the Commission found grounds for concern about the merger's impact on competition in several neighbouring product markets, of differing geographic dimensions: the market for academic journals and books (worldwide); for professional books on law and taxation (in various Member States); for educational publishing for schools (in the United Kingdom); for various kinds of business publication (the Netherlands); for Dutch dictionaries; and for services provided from transport databases (Europe-wide). Each of these markets presented its own competition problems. However, the parties' strength across such a wide-ranging series of closely related markets, and the resulting very large size of the merged entity — several times that of any other publisher of professional information in the Community — was a further source of concern. In the Commission's view, such a market structure could prevent the maintenance of competition in the supply of legal, fiscal and scientific information, with a consequent adverse effect on prices. In addition, there could be a foreclosure effect, since the combination of the parties' financial resources and their ownership of copyrighted material would be likely to discourage investment by existing and potential competitors. In the event, however, it was not necessary for the Commission to reach a final view on these matters, as, following the opening of a phase II investigation at the end of 1997, in March this year the parties announced that they had decided to abandon their current merger plans.

### *Vertical links*

155. The two, linked, German digital pay-TV cases — *Bertelsmann/Kirch/Premiere* and

*Deutsche Telekom/Betaresearch* — already referred to, gave rise to concerns over the creation of dominance through vertical market links, rather than the traditional horizontal overlaps. In order to supply a complete 'package' of digital pay-TV services to consumers, various elements are needed — notably, 'set-top box' technology (to decode the programmes being sold and to record details for charging purposes), broadcasting facilities, access to cable and/or satellite networks, and programming content. The proposed operations would have brought together leading suppliers of all these elements to the German market. They involved the development of *Premiere* as a joint digital pay-TV channel and marketing platform. *Premiere* would use *Kirch's* current digital TV activities and its 'd-box' technology (the set-top decoder box that is required for digital reception), together with the related technical services (provided by *Deutsche Telekom*) and content (from an existing joint venture involving *Bertelsmann* and *Kirch CLT-UFA*).

156. These concentrations would, it was considered, create or strengthen dominant market positions in the key areas. *Premiere* would have achieved a dominant position on the market for pay-TV in Germany (and the rest of the German-speaking area of Europe). Currently, it is one of only two providers of pay-TV in Germany. The combination of this already strong position, giving access to a large base of subscribers, plus the important programme resources of *Kirch* and *CLT-UFA* would, the Commission found, have prevented the development of an alternative broadcasting and marketing platform by other firms, since the merged entity would be able to determine the conditions on which other broadcasters could enter the pay-TV market. Similarly, in regard to technical pay-TV services, the parties would have become, permanently, the dominant supplier of these services for satellite TV, and the only supplier of them for cable pay-TV. All digital pay-TV providers in the area currently use the *Betaresearch*-access technology and the related d-box decoder, which employs a proprietary encryption/decryption system. An alternative technology was not considered likely to be developed, so other service providers would have to obtain a licence for it from *Betaresearch*; again creating the ability for the merged entity to foreclose this market to competitors. As regards cable networks, *Deutsche Telekom* already had the largest share of subscribers. The operation would have made it harder for other cable network oper-

ators to compete, because they would have had to adopt Deutsche Telekom's transparent transmission model for digital pay-TV. Premiere would have been unlikely to accept a different marketing model developed by the competitors, which they would need in order to be able to finance the development of their own networks.

157. The merged entities would, accordingly, have been able to act independently of competitors in all the major aspects of the supply of digital pay-TV and associated services, and in the absence of agreement with the parties on remedies, prohibition was the only alternative.

#### *Potential competition*

158. In assessing a merger's effect, the Commission takes account of potential competition as well as actual competition, and the former aspect can sometimes be decisive for the outcome. In *ITS/Signode/Titan* <sup>(1)</sup> the Commission examined competition in the supply of steel and plastic strapping in western Europe, and found possible grounds for concern in regard to the parties' combined share in steel strapping. In the course of a detailed investigation (phase II), the Commission found that — contrary to indications in the initial investigation — plastic strapping could be substituted for steel effectively and without cost penalty in many applications. On this basis the combined market share of the parties in the relevant geographic market was of the order of 40 %, most of it in the steel sector. Entry into steel strapping was found to be difficult, but plastic strapping was considered relatively easy to produce and market, and demand for it (by contrast with that for the steel variety) was growing. Consequently, the likelihood of new entry into the plastic strapping sector in the event of an attempt by the parties to raise prices for their products, and in particular for the steel variety, was considered to provide an adequate safeguard to competition following the merger, given also that customers appeared to have at least some countervailing power. Accordingly the Commission decided to clear the operation.

#### *Countervailing buyer power*

159. The issue of the ability of one or more powerful customers to effectively neutralise the position of a potentially dominant supplier was also

considered in detail in *Enso/Stora* in respect of the market for liquid packaging board (used, e.g., for milk and fruit juice cartons). The effect of the merger would be to reduce the number of suppliers in this specialised market in the EEA to three, with the merged entity becoming by some way the leader in market share terms. Technical and commercial entry barriers were found to be high and total demand growth modest, making new entry unlikely. However, the market was also heavily concentrated on the demand side, with one firm in particular — Tetra Pak — accounting for a very substantial share. The two other main buyers (Elopak and SIG Combibloc) did not purchase such large quantities as Tetra Pak. However, they too appeared to possess a measure of countervailing power, since they imported 'strategic' quantities from the USA. Overall, the Commission's investigation suggested that these circumstances produced, exceptionally, a situation of mutual dependence between buyers and sellers, which the merger was unlikely to disturb, and the operation was cleared.

### **3. Remedies**

#### *Phase I*

160. As has already been noted, there was a significant number of cases in which it proved possible to use the Commission's new powers to resolve possible issues of dominance at phase I by means of a formal undertaking, without the need for the expense and delay of a phase II investigation. As remarked above, this procedure is not suitable for all cases which raise competition problems. If the problem, and a satisfactory solution for it, cannot be readily identified, if the remedy cannot be speedily implemented, or if the parties are unwilling or unable to cooperate with the Commission in achieving a solution within the short timescale allowed, then the normal process, i.e. a full phase II investigation, will be appropriate. It is, of course, essential that parties wishing to offer an undertaking at phase I do so within the prescribed time limit of three weeks from the date of notification. The time limit also means that it is vital that the remedy proposed is a genuine attempt by the parties to clearly resolve the competition problem as identified by the Commission, and thus remove the grounds for the 'serious doubts' about the operation's compatibility with the common market which are the

<sup>(1)</sup> Case No IV/M.970.



basis for opening phase II proceedings, rather than some kind of ‘opening offer’ which might be improved on later if the Commission insists. There is very little scope for substantive revision of proposals under this procedure. Where phase I undertakings are offered, the Commission needs, among other things, to ensure that Member States have an opportunity to comment on the remedy and, if appropriate, ‘market test’ it with interested third parties before deciding whether or not to accept it. The Commission is not obliged to accept any remedy at phase I, and it will not allow the process to be abused by parties holding back from offering a fully effective remedy until the last moment, in the hope that something less might prove sufficient.

161. Given the general framework laid down in the revised regulation, it was to be expected that the remedies adopted in most cases where phase I undertakings were accepted would be relatively simple and straightforward divestments of overlapping businesses, and such was the result <sup>(1)</sup>. The first case of this kind — *Owens-Illinois/BTR Packaging* <sup>(2)</sup> — was in many respects typical. This large transaction affected many sectors of the packaging industry. But the Commission found competition problems likely in only one area — namely the glass container (bottles, jars, etc.) market in the UK and Ireland — due to the significant overlap between the parties in this highly concentrated sector. The remedy agreed upon was that BTR would divest the whole of its glass container business, carried on at four plants operated by its subsidiary Rockware, together with its interest in an associated glass recycling business, to an appropriate third party.

162. In *Pakhoed/Van Ommereen* <sup>(3)</sup>, by contrast, agreement could not be reached on satisfactory undertakings, and the parties abandoned their merger plans. Overlaps of concern were found in regard to the supply of tank storage for various products in the harbours of Amsterdam, Rotterdam and Antwerp (collectively known as the ARA area). Following discussion with the Commission, satisfactory divestments were agreed for all these except petroleum products, where there would, however, have been a combined share post-merger of some 90 % at Rotterdam. Whether

or not this was the appropriate geographic market — as, in contrast to the parties, third parties considered it to be — was in the Commission’s view a complex issue, which could only be properly clarified in the course of a full phase II investigation. In the event, however, the parties decided, shortly before the deadline for a phase I decision, to abandon the merger rather than offer further divestment to address the Commission’s concerns.

### Phase II

163. Of the nine phase II cases decided in 1998, five involved clearances subject to formal undertakings regarding remedies, and in one other (*Enso/Stora*) the Commission took note, in clearing the merger, of certain assurances offered by the parties. The remedies in *Agfa-Gevaert/Du Pont* and *Hoffmann-La Roche/Boehringer Mannheim* have already been mentioned. In *Veba/Degussa* <sup>(4)</sup> the competition problem arose in the market for fumed silica — a speciality chemical for which the market was highly concentrated. Veba was active in this market on its own account, whereas Degussa’s activity was carried out via a joint venture with one of only two other suppliers — Cabot Hüls AG. The remedy adopted was for Veba to sell its stake in the joint venture to a third party independent of the merged company, thereby ensuring that there would remain three independent competitors on this market, as before.

164. In *Worldcom/MCI*, the remedy adopted — divestment of the overlap in the market of concern — was not itself a novel one. However, the undertaking also contained some additional provisions, designed to ensure the effectiveness of the divestment and to coordinate the process with the US authorities who were also examining the operation. It was important to ensure that the divestment was made to a new entrant, rather than to an existing player; otherwise customer choice would still be substantially reduced. In addition, there were requirements designed to prevent the merging parties from setting up a new business which competed with the one divested (and which, given the parties’ overall strength, could rapidly have neutralised it) and to provide the buyer of the divested business with the services necessary to operate it effectively. These included servicing/maintenance of the acquired

<sup>(1)</sup> See, for example, the following cases: IV/M.931 *Neste/Ivo*; IV/M.1082 *Allianz/AGF*; IV/M.1182 *Akzo Nobel/Courtaulds*; IV/M.1137 *Exxon/Shell*; IV/M.1339 *ABB/Elsag Bailey*.

<sup>(2)</sup> Case No IV/M.1109.

<sup>(3)</sup> Case No IV/M.1145.

<sup>(4)</sup> Case No IV/M.942.

network, and unrestricted access to the remaining Worldcom/MCI network through so-called 'peering' arrangements. The parties offered the same undertaking jointly to the Commission and the US DoJ, and the means of enforcement had to reflect the differing procedures of the two investigating authorities. Thus, although the Commission took, as usual, powers to appoint an independent trustee to oversee and, if necessary, carry out the divestment, the powers were held in reserve while the parties were given an opportunity to complete the divestment, under the supervision of the DoJ, before closing the merger. This helped to ensure that the divestment was completed in a matter of months — a short timescale for such a major divestment. The adoption of these provisions also reflects the particularly close cooperation with the US authorities in this case, as regards remedies and also other aspects. DoJ observers attended the hearing of the Commission case in Brussels, and there were also joint Commission/DoJ meetings with the parties — the first time such meetings had taken place.

165. In *Skanska/Scancem* <sup>(1)</sup>, the Commission's investigation focused on the markets for cement and concrete (both dry and ready-mixed) and concrete products in Sweden, Finland and Norway. The combined market shares produced by the merger in some markets were very high — as much as 90 % in cement. The merger also produced substantial vertical effects, however, since both parties also had substantial activities at all three main levels of the construction industry — raw materials (cement and aggregates), construction materials (concrete, concrete products) and, finally, construction itself. Most of the parties' competitors were not vertically integrated, further reducing their ability to compete effectively after the merger. In order to remedy the dominant positions identified, Skanska undertook to divest the whole of its shareholding in Scancem and furthermore to dispose of Scancem's cement business in Finland. The first part of the remedy is designed to end the vertical links which gave rise to concern; the second, to create an independent source of supply of cement of suitably high quality.

166. As already mentioned, *Enso/Stora* was cleared without conditions or obligations. The Commission took account of certain undertakings which had been offered by the parties (some

of them in the course of the first phase of the investigation) in order to address concerns about the position of Elopak and Combibloc in the more concentrated market for liquid packaging that would result from the merger. These were as follows. Enso would divest its shareholding in a joint conversion operation with Elopak, since this vertical link could weaken Elopak's countervailing power. The merged company would offer Elopak and Combibloc a price protection arrangement. Broadly, under this arrangement any changes in the prices charged to all three buyers will be the same unless justified by objective cost data; a measure designed to ensure that the smaller customers are not subject to unjustified price discrimination in comparison with Tetra Pak. Finally, the parties undertook not to oppose an application for a duty-free quota for liquid packaging board from outside the Community. The adoption of such a quota would make imports more competitive and thus encourage other suppliers.

#### 4. Referrals to Member States

167. Member States made four requests for a case falling under the merger regulation to be referred back to their national competition jurisdiction (Article 9). All were granted.

168. In *Vendex/KBB* <sup>(2)</sup> the request was made by the Dutch authorities, on the basis that the operation threatened to lead to the creation of a dominant position in non-food retailing in the Netherlands. The Commission accepted that consumer tastes and habits were important factors for competition in retailing markets, and that they showed marked national, and possibly even regional or local characteristics. Non-food retailing in the Netherlands could accordingly be considered a 'distinct market within a Member State' as required by Article 9. Both Vendex and KBB had major shares of such a market; they were, for example, the only retailers in the Netherlands who owned department stores there. There was accordingly a risk that a dominant position or positions would be created or strengthened by the merger. The precise boundaries of the geographic and product markets affected by the merger, and the precise impact of the merger on competition in those markets, could only be determined by a

<sup>(1)</sup> Case No IV/M.1157.

<sup>(2)</sup> Case No IV/M.1060.

more detailed investigation, which, given the sector and area concerned, could best be carried out by the relevant national competition authority rather than by the Commission. The merger had no significant effects in other Member States. Accordingly the Commission concluded that the criteria for reference back to a Member State under Article 9 of the merger regulation had been met, and that there were no other factors which could make it appropriate for the Commission to retain it. It therefore referred the case to the national authorities as regards the non-food retail sector in the Netherlands, and cleared the remainder of the operation.

169. In *Krauss-Maffei/Wegmann* <sup>(1)</sup>, the German authorities requested the referral of this joint venture on the ground that it threatened to create a dominant position in the market for the supply of armoured military vehicles in Germany. Mainly on the basis of purchasers' behaviour, the Commission found this to be an essentially national market, accessible to foreign competition only to a limited extent. The parties' activities were complementary; Krauss-Maffei was an important supplier of the vehicle chassis, and Wegmann of turrets. Nevertheless, by combining major suppliers of these key 'subsystems', the merger could give the parties a competitive advantage in providing a complete vehicle 'package' as a result of which they might be able to foreclose the vehicles market to other suppliers. The Commission's own investigations were unable to resolve these concerns. There were no significant effects in other markets, and no other factors which would make it appropriate for the Commission to retain the case. Accordingly the Commission decided to refer the case back to the German authorities as regards the market for armoured military vehicles, and to clear the remainder of the operation.

170. In *Alliance Unichem/Unifarma* <sup>(2)</sup>, the Italian authorities requested referral of this merger in the area of pharmaceutical wholesaling, because of the risk that it would create or strengthen a dominant position in this market in certain parts of Italy, notably in the north-west. The Commission found pharmaceutical wholesaling to be a market essentially regional or local in scope (as in previous cases in the sector), although the precise boundaries in a given case

could only be established after more detailed analysis — which the Italian authority was better placed to undertake. The merger would create the largest wholesaling group in the north-west of Italy, with a substantial share both in absolute terms and relative to that of competitors. Moreover there were shareholding links between the parties and some of their competitors. The nature of the market, with its requirements for a substantial stock and frequent and regular delivery service to pharmacies even in remote areas, made entry difficult, and there was no significant countervailing buyer power. Accordingly the Commission decided to refer the whole of the operation to the Italian authorities.

## 5. Rules and procedures

Several issues of interest in this area arose during the year.

### *Revised notices*

171. As part of the merger regulation revisions, the Commission introduced a new implementing regulation and a modified notification form (Form CO) <sup>(3)</sup> and published revised versions of its notices on the concept of undertaking concerned, the concept of concentration, turnover calculation, and full-function joint ventures <sup>(4)</sup>. For the most part the changes are technical or clarificatory and stem from the changes to the regulation itself. Perhaps the main substantive change concerns the ending of the distinction between 'concentrative' and 'cooperative' joint ventures as determinative for the applicability of the merger regulation. Jurisdiction will now be determined by applying the criterion of full functionality, on which the relevant notice gives some further guidance. It is intended that guidance on the substantive issues concerning cooperative aspects of full-function joint ventures will be issued in due course, after the Commission has had sufficient experience in dealing with them.

### *Incomplete notifications*

172. The total number of notifications concerning merger cases which have been declared incomplete by the Commission (pursuant to Arti-

<sup>(1)</sup> Case No IV/M.1153.

<sup>(2)</sup> Case No IV/M.1220.

<sup>(3)</sup> Commission Regulation (EC) No 447/98 of 1 March 1998.

<sup>(4)</sup> OJ C 66, 2.3.1998.

cle 4 of the implementing regulation) remains small, but has undergone a certain increase in recent years. The Commission is keen to find ways of reducing the number of incomplete notifications. Accordingly it was pleased to enter into discussions on this matter with representatives of the legal community, as a result of which some 'Best Practice Guidelines' have been drafted and published on the Directorate-General IV website on the Internet <sup>(1)</sup>.

173. The Commission found that in most cases where a notification was declared incomplete, there had been no, or only very minimal, discussion of the case or the content of the notification with the Commission before it was submitted. Absence of substantive pre-notification discussion (and/or submission of an advance draft of the Form CO) inevitably increases the risk that a notification will be found incomplete. There was a variety of reasons why it had been necessary to declare notifications incomplete, but three main categories could be identified. Some notifications could not be accepted because certain formal requirements were not met — for example, not all the relevant parties had been included, or the notification was made before sufficiently clear agreements to bring about the concentration were in existence. In others (possibly the largest single category) the information provided with the notification was insufficient — for example, as regards the markets considered to be affected by the merger and the parties' and competitors' shares in them — or insufficiently clearly presented, to enable a proper competition assessment to be undertaken in the time available. The latter point can be of particular importance in the — not uncommon — cases where the supporting documentation is voluminous and the possible markets numerous or complex. The third category comprised cases where the Commission's investigation revealed the existence of potential affected markets which had not been identified by the notifying parties — although, in some instances at least, they arguably could, and therefore should, have been — and on which further information was required which could not be provided and/or properly assessed within the time remaining.

174. The Commission recognises that parties to mergers, and their advisers, will want to minimise the amount of effort and delay required to

comply with Community merger control procedures. At the same time, however, the scale and complexity of many of the cases that it is required to decide on means that the information that has to be submitted at the outset will need to be extensive and detailed. It also needs to be relevant and focused on potential problem areas — even if the parties consider that they can show that the potential problems will not in fact materialise. The guidelines cover such aspects as prenotification, timing issues, the desirability of adopting a prudent approach to market definition and identification (e.g. where there is scope for debate over geographic market definition, providing market data on a national basis as well as a wider one such as the EU as a whole) and the important contribution that can be made by the attendance at prenotification meetings of representatives from the notifying parties who possess a detailed understanding of the commercial activities and markets involved. If followed, they will minimise the chances that a notification is declared incomplete, as well as the need for further information from the parties after the notification is made; although the Commission of course remains free to proceed with such declarations where appropriate.

#### *Re-examination after annulment by the Court — Kali und Salz*

175. In the light of the annulment of the original 1993 decision in this case — the first time a Commission decision in a merger case has been annulled — it was necessary for the Commission to re-examine it. This unprecedented process, which culminated in a decision to clear the merger at the first phase (Article 6(1)(b) of the merger regulation) gave rise to a number of procedural and substantive issues, of which the following are perhaps of most general interest.

