

European Community  
competition policy



1999





# European Community competition policy

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



1999

European Commission  
Directorate-General for Competition

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**FOREWORD BY PROFESSOR MARIO MONTI,**  
Member of the Commission with special responsibility  
for competition policy



Competition policy is relevant not only for those in business and their advisers, but also for the citizens of Europe, who need to have an overall view of how competition policy is implemented and its relevance to improving their daily lives. One of the essential roles of competition is to promote innovation and ensure that goods and services are produced as efficiently as possible and that these efficiencies are benefiting consumers in the form of lower prices or improvements in quality, choice or services. For example, during the period 1997–99, residential tariffs for international calls fell, on average, by 40 % in most Member States. The introduction of competition to this sector resulted not only in a reduction in prices but also gave rise to a considerable increase in the supply of new and efficient services and products.

Another role is to ensure that markets are sufficiently competitive in order to keep up with globalisation, and to support employment. For example, State aid control helps to foster structural change and thereby contributes to the development of competitive and innovative industry structures, which safeguard the creation of new jobs. Without competition the driving forces behind growth and employment would be lost. It is therefore of the utmost importance that the competition rules be clear, transparent, and efficiently enforced. But competition rules must also keep up with the pace of economic and technological development in the 21st century.

This year, I would therefore like to put the spotlight on the need to modernise Community competition law, both in the area of antitrust, where the actions of companies may distort competition, and in the area of State aid, where the actions of Member States may produce similar effects.

**Reform in the field of vertical restraints**

In 1999, new competition rules in the field of vertical restraints were established. This follows a

thorough policy review and an extensive consultation exercise, which commenced in 1997 with the publication of the Commission's Green Paper on vertical restraints. The reform of the Commission's policy in the area of vertical restraints represents an important pillar in the overall reform process. This review exercise resulted in the reaching of a consensus in favour of an approach which focuses on economic analysis, with vertical restraints being assessed in terms of their impact on the market and not of their form. Such a consensus has major implications for review of policy in other areas.

This is a policy area where the need for reform was widely acknowledged. In fact, the block exemption regulations concerning certain types of distribution agreement had been criticised in recent years for being too narrow in scope and over-formalistic in their approach and for imposing a straitjacket on industry which was incompatible with the evolution of production and distribution methods. The Commission's reform is aimed at simplifying the rules and reducing the regulatory burden for companies, especially companies lacking market power like SMEs, while ensuring a more effective control of vertical restraints implemented by companies holding significant market power.

The Council agreed with the Commission's plans for reform in June 1999 when it adopted Regulation (EC) No 1215/1999 broadening the legislative powers of the Commission in the field of vertical restraints. On the basis of these new powers, the Commission adopted, in December, a new Regulation (EC) No 2790/1999 exempting certain categories of vertical agreements and concerted practices from the prohibition of restrictive agreements in Article 81. This new block exemption regulation has a wide scope as it covers all vertical restraints concerning final or intermediate products as well as services, with the exception of a limited number of 'hardcore' restrictions and conditions. Its principal objective

is to allow undertakings which have no significant market power to benefit from a safe haven within which they are no longer obliged to assess the validity of their agreements under the Community competition rules. In order to link the granting of exemption to the market power of the undertakings in question, the block exemption uses a market share threshold set at 30 %. Above this threshold, the block exemption does not apply. Agreements that are not covered by the block exemption are not presumed to be illegal but require an individual examination under Article 81. In order to assist undertakings in carrying out such an examination, and thus to increase the effectiveness of the competition rules, the Commission published in September the draft of a set of guidelines which is currently subject to public consultation and which we hope will be adopted in the first half of 2000.

Another important element of this reform was introduced by Council Regulation (EC) No 1216/1999 whereby all vertical agreements have been dispensed from the requirement of prior notification provided for by Article 4(2) of Regulation No 17. This change makes it possible to backdate an exemption for individual vertical agreements to the date on which they were concluded and not, as in the past, to the date of their notification. Such a possibility for retroactive exemption is necessary to cover agreements which, while falling outside the new block exemption, may fulfil the conditions for individual exemption under Article 81(3).

By ensuring a wider coverage of such agreements in a single block exemption, the new rules will restore the freedom to contract for most companies, while allowing the Commission to concentrate more on important cases which raise serious competition issues and affect the interests of consumers.

### **Modernisation of antitrust rules (Articles 81 and 82 of the Treaty)**

1999 saw the intensification of the debate on the reform of the procedural rules in the area of antitrust with the publication by the Commission of a White Paper on modernisation of the procedural rules implementing Articles 81 and 82 of the EC Treaty. This document proposes a fundamental reform of Regulation No 17, the procedural regulation which has been in place since 1962. It is designed to stimulate discussion

between the Commission and interested parties. Many contributions, mostly of a very high quality, have been received by the Commission.

The European Parliament adopted a resolution on this matter on 18 January 2000, following the report made by Mr Karl von Wogau. The resolution emphasises the urgent need for reform in view of the shortcomings of the existing system and the important changes that have taken place in the real economic world. It welcomes the Commission's proposal and supports in principle the main points in the White Paper, namely the abolition of the notification and authorisation system under Article 81 of the Treaty and decentralised implementation of competition rules by enhancing the role of the authorities and courts of the Member States, as this could do much to bolster the European 'culture of competition'.

The Economic and Social Committee adopted an opinion on 8 December 1999. This opinion also supports the Commission's proposal, saying that it will benefit industry and in particular SMEs. However, it sets out a number of measures that it considers should be taken prior to the implementation of the reform. These measures include direct consultation of courts, training and other forms of assistance to national courts and measures to address the issue of forum shopping. The Committee also stresses that harmonisation of the national procedural rules would be desirable in order to promote consistent application of substantive rules.

The White Paper proposes a reform based on abolition of the current system of notification and authorisation which will in turn lead to an increase in the involvement of national competition authorities and courts in the application of the Community competition rules. The reforms proposed in the White Paper are based on two principal objectives: first, releasing the Commission from tasks which are not contributing sufficiently to the efficient enforcement of the competition rules, and second, bringing the decision-making process closer to citizens.

### *Releasing the Commission from tasks which are not contributing sufficiently to the efficient enforcement of the competition rules*

The current system, put in place in the early 1960s to deal with the difficulties of that period, is a system based on authorisation by a cen-



tralised body: agreements restrictive of competition are automatically void unless notified to the Commission, which has sole power to exempt them from the competition rules. This system facilitated the development of a body of clear, structured rules and their coherent application throughout the Community. It favoured the setting-up of national competition authorities and the adoption of national competition rules mirroring those of the Community. However, some 40 years after the adoption of Regulation No 17, the environment in which competition policy finds itself has been largely transformed: the Community has become a market which is strongly integrated, it has also increased in size and with future enlargements will soon consist of more than 20 Member States.

In this changed environment it has to be recognised that the system put in place by Regulation No 17 has reached its limits. The authorisation regime which compels undertakings to notify their agreements to the Commission has become a bureaucratic constraint which no longer facilitates the efficient protection of competition. Dealing with notifications prevents the Commission from focusing on the most serious restrictions. It is very rare for such notifications to give rise to a prohibition decision; in the last five years only 0.5 % of notifications have resulted in the adoption of a prohibition decision. This shows the lack of relevance of a notification system for the efficient enforcement of the competition rules. Management of the centralised exemption system diverts the Commission from its primary mission which is the detection and suppression of the most serious infringements, which are never notified. In addition, the notification system obstructs the full application of the Community competition rules by national competition authorities and courts.

It is for these reasons that the White Paper proposes a fundamental reform; namely, the replacement of the current system based on prior authorisation by one based on subsequent suppression of possible infringements. This will allow the Commission to refocus on those infringements which are never notified and which are the most harmful for European consumers and the European economy. Such a reform would increase the efficiency of control in at least two respects. First, by increasing the probability that those responsible for infringements will be identified and fined, the reform would reinforce the dissua-

sive effects of the competition rules. Secondly, a growing involvement of national competition authorities and courts in the application and enforcement of Community competition rules should greatly improve the detection of the most harmful infringements and the overall effectiveness of competition policy. In fact, national competition authorities, being closer to local markets, are generally in a better position to both detect and suppress the more serious infringements of the Community competition rules. Moreover, national courts can, where appropriate, award damages, grant interim measures or even order the performance of contracts.

### *Bringing the decision-making process closer to citizens*

In a Community of 15 Member States with strongly integrated economies, the application of the full range of competition rules should no longer be confined to one body, not only for the reasons associated with efficiency outlined above, but also to ensure that the citizens of Europe view competition policy in a positive manner and recognise it as playing an important role in their daily lives. The protection of the interests of consumers, and therefore of European citizens, is at the heart of Community competition policy. However, this is not always the public perception. By permitting consumers to address national competition authorities and courts who have the power to apply the full range of EC competition rules we will go a long way towards improving the perception which European citizens have of competition policy and of its benefits for them.

### *Follow-up to the White Paper*

While the White Paper contains a reasoned choice in favour of a particular option, its primary purpose is to serve as a basis for discussion. Since it was published a number of round tables have been organised with associations of undertakings and lawyers, and a working group involving the representatives of the Member States has been set up. The Commission has received over 100 written observations from Member States, associations of undertakings, lawyers and academics. The European Parliament and the Economic and Social Committee have formulated opinions on the White Paper. It is only following a full and open dialogue with all interested par-



ties and on the basis of observations received that the follow-up to this White Paper will be proposed by the Commission.

## Mergers

The merger regulation, itself in force for less than 10 years, has already been the subject of one major review, which led to modifications adopted by the Council in June 1997, and implemented in March 1998. Therefore 1999 was the first full year in which jurisdictional and other modifications have been applied. The Commission will be reporting to the Council on the thresholds in 2000. Meanwhile, the main task of the Commission this year has been to ensure the proper application of the regulation to the ever-increasing number, size and complexity of mergers notified to it.

## Single market and State aid

State aid may cause distortions of trade and competition that are not acceptable in a common market. State aid control policy therefore contributes to the efficient operation of the single market. In order to allow the single market to generate sustainable growth and higher employment, State aid control policy will require continual review. I am personally convinced that there is still room to reduce current levels of State aid in all sectors of the economy. The Commission has made clear in several decisions that it is increasingly reviewing Member States' financial relations with industry in whatever form and in areas which so far have not been tackled extensively enough. In this context I want to mention the sectors of public banking and broadcasting. Furthermore, we will be putting the focus on fiscal measures. I have instructed my staff to step up their actions in this field, particularly in the light of the Community's 'code of conduct'. At this stage, my staff are investigating whether certain tax measures constitute State aid.

The sharpening-up of State aid control, rightly called for by the European Parliament, is behind the Commission's modernisation drive and its wish to increase the efficiency of State aid procedures. As in the area of antitrust, it is important that the efficiency of State aid procedures be improved. Several initiatives during the year under review have contributed to this aim. The

procedural regulation that was adopted by the Council in March 1999 paves the way for this purpose. Not only does it codify the procedures based on Commission practice and the Court of Justice's case law, but it will also enable the Commission to intensify its monitoring of aid. The Commission may now require the immediate provisional recovery of non-notified aid, pending its decision on the compatibility of such aid with the Treaty. It also may undertake on-site monitoring to check on compliance with its decisions. The regulation will speed up procedures by setting time limits within which the Commission has to close formal investigation proceedings. We are discussing with Member States, in the newly created advisory committee on State aid, the forthcoming block exemption regulations. Another important element to be included in the current review of State aid control policy is transparency. Transparency and the concomitant availability of further, improved information on the implementation of State aid policies are essential for the Commission to base its decision-making process and future policies upon solid economic foundations. Increased transparency is also necessary to raise awareness in Member States of the necessity for strict State aid control. Increased information to the public will, moreover, encourage peer pressure on Member States to reduce State aid volumes.

My staff are therefore examining how transparency can be increased and made more effective. The feasibility of a State aid register and scoreboard is, for example, being considered. The register would contain factual information on all State aid decisions, whilst the scoreboard would provide guidance to the Member States on how to evaluate more accurately the cost/benefit consequences of their State aid policies. The annual survey on State aid in the EU will also continue to be improved and will provide a more detailed assessment of State aid expenditure.

## Conclusion

From the foregoing it is apparent that the Commission is willing to adapt and improve the legal framework of European competition policy. While an important step has been taken with the adoption of a new policy in the area of vertical restraints, we must continue to modernise our competition and State aid rules so as to ensure their effectiveness in both the current and fore-



## FOREWORD BY PROFESSOR MARIO MONTI

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seeable economic and legal environment, particularly in the light of pending enlargement. In doing so we will better serve the objectives of the

Treaty, which, in particular, requires the maintenance of a system ensuring that competition in the internal market is not distorted.

A handwritten signature in black ink, appearing to read "Mario Monti". The signature is written in a cursive, flowing style with a long horizontal stroke at the end.





# XXIXth Report on competition policy 1999

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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. 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 reader's attention to these changes, all quotations using the old numbering appear in italics.

To assist the reader, the corresponding old and new numbers of the articles cited in this report are given below:

<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 169	Article 226
Article 173	Article 230
Article 175	Article 232
Article 177	Article 234
Article 190	Article 253

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## INTRODUCTION

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1. On 1 January, 11 Member States adopted the euro as their common currency. The changeover took place smoothly and the new currency rapidly became established on the financial markets. Competition policy contributed to this process by continuing the drive to modernise Community competition law and by pursuing the two principal objectives that underlie its approach.

2. The first objective of competition policy is the maintenance of competitive markets. Competition policy serves as an instrument to encourage industrial efficiency, the optimal allocation of resources, technical progress and the flexibility to adjust to a changing environment. In order for the Community to be competitive on worldwide markets, it needs a competitive home market. Thus, the Community's competition policy has always taken a very strong line against price-fixing, market-sharing cartels, abuses of dominant positions, and anticompetitive mergers. It has also prohibited unjustified State-granted monopoly rights and State aid measures which do not ensure the long-term viability of firms but distort competition by keeping them artificially in business.

3. The second is the single market objective. An internal market is an essential condition for the development of an efficient and competitive industry. As the Community has progressively broken down government-erected trade barriers between Member States, companies operating in what they had regarded as 'their' national markets were, and are for the first time, exposed to competitors able to compete on a level playing field. There are two possible reactions to this: either to seek to compete on merit, looking to expand into other territories and benefit from the opportunities offered by a single market, or to erect private barriers to trade — to retrench and act defensively — in the hope of preventing market penetration. The Commission has used its competition policy as an active tool to prevent this, prohibiting, and fining heavily the parties to two main types of agreement: distribution and licensing agreements that prevent parallel trade between Member States, and agreements between competitors to keep out of one another's 'territories'. Moreover, the objectives of competition policy have been integrated into the Commission's new strategy for the European single market adopted on 24 November. The aim is to

prevent anticompetitive practices from undermining the single market's achievements.

4. The implementation of these two principal objectives and the drive to modernise Community competition rules are described in some detail in this report.

5. In the context of enlargement of the European Union it should be noted that the Helsinki European Council decided that considerable progress had been made in the accession negotiations with Cyprus, Hungary, Poland, Estonia, the Czech Republic and Slovenia. In 1999, progress has also been made by candidate countries in the preparation or adoption of new competition laws, or the amendment of existing laws, in order to further align these with Community law. This progress is described in the international section of this report, together with developments in bilateral and multilateral cooperation.

6. The 1997 Treaty of Amsterdam came into force on 1 May 1999. This Treaty reaffirmed the Commission's role as the authority responsible for enforcing the competition rules, and the compatibility of the principles of free competition and services of general economic interest<sup>(1)</sup>. It also provided, *inter alia*, for the renumbering of the Treaty provisions concerning competition. For the facility of readers, corresponding old and new numbers of the relevant Treaty provisions are listed in a table at the beginning of this report.

7. Competition policy is well known among the business community, the Member States and public authorities. The maintenance of open and competitive markets is generally considered one of the most important policy objectives of the EU. None the less, and in spite of its successes, competition policy is not so well known among EU citizens and most of them are unaware of the positive impact competition policy has on them as consumers of goods and users of public and private services. The Commission therefore wants to explain more clearly action taken in the field of competition policy to EU citizens. As a result of these efforts, it is hoped that the Commission will gain their support. The Commission has already adopted a series of measures in pursuit of this objective such as the development of an information policy aimed at the general public (see Boxes 1 and 3 below).

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<sup>(1)</sup> 1997 Competition Report, points 2 to 7.



### Statistics on Commission activity in applying Community competition laws in 1999

As in previous years there was intense activity in all areas within the Commission's sphere of competence. In 1999, the total number of new cases was 1 201, comprising 388 antitrust cases (under Articles 81, 82, and 86), 301 merger cases<sup>(1)</sup> and 512 State aid cases. Comparable figures for 1998 were a total of 1 198 new cases, comprising 509 antitrust cases, 245 merger cases<sup>(2)</sup> and 444 State aid cases. While the total number of new cases remains stable compared with 1998 (1 201 as against 1 198), increases in the number of merger cases (301 against 245) and State aid cases (512 against 444) were offset by a reduction in the number of antitrust cases (388 against 509). The total number of cases closed was 1 273, comprising 582 antitrust cases, 279 merger cases, and 412 State aid cases. Comparable figures for 1998 were 1 289 cases closed, comprising 581 antitrust cases, 248 merger cases and 460 State aid cases. A more telling indicator is the increase in the number of formal decisions which are particularly resource-intensive (20 Phase II merger proceedings, as opposed to 12 in 1998 and 11 in 1997; 68 antitrust decisions, as opposed to 42 in 1998 and 27 in 1997; and 66 State aid decisions following the initiation of a formal investigation procedure, as opposed to 61 in 1998 and 32 in 1997). This demonstrates that the work output in 1999 was at an even higher level than that of the previous year.

In the antitrust sphere there were two notable features. The first was an increase in the number of cases closed by way of formal decision (68 against 42 in 1998). Secondly, there was a drop in the number of new cases (388 against 509 in 1998). New cases comprise notifications (162 in 1999 against 216 in 1998), complaints (149 in 1999 against 192 in 1998) and ex officio proceedings (77 in 1999 against 101 in 1998).

The reduction in the number of notifications can probably be partly attributed to the 1997 notice on agreements of minor importance. This trend was first noted in last year's annual report. It can also probably be attributed to companies anticipating the Commission's reforms in the area of vertical restraints, with the publication in 1998 of a communication setting out the Commission's propos-

als for reform in this field. The reduction in the number of complaints can probably be explained by sectoral factors. For example, in 1999 the Commission exempted the standard pub leases of the three largest brewers in the UK, Whitbread, Bass and S&N. This sector had heretofore given rise to numerous complaints on the part of tenants tied to brewers<sup>(3)</sup>. This is also evidenced by the fact that over the years there have been wide fluctuations in the number of complaints (177 in 1997, 159 in 1996, 114 in 1995, 170 in 1994, and 110 in 1993). It is therefore too soon to draw any conclusions regarding the reduction in the number of complaints for 1999. Moreover, some cases which in the past may have been dealt with by the Commission are now being handled by national authorities. More information on this issue is to be found below in Box 2 on cooperation with national authorities. The reduction in the number of ex officio proceedings can be explained by the fact that 1997 and 1998 were record years because the Commission initiated a number of ex officio proceedings in the run-up to liberalisation in the telecoms sector on 1 January 1998.

In 1999, 292<sup>(4)</sup> cases were notified under the merger regulation compared with 235 in 1998. The Commission took a decision in 270 cases compared with 238 in 1998. Moreover, in 1999 the Commission found it necessary to initiate the second stage of examination ('Phase II proceedings') in respect of 20 planned operations, as opposed to 12 in 1998. A total of eight cases where Phase II proceedings were initiated were authorised subject to conditions, one was formally prohibited, five were withdrawn and nine were carried over to 2000. The main factors underlying the current merger wave are the globalisation of markets, the introduction of the euro, the completion of the single market and the forthcoming enlargement. These factors will continue to generate high levels of merger activity in Europe for the foreseeable future.

While there was a slight drop in the number of Commission decisions in the area of State aid,

<sup>(3)</sup> While there were no 'beer' complaints in 1999, 19 cases were opened for beer complaints in 1998, and 22 in 1997.

<sup>(4)</sup> Changes to the merger regulation, which came into force in 1998, brought within its scope a number of joint venture cases which would formerly have been examined under Regulation No 17. Such joint venture cases falling within the scope of the new Article 2(4) of the merger regulation have also to be assessed in accordance with the criteria of Article 81 and, therefore, are mostly dealt with by the antitrust directorates rather than the merger task force. In 1999 there were 15 decisions pursuant to Article 2(4) of the merger regulation (joint venture cases).

<sup>(1)</sup> Including nine ECSC mergers.

<sup>(2)</sup> Including 10 ECSC mergers.



there was an increase in the number of decisions made following the initiation of a formal investigation procedure (there were 66 such decisions in 1999 compared with 61 in 1998 and 32 in 1997). Such decisions are extremely resource-intensive.

### Box 1: EU citizens and competition policy

EU competition policy is widely known and appreciated in the business community and among public authorities, at both national and international level. In these circles competition policy is often perceived as one of the most important of the policies pursued by the European Commission. But it is not seen in the same way by the public at large: most people are unaware of what competition policy can do for them and the benefits it can bring. Very often the Commission's competition policy is mentioned in connection with the decision to stop a merger or to refuse State aid to a company. This sort of information can generate misunderstanding and apprehension among the public, or at best a measure of indifference. Until now, the citizens of the Union have not been clearly informed of what the Commission is called upon to do and what it has done in competition policy, or of the importance of competition policy for the working of the economy as a whole.

Many citizens do not realise that competition policy is a powerful and effective tool for protecting their interests as consumers, users of services, workers and taxpayers. If they were conscious of these things, it is likely that they would provide the Commission with strong political support in this area. The Commission departments could take advantage of the day-to-day contact that consumers have with markets. The experience of consumers and consumers' associations could be of great assistance in identifying and evaluating possible anticompetitive practices.

The Commission must therefore set about explaining its competition policy more clearly to the man or woman in the street. There are different ways of achieving this, different channels that can be used and different groups to aim at. One way is to involve economic, social and trade organisations and associations.

The Commission has already adopted a series of measures in pursuit of this objective. It has developed an information policy aimed at the general public, distributing a wide variety of documentation and indeed making it available on the Internet; this includes such things as the *Competition Policy Newsletter*, the annual *Competition Reports*, and the list of prices in the motor trade. On the basis of complaints lodged by consumers the Commission has taken the step of initiating antitrust proceedings, as it did in *Volkswagen* for example, a case to which it gave wide publicity.

Nevertheless, communication with the citizens of the Union can be improved further. The Commission intends to take the following approach.

- First, for every single decision taken as part of competition policy the question should be asked what specific advantage there may be for the citizen, and especially the consumer. The Commission will seek to reflect this concern in every press release, in every decision, and in the annual *Competition Report*.
- Secondly, the Commission intends to treat consumers not merely as people who benefit as a result of competition policy but also as promoters of competition policy. As has already been pointed out, consumers and consumers' organisations can be of great help in identifying anticompetitive practices. If the Commission is able to show clearly that it can resolve competition questions that concern consumers more directly, it will be better understood. The *Volkswagen* case is still too isolated. The Commission intends to step up relations with consumers' organisations and more generally with the citizens of the Union.
- Lastly, the Commission is considering the advisability of organising meetings of various kinds with the citizens of the Union. One possibility would be an annual meeting with consumers' organisations. Here the Commission would have the opportunity of presenting and explaining its own policy. Another possibility would be 'competition conferences' to be held in the Member States. These meetings could be held once or twice a year in the country chairing the Council at the time. Through occasions of this kind it should be easier to reach national associations of consumers, trade associations, companies, national competition authorities and so on.





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

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

#### 1. New Commission competition rules in the field of vertical restraints

8. On 22 December, the Commission adopted Regulation (EC) No 2790/1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices <sup>(1)</sup>. This regulation replaces three existing regulations, one on exclusive distribution, one on exclusive purchasing and one on franchise agreements <sup>(2)</sup>, whose period of validity expired on 31 December.

9. The new regulation is the result of an in-depth policy review which the Commission launched in 1997 with the publication of a Green Paper on the application of Article 81 of the Treaty to vertical agreements <sup>(3)</sup>. The Green Paper generated wide public debate. Comments made by Member States, the European Parliament, the Economic and Social Committee, the Committee of the Regions and interested parties were generally in favour of a reform of Community competition policy in the field of vertical restraints. The Commission subsequently set out the framework for the proposed policy reform in its communication on the application of EC competition rules to vertical restraints <sup>(4)</sup> of 30 September 1998 and, at the same time, it submitted two proposals for regulations to the Council for the amendment of:

- Council Regulation No 19/65/EEC of 2 March 1965 on the application of *Article 85(3)* of the Treaty to certain categories of agreements and concerted practices <sup>(5)</sup>, in order to extend the Commission's delegated legislative powers, and
- Council Regulation No 17 of 6 February 1962, first regulation implementing *Articles 85 and 86* of the Treaty <sup>(6)</sup>, in order to extend to all vertical agreements the dispensation

from prior notification provided for by Article 4(2) of that regulation.

10. On 10 June, the Council adopted the Commission's proposals as Regulation (EC) No 1215/1999 <sup>(7)</sup> amending Regulation 19/65/EEC and Regulation (EC) No 1216/1999 <sup>(7)</sup> amending Regulation No 17.

11. The new block exemption regulation, Regulation (EC) No 2790/1999, will effect a shift from the traditional policy, which relied largely on formalistic assessment criteria, towards an approach which focuses more on the economic effects of vertical agreements. The basic aim of this new approach is to simplify the rules applicable to vertical restraints and to reduce the regulatory burden for companies, while ensuring a more effective control of agreements entered into by companies holding significant market power.

12. In sum, the new policy is based on a single Commission regulation, with a wide scope, which block-exempts, up to a market-share threshold of 30 % and subject to a limited number of 'hardcore' restrictions and conditions, all agreements or concerted practices between two or more undertakings, each of which operates at a different level of the production or distribution chain, where such agreements or practices relate to the conditions under which the parties may purchase, sell or resell certain goods or services. This includes agreements concluded by retailers' associations, on condition that none of the members has a turnover of more than EUR 50 million, and certain non-reciprocal vertical agreements concluded between competing undertakings.

13. A single market share threshold of 30 % limits the scope of the block exemption. The regulation contains specific provisions intended to ensure flexible application of the market-share threshold in cases where it is temporarily exceeded. This increases legal certainty for the undertakings concerned. Above the 30 % threshold, agreements are not presumed to be illegal but require individual examination. In order to assist undertakings in carrying out such an examination, the Commission plans to adopt a set of guidelines during the first half of 2000. A draft of these guidelines was published on 24 September and is currently subject to public consultation <sup>(8)</sup>.

<sup>(1)</sup> OJ L 336, 29.12.1999.

<sup>(2)</sup> Respectively Regulation (EEC) No 1983/83 (OJ L 173, 30.6.1983) and Regulation (EEC) No 1984/83 (OJ L 173, 30.6.1983), prolonged by Regulation (EC) No 1582/97 (OJ L 214, 6.8.1997), and Regulation (EEC) No 4087/88 (OJ L 359, 28.12.1988).

<sup>(3)</sup> COM(96) 721 final.

<sup>(4)</sup> COM(1998) 544 final.

<sup>(5)</sup> OJ 36, 6.3.1965.

<sup>(6)</sup> OJ 13, 21.2.1962.

<sup>(7)</sup> OJ L 148, 15.6.1999.

<sup>(8)</sup> OJ C 270, 24.9.1999.

14. The regulation relies on a 'blacklist' of clauses, that is, on a list of restrictions which cannot benefit from the block exemption. This list of 'hardcore' restrictions includes resale price maintenance, whether in the form of fixed or minimum prices, and certain types of territorial or customer restriction. To a large extent, it codifies current case law.

15. The application of the block exemption is also subject to a limited number of conditions, the most important of which concerns non-compete obligations, i.e. arrangements preventing the buyer from manufacturing, purchasing, selling or reselling competing goods or services. Bearing in mind the potential risks of market foreclosure associated with this type of restraint, non-compete obligations are covered by the new regulation in so far as their duration does not exceed five years. However, this rule is subject to certain exceptions. For example, in the regulation it is indicated that this time limit does not apply when the products are sold from premises owned or leased by the supplier. Moreover, in the guidelines, it will be explained which other situations may justify a longer duration (e.g. transfer of know-how and long-term investments, especially when sunk or brand specific).

16. Under the regulation, it is also possible for the benefits of the block exemption to be withdrawn. This is a mechanism which is intended to be used in situations where, below the market share threshold of 30 %, a vertical agreement does not have any objective advantages which compensate for its negative effects on competition and where, for this reason, it does not fulfil all the conditions set out in Article 81(3). The withdrawal mechanism is intended, in particular, to protect competition from the negative consequences resulting from the cumulative effect of parallel networks of similar agreements put in place by competing suppliers, as well as in cases of buying power.

17. Moreover, in order to ensure more effective supervision and to encourage the decentralised application of Community competition rules, the new Council enabling regulation allows national competition authorities to withdraw the benefit of the block exemption where a particular agreement has a negative effect within their national territory and where this territory constitutes a distinct geographic market.

18. The block exemption regulation also provides that the Commission may, by regulation

and without retroactive effect, exclude specific vertical restraints from the scope of the block exemption in cases involving parallel networks of similar vertical agreements covering more than 50 % of the relevant market.

19. Finally, the regulation provides for a transitional period whereby the agreements currently covered by the existing block exemption regulations may continue to benefit from the application of those regulations until 31 December 2001.

## 2. White Paper on modernisation of the rules implementing Articles 81 and 82 of the EC Treaty

20. On 28 April, the Commission adopted a White Paper on modernisation of the rules implementing Articles 81 and 82 of the Treaty <sup>(1)</sup>. This document is the starting point for a wide-ranging debate on the reform of Regulation No 17, the cornerstone of the system for implementing Articles 81 and 82, drawn up at the beginning of the 1960s.

21. The Treaty of Rome laid down a general ban on anticompetitive agreements, tempered with the exception in Article 81(3), but left open the question of how this exception was to be applied. At the beginning of the 1960s, European competition policy was yet to be developed: only two out of six Member States had any competition legislation, there was only one real competition authority and European law was in an embryonic state. The very general wording of Article 81(3) and the newness of the prohibition principle made it difficult for firms to evaluate the legality of their agreements. The Commission, as a young institution, needed to be informed about the types of agreement which existed and to develop real knowledge of the various sectors of the economy.

22. In those circumstances, a centralised authorisation system rapidly became the obvious choice. Regulation No 17 set up a system under which anticompetitive agreements and practices affecting trade between Member States, in order to qualify for exemption, have to be notified to the Commission, which has exclusive power to apply Article 81(3). Subject to the exceptions listed exhaustively in Article 4(2) of Regulation No 17, the exemption can be applied retroac-

<sup>(1)</sup> COM(1999) 101 final (OJ C 132, 12.5.1999).



tively only to the date of notification. Restrictive agreements which have not been declared exempt are automatically null and void. This system enabled the development of a consistent body of law and the spread of a 'competition culture' throughout the Community. Competition policy is today rightly perceived as a pillar of European integration, a true guardian of the single market.

#### *A necessary reform*

23. Despite successive enlargements of the Community and the establishment of credible competition authorities in all the Member States, the system set in place at the beginning of the 1960s has not undergone any substantial changes to date. The Regulation No 17 system today has two main shortcomings: it no longer ensures effective surveillance and it constitutes an excessive bureaucratic constraint for firms.

24. In a Community of 15 Member States, centralised surveillance cannot ensure that competition is effectively safeguarded. The growing integration of Europe's economies has considerably widened the scope of Community law and with it the Commission's powers. The latter's monopoly on the application of Article 81(3) blocks decentralised application by both courts and competition authorities and leaves the Commission as the sole real guarantor of compliance with the competition rules. This situation is all the more worrying as around half of all cases handled by the Commission start as notifications. However, notifications no longer bring to the Commission's attention the important competition cases. The figures are telling: in 35 years, the Commission has been informed by notification of agreements justifying a prohibition decision in only nine cases. While the Commission is giving its attention to analysing these notified agreements, it is unable to investigate properly the complaints it receives and to conduct the necessary own-initiative proceedings against the most serious infringements, which are never notified.

25. The second shortcoming of the current system is the bureaucracy that it generates and the insufficient legal certainty with which it provides firms. Unlike the merger regulation, Regulation No 17 does not lay down any real obligation to notify although it contains a strong incentive to firms to do so. Notifications generate major costs, whether they are made by the firms them-

selves or via specialised lawyers. The procedure set out in Regulation No 17 rapidly proved too cumbersome to be followed systematically. Under the regulation, each time a restrictive practice is notified to it, the Commission should examine the case, publish a notice in the Official Journal in the 11 languages to allow third parties to submit their comments, present a draft decision to the advisory committee and lastly, adopt the decision and publish it in all the languages. Given the large number of cases, the Commission quickly came to reserve this complex procedure for the most important ones, adopting on average less than 10 or so formal decisions each year. More than 90 % of cases are closed informally, in particular by sending 'comfort letters'. These letters merely constitute a factor which the courts may take into account and are preceded only rarely by the publication in the Official Journal of a notice giving third parties the opportunity to submit their comments (in 1997, seven publications under Article 19(3) for 210 comfort letters, i.e. 3 % of cases): the system's transparency is thus limited.

26. While Regulation No 17 has allowed the development of a complete corpus of coherent rules, it is no longer appropriate in Europe at the start of the 21st century. The procedures it laid down have proved to be impracticable. Reform is needed, all the more so since competition policy will face two major challenges in the immediate future: enlargement to include new member countries and the increasing globalisation of Europe's economies.

27. Today there is broad consensus on the need to reform Regulation No 17 and on the objectives that the reform must pursue, namely the effectiveness of competition policy and the simplification of administrative supervision. Since the 1980s, numerous proposals for reform have been made by the Member States as well as by academics and practitioners. Some of the proposals have been confined to minor adjustments to the Regulation No 17 system, while others have entailed a thorough overhaul and a sharing of the power to grant exemptions between the Commission and the national competition authorities.

28. After conducting a thorough analysis of these various options, the Commission concluded that minor adjustments to the current system were not sufficient to ensure effective application of the competition rules in an enlarged



Community and that the option of decentralising notifications to the national authorities was more risky than it was advantageous. The White Paper therefore takes a clear stance in favour of another option: the adoption of a directly applicable exception system.

29. This option consists in abolishing the authorisation arrangements and the notification system which is their corollary. Under a directly applicable exception system, Article 81(3), like Articles 81(1) and 82, could be applied not only by the Commission but also by any national authority or court. Article 81 would become, like Article 82, a unitary prohibition. Anticompetitive practices which affected trade between Member States, i.e. those caught by Article 81(1), would be lawful *ab initio* if they met the conditions laid down in Article 81(3). No procedure for authorisation by an administrative authority, and hence no notification, would then be necessary. The Commission takes the view that adopting a directly applicable exception system would enable it to safeguard competition more effectively and to simplify administrative supervision, thus meeting the requirements of Article 83 of the Treaty.

#### *More effective application of the Community competition rules*

30. Adopting a directly applicable exception system would improve the protection of competition in two ways: it would enable effective decentralisation of the application of the rules and it would make it easier for the Commission to refocus its work on restrictions that are really detrimental to competition.

31. The reform proposed in the White Paper would improve the protection of competition by facilitating effective decentralised application not only by national authorities but also by national courts. In an enlarged Community, effective protection of competition requires the involvement of several decision-makers in the application of the rules. At present, national courts apply Articles 81(1), 82, and 86(1) and (2), the Court of Justice having recognised the direct effect of these provisions at the beginning of the 1970s. However, the effectiveness of the courts' intervention is largely undermined by the fact that the firms against which an action is brought may notify their agreements to the Commission and de facto block any court proceedings. There are three reasons for allowing national courts to

apply Article 81 in full: (i) they have powers which neither the national authorities nor the Commission have, such as the power to award damages to victims of illegal agreements, to order specific performance of a contract or to rule more quickly and more effectively than the competition authorities on urgent measures; (ii) they can simultaneously apply competition law and general commercial law, which simplifies proceedings in cases where Community competition law applies to one aspect only of a dispute; (iii) lastly, giving national courts the power effectively to apply Article 81 should result in a greater number of legal actions being brought in this field and thus contribute to the effective application of competition law. This is in line with the role in the effective application of Community law traditionally ascribed by the Court of Justice to the national courts.