176. The regulation (Article 10(5)) provides that, where the Court of Justice makes a judgment annulling a Commission decision in whole or in part, the time periods laid down in the regulation for initial examination of the case and for taking a decision on it are to start again from the date of the judgment. However, in the Commission's view it did not follow that the timetable would restart automatically. Article 10(1) provides that the initial examination period begins on the day after receipt of the notification or, if the notification is incomplete, on the day after receipt of a complete one. If the sole basis for that

<sup>(1)</sup> Under 'Mergers — Other documents' on the DG IV website — <http://europa.eu.int/comm/dg04>.

examination was the situation obtaining at the time of the original notification (so-called *ex tunc* basis), then other things equal, no further information would be necessary for the Commission to carry out its assessment and the original notification could be regarded as complete. If, on the other hand, the current situation has to be examined (*ex nunc* basis), then — in view of the passage of time and the possibility that relevant facts (e.g. market shares, number of competitors, etc.) had changed meanwhile — the original notification would not necessarily contain all the information that was likely to be required, and in that case it would be incomplete until the appropriate revised or additional information was provided.

177. In the case in point, the Commission considered a mixture of the two approaches to be appropriate. The Commission's jurisdiction to deal with the case under the regulation had not been contested. Accordingly the Commission did not find it necessary to re-examine that issue, and to that extent the approach may be regarded as *ex tunc*. The competitive assessment, on the other hand, needed to reflect the present situation (i.e., *ex nunc*). In its decision the Commission was required, as in more normal cases, to declare that the operation was or was not compatible with the common market — not whether it had been compatible at some time in the past. It was therefore necessary to undertake a completely new competitive assessment based on facts pertaining to the current market situation, including also those parts of the contested decision which had been upheld by the Court (such as the market definitions). It followed that the original notification was, at the time of the judgment, incomplete.

178. It was, however, found necessary to make an exception to the *ex nunc* basis of the competitive assessment in the case of the 'failing company defence' originally advanced by the parties, since the situation to which it related no longer obtained and could not be re-created. The acquired company MdK was subsequently restructured and transformed into a limited company under German law, and it would have been impossible to have separated this newly created economic entity into its former component parts for assessment purposes — e.g. in order to decide whether or not there might be a potential alternative acquirer.

179. On receipt of the complete notification, the Commission carried out an initial examina-

tion of the case on the above basis, in the usual way. It found that in the present circumstances no dominant position was likely to be created or reinforced in the relevant markets, which, as before, were those for potash-based products for agricultural use in Germany, and in the rest of the EU, respectively. In Germany, Kali und Salz GmbH remained a de facto monopolist. However, for the reasons outlined in the Commission's original decision and subsequently upheld by the Court (notably, the 'failing firm defence', which — see above — had to be examined '*ex tunc*') the proposed concentration would not be responsible for a deterioration in the competitive structure of the market. Moreover, following the ending of the commercial links between SCPA and Kali und Salz, SCPA was also now supplying Germany. In the rest of the EU, the combined market share of the parties was now below 50 %, and the export cartel that was observed in the original investigation had been ended, as had the close commercial links between Kali und Salz and the other main competitor, SCPA. Kali und Salz GmbH was now established as an independent competitor in France. Accordingly the operation was cleared (Article 6(1)(b) of the regulation).

#### *Fine imposed for breach of the regulation*

180. The Commission this year imposed the first fine on a company for failure to notify a concentration under the regulation in time, and for putting it into effect without the Commission's authorisation. In February, the Korean company Samsung was fined a total of ECU 33 000 in respect of the acquisition of AST Research Inc. (AST) <sup>(1)</sup>. The operation was notified to the Commission in April 1997. According to information in the Commission's possession, however, Samsung had already acquired control of AST for the purposes of the merger regulation in, or before, January 1996. The regulation (Article 4) requires that a notifiable concentration be notified not more than a week after the event — such as the acquisition of a controlling interest — giving rise to the concentration. Moreover it must not be implemented until it has been authorised, whereas this acquisition had been completed and implemented for some time before it was notified. In setting the amount of the fine, the Commission took into account, in mitigation, the fact

<sup>(1)</sup> Case No IV/M.920.

that no damage to competition had resulted, that the infringement had not been intentional and the parties had eventually notified the operation, and that Samsung had recognised the breaches and cooperated with the Commission in its investigations. Nevertheless the breaches had continued for a considerable period. Moreover, as an impor-

tant company with significant European activities, Samsung could be expected to be aware of the Community's merger control rules. The relatively small amount of the fines imposed took account of these factors and also of the fact that this was the first time that the Commission had taken such action.

### **Box 7: Implementation of the new Article 2(4) of the merger regulation**

The new merger regulation came into force on 1 March 1998, incorporating a number of amendments which extended the regulation's scope to include joint ventures known as full function cooperative joint ventures. This amendment brings into the ambit of the merger regulation a number of joint ventures which would formerly have been examined under Regulation 17/62.

Article 2(4) applies to all joint ventures constituting a concentration within the meaning of Article 3, albeit only 'to the extent that (they have as their) object or effect the coordination of the competitive behaviour of undertakings that remain independent'. In 1998, 13 of the 76 joint venture cases decided under the amended merger regulation necessitated an analysis under Article 2(4). The most in-depth analyses were made in cases within the telecommunications and Internet areas. So far, remedies to settle Article 2(4) concerns have been included in only one case (Case No IV/M.1327 — *Canal+/CDPQ/BankAmerica* of 3 December 1998, see below). A second-phase examination was opened in one other case (Case No JV.15 — *BT/AT&T*, see below).

In the *Canal+/CDPQ/BankAmerica* case, the spill-over effects were found on a market upstream from the joint venture, namely in the market for the wholesaling of TV rights in Spain (although the notified transaction concerned the downstream market in France). On the Spanish market, Canal+ had strong or dominant positions on the pay-TV market and on the upstream market for content. The notified transaction was found, through the balance of power in the joint venture, to give Canal+ a strong incentive to favour Cableuropa (controlled by CDPQ and BankAmerica) in the sale of Spanish pay-TV rights. The remedies accepted will eliminate the possibility of discrimination against other competitors on the Spanish pay-TV market.

The *Canal+/CDPQ/BankAmerica* case shows the potential use of Article 2(4). Firstly, the notified transaction did not create or strengthen the dominant position of Canal+; rather, it gave rise to a situation where the company's commercial incentives would change so that there would be an increased risk of discrimination against other pay-TV operators in Spain. Secondly, the remedy basically sets a benchmark for Canal+'s future behaviour on the Spanish market for pay-TV content, but leaves the notified transaction structurally unchanged. In the absence of Article 2(4), this remedy could have been more difficult to accept under the merger regulation.

The Commission dealt with four cases in the Internet field.

The *Telia/Telenor/Schibsted* case is worth describing in detail as it helped to establish the Commission methodology in handling Article 2(4) issues under the merger regulation. Telia, the incumbent telecoms operator in Sweden, Telenor the Norwegian incumbent and Schibsted, a Norwegian publishing and broadcasting company, formed a joint venture to provide Internet gateway services and offer website production services. Internet gateway services are designed to enable users of the Internet to access content more easily. This content may be provided by the gateway service provider or other third parties and may be free of charge to the user (normally financed by advertising) or content for which the user has to pay for access ('paid-for content').

In its analysis of the case, the Commission found that the supply of gateway services in themselves did not amount to a market as such, but that advertising on web pages and paid-for content could be considered relevant markets. These two markets were relevant markets for the purposes of dominance, as was the production

of websites. Website production was also considered to be a candidate market for the analysis of coordination under Article 2(4) as the joint venture and two of the parent companies (Telia and Telenor) were present on this market. The other candidate market was the provision of dial-up Internet access where both Telia and Telenor (through its stake in the Swedish telecommunications company Telenordia) were present.

In its analysis of the operation, the Commission had two distinct situations to assess under Article 2(4). First, the website production market involved the presence of the joint venture and two of the parent companies on the same market. The combined market share of the parent companies and the joint venture was less than 10 % on the narrowest possible and most unfavourable market definition to the parties. Accordingly, the Commission concluded that, even if the parent companies were to coordinate their activities on this market, it would not amount to an appreciable restriction of competition. In the second part of its Article 2(4) reasoning, on the dial-up Internet access market in Sweden, the Commission found that that market was characterised by high growth, relatively low barriers to entry and low switching costs. The market shares which Telia and Telenordia enjoyed on this market were 25–40 % and 10–25 % respectively, but the Commission found that these market shares were of limited significance in such a growing market and, therefore, the market structure is not conducive to the coordination of competitive behaviour. In addition, the likelihood of coordination was reduced further by the relative size of the dial-up Internet access market (which accounted for over 90 % of Internet revenue in Sweden) compared with the size of the other markets on which the joint venture would be active. The Commission therefore concluded that there would be no likelihood of the parent companies coordinating their behaviour on this market.

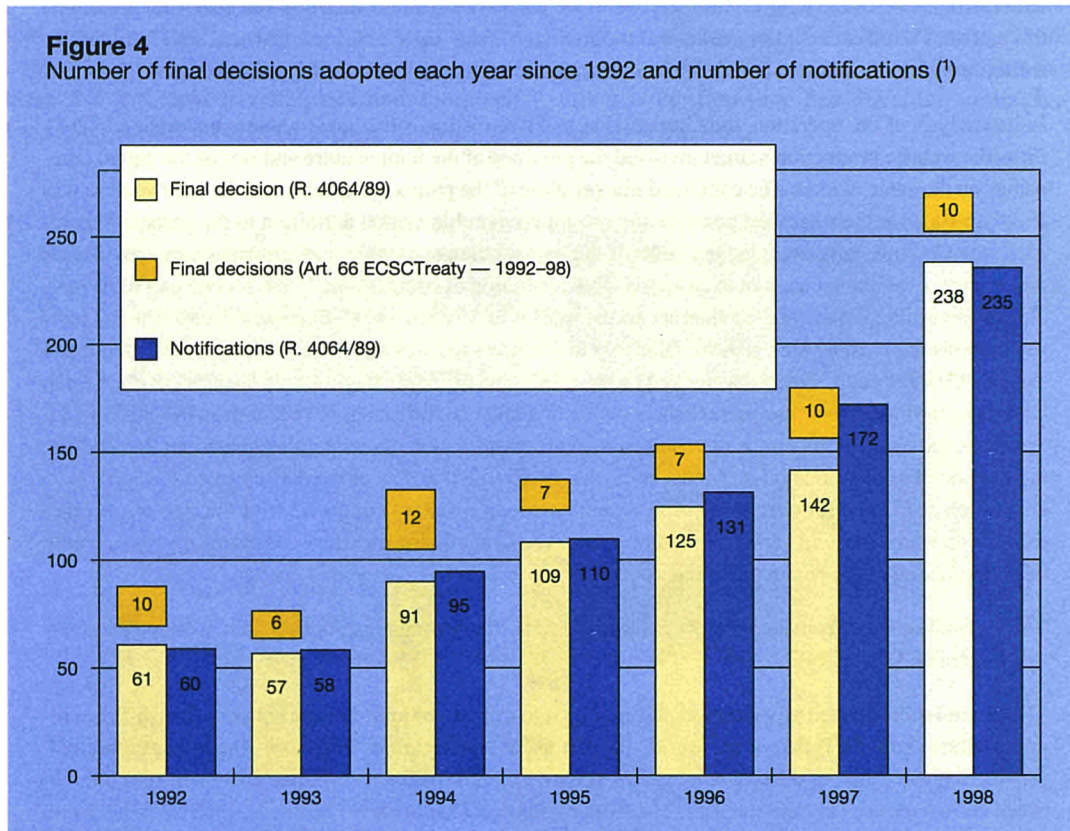
The Commission also considered eight cases in the field of telecommunications which involved an investigation under Article 2(4).

The Commission decided to open a detailed enquiry into a proposed joint venture between British Telecommunications and AT&T, two of the world's largest telecommunications operators. The joint venture will provide a broad range of telecommunications services to multinational corporate customers and international carrier services to other carriers. The Commission decided to carry out a second-phase inquiry into the effects of the venture on several global telecommunications markets and also some in the UK. Subsequent to its preliminary inquiry, the Commission has expressed concerns in the following areas: the parties' combined market position on the markets for the provision of global telecommunications services to large multinational companies and for international carrier services, the effect of the creation of the joint venture being the possible creation or strengthening of a dominant position for certain telecommunications services in the UK; and the possible coordination effects of the proposed joint venture in the UK between ACC, a wholly owned subsidiary of AT&T, and between BT and Telewest, in which AT&T through TCI will have a jointly controlling stake. The final decision is expected in April 1999.

The Commission's first cases to have included an examination of Article 2(4) effects have already displayed some common themes. The relative size of the Article 2(4) market and the joint venture's market, which is assessed for dominance purposes, has been important in assessing the likelihood of coordination. Normally, the commercial incentives, and hence the risk of coordination, are smaller if the joint venture's market is significantly smaller than the Article 2(4) market. However, this cannot be considered a sufficient condition for the absence of coordination between the parent companies. The nature of the markets themselves will also play a part in the Commission's assessment. The nature of existing links between the parent companies is also relevant for the determination of causality between the notified operation and the Article 2(4) effects, though their existence does not automatically imply that there is no effect. Again, other factors would have to be taken into account before that analysis can be made.

## C — Statistics

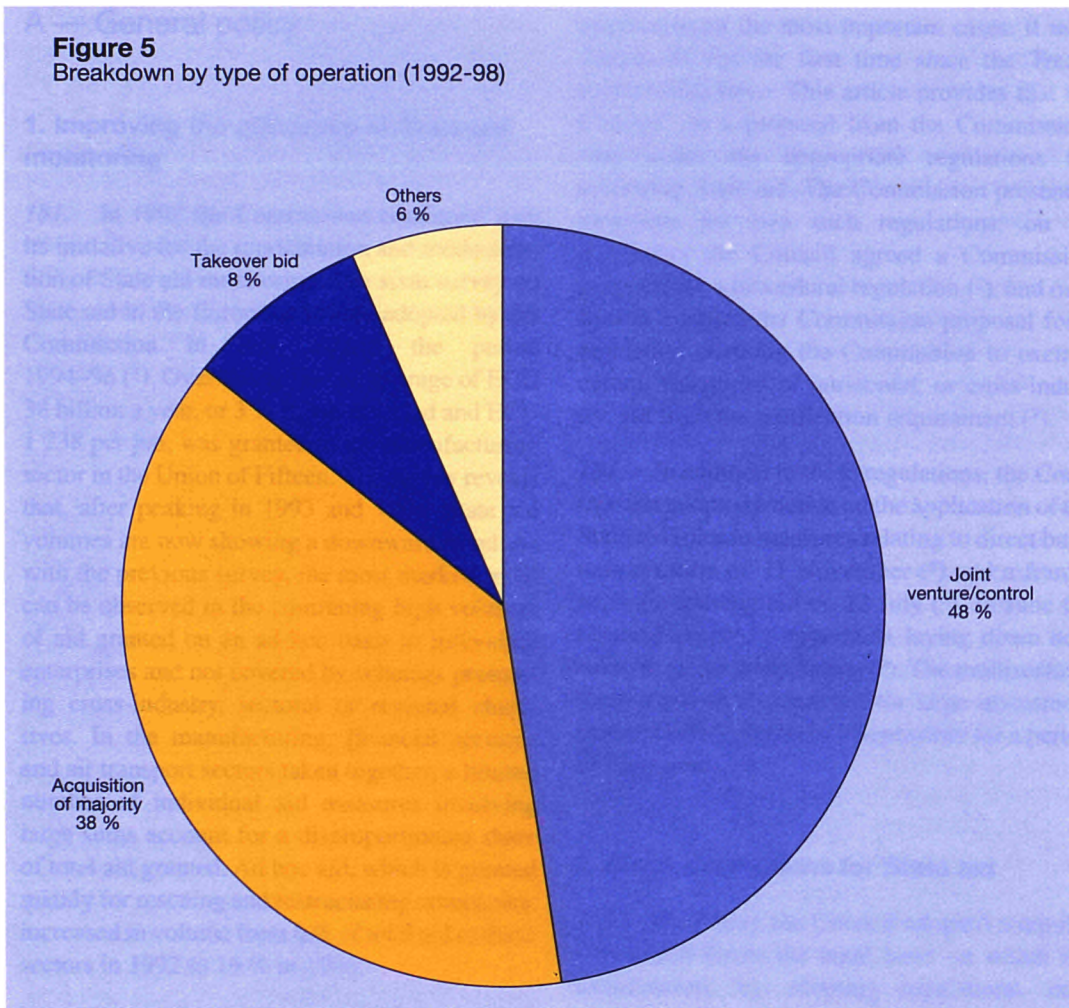
**Figure 4**  
Number of final decisions adopted each year since 1992 and number of notifications <sup>(1)</sup>



<sup>(1)</sup> The Commission has modified the set of figures concerning final decisions (Regulation (EEC) No 4064/89) to take account of decisions adopted under Article 9(3) (partial referral to Member States): +1 decision in 1992, +1 decision in 1994, +6 decisions in 1997.



**Figure 5**  
Breakdown by type of operation (1992-98)





### III — STATE AID

#### A — General policy

##### 1. Improving the efficiency of State aid monitoring

181. In 1998 the Commission continued with its initiative for the reorientation and modernisation of State aid monitoring. The sixth survey on State aid in the European Union, adopted by the Commission in July, covers the period 1994–96<sup>(1)</sup>. Over this period an average of ECU 38 billion a year, or 3 % of value added and ECU 1 238 per job, was granted to the manufacturing sector in the Union of Fifteen. The survey reveals that, after peaking in 1993 and 1994, State aid volumes are now showing a downward trend. As with the previous survey, the most marked trend can be observed in the continuing high volumes of aid granted on an ad hoc basis to individual enterprises and not covered by schemes promoting cross-industry, sectoral or regional objectives. In the manufacturing, financial services and air transport sectors taken together, a limited number of individual aid measures involving large sums account for a disproportionate share of total aid granted. Ad hoc aid, which is granted mainly for rescuing and restructuring companies, increased in volume from 6 % of total aid to these sectors in 1992 to 16 % in 1996.

182. High levels of State aid continue to create distortions of competition. A tough State aid policy and close monitoring remain important if Europe is to become more competitive on world markets. At the European Council meeting in Cardiff, Member States emphasised the need to promote competition and to reduce distortions such as State aid. Only thus can the continuing disparities between the levels of aid granted by Member States be attenuated, lending support to the objective of economic and social cohesion.

183. The aim of the modernisation drive is to improve transparency and legal certainty, to make the State aid monitoring system more efficient, to reinforce vetting, in particular in cases involving large volumes of ad hoc aid, and to simplify the monitoring system for more minor cases. In 1998 the Commission focused its efforts on simplifying and clarifying the procedural rules and on concentrating resources on closer

monitoring of the most important cases. It used Article 89 for the first time since the Treaty entered into force. This article provides that the Council, on a proposal from the Commission, may make any appropriate regulations for reviewing State aid. The Commission presented proposals for two such regulations: on 16 November the Council agreed a Commission proposal for a procedural regulation<sup>(2)</sup>, and on 7 May it adopted the Commission proposal for a regulation enabling the Commission to exempt certain categories of horizontal, or cross-industry, aid from the notification requirement<sup>(3)</sup>.

184. In addition to these regulations, the Commission adopted a notice on the application of the State aid rules to measures relating to direct business taxation on 11 November<sup>(4)</sup> and a framework on training aid on 22 July<sup>(5)</sup>. In June the Council adopted a regulation laying down new rules on aid to shipbuilding<sup>(6)</sup>. The multisectoral framework on regional aid for large investment projects is to apply from 1 September for a period of three years<sup>(7)</sup>.

##### 2. Block exemptions for State aid

185. On 7 May the Council adopted a regulation which forms the legal basis on which the Commission, by adopting regulations, may exempt en bloc certain types of horizontal State aid measures from the notification requirement<sup>(8)</sup>. Aid for SMEs, R & D, environmental protection and employment and training, together with regional aid schemes may thus be declared exempt. In addition, the Commission may adopt a regulation in connection with the *de minimis* rule. The Commission has started to prepare the block exemptions.

186. The reason for this regulation is that the Commission has to concentrate its efforts on the more important cases and should be relieved of the task of assessing the compatibility of most

<sup>(1)</sup> COM(1998) 417 final.

<sup>(2)</sup> Proposal for a Council regulation (EC) laying down detailed rules for the application of Article 93 of the EC Treaty (OJ C 116, 16.4.1998).

<sup>(3)</sup> Council Regulation (EC) No 994/98 of 7 May 1998 on the application of Articles 92 and 93 of the Treaty to certain categories of horizontal State aid (OJ L 142, 14.5.1998).

<sup>(4)</sup> OJ C 384, 10.12.1998.

<sup>(5)</sup> OJ C 343, 11.11.1998.

<sup>(6)</sup> OJ L 202, 18.7.1998.

<sup>(7)</sup> OJ C 107, 7.4.1998.

<sup>(8)</sup> Council Regulation (EC) No 994/98 of 7 May 1998, referred to above.

standard cases, where such assessment is a mere formality. The areas covered by the enabling regulation have been subject to guidelines and frameworks for some time. Member States devise their aid schemes according to these rules. It can therefore be assumed from experience that these horizontal aid measures are usually compatible with the common market. However, the Commission retains the right to monitor them and to assess whether a given aid measure complies with the Treaty. Member States will have to keep a register of aid measures and send the Commission annual reports. Incorrect application of the rules exempting aid from the notification requirement will not only be subject, as at present, to the consequences of a decision finding aid to be unlawful under Commission proceedings but may also be referred to a national court.

### 3. Procedural regulation

187. The most important legislative effort in the area of State aid policy in 1998 was the codification of the rules on the Commission's procedures for monitoring State aid. On 18 February the Commission adopted, pursuant to Article 88 of the EC Treaty, a proposal for a regulation<sup>(1)</sup> which seeks to codify the various aspects of the procedure for reviewing aid, while strengthening the Commission's monitoring powers where appropriate. On 16 November the Council meeting on industrial affairs reached political agreement on the regulation. The Council will be able to adopt it formally at the beginning of 1999, once Parliament has delivered its opinion. Thus for the first time, there will be a basic instrument on Community monitoring of State aid which incorporates all procedural rules in a single, coherent text.

188. The regulation is important for two reasons. First, it codifies the various procedures already in use which are based on Commission practice and on the case law of the Court of Justice. Thus, all these fragmentary rules will from now on be replaced by a transparent, binding instrument. Codifying all the procedural rules in one regulation will doubtless have an impact on State aid policy in the medium to long term. In addition to providing legal certainty, the regulation will make the

rules more accessible and give this area of policy a higher profile. This should result in all those concerned being more familiar with the rules and becoming more involved. However, the regulation does more than simply codify the procedures already in place. It will also enable the Commission to intensify its monitoring of aid in certain respects; it gives the Commission new powers which should better equip it in its work to combat unlawful aid and aid misuse.

189. In certain circumstances, for example, the Commission will be able to require the immediate provisional recovery of aid unlawfully granted until it has taken a decision on the compatibility of the aid with the common market. The regulation also lays an obligation in principle on the Commission to require the recovery of aid unlawfully granted which is not compatible with the common market. The Member State must recover the aid without delay in accordance with its domestic-law procedures, provided they allow the immediate and effective execution of the Commission's decision. Furthermore, it must take all necessary measures, including provisional ones, to obtain this result.

Another new principle established by the regulation is that the Commission may undertake on-site monitoring visits in cases where it has serious doubts about whether decisions authorising aid are being complied with. If required, Member States must afford the necessary assistance to the Commission officials to enable them to carry out their inspection.

In order to ensure legal certainty in respect of unlawful aid granted some time ago, the regulation lays down a ten-year limitation period: the Commission may no longer order recovery if 10 years have passed since the aid was granted.

190. Lastly, the regulation is also intended to speed up procedures. It therefore sets a time limit on the formal investigation procedure of eighteen months from the date on which proceedings are initiated; at present there is no limit on the time it takes to complete the procedure. When this period is up, the Member State may request the Commission to take a decision, which the Commission must do within two months of receiving the request. With the same end in view (shortening the decision-making process), the regulation provides that from now on the initiation of proceedings will be published in the authentic language version only, accompanied by a summary notice in the oth-

<sup>(1)</sup> Proposal for a Council regulation (EC) laying down detailed rules for the application of Article 93 of the EC Treaty, referred to above.

er languages. Final decisions, however, will continue to be published in full in all official languages.

#### 4. State aid contained in tax systems

191. The Commission's notice on the application of the State aid rules in the field of direct business taxation <sup>(1)</sup> is in line with its commitment to strict control of State aid in all its forms. This commitment complements the efforts of Member States within the Code of Conduct Group to put an end to harmful tax competition. On the basis of this notice, the Commission will assess or reassess, case by case, all specific tax schemes in the Member States. The notice sets out the circumstances in which tax measures fall under the State aid rules and outlines the procedural consequences of their doing so.

192. The document indicates that, to fall under the State aid rules, a tax benefit must be specific in the sense of benefiting certain enterprises or the production of certain goods. The tax benefit may be provided in various forms, including lower rates of taxation, tax deductions, accelerated depreciation and tax debt cancellation. Under the notice, a tax benefit will be regarded as specific where it derives from an exception to the generally applicable tax rules, unless this exception is justified by the nature of or rationale for the system, or from a discretionary practice on the part of the tax authorities. Tax rules that are, for example, aimed at a certain region, a certain sector or a certain function within an enterprise (such as financial services) will be regarded as specific under the State aid rules. In the *Irish corporation tax cases* <sup>(2)</sup>, the Commission made clear that it no longer considers the preferential treatment of manufacturing over services to be a general measure. Developments in the concept of State aid over time and a stricter interpretation of Article 87 of the EC Treaty may lead to a revision of earlier Commission decisions, in which case the Commission will propose appropriate measures under Article 88(1) of the EC Treaty.

## B — Concept of aid

193. Any State aid that falls foul of all four tests in Article 87(1) of the EC Treaty is in principle incompatible with the common market. More

specifically, to be caught by Article 87(1), the aid must (i) confer an economic advantage on the recipient, (ii) be granted by the State or through State resources, (iii) be granted selectively to 'certain undertakings' or to 'the production of certain goods' and thus distort competition, and (iv) affect trade between Member States. The form in which the aid is provided (grant, interest rebate, tax relief, loan guarantee, etc.) is not relevant to the application of Article 87.

194. The way in which measures are classed as State aid within the meaning of Article 87(1) is of importance to national authorities, obliged as they are under Article 88(3) to notify the Commission of any plans to grant aid or alter existing aid measures. The issue becomes relevant for countries in the process of negotiating the incorporation of Community law into their own legal systems in order to prepare for their accession to the EU. The definition is also important to national courts with jurisdiction to rule on the existence and legality of State aid and to formulate and address requests for preliminary rulings to the Court of Justice under Article 234 of the EC Treaty. Finally, guidance on the definition of State aid is crucial to potential aid recipients inasmuch as they are required to examine with diligence the legality of the aid they hope to receive.

In the course of 1998 the Commission took a number of decisions which are of interest as regards the concept of State aid. These decisions are described below.

### 1. Advantage to a firm or firms

195. An economic advantage may be conferred through a variety of means and circumstances. The Court of First Instance ruled in *Ladbroke* <sup>(3)</sup> that the decision of the French Minister for the Budget to allow Pari Mutuel Urbain to defer payment of part of the State's share of levies on bets taken on horse races had the effect of conferring a financial advantage on that organisation and thus improved its position on the market for bet taking, both at home and abroad.

196. In *Istituto Poligrafico e Zecca dello Stato* <sup>(4)</sup>, the Commission found that an economic ad-

<sup>(1)</sup> OJ C 384, 10.12.1998.

<sup>(2)</sup> Cases E-1/98 and E-2/98 (OJ C 395, 18.12.1998).

<sup>(3)</sup> Case T-67/94 *Ladbroke Racing v Commission* (1998) ECR II-1.

<sup>(4)</sup> Case C-64/98 (ex NN-95/97), not yet published in the Official Journal.

vantage may be conferred on publicly controlled undertakings through the conclusion of exclusive contracts to supply services or goods to the State where those contracts are remunerated above the normal market rate. The contracts may simply help to ensure the recipients' continued operation and enable them to cross-subsidise their commercial activities. The recipient in the above case operates in the coinage sector, which is not the subject of intra-Community trade. However, it won two contracts with non-EU countries, and was suspected of having defeated its European competitors through cross-subsidisation.

197. In its decision concerning rescue aid to *Case di Cura Riunite* <sup>(1)</sup>, the Commission considered that the provision of a State guarantee to this Italian health institution did not confer an economic advantage. Given that the recipient's weak financial situation would not allow it to obtain credit on the market, the Commission considered that the aid element equalled the entire amount of credit obtained as a result of this guarantee mechanism. However, the State was Case di Cura's main customer and owed the company a significant amount derived from normal commercial transactions, exceeding by more than four times the guaranteed credit. Since the State could not be subjected to liquidation proceedings, as opposed to any other debtor in similar circumstances, Case di Cura was at a significant disadvantage compared with its competitors selling services to private customers. The guarantee was granted only until such time as the State should repay its outstanding debts. In this case, the State was not granting any unjustified support to the undertaking but only reducing some of the financial disadvantages which it itself had caused the undertaking by not repaying its outstanding debts.

198. An economic advantage may be gained as a result of the terms on which undertakings have access to or exploit infrastructures. Undertakings allowed to benefit from an infrastructure development, e.g. by moving to a business park, obtain a gratuitous advantage if they do not pay a fee. In its decision to initiate proceedings under Article 88(2) in respect of a package of aid granted by the Austrian authorities to Lenzing Lyocell <sup>(2)</sup>, the Commission noted that certain infrastructure developments were made specifically for the benefit of this enterprise and questioned whether

a private investor operating a business park would provide company-specific development free of charge.

199. In particular with regard to site decontamination, the Commission takes into account the 'polluter pays' principle and, when applicable, the Community guidelines on State aid for environmental protection <sup>(3)</sup>. In a case involving State funding provided to an Austrian company carrying out decontamination work on a site <sup>(4)</sup>, the Commission decided that an economic advantage was conferred on the site owner in the form of savings on decontamination costs. Under domestic law, the landowner bears subsidiary liability after the polluter. In the case in point, the polluter was being wound up and had ceased trading. It was thus possible to conclude that the polluter could no longer derive any advantage from the decontamination.

200. In the wider context of the provision of State assistance to property developers, it was considered in the case of the *English Partnerships scheme* <sup>(5)</sup> that funding provided in order to cover the estimated gap between the value of the undeveloped asset plus the cost of its development and the allegedly lower value of the finished project constituted State aid within the meaning of Article 87(1). The funding made available under this scheme is meant to provide a quantifiable incentive to investors/developers to carry out work on a site whose unattractive condition or location discourages private investors.

201. The private investor principle has been applied regularly by the Commission. On the basis of this criterion, the Commission assesses whether the State, when assisting public undertakings or private undertakings partially owned by it, does so on more favourable terms than would a private investor operating under normal market conditions. If so, the State's action involves State aid within the meaning of Article 87(1). The Court of First Instance delivered two rulings which refer to the application of this criterion. In *Cityflyer Express* <sup>(6)</sup>, it held that, where the Commission concludes that a private investor would not have acted on the terms on which the State has acted, it must further examine which terms would have been satisfac-

<sup>(1)</sup> Case N-461/97 (OJ C 149, 15.5.1998).

<sup>(2)</sup> Case C-61/98 (ex NN-189/97), (OJ C 9, 13.1.1999).

<sup>(3)</sup> OJ C 72, 10.3.1994.

<sup>(4)</sup> Case C-24/98 (ex N-663/97) *Kiener Deponie Bachmanning* (OJ C 201, 27.6.1998).

<sup>(5)</sup> Case E-2/97.

<sup>(6)</sup> Case T-16/96 *Cityflyer Express v Commission* (1998) ECR II-757.

tory to the private investor. In *BP Chemicals* <sup>(1)</sup>, the Court ruled that, even if the State has already twice acquired stakes in a company, thereby twice granting State aid to that company, this should not automatically mean that a third capital injection may not be considered on its own merits as an autonomous investment and be examined in the light of the private investor criterion. In the case in question, however, considering that the first two capital injections were not profitable, the Court asked the Commission to determine whether a private investor would have made a third capital injection.

202. The Commission concluded in the *Ponsal* case <sup>(2)</sup> that no aid was involved in a waiver of public debts on the occasion of this enterprise's liquidation; its conclusion was based on alternative calculations submitted by the national authority confirming that other means of liquidation permitted under national law would have entailed higher losses. The authorities also provided evidence that they had complied fully with domestic insolvency law.

203. In assessing the selling price of a public steel company <sup>(3)</sup>, the Commission concluded, on the basis of a detailed examination of the two methods used by independent auditors, namely property evaluation and future cash-flow evaluation, that the private investor criterion was met. Price levels were calculated according to a pessimistic and an optimistic scenario; the actual price was deemed to correspond to the market level because it fell within this range. The argument that added value was obtained after the company's flotation on the stock exchange serves to prove after the event that the above analysis was valid, but is not sufficient evidence in itself that the private investor criterion was met and therefore that the existence of aid could be ruled out.

204. In deciding to initiate Article 88(2) proceedings in respect of the granting of preferential electricity tariffs by the French public enterprise EDF to certain paper mills <sup>(4)</sup>, the Commission examined, among other issues, whether there was any commercial logic in EDF's behaviour. The

Commission doubted whether this discriminatory behaviour was justified by a commercial rationale, i.e. vying with competitors for customers while at the same time managing to cover at least variable and certain fixed costs.

205. In two cases involving companies entrusted with the operation of a service of general economic interest (the construction of the natural gas network and gas distribution in Denmark) <sup>(5)</sup> the Commission concluded that a series of tax-relief measures granted to these companies constituted State aid within the meaning of Article 87(1). The tax relief was offered to enterprises which had not been chosen by a public tendering procedure, in order to offset their initial investment in the construction and expansion of the natural gas system. However, the Commission decided to approve this aid on the basis of Article 86(2) of the EC Treaty since it was demonstrated that application of the competition rules would hinder performance of the particular tasks assigned to the recipients. In applying Article 86(2), the Commission accepted that trade would not be affected to an extent contrary to the Community interest, mainly because the measures in question would be renounced after 2000 in the context of the implementation of the EU directive aimed at liberalising the internal gas market <sup>(6)</sup>.

## 2. Origin of resources

206. On the topic of conferring an advantage through legislation, the Court of Justice examined a number of joined cases in which an undertaking was exempted from compliance with the generally applicable legislation on fixed-term employment contracts <sup>(7)</sup>. The Court concluded that this exemption did not transfer State resources directly or indirectly to the undertaking in question.

## 3. Specificity criterion

207. It is important, especially in the case of taxation or social policy measures, to distinguish between the situation whereby the beneficiaries are certain undertakings or the production of cer-

<sup>(1)</sup> Case T-11/95 *BP Chemicals v Commission*, not yet reported.

<sup>(2)</sup> Case C-32/97 *Porcelanas del Norte (Ponsal)/Comercial Europa de Porcelanas (Comepor)*, not yet published in the Official Journal.

<sup>(3)</sup> Case NN-83/98 *Preussag Stahl*, acquisition of the company by the German authorities, not yet published in the Official Journal.

<sup>(4)</sup> Case C-39/98 (ex NN-53/98), not yet published in the Official Journal.

<sup>(5)</sup> Cases N-449a/97 and NN-50/98, not yet published in the Official Journal.

<sup>(6)</sup> Directive 98/30/EC of the European Parliament and of the Council of 22 June 1998 (OJ L 245, 4.9.1998).

<sup>(7)</sup> Joined Cases C-52/97, C-53/97 and C-54/97 *Viscido and Others v Ente Poste Italiane* (1998) ECR I-2629.

tain goods, as specified in Article 87(1), and that whereby the measures in question have a cross-sectoral impact and are intended to favour the whole of the economy. In the latter case, there is no State aid within the meaning of Article 87(1), but a general measure.

208. In the *Ladbroke* judgment <sup>(1)</sup> the Court of First Instance had the opportunity to elaborate on the specificity criterion. The fact that aid awarded to an economic actor may indirectly benefit other actors whose activities depend on the activity of the recipient does not suffice to conclude that the aid is a general measure not caught by Article 87(1). It may possibly afford scope for allowing a derogation on the basis of Article 87(3)(c) (aid to promote the development of certain economic activities). The undertaking *Pari Mutuel Urbain* is exclusively competent to organise a specific type of betting on horse racing in France and is subject to a tax regulation which is specific to the horse racing sector in France. The Court agreed with the Commission that the special regulations which were being examined in this case should not be regarded as a derogation from the general tax rules, but should be viewed in the context of the tax system applied in the horse racing sector. Furthermore, it ruled that the temporary or permanent nature of the measures was of no relevance to the interpretation of Article 87(1). Also, the fact that the measures did not address an ad hoc operation was irrelevant in the light of the established case law that only the effects of aid matter in order to characterise it as State aid, and not its causes or aims.

209. Payments made to the redundant workers of an insolvent company after termination of their employment contracts, in order to ensure more suitable unemployment cover for them constitute a measure which gives them additional coverage going beyond the company's legal obligations. The Commission concluded in one case <sup>(2)</sup> that such a measure did not amount to State aid to the insolvent company, but to extraordinary assistance having a basic positive effect on the social protection position of the workers.

210. In July the Commission re-examined the preferential treatment of manufacturing over service companies in the system of corporation tax

in Ireland. In 1980, at a time when trade in services was less liberalised than in the late 1990s, the Commission had considered that this treatment accorded to the manufacturing sector, virtually the only sector open to competition, constituted a general measure. In its decision of 22 July <sup>(3)</sup>, proposing appropriate measures under Article 88(1) of the EC Treaty, the Commission decided that this preferential treatment constituted not only State aid but operating aid which could no longer be authorised in the context of Ireland's loss of 87(3)(a) assisted region status. It therefore needed to be eliminated through the adoption of a unified tax rate for both the manufacturing and the service sector of the economy.

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

211. As the Court of First Instance ruled in *Flemish Region v Commission* <sup>(4)</sup>, when the State confers even a limited advantage on an undertaking which is active in a sector characterised by intense competition, there is a distortion or risk of distortion of competition. In order to establish the impact on trade between Member States it is sufficient to conclude that the beneficiary exercises, even partially, activities involving significant trade between Member States.

212. In the case of a British scheme concerning the extension of tax relief, namely the 'non-fossil-fuel obligation' in favour of electricity generators using renewables <sup>(5)</sup>, the Commission considered that trade in electricity between Member States was likely to be affected, notably as regards trade between the UK and France via the cross-Channel link.

213. Aid to enterprises in support of foreign direct investment may affect trade between Member States. It is possible that competitors of the recipient may be trying to increase their market share in the third country in question unaided. This position was confirmed in the Commission's negative final decision on the first notified case of foreign direct investment aid granted to a large enterprise <sup>(6)</sup>. The Commission examined

<sup>(1)</sup> Case T-67/94, see footnote 104.

<sup>(2)</sup> Case C-44/97 (ex NN-78/97), aid in favour of the Spanish company Magefesa and its successors, not yet published in the Official Journal.

<sup>(3)</sup> Cases E-1/98 and E-2/98 (OJ C 395, 18.12.1998).

<sup>(4)</sup> Case T-214/95 (1998) ECR II-717.

<sup>(5)</sup> Case N-153/98, not yet published in the Official Journal.

<sup>(6)</sup> Case C-77/98 (ex 99/97), direct investment in China by the Austrian company Lift GmbH, not yet published in the Official Journal; see Section C.3 below.



whether the derogation in Article 87(3)(c) could apply. It should be noted that it is the Commission's practice to authorise foreign direct investment aid to small and medium-sized enterprises if it is granted within the terms of the guidelines on State aid to SMEs.