32. The adoption of a directly applicable exception system would also allow decentralised application by the national competition authorities. This clearly presupposes that the seven Member States that have not yet done so empower their authorities to apply Community law. There is a clear advantage in better exploiting the synergies which exist between the Commission and these specialised authorities, which often have extensive resources and a very good knowledge of their respective national markets.

33. Adopting a directly applicable exception system would allow the abolition of the notification arrangements, which have become ineffective in safeguarding competition. This would enable the Commission to focus on the most serious restrictions. In these circumstances, complaints would take on greater importance and the White Paper thus proposes improving the way in which they are handled, in particular by introducing a deadline of four months within which the Commission must inform the complainant of the action it intends to take in response to the complaint. In addition, the reform should be accompanied by a strengthening of the Commission's powers to penalise infringements. The White Paper proposes a number of measures, including updating the amounts of fines and periodic penalty payments, making it easier to have recourse to oral questions during an investigation and reforming the mechanisms for obtaining authorisation from a judge to conduct an investigation.



*Simplifying administrative supervision*

34. Secondly, adopting a directly applicable exception system would simplify administration, the second requirement of Article 83(2)(b) of the Treaty. Firms would no longer be obliged to notify their restrictive agreements to the Commission and, if the conditions of Article 81(3) were met, they could apply directly to the national courts in order to have its provisions enforced.

35. The White Paper sets out the arguments in support of a particular option for reform but it none the less offers a basis for discussion. Since its publication, numerous debates have been organised with business associations and lawyers, a working group has been set up with the representatives of the Member States, and various conferences have been held. Around 100 written statements from Member States, firms and business associations, lawyers and academics have been received by the Commission. The European Parliament adopted a resolution on the subject on 18 January 2000 following the report by Mr Karl von Wogau. The resolution supports the general thrust of the Commission's proposal while stressing the importance of consistency in the application of Community law and of legal certainty for firms. The Economic and Social Committee also discussed the White Paper and adopted an opinion on 8 December. It too came out in favour of the Commission's proposal, considering it to be beneficial for firms in general and SMEs in particular. However, it listed a number of flanking measures which it considered necessary in order to ensure the uniform application of Community law in a system of parallel jurisdictions. On the basis of all these responses to the White Paper, the Commission will draw up a proposal for a regulation which will be presented to the Council and to Parliament.

36. Other instruments will then need to be amended or produced: for example, the notices on cooperation with national authorities and courts will need to be revised and a specific notice on complaints will need to be drafted. Specific measures to train national judges should be taken and the network made up of the Commission and the national authorities should establish rules on how it will operate. The White Paper merely marks the start of the final stage of the thorough reform of the rules implementing Articles 81 and 82, which is essential to the smooth

operation of a Community with enlargement on its agenda.

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

37. Companies need to respond to increasing competitive pressure and changes in the market place driven by globalisation, the speed of technological progress and the generally more dynamic nature of markets. Cooperation can be a means of sharing risk, saving costs, pooling know-how and launching innovation faster. In particular for small and medium-sized enterprises, cooperation is an important means of adapting to the changing market place. Consumers will share these gains, provided that effective competition is maintained in the market.

38. In 1998 the Commission's departments had intensified their thinking on the review of policy in this area, reaching certain initial conclusions such as on the need to focus on economic analysis, in line with the way in which the vertical restraints exercise was tackled<sup>(1)</sup>. Work on the review continued in 1999, with the Commission's departments preparing drafts of revised block exemption regulations on specialisation and on research and development, as well as draft guidelines on the applicability of Article 81 to horizontal cooperation agreements. The objective is to clarify the Commission's policy in the area of horizontal cooperation and to make it more effective for the future economic and legal environment. The approach is likely to be similar to that recently adopted for vertical agreements. The Commission hopes to be in a position to start public consultation on the drafts in the first half of 2000.

39. It should also be recognised that this review is an essential pillar of the Commission's attempts to modernise the EC competition rules. By clarifying the rules, the Commission should be freed from examining cases which are of no interest from a competition policy point of view and will thus be able to concentrate on more important cases, particularly on those which harm consumers by increasing prices or by reducing output, innovation or the variety or quality of goods and services. Moreover, any switch to a directly applicable exception system

<sup>(1)</sup> 1998 Competition Report, points 54 and 55.

under Article 81 (see Section 2 above) requires both a reinforcement of the legislative framework and the setting-up of mechanisms, such as guidelines, in order to ensure the uniform application of Article 81 in a system where several bodies have enforcement powers.

#### 4. Review of procedural rules

As regards procedures, two changes should be noted.

40. In a number of previous reports <sup>(1)</sup>, mention was made of consultation of the advisory committee in cases where the Commission envisaged sending a comfort letter to the companies concerned following the publication of a notice under Article 19(3) of Regulation No 17. This practice has been abandoned since 1998 in cases where the notice does not give rise to any comments which might change the positive stance taken in it: where the comfort letter is a logical follow-up to the notice, the Committee is merely informed after the event. It is only when key developments which might modify the initial stance follow the publication of the notice that the Commission enters the case on the agenda of a Committee meeting prior to sending the comfort letter. A case may also be discussed at the request of a Member State. When it publishes its intention to take a favourable view of a request or notification, the Commission gives interested institutions and individuals the opportunity to submit their comments. The competent authorities in the Member States may therefore take advantage of the publication to send their comments to the Commission and request that the case be discussed in the advisory committee.

41. The second innovation is intended to align practice in the antitrust field and the mergers and acquisitions field. So that the same letter does not have to be sent twice, once to the firm and once to its lawyer, firms may nominate a lawyer to receive their correspondence from the Commission. Such correspondence would be formally addressed to the firm involved in the proceedings, but would be sent to its lawyer (using the 'care of' formula), who would be required to forward it to the firm. However, the Commission allows firms this possibility only if the lawyer possesses an authorisa-

tion containing the following three elements: (1) the representative is authorised to receive and pass on any correspondence relating to a case, and to reply to any correspondence; (2) he has power of attorney to act for the firm, in particular by replying on its behalf; and (3) the firm undertakes to inform the Commission should the authorisation be withdrawn or amended.

42. This procedure applies to all correspondence sent in the course of proceedings, with the exception of requests for information under Article 11 of Regulations No 17 and (EEC) No 4064/89. Under paragraph 4 of this article in each case 'the owners of the undertakings or their representatives and, in the case of legal persons, companies or firms, or of associations having no legal personality, the persons authorised to represent them by law or by their constitution, shall supply the information requested'. This wording is designed to ensure that any reply to requests for information, or indeed failure to reply, commits the firm. Requests for information should therefore always be sent directly to the firm. This does not of course prevent the persons mentioned in Article 11(4) from designating a lawyer to reply; however, in such cases, the reply is fully binding on them. It should be noted that the White Paper on modernisation proposes amending Article 11(4) <sup>(2)</sup>.

#### B — Consolidating the single market <sup>(3)</sup>

43. 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, and by punishing anti-competitive conduct. The Commission believes that this action to consolidate the single market has an immediate impact on the progress of economic and monetary union.

<sup>(2)</sup> White Paper on modernisation, point 116.

<sup>(3)</sup> Most of the cases which gave rise to a positive approach on the part of the Commission are discussed in the following section (C — Sector-based policies).

<sup>(1)</sup> 1989 Competition Report, point 4; 1990 Competition Report, point 3.



### Box 2: Cooperation with national authorities and national courts

In the antitrust field, the 1997 notice on cooperation between the Commission and the competition authorities in the Member States was applied in some 50 cases, namely:

- 13 complaints rejected or suspended by the Commission on the ground that a national authority was handling them;
- 4 discomfort letters sent to the national authority so that, if it wished, it could prohibit a restrictive agreement notified to the Commission that did not meet the conditions of Article 81(3) but was not relatively significant enough to justify initiating the formal procedure;
- 30 cases of cooperation on cases handled simultaneously by the Commission and a national authority;
- 10 cases of the Commission being consulted by a national authority on a case handled by that authority alone;
- 2 dilatory notifications.

In addition, pursuant to point 49 of the notice, the Italian competition authority spontaneously informed the Commission of four cases in which it was applying Articles 81 and 82: *Stream/Telepù* (pay television, encrypted film rights); *Enell/Unapace* (electrical energy supply); *KM Zundholz/CIF-Conaedi* (production and sale of matches); and *Aeroporti di Roma* (groundhandling tariffs).

As regards relations with national courts, five cases in which the relevant notice on cooperation was applied in 1999 should be noted. These were the reply to the question put by the Helsingborg District Court (*tingsrätt*) in Case IV/36.568 — *Scandlines Sverige/Port of Helsingborg* (port charges), and four questions put by the Barcelona and Madrid Courts of First Instance in cases relating to the distribution of petroleum products.

In the merger field, five cases were referred to the competent authorities in the Member States under Article 9 of Regulation (EEC) No 4064/89. Three cases were referred in full: *Rabobank/Beeck/Homann* to the German Federal Cartel Office, *Heineken/Cruzcampo* to the Spanish authorities, and *CSME/MDP-SCPA* to the French authorities. Two further cases were referred in part: *Petrofina/Total* and *Totalfina/Elf Aquitaine* to the French authorities. More detailed information can be found in Chapter II of this report.

A case in which national law was applied and which is of interest for the Community was the prohibition by France of the acquisition of Orangina by Coca-Cola, despite undertakings given by the latter. Coca-Cola proposed granting an exclusive 10-year licence to an independent third party to market Orangina on the 'non-home' market. However, the Minister for Economic Affairs, in agreement with the Competition Council, took the view that such a system would lead to coordination of behaviour, which, while it might be necessary in order for Orangina to remain competitive on this market, would also be detrimental to free competition. Faced with the impossibility of resolving this contradictory situation, the Minister prohibited the acquisition. This case is the first in which the concept of joint dominant position, already familiar in Community law, has been applied under French law.

## 1. Cartels

44. Of all restrictions of competition, restrictive practices in the form of secret agreements are undoubtedly the most destructive. Very often, these 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, they almost

invariably concern prices and thus severely undermine competition. The Commission is committed to an extremely tough stance against cartels, particularly following the adoption of the euro as a common currency. The changeover to the euro in 11 Member States should increase price transparency within the Union and, as a result, intensify competition to the benefit of consumers. This must not be countered by restrictive



agreements designed to sidestep 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.

45. As in previous years the Commission demonstrated its firm commitment by its strong action against secret cartel agreements between companies. Final decisions were issued in two cases and additional sets of proceedings have been instituted.

46. On 26 October, the Commission found that the Dutch association of electrotechnical equipment wholesalers, the Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied (FEG), together with its largest member Technische Unie (TU), restricted competition by operating a system of collective exclusive dealing in combination with a system of price coordination on the Dutch wholesale market for electrotechnical equipment.

47. The Commission found evidence that FEG prohibited the association of importers of such products in the Netherlands from selling to wholesalers which were not members of FEG. The prohibition deprived these wholesalers of their sources of supply and complicated and delayed entry to the Dutch market by foreign wholesalers. At the same time, the arrangement prevented suppliers from selling their products on the Dutch market via wholesalers other than FEG members. As the collective exclusive dealing arrangement deprived potential price-cutters, such as non-FEG wholesalers, of their sources of supply, the artificial price stability created by FEG and its members could not be endangered by outsiders. The Commission imposed fines of EUR 4.4 million on FEG and EUR 2.15 million on TU <sup>(1)</sup>.

48. On 8 December, the Commission adopted a decision imposing fines totalling EUR 99 million on eight producers of seamless steel tubes: British Steel Limited (United Kingdom), Dalmine SpA (Italy), Mannesmannröhren-Werke AG (Germany), Vallourec SA (France), Kawasaki Steel Corporation, NKK Corporation, Nippon Steel Corporation and Sumitomo Metal Industries Limited (Japan). These firms, which are among the largest producers of seamless

tubes in the world, had colluded until 1995 <sup>(2)</sup> over keeping to their respective domestic markets for certain seamless tubes used in oil and gas prospecting and transportation <sup>(3)</sup>.

49. The products covered by the cartel were 'standard' steel borehole pipes (commonly known as 'oil country tubular goods', or OCTG) and 'project' transportation pipes (commonly known as 'line pipe'); both varieties are used in oil and gas exploration and transport. To coordinate their behaviour on the standard OCTG and project line pipe markets, the European and Japanese producers set up a cartel, which they called the 'Europe Japan club'. The cartel restricted competition in the common market by requiring that the domestic markets of the different producers (i.e. the German, French, Italian, UK and Japanese markets) be respected: the supply of seamless tubes to Member States of the Community where a national producer was established was limited by the other producers party to the agreement refraining from delivering tubes to those markets.

50. In fixing the amounts of the fines, the Commission took account of the fact that, by definition, an agreement requiring the participating firms to keep to their domestic markets constitutes a very serious infringement of Community law, since it undermines the proper functioning of the single market. Moreover, the four Member States concerned account for most of the consumption of seamless OCTG and line pipe in the EC and hence constitute an extensive geographic market.

51. However, the Commission also took account of the fact that the standard OCTG and project line pipe sold in the Community by the firms to which the decision is addressed account for only about 19 % of Community consumption of seamless OCTG and line pipe. As attenuating circumstances, the Commission noted that the sector was in a long-term crisis and that its position had deteriorated since 1991; coupled with the increasing flow of imports, these factors have resulted in capacity reductions and plant closures.

52. Pursuant to the notice on the non-imposition or reduction of fines in cartel cases <sup>(4)</sup>, the fines

<sup>(1)</sup> OJ L 39, 14.4.2000; Bull. 10-1999, point 1.3.32; Press Release IP/99/803, 26.10.1999.

<sup>(2)</sup> Except in the case of British Steel, which ceased producing the pipes in 1994.

<sup>(3)</sup> Bull. 12-1999; Press Release IP/99/957, 8.12.1999; not yet published in the Official Journal.

<sup>(4)</sup> OJ C 207, 18.7.1996.



imposed on Vallourec and Dalmine were reduced, since they had cooperated with the Commission in establishing the facts.

## 2. Opening-up of markets

53. The Commission has always kept a close eye on distribution agreements. While most distribution agreements are pro-competitive and facilitate market entry, some lead to the setting-up of watertight national distribution networks which partition markets, in particular where distributors are prevented from supplying customers based outside the contract territory. In this way, national markets are artificially isolated from one another, limiting competition and price convergence. Such agreements impinge upon the right of European consumers to purchase goods in the Member State of their choice and result in their being denied the benefits of the internal market, particularly where there are price differences between Member States. This is taken into account in the Commission's new block exemption regulation in the field of vertical restraints<sup>(1)</sup>, which, *inter alia*, does not apply to certain types of territorial and customer protection leading to a partitioning of markets<sup>(2)</sup>. Moreover, companies are advised not to use these restrictions in their agreements as individual exemption of such clauses will be unlikely<sup>(3)</sup>.

54. In 1999 the Commission continued to demonstrate its determination to promote the opening-up of markets, a prime example of this being the case involving the creation of the joint venture British Interactive Broadcasting Ltd (BiB, which has since changed its name to 'Open')<sup>(4)</sup>. Open is to provide a new type of service, digital interactive television services, to consumers in the United Kingdom. This involves putting in place the necessary infrastructure and services to allow companies, such as banks, supermarkets and travel agents, to interact directly with the consumer via the TV set. In this case, the main concern raised by the Commission pursuant to Article 81 was that the creation of Open eliminated BT and BSkyB, two of the parents of BiB, as potential competitors in the digi-

tal interactive television services market. The Commission decided to clear the creation of BiB only after the parties had given substantial undertakings aimed at ensuring that the digital interactive television services market in the UK remained open to competition. In particular, as competition to BT and BSkyB comes from the cable networks, the decision should ensure that third parties will have sufficient access to BiB's subsidised set-top boxes, as well as to BSkyB's films and sports channels, and that set-top boxes other than BiB's can be developed in the market.

55. Another case where the Commission was concerned to ensure that a market remained open was the *Microsoft Internet Explorer* licensing case<sup>(5)</sup>. In this case, the Commission approved Microsoft's revised licensing agreements with Internet service providers (ISPs) by way of a comfort letter. An ISP is a company that maintains a permanent connection to the Internet and enables its subscribers to connect to the Internet via a telephone link to itself. ISPs may also provide their subscribers with worldwide web (www) pages. In 1998, Microsoft, the computer software manufacturer, formally notified the Commission a set of revised agreements made with some European ISPs for the licensing and distribution of its Internet Explorer products. Microsoft's formal notification of its agreements followed an inquiry launched by the Commission's Directorate-General for Competition into a previous version of the agreements. During this inquiry, the Competition DG advised Microsoft to re-examine the agreements to ensure that they did not contain restrictions that might have the effect of illegally foreclosing access to the market for Internet browser software by Microsoft's competitors and of illegally promoting the use of Microsoft's proprietary technology on the Internet.

56. Microsoft subsequently amended its agreements and notified the revised agreements to the Commission. There were two major changes: the ISPs' failure to attain minimum distribution volumes or percentages for Internet Explorer browser technology will no longer result in termination of their agreements, and ISPs are now allowed to promote and advertise competing browser software<sup>(6)</sup>. In the light of these changes

<sup>(1)</sup> Regulation (EC) No 2790/1999 on the application of Article 81(3) to categories of vertical agreements and concerted practices (OJ L 336, 29.12.1999). See Chapter I.A above.

<sup>(2)</sup> Article 4 of Regulation (EC) No 2790/1999.

<sup>(3)</sup> See Press Release IP/99/1045, 22.12.1999.

<sup>(4)</sup> See Press Release IP/99/686, 16.9.1999.

<sup>(5)</sup> See Press Release IP/99/317, 10.5.1999.

<sup>(6)</sup> Further details of the notification of the Microsoft Internet Explorer licensing agreements were published in the *Official Journal of the European Communities* (OJ C 175, 9.6.1998).



the Commission cleared the agreements by way of a comfort letter. The comfort letter covers only the agreements between Microsoft and the ISPs and does not give any ruling on the overall behaviour of Microsoft as regards a possible abuse of a dominant position.

### 3. Undertakings in a dominant position

57. Article 82 prohibits undertakings in a dominant position on a given market from abusing this situation to the detriment 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. In 1999 the Commission adopted four prohibition decisions under Article 82.

58. On 10 February, the Commission found that the Finnish airport operator Ilmailulaitos Luftvartsferket abused its dominant position by granting a 60 % discount on landing fees at Helsinki, Vaasa, Turku, Pori and Tampere airports for domestic flights but not for intra-Community flights. It ordered Ilmailulaitos Luftvartsferket to terminate its discriminatory fees system, which had been introduced for no objective reason. These discriminatory fees favoured the access of domestic flights over those originating in other Member States <sup>(1)</sup>.

59. Also on 10 February, the Commission found that the operator of Portuguese airports, Aeropor-

tos e Navegação Aérea-Empresa Publica, abused its dominant position by maintaining a tariff structure with a 50 % reduction on landing fees for domestic flights but not for intra-Community flights and a volume discount ranging from 7 to 32 % according to the number of monthly landings at Lisbon, Oporto and Faro airports. As this discriminatory rate structure, for which there was no objective justification, had been introduced by a government measure, the decision was adopted under Articles 82 and 86 (former Articles 86 and 90) of the EC Treaty. Again, these discriminatory fees favoured the access of domestic flights over those originating in other Member States <sup>(2)</sup>.

60. The Commission set out its policy on commissions paid by airlines to travel agents in its decision in the *Virgin/BA* case <sup>(3)</sup>. Virgin's complaint against BA was the first of a series of complaints received by the Commission alleging abuses of a dominant position by airlines operating loyalty rebate schemes which effectively tie travel agents to a dominant airline. The Commission found that the commissions offered by BA to UK travel agents were equivalent to a 'loyalty discount' i.e. a discount based not on cost savings but on loyalty. Schemes of this type have been consistently condemned as an abuse of a dominant position in other industries in the past. It is well-established Community law that a dominant supplier cannot give incentives to its customers and distributors to be loyal to it, thereby foreclosing market access by the dominant firm's competitors. As a dominant firm, BA should provide supplementary commissions to travel agents only where these reflect extra services provided by the agent or efficiencies realised by BA. The Commission is taking all measures necessary to ensure that the principles in this decision are applied to other EC airlines in equivalent situations. The Commission imposed a fine of EUR 6.8 million on British Airways for a serious abuse of a dominant position over a period of seven years.

61. On 20 July, the Commission found that the local organising committee of the 1998 Football World Cup (Comité Français d'Organisation de la Coupe du Monde de Football 1998, or 'CFO') had abused its dominant position by implementing discriminatory ticket sales arrangements in

<sup>(2)</sup> OJ L 69, 16.3.1999; Bull. 1/2-1999, point 1.3.80.

<sup>(3)</sup> Decision of 14 July 1999. Not yet published in the Official Journal.

<sup>(1)</sup> OJ L 69, 16.3.1999; Bull. 1/2-1999, point 1.3.79.



the run-up to the tournament that favoured consumers resident in France. The decision followed an investigation by the Commission, which revealed that some 570 000 entry tickets had been sold by the CFO exclusively to consumers able to provide an address in France. The practical effect of such a requirement was to deny the overwhelming majority of consumers outside France access to a significant proportion of entry tickets for finals matches.

62. The Commission would normally impose a heavy fine where an undertaking abuses a dominant position in this manner. Nevertheless, given that the abusive ticketing arrangements as implemented by the CFO were similar to those adopted for previous World Cup finals tournaments, and that the CFO could not easily have relied upon previous decisions of the Commission or case law of the Court of Justice in order to ascertain its responsibilities under EC competition rules, the Commission decided to impose no more than a symbolic fine of EUR 1 000 on the CFO. However, the decision sends a clear signal that the Commission expects future tournament organisers to ensure that their ticketing arrangements comply fully with EC competition rules before putting them into effect (1).

63. On 7 October, the Court of First Instance upheld in all material respects the Commission's decision concerning infringements by Irish Sugar of Article 82 (2). The Commission had imposed a EUR 8.8 million fine on Irish Sugar and its subsidiary SIDL for having abused their dominant position on the Irish markets for industrial and retail sugar. The abuses consisted in a series of commercial practices, primarily rebate policies, aimed at tying customers to Irish Sugar and thereby foreclosing market entry (2).

64. The Court confirmed the Commission's view that Irish Sugar and its subsidiary SIDL held a (vertically) collective dominant position on the relevant markets, observing *inter alia* that their market power was not affected by any counter-vailing buying power on the part of their main customers. The Court went on to uphold the Commission's finding that various commercial practices engaged in by Irish Sugar and/or SIDL had been abusive. It did, however, reduce the fine to EUR 7.88 million, on the grounds that the Commission had not sufficiently proven one of the abuses during a two-year period. Irish Sugar has appealed against the judgment (3).

(1) Decision of 14 May 1997 (01 L 236, 22.9.1997) and Case T-228/97 *Irish Sugar v Commission*.

(2) For more details see 1997 Competition Report, point 65.

(3) Case C-497/99 P *Irish Sugar v Commission*.

(1) OJ L 5, 9.1.2000.

### Box 3: Relations with consumer organisations

#### A — Relations which are necessary and reciprocal

The goal of competition policy is to maintain a high degree of competition in the common market. For final users, this policy is reflected in lower prices, a wider choice of goods, and technological innovation. Given the impact of competition policy on final consumers, it would appear legitimate for relations to develop between the authorities responsible for competition and the organisations which represent consumers.

Consumer organisations have a right to expect the Commission to protect consumers as economic agents. It should preserve their capacity to act on the market as agents of competition and to reap its rewards. Consumers make up a structural element of the market (demand) which reacts to the commercial practices of firms (supply). Ensuring that markets operate properly therefore also means ensuring that consumers are able to make choices which influence the behaviour of suppliers.

The Commission, and its departments which deal with competition, can expect a good deal of feedback from consumers and consumer organisations. Their knowledge of the daily operation of markets, especially markets for consumer goods, means that consumer organisations are in a



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position to provide the Commission, by means of complaints or through informal contacts, with information which may allow its departments to start own-initiative proceedings. Likewise, when they are interested parties in the context of proceedings initiated against firms, they can contribute to the establishment of the facts. Lastly, consumer organisations can act as an excellent information relay for the Commission, passing on information intended for the public.

#### *B — State of relations between the Competition DG and consumer organisations*

The Commission departments responsible for competition are in fairly regular contact with consumer associations, notably in the context of general consultation on draft legislation or of individual cases in which such associations lodge a complaint with the Commission or express concerns informally.

As regards draft legislation or rules, or monitoring reports in specific areas, consumer associations within the EU, together with their European federation, BEUC, have contributed to the debates. For example, BEUC was represented at the hearing organised by the Commission on the Green Paper on vertical restraints in competition policy and at the hearing organised by the European Parliament on the White Paper on modernisation. Cooperation between the Commission and consumer associations has been judged satisfactory during several such consultation exercises.

Where the Commission publicises notifications of agreements or plans for mergers or acquisitions via a notice in the Official Journal, consumer associations sometimes contact the Commission as interested parties in individual cases, where they consider that consumer interests may be harmed by the effect of a restrictive agreement or a merger. The Commission may also contact them by administrative letter to ask for information in the context of proceedings. Thus, the UK Consumers' Association played an active part in the *Airtours/First Choice* merger case, in particular during the hearing. It presented economic studies and a legal argument in support of its position. Likewise, in a number of transatlantic alliance cases, the Commission had the opportunity of hearing consumer associations (airline passengers). The same went for postal services cases, especially *REIMS II*, in which the Commission received comments from BEUC.

Consumer associations may also lodge complaints directly with the Commission in respect of a firm or a particular sector of the economy. When it receives complaints of this kind, the Commission enjoys a certain amount of discretion, on the basis of the case law of the Court of Justice (*Automec II* judgment), in deciding whether to launch own-initiative proceedings or to reject the complaint on the ground of lack of Community interest. The Commission has already opened own-initiative proceedings on the basis of information received from individual consumers or their representative associations. The most significant own-initiative proceedings of this kind were without doubt those which were initiated against Volkswagen-Audi and which terminated in a decision imposing a fine of ECU 102 million. Another example is the case involving the Greek/Italian ferry cartel, in which the Commission initiated proceedings following receipt of a complaint (in the form of a letter from a consumer).



## C — Sector-based policies

### 1. Telecommunications

#### 1.1. Directive under Article 86(3) on the legal separation of cable and telecommunications activities <sup>(1)</sup>

65. On 23 June, the Commission adopted a directive amending for the sixth time Directive 90/388/EEC of 28 June 1990 on competition in telecommunications services. Pursuant to this amendment, Member States must ensure that telecommunications operators which are in dominant positions and which are controlled by a Member State or granted special rights pursue their cable television activities in a structurally separate company. This is in the light of the conflict of interests that exists between the operation of the two networks. An operator active on both networks is much less inclined to carry out rapid upgrading of the cable network and to use it to compete with its own telephone network, which also allows broadband transmission thanks to new technologies available today such as xDSL.

66. The directive was adopted following wide consultation of interested parties during 1998 on the basis of a first draft adopted on first reading by the Commission on 16 December 1997 <sup>(2)</sup>. During the consultation process, a consensus was reached on the need to deal with the conflict of interests arising where the same operator owns the telephone and cable networks. Legal separation was thought to be the minimum needed to deal with this problem. This general analysis was confirmed by the European Parliament in its resolution adopted on 9 February.

67. For this reason, several operators announced that they were taking the necessary preparatory steps to comply with the legal separation obligation, or even to go one step further (divestment of the cable networks), even before the directive was adopted. Most considered that the approach taken met the demands of the market in a multimedia environment and was in the interest of the firms themselves. Deutsche Telekom thus launched a call for tenders for its cable networks in August, while France Télécom transferred its

cable networks to companies jointly owned with the operators of its networks. The Commission none the less reserves the right to go further in certain cases, as illustrated by its decision on the *Telia/Telenor* merger <sup>(3)</sup>.

#### 1.2. Fifth report on the implementation of the directives

68. On 10 November, the Commission adopted its fifth report on the implementation of the telecommunications regulatory package (COM(1999) 537 final). This report takes stock of the results of telecommunications liberalisation in the Member States.

69. The fifth report was prepared by the 'joint team' (body responsible for implementing Community telecommunications legislation) comprising officials drawn from the Directorates-General responsible for telecommunications and for competition. This team heard comments from incumbent operators, new entrants and the national regulatory authorities from each Member State during bilateral meetings held in Brussels and collected statistics from the authorities, which are summarised in the annex to the report.

70. The report's main conclusion is that the introduction of competition has boosted the European Union's telecommunications services sector, which registered an annual growth in 1999 of 10.3 %, four times greater than the growth of GDP in the EU. In terms of value, the telecommunications services market was worth EUR 183 billion. The most dynamic segment of the market was mobile telephony, which grew by 31.5 % in 1999 to a value of EUR 49 billion. Furthermore, thanks to competition, residential telephone tariffs for international calls fell by 40 % on average between 1997 and 1999 in most Member States <sup>(4)</sup>; business tariffs for similar calls were also down in most Member States (on average by 25 % over the same period). Tariffs for 10-minute regional and long-distance calls fell by 13 % and 30 % respectively <sup>(5)</sup>. The overview of quality indicators annexed to the report confirms that voice telephony services offered by incumbent operators have improved. However, tariffs for local calls have not

<sup>(1)</sup> See IP/99/413, 23.6.1999.

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

<sup>(3)</sup> See Chapter II below.

<sup>(4)</sup> For 10-minute calls. Source: Eurodata Foundation.

<sup>(5)</sup> Fifth report on the implementation of the telecommunications regulatory package (COM(1999) 537 final, p. 2).

fallen significantly. The statistical data annexed to the report also confirm the rapid growth in mobile and Internet penetration in the European Union, which is underpinned by the keen competition on these markets.

71. However, the report identifies a number of remaining barriers to the establishment of a single European market, arising in particular from the gaps in harmonisation of national rules and approaches. Filling these gaps is one of the objectives of the review of the regulatory framework also launched by the Commission on 10 November with the adoption of its communication 'Towards a new framework for electronic communications infrastructure and associated services: The 1999 Communications Review' (COM(1999) 539).

### *1.3. Monitoring the implementation of the directives*

72. The Commission continued to monitor the effective implementation of the liberalisation directives in those Member States which had not correctly applied them, together with the introduction of the regulatory framework in Portugal, whose additional period of grace for introducing competition expired on 31 December.

73. During 1999 the Commission continued the infringement proceedings initiated in 1997 and 1998 against those Member States which had not correctly transposed the liberalisation directives. The Commission thus decided to send five reasoned opinions to Greece <sup>(1)</sup>, which had neither lifted all restrictions on the operation of DCS 1800 and DECT mobile telecommunications services, despite the availability of frequencies, nor liberalised satellite services and alternative infrastructures in accordance with the directive on the implementation of full competition (Commission Directive 96/19/EC) and with Commission Decision 97/607/EC. These first two objections were referred to the Court of Justice (Joined Cases C-396 and C-397/99). On 9 September, the Commission also brought an action before the Court of Justice in the context of proceedings initiated against Belgium on 2 December 1997 for failure to implement a Community directive in respect of the cost accounting method to be implemented by the incumbent operator, Belgacom. Under

Directive 90/388/EEC Belgium had to ensure that a method identified the cost elements incorporated in the interconnection charge from the first half of 1997. Since Belgium amended its legislation accordingly, the Court was able to close the case (Case C-337/99). On 28 July, the Commission decided to refer to the Court another infringement case against Belgium, this time in respect of the method of calculating the net cost of universal service provision and the contributions of operators to its financing on the telecommunications market (Case C-384/99). On 17 October, the Commission brought an action before the Court of Justice against Portugal for preventing competition in 'call-back' services on its territory (Case C-429/99). Despite substantial progress made by the Member States and especially by Belgium in the last few months of the year, 1999 ended with 15 infringement proceedings in progress against Member States which had not correctly transposed the competition directives. On the same date, a total of 70 infringement proceedings were also under way in respect of the harmonisation directives adopted by Parliament and the Council in this sector.

### *1.4. Launching of an inquiry into the telecommunications sector <sup>(2)</sup>*

74. On 27 July the Commission decided to launch an inquiry into the telecommunications sector, pursuant to Article 12 of Regulation No 17, covering three areas:

- *leased lines, especially international leased lines*: the Commission had received informal complaints against certain incumbent operators, in which it was alleged that discrimination was being practised as regards charges, treatment and delays in delivery or the quality of service. Furthermore, the main international association of telecommunications users (INTUG) had compared the charges for leased lines applied by incumbent operators across the common market and its findings showed that the cross-border/national charge ratio exceeded 120 % in all Member States and was as high as 500 % in some cases, discrepancies which did not appear to be justified;
- *mobile roaming services, including national roaming*: no real competitive supply appeared

<sup>(1)</sup> See Press Release IP/99/152, 3.3.1999.

<sup>(2)</sup> See Press Release IP/99/786, 22.10.1999.



to be emerging on the market for wholesale or retail roaming services. Moreover, the Commission had received complaints from users who considered that roaming charges were extremely high;

- *the local loop (line rental and local calls)*: charges appeared to remain inflexible, although the level of monthly rental fees still differed significantly from one Member State to another. On the other hand, complaints received by the Commission seemed to indicate that in some Member States the price for access to unbundled local capacity seemed to be being kept artificially high. It therefore seemed appropriate to research any evidence of anticompetitive pricing, and to determine the real state of local-loop pricing in all Member States, on the basis of cost accounting data, where available.

75. The aim of the Commission's inquiry is to establish whether current commercial practices and prices infringe the EU competition rules, in particular the prohibition of restrictive practices and abuses of dominant positions (Articles 81, 82, and/or 86 of the EC Treaty). This is only the third sector inquiry ever launched by the Commission.

76. On 22 October, the Commission launched the first phase of this sector inquiry into leased line charges. Detailed questionnaires were sent to national competition authorities, telecommunications regulators, incumbent operators throughout the EU, new entrants which provide and/or use leased lines and major business users.

## 2. Postal services

### 2.1. *The stage reached in the liberalisation of postal services*

77. The time limit for the implementation by Member States of the laws, regulations and administrative provisions necessary to comply with the 1998 postal services directive<sup>(1)</sup> expired on 10 February. The postal directive is a first step towards the creation of an internal market in the

postal sector; it establishes common rules to ensure greater harmonisation of the conditions governing the postal sector in the Community. The directive has two main aims: to provide for the gradual and controlled liberalisation of the postal market, and at the same time to guarantee the provision of a universal postal service to all users throughout the Member States. In implementing its first aim, the directive establishes maximum limits for postal services which may be reserved. In furthering its second aim, the directive sets forth certain minimum requirements which the universal service must fulfil. At this stage, the postal services directive allows, to the extent necessary to ensure the maintenance of a universal service, the reservation of domestic general letter mail services up to a weight of 350 grams and below five times the public tariff for the first class service.

78. Within this legal framework, the transposition measures notified by certain Member States raise competition issues which are currently being examined under Articles 86 and 82 of the EC Treaty. The Commission has received a number of complaints that some Member States' implementing legislation effectively extends the scope of the existing national postal monopolies. For example, certain postal services, which are separate and distinct from the general letter mail service and were previously provided by private operators in competition with the incumbent postal operator, would be for the first time included within the scope of the reserved area. The Commission will investigate these complaints and determine whether the exclusion of competition in these distinct service areas is necessary to ensure the universal postal service.

79. Complainants have raised concerns as major players continue to expand into foreign markets by buying up competitors and potential competitors active in markets outside the universal service obligation. The issue of whether the funding of some of these acquisitions by means of revenues derived from the reserved area infringes the competition rules is currently being examined by the Court of First Instance in Case T-175/99.

80. The question of a possible cross-subsidisation of competitive activities through monopoly income is also of relevance under the State aid provisions of the Treaty. In that respect, the Com-

<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). See also 1997 Competition Report, point 124.

mission decided to open a formal investigation into State aid to Deutsche Post AG <sup>(1)</sup>.

## 2.2. Decision exempting the Reims II Agreement

81. On 15 September, the Commission approved, under the competition rules of the EC Treaty, the Reims II Agreement between 16 European postal operators on terminal dues <sup>(2)</sup>. 'Terminal dues' is the term used for the remuneration that a postal operator sending cross-border mail has to pay to the receiving postal operator for delivering the mail to the addressees. The parties to the Reims II Agreement comprise all Member States of the EU except for the Netherlands. The public postal operators of Norway, Iceland and Switzerland are also parties to the agreement <sup>(3)</sup>.