## C — Assessing the compatibility of aid with the common market

### 1. Horizontal aid

#### 1.1. Research and development

214. In applying the 1996 Community framework for State aid for research and development <sup>(1)</sup>, the Commission is particularly concerned to ensure that the aid notified to it is actually granted to research and development projects and acts as an incentive for these projects to be carried out. In 1998 the Commission initiated Article 88(2) proceedings in several cases involving aid for research and development where there were doubts about at least one of these conditions; these were in the fields of electronics (Sican) <sup>(2)</sup>, paper (KNP Leykam) <sup>(3)</sup>, packaging (Biotec Biologische Naturverpackungen GmbH) <sup>(4)</sup> and printers (Océ NV) <sup>(5)</sup>.

215. In the *Sican* case, the Commission, following complaints, found that aid of more than ECU 100 million had been disbursed without having been notified by the German authorities. Moreover, the information provided by those authorities was not such as to enable the Commission to assess the aid's compatibility with the Community framework on R & D aid. In the *Océ* case, the Commission decided to launch a formal investigation as it had serious doubts about whether the work which had been carried out could be defined as research and development: the information provided to the Commission suggested that the aid planned by the Dutch authorities was for work which was very close to the market and which could not therefore be defined as research and development within the meaning of the Community

framework. The Austrian authorities decided to abandon their plans for KNP Leykam. The German authorities also decided to withdraw their notification in the *Biotec* case, finding that part of the aid came under a scheme previously approved by the Commission and deciding to withdraw the rest of the aid.

216. In numerous other cases, the Commission found that the notified aid met the criteria laid down in the Community R & D framework (in particular as regards the research and development character of the projects and the incentive effect of the aid) and was therefore compatible with the EC Treaty. An example is the *Commend* case notified jointly by the Dutch <sup>(6)</sup> and French <sup>(7)</sup> authorities: this Eureka project involves Austrian, Belgian, Dutch, French and German manufacturers and has as its objective the acquisition of know-how which is largely upstream of the development of marketable products. The project corresponds to industrial research within the meaning of the framework. The aid granted by the Dutch and French Governments should enable cooperation at Community level on an ambitious technological project which will also allow widespread diffusion of its results. The Commission therefore considered that the planned aid was an incentive to the recipients to step up their R & D efforts and to cooperate on work which was more ambitious and involved higher risks than the work they would otherwise have carried out.

#### 1.2. Employment and training

217. One of the major challenges facing the Community is finding ways to improve the employment situation. Promoting a 'high level of employment' has become a matter of common concern to Member States. The new title on employment that is to be inserted in the EC Treaty requires Member States to develop a coordinated strategy for employment and for promoting a skilled, trained and adaptable workforce and labour markets responsive to economic change. The important part played by training, both in enhancing the Community's competitiveness and in creating and maintaining jobs, has encouraged Member States to promote investment in training. The Commission has set up various initiatives in

<sup>(1)</sup> OJ C 45, 17.2.1996.

<sup>(2)</sup> Case C-20/98 (ex NN-166/97, NN-169/97 and NN-170/97) (OJ C 307, 7.10.1998).

<sup>(3)</sup> Case C-23/98 (ex N-895/96) (OJ C 296, 24.9.1998).

<sup>(4)</sup> Case C-8/98 (ex N-237/97 and NN-151/97) (OJ C 219, 15.7.1998).

<sup>(5)</sup> Case C-18/98 (ex N-939/96) (OJ C 270, 29.8.1998).

<sup>(6)</sup> Case N-506/97 (OJ C 192, 19.6.1998).

<sup>(7)</sup> Case N-664/97 (OJ C 192, 19.6.1998).

the training sphere. It has endeavoured to integrate the training dimension and its favourable approach thereto into other Community policies, including competition policy.

218. On 22 July the Commission adopted a framework on training aid <sup>(1)</sup>. This specifies in which circumstances public financing provided to firms for the purpose of training their workers may fall within the scope of the competition rules relating to State aid. Only a very small proportion of public financing provided for training workers is actually covered by the framework. Most State measures in this field do not constitute aid pursuant to Article 87(1), but rank as general measures. This applies to measures directly targeted at workers irrespective of the firm in which they work or to measures which are open to all firms without discriminating, for example, through tax incentives. This kind of measure does not raise any competition concerns and is, on the contrary, encouraged by the Commission.

219. However, where State assistance benefits certain firms only by reducing the costs they would normally have to bear in order to train their workers, this gives them an advantage over their competitors and is therefore likely to distort competition. The framework sets out the criteria which the Commission will use to assess the compatibility of such aid with the common market. The criteria are intended to avoid distortions of competition between firms where such distortions cannot be justified by the training objectives.

220. When assessing compatibility, the Commission takes a very favourable view of aid which effectively benefits workers and improves their employability. Training providing workers with skills that are readily transferable to other firms effectively increases their employability. Authorisable aid amounts are therefore greater for this kind of measure than for company-specific training which is of less benefit to the workers themselves.

The Commission also considers that lower levels of spending on training in small and medium-sized enterprises and in the most disadvantaged areas, and the difficulties faced by certain categories of worker on the labour market, may justify larger amounts of aid.

These principles are reflected in a range of intensity thresholds below which aid may be considered compatible with the common market. The thresholds vary between 25 % of expenditure by large firms on specific training projects and 90 % of expenditure on general training projects by SMEs in Article 87(3)(a) areas whose workers are considered to be at a disadvantage on the labour market.

### 1.3. Environment

221. In 1998 the Commission had various opportunities to further clarify its interpretation of the guidelines on State aid for environmental protection <sup>(2)</sup>. On one occasion, it stressed that environmental considerations did not justify aid exceeding the intensity authorised for regional aid where the recipient did no more than adapt its plant to the legal requirements, notwithstanding the fact that those requirements were particularly strict because the plant was situated in a nature reserve <sup>(3)</sup>.

222. The Commission authorised, for limited periods of up to five years, operating aid for the use of renewable forms of energy <sup>(4)</sup>. Also, in several Dutch cases with regard to environmental taxes on waste treatment <sup>(5)</sup>, the Commission applied its practice of approving under certain conditions operating aid for environmental purposes.

### 1.4. Rescue and restructuring aid

223. Aid for rescuing and restructuring firms in difficulty accounts for a high proportion of the aid given to individual recipients on an ad hoc basis. The sixth State aid survey <sup>(6)</sup>, published in July and covering the period 1994–96, found that the high levels of ad hoc aid in the manufacturing, financial services and air transport sectors reported in the fifth survey had continued. The Commission remains concerned at this trend, given the particular distortions which can be caused by the maintenance in existence of firms which would otherwise exit the market.

<sup>(2)</sup> OJ C 72, 10.3.1994.

<sup>(3)</sup> Case C-41/96, Netherlands, aid in favour of the construction of a hydrogen peroxide factory (OJ L 171, 17.5.1998).

<sup>(4)</sup> Cases N-752/97, green electricity, not yet published in the Official Journal, and N-153/98, non-fossil-fuel obligation for renewables, not yet published in the Official Journal.

<sup>(5)</sup> Cases N-513, 755 and 754/97 (OJ C 156, 21.5.1998) and Case N-813/97, not yet published in the Official Journal.

<sup>(6)</sup> COM(1998) 417 final.

<sup>(1)</sup> OJ C 343, 11.11.1998.

224. The Commission continued to work on tightening the guidelines on aid for rescuing and restructuring firms in difficulty. Pending completion of this process the Commission extended the validity of the existing guidelines <sup>(1)</sup> until March 1999 <sup>(2)</sup>. In applying the guidelines the Commission has in many cases made clear that aid for restructuring cannot be found compatible with the common market if there is no viable restructuring plan.

## 2. Regional aid

225. In December, in accordance with its decision taken in December 1997 when it set the ceiling for regional aid coverage for the period from 2000 to 2006 at 42.7 % of the Union's population, the Commission updated the national coverage ceilings on the basis of the most recent data (1994–96 for per capita GDP and 1995–97 for unemployment). It has informed Member States of their respective ceilings. They are now in possession of all the information they need to notify their regional aid maps, which will be valid for the period from 2000 to 2006. They have been asked to do so before 31 March 1999, so that the exercise can be completed in good time, failing which no regional aid can be granted after 31 December 1999.

226. Following the adoption of the guidelines on national regional aid in December 1997, the Commission has been examining all schemes notified since then in the light of the new rules; however, it has not applied the new intensities, which will enter into force on 1 January 2000. Moreover, with a view to ensuring equal treatment and pursuant to Article 88(1) of the Treaty, it proposed appropriate measures to the Member States in February with two objectives in mind: first, to set an expiry date of 31 December 1999 for the current maps of areas eligible for regional aid so that they would have a uniform expiry date which also matched that of the Structural Funds, and second, to amend, if necessary, all existing schemes due to remain in force after 31 December 1999 so as to ensure that they are applied in a manner consistent with the new rules as from 1 January 2000. All the Member States accepted these appropriate measures. In cooperation with

them, the Commission is monitoring the measures' implementation.

227. This year the Commission took the last two decisions on regional maps in the Member States drawn up under the previous regional aid guidelines <sup>(3)</sup>. The countries concerned are Sweden <sup>(4)</sup> and Austria <sup>(5)</sup>. The maps in question will expire on 31 December 1999. The Commission also approved the new regional aid scheme for Greece, concerning the granting of national regional aid throughout the country <sup>(6)</sup>.

## 3. Aid to outward foreign direct investment

228. Government support measures for foreign direct investment constitute State aid. Nevertheless, they may be compatible with the common market if, apart from their effect on the competitiveness of Community industry, they promote other Community objectives such as the development of SMEs. When assessing aid to outward foreign direct investment by SMEs, the Commission therefore continued to apply the guidelines on aid to SMEs.

229. Aid to large firms, however, is assessed on a case-by-case basis. In the *Lift GmbH* case <sup>(7)</sup> the Commission took a negative decision on aid for an investment in China. It found that the aid might affect the competitive situation of European competitors in the relevant market. In its decision to initiate the proceedings the Commission had announced that it would check, among other criteria, the necessity of the aid and its intensity in the light of the international competitiveness of the European industry and/or the risks involved for an investment project in certain third countries. The Member State failed to prove that, for a global player with a turnover of ECU 180.5 million, aid amounting to ECU 0.13 million was a necessary precondition for establishing a factory in China, where the company had already rented premises.

With this decision the Commission has no intention of prejudging its future policy on State aid in support of foreign direct investment. It does not rule out the possibility that foreign direct invest-

<sup>(1)</sup> OJ C 368, 23.12.1994.

<sup>(2)</sup> Act of extension published in OJ C 74, 10.3.1998.

<sup>(3)</sup> OJ C 212, 12.8.1988.

<sup>(4)</sup> Case N-65/97 (OJ C 89, 25.3.1998).

<sup>(5)</sup> Case N-482/98, not yet published in the Official Journal.

<sup>(6)</sup> Case NN-59A/98, not yet published in the Official Journal.

<sup>(7)</sup> Case C-77/98 (ex 99/97), referred to above.

ment by large undertakings may be eligible for State aid where it can be established that the project in question does not create an incompatible distortion of competition within the EEA. Furthermore, in this context, any potential element of export subsidisation should be carefully examined in the light of the Community's international obligations and, in particular, the prohibition of export subsidies contained in the WTO Agreement on Subsidies and Countervailing Measures (ASCM).

## 4. Sectoral aid

### 4.1. Sectors subject to specific rules

#### 4.1.1. Shipbuilding

230. The Commission's commitment to phasing out operating aid for shipbuilding was impeded by the continued absence of ratification of the OECD shipbuilding agreement by the United States. In June the Council therefore adopted a regulation establishing new rules on aid to shipbuilding <sup>(1)</sup> to succeed the seventh Council directive on aid to shipbuilding. It will enter into force on 1 January 1999 and will apply until 31 December 2003. It will lead to a shift away from operating aid (which will be abolished at the end of 2000) to other forms of support such as closure aid, aid for research and development and environmental protection, restructuring aid, regional investment aid for improving the productivity of existing installations, and investment aid for innovation. The current ceilings for operating aid of 9 % (4.5 % for smaller vessels and conversions) will be maintained until their abolition on 31 December 2000. The regulation provides for the Commission to undertake a regular review of the market situation.

231. On 21 January and on 29 July the Commission submitted its first two monitoring reports to the Council on the restructuring of the publicly owned shipyards in Spain and of MTW-Schiffswerft and Volkswerft Stralsund in Germany <sup>(2)</sup>. The reports provided information on the progress made in implementing the restructuring plans and on compliance with the conditions attached

to the Commission's approval of the associated aid such as capacity reductions and limitations on production.

With respect to compliance with capacity limitations the Commission found reason to initiate the procedure provided for in Article 88(2) of the Treaty to examine the exceeding of new building capacity limitations by the German yard Kvaerner Warnow Werft <sup>(3)</sup>.

232. One of the few opportunities the Commission has had to address the misuse of previously approved aid by the recipient was in the negative final decision concerning the misuse of ECU 400 million by Bremer Vulkan Group <sup>(4)</sup>. Bremer Vulkan had received the aid on condition that it be used exclusively for the restructuring of its two East German shipyards MTW Schiffswerft Wismar and Volkswerft Stralsund. In fact, the ECU 400 million was used for other purposes, mainly for the benefit of other subsidiary companies of Bremer Vulkan Verbund AG that had become insolvent in the meantime. The Commission decided that the German Government should recover the misused aid as part of the insolvency proceedings. In addition, the German Government should take all suitable steps to recover any partial amounts from companies previously belonging to the Bremer Vulkan Group.

233. The Commission also placed under scrutiny the control of development aid in shipbuilding, where it is often not easy to verify whether the conditions are subsequently complied with. In February the Commission partly terminated the procedure with a negative decision in a case in which Germany had granted development aid in connection with the building of a dredger by Volkswerft Stralsund and its sale to PT Rukindo in Indonesia <sup>(5)</sup>. The development project had been approved by the Commission in 1994 on condition that the vessel be used only in Indonesia. However, since 1995 the vessel had been employed in Malaysia for more than 300 days. The Commission considered that the aid had been misused and that it was incompatible with Article 4(7) of the shipbuilding aid directive. It therefore requested that the development aid be repaid with interest.

<sup>(1)</sup> Council Regulation (EC) No 1540/98 of 29 June 1998 establishing new rules on aid to shipbuilding (OJ L 202, 18.7.1998).

<sup>(2)</sup> SEC(1998) 71 final and SEC(1998) 1313 final.

<sup>(3)</sup> Case C-66/98 (ex NN-113/98), not yet published in the Official Journal.

<sup>(4)</sup> Case C-7/96.

<sup>(5)</sup> Case C-22/97, German development aid to Indonesia, not yet published in the Official Journal.

234. In May the Commission initiated proceedings under Article 88(2) in respect of a French development aid project <sup>(1)</sup>. The aid was to be granted in connection with the sale of two cruise vessels by Chantiers de l'Atlantique to Renaissance Financial, which employ the vessels in French Polynesia. Renaissance Financial was domiciled in Paris and was a subsidiary of the American company Renaissance Cruise Inc. When assessing development projects the Commission checks that the actual shipowner is domiciled in the beneficiary developing country. Since in this case the owner was domiciled in Paris, the Commission was not satisfied that the aid proposal complied with the requirement. Also, the Commission was not convinced that the project had a genuine development content, given that the immediate beneficiaries were the investors investing in the company in Paris. In fact, it appeared that French Polynesia would benefit only in the sense that from time to time passengers would visit the islands.

#### 4.1.2. Steel

235. In 1998 the Commission continued to apply the sixth Steel Aid Code <sup>(2)</sup>. No use has yet been made of the new possibility to grant aid for partial closures; however, several companies have taken advantage of the new provisions on environmental protection, which allow greater aid amounts for companies whose investment results in a significantly higher level of environmental protection than that required by mandatory standards. None the less, the Commission has taken negative decisions where it has found that aid does not pursue the objectives laid down in the code. This applies, for example, to the *ESF Feralpi* case <sup>(3)</sup>, in which the Commission ordered that the aid be recovered, considering that it was not possible to make a distinction between different types of activity within an ECSC company and that aid approved by the Commission for a stated purpose could not be used for other purposes.

#### 4.1.3. Coal

236. On 3 June the Commission took three decisions concerning the coal industry in Spain. First,

it authorised <sup>(4)</sup> Spain to grant supplementary financial assistance for the 1994, 1995 and 1996 financial years totalling ECU 416.7 million (ESP 67 053 million). Of this amount, ECU 127.1 million (ESP 20 452 million) was linked to current production, while ECU 289.6 million (ESP 46 601 million) went to cover inherited liabilities. Furthermore, the Commission authorised <sup>(5)</sup> the grant of financial assistance for the 1997 financial year totalling ECU 1 068.3 million (ESP 177 234 million). Of this amount, ECU 704.5 million (ESP 116 877 million) was linked to current production, while ECU 363.8 million (ESP 60 357 million) went to cover inherited liabilities. Finally, it approved <sup>(6)</sup> aid for 1998 totalling ECU 1 164.8 million (ESP 193 817 million). Of this amount, ECU 762.3 million (ESP 126 855 million) is linked to current production, while ECU 402.4 million (ESP 66 962 million) covers inherited liabilities.

237. On 20 July the British coal producer RJB Mining plc filed an action before the Court of First Instance of the European Communities to obtain annulment of the decisions concerning Spain <sup>(7)</sup>.

238. On 10 June the Commission authorised <sup>(8)</sup> Germany to grant financial assistance for the 1997 financial year totalling ECU 5 331.2 million (DEM 10 470.4 million). Of this amount, ECU 4 919.1 million (DEM 9 661.2 million) was linked to current production, while ECU 412.1 million (DEM 809.2 million) went to cover inherited liabilities. On 20 July RJB Mining filed an action against this decision also before the Court of First Instance to obtain its annulment <sup>(9)</sup>.

239. On 29 July the Commission, following two complaints lodged by a British anthracite producer, declared <sup>(10)</sup> illegal the use of ECU 7.1 million (DEM 13.55 million) in State aid granted by Germany and originally authorised <sup>(11)</sup> for the 1996 financial year. ECU 3.5 million (DEM 6.8 million) in State aid granted by Germany for the 1997 financial year before the relevant Commission decision had been taken has also been declared illegal. The recipients (Preussag

<sup>(1)</sup> Case C-37/98 (ex N-124/98) (OJ C 307, 7.10.1998).

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

<sup>(3)</sup> Case C-75/97, not yet published in the Official Journal.

<sup>(4)</sup> Decision 98/635/ECSC (OJ L 303, 13.11.1998); see also 1997 Competition Report, point 240.

<sup>(5)</sup> Decision 98/636/ECSC (OJ L 303, 13.11.1998).

<sup>(6)</sup> Decision 98/637/ECSC (OJ L 303, 13.11.1998).

<sup>(7)</sup> Case T-111/98 R.

<sup>(8)</sup> Decision 98/687/ECSC, OJ L 324, 2.12.1998).

<sup>(9)</sup> Case T-110/98 R.

<sup>(10)</sup> Decision not yet published in the Official Journal; see also 1997 Competition Report, point 241.

<sup>(11)</sup> Decision 96/560/ECSC (OJ L 244, 25.9.1996).

Anthrazit GmbH and Sophia Jacoba GmbH) have been paying back the aid.

240. On 29 July the Commission authorised<sup>(1)</sup> the acquisition of Saarbergwerke GmbH and Preussag Anthrazit GmbH by Ruhrkohle AG. The new company, Deutsche Kohle AG, will control all German coal production. On 29 September RJB Mining brought a further action before the Court of First Instance for annulment of this decision<sup>(2)</sup>.

241. On 2 December the Commission, having examined the German coal industry restructuring plan for the years 1998–2002, authorised<sup>(3)</sup> Germany to grant financial assistance for the 1998 financial year totalling ECU 4 803.6 million (DEM 9 427 million). Of this amount ECU 4 288.4 million (DEM 8 416 million) is linked to current production, while ECU 515.2 million (DEM 1 011 million) covers inherited liabilities.

#### 4.1.4. Motor vehicle industry

242. In 1998 the Commission applied the new Community framework for State aid to the motor vehicle industry<sup>(4)</sup>. Among the decisions taken in the course of 1998, the following may be mentioned.

243. The Commission decided<sup>(5)</sup> not to raise any objections to training aid granted by the Portuguese Government to AutoEuropa, a joint venture set up in 1991 by Ford and Volkswagen near Setubal. The Commission had approved regional investment aid and training aid for the plant to be built and brought into operation. The implementation of the 1991 decision approving this aid was monitored and it was found that the company had continued to receive training aid after the launch of production in 1995. With the cooperation of the Portuguese authorities and the company, the sums paid out in excess of those allowed under the framework on training aid have been recovered.

244. The Commission approved regional aid totalling ECU 38 million to be granted to LDV Ltd for an investment project involving the manufacture of a new range of vans in a joint venture with Daewoo<sup>(6)</sup>. The investment will be made in

an LDV plant in Birmingham, United Kingdom. This is the first decision adopted under the current motor vehicle industry framework involving an alternative site in a central or eastern European country. Instead of concentrating all its European production of light commercial vehicles at its plant in Lublin, Poland, Daewoo has decided to use LDV's existing facilities in Birmingham to manufacture some of the vehicles.

245. The Commission continued to monitor the restructuring plans for Seat SA<sup>(7)</sup> and Santana Motor SA<sup>(8)</sup> in Spain, together with major investment projects whose implementation is spread out over several years, and payments made by the national authorities in the *Fiat Mezzogiorno*<sup>(9)</sup> case in Italy.

#### 4.1.5. Synthetic fibres industry

246. In 1998 the Commission continued to be vigilant in applying the latest code on State aid to the synthetic fibres industry, which came into force in 1996 for a period of three years<sup>(10)</sup>. The Commission decided on 16 December to extend the validity of the code until August 2001, at which point a decision could be taken on whether or not to bring the industry within the scope of the multisectoral framework on regional aid to large investment projects<sup>(11)</sup>. Among the decisions taken this year the following may be mentioned.

247. The Commission decided to terminate the Article 88(2) proceedings it had initiated in March 1997 in respect of the Portuguese Government's proposal to award aid for investments by the rope and cord producer Cordex SA<sup>(12)</sup>. In the course of the proceedings the Portuguese authorities agreed to modify their original notification by omitting from the list of eligible costs those activities which came within the scope of the code, including support for new capacity for the extrusion of polypropylene filament yarn. Since the project fell within an approved scheme, the Commission was able to authorise aid totalling ECU 2.69 million.

248. On 25 March the Commission decided to initiate Article 88(2) proceedings in respect of the Spanish authorities' proposal to award State aid

<sup>(1)</sup> Decision not yet published in the Official Journal.

<sup>(2)</sup> Case T-156/98 R.

<sup>(3)</sup> Decision not yet published in the Official Journal.

<sup>(4)</sup> OJ C 279, 15.9.1997.

<sup>(5)</sup> Case NN-36/97 (OJ C 208, 4.7.1998).

<sup>(6)</sup> Case N-420/98, not yet published in the Official Journal.

<sup>(7)</sup> Case C-34/95, 96/257/EC (OJ L 88, 5.4.1996).

<sup>(8)</sup> Case C-1/95, 97/17/EC (OJ L 6, 10.1.1997).

<sup>(9)</sup> Case C-45/91 (OJ L 117, 13.5.1993).

<sup>(10)</sup> OJ C 94, 30.3.1996.

<sup>(11)</sup> OJ C 24, 29.1.1999.

<sup>(12)</sup> Case C-17/97(ex N-639/96) (OJ C 207, 3.7.1998).

amounting to ECU 1.2 million to the synthetic fibres producer Brilén SA <sup>(1)</sup>. The investment project concerned the technological rationalisation and upgrading of the company's polyester yarn production plant. Since the project appeared to involve an increase in capacity for one of the fibres covered by the code on aid to the synthetic fibres industry (polyester filament yarn), the Commission had doubts about whether the proposed aid would fulfil the authorisation criteria laid down in the code.

249. The Commission decided to initiate Article 88(2) proceedings in respect of the German authorities' proposal to award State aid for a greenfield investment by a newly created company Saxonylon Textil GmbH <sup>(2)</sup>, a subsidiary of the Singaporean Toloram Group. The aid would support an increase in capacity of polyamide, textile and industrial filament yarn. Furthermore, it was proposed to award the maximum regional aid intensity permitted in the former East Germany and the aid did not seem likely to contribute directly to the restructuring and reduction of capacity in the synthetic fibres industry as a whole in that region.

250. Finally, the Commission decided to terminate with a final partly negative decision Article 88(2) proceedings initiated in October 1997 in respect of aid granted to the viscose and synthetic fibres producer SNIACE SA <sup>(3)</sup>.

#### 4.1.6. Textiles and clothing

251. In view of the specific nature of the textile and clothing industry, the multisectoral framework on regional aid for large investment projects <sup>(4)</sup>, which entered into force on 1 September, provides for specific treatment of this sector. An aid measure in support of new investment in the textile industry must be notified individually if the overall project cost exceeds ECU 15 million (instead of the of ECU 50 million project-cost threshold for other sectors), the intensity exceeds 50 % of the eligible ceiling in the region in question and the aid per job created or maintained exceeds ECU 30 000 (instead of ECU 40 000) <sup>(5)</sup>.

<sup>(1)</sup> Case C-25/98 (ex N-851/97) (OJ C 199, 25.6.1998).

<sup>(2)</sup> Case C-63/98 (ex N-362/98), not yet published in the Official Journal.

<sup>(3)</sup> Case C-68/97 (ex NN-118/97), not yet published in the Official Journal.

<sup>(4)</sup> OJ C 107, 7.4.1998.

<sup>(5)</sup> See 1997 Competition Report, point 210.

#### 4.1.7. Transport

252. In 1998 the Commission adopted 35 decisions on aid in the transport sector.

##### *Air transport*

253. In the air transport sector, the Commission continued to monitor compliance with the conditions laid down in decisions authorising restructuring aid to airlines:

254. On 3 June it decided not to object to payment of the second instalment, worth ECU 258.23 million (ITL 500 billion), of an increase in the capital of Alitalia. This decision followed the positive decision adopted on 15 July 1997 with regard to a capital increase for the company totalling ECU 1420.26 million (ITL 2 750 billion) payable in three instalments provided certain conditions were met, ensuring in particular that the restructuring plan was monitored, that arrangements for its implementation were transparent and that Alitalia's problems were not passed on to its competitors. While stressing the importance of making good the delays in cost reductions, particularly with regard to crews, the Commission found that the restructuring plan had been implemented satisfactorily and that Italy had given further undertakings intended both to ensure that the aid would not be used to finance promotional campaigns and to enable competing airlines to benefit from traffic rights to non-EEA countries.

255. On 14 August the Commission authorised restructuring aid to Olympic Airways comprising loan guarantees, a reduction in the airline's debt and a capital injection. This aid, initially authorised in October 1994, had been partially frozen for more than two years owing to the Greek Government's failure to comply with certain conditions of the authorisation decision. The Commission was satisfied that the Greek authorities were now acting in accordance with the undertakings given and that the aid, which is part of a revised restructuring plan extended until 2002, was compatible with the competition rules. However, it reduced the authorised capital injection from ECU 165 million (GRD 54 billion) to ECU 125 million (GRD 40.8 billion), extended until 2002 the conditions initially laid down and made its decision subject to compliance with further conditions.

256. Following the annulment by the Court of First Instance of the Commission decision of 27

July 1994 <sup>(1)</sup> authorising the recapitalisation of Air France to the tune of ECU 3.05 billion (FRF 20 billion), owing to insufficient reasoning on two points, one relating to the purchase of new aircraft and the other to the competitive position of Air France on routes outside the European Economic Area, the Commission decided on 22 July to adopt a new decision authorising the same amount and clarifying its position regarding the two points raised by the Court. It stressed first of all that the aid was granted in the context of a restructuring plan considered convincing by the Court, that the air transport sector was expanding rapidly, that there was no change in the number of seats offered by Air France and that all the aid granted to the airline was intended to reduce its debt burden and not to finance the purchase of new aircraft. Secondly, the Commission pointed out that the general conditions laid down offered sufficient guarantees in themselves with regard to the non-EEA routes, in particular since they involved a reduction in market share throughout the world, since the aid had a much greater effect on the competitive situation for intra-EEA routes than for other routes, and since too tight a restriction on Air France's capacity on non-EEA routes would essentially benefit the airlines of non-member countries.

257. In cases other than those involving restructuring aid, the Commission authorised the following:

- on 29 July, pursuant to Article 87(2)(a), social aid to residents of the Canary and Balearic islands for intra-archipelago flights; a similar decision was adopted on 27 August in respect of aid granted to residents of Madeira for flights between the island and the rest of Portugal; and
- on 11 November, under the Community guidelines on State aid for environmental protection, a grant of ECU 150 944 (NLG 332 637) awarded by the Netherlands to Martinair for the installation of new equipment designed to reduce pollutant emissions.

258. However, on 21 January the Commission adopted a negative final decision in respect of two grants of ECU 24 407 and 6 696 respectively (BEF 984 600 and 270 116) to be paid by the Flemish Region to the airline Air Belgium and the tour operator Sunair in exchange for their using Ostend airport. None the less, the Commission did not oppose the payment to Sunair of a sum of ECU 111 500 (BEF 4.5 million) corresponding to the fi-

nancing by the Flemish Region of a campaign to promote Ostend and Antwerp airports.

#### *Sea transport*

259. In the maritime transport sector, the Commission authorised, pursuant to the Community guidelines on State aid to maritime transport <sup>(1)</sup>, several aid schemes designed to reduce tax and social security contribution burdens on shipping companies. Where tax relief schemes were applied to companies part of whose fleet operated under a non-Community flag, the Commission asked the Member States concerned, in accordance with the guidelines, to submit a report enabling it to assess the effects of the aid scheme on the Community-registered fleet and on the employment of Community seafarers.

By a decision adopted on 7 April the Commission initiated Article 88(2) proceedings in respect of several aid measures connected with the restructuring of the French shipping company Brittany Ferries owing, on the one hand, to serious doubts about the positive effect of the measures on the company's viability and, on the other, to the risk of distortion of competition between shipping companies from different Member States. On 9 December the Commission decided to extend the proceedings to include a plan to grant FRF 80 million more in aid to Brittany Ferries and any other additional aid granted in connection with the company's restructuring.

On 18 February the Commission also initiated Article 88(2) proceedings in respect of aid granted by Spain to the shipping company Transmediterránea under a public service contract which the company had with the Spanish State. The Commission had doubts about the terms of the contract and the circumstances in which it was awarded.

On 9 December the Commission initiated Article 88(2) proceedings in respect of various presumed aid measures to the French company Corsica Marittima, a subsidiary of SNCM, a shipping company with public service obligations to provide transport between Corsica and mainland France.

On the same day the Commission adopted a negative final decision in respect of measures

<sup>(1)</sup> Joined Cases T-371/94 and T-394/94 *British Airways and Others v Commission* (1998) ECR II-2405.



planned by the Irish Government to reduce the labour costs borne by shipowners as a consequence of employing Community seafarers on board their ships. Contrary to the requirements of the Community guidelines on State aid to maritime transport, ships other than only those registered in a Member State would benefit from the measures and the Commission therefore considered them to be incompatible with Article 87 of the Treaty.

#### *Port sector*

On 22 December the Commission initiated proceedings under Article 88(2) of the Treaty in respect of aid measures to reduce operating costs for port companies in Italy. The Commission had serious doubts about the compatibility of the measures, which supplement those intended for the restructuring of the Italian port sector, themselves the subject of a parallel investigation under Article 88(2).

#### *Rail transport*

260. In the rail transport sector, the Commission decided on 22 December not to object to a plan to grant aid notified by the British authorities and involving additional measures to finance the construction, maintenance and management of the CTRL, the rail infrastructure for high-speed trains between London and the Channel Tunnel. In assessing the notified aid, the Commission drew a clear distinction between aid to the infrastructure manager and aid to the train operator. Since the CTRL forms part of the Paris–Brussels–Cologne–Amsterdam–London line, one of the 14 priority projects in the context of the development of trans-European networks, the Commission considered that the measures to assist the infrastructure manager were compatible with the common market pursuant to Article 87(3)(b) of the Treaty. Regarding the aid for the train operator, the Commission took account of the fact that the aid was intended to offset infrastructure utilisation charges, and it therefore authorised the aid pursuant to Article 3(1)(b) of Regulation (EEC) No 1107/70.

#### *Road transport*

261. In the road transport sector, the Commission decided on 4 February to initiate proceedings under Article 88(2) of the Treaty in respect of a toll-relief system on the Tauern motorway in

Austria <sup>(1)</sup>, since the measures constituted operating aid. It also decided on 25 March to initiate proceedings in respect of aid to road haulage and combined transport in Italy <sup>(2)</sup>, given its doubts about the admissibility of the measures under Article 87(3)(c) of the Treaty.

262. On 1 July the Commission adopted a partly negative final decision on a Spanish aid scheme for the purchase of industrial vehicles. It considered that the aid granted to public bodies and public service providers at local level and to natural persons and SMEs in sectors other than transport which conducted local or regional business only did not constitute aid within the meaning of Article 87(1) of the Treaty. All other aid granted by the Spanish authorities was considered incompatible and the Commission therefore ordered its recovery. On 28 October the Commission decided to initiate proceedings in respect of the extension of the same scheme in 1997.

263. Lastly, in its White Paper ‘Fair payment for infrastructure use’ <sup>(3)</sup> adopted on 22 July, the Commission stressed the growing importance of the role played by State aid rules as Member States turn more to private companies for the development and management of transport infrastructures. In this context, the Commission intends to clarify and update its approach to aid in the inland transport sector by proposing a revision of Council Regulation (EEC) No 1107/70 <sup>(4)</sup>.

#### **4.1.8. Agriculture**

264. In 1998 several new rules entered into force regarding State aid in the agricultural sector: Community guidelines for rescuing and restructuring firms in difficulty <sup>(5)</sup>, and rules on aid for research and development <sup>(6)</sup> and on subsidised short-term operating loans in agriculture <sup>(7)</sup>. Concerning aid for rescue and restructuring, it is interesting to note that no Member State, when notifying these aid measures, has so far requested the application of the special rules devised for the agricultural sector (point 3.2.5 of the Community guidelines). The few notifica-

<sup>(1)</sup> OJ C 205, 5.7.1997.

<sup>(2)</sup> OJ C 198, 24.6.1998.

<sup>(3)</sup> OJ C 211, 7.7.1998.

<sup>(4)</sup> COM(1998) 466 final.

<sup>(5)</sup> OJ L 130, 15.6.1970 (Special Edition 1970 (II), p. 360).

<sup>(6)</sup> OJ C 283, 19.9.1997.

<sup>(7)</sup> Commission communication amending the Community framework for State aid for research and development (OJ C 48, 13.2.1998).

tions concerning this type of aid were based on the general rules applicable to all sectors.

265. No particular problems were raised by the application of the new rules for research and development, requiring compliance with the following criteria: (1) general interest of the project for the specific sector concerned; (2) need to spread information in adequate publications at least of national relevance and not restricted to members of specific organisations; (3) availability of the results of the work to all interested parties; and (4) compliance with the conditions laid down in Annex II ('Domestic support: the basis for exemption from the reduction commitments') to the agreement on agriculture concluded in the course of the Uruguay Round of multilateral trade negotiations <sup>(1)</sup>.

266. More problematic was the entry into force of the rules concerning subsidised short-term operating loans. By letter dated 19 December 1997 <sup>(2)</sup> the Commission informed the Member States that, starting from 30 June 1998, the Commission communication on subsidised short-term loans in agriculture <sup>(3)</sup>, as interpreted by Commission letter dated 19 December 1997 <sup>(4)</sup>, would enter into force again and that the procedure pursuant to Article 88(2) of the EC Treaty would be initiated in respect of the aid which would come into or remain in force after 30 June 1998 and which did not comply with the new rules. This, strictly speaking, meant that the new rules would be applicable to national contributions to pay interest on short-term loans expiring after 30 June 1998. Notwithstanding the request of a Member State, the Commission refused to postpone again the entry into force of the communication, and initiated the procedure provided for in Article 88(3) of the EC Treaty against an Italian regional aid scheme which did not seem to comply with the new rules, as interpreted by the Commission. Other national regional draft schemes were notified, but their examination, for the time being, is still pending.

#### 4.1.9. Fisheries

267. The guidelines for the examination of State aid to fisheries and aquaculture form the

basis on which the Commission has been able to assess both planned aid and aid which has existed since 1985. The guidelines were based to a large extent on the currently applicable structural legislation, 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 <sup>(5)</sup>.

#### 4.2. Specific sectors not subject to special rules

##### 4.2.1. Financial sector

268. Following a request by the Amsterdam European Council of June 1997, and on the basis of answers to a questionnaire submitted to Member States, the Commission drew up a report on 'services of general economic interest in the banking sector'. The report was submitted to the Council meeting on economic and financial affairs on 23 November.

269. The report examines whether, in the different Member States, credit institutions render services of general economic interest and whether the provision of a comprehensive and efficient financial infrastructure is deemed to constitute such a service. The report also examines the necessity of an exception under Article 86(2) of the EC Treaty for any such tasks and the comparability of situations in the different Member States.

The information received from the Member States suggests a distinction between three types of activity, which are consequently discussed in the report:

- (i) The provision of a comprehensive, efficient financial infrastructure for the entirety of their territories is considered by two Member States to be a service of general economic interest. However, no Member State claimed that such overall territorial coverage entails extra costs which would have to be compensated by the public authorities. Only Sweden compensates a credit institution for the extra cost of operating branches in remote areas.
- (ii) Aid granted to certain credit institutions in order to perform special tasks on behalf of the

<sup>(1)</sup> Commission communication on subsidised short-term loans in agriculture (OJ C 44, 16.2.1996, as interpreted by Commission letter dated 19 December 1997 (SG(97)D/10801)).

<sup>(2)</sup> OJ L 336, 23.12.1994.

<sup>(3)</sup> SG(97)D/10801.

<sup>(4)</sup> OJ C 44, 16.2.1996.

<sup>(5)</sup> SG(97)D/10801.

State, e.g. granting social housing loans, might fall under Article 86(2) of the EC Treaty. An examination will take place on a case-by-case basis.

- (iii) Fund-raising activities of special institutions exclusively for non-commercial, non-competitive public purposes should not pose problems under the competition rules of the Treaty if repercussions on commercial activities are avoided.

On the basis of this report the Commission will examine in the future the application of Article 86(2) of the EC Treaty to aid in the banking sector on a case-by-case basis.

270. Regarding specific cases of State aid to the banking sector, the Commission approved supplementary restructuring aid, estimated at between ECU 8 billion and ECU 15 billion (FRF 53 billion and FRF 98 billion), granted by France to *Crédit Lyonnais*<sup>(1)</sup> in addition to the aid of ECU 6.8 billion (FRF 45 billion) and of some ECU 600 million (FRF 4 billion) already granted in 1995 and 1996. Such aid amounts are unique in the history of the Community. The aid was approved on condition that *Crédit Lyonnais* reduce its balance sheet by ECU 47.26 billion (FRF 310 billion) in Europe and worldwide, over and above the reductions imposed on the bank in 1995, which would entail a total reduction in its balance sheet by more than a third since 31 December 1994. These compensatory measures were considered all the more necessary since, in the banking sector, aid corresponding to a capital injection relaxes the solvency constraints to which other banks making losses and not receiving aid are subject, which constraints would normally oblige them, if their own funds did not exceed the solvency requirement, to reduce their liabilities and their activity. *Crédit Lyonnais* will also have to reduce the number of its branches in France to 1 850 by the year 2000. Lastly, the French Government has undertaken to privatise *Crédit Lyonnais* by October 1999, by means of an open, transparent and non-discriminatory procedure.

271. On 29 July the Commission approved aid granted to *Banco di Napoli*<sup>(2)</sup> by the Italian Government for its restructuring and privatisation.