82. The main aims of the Reims II Agreement are to provide the parties with cost-based compensation for the delivery of cross-border mail which reflects more closely the real costs of delivery of each party, and to improve the quality of the cross-border mail service. In this respect, the Reims II Agreement links terminal dues to domestic mail tariffs in the country of destination and to the quality of service provided by the postal operator that delivers the mail. The agreement also introduces a system of quality-of-service standards in order to improve the quality of service' and a penalty system which is to be applied when the agreed standards are not met. Special transitional rules are set out for the pub-

lic postal operators in Greece, Italy, Spain and Portugal.

83. The Commission expects the notified agreement to lead to an improvement in the distribution of goods and to promote technical or economic progress. Given that terminal dues previously often resulted in a remuneration for the delivery of cross-border mail which did not cover costs, a move towards a more cost-based system will allow the postal operators to maintain and improve this service. By linking increases in terminal dues to improvements in the quality of service, the Reims II Agreement provides a strong incentive for the parties to improve their performance. A better quality of service for cross-border mail would also be beneficial to consumers.

84. In order to ensure that the agreement is compatible with the competition rules of the EC Treaty, the Commission requires in its decision that the transitional period provided for in the agreement be postponed so as to ensure that terminal dues for the rest of 1999 are not increased beyond 55 % of domestic tariffs, and that the maximum increase in terminal dues is to 65 % of domestic tariffs in 2000 and to 70 % of domestic tariffs in 2001. In addition, the parties will have to grant each other effective access to the 'generally available domestic rates' (such as bulk rates for direct mail, printed matter or periodicals) in the country of delivery (so-called 'Level 3 access'). Furthermore, the parties will have to introduce, by the end of 1999, a transparent cost accounting system ensuring that all significant cost elements can be identified, quantified, compared and vetted. The exemption was therefore granted for the period 1 April 1999 to 31 December 2001. The Commission will closely monitor the development of tariffs for domestic and cross-border mail under the agreement and has already contacted the parties in this connection.

<sup>(1)</sup> Case C-61/99 (OJ C 306, 23.10.1999).

<sup>(2)</sup> Commission decision of 15 September 1999 in Case No IV/36.748 — *Reims II* (OJ L 275, 26.10.1999).

<sup>(3)</sup> The content of the amended agreement for the remuneration of mandatory deliveries of cross-border mails was published in the Official Journal (OJ C 371, 1.12.1998).



### 3. Media

#### **Box 4: Convergence between telecommunications, media and the Internet**

The development of digital technology, beginning in the field of computing, then telecommunications and now in television, has led to convergence between the areas through this common underlying technology. Accelerating the whole process dramatically has been the explosive growth of the Internet.

Convergence can be viewed in different ways: technologically, from the consumer's perspective and from the point of view of the market players. Technological convergence means that different services (e.g. television, telephony, Internet access) can now be provided over more or less any infrastructure (satellite, TV, cable, fixed telephone networks). From a consumer point of view, the same device, whether it be a TV, a fixed or mobile telephone or a PC, is today capable of delivering a range of different services, including moving images, telephony and Internet access. Access therefore becomes a key issue both in terms of access to infrastructure for operators, in particular new market entrants, and in terms of consumer access to the full range of services and content. Finally, the market players from all three areas, telecommunications, IT and the media, are positioning themselves to enter each other's market as well as protect their existing market positions. They are achieving this through alliances and joint ventures, several of them already notified to the Commission.

Basically, these developments are procompetitive in that the number of communication channels is increasing dramatically. However, the Commission has had to address these developments in a number of cases in the past few years and to assess whether the response of the market players gives rise to competition concerns.

Since the prohibition of the MSG operation in 1994, where the joint venture between Kirch, Bertelsmann and Deutsche Telekom was found to create a dominant position on the market for technical services for pay-TV, a wide variety of other cases have been notified to or investigated by the Commission. The underlying theme of these cases is that companies in different industries have formed joint ventures or acquired other companies in order to diversify their activities and to offer services in new and related markets.

In the area of telecommunications, media and information technology, the issue of convergence is probably best looked at in relation to three levels. These levels are infrastructure, access and content.

An important competition concern from the point of view of infrastructure is the promotion of competition in the last link between the local exchange and the consumer (the local loop). The Commission is doing this by ensuring that incumbent telecommunications companies separate their cable-TV activities into a separate company and on a case-by-case basis by requiring divestment of the cable company concerned. In addition, the Commission has encouraged the unbundling of the local loop to enable other infrastructure providers to offer services over their own infrastructure leased from the incumbent telecommunications operator. Both cable divestment and local-loop unbundling were undertakings given to the Commission by Telia and Telenor to secure clearance of their merger, which was subsequently abandoned.

Existing operators in the telecommunications field have sought to expand their operations into access activities, and in doing so have met companies seeking to do the same from the area of content. An example of this was the formation of British Interactive Broadcasting, now known as Open, to provide interactive services using an incoming signal via satellite and a return signal via a telecommunications line. This joint venture was set up by BT (the telecommunications provider), BSkyB (the content owner and broadcaster), Midland Bank and Matsushita. A key function of the joint venture was to subsidise the cost of the set-top box needed in order to have access to digital satellite TV, to the Internet (limited access) and to interactive services, and to provide a platform for those services.

Other operations in the telecommunications sector have raised a different issue, where companies have withdrawn from ownership of activities in a vertically related market, replacing this with an outsourcing contract for the activities which had been sold off. In 1999 the Commission assessed and approved under



the merger regulation an operation by which AT&T and IBM acquired assets from each other in the area of data networks and business services to large companies. In each case, the two companies replaced their activities with outsourcing contracts for the activities they had sold to the other. MCI WorldCom and EDS concluded a similar arrangement, which was not, however, notified to the Commission.

Overall, in its assessment of these types of operation in vertically related markets, the Commission treats each case on its own merits. However, certain themes run through its approach. First, companies which are dominant on one market should not be permitted to extend that dominance into related markets. An example would be dominance with regard to ownership of films and sports rights being used to achieve dominance in pay-TV and digital interactive television services. Second, the Commission cannot accept the concentration of excessive market power in the hands of one or a limited number of players which can put it or them in a gatekeeper role for existing or emerging markets. Finally, companies which have control of an important access device such as a set-top box, an EPG (electronic programming guide), a telecommunications local loop or an Internet browser (such as Netscape Navigator or Microsoft Internet Explorer) are likely to be required to meet demanding conditions for the approval of any operation notified to the Commission, *inter alia* to ensure that access to that device is not restricted.

*Incompatibility with the common market, pursuant to Articles 90(3) and 52 (now Articles 86(3) and 43) of the EC Treaty, of a monopoly established by law*

85. In its judgment of 8 July in Case T-266/97, the Court of First Instance (CFI) dismissed the application by Vlaamse Televisie Maatschappij NV (VTM) for annulment of the decision adopted on 26 June 1997 by the Commission under Articles 90 and 52 (now Articles 86 and 43) of the Treaty <sup>(1)</sup> concerning the exclusive right to broadcast television advertising in Flanders.

86. The CFI first rejected two pleas claiming that the Commission had breached the right to be heard and the principle of legal certainty. With regard to the first plea, the CFI stressed that while an undertaking, that was the direct beneficiary of the State measure being challenged, had the right to be heard concerning the objections set out by the Commission in the letter of formal notice it addressed to the Member State in question, this did not mean that the Commission was required to communicate to that undertaking a copy of any complaint which had prompted initiation of the procedure or the comments submitted by the Member State in reply to the Commission's objections. The Court went on to point out that statements made in public by a Member of the Commission could not be regarded as committing the Commission, which operated according

to the principle of collective responsibility, meaning in particular that it took its decisions as a body.

87. With regard to the second plea, the Court ruled that the Commission did not have to examine on a single occasion the compatibility of a national regulatory measure with all of the Treaty rules. It then confirmed the Commission's assessment of the exclusive right, pointing out that, for Article 90 (now Article 86) to apply in conjunction with Article 52 (now Article 43), it was sufficient for the State measure concerned to be found to constitute a barrier to the right of establishment, there being no need to examine whether it constituted a disguised form of discrimination whose effects were protectionist <sup>(2)</sup>.

## 4. Transport

### 4.1. Air transport

#### Airports

88. On 10 February, the Commission took two decisions <sup>(3)</sup> on systems for discounting and differentiating landing charges at Portuguese and Finnish airports, thereby fleshing out its policy on competition at airports <sup>(4)</sup>. After the Frankfurt

<sup>(1)</sup> Case No IV/35.760 — VT4/Vlaamse Gemeenschap+VTM (OJ L 244, 6.9.1997).

<sup>(2)</sup> 1997 Competition Report, Part Two, Chapter II.A.2.

<sup>(3)</sup> OJ L 69, 16.3.1999.

<sup>(4)</sup> 1998 Competition Report, Box 4.



airport decision, which concerned access to the groundhandling market, and the Paris airports decision, which related to the airports' commercial policy, the focus has now switched to the issue of charges for access to airport infrastructures, and in particular the principle of non-discrimination in the setting of those charges. The Commission first tackled this issue with a decision concerning Zaventem airport <sup>(1)</sup>; it has now adopted a further two decisions relating to the differentiation of landing charges according to the origin of the flight (domestic or international). It found that the reductions for domestic flights of 50 % and 60 % respectively at Portuguese and Finnish airports were in flagrant breach of the single transport market.

89. The Commission's approach to competition in the airport sector is now clear and known to all parties. Other Community airports will have to adopt a charging policy which is in line with that approach if they are to avoid incurring heavy fines in the next round of cases that the Commission has to deal with in this area. A letter setting out the Commission's approach towards landing charges was sent to all the authorities or entities operating airports at which such discounts or differentiated charges were applied, calling on them to alter their system of charges.

*Partial prolongation of block exemption  
Regulation (EEC) No 1617/93*

90. On 26 May, the Commission adopted Regulation (EC) No 1083/1999 <sup>(2)</sup> partly prolonging Regulation (EEC) No 1617/93 <sup>(3)</sup>, by which the Commission granted a block exemption for certain categories of restrictive agreements in four areas, i.e. joint planning and coordination of airline schedules, joint operation of a scheduled air service on a new or a low-density route, consultations on tariffs for the carriage of passengers, and slot allocation and airport scheduling. While Regulation (EEC) No 1617/93 has been prolonged for passenger tariff consultations and slot allocation at airports until 30 June 2001, it has not been renewed for joint planning and coordination of airline schedules and joint operations. The regulation entered into force on the date of its publication in the Official Journal.

<sup>(1)</sup> 1995 Competition Report, point 120.

<sup>(2)</sup> OJ L 131, 27.5.1999.

<sup>(3)</sup> OJ L 155, 26.6.1993; as last amended by Regulation (EC) No 1523/96 (OJ L 190, 31.7.1996).

91. The new regulation adapts the legal environment created by Regulation (EEC) No 1617/93 to match it to the present state of development of the air transport industry. The Commission's own investigation and the extensive consultation exercise to canvas views from the industry and the Member States made clear that it was not appropriate to prolong the block exemption in respect of agreements on joint planning and coordination of schedules and agreements on joint operations. Joint planning and scheduling within the limited meaning of the original definition in Regulation (EEC) No 1617/93 appears to be of lesser importance. Where such agreements are concluded, they are mostly part of more comprehensive agreements, such as alliance agreements and cooperation agreements. Such wide-ranging agreements, however, fall outside the scope of Article 2 of Regulation (EEC) No 1617/93. It also became evident that little use has been made of joint operations and that such agreements are of little importance to the industry. Therefore, there was no longer any need to block exempt these types of operation.

92. The Commission did, however, feel the need to further continue and intensify its investigation into passenger tariff consultations and slot allocation with the aim of verifying whether these two categories should continue to be exempted in future. It was therefore decided to extend Regulation (EEC) No 1617/93 for these two issues until June 2001.

*Alitalia/KLM*

93. During the year the Commission also approved an alliance between Alitalia and KLM. However, the alliance was so wide-ranging that the Commission regarded the agreement as falling under the merger regulation, and it was examined as a merger. The alliance was only cleared subject to extensive undertakings from the parties designed to prevent the creation of a dominant position on the market for non-stop travel between Amsterdam and Milan and Amsterdam and Rome. These undertakings, which are described in Chapter II.B.4 of this report, are designed to allow new entrants to compete on the Amsterdam–Milan and Amsterdam–Rome routes. They go further than the undertakings obtained at the time of the Sabena/Swissair merger <sup>(4)</sup> or the remedies im-

<sup>(4)</sup> OJ C 200, 4.8.1995.

posed on the Lufthansa/SAS alliance <sup>(1)</sup>. They are similar to the 'proposed remedies' published by the Commission for the BA/AA and Lufthansa/United/SAS alliances <sup>(2)</sup>.

#### *Virgin/British Airways*

94. The Commission set out its policy on commissions paid by airlines to travel agents in its decision on the *Virgin/BA* case <sup>(3)</sup>. This case is discussed in Chapter I.B of this report.

## 4.2. Maritime transport

### Liner conferences

95. Following the Commission's TACA (Trans-Atlantic Conference Agreement) decision of 16 September 1998 <sup>(4)</sup>, several shipping lines withdrew from TACA, leaving eight members which at the beginning of 1999 notified an amended agreement ('revised TACA'). On 6 May, the Commission published, pursuant to the competition procedures applicable in the transport sector <sup>(5)</sup>, a summary of the revised TACA notification <sup>(6)</sup>. The Commission has 90 days from the date of such publication in which it can raise serious doubts and so continue its investigation into the case.

96. As regards the maritime transport aspects of the revised TACA, the Commission informed the parties within the 90-day period that it had serious doubts whether their revised agreement could be cleared in its current form. The Commission's investigation centred on whether the parties' arrangements (particularly as regards the exchange of information) could harm competition between the parties when they negotiate and agree individual service contracts with shippers.

97. As far as inland transport is concerned, the revised TACA no longer provides for inland

price-fixing. The parties have instead agreed that they could adopt a 'not-below-cost' rule. Under such a rule each line would agree, where they provide maritime transport services pursuant to the conference tariff, not to charge a price less than the direct out-of-pocket cost incurred by it for inland transport services supplied within the EEA in combination with those maritime services. The Commission did not within the 90-day period raise serious doubts against the not-below-cost rule, with the consequence that the rule is deemed exempt for three years <sup>(7)</sup>. The Commission accepted, in this case, that the possibility of implementing a not-below-cost rule was aimed at avoiding the risk that below-cost pricing on the inland leg would undermine the stability brought about by the conference maritime tariff which is permitted under the block exemption for liner conferences <sup>(8)</sup>.

98. All major conferences serving Europe have now abandoned inland price-fixing. However, appeals from shipping lines to the Court of First Instance against the Commission decisions prohibiting inland price-fixing are continuing. The Commission's approval of the not-below-cost rule is also the subject of an appeal from shippers to the Court of First Instance.

### Capacity management agreements

99. On 30 April, the Commission adopted a decision prohibiting a capacity management programme between conference and non-conference members, the Europe-Asia Trades Agreement (EATA), which operated in combination with direct price-fixing agreements <sup>(9)</sup>. The purpose of the EATA was to increase prices by establishing a capacity management programme concerning scheduled maritime transport services for the carriage of containerised cargo from northern Europe to the Far East. A capacity management programme is an agreement under which the parties agree not to use a proportion of the space on their vessels for the carriage of goods in a particular trade. The proportion set aside is part of the forecast excess of supply over demand. In 1994 the Commission prohibited a similar arrangement on the transatlantic trades: the Trans-Atlantic Agree-

<sup>(1)</sup> OJ L 54, 5.3.1996.

<sup>(2)</sup> OJ C 239, 30.7.1998.

<sup>(3)</sup> OJ L 30, 4.2.2000.

<sup>(4)</sup> Commission decision of 16 September 1998 in Case No IV/35.134 — TACA (OJ L 95, 9.4.1999); 1998 Competition Report, points 105–109.

<sup>(5)</sup> For maritime transport: Council Regulation (EEC) No 4056/86 of 22 December 1986 laying down detailed rules for the application of Articles 85 and 86 (now Articles 81 and 82) of the EC Treaty to maritime transport (OJ L 378, 31.12.1986).

For inland transport: Council Regulation (EEC) No 1017/68 of 19 July 1968 applying rules of competition to transport by rail, road and inland waterway (OJ L 175, 23.7.1968).

<sup>(6)</sup> OJ C 125, 6.5.1999.

<sup>(7)</sup> IP/99/620; *Competition Policy Newsletter*, 1999, No 3, October.

<sup>(8)</sup> Article 3 of Council Regulation (EEC) No 4056/86.

<sup>(9)</sup> Commission decision of 30 April 1999 in Case No IV/34.250 — *Europe-Asia Trades Agreement* (OJ L 193, 26.7.1999); IP/99/313.



ment (TAA) <sup>(1)</sup>. In the case of the EATA up to 17 % of the capacity of certain vessels was withdrawn from supply. On all occasions only the supply of eastbound capacity was restricted, with the result that Community exporters bore the brunt of the anticompetitive effects of the EATA.

100. The EATA decision confirmed that an individual exemption for a capacity non-utilisation agreement is not possible when, as in the TAA case, it is a tool for maintaining excess capacity and artificially raising freight rates. Capacity regulation can only bring benefits if there was a real withdrawal of inefficient or outdated capacity so as to bring about a reduction of costs, leading to price reductions for shippers.

### Consortia

101. Commission Regulation (EC) No 870/95 <sup>(2)</sup> contains a block exemption for liner shipping consortia which expires in April 2000. As a first step in preparing for its expiry, the Directorate-General for Competition prepared a 'Report on Commission Regulation (EC) No 870/95' <sup>(3)</sup>. The report was sent for comment to industry associations. The Commission took into account the comments received when drawing up a draft new regulation. The application of Regulation (EC) No 870/95 has worked well in practice and the reasons for its adoption are still valid. The Commission therefore published a draft new block exemption regulation <sup>(4)</sup>, largely replicating Regulation (EC) No 870/95.

102. The most important change made in the preliminary draft regulation as compared with Regulation (EC) No 870/95 is that the trade share thresholds (i.e. the share of trade held by the consortium between the pairs of ports that it actually serves) are replaced by market share thresholds. Market share is the usual indication of market power used in competition legislation. The trade share criterion was adopted in the existing regulation because shipping companies had considered that market shares would be difficult to calculate; experience has shown that shipping companies are able to provide market shares.

### 5. Insurance

#### *P&I insurance*

103. P&I clubs are mutual non-profit-making insurers which offer shipowners insurance cover for their contractual and third party liabilities: injury or death of crew or passengers, loss of cargo, collision damage to vessels, damage to third-party property (harbour equipment), damage to the environment, etc. Most of the P&I clubs are members of the International Group of P&I clubs (IG) and together they insure 90 % of worldwide tonnage.

104. In 1995, the IG requested a renewal of the exemption which had initially been granted in 1985 <sup>(5)</sup> for a period of 10 years. This was granted in 1999 <sup>(6)</sup>.

105. The IG members cooperate within the framework of a claims-sharing arrangement, the details of which are spelled out in a century-old pooling agreement and, since the beginning of the 1980s, the International Group agreement (IGA). Under the pooling agreement, the IG members share each other's claims in excess of USD 5 million. For the layer between USD 5 million and USD 30 million, each club makes a contribution which is roughly based on the number of claims it faces, the tonnage it covers and the total calls (i.e. premiums revenue from shipowners) it collects. Above USD 30 million, the clubs purchase together reinsurance from commercial insurers, currently up to USD 2 billion. Finally, the excess of any claim above USD 2 billion up to an upper limit (the so-called overspill) is again shared by the clubs.

106. The IGA essentially lays down a number of rules concerning the procedures to be followed by clubs when a shipowner wishes to change clubs. A shipowner insured by an IG member club can only be offered a lower rate by another club in one or the other of two circumstances: either the new club can demonstrate to an expert committee that the old club's rate is unreasonably high, or the old club fails to demonstrate to the expert committee that the new club's rate is unreasonably low.

107. When the IG applied for renewal of its 1995 exemption, the Greek Shipping Cooperation

<sup>(1)</sup> Commission decision of 19 October 1994 in Case No IV/34.446 — *Trans-Atlantic Agreement* (OJ L 376, 31.12.1994).

<sup>(2)</sup> OJ L 89, 21.4.1995.

<sup>(3)</sup> DG IV working paper, 28.1.1999

(<http://europa.eu.int/comm/dg04/entente/other.htm>).

<sup>(4)</sup> OJ C 379, 31.12.1999.

<sup>(5)</sup> Decision of 16 December 1985 (OJ L 376, 31.12.1985).

<sup>(6)</sup> Decision of 12 April 1999 (OJ L 125, 19.5.1999).

Committee (GSCC), an organisation representing Greek shipowners, drew the Commission's attention to the clause in the pooling agreement which — at that time — forced all clubs to offer an upper level of cover of USD 18 billion (the upper level for overspill claims). In its view, this clause severely restricted competition because it prevented shipowners from negotiating the level of cover which they actually want, given the nature of the risk represented by their fleet.

108. During the course of the administrative procedure, the IG reduced the upper level of cover from USD 18 billion to USD 4.25 billion. The Commission considered that at this level the claims-sharing arrangement is not anticompetitive because the participating clubs could not provide the same level of cover on their own.

109. In contrast, the provisions in the IGA concerning the procedures which clubs must follow to quote rates are anticompetitive within the meaning of Article 81(1). However, the IG has changed its rules so that charges for the club's administrative costs (e.g. claims handling cost, club manager fees) now fall outside the scope of the quotation procedures. Furthermore, the IG has inserted provisions in the IGA in order to enhance transparency for shipowners with regard to these administrative costs. Accordingly, these rules qualified for exemption and benefit from an exemption pursuant to Article 81(3) for 10 years.

110. As far as Article 82 is concerned, the Commission took the view that the P&I clubs which are members of the IG collectively hold a dominant position on the worldwide market for the provision of P&I cover. It concluded, however, that neither the clause concerning a minimum common level of cover (objected to by the GSCC), nor the clauses concerning the conditions at which individual clubs can offer reinsurance to third parties constitute an abuse of that dominant position.

111. Finally, in its decision, the Commission states that it 'will revoke the exemption ... if the members of the IG collectively hold a market share larger than twice the minimum scale economically required to provide the level of cover agreed at any moment within the IG'. This reflects the fact that the level of cover offered by the IG requires at the present time the IG members to have a market share of more than 50 %. If that was no longer the case, then the basis on which the decision was adopted would have

changed and the exemption would need to be considered anew.

### *Report on the operation of the block exemption in the field of insurance*

112. On 12 May, the Commission adopted a report <sup>(1)</sup> to the Council and the European Parliament on the operation of Council Regulation (EEC) No 1534/91 <sup>(2)</sup> and Commission Regulation (EEC) No 3932/92 <sup>(3)</sup>, which applies Article 81(3) of the Treaty to certain categories of agreements in the field of insurance. The report chiefly describes how the Commission has applied the exemption system over the last six years. It does not contain proposals for amendments, since the current exemption regulation will be valid for another four years, but it does set out a number of forward-looking ideas on which the Commission wishes to receive comments from the industry, national supervisory and competition authorities and national courts.

113. Like any other exemption regulation, Regulation (EEC) No 3932/92 has cut down the number of individual cases which the Commission has had to examine. However, it has still had to assess numerous individual cases, either where the agreements were notified by operators who were aware that they did not meet the exemption conditions or were unsure of their scope, or in response to complaints. It had furthermore become clear that certain provisions of the regulation could be interpreted in different ways, that others no doubt needed to be re-examined as to their substance and that some of the aims of the instrument had not been achieved.

114. From a practical point of view, assessing pools for the common coverage of certain types of risks in the light of the regulation (Title IV) is the most complex task <sup>(4)</sup>. The report outlines the developments in the approach taken by the Commission, which has had to supplement the arrangements set in place by the regulation. As reflected in recent cases <sup>(5)</sup>, the new approach essentially means that a pool which is necessary in order to attain the minimum dimension for covering the

<sup>(1)</sup> COM(1999) 192 final. Text available on the Internet ([http://europa.eu.int/comm/dg04/entente/other.htm#dgiv\\_pdf\\_ins\\_rep1999](http://europa.eu.int/comm/dg04/entente/other.htm#dgiv_pdf_ins_rep1999)).

<sup>(2)</sup> OJ L 143, 7.6.1991.

<sup>(3)</sup> OJ L 398, 31.12.1992.

<sup>(4)</sup> See above.

<sup>(5)</sup> 1998 Competition Report, points 111–119.



risks concerned is now deemed to fall outside the scope of Article 81(1). At a procedural level, the Commission first ascertains whether the market shares of the pool or of its members are lower than the thresholds stipulated in the regulation. If so and if the other requirements of the regulation are met, the pool qualifies automatically for exemption. If the thresholds are exceeded, the Commission checks whether the pool is indeed necessary in order to attain the minimum dimension for covering the risks in question. If so, there is no restriction of competition and Article 81(1) consequently does not apply, irrespective of the market share of the parties<sup>(1)</sup>. Lastly, where the pool is not necessary in order to attain the minimum dimension, it can still escape the purview of Article 81(1) if its members remain genuinely free, *de jure* and *de facto*, to decide whether or not to bring the risks in question into the pool.

115. The Commission's experience in the other areas has also shown that, while the economic and legal principles are now fairly clear, assessment of the technical and economic parameters in specific cases is often arduous and requires expert evaluations that the Commission departments are not always in a position to conduct. As far as the joint compilation of statistics with a view to calculating risk premiums (Title II) is concerned, the problem is one of determining the extent of minimum co-operation. The Commission therefore intends to focus primarily on gauging the concrete effects of the agreements concerned on the individual behaviour of insurers when they calculate their own risk premiums and/or commercial premiums.

116. For the rest, experience has revealed certain problems in interpreting the requirements for exempting agreements on standard policy conditions (Title III) which could prompt the Commission, once it has received more comprehensive reactions from the industry, to contemplate some amendments to the existing text. The report also raises the question of whether or not to continue allowing certain 'black clauses', which are currently exemptable where the insurer expressly declares that they are not binding.

117. Agreements on security devices (Title V) have largely been concluded at national level,

while Europe-wide agreements, explicitly provided for by the regulation, are fairly limited and Community harmonisation work has for the most part not yet borne fruit. This situation gives rise to a number of barriers to free movement of the products concerned and the freedom of fitters and repairers to provide their services.

118. The report states that the Commission is not at this stage considering extending the block exemption system to two types of agreement which are not currently covered (claims settlement and registers of aggravated risks) although they are mentioned in the regulation, since it has not gained sufficient experience with regard to the former (having received only one complaint, subsequently withdrawn, concerning an agreement of that nature) and in view of the nature of the latter (which should not normally fall within the scope of Article 81).

## 6. Energy

119. Liberalisation of the electricity and gas industries made further progress in 1999. The electricity directive has been implemented at national level by most Member States, while the gas directive is still in the process of being transposed. Liberalisation will result in electricity and gas being just like any other product for the sale of which suppliers compete. Accordingly, the general principles of competition law are, subject to certain limits, now applicable to electricity in the same way as they are applied to other product markets. The same will soon be true for gas markets.

### *Electricity*

120. Ten of the twelve Member States which were required to implement the electricity directive in 1999 actually did so. Three Member States had a derogation (Belgium and Ireland until 2000, Greece until 2001). Two Member States (France and Luxembourg) did not fulfil their obligation; the Commission therefore decided to initiate proceedings under Article 226 of the EC Treaty against them.

121. Of those Member States which transposed the directive, most chose the directive's pro-competitive options with regard to generation, access to the network and unbundling. All Member States but one opted for the authorisation proce-

<sup>(1)</sup> In cases where the pool is necessary for some members but not for others, the approach is pragmatic. The 'smallest' pool necessary to enable those members who do not have the minimum individual dimension for covering the risk concerned to do so is regarded as not restricting competition.

ture instead of the tendering procedure for new power stations. Furthermore, 13 out of 15 Member States chose regulated third party access (TPA) instead of negotiated TPA or the single buyer option in order to determine access to the grid. Thirdly, most Member States decided to legally separate the transmission system operator(s) (TSO) from the vertically integrated electricity supply business. They thus went further than the requirements of the directive, which required only the unbundling of management and accounts of transmission grid operations as well as the creation of 'Chinese walls' against any information flow between the grid and supply business.

122. Many Member States opened up their markets to a greater extent than the minimum required by the directive. Instead of the 26.5 % minimum requirement, countries like the UK, Germany, Sweden and Finland committed themselves to 100 % market opening. Other countries opened up 90 % (Denmark), 33 % (Netherlands, Spain) or 30 % (Italy) of their requirements. As a result, more than 60 % of total EU electricity demand was liberalised in 1999. This should set free a sufficient number of electricity consumers to shop around and instigate competition among suppliers, particularly in view of the fact that the Union's largest consumers of electricity are among the so-called eligible customers <sup>(1)</sup>.

123. As regards competition law enforcement, in 1999 the Commission dealt mainly with network issues, cooperation and joint ventures between suppliers, and stranded costs. The application of the antitrust rules focused on cross-border issues and cases in order to foster the emergence of trade between Member States. In one joint venture case <sup>(2)</sup> the Commission took the delay of one Member State in opening up its market to competitors from other Member States into account in its competition assessment. The parties had to give an undertaking to the effect that the venture would not become active in the Member State until the latter had fulfilled its obligations under the electricity directive.

124. Since many Member States intend to grant financial aid to electricity companies to make up for investments or commitments which can no

longer be recovered or honoured because of the introduction of competition, the Commission has decided to establish guidelines for the treatment of such stranded costs under the State aid rules. The Commission discussed draft guidelines with the Member States during a multilateral meeting in June 1999 and expects to be in a position to adopt final guidelines in the first half of 2000.

125. Most Member States opted to establish an independent electricity regulator which will have to monitor the electricity industry and in particular TPA. The Commission is closely collaborating with these newly created authorities and indeed created an EU Electricity Regulation Forum, whose inaugural meeting was held in Florence (the so-called 'Florence process' <sup>(3)</sup>), in which representatives from all Member States, TSOs and electricity producers participate. The Commission endeavours to reach consensus on measures to harmonise national regulation in order to bring about the internal electricity market. In 1999 the forum dealt mainly with the issue of cross-border transmission tariffication and congestion <sup>(4)</sup>.

126. In accordance with the case law of the Court of Justice <sup>(5)</sup>, national regulators have a duty not to approve any practice or agreement contrary to Community competition law. This contributes to the creation of the internal electricity market by providing a minimum standard for a level playing field throughout the EU.

## Gas

127. The gas directive was adopted in 1998. It has to be incorporated into national law by August 2000. The Commission expects that all Member States will be able to meet this deadline and that the gradual opening-up of the gas market will then begin. Derogations from the directive are limited, and can only be granted to Member States fulfilling certain conditions, e.g. emergent gas markets as in Greece and Portugal.

128. The fundamental principles governing the liberalisation of the electricity market also apply

<sup>(1)</sup> For further information, see the second report from the Commission to the Council and the European Parliament on the state of liberalisation of energy markets (COM(1999) 198 final, 4.5.1999).

<sup>(2)</sup> *EdF/Louis Dreyfus*, M.1557, 28.9.1999.

<sup>(3)</sup> Subsequent meetings of the Electricity Regulation Forum also took place in Florence, most recently on 25 and 26 November 1999.

<sup>(4)</sup> See the second report from the Commission to the Council and the European Parliament on harmonisation requirements (COM(1999) 164 final, 16.4.1999).

<sup>(5)</sup> Paragraph 48 of the Court's judgment in Case 66/86 *Ahmed Saeed* [1989] ECR 851.



to the gas market, namely third party access, unbundling and eligible customers. These principles may allow the market to be gradually opened, although nearly all Member States are expected to choose to open their markets faster than required. It can be expected that the gas industry will benefit from experience gained in electricity liberalisation. In this respect, the Gas Regulatory Forum will play an important role, following the example of the Florence process for electricity liberalisation.

129. As regards competition law enforcement, the Commission mainly dealt with cases of third party access (prior to liberalisation), allocation of scarce capacity in gas interconnectors and foreclosure effects caused by long-term agreements. The proceedings are still under way.

130. Another important aspect of gas liberalisation is the link between the electricity and gas markets. Gas is currently seen as the preferred fuel for new power plants and combined heat and power plants. Consequently, access to gas is essential for newcomers in the electricity market.

## 7. Banking/financial services

### *European Court judgments on Dutch supplementary pension funds*

131. On 21 September, the ECJ delivered judgment in a number of Article 234 cases involving Dutch pension funds providing supplementary pensions <sup>(1)</sup>. Affiliation to such funds had been made compulsory for the sectors at issue at the request of the relevant associations of employers and employees. Some of the undertakings active in those sectors had, however, refused to pay their contributions as they did not wish to be affiliated, and invoked the European competition rules. The ECJ was asked to give rulings on whether Article 81 applies to collective agreements between labour and management, whether Articles 81 and 82 apply to Dutch supplementary pension funds, and on the compatibility of the exclusive rights granted to such funds with Articles 82 and 86.

<sup>(1)</sup> Case C-67/96 *Albany International v Stichting Bedrijfsfonds Textielindustrie*; Joined Cases C-115/97, C-116/97 and C-117/97 *Brentjens' Handelsonderneming v Stichting Bedrijfspensioenfonds voor de handel in bouw materialen*; Case C-219/97 *Maatschappij Drijvende Bokken v Stichting Pensioenfonds voor de Vervoer- en Havenbedrijven*.

132. The Court ruled that agreements concluded within the framework of collective negotiations between labour and management in order to improve conditions of work and employment do not, given their nature and purpose, fall within the scope of Article 81. It considered that, under the Treaty, the aim of the Community is not only to ensure competition but also to pursue a social policy. It took the view that the achievement of the social policy objectives of such agreements could be seriously hindered if the social partners had to comply with Article 81 when together trying to improve labour conditions.

133. The Court also ruled that Dutch sectoral pension funds are 'undertakings' within the meaning of the competition provisions of the Treaty. The pension fund itself determines the level of premiums and benefits and operates in accordance with the principle of capitalisation. The level of the benefits depends on the return on its investments, in respect of which it is, like insurers, supervised by the insurance supervisor. It follows that the fund carries on an economic activity and that it competes with insurers.

134. The Court also considered that, in these circumstances, the fund's non-profit-making character and the fact of its having some aspects of solidarity (e.g. no medical selection and the fact that contributions do not reflect the risk) were insufficient bases on which to conclude that the fund is not an undertaking. The Court added that these latter aspects may well make the fund less competitive than insurers, but its activities nevertheless remain economic. These aspects may, however, justify the grant of exclusive rights to such a fund.

135. The Court also ruled that the Netherlands does not infringe Article 82, read in conjunction with Article 86 of the Treaty, where it provided for compulsory affiliation to a specified sectoral pension fund and granted the pension fund an exclusive right to administer the collected contributions. The Court considered that the decision by the public authorities to make affiliation compulsory necessarily implied that the fund should be regarded as having an exclusive right within the meaning of Article 86(1). As it has a legal monopoly in a substantial part of the common market, it also occupies a dominant position. In the present cases, certain firms would like to offer their employees a better pension arrangement and, for efficiency reasons, would like to have all



their pension arrangements with a single insurer. However, they are prevented from doing this as they are required to take out a pension with the sectoral pension fund. The resulting restriction of competition is a direct consequence of the exclusive right.

136. The Court therefore considered it necessary to examine whether that exclusive right can be justified on the basis of Article 86(2). It ruled that the pension arrangement fulfils an essential social function in the Netherlands, because of the low statutory pension. The exclusive right is necessary, i.e. without such a right the fund may well not be able to fulfil its tasks of general economic interest on acceptable economic conditions and its financial equilibrium may be endangered. The Court specifically referred to the dangers of the 'good risks' leaving and the fund being left holding the 'bad risks', thereby increasing the cost of pensions for workers to whom the fund could no longer offer pensions at acceptable cost. This is a particular danger in funds such as in the present cases where there is a high level of solidarity.

137. The Court thus ruled that the grant of the exclusive rights is justified in such cases, because it would not otherwise be possible for these pension funds to carry out under economically acceptable conditions a particular social task of general economic interest which is assigned to them. However, this does not prevent the Commission from monitoring the behaviour of the pension funds at issue in the exercise of their exclusive rights under Articles 81 and 82.