The estimated net cost to the State of this aid is somewhere between ECU 1.14 billion and ECU 6.14 billion (ITL 2 217 billion and ITL 11 895 billion) (the maximum amount of the State guarantee). As a compensatory measure, the bank will have to sell or close 18 branches in addition to the already completed sales of 59 branches and seven subsidiaries or offices abroad which the Commission took into account in assessing the aid's compatibility with the common market.

#### 4.2.2. Audiovisual sector

272. During 1998, the Commission's departments attempted to set in place a framework within which complaints concerning the public financing of certain broadcasters in different Member States could be assessed. On 15 September the Court of First Instance found against the Commission under the Article 232 procedure for failing to fulfil its obligation to act under the Treaty<sup>(3)</sup>. The court proceedings were initiated in 1996 by *Gestevisión*, a Spanish private broadcaster which lodged a complaint against RTVE — the Spanish public broadcaster — and against the Spanish regional broadcasters in 1992. According to the judgment, the Commission should not have prolonged its preliminary investigation for such a long period without taking a position. The Commission is now required to take a position within a reasonable period and with due diligence.

273. The attempt to develop a framework under which all pending cases could be assessed resulted in the presentation of a discussion paper to the Member States on 20 October. The majority of Member States were against the adoption of guidelines and expressed a preference for a case-by-case approach. In parallel, the Commission departments held two public hearings with the private and public operators concerned (on 4 and 18 December respectively) in order to obtain a more complete picture from an economic point of view of the issues involved.

#### 4.2.3. Cultural sector

274. The Commission had the opportunity to apply Article 87(3)(d) in three cases where it concluded that the aid measure in question served the

<sup>(1)</sup> OJ L 346, 31.12.1993, replaced on 20 November 1998 by (codified) Council Regulation (EC) No 2468/98 of 3 November 1998 (OJ L 312, 20.11.1998).

<sup>(2)</sup> Case C-47/96 (OJ L 221, 8.8.1998).

<sup>(3)</sup> Case C-40/96, not yet published in the Official Journal.

<sup>(4)</sup> Case T-95/96 *Gestevisión Telecinco v Commission*, not yet reported.

purpose of promoting culture and heritage conservation in a reasonable way. In decisions of 3 June, 29 July and 25 November <sup>(1)</sup> it confirmed its approach as already expressed in Cases N-32/97 (Ireland) and N-917/96 (Denmark) to approve aid to the film industry in applying Article 87(3)(d) of the EC Treaty to a French and Dutch scheme to support the production of films. The level of aid is limited to 50 % of production costs.

275. The derogation under Article 87(3)(d) also gives room for supporting the export of books. Unlike the film industry, book publishing and distribution in Europe is, in principle, not dependent on public support. The Commission authorised in June, in a case concerning aid to Coopérative d'Exportation, Livre Français (CELF) <sup>(2)</sup>, the granting of aid for the exporting of books to non-French-speaking countries, provided it is intended to offset the extra cost involved in handling small orders. In May 1993, the Commission did not raise any objections to the aid to CELF. This decision, however, was partly annulled by the Court of First Instance on the ground that, given the competition in the book market, the Commission had failed to fully analyse the impact of the aid on the common market <sup>(3)</sup>. In its new decision, the Commission applied the cultural derogation. It concluded that this aid measure only pursues a cultural objective and does not support the other, commercial, activities of CELF.

#### 4.2.4. Energy sector

276. Differences in excise duties on fossil fuel for cars may lead to a competitive imbalance among petrol stations close to State borders. In 1997, the Dutch Government introduced an aid scheme to compensate for the disadvantage to the owners of 624 Dutch petrol stations on the border with Germany resulting from the increase in excise duty on light oil. The aid consists of a subsidy, which is based on the quantity of light oil supplied. It decreases in proportion to the distance to the German border. The duration of the scheme is three years and a ceiling of ECU 100 000 per service station will apply for this period. The Dutch Government therefore considers that the measure should fall under the *de minimis* rule.

277. On 3 June, the Commission decided to initiate proceedings under Article 88(2) of the EC Treaty in respect of this scheme <sup>(4)</sup>. It has doubts whether the *de minimis* rule is applicable in this case <sup>(5)</sup>. Even if each service station could be considered a separate undertaking for the purposes of the *de minimis* rule, the rule may not apply if the aid has an effect on trade and competition between Member States. In the present case, the possibility cannot be ruled out that the measure affects trade and competition with at least one Member State (Germany).

## D — Procedures

278. Case law over the last year has been particularly rich as regards the procedural rules applicable in the State aid field. The main developments have been in relation to the rights of third parties, the recovery of unlawful aid and the consequences for the validity of the administrative procedure of a judgment annulling a decision.

### 1. Rights of third parties

279. Given the essentially bilateral nature of the various procedures laid down in Article 93, which are based principally on a dialogue between the Member State concerned and the Commission, the rights which third parties are recognised as having in the State aid field are necessarily more restricted than their rights under Articles 81 and 82 of the Treaty. Case law has shown that third-party rights are essentially relevant in the context of the procedure under Article 88(2).

280. In a judgment given on 2 April <sup>(6)</sup> the Court of Justice clarified the legal rules on complaints which denounce national measures as State aid and which are lodged with the Commission by third parties; in particular, the Court set out the extent of the Commission's obligations to investigate such complaints.

First, the Court established the principle that the Commission is required, in the interests of sound administration of the basic Treaty rules on State aid, to conduct a diligent and impartial examina-

<sup>(1)</sup> Cases N-3/98 and N-486/97, not yet published in the Official Journal.

<sup>(2)</sup> Case C-39/96.

<sup>(3)</sup> Case T-49/93 *SIDE v Commission* (1995) ECR II-2501.

<sup>(4)</sup> Case C-43/98 (ex N-558/98) (OJ C 307, 7.10.1998).

<sup>(5)</sup> See Chapter III.B.4 above.

<sup>(6)</sup> Case C-367/95 P *Commission v Sytraval and Brink's France* (1998) ECR I-1719.

tion of the complaints it receives, which may make it necessary for it to examine matters not expressly raised by the complainant. However, this principle does not imply that the Commission is under any obligation to examine of its own motion objections which the complainant would certainly have raised had it been aware of the information obtained by the Commission in the course of its investigation.

Second, the Court confirmed that the Commission is not under any obligation to hear complainants during its initial investigation into aid pursuant to Article 88(3) of the Treaty.

281. Then, in joined Cases T-371/94 and T-394/94 <sup>(1)</sup>, the Court of First Instance ruled that interested third parties within the meaning of Article 88(2) of the Treaty cannot enjoy the same rights to a fair hearing as those which individuals against whom proceedings have been instituted are recognised as having. The former have only the right to be involved in the administrative procedure to the extent appropriate in the light of the circumstances of the case. The extent of their rights to participate and be informed may therefore be limited, in particular when the amount of information in the Commission's possession is already relatively extensive, leaving outstanding only a small number of doubts likely to be dispelled by information supplied by the third parties concerned.

Where this is the case, the Commission, while providing such parties with general information on the essentials of the planned aid, may confine itself to concentrating, in its notice initiating the adversarial investigation procedure under Article 88(2), on those aspects of the planned aid concerning which it still harbours doubts.

282. In a judgment given on 15 September <sup>(2)</sup> the Court of First Instance held that, once the Commission has terminated proceedings under Article 88(2) with a decision to approve aid subject to conditions, it is not entitled to depart from the scope of that initial decision without reinitiating the proceedings. It follows that, if one of the conditions to which approval of an aid measure was subject is not satisfied, the Commission may not normally adopt a decision derogating from

that condition without reinitiating Article 88(2) proceedings and thus giving notice to the parties concerned to submit their comments, unless it is a relatively minor deviation from the initial condition, leaving the Commission in no doubt as to whether the aid at issue is still compatible with the common market.

283. The concept of party concerned within the meaning of Article 88(2) of the Treaty was defined more closely. In an order of 18 February <sup>(3)</sup> the Court of First Instance recognised that organisations representing the workers of an undertaking which is receiving aid might, as interested parties, submit their comments on considerations of a social nature which could be taken into account if appropriate by the Commission in its assessment of whether or not aid within the meaning of Article 88(1) is compatible with the common market.

284. As regards the admissibility of actions for annulment of Commission decisions brought by interested third parties, the Court of First Instance held in Cases T-11/95 <sup>(4)</sup> and T-189/97 <sup>(5)</sup> that the fact that a third party is concerned by a case is not sufficient in itself for that party to be regarded as individually concerned in the same way as the addressee of the final decision. It follows from the definition given by the Court of Justice in the *Intermills* judgment <sup>(6)</sup> that the concept of parties concerned within the meaning of Article 88(2) of the Treaty covers an indeterminate group of natural and legal persons such that a third party's being concerned is not sufficient for it to be concluded that it is individually concerned by a final decision within the meaning of the fourth paragraph of Article 230.

Consequently, in its order in Case T-189/97 <sup>(7)</sup> the Court of First Instance held that organisations representing the workers of an undertaking which is receiving aid cannot claim on that basis to be individually concerned, within the meaning of the fourth paragraph of Article 230, by a negative final decision.

285. In Case T-95/96 <sup>(8)</sup> the Court of First Instance examined the conditions under which an

<sup>(1)</sup> *British Airways and Others v Commission* (1998) ECR II-2405.

<sup>(2)</sup> Case T-140/95 *Ryanair v Commission*, not yet reported.

<sup>(3)</sup> Case T-189/97 *Comité d'entreprise de la Société française de production and Others v Commission* (1998) ECR II-335.

<sup>(4)</sup> *BP Chemicals v Commission*, not yet reported.

<sup>(5)</sup> See footnote 203.

<sup>(6)</sup> Case 323/82 *Intermills v Commission* (1984) ECR 3809.

<sup>(7)</sup> See footnote 203.

<sup>(8)</sup> *Gestevisión Telecinco v Commission*, not yet reported.

action for failure to act brought by a third party is admissible. The Court ruled that an action for failure to act brought by a complainant in respect of the Commission's failure to adopt a decision in response to the complaint is admissible if, the Commission having begun a preliminary investigation in accordance with the procedure under Article 88(3) of the Treaty, the complainant is directly and individually concerned by the institution's failure to take any decision terminating that procedure.

286. The implications for the rights of interested third parties of the requirement to provide a statement of reasons laid down in Article 253 of the Treaty were also spelled out. In joined Cases T-371/94 and T-394/94 <sup>(1)</sup>, the Court of First Instance found that, where the Commission authorises aid, the requirement to provide reasons is not determined solely on the basis of the interest which the Member State to which that decision is addressed may have in obtaining information. Thus, even though it is not required in its statement of reasons to discuss all the issues of fact and law raised by interested parties during the administrative procedure, the Commission must none the less take account of all the circumstances and all the relevant aspects of the case so as to make clear both to the Member States and to the persons concerned the circumstances in which it has applied the Treaty.

## 2. Recovery of aid

287. At 20 % of all cases dealt with by the Commission, the number of State aid measures that have not been notified to the Commission is still too high. It is therefore significant that the Community courts have confirmed the Commission's policy of consistently ordering the recovery of aid that has been granted in breach of the notification obligation and is incompatible with the common market. The Commission also examines, in line with the *Deggendorf* decision of the Court of Justice <sup>(2)</sup>, the cumulative effect of former unlawful aid and new aid, if the unlawful aid has not yet been repaid <sup>(3)</sup>.

288. In a judgment given on 29 January <sup>(4)</sup> the Court of Justice ruled that the authorities of a Member State may not plead that it is absolutely impossible for them properly to implement a Commission decision ordering them to recover unlawful aid without taking any step whatsoever to recover the aid from the undertakings in question and without proposing to the Commission any alternative arrangements for implementing the decision which would enable the difficulties to be overcome. Although insuperable difficulties may prevent a Member State from complying with its obligations under Community law, mere apprehension of such difficulties cannot justify a failure by a Member State to apply Community law correctly.

289. In Case T-67/94 <sup>(5)</sup> the Court of First Instance confirmed that it is not for the Member State concerned, but for the recipient undertaking, in the context of proceedings before the public authorities or before the national courts, to plead the existence of exceptional circumstances on the basis of which it had entertained legitimate expectations leading it to decline to repay the unlawful aid. Consequently, the Commission may not give as a reason for limiting in time a Member State's obligation to recover unlawful aid the fact that the contents of a national court's ruling were such as to give rise to a legitimate expectation on the part of the recipient of the aid that the latter was lawful.

## 3. Consequences of a judgment annulling a decision

290. Lastly, in a judgment of 12 November <sup>(6)</sup> the Court of Justice clarified the consequences of one of its judgments partially annulling a final decision on the ground that the Commission had wrongly dispensed with examining the compatibility of an aid measure in the light of Article 87(3). Since the investigation measures taken by the Commission as part of the procedure laid down in Article 88(2) of the Treaty allowed an exhaustive analysis to be made of the compatibility of the aid having regard to Article 87(3), the procedure for replacing the annulled decision could be resumed at that point with a fresh analy-

<sup>(1)</sup> See footnote 201.

<sup>(2)</sup> Case C-355/95 P *Germany and Textilwerke Deggendorf v Commission* (1997) ECR I-2549.

<sup>(3)</sup> Case C-44/97 *Aid in favour of Magefesa*, not yet published in the Official Journal.

<sup>(4)</sup> Case C-280/95 *Commission v Italy* (1998) ECR I-259.

<sup>(5)</sup> *Ladbroke Racing v Commission* (1998) ECR II-1.

<sup>(6)</sup> Case C-415/96 *Spain v Commission*, not yet reported.

sis of the investigation measures, the reliability of which had not been challenged.

#### **4. Application of the State aid rules by national courts**

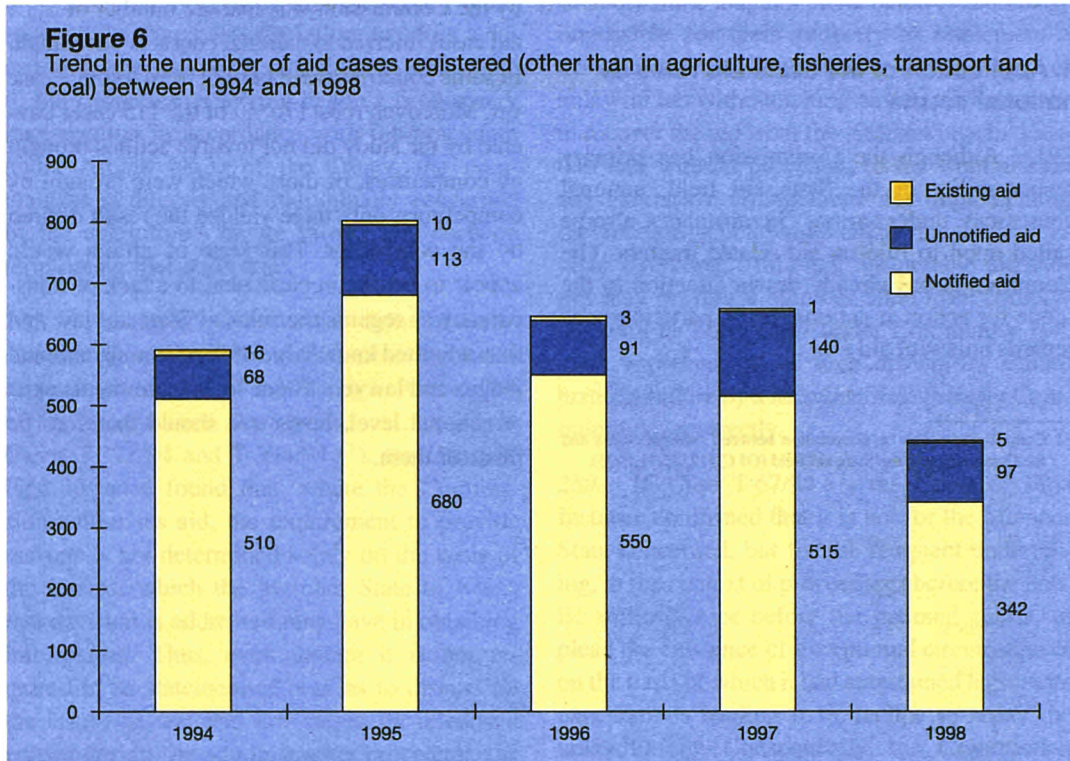
291. Although the Commission has primary responsibility in the State aid field, national courts may, under various circumstances, also be called upon to rule on aid-related matters. The Commission has already drawn attention to the scope for action at national level, particularly as regards unlawful aid <sup>(1)</sup>.

<sup>(1)</sup> Commission notice on cooperation between national courts and the Commission in the State aid field (OJ C 312, 23.11.1995).

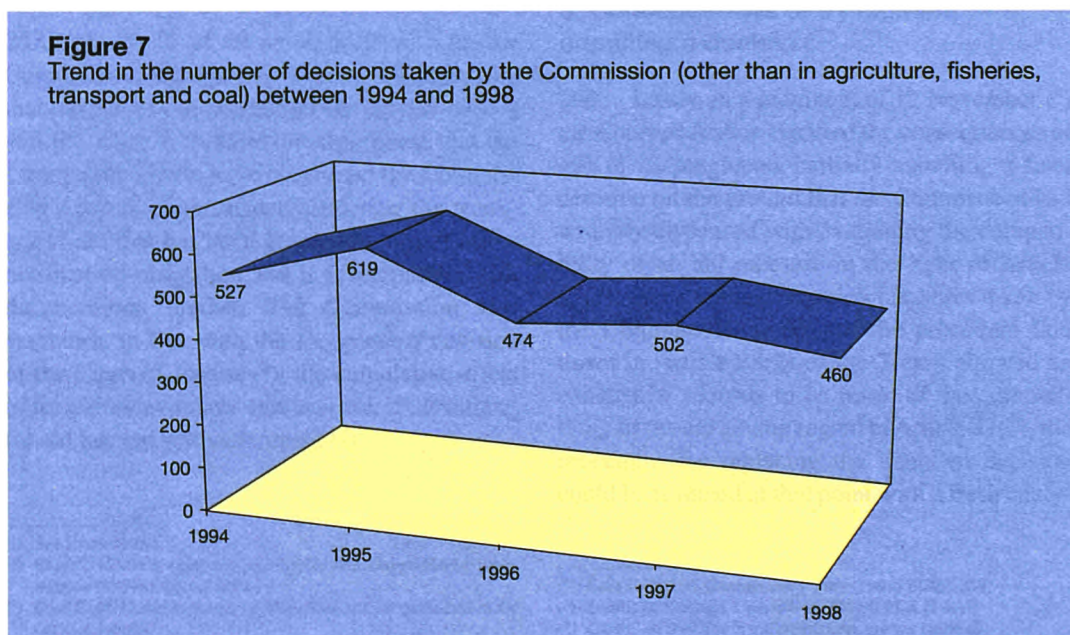
292. The main conclusion reached by a study on the practice of national courts commissioned by the Commission was that the number of State aid cases referred to national courts is very small. In some countries there has not been a single case yet. Moreover, most (76 %) of the 115 cases covered by the study did not involve actions brought by competitors; of those which were brought by competitors, only three yielded the result desired by the competitor. This state of affairs would appear to be due in particular, to a lack of transparency as regards the rules of State aid law and thus a limited knowledge of them among national judges and lawyers. Since legal instruments exist at national level, better use should therefore be made of them.