## 8. Professions

138. The Commission is developing its approach towards the issues involved in applying the competition rules to the professions. In the case of several of the professions, services are as yet still provided on a national or even local level, and the condition that intra-Community trade must be appreciably affected for the EC Treaty rules on competition to apply is therefore not met in most of the cases encountered by the Commission.

### Box 5: Professions

Competition policy in this area pursues two main objectives: (1) putting an end to restrictive practices; and (2) promoting forms of cooperation that facilitate access to other geographic markets, thereby enabling members of the professions to operate at Community or international level. The Commission's action focuses primarily on cases which have a Community dimension in that they concern the rules governing the same profession in all or at least several Member States or, in the case of the members of a profession in a single Member State, relate to a restrictive practice that has a significant impact in several Member States.

The Commission is endeavouring gradually to draw the dividing line between purely ethical rules which lie outside the scope of the competition provisions and rules or practices whose object or effect is contrary to Article 81 of the Treaty. The goal of promoting competition in the professions is thus, in each individual case, reconciled with the objective of maintaining purely ethical rules specific to each profession.

The Commission has so far published three decisions concerning the application of Article 81 of the Treaty to the behaviour of a professional body (*CNSD*, *COAPI* and *EPI*)<sup>(1)</sup>. In the first two decisions, the Commission found that collective price-fixing was incompatible with the common market, irrespective of the national regulatory framework. An appeal against the first-named decision was brought before the Court of First Instance<sup>(2)</sup>, which has not yet ruled on the matter. The Commission also brought infringement proceedings against Italy with regard to the Italian legislation on customs agents, in which the Court of Justice delivered its judgment on 18 June 1998<sup>(3)</sup>. The third decision relates to the code of conduct of the Institute of Professional Representatives before the European Patent Office (the EPI), and more particu-

(<sup>1</sup>) Commission decision of 30 June 1993 in Case No IV/33.407 — *CNSD* (OJ L 203, 13.8.1993); Commission decision of 30 January 1995 in Case No IV/33.686 — *COAPI* (OJ L 122, 2.6.1995); Commission decision of 7 April 1999 in Case No IV/36.147 — *EPI code of conduct* (OJ L 106, 23.4.1999).

(<sup>2</sup>) Case T-513/93 *CNSD v Commission*.

(<sup>3</sup>) Case C-35/96 *Commission v Italy* [1998] ECR I-3851.



larly restrictions on advertising and unsolicited offers of services. The decision grants negative clearance for those rules which are necessary, in particular in order to ensure professional secrecy and impartiality or to avoid conflicts of interest and misleading advertising. On the other hand, the provisions which prohibit members from carrying out comparative advertising under the conditions laid down by Directive 97/55/EC<sup>(1)</sup> and from actively offering their services to former clients of other representatives were found to be restrictions of competition in breach of Article 81(1) of the Treaty. Those restrictions were exempted for a short period. The EPI made an application to the Court of First Instance<sup>(2)</sup> for an annulment of the part of the decision relating to the exemption.

The above cases have already made it possible to develop the main principles governing the application of the competition rules to the professions.

- Members of the professions are normally undertakings within the meaning of Article 81 of the Treaty where they carry on their activities as self-employed persons, and their professional bodies or associations, to which all the members of a given profession belong, may according to the circumstances be regarded as associations of undertakings.
- The collective fixing of prices and the prohibition of certain forms of advertising by a professional association may constitute restrictions of competition within the meaning of Article 81(1) of the Treaty.
- Rules which are necessary, in the specific context of each profession, in order to ensure the impartiality, competence, integrity and responsibility of the members of that profession or to prevent conflicts of interest and misleading advertising are not considered to be restrictions of competition within the meaning of Article 81(1) of the Treaty.
- The legal framework within which agreements are made and the classification given to that framework under the various national laws are irrelevant as far as the applicability of the Community rules on competition are concerned. The Court of Justice has repeatedly confirmed this principle<sup>(3)</sup>.
- Even if by delegating to a professional association power to fix the prices to be charged by its members a Member State may be infringing the rules of the Treaty, the association's exercise of that power does not escape the application of Article 81 of the Treaty<sup>(4)</sup>.

<sup>(1)</sup> OJ L 290, 23.10.1997.

<sup>(2)</sup> Case T-144/99 *EPI v Commission*.

<sup>(3)</sup> *Inter alia* Joined Cases 43/82 and 63/82 *VBVB and VBBB v Commission* [1984] ECR 19; Case 123/83 *BNIC v Clair* [1985] ECR 391; Case C-35/96 *supra*.

<sup>(4)</sup> Commission decision of 30 January 1995 (OJ L 122, 2.6.1995).

## 9. Sport

### *Preliminary approach to applying the competition rules*

139. The Commission's report to the European Council on sport<sup>(1)</sup> contains a section setting out the Commission's preliminary thinking on application of the competition rules in this area. The report begins by stressing the social and cultural aspects of sport and its increasing economic importance. There are two dimensions involved:

(i) the social, educational, cultural and integrational role of sport, which should be preserved; and (ii) the economic dimension created by the commercial activities generated by sport. The first dimension normally lies outside the scope of the Treaty rules on competition; the second is however subject to those rules, which are applied with due regard to the specific characteristics of sport, namely the interdependence between clubs, the principle of equal opportunities, the uncertainty of the outcome and the sociocultural objectives of sport.

140. The report outlines preliminary conclusions regarding the application of the competition rules

<sup>(1)</sup> COM(1999) 644 final.



in the field of sport, giving examples of practices of sports organisations under three headings:

— *Practices which do not come under the competition rules:* the regulations of sporting organisations drawing up rules without which a sport could not exist, or which are necessary for its organisation or for the organisation of competitions. The rules intrinsic to sport are, first and foremost, the ‘rules of the game’. The aim of these rules is not to distort competition.

In an unpublished decision it adopted on 3 December rejecting a complaint (the Mouscron case <sup>(1)</sup>), the Commission took the view that the UEFA Cup rule requiring each club to play its home match at its own ground is a sporting rule which falls outside the scope of the competition rules laid down in the Treaty;

— *Practices that are, in principle, prohibited by the competition rules:* these are restrictive practices in the economic activities generated by sport. They may concern, in particular, restrictions on parallel imports of sports products or sponsoring agreements that foreclose a market by excluding other suppliers for no objective reason. With regard to the sale of exclusive rights to broadcast sporting events, it is likely that any exclusivity which, by its duration and/or scope, resulted in the foreclosing of the market would be prohibited.

Lastly, it is likely that there would be a ban on the practice of a sporting organisation using its regulatory power to exclude from the market, for no objective reason, any economic operator which, even though it complies with the justified quality or safety standards, has not been able to obtain a certificate from this organisation attesting to the quality or safety of its products.

Unjustified discrimination in the sale of entry tickets to stadiums, by organisers of sporting events enjoying a dominant position, between users who are resident in a particular Member State and those who live outside that Member State is prohibited. On 20 July, the Commission found that the Comité français d’organisation (CFO) for the 1998 Football World Cup had abused its dominant position by operating a discriminatory system of ticket sales which

favoured consumers resident in France (see Chapter I.B.3 above) <sup>(2)</sup>;

— *Practices likely to be exempted from the competition rules:* the *Bosman* judgment <sup>(3)</sup> recognised as legitimate the objectives designed to maintain a balance between clubs, while preserving a degree of equality of opportunity and the uncertainty of the result, and to encourage the recruitment and training of young players. Consequently, agreements between professional clubs or decisions by their associations that are really designed to achieve these two objectives would be likely to be exempted, provided that they did not infringe other provisions of the Treaty (in particular Article 39) and the restrictions were proportionate to those objectives. It is also likely that short-term sponsoring agreements based on an invitation to tender and with clear and non-discriminatory selection criteria would be authorised.

141. Any exemptions granted in the case of the joint sale of broadcasting rights must take account of the benefits for consumers and of the proportional nature of the restriction on competition in relation to the legitimate objective pursued. The impact on the structure of the broadcasters’ market must also be taken into consideration. In this context, there is also a need to examine the extent to which a link can be established between the joint sale of rights and financial solidarity between professional and amateur sport, the objectives of the training of young sportsmen and women and those of promoting sporting activities among the population at large.

142. The examples given of the three categories of practices by sporting organisations help to create a clearer legal environment which is gradually ensuring the legal certainty which the sporting world is legitimately seeking.

## 10. Motor vehicles

### *Motor vehicle distribution*

143. Article 81 prohibits agreements between producers and dealers who restrict inter-brand competition by partitioning markets. Moreover,

<sup>(1)</sup> OJ L 5, 8.1.2000.

<sup>(2)</sup> Case C-415/93 [1995] ECR I-4921.

<sup>(1)</sup> Complaint by the Lille municipal authorities against UEFA.



the block exemption regulation for motor vehicle distribution (Regulation (EC) No 1475/95 <sup>(1)</sup>) contains several provisions aimed at intensifying competition in the markets for new cars and spare parts and improving the position of consumers by guaranteeing them the full benefits of the internal market. In accordance with these principles, in 1999 the Commission initiated two proceedings against car manufacturers and/or their importers, based on evidence found during inspections.

144. Article 11 of Regulation (EC) No 1475/95 requires the Commission to evaluate on a regular basis the application of the regulation, particularly as regards the impact of the exempted system of distribution on price differentials of contract goods between the different Member States and on the quality of service to final users. The evaluation of car price differences has been ongoing since 1993, with the twice-yearly publication by the Commission of its 'Report on car prices within the European Union' <sup>(2)</sup>, accompanied by a press release. This report is aimed at analysing car price differentials across the European Union and improving price transparency for consumers. Analysis of these reports compiled as of 1 May and 1 November reveals that price differentials are still too high for many models <sup>(3)</sup>.

145. In addition, the Commission has to draw up a general report on the evaluation of the regulation before the end of 2000. The quality of service to final users is a core aspect which has to be considered in this exercise. The principle of a single market requires in particular that consumers must be able to purchase motor vehicles wherever in the Community prices or terms are most favourable, and that effective competition on the maintenance and repair markets is ensured. Bearing these aspects in mind, the Commission has addressed questionnaires to a number of parties directly affected by the regulation, such as car manufacturers, importers, consumer associations, independent resellers and intermediaries, producers of spare parts, independent repairers, franchised dealers, and companies active in electronic commerce.

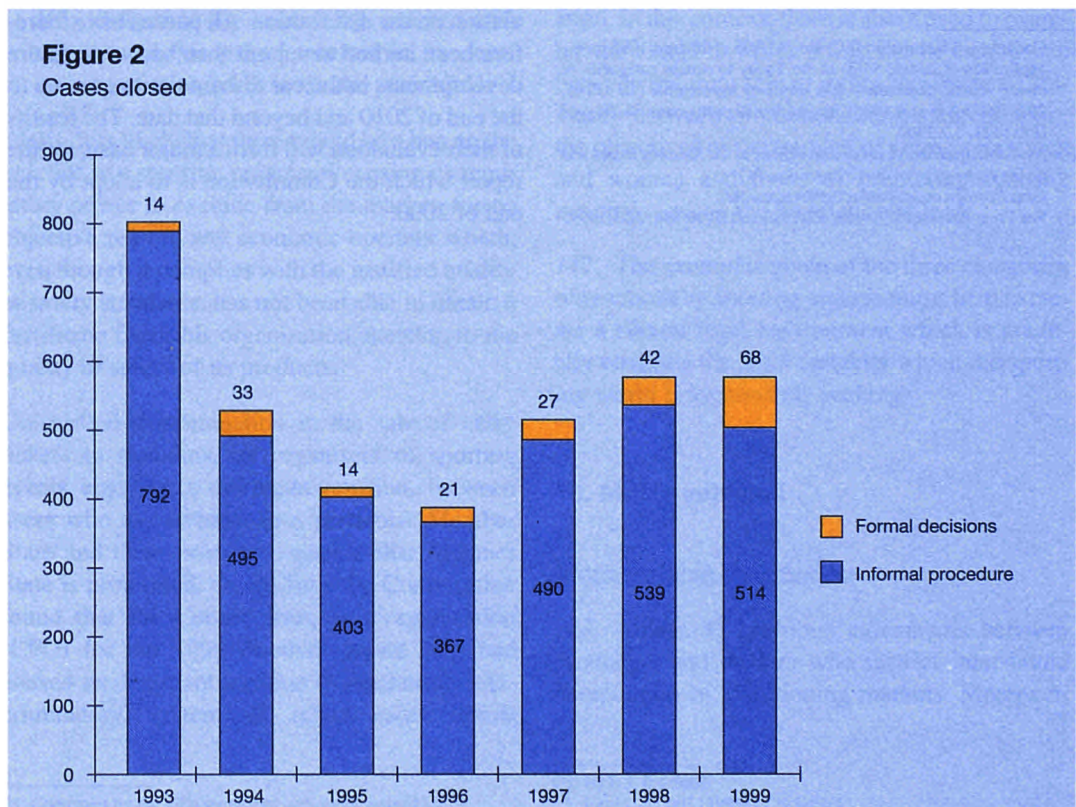
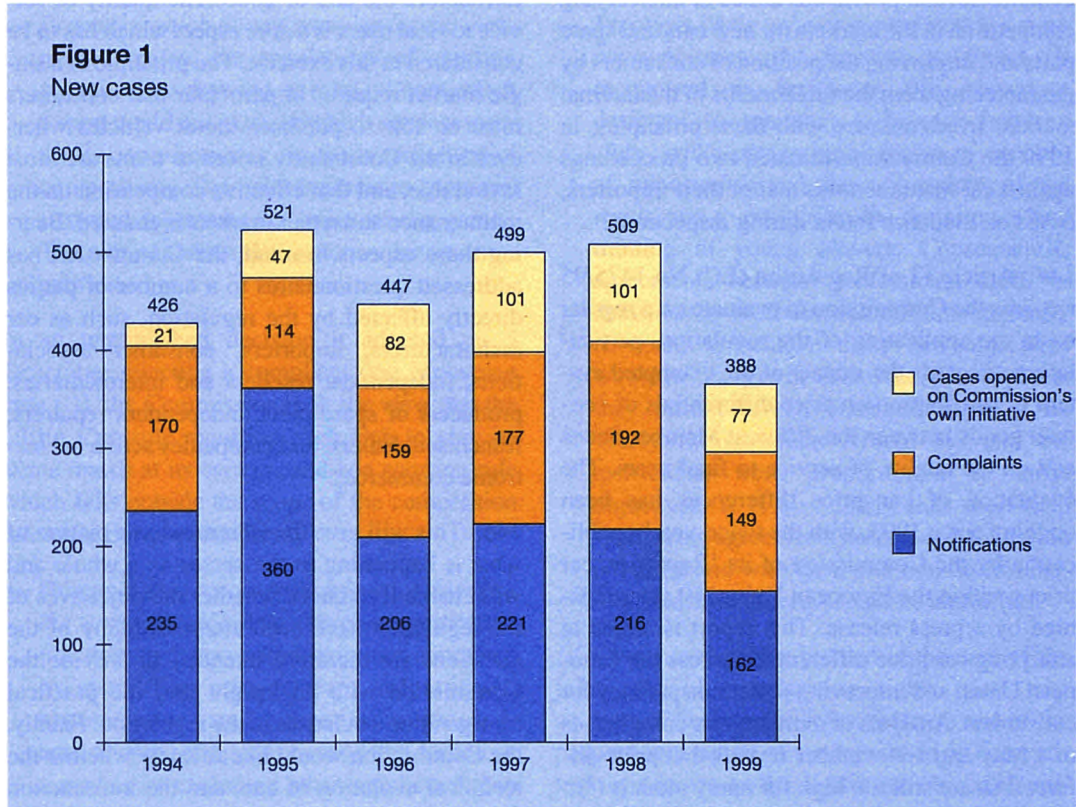
146. This will give the Commission a picture of what is happening in the sector as a whole and will enable it to check whether the objectives of the regulation have been attained. Many of the questions are therefore intended to provide the Commission with an insight into the practical transposition of clauses in the regulation. Finally, the Commission would like to know whether the technical evolution of cars and the introduction of new marketing and distribution methods does not call into question the basis for a specific regulation on car distribution. All parties have therefore been invited to submit their views on future developments in the car distribution sector, up to the end of 2010 and beyond that date. The results of their evaluation will form a major basis for the report which the Commission is to adopt by the end of 2000.

<sup>(1)</sup> Commission Regulation (EC) No 1475/95 of 28 June 1995 on the application of Article 85(3) of the Treaty to certain categories of motor vehicle distribution and servicing agreements (OJ L 145, 29.6.1995). See also 1996 Competition Report, points 54–56, and IP/00/121, 7.2.2000.

<sup>(2)</sup> Available from the Commission offices in the Member States and on the home page of the Competition DG (<http://europa.eu.int/comm/dg04/aid/en/car>).

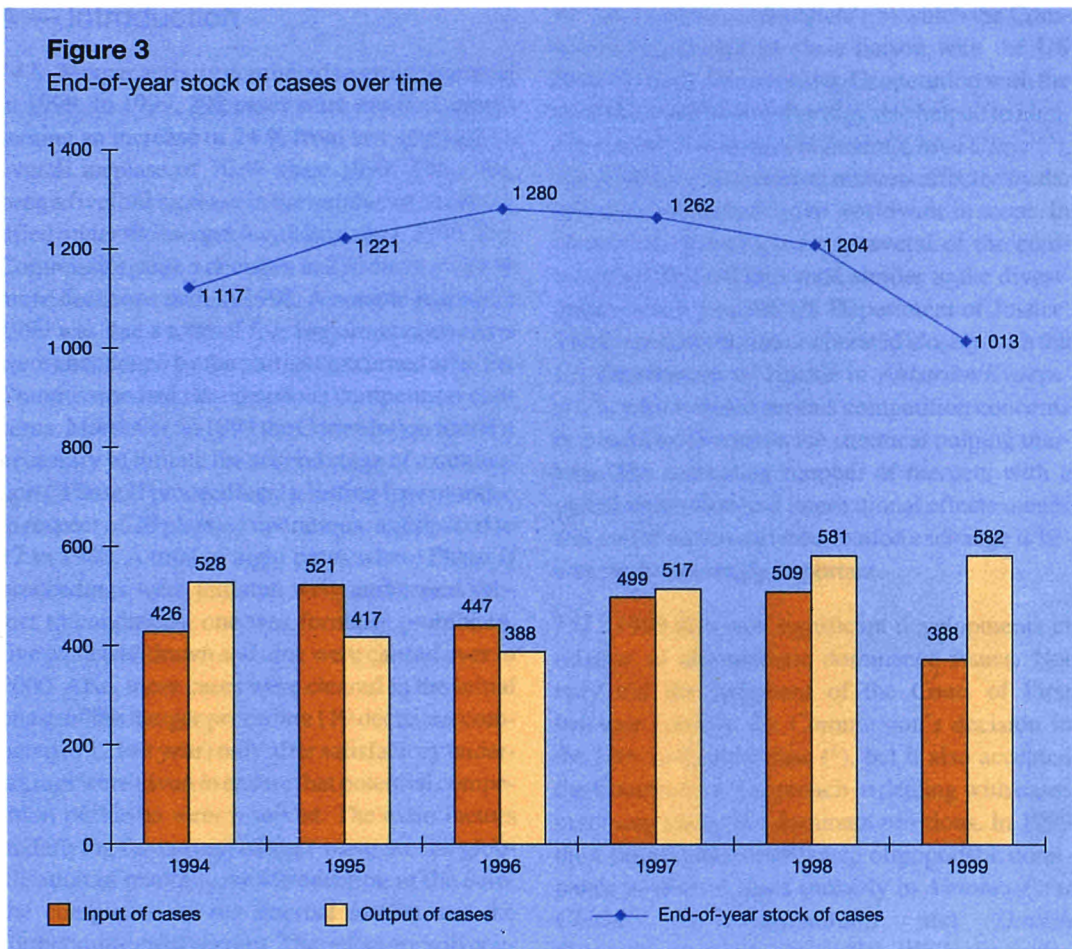
<sup>(3)</sup> See Press Releases IP/99/60, 1.2.1999 and IP/99/554, 22.7.1999.

## D — Statistics





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







## II — MERGER CONTROL

### A — Introduction

147. Merger activity continued to grow unabated in 1999. In 1999, 292 cases were notified, representing an increase of 24 % from last year and an overall increase of 70 % since 1997. There has been a fivefold increase in the number of cases notified under the merger regulation since 1990. The Commission took a decision in 270 cases — 13 % more decisions than in 1998. A notable feature in 1999 was that a total of five important operations were abandoned by the parties concerned after the Commission had raised serious competition concerns. Moreover, in 1999 the Commission found it necessary to initiate the second stage of examination ('Phase II proceedings'), lasting four months, in respect of 20 planned operations, as opposed to 12 in 1998. A total of eight cases where Phase II proceedings were initiated were authorised subject to conditions, one was formally prohibited, five were withdrawn and nine were carried over to 2000. Also, more cases were cleared in the initial phase of the merger procedure (19 decisions compared to 12 last year) only after satisfactory undertakings were given to ensure that potential competition problems were resolved. The main factors underlying the current merger wave are the globalisation of markets, the introduction of the euro, the completion of the internal market and the forthcoming enlargement. These factors will continue to generate high levels of merger activity in Europe for the foreseeable future.

148. A distinctive feature of today's merger control is that cases are becoming increasingly complex. The structure of a large number of the operations notified in 1999 was extremely complicated and required simultaneous analysis of several different markets.

149. The geographical scope of mergers is also increasing. To analyse these cases properly the Commission has to continue to liaise closely and exchange information with other antitrust authorities. The experience gained from such cooperation in 1999 shows that it can significantly improve the outcome of investigations and the Commission attaches great importance to cooperation with other antitrust authorities.

150. Notable examples of cases which involved international cooperation in 1999 include two cases in the oil and chemicals sector (*Exxon/Mobil*<sup>(1)</sup>) and

*BP Amoco/Atlantic Richfield*<sup>(2)</sup>) which the Commission examined in close liaison with the US Federal Trade Commission. Cooperation with the American antitrust authorities also helped to identify common remedies in *Imetal/China Clays*<sup>(3)</sup>, where many of the product markets affected by the operation were found to be worldwide in scope. In *Honeywell/AlliedSignal*<sup>(4)</sup>, several of the commitments entered into were similar to the divestments ordered by the US Department of Justice. The Commission also cooperated closely with the US Department of Justice in *Ahlström/Kvaerner*<sup>(5)</sup>, which raised serious competition concerns in a number of worldwide chemical pulping markets. The increasing number of mergers with a global dimension and international effects means that coordination and information exchange is becoming increasingly important.

151. 1999 also saw significant developments in relation to oligopolistic dominance issues. Not only did the judgment of the Court of First Instance confirm the Commission's decision in the *Gencor/Lonrho* case<sup>(6)</sup>, but it also accepted the Commission's approach in dealing with cases involving collective dominant positions. In 1999 the Commission investigated oligopolistic dominance in several cases (notably in *Airtours/First Choice*<sup>(7)</sup>, *Exxon/Mobil* and *Danish Crown/Vestjyske Slagterier*<sup>(8)</sup>). While the analysis of each case is based on the facts of that particular case, some commonalities exist and these are examined in more detail below. The Commission recognises the need to further clarify its approach to dealing with oligopolistic dominance in order to avoid uncertainty within the business community. It will continue to pursue its work in this area.

152. The third keynote of the year was that, for the first time, the Commission imposed fines on a number of notifying parties for providing incomplete or misleading information in merger proceedings (see box below). The relatively short time periods within which the Commission has to investigate notified operations and the fact that transactions are becoming increasingly complex make it essential for the achievement of a proper

(1) Case No IV/M.1383.

(2) Case No IV/M.1532.

(3) Case No IV/M.1381.

(4) Case No IV/M.1601.

(5) Case No IV/M.1431.

(6) Case T-102/96 *Gencor v Commission* (25.3.1999).

(7) Case No IV/M.1524.

(8) Case No IV/M.1313.

outcome that notifying parties provide the Commission with full and accurate information. By imposing these fines the Commission has emphasised the importance it attaches to compliance with these requirements. It is also considering whether it may be appropriate to propose to the Council that the maximum amounts of fines should be increased.

## B — New developments

### 1. Market definition

#### *Oil and chemicals*

153. The wave of mergers in the oil and chemicals sector was one of the most important features of 1999 and the Commission investigated a number of operations in this sector. While earlier transactions in the oil and chemicals sector have essentially concerned the combination of businesses in limited fields of activities through the constitution of joint ventures, a number of the latest mergers are more global in the sense that they combine the whole of the merging parties' activities.

154. The Commission opened full investigations into three operations in the oil and chemicals sector (*Exxon/Mobil*, *BP Amoco/Atlantic Richfield* and *Total/Elf Aquitaine* <sup>(1)</sup>). The analyses covered the whole oil and gas chain, from oil exploration to refining and retail fuel sales. Of particular interest is that, for the first time, the Commission investigated in detail the upstream markets for the exploration and development of crude oil and natural gas. These investigations were carried out in order to establish whether the mergers between Exxon and Mobil and that between BP Amoco and Atlantic Richfield would result in too small a cluster of oil companies capable of searching for and developing the unexplored reserves that will be consumed 10 to 15 years from now. They indicated that the so-called 'super majors' (the two merging companies together with Shell) would still face competitive constraints from smaller oil companies. Moreover, they revealed that the countries in whose territory oil and gas is found have no incentives to enable oil companies to restrict production. In addition, the Commission found that,

because of size differences, smaller explorers would not compete for the same type of exploration rights as the larger explorers and would not be dependent on them to sell their oil. It therefore concluded that no dominant positions would be created or strengthened in these upstream markets.

155. In *Exxon/Mobil*, the Commission also concluded that there was a separate market for motor fuel retailing on toll motorways in France. It found that toll motorways in France constitute separate product markets by virtue of their specific characteristics. In particular, it found that demand on French toll motorways is captive in that the opportunity to leave the motorway to buy fuel at off-motorway stations is very limited, owing mainly to the payment of a toll. It also found that pump prices on toll motorways are generally higher than prices on ordinary roads. Finally, it found that a number of factors make entry to the toll motorway motor fuel retailing market more difficult than to the retail service station market as a whole.

#### *Transport and postal sector*

156. During the year, the Commission dealt with several cases in the postal sector, a number of them involving large national postal companies such as Deutsche Post, La Poste and the Dutch Post (TNT). The markets for express mail services <sup>(2)</sup>, parcels <sup>(3)</sup>, freight forwarding <sup>(4)</sup> and logistics <sup>(5)</sup> were all considered. The goal of the acquisitions for national postal companies is a strategic positioning in a liberalised market environment in order to diversify from their traditional monopoly activities in the face of declining profits. A 'one-stop shop' with extensive product and geographic coverage seems to be of advantage in view of the major role delivery services will play in the growth of e-commerce.

157. In the past, the Commission has distinguished between the markets for mail, for parcels

<sup>(1)</sup> Case No IV/M.1628.

<sup>(2)</sup> Case No IV/M.1347 — *Deutsche Post/Securicor*; Case No IV/M.1405 — *TNT Post Group/Jet Services*.

<sup>(3)</sup> Case No IV/M.1371 — *La Poste/Denkhaus*; Case No IV/M.1447 — *Deutsche Post/trans-o-flex* (notification withdrawn); Case No IV/M.1513 — *Deutsche Post/Danzas/Nedlloyd*.

<sup>(4)</sup> Case No IV/M.1410 — *Deutsche Post/Danzas*; Case No IV/M.1513 — *Deutsche Post/Danzas/Nedlloyd*; Case No IV/M.1549 — *Deutsche Post/ASG*; Case No IV/M.1585 — *DFDS/FLS Industries/Dan Transport*; Case No IV/M.1649 — *Gefko/KN Elan*.

<sup>(5)</sup> Case No IV/M.1500 — *TPG/Tecnologica*.



and for freight forwarding services on the grounds that differences in size and format of the transported item require different handling and sorting equipment. These markets have been further segmented according to the speed of delivery into the markets for express or standard mail (parcel, freight). Express services guarantee delivery within a certain time, whereas standard services only contain a general indication of the delivery time. All of the above postal and transport services are offered for domestic and cross-border deliveries. However, the Commission has viewed national and international postal services as separate product markets because there are differences in price and product, and there are frequently different suppliers for domestic services on the one hand and international services on the other. It has considered that the relevant geographic markets for all postal and transport services are national, primarily due to the national nature of the network infrastructure.

158. There has recently been a certain shifting and blurring of the boundaries between these various services. Different providers are increasingly tending to design and offer special and personalised packages of services so as to meet the specific needs of certain types of client. These services often combine different delivery services with each other and with other value-added services such as 'track and trace' and they can also include features like warehousing, invoicing and transport. Depending on the centre of gravity of these activities, the Commission has classified them either as stand-alone logistics services<sup>(1)</sup> or as an add-on service to the delivery services in question<sup>(2)</sup>. Another pattern that has been observed is that cooperative ventures between mainly regional providers are being replaced by integrated European and even wider networks both in the parcels and freight-forwarding market. The Commission has analysed whether this tendency leads to the foreclosure of small and medium-sized competitors or to a lessening of potential competition<sup>(3)</sup>.

159. The Commission has to ensure that the acquisitions of private companies by former State monopolies will not serve as a basis to build up dominant positions in any particular segment and/or geographic area of this fast-developing

sector. In recent cases involving national postal companies, the acquisitions mainly proved to be of a complementary nature, thus not leading to serious competition concerns. So far, the Commission has initiated an in-depth enquiry into just one case (*Deutsche Post/trans-o-flex*<sup>(4)</sup>). It should, however, be noted that the main concerns raised by competitors and customers relate to alleged cross-subsidisation and State financing of such acquisitions. The Commission is at present pursuing these matters under the State aid rules.

## 2. Dominance assessment

### *Collective dominance*

160. Following the judgment of the European Court of Justice in the *Kali und Salz*<sup>(5)</sup> case in 1998, where the Court confirmed the application of the merger regulation to collectively dominant positions, the Commission's jurisdiction to deal with oligopolies and the approach adopted was confirmed by the judgment of the Court of First Instance in *Gencor/Lonrho*. The judgment, delivered in March, is significant in a number of respects. First, the Court confirmed the Commission's approach to tackling collective dominant positions. In particular, it accepted that market characteristics such as market transparency, homogeneity of the product, market maturity, low rate of innovation, cost structures and multi-market contacts can be used in identifying whether markets are prone to oligopolistic dominance. Second, it upheld the Commission's analysis as to how the operation would have changed the competitive relations between the competitors and thereby made anti-competitive parallel behaviour more likely. Third, it concluded that structural links are not necessary for a finding of collective dominance. Although the Court did not provide any guidance as to which of the above factors should be considered particularly important in order to find collective dominance, it accepted that all these factors can be indicators of whether markets are prone to exhibit anticompetitive parallel behaviour.

161. The Commission examined the issue of collective dominance in four Phase II cases, three

<sup>(1)</sup> Case No IV/M.1500 — *TPG/Tecnologica*.

<sup>(2)</sup> Case No IV/M.1513 — *Deutsche Post/Danzas/Nedlloyd*.

<sup>(3)</sup> Case No IV/M.1513 — *Deutsche Post/Danzas/Nedlloyd*; Case No IV/M.1549 — *Deutsche Post/ASG*.

<sup>(4)</sup> Case No IV/M.1447 (notification withdrawn); see also box for fines proceedings.

<sup>(5)</sup> Joined Cases C-68/94 and C-30/95 *French Republic, SCPA and EMC v Commission* [1998] ECR I-1375.



of them subsequent to the Court's judgment. In the *Airtours/First Choice* case, it eventually prohibited the operation on the grounds that it would have led to an oligopoly of three companies on an already highly concentrated market (see box below). In *Exxon/Mobil*, it found that the operation would have led to a strengthening of the existing oligopoly in the national long-distance wholesale transmission of natural gas in Germany. It also found that, in view of the equity links between Exxon, BP/Mobil and Aral and the other structural factors of the industry, the operation would have created or strengthened oligopolistic dominant positions in the markets for the distribution of fuels in Germany, Austria, the Netherlands, Luxembourg, the UK and on French toll motorways. A point of interest is the fact that, in motor fuel retailing, the Commission found that the merger would have created or reinforced an oligopoly in a number of national markets which were only moderately concentrated (a

minimum of three players in the UK to a maximum of seven players in Luxembourg). Despite the relatively low levels of concentration in this case, the markets were found to display all the characteristics typical of markets conducive to oligopoly. Finally, in *Danish Crown/Vestjyske Slagterier*, the Commission found that a duopoly would have supplied 70 % of the Danish market for fresh pork meat sold through supermarkets.

162. In all these cases the Commission investigated market characteristics such as market transparency, homogeneity of the product, maturity of the market, rate of innovation, similarity of cost structures, multi-market contact, links (structural or other) in order to establish whether the markets in question are conducive to oligopolistic dominance. The Commission has proceeded on a case-by-case basis in its analysis of these characteristics. However, the relevance of each of the market characteristics depends on the context of a specific market.

#### **Box 6: Collective dominance: Airtours/First Choice**

The Commission undertook a detailed investigation of this hostile bid in the UK package holiday sector, notified on 29 April. In the light of the results of its investigation, the Commission decided, on 22 September, to prohibit the proposed merger. The grounds for this decision were, in brief, that it would lead to the creation of a situation of collective dominance between the merged Airtours/First Choice and the two other large, vertically integrated suppliers that would remain (Thomson and Thomas Cook), which would substantially reduce competition in the short-haul package tour market in the UK.

This was the first occasion on which the Commission had prohibited a merger on the grounds of collective dominance among more than two firms. However, the question of the applicability of the merger regulation to dominant positions among several firms rather than just one has been considered before <sup>(1)</sup>, and there have been a number of cases (including two which were the subject of review by the European Courts, see above <sup>(2)</sup>) which have dealt with the issue of dominance by two firms (duopoly) and confirmed the principle that the regulation applies to collective dominance.

The UK package holiday sector was found to exhibit a number of characteristics such as market transparency, mature market, low rate of innovation, similarity of cost structures, commercial links between the oligopolists (and so on) which made it more likely, in the Commission's view, that the merger would lead to collective dominance with substantial adverse effects on competition.

The structure was highly concentrated even before the merger; the four largest firms, each with a substantial market share individually, had 80 % of the market between them and the merger would bring together the second and third largest.

All four large companies (in contrast to the numerous, but much smaller, competitors who made up the remaining 20 % of the market) were fully vertically integrated, both upstream into charter airline operation, and downstream into distribution via the chains of travel agents which they owned. This tended to

<sup>(1)</sup> For example, in 1998 in the Phase II cases *Price Waterhouse/Coopers & Lybrand* (Case No IV/M.1016) and *Enso/Stora* (Case No IV/M.1225) — see the 1998 Competition Report.

<sup>(2)</sup> See also the Commission's 1998 Competition Report.



align their cost structures. It was also found that important commercial links existed between the four large companies — for example, significant supplies of seats on each other's airlines and arrangements to distribute each other's holidays through their travel agency chains. This increased the transparency of the market and reduced the likelihood of strong competition between them.

Another key feature of the market was the relative inflexibility of supply. Sales volume, and full use of the aircraft, was widely considered to be critical to commercial success, especially for short-haul packages (essentially those to the Mediterranean area) because unit profit margins are low. Moreover, a holiday is valueless if it is unsold by the departure date. But capacity (number of holidays for sale) has to be largely fixed well in advance of its being sold, and in particular it cannot be reduced at short notice without risk of substantial losses. A tour operator's range of destinations, flight schedule and seat allocations has to be set well before its brochure is issued and selling begins. For typical short-haul packages in the UK, this is as much as a year before the holiday season concerned. Charter airlines cannot easily reduce their capacity at short notice; flights generally have to be made even if bookings on them are insufficient. This inflexibility created an incentive for the larger, integrated tour operators to keep the market 'tight' and not to expand capacity in order to compete aggressively with each other for market share. Oversupply by one supplier would increase the number of unsold holidays, threatening the profitability of all, whereas constraining capacity would, other things being equal, improve profitability for all.