E — Statistics

**Figure 6**  
Trend in the number of aid cases registered (other than in agriculture, fisheries, transport and coal) between 1994 and 1998

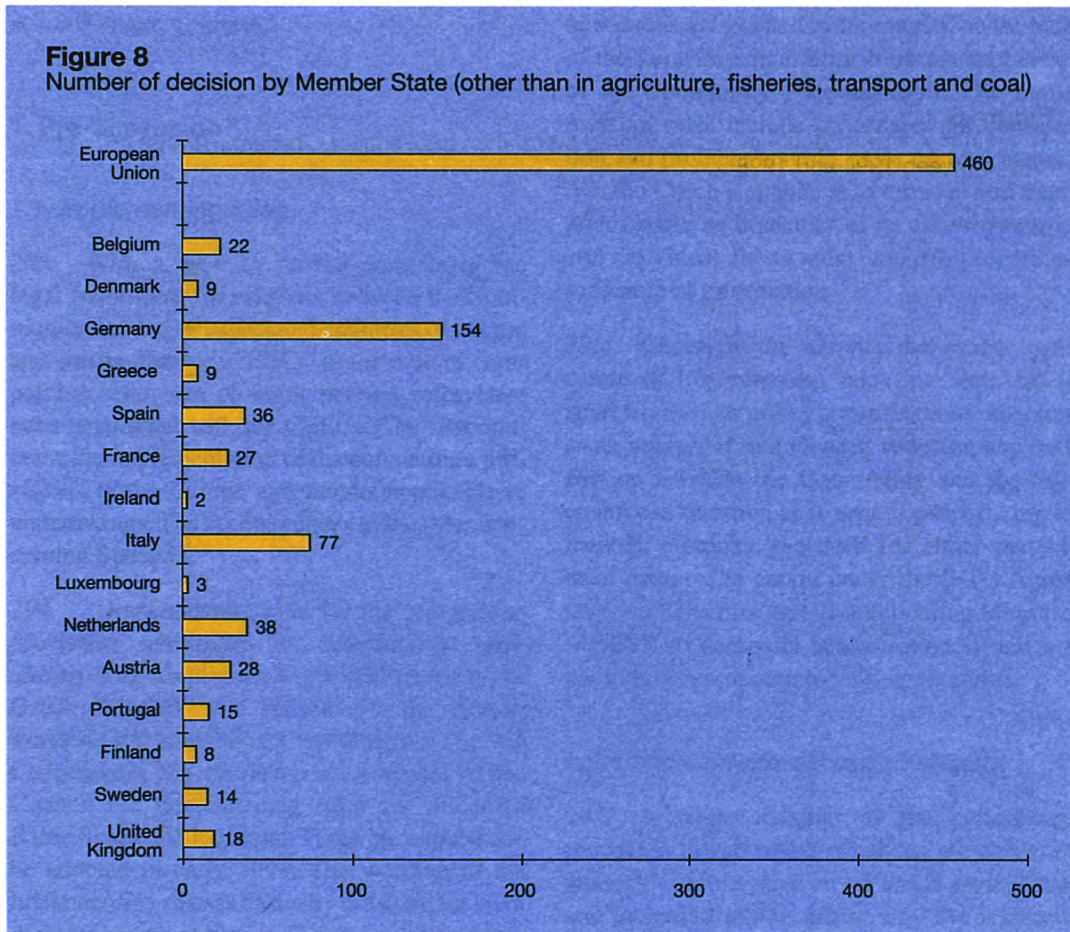


**Figure 7**  
Trend in the number of decisions taken by the Commission (other than in agriculture, fisheries, transport and coal) between 1994 and 1998





**Figure 8**  
 Number of decision by Member State (other than in agriculture, fisheries, transport and coal)





## IV — INTERNATIONAL ACTIVITIES

### A — Enlargement

#### 1. Pre-accession

##### 1.1. Implementing rules

293. With a view to further completing the legal framework for relations between the Community and the 10 associated countries of central and eastern Europe (CEECs) in the field of competition, two sets of implementing rules have been negotiated with the CEECs. The first concerns the implementation of the competition provisions of the Europe agreements applicable to undertakings. The second relates to the rules concerning State aid.

294. Implementing rules for the competition provisions applicable to undertakings have already been adopted for five CEECs, namely the Czech Republic <sup>(1)</sup>, Poland <sup>(2)</sup>, the Slovak Republic <sup>(3)</sup>, Hungary <sup>(4)</sup> and Bulgaria <sup>(5)</sup>. The Commission has presented its proposal to the Council for implementing rules for the three Baltic States and Romania. These are expected to be adopted in early 1999. The wording of the implementing rules is basically the same for all of the associated countries. They contain mainly procedural-type rules, i.e. rules regarding competence to deal with cases, procedures for notification of cases to the other party, consultation, comity and the exchange of information.

295. On 24 June the EU–Czech Association Council approved implementing rules for State aid in the Czech Republic. It is the first associated country where such rules are now formally in force in the field of State aid. The implementing rules constitute a two-pillar system of State aid control. On the Community side, the Commission assesses the compatibility of State aid granted by EU Member States on the basis of the Community State aid rules. On the side of the Czech Republic, the Czech national monitoring authority is to monitor and review existing and

new public aid granted by its country, on the basis of the same criteria as arise from the application of the Community State aid rules. The implementing rules include procedures for consultation and problem solving, rules on transparency (i.e. the Czech Republic is to draw up and thereafter update an inventory of its aid programmes and individual aid awards), and rules on mutual exchange of information.

296. Generally, the adoption and proper application of implementing rules for State aid is, apart from wider policy considerations, also seen as an important step towards reducing any trade friction between the Community and the third country in question as it may, if properly implemented, eliminate the need for either party to have recourse to action under the WTO Agreement on Subsidies and Countervailing Measures (ASCM) to deal with subsidisation issues, e.g. the imposition of countervailing measures.

##### 1.2. Enhanced pre-accession strategy

297. A major element of the enlargement process is the so-called enhanced pre-accession strategy which centres on accession partnerships and increased pre-accession aid. The accession partnership serves as a new single framework which covers in detail for each applicant the priorities to be observed in adopting the Union *acquis*, or existing body of rules, and also the financial resources available for that purpose, in particular the Phare programme. Legislative alignment, enforcement and institution building in the field of competition are among the most important short-term (1998) and medium-term priorities which the Commission has identified in the different accession partnerships. The same applies to the so-called national programmes for the adoption of the *acquis* which were adopted by each associated country on the basis of the accession partnerships.

##### 1.3. Progress in alignment of competition rules

298. The Commission agreed to report regularly to the European Council on progress made by each of the candidate countries towards accession. The first progress reports for the 10 CEECs, Cyprus and Turkey were submitted at the end of 1998. The reports take into consideration

<sup>(1)</sup> Decision No 1/96 of the Association Council of 30 January 1996 (OJ L 31, 9.2.1996).

<sup>(2)</sup> Decision No 1/96 of the Association Council of 16 July 1996 (OJ L 208, 17.8.1996).

<sup>(3)</sup> Decision No 1/96 of the Association Council of 15 August 1996 (OJ L 295, 20.11.1996).

<sup>(4)</sup> Decision No 2/96 of the Association Council of 6 November 1996 (OJ L 295, 20.11.1996).

<sup>(5)</sup> Decision No 2/97 of the Association Council of 7 October 1997 (OJ L 15, 21.1.1998).

progress since the delivery of the Commission opinions of 1997 <sup>(1)</sup>.

299. In the past year, most of the CEECs have taken decisive steps to adopt or prepare new legislation, or amendments to existing legislation, in order to further align their legislation with Community law. This is certainly the case in the field of antitrust. For example, new competition acts came into force in Hungary, Bulgaria, Estonia and Latvia. The competition authorities of the CEECs have also now gained some experience in the enforcement of the law. However, on several occasions the Commission has emphasised the need to further strengthen the CEEC competition authorities, in particular with regard to their investigative and fining powers, their independence and their resources.

300. In contrast to antitrust policy, the introduction of State aid control in the CEECs has proven to be much more controversial and difficult to bring about. While a number of countries have started introducing or preparing rules on the control of State aid, a lot of work remains to be done. The most urgent priority is to create transparency in the granting of State aid by establishing a State aid inventory of all existing direct and indirect aid. While some CEECs provided reports to the Commission on their respective State aid schemes during 1998, the Commission has generally been critical of the lack of a comprehensive picture of the State aid situation in most CEECs.

301. A second priority is the setting-up or strengthening of an independent State aid monitoring authority, and of a system for implementing this monitoring. Most of the CEECs have now established such a monitoring authority. However, legal procedures and the necessary powers to ensure genuine control of new and existing State aid in these countries are still lacking.

302. Finally, with respect to approximation of legislation, while certain countries have taken steps to lay down or prepare substantive and procedural rules in this field, the Commission has noted that they are generally lagging behind the level that is required for this stage in the run-up to accession.

#### *1.4. Technical assistance*

303. In view of these remaining shortcomings, technical assistance in the field of competition

remains an essential tool to prepare the candidate countries for accession. While it is for the candidate countries themselves to devote the necessary resources to focused and cost-efficient implementation of competition law, Community assistance serves as a catalyst. Along with specific actions in the framework of the national Phare programmes, DG IV has pursued a proactive policy of further intensifying its contacts with the competition authorities of the CEECs and between those authorities.

304. New electronic information links are in place which will intensify mutual exchange of information. Cooperation includes consultation on new policy developments. For example, the CEECs were consulted on the Commission's Green Paper on vertical restraints (both in writing and at an oral hearing).

305. DG IV continued, with Phare, to support the organisation of multi-country technical assistance programmes in the field of competition. In particular, joint training sessions for experienced and non-experienced competition officials from the candidate countries took place between December 1997 and January 1998 and between November and December 1998. These programmes include lectures by Commission experts and discussion on practical cases presented by the participants.

306. Most of the candidate countries have established some form of working group structure with DG IV which facilitates informal and technical discussions at expert level on competition approximation, institution building and enforcement. These informal meetings, but also the numerous personal contacts between officials, have contributed to the enhancement of both the legal framework and the enforcement practice of the candidates' competition authorities. In view of the problems regarding State aid described above, assistance will in the future be focused on the establishment of a State aid inventory, regional aid maps and a proper framework for aid to sensitive sectors, and on the assessment of individual cases.

307. The fourth Competition Conference of the CEECs and the European Commission took place on 25 and 26 May in Bratislava. The delegations included high-level officials from the competition and State aid authorities of the CEECs and the Commission. The annual conference serves as a forum for the exchange of views and experience in the field of approximation of

legislation and enforcement. It also served to establish and strengthen professional contacts between officials responsible for competition in the Community and in the CEECs.

## 2. Accession negotiations

308. Following the opening of the Intergovernmental Conference on 30 March the screening exercise started on 3 April with the first multilateral meeting involving all of the candidate countries. Between 9 and 19 October, six candidate countries, namely the Czech Republic, Estonia, Hungary, Poland, Slovenia and Cyprus, participated in the screening of the competition chapter, i.e. the analytical examination of the *acquis* in the competition field. The objective of the exercise was to inform — during a day of multilateral screening — the applicants fully about the Community *acquis* and — at subsequent bilateral meetings — to identify, within each applicant country, possible substantive problems that could arise during the accession negotiations proper.

309. On 11 May a multilateral screening meeting on competition policy took place with five other countries, namely Bulgaria, Latvia, Lithuania, Romania and Slovakia. The screening of the Article 86 directives, in particular in the field of telecommunications, took place between 28 April and 7 May for the first six countries, and on 23 June for the other five countries, as part of the screening of the entire telecommunications chapter.

## B — Bilateral cooperation

### 1. North America

#### 1.1. United States

##### 1.1.1. Implementation of the 1991 cooperation agreement <sup>(1)</sup>

310. The Commission adopts each year a report to the Council and the European Parliament on its cooperation activities with the US

under the 1991 agreement. There have been three such reports up to now:

- the first covered the period from 10 April 1995 (date of entry into force of the 1991 agreement) to 30 June 1996 <sup>(2)</sup>;
- the second covered the period from 1 July 1996 to 31 December 1996 <sup>(3)</sup>;
- and the third covered the period from 1 January 1997 to 31 December 1997 <sup>(4)</sup>.

During 1998 the Commission cooperated with the US DoJ and the US FTC in a substantial number of cases. Beyond the specific case-related benefits arising out of this intensive cooperation for both competition authorities and private parties involved (in terms of a more rapid and coherent management of the case on both sides of the Atlantic), the close daily contact between case teams in the Commission (DG IV) and the US DoJ and FTC is conducive to mutual confidence building and trust, accrued knowledge of the substantive and procedural rules of the partner, convergence by example and, finally, the development of 'best practices' in all phases of the procedure.

311. One of the most interesting transatlantic cooperation cases so far involved the *World-Com/MCI* merger, which received clearance in July 1998. The notified merger plan did not raise concerns about transatlantic cable capacity holding in the same acute form as the proposed *BT/MCI* merger (scrutinised by the Commission in 1996 and finally abandoned by the parties), but it did raise issues regarding competition among providers of Internet access and connectivity. The Commission's investigations, and negotiations of remedies, were undertaken in parallel with the examination of the case by the US DoJ. The process was marked by a considerable level of cooperation between the two authorities, including exchanges of views on the analytical method to be used, coordination of information gathering and joint meetings and negotiations with the parties. The timetable for divestiture afforded the parties the opportunity, subject to clearance from the US DoJ and the Commission, to agree a sale in advance of, but conditional on,

<sup>(1)</sup> Agreement between the European Communities and the Government of the United States of America regarding the application of their competition laws (OJ L 95, 27.4.1995, as corrected by OJ L 131, 15.6.1995).

<sup>(2)</sup> Adopted on 8 October 1996, COM(96) 479 final; see 1996 Competition Report, points 299 to 311.

<sup>(3)</sup> Adopted on 4 July 1997, COM(97) 346 final; see 1996 Competition Report, points 312 to 318.

<sup>(4)</sup> Adopted on 3 September 1998, COM(1998) 510 final; see 1997 Competition Report, points 317 to 327.

the merger. Under the terms of their undertakings submitted the parties sought the consent of the two competition authorities to the proposed buyer of the divested activities. The two authorities continued to cooperate until the undertakings were fully implemented and exchanged formal letters to this effect in accordance with the 1991 EC-US agreement. Remedies included the possibility for the Commission, in appropriate circumstances, to appoint a trustee to oversee compliance with the undertakings and, if necessary, to ultimately take control of the sale process (i.e. finding a buyer and drawing up an agreement).

312. Another example of successful EU-US cooperation was the *Dresser/Haliburton* merger cleared by the Commission in July. The merger involved two US-based companies. Halliburton is one of the largest energy services companies in the world. Dresser, which is active in the same range of activities, is smaller in size and more specialised. The parties had overlapping activities in the oilfield services industry, in particular in drilling fluids, directional drilling services and completion products and services. Within the latter two segments the combined market shares were not substantial, whereas there are a number of competitors with comparable strength and a number of customers with effective countervailing buyer power. As far as the market for drilling fluids was concerned, however, the concentration would result in significant market shares. The parties had already negotiated a divestiture plan with the US DoJ, as a result of which the market overlap would be removed. On this basis, the Commission did not have any further concerns about the drilling fluids market. In this respect the case is an interesting example of coordinated merger review procedures in the EU and the US and, to some extent, of work allocation between the two authorities.

313. Other cases where close transatlantic cooperation occurred were *Price Waterhouse/Coopers & Lybrand*, *Exxon/Shell*, *Daimler-Benz/Chrysler*, *Seagram/Polygram*, *Hercules/Betz Dearborn*, *Marsh McLennan/Sedgwick* and *BP/Amoco*. Details on the substance of these cases are given in Part II of the report. (Case-related EC-US cooperation is further discussed in detail in the fourth report to the Council and the European Parliament for 1998 <sup>(1)</sup>).

### 1.1.2. Adoption of the 1998 EC-US positive comity agreement <sup>(2)</sup>

314. On the basis of a mandate from the Council, the Commission negotiated with the United States an agreement which strengthens the relevant provisions of the 1991 agreement as regards the exercise of positive comity. The product of these negotiations, the 1998 EU-US positive comity agreement, was signed in Washington and entered into force on 4 June. It spells out more clearly the circumstances in which a request for positive comity will normally be made and the manner in which such requests should be treated. In contrast to the 1991 agreement, the EU rules on merger control are in principle not within the scope of the 1998 agreement due to EC and US merger legislation, which would not allow a deferral or suspension of action as envisaged by the agreement.

### 1.2. Canada

315. Following negotiations, the draft competition cooperation agreement between the European Communities and the Canadian Government was finalised in May of this year. On 4 June the Commission adopted a proposal for the joint adoption by the Council of Ministers and the Commission of a decision to conclude the agreement. The European Parliament has now approved the Commission proposal. It is expected that the agreement will shortly be adopted by the Council and Commission, and that it will be signed and come into effect during 1999. In the meantime, the Commission and the Canadian Competition Bureau will discuss bilaterally the practical logistics of future cooperation between the authorities within the framework of the agreement.

316. The proposed agreement is designed to facilitate increased cooperation between the European Communities and Canada with respect to the enforcement of their respective competition rules. An increasing number of cases are being examined by both competition authorities, and there is consequently a growing recognition of the importance, on the one hand, of avoiding conflicting decisions and, on the other, of coordinating enforce-

<sup>(2)</sup> Agreement between the European Communities and the Government of the United States of America on the application of positive comity principles in the enforcement of their competition laws (OJ L 173, 18.6.1998).

<sup>(1)</sup> Not yet published.

ment activities to the extent that this is considered mutually beneficial by both parties.

317. In substance, the proposed agreement is very similar to the one entered into between the EU and the US in 1991. Essentially, it provides for (i) the reciprocal notification of cases under investigation by either authority, where they may affect the important interests of the other party; (ii) the possibility of coordination by the two authorities of their enforcement activities, and of rendering assistance to each other; (iii) the possibility for one party to request the other to take enforcement action (positive comity), and for one party to take into account the important interests of the other party in the course of its enforcement activities (traditional comity); and (iv) the exchange of information between the parties, while not affecting either party's confidentiality obligations with respect to such information.

## 2. Other countries

### 2.1. Japan

318. The Commission finalised a new list of proposals for further deregulation in Japan. The list included a series of proposals for deregulation in the area of competition. The new package was given to Japan on 12 October during an EU–Japan ministerial meeting in Tokyo. The proposals were also discussed with Japan at a high-level mission to Tokyo between 3 and 6 November.

319. During the annual bilateral meeting between the Commission and the Japanese Fair Trade Commission (JFTC) in Brussels on 24 November, positive developments in the area of deregulation of competition policy were acknowledged (elimination of most exemptions and exceptions from Japanese competition rules, increased budgetary resources and staff for the JFTC).

320. However, the Commission repeated its main proposals to the Japanese Government for:

- competition advocacy by the JFTC in government measures,
- JFTC review of existing and new administrative guidance,
- tougher investigative action by the JFTC, particularly in the distribution area,
- deterrent sanctions for antitrust infringements, and
- better chances for victims to seek injunctive judicial relief and damages in court.

321. The OECD recommendation, issued in 1986 and last revised in 1995<sup>(1)</sup>, establishes so far the basic framework for cooperation between the Commission and the JFTC. In the period from 1993 to 1998 the Commission made 30 notifications to the JFTC and received from the JFTC 7 notifications in return. This would indicate that the Commission deals with more cases involving Japanese companies or other Japanese interests, whereas the JFTC deals with fewer cases involving European companies or other European interests. In turn this could be explained by the fact that European firms have more difficulties penetrating the Japanese market, than Japanese firms the EU market.

In the *Nordion* case, the Commission cooperated with the JFTC. Following Nordion's undertaking to abandon the exclusivity clauses contained in its sales contracts with European customers, the Commission decided to suspend a proceeding under Article 82 of the EC Treaty against Nordion for abuse of a dominant position in the market for the production and sale of molybdenum 99 (Mo-99), a base product for radiopharmaceuticals used in nuclear medicine. The enquiry carried out in Japan by the JFTC led to identical results for the Japanese market. The JFTC adopted a recommendation requesting Nordion to put an end to the exclusivity clauses tying Japanese customers. Nordion accepted the JFTC recommendation and, thus, the Japanese competition authority issued the formal decision on this case in September 1998. The final decision has the same content as the recommendation.

### 2.3. Mediterranean countries

322. Agreements have already been concluded with Tunisia, Israel, Jordan and the Palestinian Authority. Others are being negotiated with Algeria, Lebanon, Egypt and Syria. The provisions on competition contain clear commitments aimed at bringing the competition policies of the countries

<sup>(1)</sup> Revised recommendation of the Council concerning Cooperation between Member Countries on Anticompetitive Practices affecting International Trade, 27 and 28 July 1995, C(95)130/final.

concerned into line with the Community arrangements. A first conference bringing together representatives of the Community and of the national competition authorities of the Member States and of the Mediterranean countries was held this year in Tunis. Only Tunisia and Algeria have asked for technical assistance. As regards Tunisia, a preliminary report identifying a technical assistance programme was drawn up in September. It is being studied by the Tunisian authorities.