The Commission also found that there were potentially significant barriers to expansion by the many smaller tour operators to a size comparable to that of the four large firms, and at which economies of scale and scope could be maximised so that they could compete effectively with them. In particular, it was considered necessary for a tour operator wishing to reach such a size to integrate into travel agency, given the strength of the agency chains owned by the four large operators, in order to ensure adequate and cost-effective distribution of the operator's own holidays, and probably also into airline operation. Neither was likely to be easily or quickly achievable. In particular, establishing a national travel agency network (whether by a series of acquisitions or by organic growth) was likely to be a costly and long-term affair, and alternatives to the traditional method of sales through travel agents' shops (e.g. via the Internet, telephone or mail order) did not seem likely to substantially displace them for some time to come, if at all.

The Commission found that the risk of an oversupplied market, referred to above, would act as a deterrent for the oligopolists to compete for market share. It also found that there would be scope for retaliation among the oligopolists if one of them were to do so. Against this background, the removal of First Choice as a competitor in tour operation and travel agency, and its likely loss as a major supplier of airline seats to third parties (in which it was, unlike some of the other large tour operators, a key player) would, in the Commission's view, lead to the creation of a collective dominant position among the three remaining large firms, with significant anticompetitive consequences. It would strengthen their interdependency, further marginalise the 'fringe' of smaller players, and increase market transparency. That would raise the incentives for the oligopolists to restrict their capacity, and facilitate the adoption of effective strategies for doing so.

### *Single dominance*

163. The Commission also dealt with a number of cases involving single dominant positions. A notable feature in 1999 was the large number of cases where the parties abandoned the merger plan before a formal prohibition decision was adopted by the Commission. Even without a decision, the effect of the Commission's intervention in these cases was to prevent the creation or reinforcement of a dominant position to the detriment of European consumers. Four cases,

where serious competition concerns arose, were abandoned before a formal decision was taken.

164. For example, the transaction which would have combined the pulping activities of Ahlström and Kvaerner was withdrawn only one day before the Commission could issue a decision prohibiting the operation. The Commission had opened a full investigation into this merger following a number of complaints and found that the operation raised serious competition concerns in a number of markets regarding the worldwide



supply of machinery, engineering and maintenance services in the chemical pulping sector, where the parties' overlapping activities would have created or strengthened a dominant position. In particular, the Commission was concerned about the parties' strong position in the supply of chemical digesters, components of bleaching lines, washing equipment, recausticising equipment, evaporators, recovery boilers and lime kilns as well as the parties' position as regards green field operations. The operation would have raised similar concerns in relation to worldwide refurbishment and maintenance activities of chemical digesters, washers and recovery equipment. The Commission also sought to prohibit the operation on the grounds that the parties would have become the only viable full-line supplier in the chemical pulping sector, providing incentives and the ability to cross-subsidise in an anticompetitive manner between products where it would have had a dominant market position and those for which it would face more competition, and also to tie products in competitive markets to those for other pulp mill equipment, in which it would have had a dominant position.

165. In *KLM/Martinair* <sup>(1)</sup>, the Commission decided to open a full investigation based on competition concerns regarding the supply of seats to tour operators, for incorporation into package tours for Dutch customers, on flights from Amsterdam/Schiphol to destinations around the Mediterranean. Together, the two airlines would have become by far the largest single carrier from Amsterdam to these destinations.

166. KLM is the largest and Martinair the second-largest Dutch airline. Both companies are based at Amsterdam/Schiphol airport. The operation consisted of the acquisition by KLM of the 50 % of those shares in Martinair which it did not already own. These shares are currently owned by Nedlloyd. The operation was a change from joint control of Martinair by KLM and Nedlloyd together to one of sole control by KLM. In the circumstances of the case, this change would have materially reduced Martinair's remaining independence from KLM, with serious consequences for competition. The Commission considered that the operation would have allowed KLM to fully integrate the operations of Martinair with those of its subsidiary Transavia. KLM (principally through its

subsidiary Transavia) already supplied a substantial share of the supply of 'holiday' flights — whether on chartered or scheduled services — to tour operators in the Netherlands. Martinair is an equally significant competitor in this market, and together the two airlines supply around two thirds of it. The Commission was therefore concerned that the operation would have created a dominant position, regardless of whether the relevant market consisted of individual routes, a bundle of routes to certain regions or of all flights to the Mediterranean. A prohibition decision was proposed but the parties chose to abandon the operation before a decision was taken.

167. Similarly, the proposed alliance between the Rotterdam Port Authority and the container terminal operators Hutchison and ECT <sup>(2)</sup> would have led to a significant addition of capacity, given that the first, fourth and ninth largest container terminal operations in northern Europe would have been brought under the joint control of Hutchison. The Commission's investigation showed that the merger would have created a dominant position for ECT/Hutchison on the market for stevedoring services to deep-sea container ships in northern Europe. As a result of the merger, ECT/Hutchison would have had a market share of 36 % on this market with the nearest competitors having less than half of the joint market share of the parties. However, ECT/Hutchison's combined market position would have been much stronger than reflected by their market share, given their strong joint position in transshipment, their leading position in Far East cargo and the fact that their terminals are particularly suited to serving larger deep-sea vessels. The operation was abandoned before a formal decision was adopted.

In another case, *Deutsche Post/trans-o-flex*, the parties also abandoned their agreement following information from the Commission that a statement of objections would be sent setting out serious competition concerns.

### 3. Remedies

#### *Phase II*

168. In 1999, nine Phase II decisions were adopted. Of these, eight resulted in conditional clearance decisions.

<sup>(1)</sup> Case No IV/M.1328.

<sup>(2)</sup> Case No IV/M.1412.



**Box 7: Assessment of potential dominance**

Recent merger cases demonstrate that market dominance may be established even at relatively low market share (see, for example, *Rewe/Meinl* (37 %) and *Hutchison/ECT/RMPM* (36 %)). These cases highlight the fact that there is no formal threshold in Community merger control for potential market dominance. However, ECT/Hutchison's combined market position would have been much stronger than reflected by their market share, given specific features such as their joint position in transshipment, etc. The Commission's assessment in individual cases will be based on an assessment of all the specific features of the market concerned.

169. *Rewe/Meinl* <sup>(1)</sup> is a significant retail case where the focus of concern was the procurement market. The takeover of Meinl, the fourth largest Austrian food-retail chain, by the market leader Rewe/Billa would have created a dominant position on the Austrian food retail market and on nine regional procurement markets in Austria for daily consumer goods. The Commission considered the strong link between the retail market and the procurement side. A competitor having a strong position in retailing and a significant purchasing volume will usually be able to achieve better purchasing prices and conditions from its suppliers, which in turn can be used to attack its rivals on the downstream side. In the present case, Rewe/Billa was already market leader, and the only retailer expanding at a rapid pace. As a result of the acquisition, the new entity would have achieved a market share of well over 30 %, considerably more than its nearest competitor, Spar. In order to evaluate the real strength of the new entity on the relevant markets, the Commission looked at the market shares in combination with a number of additional advantages the parties have, such as, for example, their centralised structure, their high share of favourable locations, the high combined share of profitable shops, etc. The Commission concluded that the operation as notified in its original form would also have increased the already existing high entry barriers to the Austrian food retail market. The parties made comprehensive commitments removing the Commission's concerns on both the retail and procurement side of the deal. Following the commitments, Rewe/Billa acquired only 34 % of Meinl's food retail activities. Rewe/Billa also undertook not to acquire any outlets to be used for food retailing in eastern Austria. Following the undertakings, Rewe/Billa will not

strengthen its existing strong position and Meinl will remain active as a competitor. The reduction of market share on the retail market will also have a positive impact on the procurement markets by reducing the dependency of suppliers operating on that market.

170. In the proposed merger between Danish Crown and Vestjyske Slagterier the operation would have led to the creation of a duopolistically dominant position of the parties together with another large Danish cooperative slaughterhouse, Steff-Houlberg. The duopoly would have accounted for about 70 % of the market for fresh pork meat sold through supermarkets. In this market, competitive actions by competitors are very transparent due to the weekly pig price quotation. In addition, there were a number of structural links and other similarities between the parties and the number two competitor, Steff-Houlberg. In particular, Steff-Houlberg was already channelling a large volume of meat through companies controlled by the parties, and the merged entity and Steff-Houlberg would have had similar cost structures, technology and sales channels. The Commission consequently found that, owing to the market structure, neither of the duopolists would have had any incentives to compete with each other on the Danish market. To remedy these concerns, the parties committed themselves to abolishing the pig price quotation and the related rules concerning the basis on which farmers are paid. Furthermore, the parties undertook to sever all structural commercial links (common sales channels) with third parties, notably Steff-Houlberg. Finally, the parties undertook to sell slaughter capacity amounting to potentially more than 10 % of the Danish consumption of fresh pork meat sold through supermarkets and to loosen the exclusive supply restrictions on their farmers to supply other slaughterhouses. The Commission found that

<sup>(1)</sup> Case No IV/M.1221.



these remedies would make the market less transparent, allow divergent cost structures, sever the links between the parties and their Danish competitors and provide an alternative to Danish supermarkets. On balance, the Commission found the remedies sufficient to remedy the competition problem created by this merger.

171. In *Exxon/Mobil*, the operation as notified would have created or strengthened dominant positions in a large number of markets. Serious competition concerns arose, amongst others, on the markets for wholesale transmission of natural gas in the Netherlands and Germany, motor fuel retailing in several Member States, Group I base oils (an ingredient for the production of lubricants) in the EEA and aviation lubricants worldwide. In order to remedy these concerns, the parties offered what is the most comprehensive remedy package accepted under the merger regulation to date. Several of these remedies raised particularly difficult issues. For example, Mobil agreed to withdraw from its joint venture with BP covering motor fuel and lubricants retailing in Europe. In relation to aviation lubricants, the Commission obtained the divestiture of Exxon's business after the parties had initially proposed to divest Mobil's aviation lubricants business. The Commission considered the sale of Mobil's business to be inadequate because, even though it would have eliminated the overlap between the parties, the Commission found that Mobil's business was more integrated with the Mobil group than that of Exxon. Therefore, Exxon's aviation lubricants business was considered to be more viable as a stand-alone entity, allowing the eventual purchaser to compete independently from the parties.

172. At the same time as the Commission was investigating *Exxon/Mobil*, it was also investigating another important merger in the oil and chemicals sector: the takeover by BP Amoco of Atlantic Richfield. To illustrate the rapid pace of consolidation in this sector, the BP Amoco Group had itself only been formed after the merger between The British Petroleum Company and Amoco Corporation in December 1998. As initially notified, the operation would have created dominant positions on the market for the transport of unprocessed natural gas to the UK mainland through off-shore pipelines from fields in the southern North Sea ('SNS') sector of the UK continental shelf and also on the market for processing natural gas in processing facilities on the

UK mainland servicing the SNS area. In order to eliminate the competitive concerns, BP Amoco undertook to divest certain pipeline and processing interests, which had the effect that the merged entity's position remains similar to that of BP Amoco's beforehand.

173. The Commission carried out an in-depth investigation into the merger between the Swedish Telia and the Norwegian Telenor<sup>(1)</sup>, and concluded that the concentration as originally notified would have caused serious competition concerns in a number of telecommunications and related services markets in both Sweden and Norway. The operation would also have led to adverse competition effects in the Irish mobile telephony market, where the merged entities would have had control over both of the only two operators active on the Irish market. Lastly, there were serious competition concerns in a number of Nordic, Swedish and Norwegian television services markets. The operation was subject to far-reaching commitments to open up access to the local access networks for telephony as well as to divest Telia and Telenor's respective cable-TV businesses and other overlapping business. More particularly, Telia and Telenor committed themselves to divesting all existing overlaps in the field of telecom services. The parties also undertook to sell either company's stake in one of the two existing Irish mobile telephony operators. The parties also undertook to divest their respective interests in cable-TV networks in Sweden and Norway and to implement a set of measures to promote competition, in the last link between the local exchange and the consumer (the local loop), in both countries.

174. The *Telia/Telenor* case raises a number of interesting issues and although the merger has since fallen through, the issues of substance in the Commission's decision remain valid. Most importantly, the decision sets out the Commission's approach to operations between incumbent operators in the EU. In telecommunication services and television distribution, the competitive analysis has to go beyond issues of direct overlaps, and the significance of possible network effects and foreclosure must be analysed. One example of this is that the decision found Telia and Telenor to be each other's closest actual and potential competitor in Norway and Sweden. It

<sup>(1)</sup> Case No IV/M.1439.



was therefore found that a merger between the two companies, even after the proposed divestiture of the nationally overlapping activities, would have strengthened their respective dominant positions. The finding that Telia and Telenor were each other's closest actual and potential competitor was based on past experience as well as on the fact that these two companies enjoyed a stronger degree of control over their respective network infrastructures than any competitor in the Nordic area. The pre-merger level of competition between Telia and Telenor was found to be an important price constraint in the relevant markets, which also benefited other market participants, owing to the non-discrimination provisions in the applicable telecommunication regulations. Following the merger, this constraint would have been removed, and the merged entity would have controlled a significant proportion of the transmission infrastructure, including access to all end-users in Norway and Sweden. The merged entity would also have become, to a higher degree than Telia or Telenor alone, a necessary contracting party for its competitors. This would have enabled them to foreclose access to those competitors, thereby reducing the choice available to final users. In any future notifications of operations involving incumbent operators, the Commission will look very closely at access to local telecommunications and cable-TV networks and may require cable-TV network divestitures and/or local-loop unbundling (local-loop unbundling enables other infrastructure providers to offer services over their own infrastructure leased from the incumbent operator) in order to resolve competition issues in line with its approach in the telecommunications sector (see Chapter I.C.1. above). The decision also illustrates the Commission's commitment to maintaining and developing a level playing field in the converging technology markets, telecoms, TV and the Internet. In these network industries it is particularly important to ascertain that mergers and other private initiatives will not foreclose the consumer's access to the increased choice made possible by the developing technologies. From a procedural viewpoint, this merger created issues in relation to the timetable for submitting commitments (see box below).

175. As the Commission's decision not to accept the proposed remedies in *Airtours/First Choice* demonstrates, appropriate remedies in oligopoly cases can amount, in effect, to attempting to create (or recreate) a competing business capable of

exerting sufficient competitive pressure. As such, it is particularly important to ensure that the divested assets, together with those (if any) of their ultimate acquirer(s), will prove sufficient to maintain competition at an acceptable level, given also that the market share and strength of the merged entity will also have increased as a result of the merger. *Airtours'* principal remedy proposal consisted of an undertaking to divest certain tour operating assets, including brand names and existing bookings, to a suitable third party. This proposal was found to be inadequate. In particular, it did not address the problem of access for the prospective buyer to a suitable channel of distribution for its holidays. It would not, therefore, remedy one of the main competition problems of the merger.

176. This has a number of implications. The number of prospective purchasers is reduced by the need to exclude, as a rule, the other oligopolists, although suitable acquirers may still be found. That will also, other things being equal, increase the scale of the divestment needed to resolve the competition problem, by comparison with cases of single-firm dominance, since the buyer's existing business is likely to be much smaller. Although this is not a problem confined to oligopoly cases, it may be difficult or impossible for the merging parties to sever a proportionately sized, viable business, as opposed to a disparate collection of assets, from the whole. This is not as a rule problematic in many cases where, for example, concerns arise in areas which are largely peripheral to the parties' 'core' businesses. In those cases the whole of the overlap can be divested without seriously prejudicing the commercial and economic rationale for the merger. But where the overlap arises in a core business, that may not be possible. In such cases, the merger may have to be prohibited.

177. A more straightforward remedy was found in the merger between *Sanitec and Sphinx* <sup>(1)</sup> in the European bathroom products sector. An in-depth inquiry into the transaction showed that the operation as notified would have led to adverse competition effects in ceramic sanitaryware and other bathroom products in the Nordic countries. The high market shares (up to 90 %), the absence of countervailing buying power and only marginally present competitors led the Commission to conclude that the operation

<sup>(1)</sup> Case No IV/M.1578.



would have had a particularly negative effect on Nordic customers. Sanitec subsequently offered a full divestiture of Sphinx's Gustavsberg business in the Nordic countries. A notable feature of these undertakings is that while the Commission did not find competition problems in taps and mixers as such, the possibility for the potential buyer to buy also this business was considered important for the viability of the divested business. The option to acquire also the taps and mixers business will ensure that the buyer will be able to offer a full range of products and compete fully with Sanitec on the Nordic market.

178. In *Honeywell/AlliedSignal*, the Commission's investigation focused on the markets for avionics for commercial applications (products generally found in aircraft cockpits, such as communication and navigation equipment). The operation combined the first and the third largest worldwide suppliers of commercial avionics with major presence in all aviation segments. The combined market shares produced by the merger in some markets were as much as 100 % in weather radars for civil helicopters and terrain awareness warning systems (TAWS). The combined entity would have reached market shares of up to 74 % in airborne collision avoidance systems (ACAS) processors and mode S transponders and there would have been only one remaining competitor in a market which exhibited high barriers to entry. Furthermore, the parties' strong position in the market for TAWS would have had an effect on the future market for integrated hazard awareness systems (IHAS), since the TAWS is a key part of this system. The new entity would have been able to technically link its engineering force and technology for the next generation of IHAS and thereby foreclose competition.

179. In order to remedy their resulting dominant positions, the parties offered to divest Honeywell's entire ACAS business and AlliedSignal's weather radar business. With respect to TAWS, commitments were given to supply third parties open interface standards of other avionics products of the new entity, so that new suppliers can have their products installed on aircraft equipped with other avionics from the new entity. Regarding IHAS, there will be an obligation to supply third parties with TAWS technology as well as interface data so that future product development by competing suppliers can continue to take place.

180. These cases and the undertakings on which their clearance was conditional demonstrate the increasingly complex nature of transactions the Commission has to deal with. This, together with the fact that complicated undertakings need careful monitoring on the Commission's part months, and even years, after the decision has been taken, means that the Commission is forced to devote more time and resources to the cases concerned. Moreover, when the nature of competition problems becomes such that they require elaborate undertakings and mechanisms to remove the concerns, the Commission has to carefully consider whether accepting complex undertakings will lead to a truly satisfactory result from the competition point of view or whether such transactions should instead be prohibited.

#### *Phase I*

181. There was a significant upward trend in decisions where operations were cleared in Phase I only after undertakings were submitted. The number of decisions where first phase remedies were accepted clearly exceeded last year's total of 12 decisions. In 1999, 19 cases which would previously have been subject to second phase investigations were able to be cleared after six weeks with undertakings.

182. As in cases where the Commission opened an in-depth investigation, cases where remedies were accepted in Phase I typically involve substantial and complex divestments. The most comprehensive undertakings in Phase I proceedings were accepted in the merger between Hoechst and Rhône-Poulenc into Aventis <sup>(1)</sup>. Those undertakings included the divestment of the chemical businesses of Rhodia and Celanese as well as Hoechst's veterinary division, HR Vet. In addition, the parties submitted commitments in response to competition concerns in various pharmaceutical and agrochemical markets as identified by the Commission during its investigation.

183. The existence of Phase I remedies facilitates the speedy clearance of operations. This can, however, be done only if the Commission is certain that all potential competition problems are resolved. Moreover, it is essential that the Commission be given sufficient time to investigate noti-

<sup>(1)</sup> Case No IV/M.1378.



fied transactions, in particular if it is likely that they could be cleared only subject to undertakings. For instance, despite the need for substantial undertakings, the *Hoechst/Rhône-Poulenc* case was able to be cleared in Phase I because there were detailed discussions between the parties and

the Commission before the operation was formally notified. Therefore, in cases where the parties suspect that the transaction will lead to competition concerns, it is important that they contact the Commission at the earliest possible stage, and before formal notification takes place.

### Box 8: Legal deadlines for submitting undertakings in Phase II cases

Article 18(2) of the implementing regulation <sup>(1)</sup> provides that commitments offered to the Commission in Phase II cases must be submitted to the Commission within not more than three months from the date on which the Phase II proceedings are initiated. The Commission may, in exceptional circumstances, extend the three-month period. The Commission had to take a stance on the issue of extending the legal deadline to accept remedies in Phase II proceedings twice in 1999.

In *Telia/Telenor*, the Commission agreed to accept commitments one week after the expiry of the legal deadline. In reaching this decision, the Commission took into account the fact that the notifying companies faced additional and exceptional constraints in submitting the proposed commitments. These additional constraints were due, not to the companies' ownership structure as such, but to the fact that the Swedish and Norwegian Parliaments had to be consulted prior to the submission of the proposed remedies. The Commission also took account of the fact that the parties had already indicated what the additional commitments would be in their request for an extension and that this request was submitted within the legal deadline. The Commission further took note of the clear-cut character of the proposed undertakings, which enabled it to conduct a full and proper assessment of the modified proposal.

In *Airtours/First Choice*, however, the Commission rejected the submission of undertakings outside the legal deadline. The Commission considered a package of possible remedies offered by Airtours shortly before the end of the three-month period, but these undertakings were found to be inadequate. Airtours subsequently revised its proposal, but the proposal was submitted to the Commission only after the legal deadline to accept remedies had expired. No exceptional circumstances were found to exist in this case. There was nothing, in the Commission's view, in the new proposal which could not have been included in the original one. Moreover, in order to assess the revised proposal, it would have been necessary to consult third parties and liaise with Member States, and this could not have been completed within the short time remaining under the statutory period for a final decision.

These two cases illustrate the difficulties relating to the extension of the time limit to accept undertakings. Article 18(2) aims to reconcile two equally important needs: first, the need properly to assess the undertakings submitted by the parties for the Commission, Member States and interested third parties within a reasonable time and, second, the need to take account, in line with the principle of proportionality, of specific situations justifying a shortening of the time period that is considered necessary to carry out the assessment. The Commission also has to liaise closely with the advisory committee of Member States and time may also be needed to negotiate any changes that may be necessary. Moreover, the Commission needs to complete the internal procedures leading to the adoption of a final decision by the College of Commissioners within the statutory four-month deadline. In the absence of exceptional circumstances, the three-month deadline will therefore be considered the strict final deadline for submitting undertakings in Phase II proceedings in future cases. The Commission has outlined the reasons for this time limit in its draft notice on commitments, which was released to the general public for comments before the *Airtours/First Choice* case.

<sup>(1)</sup> Commission Regulation (EC) No 447/98 of 1 March 1998 on the notifications, time limits and hearings provided for in Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings.



#### 4. Article 2(4)

184. The amendments to the merger regulation, which came into force on 1 March 1998, extended the regulation's scope to include full function cooperative joint ventures. According to Article 2(4) of the merger regulation, a joint venture having as its object or effect the coordination of the competitive behaviour of its parent companies also has to be appraised in accordance with the criteria of Article 81(1) and (3) of the EC Treaty. In 1999, 19 such cases were investigated and 15 decisions taken. Four cooperation cases were cleared only after the parties submitted undertakings.

185. In *BT/AT&T* <sup>(1)</sup>, a Phase II case, there was a risk of parental coordination between ACC, a wholly owned subsidiary of AT&T, BT and Telewest, in which AT&T, through TCI, holds a 22 % stake regarding the distribution of AT&T/Unisource services in the UK. The Commission raised concerns that the joint venture could lead to coordination of the parties' competitive behaviour. In order to remove these concerns, AT&T offered to divest ACC UK. AT&T also committed itself to more structural separation between AT&T and Telewest. Furthermore, AT&T undertook to give another distributor the option to distribute AUCS services (i.e. global telecommunications services offered by the company AUCS, a joint venture between AT&T and Unisource) in the UK, as AT&T UK will be wound up. The Commission declared the concentration compatible with the common market subject to full compliance with these undertakings.

186. In the *Skandia, Storebrand and Pohjola* case <sup>(2)</sup>, concerning the insurance sector, the Commission also approved the joint venture with commitments. The Commission concluded that the operation would have only minor effects on competition in the Nordic countries, with the exception of Norway, where Skandia has a significant market presence through Vesta, a wholly owned subsidiary of Skandia P&C Insurance Company Ltd (publ). In order to remedy the competition concerns arising from the combined market shares of Storebrand and Vesta in Norway, Skandia agreed to divest its Vesta Forsikring A/S subsidiary there, thus avoiding a further strengthening of Storebrand's market position.

187. In *Alitalia/KLM* <sup>(3)</sup>, the Commission authorised the concentration during the first phase investigation in view of the companies' significant undertakings to promote the entrance of new competitors on two hub-to-hub routes, Amsterdam–Milan and Amsterdam–Rome, where the Commission found that the alliance between Alitalia and KLM would have created a monopoly. To remedy these concerns, Alitalia and KLM proposed a set of measures to facilitate entry in line with previous decisions in the air transport sector (see Chapter I.C.4. above). The extensive undertakings offered included: a commitment to make available slots to new entrants on the routes in question (up to 336 weekly slots); a commitment to reduce the parties' frequencies on the Amsterdam–Milan and/or Amsterdam–Rome routes when an entrant starts operations; a commitment to enter into interlining agreements with the new entrant and to give any new entrant the opportunity to participate in KLM's and Alitalia's Frequent Flyer Programme; a commitment to refrain from tying travel agents and corporate customers in Italy and the Netherlands respectively with loyalty or other similar rebate schemes; and a commitment to ensure that, once a competing airline has entered on the route(s) in question, the first screen of the computer reservation system (CRS) is not filled with the flights of the Alliance and that consumers will be informed about the precise code-share arrangements.

188. The cooperative joint venture between Fujitsu and Siemens <sup>(4)</sup> was cleared subject to the companies' compliance with certain commitments. This operation combines the European businesses of Siemens and Fujitsu for the development, manufacture and sale of computer hardware and related products, including desktop PCs, laptops, workstations, servers and storage systems. However, the Commission found that there was a risk of parental cooperation on the financial workstations market. To address the Commission's serious competitive concerns in that market, Siemens undertook to divest Siemens Nixdorf Retail and Banking Systems GmbH, a subsidiary active on that market.

189. Joint venture cases of this kind involve the application of Article 81 and, therefore, are mostly dealt with by the antitrust directorates within the Directorate-General for Competition rather than by the merger task force.

<sup>(1)</sup> Case No JV.15.

<sup>(2)</sup> Case No JV.21.

<sup>(3)</sup> Case No JV.19.

<sup>(4)</sup> Case No JV.22.



### Box 9: Fines for supplying incorrect or misleading information in the notification

An important development in merger control was that, for the first time, the Commission used its powers to fine companies for supplying incorrect or misleading information in their notifications or during the subsequent investigations. The merger regulation stipulates that the Commission can impose fines of between EUR 1 000 and EUR 50 000 where a company provides intentionally or negligently incorrect or misleading information in a notification or in response to a request for information.

The Commission fined four companies for infringing the merger regulation. In February 1999, Deutsche Post AG notified its planned acquisition of sole control over the German high-speed delivery service, trans-o-flex GmbH. According to Deutsche Post, it had acquired a minority shareholding in trans-o-flex in 1997 but the notification contained facts that pointed to an acquisition of sole control during that time. If that had been the case, the Commission would have had no jurisdiction to assess the transaction as notified in 1999 but, instead, the evaluation of the acquisition of the shares in 1997 would have had to be carried out by a number of national authorities. On the basis of these indications, the Commission requested additional information from Deutsche Post and others concerning the 1997 transaction. In the course of this investigation, it became apparent that Deutsche Post had deliberately supplied incorrect and misleading information to deceive the Commission. The Commission's investigation suggested that Deutsche Post had exercised control over trans-o-flex since 1997 through its largest shareholder, a company called Industrial Information. Deutsche Post thus committed a serious infringement of two provisions of the merger regulation. The Commission therefore imposed two separate fines, the maximum amount of EUR 50 000 permitted under the merger regulation for each.

The Commission also imposed a fine on KLM for supplying incorrect and misleading information. KLM notified the Commission of its planned acquisition of Martinair in September 1998. The notification was subsequently withdrawn. The operation was re-notified to the Commission in December 1998 but abandoned in May 1999 after the Commission raised objections against the operation. The Commission started proceedings in that case because KLM supplied incorrect information in its first notification, the one issued on September 1998. In that notification, KLM submitted incorrect information on the charter destinations of its subsidiary Transavia and withheld relevant information on scheduled flights of Transavia. In particular, KLM gave an incorrect description of the destinations of Transavia and failed to list 10 important Transavia destinations. KLM presented the operations of Transavia and of Martinair as 'largely complementary' while, in reality, both airlines operated to all Mediterranean destinations. Furthermore, KLM failed to inform the Commission about the fact that Transavia had substantial scheduled operations to Mediterranean destinations and sold a significant number of seats on these flights to Dutch tour operators, thereby giving a misleading description of the activities of Transavia. The Commission considered the behaviour of KLM to be grossly negligent, at the very least, and imposed a fine of EUR 40 000.

The Commission decided to impose the maximum fine of EUR 50 000 on Sanofi and Synthélabo <sup>(1)</sup> for providing incorrect information. In this case the Commission had to revoke its original clearance decision following the discovery that the parties had not provided information on all their overlapping activities. The Commission found that possible competition concerns were created also in the area of stupefying active substances, which the parties had not described in the notification. As it became clear that the original clearance decision was based on incorrect information, it was revoked. A new decision was subsequently issued, taking into account the divestment of Synthélabo's activities in stupefying active substances.

These decisions underline the Commission's determination to ensure that firms comply fully with their legal obligations. By imposing fines in these particular cases, the Commission emphasises the importance it attaches to the requirement under the merger regulation that complete and correct information be supplied. This is essential to enable the Commission to adopt its decisions within the strict deadlines of the

<sup>(1)</sup> Case No IV/M.1397.



merger regulation and in full knowledge of the relevant facts. Incorrect or misleading information can lead the Commission to take incorrect decisions, with potentially serious effects on businesses and consumers in the EU. Therefore, the Commission will continue to strictly apply its procedural rules and to impose fines if these rules are broken. In view of the gravity of the infringement of the procedural rules in merger cases, the Commission is also considering whether it may be appropriate to propose to the Council that the amounts of the fines, which are currently relatively low, be increased.

## 5. Referrals to Member States

190. Under Article 9 of the merger regulation, a case may be referred to a particular Member State if the concentration threatens to create or to strengthen a dominant position as a result of which effective competition will be significantly impeded on a market within a particular Member State which presents all the characteristics of a distinct market.

191. In 1999, three cases were referred in full and two partially to Member States. One request for referral was refused. In *Rabobank-Beeck/Homann* <sup>(1)</sup>, the Commission accepted a request for referral made by the German competition authorities. The case, which concerned the German delicatessen food sector, risked creating a dominant position in Germany or in part of it. As this threat was limited to a distinct market in Germany, the Commission referred the case to the Bundeskartellamt. The Commission granted a referral to Spain in the *Heineken/Cruzcampo* case <sup>(2)</sup>, which concerned beer distribution in Spain. The grounds for referral were that competition issues were either regional or national in nature. The Commission further decided to refer to the French national authorities the proposed concentration notified by the two rock-salt producers in France, *Compagnie des Salins du Midi et des Salines de l'Est (CSME)* and *MDPA/SCPA* <sup>(3)</sup>. The planned joint venture threatened to create or strengthen a dominant position on the market for ice-control salt in the north-east of France. In this sector, the dimension of the geographic markets is limited by the high proportion of transport costs in the final price of ice-control salt. An initial analysis of the markets showed that the north-east of France could be defined as a distinct market. The other French regions using ice-control salt were also likely to be affected by the operation. On the basis of this, the Commission decided to refer the case to the

French authorities. In addition, the takeover of Petrofina by Total was partially dealt with by the French competition authorities. The French dealt with the effects of the operation on the petroleum storage infrastructure in the southern part of France (i.e. Languedoc-Roussillon), where the transaction raised serious doubts. The *Total-fina/Elf Aquitaine* case <sup>(4)</sup> was also partially investigated by the French authorities.

192. The UK competition authorities requested a referral of part of the *Exxon/Mobil* case, namely that concerning motor fuel retailing in the north-west of Scotland. However, the Commission had already raised concerns in the motor fuel retailing market covering the whole of the UK. Given that the request to deal with the effects of the merger in the north-west of Scotland fell within the scope of this enquiry, the Commission decided to deal with these concerns as part of its overall assessment of the UK motor fuel retailing market.

193. In *EDF/London Electricity* <sup>(5)</sup> the United Kingdom authorities requested a referral under Article 9(4). The UK authorities were concerned that the Director-General of Electricity Supply, the statutory electricity industry regulator, should remain able to take certain measures to ensure regulatory transparency and protect consumers. The Commission found, however, that the Article 9 request did not meet the criteria for referral of a case to a Member State, because the operation did not strengthen a dominant position on either of the distinct markets concerned (Article 9(2)(a) of the merger regulation).

## 6. Decisions under Article 21

194. In the *BSCH/A. Champalimaud* case <sup>(6)</sup>, the Republic of Portugal opposed the operation even though it had been cleared by the Commission.

<sup>(1)</sup> Case No IV/M.1461.

<sup>(2)</sup> Case No IV/M.1555.

<sup>(3)</sup> Case No IV/M.1522.

<sup>(4)</sup> Case No IV/M.1628.

<sup>(5)</sup> Case No IV/M.1346.

<sup>(6)</sup> Case No IV/M.1616.



By two decisions (of 20 July and 20 October), the Commission took action against the Portuguese measures. The decisions were adopted pursuant to Article 21 of the merger regulation, which grants the Commission exclusive powers to assess concentration operations having a Community dimension. In these decisions, and in particular the final one adopted on 20 October, the Commission indicated that the measures of the Portuguese authorities could not be regarded as protecting legitimate interests within the meaning of Article 21 of the merger regulation. In particular, these decisions indicate that, in so far as the measures of the Portuguese authorities are based on the protection of national and strategic interests, they are contrary to Article 21 of the merger regulation, both because the Portuguese authorities failed to notify them to the Commission and because such interests could not be considered legitimate. The decision also states that the alleged prudential interests advanced by the Portuguese authorities could not be considered justified.

195. With the first Article 21 decision of 20 July 1999, the Commission requested the suspension of the decision by the Portuguese Minister for Finance to oppose the operation and the measures deriving therefrom, such as the suspension of voting rights of BSCH and A. Champalimaud in Mundial Confiança. The Commission subsequently decided to open an accelerated infringement procedure against Portugal for not suspending the measures against the BSCH/A. Champalimaud operation. This decision was necessary in order to reach a prompt solution. The operation between BSCH and A. Champalimaud, although approved under the EC merger rules, could not be put in place. Moreover, Banco Comercial Português announced its intention to launch bids over the companies of the Champalimaud group, which required that the legal situation concerning the control of these companies be clarified quickly.

196. BSCH and Mr Antonio Champalimaud subsequently concluded a new agreement which replaced the previous one. This operation has been notified under the merger regulation and is not expected to be opposed by the Portuguese authorities. The case is very important for Community law and the business community, as it shows that the Commission can act speedily and with determination to reaffirm its exclusive competence in merger matters. In addition, the case

underlines the importance of transnational operations in the financial and banking sectors.

197. In *EDF/London Electricity*, as well as submitting an Article 9 request, the UK authorities also submitted a request for the recognition of certain 'legitimate interests' under Article 21(3) of the merger regulation. Article 21(3) provides that Member States may take appropriate measures to protect 'legitimate interests' other than those taken into consideration by the merger regulation, provided they are compatible with the general principles and provisions of Community law. Interests relating to public security, plurality of the media and prudential rules are expressly to be regarded as 'legitimate' interests. Any other public interest must be communicated to the Commission by the Member State concerned, and recognised after an assessment of the interest's compatibility with Community law, before the measures referred to may be taken.

198. The UK authorities argued that the UK had a public interest in maintaining the integrity of the regulatory system for the electricity sector. The UK considered it to be in its public interest to be able to make modifications to the statutory licence of a public electricity supply company ('PES'), even in cases where such a company is a party to a concentration with a Community dimension. The UK therefore proposed modifications to the licence of London Electricity. The Commission, however, concluded that there was no need to recognise a 'legitimate interest' as the modification to London Electricity's licence proposed by the UK electricity regulator (the Director-General of Electricity Supply — DGES) constituted the application of regulatory provisions of national law and the modifications were aimed not at the concentration itself but at the conduct of the merged undertakings after the concentration, to ensure that the regulator would be able to continue to carry out his duties.

## 7. Revocation of a Commission decision

199. In *Sanofi/Synthélabo*, the Commission revoked its clearance decision of 15 March 1999 pursuant to Article 6(3)(a) of the merger regulation. After receiving third parties' observations, the Commission had to consider possible competition concerns being created in the area of stupefying active substances which the parties had not described in their notification. Therefore, the

clearance decision was considered to be based on incorrect information and the parties were subsequently fined (see box). Following the revocation decision, the parties submitted to the Commission the relevant information relating to stupefying active substances. The parties further undertook to divest the Synthélabo activities in the area of stupefying active substances and, consequently, the Commission adopted the final clearance decision.

## 8. Guidance notices

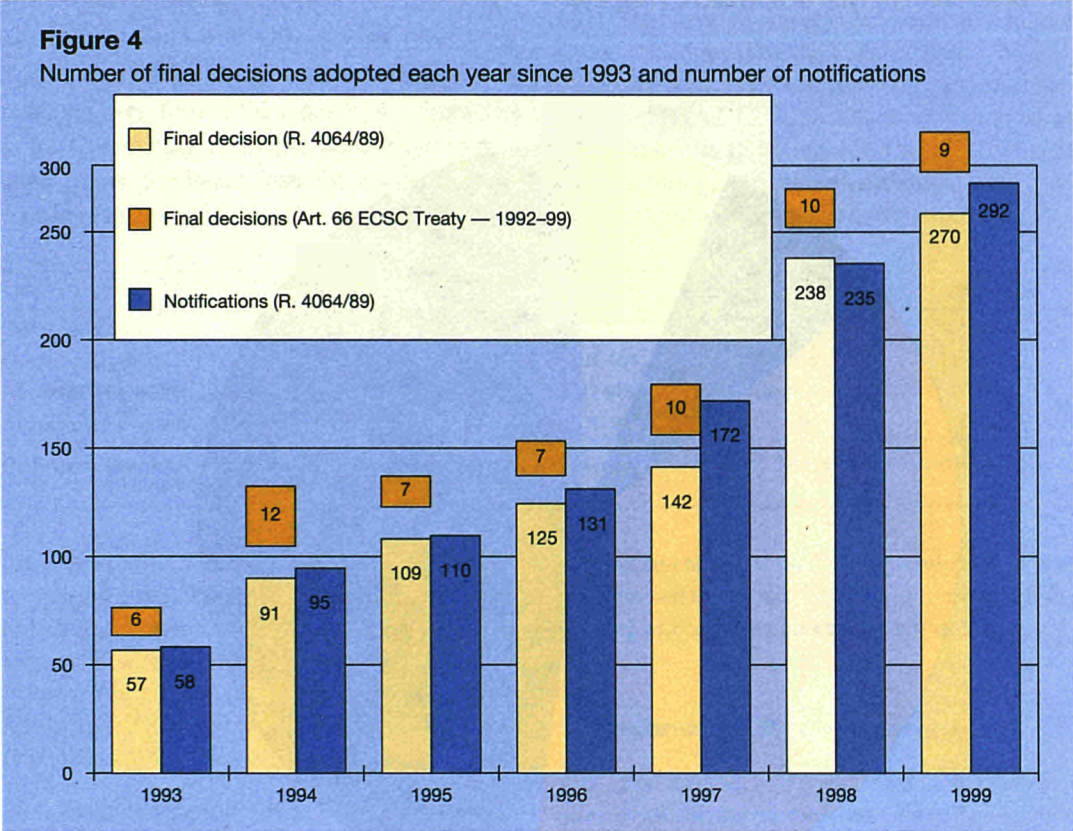
200. As part of its objective of ensuring the transparency and clarity of European merger control, the Commission has adopted a number of guidance notices in recent years relating to various aspects of the merger regulation. These guidance notices had previously been the subject of widespread consultation with Member States, industry and the legal profession before their final adoption by the Commission. Similar consultation exercises were carried out in 1999 on three draft notices <sup>(1)</sup>. The first was a revi-

sion of the current notice on restrictions directly related and necessary to the implementation of the concentration, which has been in operation since the merger regulation first came into force. The new draft notice takes into account the refinements made to the Commission's practice since that time. The second is an important new draft notice on remedies, which have become a vital tool in addressing competition problems raised in a large number of cases. The proposed notice sets out the general principles applicable, summarises the main types of commitment adopted to date and sets out the substantive and procedural requirements for submitting commitments to the Commission and their subsequent implementation by the parties concerned. The third notice concerns a proposal to simplify the handling of routine cases notified to the Commission. This is essential in order to ensure that the Commission's resources are utilised as efficiently as possible. The proposed notice sets out and explains the simplified procedure, which provides for approval of routine cases without a formal decision of the Commission. At the same time a number of safeguards are introduced to ensure legal certainty and transparency. The Commission intends to adopt the three notices during the first half of 2000.

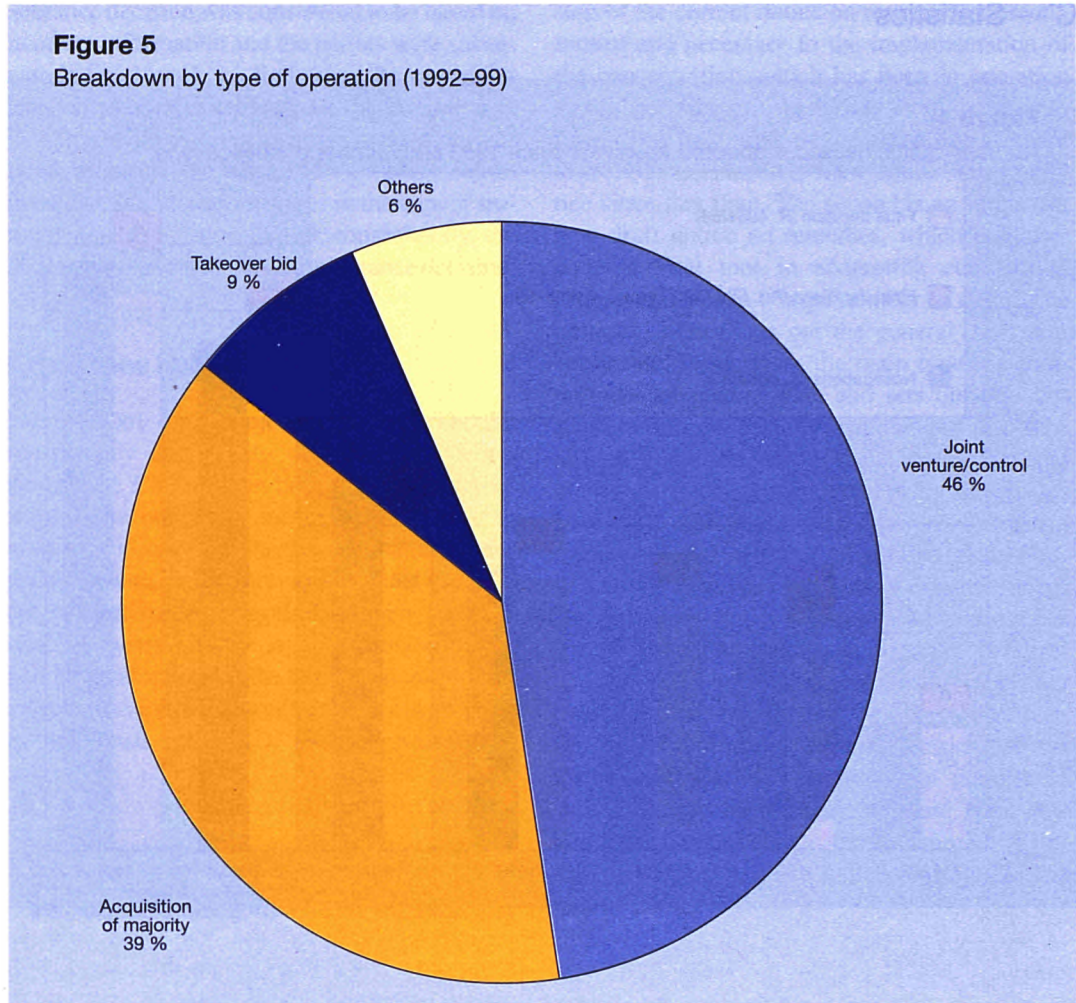
<sup>(1)</sup> Draft Commission notices regarding the treatment of ancillary restraints, commitments and routine cases under the merger regulation were published on the Competition DG's website ([http://europa.eu.int/comm/dg04/lawmerg/draft\\_notices/index.html](http://europa.eu.int/comm/dg04/lawmerg/draft_notices/index.html)).



C — Statistics



**Figure 5**  
Breakdown by type of operation (1992-99)





### III — STATE AID

#### A — General policy

201. 1999 saw the appointment of a new Commission determined to keep a tight control on State aid in all its forms, with the clear goal of reducing even further the amount of aid granted in the Community. Activities undertaken in previous years continued, namely work on modernising and simplifying the procedural rules,

improving transparency and concentrating resources on important cases.

202. The seventh survey on State aid in the Union <sup>(1)</sup>, adopted by the Commission in March, covers the period 1995–97. Over this period, an annual average of EUR 95 billion was granted in State aid by the 15 Member States (EU-15) to the manufacturing, agricultural, fisheries, coal mining, transport and financial services sectors.

	1993–95	1995–97	1995–97
Geographic area	EU-12 (*)	EU-12	EU-15 (**)
Overall aid (million EUR)	101 464	88 466	95 064
Aid to the manufacturing sector (million EUR)	41 809	36 365	37 680
Aid per person employed (EUR)	1 460	1 298	1 261

(\*) Belgium, Denmark, Germany, Greece, Spain, France, Ireland, Italy, Luxembourg, the Netherlands, Portugal and the United Kingdom.

(\*\*) EU-12 + Austria, Finland and Sweden.

Overall, aid was down significantly (by 13 %) on the period 1993–95 (EU-12). In the manufacturing sector alone, EUR 38 billion, or 2.8 % of value added, was granted in aid in the Union of Fifteen. The amount of aid per employed person fell from EUR 1 460 in 1993–95 to EUR 1 298 (EU-12) in 1995–97.

203. Over the period 1995–97, regional objectives <sup>(2)</sup> were behind 57 % of aid granted to the manufacturing sector, while horizontal objectives <sup>(3)</sup> and aid to particular industries <sup>(4)</sup> accounted for 31 % and 12 % respectively. It is also noteworthy that aid granted on an ad hoc basis to individual firms is now stabilising at around 10 % of total aid to the manufacturing sector, whereas previous reports emphasised the increase in this type of aid.

204. However, despite the downward trend, the seventh survey stresses that, in absolute terms, the level of aid remains high. Moreover the survey also shows, that when expressed for example in terms of aid per person employed or aid as a percentage of GDP, there are differences in the amounts of aid that are granted by different Member States. These differences should be reduced further. A tough State aid policy, together with an appropriate monitoring mechanism, must therefore be maintained in order to reinforce the

competitiveness of the Community on world markets and to reap the benefits of the single market and of economic and monetary union.

#### 1. Modernising State aid control

205. For around two years now, the Commission, with the support of the Council, has been taking various steps to modernise the conditions in which State aid is monitored. An overall system, which is coherent and effective, provides the Commission with a body of legislation and rules that allows it to focus on cases with a real impact on the common market and eases the administrative burden on firms while ensuring legal certainty and improving transparency.

206. Thus the procedural regulation <sup>(5)</sup> laying down detailed rules on the application of Article 88 entered into force on 16 April. It sets out and codifies established practices and the case law of the Court of Justice regarding, for example, deadlines within which the Commission must take decisions, definitions of existing aid, new aid, misuse of aid, individual aid and aid schemes, and the rights of interested parties. It will result in the State aid rules being better understood.

207. The procedural regulation also tightens aid control. It gives the Commission additional powers, in particular with regard to the recovery of

<sup>(1)</sup> COM(1999) 148 final.

<sup>(2)</sup> Regions assisted under Article 87(3)(a) and (c) of the EC Treaty.

<sup>(3)</sup> Research and development, environment, SMEs, trade, energy saving and other objectives (principally rescuing and restructuring firms).

<sup>(4)</sup> Shipbuilding, steel and other industries.

<sup>(5)</sup> Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 83, 27.3.1999).

unlawful and incompatible aid. Thus, whereas the recovery of incompatible aid used often to be delayed by appeals to the national and European courts, the procedural regulation stipulates that from now on Member States must take all measures available under their respective legal systems, including provisional measures, to obtain immediate and effective execution of the decision ordering recovery. Firms in the Member States should thus all be dealt with in a similar way as regards the repayment of incompatible aid. Moreover, the Commission may carry out on-site monitoring visits where it has serious doubts about whether an individual decision is being complied with. Lastly, where it is misused, i.e. where it is used by the recipient in a way which contravenes a Commission decision, the Commission is entitled to initiate the procedure laid down in Article 88(2) of the Treaty.

208. Lastly, the procedural regulation goes some way towards speeding up procedures, for example by placing a time limit on taking a final decision following the initiation of proceedings under Article 88(3) of the EC Treaty or by laying down strict rules on requests for additional information by the Commission and replies sent by the Member States in the context of the investigation of a case.

209. Another aspect of the modernisation of State aid control was introduced by Regulation (EC) No 994/98 of 7 May 1998, which enables the Commission to adopt block exemption regulations for State aid. These regulations may declare certain categories of State aid compatible with the Treaty if they fulfil certain conditions, thus exempting them from the requirement of prior notification and Commission approval. On 28 July 1999, the Commission adopted three draft block exemption regulations concerning respectively State aid to small and medium-sized enterprises, training aid and the *de minimis* rule. The regulations set out clear rules along the lines of existing EU State aid guidelines and frameworks. The Commission's main objective is to free resources from assessing numerous standard cases the compatibility of which with EU rules is normally not problematic. This will increase efficiency and give the Commission's departments more room to concentrate on important cases. Member States will take greater responsibility for applying EU State aid rules. Businesses will benefit from administrative simplification and increased transparency. On 24 and 25 November the advisory committee on State aid (consisting

of representatives of Member States) was consulted on the drafts.

210. A proposal <sup>(1)</sup> for an amendment of the transparency directive <sup>(2)</sup> was agreed by the Commission on 30 March (see below). On 24 November, the Commission adopted a notice on State guarantees <sup>(3)</sup>, which sets out its approach to State aid in the form of guarantees (see below). In addition, on 8 July it adopted new guidelines on State aid for rescuing and restructuring firms in difficulty <sup>(4)</sup> (see below), with a view to tightening control. The validity of the Community guidelines on State aid for the environment <sup>(5)</sup>, which entered into force in 1994, expired on 31 December. In December the Commission adopted a decision <sup>(6)</sup> extending the validity of these guidelines until 30 June 2000. Lastly, on 7 July the Commission adopted a notice on the reference and discount rates <sup>(7)</sup>, which is essentially concerned with adapting the relevant rules in the light of the introduction of the euro. Thus, the reference rate for the 11 euro-zone Member States will from now on be identical, being defined as the average of the five-year interbank swap rates, plus a premium of 75 basis points.

## 2. State aid and tax policy

211. There is a general consensus on the need to combat harmful tax competition. In accordance with the Council conclusions of 1 December 1997 <sup>(8)</sup>, the Code of Conduct Group identified close on 280 potentially harmful measures. Following a thorough examination by the group of all of these measures, 66 have been classed as harmful within the meaning of the code of conduct. The criteria used to assess whether measures are harmful or not in the context of the code of conduct may, of course, differ from those used to make an assessment under Article 87(1) EC. The Commission has therefore undertaken to study all these measures attentively, in keeping with its notice on the application of the State aid rules to measures relating to direct business tax-

<sup>(1)</sup> OJ C 377, 29.12.1999.

<sup>(2)</sup> Commission Directive 80/723/EEC of 25 June 1980 on the transparency of financial relations between Member States and public undertakings (OJ L 195, 29.7.1980).

<sup>(3)</sup> OJ C 71, 11.3.2000.

<sup>(4)</sup> OJ C 288, 9.10.1999.

<sup>(5)</sup> OJ C 72, 10.3.1994.

<sup>(6)</sup> OJ C 14, 19.1.2000.

<sup>(7)</sup> OJ C 241, 26.8.1999.

<sup>(8)</sup> OJ C 2, 6.1.1998.



ation<sup>(1)</sup>. Requests for additional information on around 50 of these measures have already been sent to the Member States. The remaining measures will be examined thoroughly in the near future.

212. Apart from this general initiative, the Commission closed its formal investigation into the scheme offering State aid to non-residential building tenants in the customs house docks area (CHDA) in Dublin<sup>(2)</sup> after the Irish authorities limited the period during which tenants may benefit from tax relief under the scheme, bringing the deadline forward from a potential 2010 to 2003. The decision states that tax exemptions constitute operating aid where they relieve an undertaking of the expenses it would normally have to bear as part of its day-to-day running or normal activities. The continuous nature of operating aid, in particular, points to the conclusion that such aid should not, in principle, be authorised for periodic costs that continue to accrue for a significant period after the date on which a region ceases to fall under Article 87(3)(a). Furthermore, as aid schemes, periodic tax exemptions are subject to the appropriate measures procedure laid down in Article 88(1) of the EC Treaty.

213. As regards tax aid for investment in Portugal<sup>(3)</sup>, the Commission found compatible, with the common market, aid whose intensity was limited in relation to the costs of carrying out the assisted projects and which was granted as an incentive to firms to undertake specific investment projects. The scheme lays down transparent rules which make it possible to quantify the advantage conferred on each firm. This kind of aid is no different from a subsidy and qualifies for the regional exemptions under Article 87(3)(a) and (c) of the Treaty, in accordance with point 31 of the Commission notice on the application of the State aid rules to measures relating to direct business taxation<sup>(4)</sup>.

### 3. Transparency directive

214. On 30 March, the Commission adopted a draft amendment<sup>(5)</sup> to Directive 80/723/EEC<sup>(6)</sup>

(the transparency directive). In its present form, this directive allows the Commission to investigate the financial relations between Member States and public undertakings. It requires the public authorities to supply information to the Commission, on an annual basis for enterprises in the manufacturing sector and at the Commission's request for other enterprises.

215. The proposed amendment has become necessary in the light of progressive market liberalisation in Europe. In recent years the Commission has been confronted with a growing number of complaints about the behaviour of enterprises which have special or exclusive rights and/or receive compensation payments for rendering services of general economic interest but which also operate in competition with other companies. When dealing with such complaints under the State aid rules the Commission has had to assess whether or not aid is compatible with the common market or qualifies for the derogation provided for in Article 86(2) of the EC Treaty.

216. The amendment aims to create transparency in the accounts of (private and public) companies which operate such different activities. It does not apply to sectors for which another Community instrument already requires separation of accounts<sup>(7)</sup>, to cases where the contract to provide the service of general economic interest has been awarded and/or the special or exclusive right has been granted by means of an open and transparent procedure, or to undertakings with an annual total net turnover of less than EUR 40 million.

### 4. Notice on State guarantees

217. On 24 November, the Commission adopted a notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees<sup>(8)</sup>. The Commission's intention is to make its policy in this area as transparent as possible, thereby ensuring that its decisions are predictable and that equal treatment is guaranteed. The document does not lay down any new rules but sets out the existing principles of assessment.

218. State guarantees are usually associated with a loan or other financial obligation to be con-

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

<sup>(2)</sup> Case C-1/99 (ex NN-133/99), not yet published.

<sup>(3)</sup> Case N-97/99 (OJ C 375, 24.12.1999).

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

<sup>(5)</sup> OJ C 377, 29.12.1999.

<sup>(6)</sup> Commission Directive 80/723/EEC of 25 June 1980 on the transparency of financial relations between Member States and public undertakings (OJ L 195, 29.7.1980).

<sup>(7)</sup> For example, in the postal, telecoms or electricity sectors, according to the relevant directives.

<sup>(8)</sup> OJ C 71, 11.3.2000.

tracted by a borrower with a lender and may be granted either as individual guarantees or under guarantee schemes. If aid is involved, the beneficiary is in most cases the borrower because he can raise funds at a lower cost than would be possible without the guarantee. The notice explains how the aid element of a guarantee should be calculated and sets out several methods for making this calculation.

219. Under certain circumstances (e.g. if a guarantee is granted subsequently to cover an existing loan without the terms of the loan being changed), there may also be aid to the lender. This has to be examined on a case-by-case basis.

220. The notice also lists some circumstances in which the Commission assumes *a priori* that no aid element is contained in a guarantee. These are that the borrower is not in financial difficulty and could in principle obtain a loan on market conditions from the financial markets, that the guarantee is linked to a specific financial transaction, is for a fixed maximum amount, does not cover more than 80 % of the outstanding loan and that the market price is paid for the guarantee. Similar considerations apply to guarantee schemes, including that the premium paid by the recipient firms should be calculated in such a way as to make the scheme, in all probability, self-financing. However, this list does not mean that guarantees automatically include aid if not all of the conditions are met.

221. The notice does not address the question of compatibility. In that respect the same rules apply as to State aid in other forms.

222. The principles explained in the notice apply to all forms of State guarantee, regardless of whether they are fixed in a contract or by law. The Commission also defines as aid in the form of a guarantee the more favourable funding terms obtained by enterprises whose legal form provides an explicit State guarantee or coverage of losses by the State. The same applies to the acquisition by a State of a holding in an enterprise if unlimited liability is accepted instead of the usual limited liability.

223. Furthermore, the notice explains the consequences of failure to notify State aid in the form of guarantees. Guarantees differ from other State aid measures (e.g. grants) in that, in the case of a guarantee, the State enters into a legal relationship not only with the beneficiary but also with

third parties, e.g. the provider of a loan which is guaranteed by the State. Therefore, it has to be examined whether the fact that State aid has been unlawfully granted has consequences for these third parties also. However, this is a matter which has to be assessed under national law.

## B — Concept of aid

224. Any State measure that meets the criteria in Article 87(1) of the EC Treaty constitutes State aid and may be incompatible with the common market. More specifically, to be caught by Article 87(1), the aid must (i) be granted by the State or through State resources, (ii) confer an economic advantage on the recipient, (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 its assessment under Article 87(1).

225. The qualification of a planned measure as State aid within the meaning of Article 87(1) is of importance to national authorities, obliged as they are under Article 88(3) EC and Article 2 of the procedural regulation <sup>(1)</sup> to notify it to the Commission. Guidance on the definition of State aid is also crucial to potential aid recipients inasmuch as they are required to examine the legality of the aid they hope to receive. Should a Member State be in any doubt as to whether a planned measure qualifies as aid, it is strongly advised to notify it to the Commission. Otherwise, the recipient runs the risk of having to reimburse the aid received, with interest.

### 1. Origin of resources

226. To qualify as aid, the support measure must derive from State resources. In *Kinderkanal and Phoenix* <sup>(2)</sup> the Commission found that the receiver fees collected in Germany from each owner of a television set had to be classed as State funds. They are mandatory and have to be paid irrespective of whether the receiver actually watches the programmes of the public broadcast-

<sup>(1)</sup> Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 83, 27.3.1999).

<sup>(2)</sup> Case NN-70/98 (OJ C 238, 21.8.1999).



ers. The funds are collected and distributed on the basis of State regulations.

227. Similarly, the Commission considered public funds the amounts that French notaries in rural areas have to deposit at the Crédit Agricole bank <sup>(1)</sup>. Under French law, these notaries are obliged to deposit at the Crédit Agricole funds they receive from their clients in connection with transactions that have to be carried out by notaries. In return, they receive a 1 % commission for the deposits. The Commission noted that the Member State used its discretionary power to grant the Crédit Agricole exclusive rights to receive financial resources, and that these funds came from notaries, who, in France, are appointed by a minister and exercise a public office. The Commission therefore concluded that the amounts deposited by the notaries had to be classed as State resources.

228. In its judgment of 17 June in *Industrie Aeronautique e Meccaniche Rinaldo Piaggio and Dornier Luftfahrt* <sup>(2)</sup>, the Court of Justice found that special insolvency proceedings may burden State resources. Authorisation to continue pursuing economic activity under special protection might involve an additional burden for the public authorities if the State or public bodies were among the principal creditors of the undertaking in difficulties. The latter would enjoy advantages at the expense of the State, such as a State guarantee, a reduced rate of tax, exemption from the obligation to pay fines, or a de facto waiver of public debts.

## 2. Advantage to a firm or firms

229. It is the economic advantage conferred on a firm by a State aid measure that may lead to a distortion of competition within the meaning of Article 87(1) EC. This advantage may be conferred through a variety of means and circumstances and is not derived from the operation of the market. Where there is no such advantage, the measure does not constitute aid. Accordingly, in one case the Commission found that reducing the concession fees payable by a public broadcasting enterprise did not constitute aid <sup>(3)</sup>. The reduction did not confer an advantage on the firm because

in this specific case it simply reduced the advantage of its private competitors, which paid even lower fees. In a case where a Spanish wine-growing company received aid for the restoration of historic monastery buildings in its possession, the Commission also found that no aid was involved <sup>(4)</sup>. The buildings were not used for the economic activities of the company, and the support received covered only a small part of the restoration costs. The Commission concluded that the recipient did not derive any economic advantage linked to its business activities that could lead to a distortion of competition.

230. According to well-established case law, partially reducing social security charges for a particular industrial sector constitutes aid within the meaning of Article 87(1) EC <sup>(5)</sup>. On 5 October, the Court of Justice ruled in its decision on the French textile plan <sup>(6)</sup> that there is also an advantage where the State grants a reduction in social security charges as compensation for additional costs which the undertakings are incurring as a result of collective agreements with the unions. These agreements have been voluntarily concluded by the companies concerned on the basis of the economic evaluation of the parties to the agreement.

231. The advantage is not always apparent where it is conferred by means other than a direct grant. In its 24 November notice on State guarantees <sup>(7)</sup> the Commission undertook to assess to what extent State guarantees may constitute an advantage for the enterprises affected. Where the guarantee is given on market conditions the Commission assumes *a priori* that no aid element is involved. In its decision in *Hoogovens-Usines Gustave Boël* <sup>(8)</sup>, for example, the Commission found that the intervention of the Belgian authorities in the context of the takeover of Hoogovens-Usines Gustave Boël by Dufenco occurred under market conditions and therefore did not constitute aid.

232. In the *Tubacex* case <sup>(9)</sup>, however, the Court of Justice found that in certain circumstances market rates for bank loans are not the appropri-

<sup>(1)</sup> Case C-89/97.

<sup>(2)</sup> Case C-295/97.

<sup>(3)</sup> Case NN-140/98, *RAI*.

<sup>(4)</sup> Case N-503/99 (OJ C 33, 5.2.2000).

<sup>(5)</sup> See Cases 173/73 *Commission v Italy* [1974] ECR 709 and C-301/87 *France v Commission* [1990] ECR I-307.

<sup>(6)</sup> Case C-251/97 *France v Commission*.

<sup>(7)</sup> SEC(1999) 1918, described in Chapter III.A.4 above.

<sup>(8)</sup> Case N-246/99 (OJ C 245, 28.8.1999).

<sup>(9)</sup> Case C-342/96 *Spain v Commission*; confirmed in Case C-256/97 *Déménagements-Manutention Transport*.



ate criterion for establishing whether an advantage has been conferred. The Court held that the rates a creditor asks for when rescheduling repayment of a debt are determined by criteria other than market rates for bank loans. In such a case the creditor is not seeking so much to make a special profit as to secure recovery of the amount due without suffering any loss, e.g. through inflation. The Court focused on the question of the background against which the Commission had to assess the presence of aid. Fogasa, an institution under the supervision of the Spanish Ministry of Labour and Social Security, has the task of paying the salaries of employees of companies that are not able to pay them owing to insolvency. The Court held that this cannot be compared with the granting of loans to undertakings in difficulties. The debts of the enterprises concerned are automatically run up just as a result of Fogasa taking over payment of salaries. Tubacex is legally obliged to repay these amounts. Only the repayment arrangements are subject to negotiation. In order to quantify possible aid elements, the Commission consequently has to analyse a comparable market situation in order to determine an appropriate reference interest rate. Fogasa therefore has to be compared with a private creditor trying to recover a loan by means of rescheduling the debt and negotiating conditions of repayment. The Commission, the Court held, was wrong in comparing the interest rate of 9 %, which was actually paid, with normal market rates for bank loans instead of looking at the rates a private creditor in a comparable situation would ask for, which presumably would be lower than those market rates.

233. The conditions under which public enterprises contract out services to dependent companies operating on the market may also constitute State aid. In the *Sécuripost* case <sup>(1)</sup>, however, the Commission found that the contractual relations between the French Post Office and *Sécuripost* respected market prices and therefore did not confer an economic advantage on *Sécuripost*.

234. A specific situation in which the State's behaviour can be compared with market conditions is where it injects capital into its undertakings. Here the Commission applies the private investor criterion. 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). This approach was confirmed by the Court of First Instance <sup>(2)</sup>. The Court acknowledged, however, that even in private business a parent company may, for a limited period, take over the losses of its subsidiary companies. This behaviour could be motivated by a desire to protect the image of the group or to redirect its activities. However, the Court found that there had to be a prospect of the subsidiary finding its way back to profitability. A private investor could not afford to inject further capital after years of continuous losses if this were more costly than winding up the company. The private investor principle also applies in cases where the State foregoes a return on investment that a private investor would seek. In its *Westdeutsche Landesbank* decision, the Commission concluded that the 0.6 % return required by the *Land* of North Rhine-Westphalia was below the level a private investor would expect when injecting such funds into the capital base of a bank. The surrender of appropriate income constitutes aid <sup>(3)</sup>.

235. On the other hand, no discriminatory advantage within the meaning of Article 87(1) is conferred on a firm where the State simply buys a product or a service from it at the market price. Consequently, the Commission has found that public support for infrastructure managers enabling them to offer a certain service (e.g. the construction and operation of toll roads) does not constitute aid if the infrastructure manager is selected through a non-discriminatory, competitive tender procedure open to all actual and potential bidders. It has taken the view <sup>(4)</sup> that such a procedure is the best means of ensuring that the public support corresponds to the minimum needed to carry out the project, thereby reflecting the market price for its execution. Where there is no call for tenders, the Commission may, in exceptional circumstances, find that public-sector funding represents the market price if the State support has been evaluated by an independent expert on the basis of generally accepted market indicators and valuation stan-

<sup>(1)</sup> Case C-24/96.

<sup>(2)</sup> Cases T-129/95, T-2/96 and T-97/96 *Neue Maxhütte Stahlwerke v Commission* [1999] ECR II-17.

<sup>(3)</sup> Case C-64/97.

<sup>(4)</sup> Most recently on 22 December 1999 in Case N-617/98 (*Container Terminal Utrecht*).



dards and has been found to represent the minimum price to be paid for a service or good <sup>(1)</sup>.

236. In a case where a Member State bought from a ferry line a predetermined number of travel vouchers for a predetermined price <sup>(2)</sup>, the Court of First Instance considered that the price did not necessarily reflect the market price. The number of vouchers bought was higher than the numbers actually used in previous years. In addition, the vouchers could be used only during the low season, thereby relieving the ferry line from possibly having to increase its capacity during the high season. The transaction was therefore considered to confer an advantage within the meaning of Article 87(1) EC.

### 3. Specificity

237. In order to determine whether a measure constitutes aid, a distinction has to be drawn between the situation where the support is directed at certain undertakings or the production of certain goods, as specified in Article 87(1) EC, and the situation where the measures in question have a cross-sectoral impact, are equally applicable throughout the Member State 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).

238. Accordingly, the Commission decided on 11 May that, as a general tax measure, a Dutch tax measure involving partially accelerated depreciation for R & D laboratories did not constitute State aid <sup>(3)</sup>. Under the measure, part of the investment in an R & D laboratory is eligible for accelerated depreciation. The Dutch authorities do not have discretionary powers in relation to the application of the measure. The measure is not sector-specific, it will be open to all companies on an equal access basis and it is not regional or local in scope. It therefore lacks any specificity.

239. However, even if a measure is not confined to a single sector, it can be considered specific. In its judgment of 17 June in *Industrie Aeronautiche e Meccaniche Rinaldo Piaggio v International*

*Factors Italia and Others* <sup>(4)</sup>, the Court of Justice found that the Italian special insolvency proceedings, which derogate from the normal insolvency proceedings, had to be considered a specific measure. The Court noted that the relevant law was intended to apply selectively to large industrial undertakings in difficulties which owed particularly large debts to certain, mainly public, classes of creditors. It also noted that the decisions of the Minister for Industry to place the undertakings in difficulties under special administration were influenced by national industrial policy considerations and were therefore discretionary. In these circumstances the legislation related to specific undertakings. Likewise, in its *Déménagements-Manutention Transport* <sup>(5)</sup> decision of 29 June, the Court underlined that, where the body granting financial assistance enjoys a degree of latitude enabling it to choose the beneficiaries or the conditions under which the financial assistance is provided, the assistance cannot be considered a general measure.

240. The Commission considered a Spanish tax credit scheme to be specific because it was restricted to large investors. The minimum investment (EUR 15 million) required under the scheme in order to qualify for the credit was high enough to restrict its application in practice to investments involving the raising of large amounts of capital. This was not justified by the nature or overall structure of the tax system to which an exception was being made <sup>(6)</sup>. The fact that only large investors could qualify for the tax credit made it a specific measure, which in turn classified it as State aid within the meaning of Article 87(1) of the Treaty <sup>(7)</sup>.

241. On 17 June, the Court of Justice confirmed the Commission's decision <sup>(8)</sup> that the reduction of social security charges under the Belgian Maribel bis/ter scheme was a selective measure <sup>(9)</sup>. Undertakings belonging to sectors of manufacturing industry not specified in the royal decrees establishing the scheme and undertak-

<sup>(1)</sup> Cases N-517/98 — *South Wales European Freight Terminal* (OJ C 81, 24. 3. 1999) and N 121/99 — *Austria* (OJ C 245, 28. 8. 1999).

<sup>(2)</sup> Case T-14/96 *Bretagne Angleterre Irlande (BAI) v Commission*.

<sup>(3)</sup> Case N-18/97 (OJ C 225, 7.8.1999).

<sup>(4)</sup> Case C-295/97.

<sup>(5)</sup> Case C-256/97; see also the decision of 22 December in State aid Case C-22/99 (*Ramondin*).

<sup>(6)</sup> See paragraphs 23–27 of the Commission notice of 11 November 1998 on the application of the State aid rules to measures relating to direct business taxation (OJ C 384, 10.12.1998).

<sup>(7)</sup> Case C-76/97 (*Daewoo*) (OJ L 292, 13.11.1999); see also Cases C-22/99 (*Ramondin*) and C-48/99–C-54/99.

<sup>(8)</sup> Case C-14/96 (OJ L 95, 10.4.1997).

<sup>(9)</sup> Case C-75/97 *Belgium v Commission*.

ings in the tertiary sector and the building sector were not eligible for the reductions under the scheme. Neither the large number of eligible undertakings nor the diversity and importance of the industrial sectors to which those undertakings belonged warranted the conclusion that the *Maribel bis/ter* scheme constituted a general economic policy measure.

#### 4. Effect on trade between Member States

242. When the State confers even a limited advantage on an undertaking which is active in a sector characterised by competition, there is a distortion or risk of distortion of competition. In order to establish the impact of this distortion on trade between Member States, it is sufficient to conclude that the beneficiary pursues, even partially, activities involving trade between Member States. The Commission thus concluded in *Marina di Stabia* <sup>(1)</sup> that a marina on the southern Italian Tyrrhenian coastline might also attract limited demand from as far up as the southern French coast and thereby affect trade between Member States. For purely local services this possibility may sometimes be ruled out. In the case of aid to public transport in the lagoon area of Venice, the Commission found that a local service without potential competition, thanks to an exclusive right enjoyed by the operating enterprise, does not affect trade between Member States <sup>(2)</sup>.

243. In a Spanish scheme involving early retirement subsidies for self-employed road hauliers <sup>(3)</sup> the Commission found no potential for distortion of competition. The scheme allows self-employed road hauliers aged over 60 to benefit from a subsidy if they definitively leave the profession. Since the beneficiaries will terminate their business activities, the measure does not confer any advantage on undertakings operating on the market and cannot have an impact on trade between Member States.

244. In its decision on the payment of compensation to Dutch petrol stations located close to the German border for an alleged decline in turnover resulting from an increase in Dutch excise duties,

the Commission insisted that State aid must not be used for the purpose of compensating border companies for differences in taxes between two countries <sup>(4)</sup>. The decision concerned the stations not caught by the *de minimis* rule. The Court of Justice confirmed that the fact that a Member State seeks to approximate, by unilateral measures, the conditions of competition in a particular sector of the economy to those prevailing in other Member States cannot deprive the measures in question of their character as aid <sup>(5)</sup>.