323. A Commission communication on 'the Euro-Mediterranean partnership and the single market' (COM(1998) 538 final of 23 September 1998) proposes, among other things, cross-sector action in the competition field to promote cooperation and technical assistance.

#### 2.4. Latin America

324. Ever since there has been a comprehensive framework of agreements with the countries of Latin America, the Commission's strategy has been one of strengthening relations with groups of countries (Mercosur, the Andean Community and the Central American isthmus). In this connection, specific cooperation actions have been initiated, namely compilation of the competition laws of the countries of Latin America and the Caribbean, the drawing-up of a list of competition authorities and institutions to facilitate contact between those responsible for implementing competition policy and the business community, and publication of a *Boletín Latinoamericano de Competencia*, which is distributed through the Internet <sup>(1)</sup>.

325. The Commission has started negotiations with Mexico with a view to introducing free trade arrangements. In the interim agreements of 1997 it is stipulated that the European Community and Mexico will have cooperation machinery at their disposal which will extend to technical cooperation.

326. In recent years there has been a strengthening of relations between DG IV and the competition authorities of the Mercosur countries — Argentina and Brazil in particular — and of Chile, which has an association agreement with Mercosur. A comparative study has been made of the laws of Mercosur, Chile and the European

Community, and it has proved very useful as a means of gaining an insight into the position of, and problems facing, these countries when it comes to developing a comprehensive legal framework in the competition sphere.

327. The prospect of the possible opening of liberalisation negotiations with Mercosur and Chile is another major factor militating in favour of establishing a cooperation framework. In principle, the development and effective application of competition rules in Mercosur ought to afford firms operating in this market greater legal certainty. In a recent communication to the Council, the Commission indicates that the negotiations will also cover competition rules, including machinery for cooperation and coordination between the authorities responsible for their implementation.

#### 2.5. Russia, Ukraine and the other NIS

328. The partnership and cooperation agreements (PCAs) which the EU has concluded with Russia, Ukraine, Moldova and most of the other former Soviet Republics contain — to a greater or lesser extent — a commitment by these countries to move towards an approximation of their competition and State aid legislation with that of the Community. Although progress is slow, the joint Committees established under the PCAs with Russia and Ukraine are expected to set up subcommittees during the first half of 1999 to deal with competition and State aid. A number of Tacis projects, with the task of providing relevant expertise, are also being undertaken.

329. In the wake of the economic turmoil experienced by Russia this year, the State Anti-monopoly Committee was integrated into a new ministry incorporating a range of diverse competencies. It is not yet clear what implications this will have for competition law enforcement in the Russian Federation.

## C — Multilateral cooperation

### 1. WTO: Trade and competition policy

330. The European Community has taken the initiative of putting competition on the international agenda. The Commission communication of June 1996 inspired the Singapore ministerial

<sup>(1)</sup> These documents are available on the Internet at the following address: <http://europa.eu.int/comm/dg04/interna/other.htm>.



meeting to set up a WTO working group on the interaction between trade and competition policy.

331. Under the guidance of its chairman, Professor Jenny, the group has attracted a remarkably high degree of interest and participation. This is reflected in the large number of submissions presented by WTO members and in the quality and openness of the discussions held on the different items on its agenda. Particularly noteworthy has been the active participation of developing countries, many of which have made presentations on their experiences relating to the introduction and enforcement of competition law. The group has been remarkably free of ideological controversies or North–South divisions. Differences of opinion about the scope of the group’s mandate have not prevented a substantive discussion of the various issues raised by members.

332. The discussions have been essentially analytical in nature. The points on which there appears to be a large degree of consensus include:

- the need to proceed in parallel with a process of trade liberalisation, elimination of unnecessary regulations and a strengthening of competition law and policy;
- the importance, from the development point of view, of adopting a competition policy as part of the process of market-oriented reform;
- the increasing importance of international cooperation to address effectively the interaction between trade and competition policies.

333. The group has also made considerable progress in identifying those elements of competition law and policy which may be of particular relevance for the multilateral trading system. These include (a) the type of anticompetitive practices subject to competition law disciplines; (b) the extent of sectoral or regulatory derogations from the application of competition law; and (c) mechanisms for enforcement, including the role of administrative authorities and the courts.

334. There is a general recognition that certain types of anticompetitive practices by business can create barriers to entry or otherwise upset the equality of competitive opportunities. It is also generally acknowledged that competition and trade can be significantly affected by regulatory policies, the activities of enterprises with exclusive or special rights, and by a wide array of trade policy measures.

335. The work in the group was confined to an educational process and the group will continue this exploratory work into 1999. The WTO will also have to answer the question whether there is a political will among its members to go ahead and open negotiations in 1999 on the establishment of a multilateral framework of competition rules.

336. In April the WTO Dispute Settlement Body adopted the final report of the GATT panel regarding access to the Japanese market for photographic film and paper. The panel ruling dismissed the US claims as they had failed to establish a causal link between measures adopted by the Japanese Government and an upsetting of the competitive relationship between domestic and imported products. The Kodak/Fuji panel was established at the request of the United States. The EU intervened as a third party in view of its economic interest in the case.

337. The issue of whether anticompetitive practices have a negative impact on trade falls outside the scope of current WTO rules. Accordingly the panel did not pass judgment on this and focused exclusively on whether nullification of trade benefits could be attributed to measures taken by the Japanese Government, but in this case there were many competition issues which would have been addressed in a more satisfactory way within a competition law framework.

338. In this connection, Sir Leon Brittan, European Commission Vice-President, and Mr Karel Van Miert, Commissioner responsible for competition, said that ‘The adoption of the report clearly illustrates the need to supplement the current framework of WTO rules with a WTO framework of competition rules’.

## 2. OECD, Unctad

339. The Commission played an active part in the work of the Committee of Competition Law and Policy of the OECD, especially in the round tables organised in 1998 (positive comity, insurance, procurement markets, relationship between regulators and competition authorities, boycott, broadcasting and buying power). The recommendation on hardcore cartels, adopted by the Committee in May, is also of particular interest. This document seeks to strengthen the effectiveness and efficiency of members’ law enforcement against hardcore cartels by eliminating or reduc-

ing statutory exceptions that create gaps in the coverage of competition law, and by removing the legal restrictions that deny competition agencies the authorisation to provide investigative assistance to foreign competition agencies.

340. The Commission also played an active part in the work of Unctad in the area of competition policy and in particular in the Expert Meeting on Competition Law and Policy which met from 29 to 31 July.

### 1. Legislative and regulatory activities

341. The coming year will see the Commission giving further thought to refocusing its departments' efforts on cases of manifest interest to the Community. Despite the hopes founded on the new provisions on vertical restraints, the ineffectiveness of the first refocusing measures adopted in 1997 will induce the Commission to take fresh steps to ensure that its legal instruments and resources are geared more closely to present needs and the challenges ahead.

342. The Commission will have to implement the new arrangements regarding vertical restraints of competition. Regulation No 19/65/EEC and Article 4(2) of Regulation No 17 should be amended in 1999. The Commission will then get down to drafting the new exemption regulation and guidelines on vertical restraints, which will probably not be ready for adoption before 2000.

The Commission is also likely to adopt a new notice on commercial agents.

343. The process of modernising Community competition law is set to continue and the Commission is considering proposing a review of Regulation No 17, which lays down detailed rules for the application of Articles 81 and 82 of the Treaty. The proposal should be the high point of the modernisation exercise.

344. After a record year for fines, the Commission is considering reviewing in the light of the experience gained some of the provisions of the guidelines on setting fines so as to correct certain aspects deemed not to accord with the objectives pursued.

345. In the merger control field, the Commission is contemplating adopting a new notice on ancillary restraints inasmuch as the existing one dates back to 1990 and is no longer entirely consistent with current practice. A notice on remedies making it possible to remove the Commission's doubts about the compatibility of a notified operation with the common market is also to be adopted next year.

346. The Commission will continue its work on drawing up Community instruments in the State aid field, in particular notices designed to increase transparency and simplify the monitoring of cases of minor importance. It thus intends to adopt two block exemption regulations, one on small and medium-sized enterprises and the other

on training aid. The guidelines on employment aid are to be reviewed in 1999. 1999 should also see the formal adoption of the procedural regulation following the reaching of agreement on it in principle at the Council meeting of industry ministers on 16 November.

### 2. International field

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

With a view to enlargement of the Union the Commission will concentrate on fostering a competition culture in the countries of central and eastern Europe. It will be especially vigilant regarding the effective application of competition rules in these countries. It will renew its call for an efficient supervisory system for State aid to be set up as quickly as possible. In this connection it will continue its work on drawing up guidelines for State aid in these regions which will take account of the special circumstances of economies in transition.

As part of its bilateral cooperation with the countries of North America, the Commission will apply itself to implementing the EU-US positive comity agreement, and it will support adoption of the draft cooperation agreement with Canada.

In the multilateral cooperation sphere it will continue to participate actively in the work of the WTO on the interaction between trade and competition.

### 3. Supervisory activities

348. The Commission intends to redouble its efforts in 1999 to promote competition in the European Community so as to ensure the successful introduction of the euro. This will involve, among other things, waging a ruthless campaign against the emergence of cartelisation phenomena which might be seen in some old-established industries as a means of putting off the evil day when cost cutting and restructuring have to be carried out following the inevitable boost to competition caused by the euro's introduction. The Commission will therefore attach particular importance to the formation and operation of its anti-cartel unit, which already has a number of cases in its in-tray. It will nevertheless remain vigilant in its other areas of activity,

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including that of the monitoring of abuses of dominant positions. It even intends adding to its corpus of decisions in such new sectors as the environment, sport and the professions, where major cases are in the pipeline. Important decisions are awaited in the financial, data processing and air transport sectors.

349. As far as merger control is concerned, the Commission does not expect the number of cases notified to stabilise in view of, firstly, the worldwide restructuring drives that are taking place in a number of industries and, secondly, the impact of the introduction of the single currency in Europe on 1 January 1999. It expects to receive between 230 and 250 notifications in 1999.

350. The success of the liberalisation policy will depend on a strict application of Community competition law. The Commission will have to ensure that the liberalisation directives are duly transposed into national law and that their provisions are applied by Member States in accordance with Article 86. It will pay particular attention to monitoring the implementation of full competition in telecommunications markets, acting in conjunction with national regulatory authorities and, if necessary, national competition authorities. It will also closely monitor

implementation of the postal services directive. Lastly, after the adoption of the liberalisation directives in the energy sector (first stage for electricity markets in February 1999), it will apply itself to rendering effective the application of the competition rules to this sector, which is to be gradually opened up to competition.

351. Energy sector liberalisation will also have an impact on the number of State aid cases investigated by the Commission.

352. An important step in the field of aid policy will be the implementation of the procedural regulation. This instrument, which makes the procedural rules more transparent, should improve compliance with them. It also provides the Commission with new weapons in its fight against unlawful aid measures and the misuse of aid.

The fall in the number of new aid cases in 1998 was probably temporary and cyclical. The year 1999 should see numerous notifications of aid measures linked to the new regional maps or to training aid.

Lastly, the Commission intends to continue pursuing its policy of firmness towards unlawful aid, as attested to in 1998 by the record number of negative decisions.

## ANNEX — CASES DISCUSSED IN THE COMPETITION REPORT

### 1. Articles 81, 82 and 86

Case	Publication	Point
ACEA		131
Stainless steel	OJ L 100, 1.4.1998	3, 65, box 3
Brussels Airport	OJ L 216, 1995	110
Cologne/Bonn Airport		Box 4
Düsseldorf Airport	OJ L 173, 14.1.1998	Box 4
Frankfurt/Main Airport	OJ L 72, 11.3.1998	72
Hamburg Airport	30.10.1998	Box 4
Stuttgart Airport	30.10.1998	Box 4
Alpha Flight Services/Aéroports de Paris (ADP)	OJ L 230, 18.8.1998	72
Amministrazione Autonoma dei Monopoli dello Stato (AAMS)	OJ L 252, 12.9.1998	70
Atlas/Global One		Box 5
Automec		28
British Interactive Broadcasting (BIB)	OJ C 322, 21.10.1998	96, 98, 99
British Airways and American Airlines	OJ L 239, 30.7.1998	101–103
British Sugar, Tate & Lyle, Napier Brown and James Budgett	OJ L 284, 19.10.1998	Box 3
Cartonboard		Box 3
Cement		165
Pre-insulated pipes	OJ L 24, 30.1.1999	Box 3
EACEM		103
EUCAR	OJ C 185, 18.5.1997	132
Inmarsat		90
IRE/Nordion		74
KLM and Northwest		104
Kodak		336
Lufthansa, SAS and United Airlines	OJ L C 239, 30.7.1998	101
P&I Clubs		116–119
Beams		Box 3
Reductions in piloting tariffs	OJ L 301, 1997	110
REIMS II	OJ C 371, 1.12.1998	93
Sabena/Austrian Airlines/Swissair and Delta Air Lines		104
SNCF/Cégétel	OJ C 293, 22.9.1998	88
Télévision Par Satellite (TPS)		96
Trans-Atlantic Conference Agreement (TACA)		73, 105
Ferry services between Greece and Italy		65
Uniworld		Box 5
Valpak		133
Van den Bergh Foods	OJ L 246, 4.9.1998	74
Verbandvereinbarung		127
Volkswagen	OJ L 124, 23.4.1998	69

### 2. Merger control

Case	Publication	Point
Agfa-Gevaert/Du Pont	IP/98/148	153
Allianz/AGF	IP/98/419	146
Anglo American Corporation/Lonrho		Box 5
Bertelsmann, Kirch and Premiere	IP/98/477	96, 142, 155

Boeing/MDD		Box 5
BP/Amoco	IP/98/1106	313
BT/AT&T		138
Canal+/CDPQ/BankAmerica	IP/98/1062	Box 7
Daimler-Benz/Chrysler	IP/98/696	313
Deutsche Telekom/BetaResearch	IP/98/103	96, 141, 155
Dresser/Haliburton	PRES/98/381	312
Enso/Stora	IP/98/1022	148, 159, 163
Exxon/Shell	IP/98/648	313
Gencor/Lonrho		Box 5, 149
Hercules/Betz Dearborn	IP/98/870	313
Hoffmann-La Roche/Boehringer Mannheim	IP/98/121	152, 163
ITS/Signode/Titan		158
Kali und Salz		140, 147, 149, 175, 179
KPMG/Ernst & Young	IP/98/132	138, 145, 150
Krauss-Maffei/Wegmann	IP/98/555	169
LHZ/Carl Zeiss	IP/98/933	138
Marsh McLennan/Sedgwick	IP/98/931	313
Owens-Illinois/BTR Packaging		161
Pakhoed/Van Ommeren		162
Price Waterhouse/Coopers & Lybrand	IP/98/454	145, 149, 313
Saint-Gobain/Wacker-Chemie/NOM		Box 5
Samsung/AST Research Inc. (AST)	IP/98/166	180
Seagram/Polygram	IP/98/824	313
Skanska/Scancem	IP/98/982	165
Telia/Telenor/Schibsted		Box 7
Unichem/Unifarma	IP/98/742	170
Veba/Degussa	IP/97/1076	163
Vendex/KBB	IP/98/494	168
Wienerberger/Cremer und Breuer	IP/98/51	138
Wolters Kluwer/Reed Elsevier	IP/98/230	138, 154
Worldcom/MCI	IP/98/213	142, 164, 311

### 3. State aid

Case	Publication	Point
Aid for the construction of a hydrogen peroxide factory	OJ L 171, 17.5.1998	221
Air Belgium		258
Air France		256
Alitalia		254
Annulment of a final decision, Spain	Not yet published	237
AutoEuropa	OJ C 208, 4.7.1998	243
Tauern motorway in Austria	OJ C 198, 24.6.1998	261
Banco di Napoli	Not yet published	271
Biotec Biologische		
Naturverpackungen GmbH	OJ C 219, 15.7.1998	214
Brilén SA	OJ C 199, 25.5.1998	248
Brittany Ferries		259
British Airways	Not yet published	256
BP Chemicals		201
Case di Cura Riunite	OJ C 149, 15.5.1998	197

## ANNEX — CASES DISCUSSED IN THE COMPETITION REPORT

Chambre syndicale des entreprises de transport de fonds et valeurs (Sytraval) and Brink's		280
Channel Tunnel rail link		3, 260
Chantiers de l'Atlantique/Renaissance Financial		234
Cityflyer Express		201
Coal industry in Germany (1997)	OJ L 324, 2.12.1998	240, 241
Coal industry in Germany (1998)	Not yet published	240, 241
Coal industry in Spain	OJ L 303, 3.6.1998	236
Comité d'entreprise de la Société française de production and others		283
Commend		216
Coopérative d'Exportation, Livre Français (CELF)		275
Cordex SA	OJ C 207, 3.7.1998	247
Crédit Lyonnais	OJ L 221, 8.8.1998	3, 270
CTRL		260
Dutch petrol stations on the border with Germany	OJ C 307, 7.10.1998	276
EDF	Not yet published	204
English Partnerships scheme		200
Fiat Mezzogiorno	OJ L 117, 13.5.1993	245
French and Dutch film industry	Not yet published	274
ESF Feralpi	Not yet published	235
Gas distribution in Denmark	Not yet published	205
German development aid to Indonesia	Not yet published	233
Germany and Textilwerke Deggendorf GmbH		287
Gestevisión Telecinco SA	Not yet published	272
Green electricity	Not yet published	222
Istituto Poligrafico e Zecca dello Stato	Not yet published	196
Intermills		284
Irish corporation tax	OJ C 395, 18.12.1998	192, 210
Italian regional aid scheme		266
Kiener Deponie Bachmanning, Austria	OJ C 201, 27.6.1998	199
KNP Leykam	OJ C 296, 24.9.1998	80, 214
Kvaerner Warnow Werft	Not yet published	231
Ladbroke Racing Ltd		208
LDV Ltd	Not yet published	244
Lenzing Lyocell	OJ C 9, 13.1.1999	198
Lift GmbH	Not yet published	229
Magefesa	Not yet published	209
Martinair		257
MTW-Schiffswerft and Volkswerft Stralsund	SEC(1998) 71 final and SEC(1998) 1313 final	231–233
Non-fossil fuel obligation for renewables (NFFO)	Not yet published	212
Océ NV	OJ C 270, 29.8.1998	214
Olympic Airways		255
Ponsal	Not yet published	202
Preussag Stahl AG	Not yet published	203
Publicly owned shipyards in Spain		231
Recovery of aid		189, 287
Spanish scheme to assist the purchase of industrial vehicles		262
Flemish Region		211
Residents of the Canary and Balearic islands		257
RTVE	Not yet published	272
Ryanair Ltd	Not yet published	202

Acquisition of Saarbergwerke GmbH and Preussag Anthrazit GmbH by Ruhrkohle AG	Not yet published	240
Santana Motor SA	OJ L 6, 10.1.1997	245
Saxonylon Textil GmbH	Not yet published	249
Seat SA	OJ L 88, 9.4.1996	245
Sican	OJ C 307, 7.10.1998	215
SNIACE SA	Not yet published	250
Sunair		258
Road haulage and intermodality in Italy	OJ C 211, 7.7.1998	261
Transmediterránea		259
Viscido and others v Ente Poste Italiane		206



European Commission

European Community competition policy — 1998

Luxembourg: Office for Official Publications of the European Communities

1999 — 102 pp. — 21x 29.7 cm

ISBN 92-828-6765-X



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Jean De Lannoy
Avenue du Roi 202/Koningslaan 202
B-1190 Bruxelles/Brussel
Tél. (32-2) 538 43 08
Fax (32-2) 538 08 41
E-mail: jean.de.lannoy@infoboard.be
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DK-2620 Albertslund
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URL: http://www.schultz.dk

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Postbus 20014
2500 EA Den Haag
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