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

#### 1. Horizontal aid

##### 1.1. Small and medium-sized enterprises

245. In general the Commission takes a favourable view of aid to small and medium-sized enterprises, given their structural handicaps as compared with large undertakings and their potential for innovation, job creation and growth. On 28 July, the Commission adopted a draft block exemption regulation on aid to small and medium-sized enterprises (SMEs). The draft follows the line taken in the existing guidelines on aid to SMEs. It furthermore allows investment aid to be calculated as aid for job creation linked to investment. This means that investment aid may be calculated as a percentage of the costs of the additional employment created by the investment. This concept was introduced for the first time in the regional aid guidelines. The Commission has proposed applying it also to SMEs outside assisted areas because it favours labour-intensive industry more than it does aid measured merely as a percentage of investment in fixed assets. It might notably help enterprises in the services sector.

246. In its decision on the Danish undertaking *VækstFonden* (Business Development Finance) <sup>(6)</sup>, the Commission approved a public fund the purpose of which is to hand out participatory loans and inject capital into innovation and risk capital funds. Investment in the latter is

<sup>(1)</sup> Case N-582/99.

<sup>(2)</sup> Case C-81/97.

<sup>(3)</sup> Case N-491/99.

<sup>(4)</sup> Case C-43/98.

<sup>(5)</sup> Judgment of 19 May 1999 in Case C-6/97 *Italy v Commission*.

<sup>(6)</sup> Case N-668/98.



undertaken in conjunction with private investors. The funds' decisions are based on commercial considerations. The Commission found that the scheme did not confer an advantage on the private investors participating in the funds such as might distort competition to an extent contrary to the common interest, since it was designed to provide them with the minimum incentive necessary to persuade them to take the additional risks involved in investing in innovative SMEs. It concluded that any advantage to the SMEs in which the funds invested would be within the allowable thresholds of the SME and R & D guidelines.

### 1.2. Research and development

247. Aid for research and development is in the Community interest and may also be approved in the form of ad hoc aid to individual undertakings. In the *Dornier Luftfahrt* case <sup>(1)</sup>, the Commission approved a State guarantee for an R & D project involving the development of a new family of regional aircraft. The measure was considered to rank as pre-competitive development and to be in line with the Community framework for State aid for research and development <sup>(2)</sup>. Similarly, the Commission approved a Dutch aid measure to stimulate a long-term research programme at Shell Chemicals BV <sup>(3)</sup>. The programme is a joint initiative by the Dutch Government and Shell Chemicals. It will focus on three themes: catalysis, pervasive analytical methods and molecular toxicology. The research could result in new materials, a better understanding of the nature and/or composition of materials and product streams and a better understanding of how certain molecular structures interact with human cells. The aid serves *inter alia* as a catalyst to intensify cooperation between Shell Chemicals and the academic world and consequently has an incentive effect. The Commission concluded that the programme was a combination of basic and industrial research and complied with the Community framework on State aid for research and development.

### 1.3. Employment and training

248. One of the major challenges facing the Community is finding ways of improving the

employment situation. The new title on employment 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. To underline the importance of this category of aid the Commission adopted on 28 July a draft block exemption regulation on training aid. It is intended to apply the provisions of the Community framework on training aid <sup>(4)</sup>.

249. The Union's interest in assisting job creation relates, of course, to regular employment. The Commission therefore approved on 3 March an Italian proposal to grant a reduction in social security contributions and a tax amnesty to employers who regularise the position of their undeclared workers <sup>(5)</sup>. The Commission acknowledged the Community interest in fighting the underground economy.

250. Aid to maintain employment is similar to operating aid. It may therefore be approved only under certain conditions in regions eligible for regional aid under Article 87(3)(a). In a case concerning the reduction of social security contributions in the towns of Venice and Chioggia <sup>(6)</sup>, the Commission took a negative decision on aid for the maintenance of jobs in the lagoon area, while approving that part of the scheme which related to aid for the recruitment of disadvantaged workers and for job creation.

251. In the case of individual aid for employee training granted to Eli Lilly Ltd in the United Kingdom <sup>(7)</sup>, the Commission approved a project to train the workforce of Eli Lilly, a bio-pharmaceutical company. The Commission identified the project as a general training project within the meaning of the Community framework on training aid. The project provides skills that are transferable to other firms in the same industry or to firms in related areas of work. Their transferability is underlined by the fact that the scheme results in nationally recognised qualifications.

<sup>(1)</sup> Case N-281/99 (OJ C 40, 12.2.2000).

<sup>(2)</sup> OJ C 45, 17.2.1996.

<sup>(3)</sup> Case N-335/98 (OJ C 298, 16.10.1999).

<sup>(4)</sup> OJ C 343, 11.11.1998.

<sup>(5)</sup> Case N-545/98 (OJ C 113, 24.4.1999).

<sup>(6)</sup> Case C-81/97.

<sup>(7)</sup> Case N-452/98.

#### 1.4. Environment

252. On 22 December, the Commission decided to extend the guidelines on State aid for environmental protection <sup>(1)</sup> until 30 June 2000. After that date, new guidelines should become applicable. In 1999 the Commission had various opportunities to clarify its interpretation of the existing guidelines.

253. On 21 April, the Commission decided not to raise any objections to several special tax provisions in the German law of January and February 1999 introducing an ecological tax reform <sup>(2)</sup>. The scheme introduced a new tax rate for electricity and mineral oil but contains several tax exemptions, in particular reduced tax rates for manufacturing industry, the agriculture and forestry sector and rail transport services. According to the guidelines on State aid for environmental protection, the introduction of environmental taxes and charges may under certain conditions justify State aid in the form of relief from environmental taxes, for example if some sectors would not be able immediately to bear the extra financial burden and required temporary relief. The Commission found that the conditions for such an approval were met. It took into account the fact that at present not all Member States of the Community or third countries impose such energy taxes and the introduction of environmental taxes therefore affects the competitive position of the undertakings concerned. The Commission also took into account the fact that the German Government had committed itself to renotifying the measures for approval after three years at the latest. Similarly, the Commission approved this aid also for the sectors falling under the ECSC Treaty <sup>(3)</sup>.

254. The Commission insists that aid for investment in environmental improvements may be based only on the additional costs necessary to meet the environmental objectives. It therefore approved only part of an environmental investment aid measure proposed by the Dutch Government to support investment in the construction of a process-integrated gas turbine at the Nerefco refinery <sup>(4)</sup>. It furthermore requires, in order to apply the guidelines, that the intended aid really serve the objective of environmental

protection. In the *Ferriere Nord* case, the Commission had serious doubts about whether the environmental protection concern was the primary goal of the alleged eligible investments and opened proceedings <sup>(5)</sup>.

#### 1.5. Rescue and restructuring aid

255. On 8 July, the Commission adopted revised guidelines for State aid granted to rescue and restructure firms in difficulty <sup>(6)</sup>. In several respects the new wording represents a tightening of the rules, in line with the commitment made by the Commission in the single market action plan in 1997. Aid for rescuing and restructuring firms in difficulty has been at the centre of some of the largest and most controversial State aid cases in recent years. The Commission has repeatedly expressed concern at the level of such aid in the European Union, which is often given on an ad hoc basis in response to a sudden crisis and has a particularly distortive effect on the single market.

256. The new guidelines, which replace the previous ones adopted in 1994, strengthen the rules in several areas. One is that of repeated restructuring aid. The 'one time, last time' principle rules out a second payment of restructuring aid to a company for 10 years after the end of its first restructuring. The text clarifies which firms can be considered firms in difficulty, stressing that new firms (including firms formed out of the assets of previous ones) are excluded. It also restricts the ability of Member States to give aid approved for other purposes (such as regional aid) to companies undergoing assisted restructuring. At the same time, it maintains the basic principles of the old guidelines: rescue aid is a short-term holding operation while the future prospects of the enterprise are assessed, and can be granted only in the form of loans or guarantees. Restructuring aid can be granted only in the context of a detailed restructuring plan which will restore the company to viability. In return, the company has to contribute some form of quid pro quo such as a capacity reduction.

257. The new rules cover the special situation of the new German *Länder*. In recent years the Commission has made special allowance for cases arising there in view of the particular difficulties associated with the region's emergence

<sup>(1)</sup> OJ C 72, 10.3.1994.

<sup>(2)</sup> Case NN-47/99 (OJ C 166, 12.6.1999).

<sup>(3)</sup> Case NN-50/99 (ex NN-61/99) (OJ C 245, 28.8.1999).

<sup>(4)</sup> Case C-44/98 (ex N-708/97) (OJ L 6, 11.1.2000).

<sup>(5)</sup> Case C-35/99 (ex N-106/99) (OJ C 288, 9.10.1999).

<sup>(6)</sup> OJ C 288, 9.10.1999.



from a non-market economy. In 1999 as well, the Commission had to assess numerous cases concerning companies in the new *Länder*. The new guidelines set clear time limits on this special treatment, the Commission being of the view that the justification for it is now at an end. The 'one time, last time' principle will, in particular, apply in full after 31 December 2000.

258. In many of the German restructuring cases the Commission raised no objections. In several cases, however, it had reason to insist on viable and realistic restructuring plans, for example in its decisions in *Spindelfabrik Hartha* <sup>(1)</sup>, *Dieselmotorenwerk Rostock* <sup>(2)</sup>, *Weida Leder* <sup>(3)</sup> and *Pittler/Tornos Werkzeugmaschinen* <sup>(4)</sup>. In the *Graphischer Maschinenbau* case <sup>(5)</sup> the Commission reduced the proposed amount of aid because it exceeded the minimum needed to restructure the company.

259. Restructuring plans may be approved only where private investors contribute substantially. In *Verlipack/Heye-Glas* <sup>(6)</sup> the Commission had, at an earlier stage, concluded that the participation of the company Heye-Glas in the restructuring of Verlipack constituted the required significant private investor's contribution. It turned out subsequently, however, that Heye-Glas had itself received public funding precisely for the purpose of investing it in Verlipack. In this case it is questionable whether the investment was dependent on a private investor's business decision. The Commission therefore reopened the proceedings under Article 88(2).

tax aid scheme that provided for aid to be granted for direct foreign investment by Portuguese companies <sup>(7)</sup>. The scheme excluded any direct or indirect export aid and required individual notification of any aid to a large enterprise and any measure in favour of SMEs that provided for intensities beyond the 7.5/15 % threshold for investment aid. The draft block exemption regulation on aid to SMEs clarifies this approach by expressly authorising aid for investment 'inside or outside the European Community' <sup>(8)</sup>.

## 2. Regional aid

261. The guidelines on national regional aid <sup>(9)</sup> adopted by the Commission in 1997 introduced a stricter method for determining the areas eligible for regional aid and the associated aid intensities or regional ceilings. The Commission wishes in this way to demarcate assisted areas more objectively, increase geographical concentration and reduce regional aid intensities. The new regional aid maps will apply for the period from 2000 to 2006, which corresponds to the next period of Structural Fund operations.

262. The year 1999 was devoted to implementing this reform. The Commission had requested the Member States to notify their draft regional aid maps before 31 March, but most did so late. The Commission was nevertheless able to approve before the end of the year the regional aid maps for Germany's five new eastern *Länder* <sup>(10)</sup>, Finland <sup>(11)</sup>, Denmark <sup>(12)</sup>, Ireland, Greece and the Portuguese regions assisted under Article

260. 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 applies the guidelines on aid to SMEs. The Commission approved a Portuguese

regions of Germany <sup>(13)</sup> and Portugal <sup>(14)</sup>, the Commission found that the draft maps did not comply fully with the guidelines, in terms of the boundaries of eligible regions and/or the aid intensities specified, and decided to initiate the procedure un-

<sup>(7)</sup> Case N-96/99 (OJ C 375, 24.12.1999).

<sup>(8)</sup> Article 3(1) of the regulation.

<sup>(9)</sup> OJ C 74, 10.3.1998.

<sup>(10)</sup> Case N-195/99 (OJ C 340, 27.11.1999).

<sup>(11)</sup> Case N-238/99 (OJ C 33, 5.2.2000).

<sup>(12)</sup> Case N-229/99 (not yet published in the Official Journal).



der Article 88(2). The maps for Austria, Spain, Italy, Luxembourg, the United Kingdom and Sweden were still being examined under the Article 88(3) procedure at the end of the year.

263. The Commission warned Member States that any aid granted under schemes that did not comply with the regional aid guidelines would be unlawful and incompatible with the common market; any regional aid disbursed after 1 January 2000 outside regions recognised as qualifying for one of the regional exceptions in Article 87(1) would also be illegal. Early finalisation of the regional aid maps and implementation of the appropriate measures accepted by the Member States in 1998 is essential in order to enable Structural Fund operations under the new programming period to begin.

264. The multisectoral framework on regional aid for large investment projects <sup>(1)</sup>, which entered into force on 1 September 1998 for a period of three years, was applied for the first time: the Commission decided on 21 April not to raise any objection to regional aid which Spain planned to grant to the firm Rockwool Pennisular SA <sup>(2)</sup>. The multisectoral framework aims at achieving stricter control of cases with a high distortive potential <sup>(3)</sup>. It awards a 'bonus' to aid for investments which directly or indirectly create jobs, and reduces the amount of aid allowed where the investment creates an increase in capacity in a declining sector or where overcapacity exists, or in cases where the recipient firm holds, before the assisted investment is carried out, a market share of at least 40 %. It also takes into account the capital intensity of the supported project. The Commission has shown that it is able to meet the very tight deadlines for vetting aid under this framework.

265. The Commission closed the formal investigation procedure concerning the scheme offering State aid to tenants of non-residential buildings in the customs house docks area of Dublin <sup>(4)</sup>, as modified by the Irish authorities. The Commission was concerned about the long-lasting effect of the tax benefit involved, which was initially planned to extend well beyond 31 December 1999, i.e. after the expiry of the current more

favourable map of assisted areas, and potentially until 2010. The Commission's concerns were heightened by the fact that the case involved both tax and operating aid, with regard to which it is making special efforts to ensure fair conditions of competition. Since the Irish authorities brought forward the expiry date of the tax reliefs granted by the scheme to tenants from the potential 2010 to 2003, the Commission concluded that it was compatible with Article 87(3)(a).

### 3. Sectoral aid

#### 3.1. Sectors subject to specific rules

##### 3.1.1. Shipbuilding

266. Council Regulation (EC) No 1540/98 establishing new rules on aid to shipbuilding <sup>(5)</sup> entered into force on 1 January. The regulation maintains the possibility of granting operating aid for shipbuilding contracts signed before the end of 2000. The notifications received by the Commission show that the Member States chose to continue their existing operating aid programmes. In accordance with Article 12 of the regulation the Commission submitted a report on the situation in world shipbuilding <sup>(6)</sup>, which was discussed by the Council on 9 November. The report focuses on the critical developments on the shipbuilding market in 1998 and early 1999. This period was marked by a reduced number of new building orders and very low prices. The Council adopted the report's recommendations and invited the Commission to inform it of developments as soon as was necessary.

267. The restructuring period of the State-owned shipbuilding group AESA in Spain and of MTW-Werft and Volkswerft in eastern Germany ended on 31 December 1998. The restructuring aid granted to these yards was governed by the rules of Council Regulation (EC) No 1013/97 <sup>(7)</sup>. The last tranche of aid to Volkswerft was approved on 8 September 1999 <sup>(8)</sup>. In October, the Commission submitted the last report to the Council under Article 2 of the regulation <sup>(9)</sup>. It

<sup>(1)</sup> OJ C 107, 7.4.1998.

<sup>(2)</sup> Case N-94/99 (OJ C 288, 9.10.1999).

<sup>(3)</sup> See the 1997 Competition Report, points 210 to 212, for further details of the multisectoral framework.

<sup>(4)</sup> Case C-1/99 (ex NN-133/99), not yet published in the Official Journal.

<sup>(5)</sup> OJ L 202, 18.7.1998.

<sup>(6)</sup> COM(1999) 474 final, 13.10.1999.

<sup>(7)</sup> Council Regulation (EC) No 1013/97 of 2 June 1997 on aid to certain shipyards under restructuring (OJ L 148, 6.6.1997).

<sup>(8)</sup> Case N-694/98 (OJ C 27, 29.1.2000).

<sup>(9)</sup> COM(1999) 480 final, 13.10.1999.



concluded that in all cases the restructuring programmes had effectively been completed. The two German yards were privatised and sold in early 1998 to major shipbuilding groups. These yards reported positive results for the first year after privatisation. With the exception of one yard privatised during the restructuring period, the remaining public yards in Spain made substantial losses in 1998 and thus failed to achieve their viability target. The Commission will continue to monitor compliance with the capacity limitations applicable to the yards in Germany and Spain.

268. In October, the Commission took a negative final decision on State aid amounting to EUR 110.9 million in the form of tax credits to the Spanish public shipbuilding group AESA<sup>(1)</sup>. The Commission found that this aid was not compatible with the conditions of the 1997 Commission decision on the abovementioned restructuring aid for these yards. The aid package approved in 1997 had included a maximum amount of aid in the form of special tax credits of EUR 349 million during the period 1995–99, to compensate the yards for the fact that they could not benefit from tax credits under Spain's general tax consolidation system. However, the yards were subsequently integrated into the State-owned holding company Sociedad Estatal de Participaciones Industriales, which was able to obtain tax credits under the general tax consolidation system by offsetting losses in one part of the group against profits elsewhere. These changed circumstances resulted in the yards receiving in 1998 a general tax credit corresponding to their entitlement to such credits on the basis of their 1997 results. Nevertheless, despite this, the yards received in July 1998 a special tax credit of EUR 110.9 million. The Commission concluded that this payment, although it did not result in the maximum amount of special tax credits approved in 1997 being exceeded, was not justified and was therefore incompatible with the original decision.

269. In July, the Commission found that Kvaerner Warnow Werft in eastern Germany had exceeded its authorised new building capacity<sup>(2)</sup>. The Commission decided that the yard has to repay EUR 41.5 million plus interest for its substantial capacity excess in 1998. During its investigations, the Commission discovered that it had also breached its capacity restriction in 1997

and opened the Article 88(2) procedure on that matter in July<sup>(3)</sup>.

### 3.1.2. Steel

270. The sixth steel aid code<sup>(4)</sup>, which governs the grant of aid to the steel industry, remains in force until the ECSC Treaty expires in July 2002. The code stipulates that only aid granted for research and development purposes, for environmental improvements and for social purposes in connection with the permanent closure of plant can be compatible.

271. The Commission adopted a final decision based on Article 88 ECSC concerning Germany's failure to take effective action to recover incompatible aid granted to Neue Maxhütte<sup>(5)</sup>. This decision, the last stage in a procedure which started in 1998, confirmed that Germany had failed to fulfil its obligations under the ECSC Treaty.

272. The Commission is also working closely with the candidate countries to ensure that their steel industries' restructuring plans are in line with the rules followed in the EU during the 1993/94 restructuring process. The Commission ensures that the Council is kept informed of relevant matters as they arise.

### 3.1.3. Coal

273. A number of cases concerned the European coal industry. On 22 December 1998, the Commission authorised Germany to grant financial assistance to its coal industry for the 1999 financial year totalling EUR 4 607.3 million (DEM 9 195.3 million)<sup>(6)</sup>. Of this amount, EUR 4 226.8 million (DEM 8 436 million) was linked to current production, while EUR 380.4 million (DEM 759.3 million) went to cover inherited liabilities.

274. On 20 January 1999, the Commission issued a letter of formal notice to France concerning the aid paid to Charbonnages de France (CdF) and authorised by the Commission in support of production for the financial years 1994 (Decision 95/465/ECSC), 1995 (Decision 95/579/ECSC) and 1996 (Decision

<sup>(1)</sup> Case C-3/99 (ex NN-145/98) (OJ C 37, 12.2.2000).

<sup>(2)</sup> OJ L 274, 23.10.1999.

<sup>(3)</sup> OJ C 245, 28.8.1999.

<sup>(4)</sup> Commission Decision No 2496/96/ECSC of 18 December 1996 establishing Community rules for State aid to the steel industry (OJ L 338, 28.12.1996).

<sup>(5)</sup> OJ L 230, 31.8.1999.

<sup>(6)</sup> OJ L 117, 5.5.1999.

96/458/ECSC) <sup>(1)</sup>. It also addressed the years 1997 and 1998, for which State aid has not yet been authorised. The Commission issued the letter in response to a complaint from five French undertakings concerning the alleged misuse of State aid which France grants on an annual basis to the public undertaking CdF. It claims that the CdF group sells coal at a price which is generally lower than the world market price, a practice supported by State aid. On 9 July, the Commission issued a further letter of formal notice to France concerning the production support aid paid to CdF for the 1997, 1998 and 1999 financial years and not authorised by the Commission <sup>(2)</sup>. The question arises as to whether the loans issued on the financial markets by CdF, which, in the light of a financial analysis carried out by the Commission departments, appear to be issued exclusively to cover operating losses, and the interest charges resulting from previous loans fall within the definition of aid for the purposes of the Community rules. Notwithstanding its critical financial condition, CdF enjoys the highest credit rating on the international financial markets for its short- and medium-term loans (Standard & Poor's AAA, confirmed by Moody's). In the absence of a formal guarantee, the Commission considers that the confidence thus shown by the international financial markets can only be explained by a tacit guarantee of the French State covering loans issued by CdF, which in turn may be considered undeclared State aid.

275. On 4 May, the Commission authorised Spain to grant financial assistance for the 1999 financial year totalling EUR 1 071.3 million (ESP 178 250 million) <sup>(3)</sup>. Of this amount, EUR 727.4 million (ESP 121 030 million) is linked to current production, while EUR 343.9 million (ESP 57 220 million) covers inherited liabilities.

276. On 18 January, a British coal producer (RJB Mining plc) lodged an application before the Court of First Instance <sup>(4)</sup> for annulment of the decision concerning the grant of State aid to the German coal industry <sup>(5)</sup> for the 1998 financial year. On 3 March, the same producer lodged an application before the Court of First

Instance <sup>(6)</sup> for annulment of the decision concerning the grant of State aid to the German coal industry <sup>(7)</sup> for the 1999 financial year.

277. Also on 3 March, the same producer lodged an application before the Court of First Instance <sup>(8)</sup> complaining that the Commission had failed to consider whether undeclared State aid had been involved in the acquisition of Saarbergwerke GmbH and Preussag Anthrazit GmbH by Ruhrkohle AG. Already on 25 January, a German power producer (VASA Energy GmbH & Co.) had lodged an application, which has several points in common with the one just mentioned, before the CFI <sup>(9)</sup> against the Commission for allegedly failing to take action following its complaint about this issue.

278. On 9 September, the Court of First Instance ruled against RJB Mining on two points of law relating to Case T-110/98 <sup>(10)</sup> with respect to the annulment of the Commission decision on State aid granted to the German coal industry for the 1997 financial year <sup>(11)</sup>.

### 3.1.4. Motor vehicle industry

279. The Commission adopted 16 decisions relating to the motor vehicle industry during the year, including 10 decisions to initiate proceedings under Article 88(2). It authorised EUR 107 million in regional aid and training aid, and took negative or partly negative decisions prohibiting EUR 28 million in regional aid.

280. As far as regional aid is concerned, the need for assistance is examined in particular on the basis of project mobility, which must be demonstrated by several factors including a location study by the investor. The proposed alternative location must be credible in the light of the firm's commercial policy, the risks to its image, its industrial strategy, etc. If mobility is not proven, no aid may be allowed. The Commission also checks whether the investor took account of the possibility of receiving aid in the decision to locate the project in an assisted area. If that is not the case, as for example in the negative decision it adopted on 22 December on the Fiat Mirafiori

<sup>(1)</sup> OJ C 99, 10.4.1999.

<sup>(2)</sup> OJ C 280, 2.10.1999.

<sup>(3)</sup> Decision 98/451/ECSC (OJ L 177, 13.7.1999).

<sup>(4)</sup> Case T-12/99 (OJ C 86, 27.3.1999).

<sup>(5)</sup> Decision 99/270/EC (OJ L 109, 27.4.1999).

<sup>(6)</sup> Case T-63/99 (OJ C 160, 5.6.1999).

<sup>(7)</sup> Decision 99/299/ECSC (OJ L 117, 5.5.1999).

<sup>(8)</sup> Case T-64/99 (OJ C 160, 5.6.1999).

<sup>(9)</sup> Case T-29/99 (OJ C 86, 27.3.1999).

<sup>(10)</sup> OJ C 314, 30.10.1999.

<sup>(11)</sup> Decision 98/687/ECSC (OJ L 324, 2.12.1998).



Meccanica project <sup>(1)</sup>, the aid is deemed not to be necessary for achieving the objectives referred to in Article 87(3) and cannot therefore be authorised.

281. The proportionality of regional aid is assessed by means of a cost-benefit analysis. This takes into account all the factors determining the investor's choice of site, giving special attention to the production cutback or closure costs that would result from a theoretical choice not to locate the investment at the selected site. The decision taken by the Commission on 29 September on the Mercedes Vitoria project <sup>(2)</sup> illustrates this practice. The economic risks, for example of delay in launching commercial production, must also be included in the cost-benefit analysis, as can be seen from the decision taken on 22 December to initiate proceedings in the Rover Longbridge case <sup>(3)</sup>.

282. In its judgment of 15 December <sup>(4)</sup>, the Court of First Instance dismissed the applications lodged by the *Land* of Saxony and Volkswagen for annulment of the Commission decision of 26

June 1996 <sup>(5)</sup> on aid granted for the Mosel and Chemnitz plants. In addition to its assessments of the conditions under which Article 87(2)(c) and Article 87(3)(b) apply, the Court confirmed the Commission's classification of the investments as greenfield or extension projects, which took into account the existence on the spot of adequate infrastructure, organised logistics, a suitably trained workforce and a well-established network of subcontractors. The Court also stressed that the Commission was entitled to refer to excess production capacities in the motor vehicle industry, and therefore to take the Community interest into consideration, in refusing to authorise payment of part of the aid in question.

### 3.1.5. Synthetic fibres industry

283. In 1999 the Commission continued to be vigilant in applying the code on aid to the synthetic fibres industry <sup>(6)</sup> and in actively following up enquiries regarding possible breaches brought to its attention. In that connection, it took a negative final decision concerning aid that the German authorities proposed to grant to Saxonylon Textil GmbH <sup>(7)</sup>, a subsidiary of the Singaporean Tolaram Group. The Commission took into

<sup>(1)</sup> Case C-9/99 (ex N-838/97), not yet published in the Official Journal.

<sup>(2)</sup> Case N-697/98 (OJ C 351, 4.12.1999).

<sup>(3)</sup> Case C-79/99 (ex N-481/99) (OJ C 62, 4.3.2000).

<sup>(4)</sup> Joined Cases T-132/96 and T-143/96, *Freistaat Sachsen, Volkswagen and Volkswagen Sachsen v Commission*.

<sup>(5)</sup> OJ L 308, 29.11.1999.

<sup>(6)</sup> OJ C 24, 29.1.1999.

<sup>(7)</sup> Case C-63/98 (ex N-362/98) (OJ L 268, 16.10.1999).

#### Box 10: Public aid to Škoda, an example of the application of State aid rules in applicant countries

The Europe agreement concluded with the Czech Republic provides that existing Community rules are to apply to public aid. In the case of motor manufacturing, this means that aid to a manufacturer must comply with the Community framework for State aid to the motor vehicle industry <sup>(1)</sup>.

In a spirit of transparency, the Czech authorities informed the Commission of their plan to grant regional aid to Škoda for a major investment at the Mladá Boleslav plant. The Competition DG provided technical assistance to enable the Czech authorities to apply the motor vehicle framework, in particular by carrying out a cost-benefit analysis.

Out of the aid initially planned of around USD 130 million, the Czech authorities thus decided to award a net grant of USD 22 million, corresponding to an aid intensity of 6.5 %.

The Commission considers that this cooperation was exemplary and should be extended to all the applicant countries. It firmly intends to ensure that the existing Community competition rules are applied in each of those countries.

<sup>(1)</sup> OJ C 279, 15.9.1997.

account the fact that the project results in a significant capacity increase in polyamide filament yarn, a product for which there is no structural shortage of supply and that the proposed aid intensity was double the maximum allowed under the code for large enterprises.

### 3.1.6. Transport

#### *Road transport*

284. In the road transport sector, the Commission decided to propose appropriate measures with a view to eliminating, from the end of the year, a toll exemption system on the Tauern motorway in Austria and an Italian aid scheme for helping SMEs to purchase special transport vehicles. The latter decision strengthens the Commission's policy stance that aid for the purchase of means of transport is not in the Community interest in markets suffering from overcapacity.

285. The Commission adopted a favourable decision on an aid scheme for restructuring road haulage and developing combined transport in Italy<sup>(1)</sup>. It took the view that aid for combined transport was compatible with the common market in so far as it was aimed at promoting operations that would prove economically viable in the medium term and were not liable to cause distortions of competition between operators or between combined transport terminals. As far as road haulage was concerned, the Commission found that the allowances granted to self-employed hauliers voluntarily ceasing their activity did not constitute aid and authorised *inter alia* the measures designed to encourage the upgrading of the vehicle fleet in line with more stringent environmental standards.

286. The Commission approved an Italian aid scheme for groupings of businesses<sup>(1)</sup>, which forms part of the above measures for restructuring the road haulage industry. In its assessment the Commission took note in particular of the structural weakness of the sector, which is fragmented into over 100 000 mostly small and very small operators.

287. The Commission authorised Spanish individual regional aid measures enabling certain

transport undertakings to obtain ISO 9000 certification<sup>(2)</sup> and found compatible with the common market a Spanish aid scheme for investments in IT equipment enabling the recipients to connect to infrastructure co-financed by the Structural Funds.

288. In the passenger transport sector, the Commission gave its approval to two schemes in the Netherlands, one concerning pilot projects for developing innovative, more efficient transport systems and the other for restructuring public transport in large cities.

289. It is also worth mentioning that, by dismissing the application for annulment brought by Italy, the Court of Justice upheld the Commission's 1996 decision finding that the tax credits granted by Italy to professional road hauliers in 1993 and 1994 constituted State aid that was incompatible with the common market and had to be recovered<sup>(3)</sup>.

#### *Rail transport*

290. In the rail transport sector, the Commission authorised a Danish aid scheme for goods transport<sup>(4)</sup> intended to compensate for the handicap suffered by the railways in relation to road transport and to create a more level playing field between the two modes. The aim of the measures was to encourage the transfer of goods traffic from road to rail by neutralising the external costs and infrastructure costs which are not borne by road transport. The aid scheme was examined in connection with the introduction of infrastructure charges payable by train operators using the Danish rail network. The amount of the grant was much lower than the estimated amount of the costs not paid by the road haulage sector. Since the grant applied without discrimination to all goods transport operators and did not affect the development of trade to an extent contrary to the Community interest, the Commission found that the aid scheme was compatible with the Treaty rules.

291. In the context of the introduction of a system of energy taxation (*Ökosteuer*) in Germany, the Commission authorised a partial reduction in

<sup>(2)</sup> Cases N-635/98, N-191/99, N-192/99 and N-196/99.

<sup>(3)</sup> Judgment of 19 May 1999 in Case C-6/97 *Italy v Commission*, not yet reported.

<sup>(4)</sup> Case N-588/98.

<sup>(1)</sup> Case C-21/98 (OJ L 227, 28.8.1999).



a new electricity consumption tax for firms engaged in transport by rail or trolleybus.

#### *Inland waterway transport*

292. In this sector the Commission authorised several aid schemes designed to help carriers adjust to the opening-up of the market.

#### *Sea transport*

293. In the maritime transport sector, the Commission continued to develop the approach set out in the Community guidelines on State aid to maritime transport <sup>(1)</sup>. It thus authorised a number of schemes granting aid in the form of tax relief in order in particular to reduce the wage costs of crews of vessels operated under the flag of a Member State. The approach is designed to reverse the trend towards the re-registration of vessels outside the Community and stop the decline in employment and know-how in the maritime transport sector.

294. The Commission also devoted increasing attention to ascertaining whether and under what conditions compensation to offset public service obligations constitutes State aid within the meaning of Article 87(1) of the Treaty. In this context, the Commission opened an investigation into finance granted to the Italian group Tirrenia.

295. In the port sector the Commission authorised tax measures intended to facilitate the replacement of obsolete facilities in French ports <sup>(2)</sup>, but found incompatible with the common market other measures forming part of the same aid scheme which concerned the acquisition of additional new equipment by handling firms operating in the ports of Dunkirk and Le Havre.

#### *Air transport*

296. In the air transport sector, the Commission cleared an ESP 20 billion (EUR 110 million) capital injection into the Spanish airline Iberia on the grounds that the operation was carried out under conditions that would be acceptable to a private investor and did not therefore constitute aid within the meaning of Article 87 of the Treaty. The Commission based its assessment mainly on

the principles spelt out in the December 1994 guidelines <sup>(3)</sup> and took account of the improvement in the company's performance since 1996 and the expectation that it would return to profit in the medium term.

297. On 20 July, the Commission opened proceedings in respect of a training project for staff of the Belgian airline Sabena, taking the view that the amount of funding granted far exceeded the maximum intensity that may be accepted by the Commission under the Community framework on training aid.

298. On 3 September, the Commission found that the scheme involving the award of aid of a social character for services to the smaller Sicilian islands was compatible with the common market under Article 87(2)(a) of the Treaty. The existence of such schemes for assisting the inhabitants of remote islands is one of the specific features of State aid in the air transport sector.

299. In the airport sector, the Commission authorised public grants for improving infrastructure at the airports of Manchester and Elba, on the grounds that the measures concerned did not constitute State aid within the meaning of Article 87 of the Treaty.

Nevertheless, in view of the increasingly important commercial role played by airports, the Commission is conducting a rethink which could call into question its traditional approach whereby aid for building or operating airport infrastructure does not fall within the scope of the Treaty rules on State aid. This rethink is linked *inter alia* to the issues of combined transport and transport infrastructure user charges.

#### **3.1.7. Agriculture**

300. As far as policy developments during the year are concerned, following multilateral consultations with the Member States the Commission adopted a new comprehensive set of Community guidelines for State aid in the agricultural sector <sup>(4)</sup>. The need to provide a clear account of the Commission's practice with regard to the different types of aid that may be considered compatible with the common market, together with

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

<sup>(2)</sup> Case C-42/99.

<sup>(3)</sup> Application of Articles 92 and 93 of the EC Treaty and Article 61 of the EEA agreement to State aids in the aviation sector (OJ C 350, 10.12.1994).

<sup>(4)</sup> OJ C 28, 1.2.2000.

the entry into force of Council Regulation (EC) No 1257/1999 <sup>(1)</sup>, prompted the initiative to revise, update and consolidate the rules followed by the Commission when assessing Member States' proposals to grant State aid in the agricultural sector and applying any of the exemptions established by Article 87(2) and (3) EC. In providing a new, clear framework for the different types of State aid allowed, the guidelines take particular account of the new developments in agricultural policy and especially the need, on the one hand, to improve and promote the quality of agricultural products and, on the other hand, to preserve the environment and the traditional heritage in the countryside.

301. The starting point for the new guidelines is that any State aid for the agricultural sector must be compatible with the Community's common agricultural and rural development policies and with its international obligations, in particular the WTO Agreement on Agriculture. In particular, any State aid which would interfere with the mechanisms of the common market organisations is prohibited because the Member States decided, when adopting the CMO regulations, to ban any unilateral aid measures which interfere with Community support for product prices. Furthermore, in accordance with the principles laid down by the Court of Justice, State aid must make a real contribution to the development of certain economic activities or certain regions. State aid which is simply intended to improve the financial situation of the recipient, without any quid pro quo from the latter, can never be considered compatible with the EC Treaty. In the light of these general principles, the guidelines then describe the main types of aid which the Commission can accept and the conditions attaching to authorisation of the aid. These can be summarised as follows:

- aid for investment on farms can normally be permitted at up to 40 % of eligible expenses, or 50 % in the less favoured areas; higher rates of aid may sometimes be allowed for investments linked to the conservation of traditional landscapes, the relocation of farm buildings in the public interest, or the improvement of the environment, animal welfare or hygiene; similarly, aid for investment in the processing and marketing of agri-

cultural products can normally be permitted at rates of up to 40 %, with an extra 10 % for Objective 1 areas, provided that it can be shown that normal market outlets exist for the products concerned;

- aid granted in return for agri-environmental undertakings given by farmers and other environmental aid;
- aid to compensate for handicaps in the less favoured areas;
- aid to help the setting-up of young farmers;
- aid for early retirement, the cessation of farming activities, or the closure of production, processing and marketing capacity;
- aid for the establishment of producer groups;
- aid to compensate for damage caused to agricultural production or the means of production by natural disasters or exceptional occurrences, adverse weather conditions or outbreaks of animal or plant disease, and aid granted to encourage insurance against such risks;
- aid to encourage the production and marketing of quality agricultural products, the provision of technical support for producers and improvement of the genetic quality of livestock;
- aid to grant specific support for the outermost regions and the Aegean islands.

302. In addition to these categories of aid, which are specifically covered in the guidelines, aid may as before also be granted, in accordance with other Community provisions, for research and development, promotion and advertising of agricultural products, short-term operating loans, rescuing and restructuring farms in difficulty, and supporting employment.

303. The guidelines will apply to all new State aid measures introduced after 1 January 2000, and Member States will be allowed one year to adjust their existing aid schemes to comply with the new rules. Individual aid already granted to farmers under existing aid schemes will not be affected by these changes.

### 3.1.8. Fisheries

304. The Commission examined the compatibility of national aid schemes in the light of the

<sup>(1)</sup> OJ L 160, 17.5.1999.



guidelines for the examination of State aid to fisheries and aquaculture <sup>(1)</sup>, which are based, to a large extent, on Council Regulation (EC) No 2468/98 of 3 November 1998 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>(2)</sup>. The Commission authorised a larger number of schemes than in 1998.

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

#### 3.2.1. Financial sector

305. In the course of 1999 the Commission approved two cases of restructuring aid in the banking sector. The two ailing banks (Crédit Foncier de France <sup>(3)</sup> and Banco di Sicilia <sup>(4)</sup>) had received State aid in the context of a restructuring operation carried out by their governments

with a view to their future privatisation. In both cases the Commission reaffirmed its policy of requiring, as a condition for the approval of restructuring aid, an adequate reduction of capacity. The latter took the form of a reduction of assets for the mortgage bank Crédit Foncier and a cutback of the network for the retail bank Banco di Sicilia.

306. The Commission also applied the ‘market economy investor principle’ in order to decide whether a capital injection into a public undertaking constitutes State aid. Finding that the return on the capital provided by the Land of North Rhine-Westphalia to Westdeutsche Landesbank Girozentrale <sup>(5)</sup> did not correspond to what a market economy investor would have demanded, the Commission decided that the transaction involved State aid. Since this aid could not be found compatible the Commission required the German Government to recover the aid from WestLB. The Commission is currently investigating similar transactions by other public German Landesbanks.

<sup>(1)</sup> OJ C 100, 27.3.1997.

<sup>(2)</sup> OJ L 312, 20.11.1998.

<sup>(3)</sup> Case C-30/96 (ex NN-44/96), not yet published in the Official Journal.

<sup>(4)</sup> Case C-16/98 (ex NN-10/98), not yet published in the Official Journal.

<sup>(5)</sup> Case C-64/97 (ex NN-175/95), not yet published in the Official Journal.

#### 3.2.2. Audiovisual sector

##### Box 11: State aid to public broadcasters

Since 1992 more than 10 complaints have been lodged with the Commission, alleging that the financing of certain public broadcasters in several Member States is incompatible with the EC Treaty rules. In November 1996, the Commission adopted its first decision in this field (RTP — Portuguese public television service) <sup>(1)</sup>. The Commission’s task was made easier by the fact that RTP had a very clear public service mandate and a transparent analytical accounting system. The Commission decision has been challenged before the Court of First Instance <sup>(2)</sup>.

In September, the CFI ruled against the Commission for failing to fulfil its obligations under the EC Treaty by not taking a decision following the two complaints lodged by the applicant in a Spanish case <sup>(3)</sup>. On 3 June, it ruled against the Commission for a second time in the similar case *Télévision Française 1 (TF1) v Commission* <sup>(4)</sup>. The Court held that since the Commission has exclusive jurisdiction to assess the compatibility of State aid with the common market, it must, in the interests of sound administration and the fundamental Treaty rules on State aid, conduct a diligent and impartial examination of any complaint alleging that State aid is incompatible with the common market. Following this judgment for failure to act, in October 1998 the Commission departments presented a discussion paper to the Member States in an attempt to develop a common framework for dealing with State aid in broadcasting.

<sup>(1)</sup> Case NN-141/95 (OJ C 67, 4.3.1997).

<sup>(2)</sup> Pending Case T-46/97.

<sup>(3)</sup> Case T-95/96 *Gestelevision Telecinco v Commission*.

<sup>(4)</sup> Case T-17/96.



In this discussion paper, the Commission departments tried to address the main issues raised by the pending State aid cases involving public broadcasters, while presenting some ideas on how fair competition between public and private broadcasters can best be ensured, with a view to stimulating discussion with the Member States.

However, most Member States were opposed to the adoption of guidelines and expressed their preference for a case-by-case approach; the Commission therefore began to deal with the pending cases, in order of receipt. In February, it sent three requests for information to Italy, France and Spain, requiring them to provide all the data needed to assess whether the aid was new or existing, i.e. introduced before the entry into force of the Treaty. In respect of these cases, it also opened the formal investigation procedure for some ad hoc measures granted to the Italian and French public broadcasters, as they could not be considered existing aid (having been introduced and granted in the 1980s and 1990s).

In 1999, the Commission also approved the funding of two newly launched special-interest channels (Phoenix and Kinderkanal) <sup>(1)</sup> by the German public broadcasters, entirely financed with a licence fee, and of a 24-hour news service by the BBC <sup>(2)</sup>, also funded solely by a licence fee. In both cases, the Commission, taking into account the specific features of the services, did not detect any abuse of the Member States' powers to define the public service remit. It considered that the broadcasters were entrusted with those tasks by an official act of the authorities, that the funding system would not distort the development of trade to an extent contrary to the common interest and that the exemption for undertakings entrusted with the operation of services of general economic interest provided for in Article 86(2) of the EC Treaty therefore applied.

In the coming months, the Commission will have to conclude its analysis of the pending cases taking into account the relevant provisions laid down in the Treaty, and the Protocol of Amsterdam. Regardless of whether the aid is found to be existing or not, the Commission will direct its action to ensuring that public service mandates as defined by Member States are transparent and that the funding scheme, as decided by the Member States, shall respect the principle of proportionality and not affect trading conditions and competition in the Community to an extent contrary to the common interest while the realisation of the remit of that public service shall be taken into account.

<sup>(1)</sup> Case NN-70/98 (OJ C 238, 21.8.1999).

<sup>(2)</sup> Case NN-88/98, not yet published in the Official Journal.

## D — Procedures

307. With regard to procedure, 1999 was marked by the entry into force of the procedural regulation on 16 April <sup>(1)</sup>. While the regulation codifies and clarifies the rules on procedure which up to now were enshrined only in Commission practice and decisions, the Court of Justice and the Court of First Instance had several occasions to further elaborate on the procedural aspects of State aid control.

### 1. *Ex post* authorisation of aid already paid

308. In *RJB Mining v Commission* <sup>(2)</sup> the Court of First Instance (CFI) confirmed that the ruling given by the Court of Justice in *Boussac* <sup>(3)</sup>, namely that the Commission may also approve illegal aid which has been paid prior to approval, applied to the coal sector. It stated that there is nothing in the code on State aid for the coal

<sup>(1)</sup> Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 83, 27.3.1999).

<sup>(2)</sup> Judgment of 9 September 1999 in Case T-110/98, not yet reported.

<sup>(3)</sup> Case C-301/87 *France v Commission* [1990] ECR I-307.



industry <sup>(1)</sup> to prevent the Commission from examining the compatibility of planned aid with the common market where the Member State which notified that planned aid has already paid it without waiting for prior authorisation. Although the prohibition in Article 4(c) of the ECSC Treaty is more strictly worded than that in Article 87 EC, the CFI held that the substantive and procedural provisions in the coal aid code of 1993 and the system established by Articles 87 and 88 EC do not differ in principle. The Commission therefore has the power to give *ex post facto* approval to aid paid prior to authorisation.

## 2. Rights of third parties

309. In several decisions <sup>(2)</sup> the Court of First Instance had to deal with the start of the time limit for lodging an application for judicial review of Commission decisions. According to the terms of Article 230(5) EC the date of publication of the measure or of its notification to the complainant is relevant for the start of the time limit. Only in the absence thereof, the Court held, may the date on which it came to the knowledge of the applicant, for example through publication in the press, be seen as the start of the time limit. This is notably the case where the Commission has committed itself to publishing the decisions.

310. In an application for annulment brought by the regional authorities of Friuli-Venezia Giulia against a Commission decision not to authorise aid which the region planned to grant, the Court of First Instance ruled on 15 June <sup>(3)</sup> that such applications may be brought by any parties that fulfil the objective conditions laid down, i.e. any parties that have the necessary legal personality and are individually and directly concerned by the decision being challenged, in accordance with the criteria laid down in Article 230(4) EC. This applies also where the applicant is a regional administrative entity. The aid measures concerned by the contested decision are measures taken by virtue of the independent legislative and financial powers directly conferred on the region by the Italian constitution. The applicant is indi-

vidually and directly concerned because the decision affects the acts of the region and prevents it from exercising its own powers as it sees fit. The contested decision furthermore prevents the applicant from continuing to apply the legislation in question, cancels its effects and requires the applicant to initiate the administrative procedure for recovering the aid from the recipients.

311. The Court of First Instance <sup>(4)</sup> confirmed, on the other hand, that an association formed to further the collective interests of a category of persons cannot be considered to be individually concerned within the meaning of Article 230(4) EC by a measure affecting the general interests of that category. The Court held that, in the absence of special circumstances such as the role which it could have played in the procedure leading to the adoption of the measure in question, such an association is not entitled to bring an action for annulment where even its members may not do so individually. The Court considered that to hold such an association's action admissible in the circumstances of this case, in which its members are not individually concerned and in which the applicant has no standing on its own, would have the consequence of allowing natural and legal persons to circumvent Article 230(4) of the Treaty by means of a collective action.

312. As in a similar case in 1998 <sup>(5)</sup>, a television broadcasting company won an action for failure to act brought before the Court of First Instance. In the judgment it delivered on 3 June <sup>(6)</sup>, the CFI confirmed that the Commission cannot prolong indefinitely its preliminary examination of government measures which have been denounced as incompatible with Article 87(1) EC, where it has agreed to initiate such an examination. The Court has consistently held that the Article 88(2) procedure must be initiated whenever the Commission has serious difficulties in determining whether an aid measure is compatible with the common market. The CFI considered that the application was well founded because when the Commission was given formal notice to act its preliminary examination had lasted for 31 months and it was unable to demonstrate that

<sup>(1)</sup> Commission Decision No 3632/93/ECSC of 28 December 1993 establishing Community rules for State aid to the coal industry (OJ L 329, 30.12.1993).

<sup>(2)</sup> Cases T-14/96 *Bretagne Angleterre Irlande (BAI) v Commission*, T-110/97 *Kneissl v Commission*, T-123/97 *Salomon v Commission* and T-89/96 *British Steel v Commission*, not yet reported.

<sup>(3)</sup> Case T-288/97 *Regione autonoma Friuli Venezia Giulia v Commission*, not yet reported.

<sup>(4)</sup> Case T-86/96 *Arbeitsgemeinschaft Deutscher Luftfahrt-Unternehmen v Commission* [1999] ECR II-179.

<sup>(5)</sup> Case T-95/96 *Gestevisión Telecinco v Commission* [1998] ECR II-3407.

<sup>(6)</sup> Case T-17/96, *Télévision française 1 (TF1) v Commission*, not yet reported.

there were exceptional circumstances explaining why it had taken so long.

### 3. Recovery of aid

313. At nearly 18 % 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 Court has confirmed the Commission's policy of consistently ordering the recovery of aid that has been granted in violation of the notification obligation and is incompatible with the common market. Article 14 of the new procedural regulation requires Member States to execute recovery decisions immediately and effectively<sup>(1)</sup>. This policy should increasingly induce recipients of State aid to verify whether the support they receive is in line with Community State aid rules, this being the only way to avoid the risk of recovery. To be convincing, recovery orders need to be genuinely executed. In the *Magefesa* case<sup>(2)</sup> the Commission therefore decided on 13 October to refer to the Court of Justice the matter of non-compliance of the Spanish authorities with the recovery order.

314. Furthermore, the Commission applied the principle that, in appropriate circumstances, effective execution of its decisions may require the lifting of the corporate veil and recovery of aid not just from the original recipient, but also from other undertakings controlled by the same persons to which the beneficiary's assets have been transferred. This principle is based on considerations of economic attribution of the benefit.

315. In *Italy v Commission*<sup>(3)</sup> the Court of Justice confirmed that implementation of the recov-

ery decision cannot be shown to be impossible where no attempt to recover the aid has even been made.

### 4. Cooperation with national courts

316. In 1999, the Commission received four information requests from the Pamplona Court of First Instance in the context of civil proceedings. The requests concerned details of the same alleged State aid received by a Spanish company. They also asked for copies of any complaints and decisions taken so far. In its joint response of 1 June to the Spanish court the Commission recalled that, on the basis of the notice on cooperation between national courts and the Commission in the State aid field<sup>(4)</sup>, national courts may ask the Commission for information of a procedural nature to enable them to discover whether a particular case is pending before the Commission or has been the subject of a notification, or whether the Commission has officially initiated proceedings or taken any other decision. National courts may also consult the Commission where the application of Article 87(1) or Article 88(3) causes particular difficulties. In accordance with the notice the Commission will not go into the substance of the individual case or the compatibility of the measure with the common market.

317. The Commission consequently informed the Spanish court that it had in 1996 received three complaints in the matter, that the case was still being examined and that, since the case was not closed, it was not possible to forward a copy of the complaints or of the other documents and information which existed in the file, including the amounts of aid granted, or to communicate the contents thereof, until the Commission had taken a decision.

<sup>(1)</sup> Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 83, 27.3.1999).

<sup>(2)</sup> Case C-44/97.

<sup>(3)</sup> Case T-6/97, not yet reported.

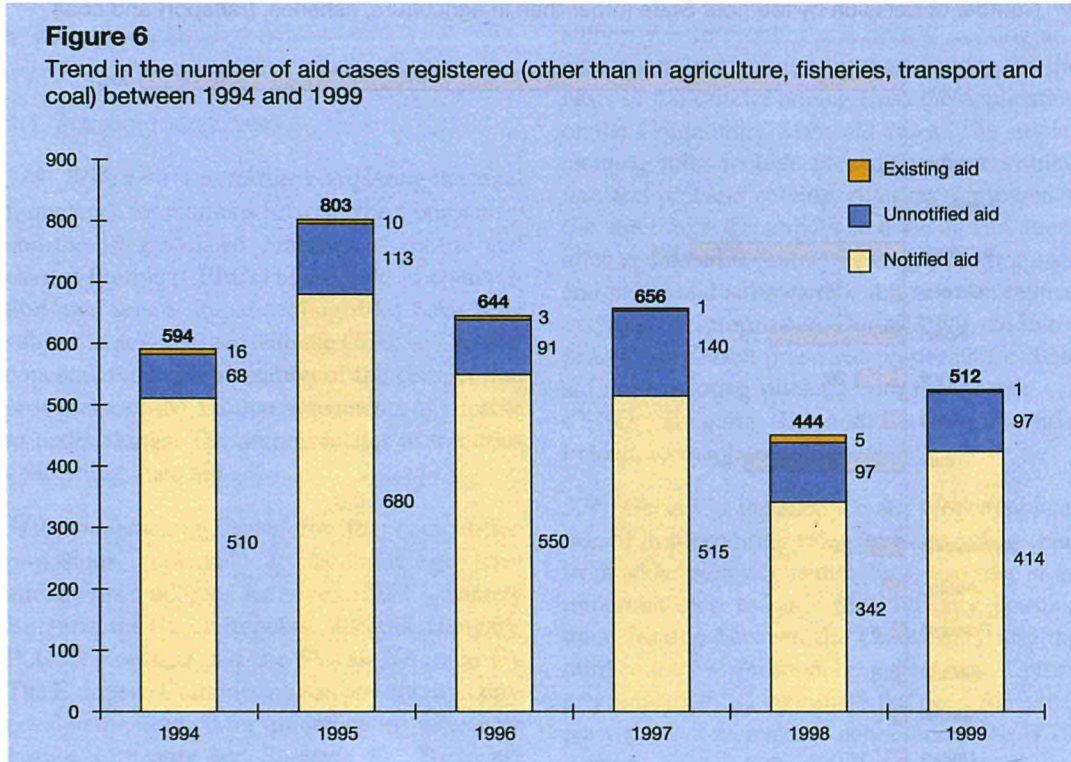
<sup>(4)</sup> OJ C 312, 23.11.1995.



E — Statistics

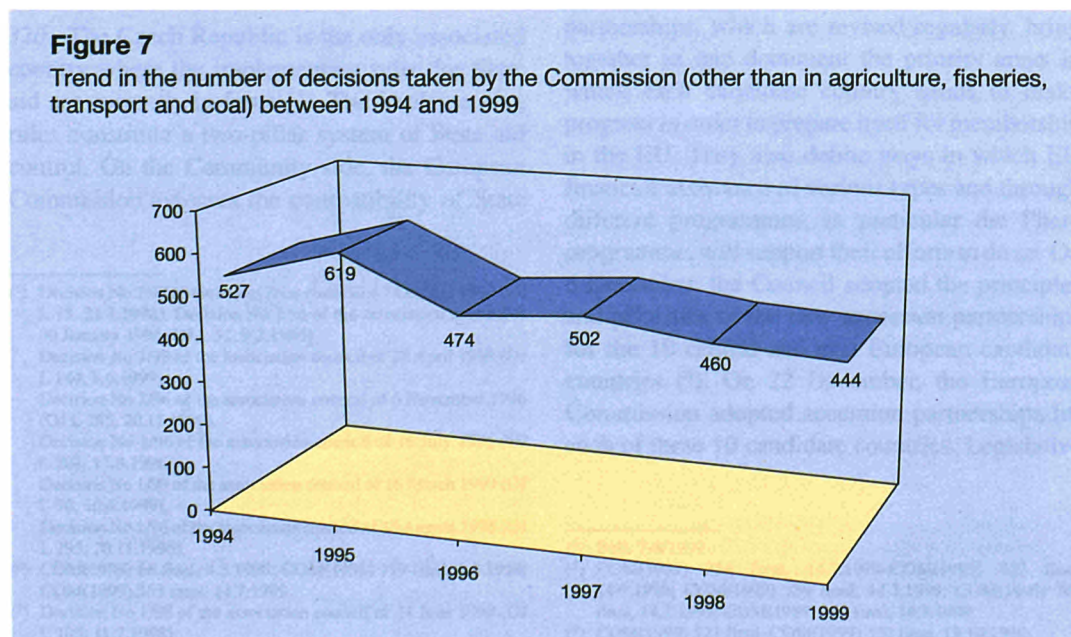
**Figure 6**

Trend in the number of aid cases registered (other than in agriculture, fisheries, transport and coal) between 1994 and 1999



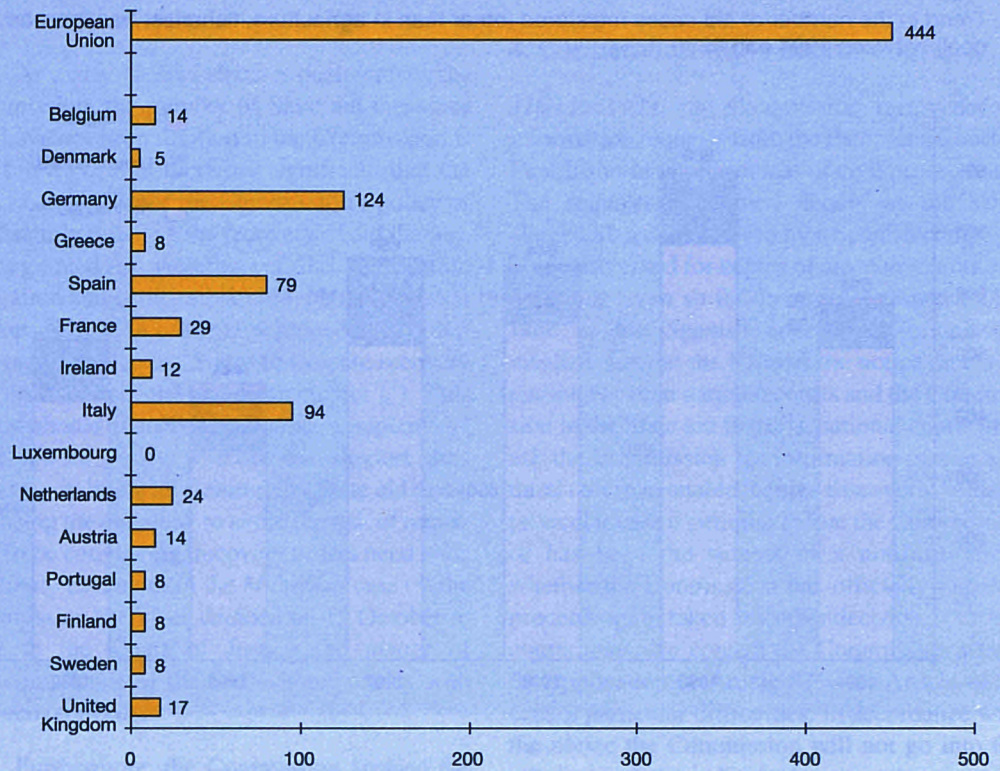
**Figure 7**

Trend in the number of decisions taken by the Commission (other than in agriculture, fisheries, transport and coal) between 1994 and 1999



**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

318. 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 subject to negotiations 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.

319. Implementing rules for the competition provisions applicable to undertakings have already been adopted for seven CEECs, namely Bulgaria, the Czech Republic, Estonia, Hungary, Poland, Romania and the Slovak Republic <sup>(1)</sup>. The European Commission has presented its proposal to the Council for implementing rules with Latvia, Lithuania and Slovenia <sup>(2)</sup>. These are expected to be adopted in early 2000. 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.

320. The Czech Republic is the only associated country where the implementing rules for State aid are currently in force <sup>(3)</sup>. The implementing rules constitute a two-pillar system of State aid control. On the Community side, the European 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 that country, on the basis of the criteria arising 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. During 1999, the European Commission presented proposals for State aid implementing rules <sup>(4)</sup> with regard to seven CEECs: Bulgaria, Estonia, Latvia, Lithuania, Poland, Romania, and Slovenia <sup>(5)</sup>.

321. 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 possible trade friction between the Community and the third country in question, because 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).

##### 1.2. Enhanced pre-accession strategy

322. 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 partnerships, which are revised regularly, bring together in one document the priority areas in which each candidate country needs to make progress in order to prepare itself for membership in the EU. They also define ways in which EU financial assistance of various types and through different programmes, in particular the Phare programme, will support their efforts to do so. On 6 December, the Council adopted the principles and priorities of the new accession partnerships for the 10 central and east European candidate countries <sup>(6)</sup>. On 22 December, the European Commission adopted accession partnerships for each of these 10 candidate countries. Legislative

<sup>(1)</sup> Decision No 2/97 of the association council of 7 October 1997 (OJ L 15, 21.1.1998). Decision No 1/96 of the association council of 30 January 1996 (OJ L 31, 9.2.1996).

Decision No 1/99 of the association council of 28 April 1999 (OJ L 144, 9.6.1999).

Decision No 2/96 of the association council of 6 November 1996 (OJ L 295, 20.11.1996).

Decision No 1/96 of the association council of 16 July 1996 (OJ L 208, 17.8.1996).

Decision No 1/99 of the association council of 16 March 1999 (OJ L 96, 10.4.1999).

Decision No 1/96 of the association council of 15 August 1996 (OJ L 295, 20.11.1996).

<sup>(2)</sup> COM(1998) 68 final, 4.3.1998; COM(1998) 119 final, 4.3.1998; COM(1999) 353 final, 14.7.1999.

<sup>(3)</sup> Decision No 1/98 of the association council of 24 June 1998 (OJ L 195, 11.7.1998).

<sup>(4)</sup> Bull. 7-8/1999.

<sup>(5)</sup> COM(1999) 354 final, 14.7.1999-COM(1999) 357 final, 14.7.1999; COM(1999) 359 final, 14.7.1999; COM(1999) 360 final, 14.7.1999; COM(1999) 362 final, 14.7.1999.

<sup>(6)</sup> COM(1999) 521 final-COM(1999) 532 final, 13.10.1999.

alignment, enforcement, institution building and transparency in the fields of antitrust and State aid are among the most important priorities identified by the European Commission in the different accession partnerships.

323. The accession partnerships are complemented by the national programmes for the adoption of the *acquis* (NPAA), drawn up by each of the 10 candidate countries. The NPAA's give details of these countries' commitments with regard to making progress in accordance with the priorities laid down in the accession partnerships.

### *1.3. Progress in alignment of competition rules*

324. The European Commission reports regularly to the European Council on progress made by each of the candidate countries towards accession. The second regular reports for the 10 CEECs, Cyprus and Turkey <sup>(1)</sup>, adopted by the European Commission in October, assess progress made since the previous reports delivered by the European Commission in 1998. In 1999, the European Commission adopted a regular report also for Malta <sup>(2)</sup> alongside its updated opinion on Malta's application for membership <sup>(3)</sup>.

325. In the past year, most of the candidate countries have taken decisive steps in preparing or passing new competition legislation, or have amended existing laws, in order to further align these with Community law. The competition authorities in these countries have also gained further experience in the enforcement of their competition legislation. However, on several occasions the European Commission has emphasised the need for the competition authorities of the candidate countries to further strengthen their independence, investigative powers, powers to impose fines, and the need for them to increase their resources.

326. In contrast with the progress made in the field of competition, the introduction of proper State aid control in the candidate countries has

been slow or inadequate. While a number of countries have introduced or are now in the process of adopting rules on the control of State aid, a lot of work remains to be done. As a matter of priority, many candidate countries still need to establish comprehensive inventories on existing aid in order to ensure transparency in this field. Despite the fact that the CEECs have submitted annual reports to the European Commission on the volume of aid granted in these countries, as is required under the Europe agreements, the European Commission still remains concerned about the lack of a comprehensive picture of the State aid situation in most CEECs.

327. A second priority for the candidate countries is to set up or strengthen their State aid monitoring authorities, and to ensure an effective monitoring of State aid. This is of the utmost importance in order to establish a sound and systematic State aid control in these countries. Most of the candidate countries have already clearly designated a monitoring authority. However, legal procedures and the necessary powers, and/or resources to ensure genuine control of new and existing State aid in these countries, are still lacking in many respects.

328. Finally, with regard to approximation of legislation, while certain countries have adopted or are currently preparing substantive and procedural rules in this field, the European Commission notes that most candidate countries are generally lagging behind the level that is required at this stage in the run-up to accession.

### *1.4. Technical assistance*

329. In view of these remaining shortcomings, technical assistance in the field of competition remains an essential tool to prepare the candidate countries for accession. Specific actions are being undertaken in the framework of the Phare programmes. Under the institution building ('twinning') arrangement, EU Member State experts are now also providing advice on a long-term basis to the competition and State aid authorities in the CEECs.

330. The European Commission has pursued a proactive policy of further intensifying its contacts with the competition authorities of the CEECs and between those authorities. On 28 and 29 June, the fifth competition conference of the CEECs and the European Commission took

<sup>(1)</sup> COM(1999) 500 final-COM(1999) 507 final, 13.10.1999; COM(1999) 509 final-COM(1999) 513 final, 13.10.1999. See also ([http://www.europa.eu.int/comm/enlargement/report\\_10\\_99/intro/index.htm](http://www.europa.eu.int/comm/enlargement/report_10_99/intro/index.htm)).

<sup>(2)</sup> COM(1999) 508 final, 13.10.1999.

<sup>(3)</sup> COM(1999) 69 final, 17.2.1999.



place in Krakow, Poland. 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 serves to establish and strengthen professional contacts between officials responsible for competition in the European Commission and in the CEECs.

331. The Competition DG continued to contribute to workshops and study visits organised by the European Commission's Technical Assistance and Information Exchange Office (TAIEX) in the field of competition. The annual joint training sessions on competition were organised by the Competition DG, in cooperation with TAIEX, for officials from the candidate countries in November and December.

332. The Competition DG continued to hold various bilateral meetings with the competition and State aid authorities of the candidate countries. Technical discussions at expert level were held on competition law approximation, institution building and enforcement. Discussions on specific State aid issues, such as the set up of a State aid inventory, regional aid maps, assessment of individual cases in sensitive sectors, were also held during ad hoc meetings with the candidate countries.

## 2. Accession negotiations

333. In order to identify potential problems with the candidate countries in view of their capability to implement Community law upon accession, a number of screening meetings on the competition *acquis* were organised with the applicant countries in 1998. The multilateral screening meeting took place with all candidate countries in May 1998. In autumn 1998, the competition *acquis* was screened bilaterally with the six countries, with which negotiations had started in March 1998 (Cyprus, the Czech Republic, Estonia, Hungary, Poland and Slovenia). With the former 'pre-in' applicant countries (Bulgaria, Latvia, Lithuania, Romania, the Slovak Republic) the bilateral screening exercise was carried out in March and April 1999. The first round of multilateral and bilateral screening of the competition *acquis* was held with Malta in November 1999.

334. In the context of the enlargement negotiations on the competition chapter, the European Commission assessed the negotiating positions submitted by Cyprus, the Czech Republic, Estonia, Hungary, Poland and Slovenia. The European Commission's evaluation of these applicants' capability to meet the accession criteria in the field of competition was reflected in the common positions adopted by the EU in May. The common positions identified a number of issues that warranted further information and/or clarification from the applicants. Cyprus, the Czech Republic, Estonia, Hungary and Slovenia submitted to the accession conference modifications and/or supplementary information to their initial negotiating positions in summer 1999. On the basis of these, the EU adopted revised common positions on the competition chapter in November. Poland submitted an addendum to its negotiating position in October and a revised common position still needs to be adopted by the EU. For all six countries, the competition chapter remains open, mainly due to insufficient progress made in the field of State aid.

## B — Bilateral cooperation

### 1. North America

#### 1.1. United States

##### 1.1.1. Implementation of the 1991 cooperation agreement <sup>(1)</sup> and of the 1998 positive comity agreement <sup>(2)</sup>

335. Every year, the Commission reports to the Council and the European Parliament on its cooperation activities with the US under the 1991 agreement. The last report covered the period from 1 January 1998 to 31 December 1998 <sup>(3)</sup>.

336. During 1999, the Commission cooperated with the Antitrust Division of the US Department

<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> 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>(3)</sup> Adopted on 13 September 1999, COM(1999) 439 final; see 1998 Competition Report, pp. 313–328.

of Justice (DoJ) and the US Federal Trade Commission (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 cases on both sides of the Atlantic), the close daily contact between case teams in the Commission (Competition DG) and the US DoJ and FTC is conducive to mutual confidence building, accrued knowledge of the substantive and procedural rules in each other's jurisdictions, substantial convergence in competition analysis, and the development of 'best practices' in both substantive and procedural matters.

337. Bilateral cooperation was particularly intensive with regard to the large oil merger cases, most notably with regard to the *Exxon/Mobil* merger. Informal contacts between the FTC and the Commission started soon after the announcement of the *Exxon/Mobil* transaction (December 1998), long before the formal notification occurred in May 1999. This allowed the EU and US authorities to discuss the particular competition concerns for future oil and gas output which they feared might stem from the creation of so-called 'super majors'. Following notification, and having obtained waivers from the merging parties which permitted the EU and US authorities to exchange confidential information, assessment of much of the substance of the case was carried out in close cooperation between the agencies. Commission staff visited their FTC counterparts, reviewed documents at FTC premises, and there were regular telephone calls, exchanges of documents, and other contacts between the two case teams. Discussion between staff on both sides focused most closely on the assessment of the effects that the proposed transaction was likely to have on competition in the upstream markets (exploration, development, production and sale of crude oil and natural gas). The likely impact of the merger on the market for aviation lubricants was also the subject of close discussion. Indeed, cooperation still continues with regard to the implementation of the remedies that were agreed in both jurisdictions.

338. Other cases which involved close transatlantic cooperation included *inter alia* the *Allied Signal/Honeywell*, *Hoechst/RPR*, *Astral/Zeneca*, and *Air Liquide/BOC* merger cases. Case-related EC-US cooperation is discussed in further detail in the fifth report to the Council and the European

Parliament for the year 1999, which will be published during 2000.

### **1.1.2. Administrative arrangements on attendance at hearings in individual cases<sup>(1)</sup>**

339. The Commission adopted on March 31 a text setting forth administrative arrangements between the competition authorities of the European Communities and of the United States concerning mutual attendance at certain stages of proceedings in individual cases involving the application of their respective competition rules. The arrangements are bilateral and reciprocal in nature. They provide that a request for attendance at a hearing or meeting may be granted in appropriate cases, subject to confirmation of satisfactory assurances or arrangements regarding confidentiality and the use of information. Attendance will be possible only with the express consent of the persons concerned by the enforcement proceedings in either jurisdiction, and the arrangements do not in any way limit the rights enjoyed by those persons.

340. The arrangements will contribute to improving mutual understanding by the competition authorities of their respective procedures, as well as to enhancing coordination, cooperation and avoidance of conflicts in appropriate cases of mutual interest. Neither these administrative arrangements, nor the letters exchanged between the Commission and the US competition authorities, constitute a binding international agreement.

### **1.1.3. EU-US working group on cooperation in global merger cases**

341. At a bilateral meeting held on 5 October between the Commission's Competition DG, the US DoJ and the US FTC, it was agreed to set up a working group designed to intensify transatlantic cooperation in the field of merger control. This working group has been mandated to focus on: (i) the scope for further convergence of analysis/methodology in merger cases being treated in both jurisdictions, particularly regarding the respective EU and US approaches towards oligopoly/collective dominance; and (ii) an in-depth study of the respective EU and US approaches to the identification and implementa-

<sup>(1)</sup> Bulletin of the European Union (March 1999).



tion of remedies (in particular, divestitures), and to post-merger compliance-monitoring. The working group is expected to conclude its deliberations during 2000.

### 1.2. Canada

342. On 17 June, a competition cooperation agreement was signed between the European Communities and the Canadian Government. It entered into force immediately. The draft agreement had been approved by the European Parliament in February, and by the Council of Ministers in May.

343. The agreement will 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 enforcement activities to the extent that this is considered mutually beneficial by both parties.

344. In substance, the 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.

345. There has already been active cooperation in a number of merger cases since the entry into force of the agreement. The first post-agreement bilateral meeting between the Commission's Competition DG and the Canadian Competition Bureau was held in Ottawa in September. As with the EU-US agreement, the Commission will report annually to the Council and Parliament detailing cooperation under the agreement with Canada.

## 2. Other countries

### 2.1. Japan

346. The Commission finalised a new list of proposals for further deregulation in Japan. The list included a series of proposals in the area of competition. The new EU proposals focused on 3 points:

- (i) more effective enforcement of the Anti-monopoly Act (AMA);
- (ii) further suppression of exemptions and exceptions under specific laws and the AMA, and clarification regarding exceptions and exemptions that will remain in force; and
- (iii) examination by the Japanese Fair Trade Commission (JFTC) of all administrative guidance — written and oral — to check for conformity with anti-monopoly guidelines coupled with publication of the results. The new package was officially given to Japan during an EU-Japan high-level meeting on 3–5 November in Tokyo.

347. The annual bilateral meeting between the Commission and the JFTC took place in Tokyo on 28 and 29 October. Commission officials stressed that progress has been made towards deregulation of competition in Japan, adding, however, that a great deal of regulatory reform is still needed to create an open, transparent and fully functioning competitive market economy, fully accessible to domestic and foreign business. Particularly, in the field of competition policy, Japan needs to enforce existing anti-monopoly rules more vigorously, eliminate exemptions, challenge cartels notably in the wholesale distribution system and subject 'administrative guidance' to rigorous scrutiny for compatibility with competition law. The tolerance of anticompetitive practices cannot be in the long-term interest of promoting efficiency in and helping restructuring of the Japanese economy. It will also be important to ensure and perhaps strengthen the independence of the JFTC when it is placed under the Ministry of General Affairs (MGA) in 2001, as part of the central government reorganisation, and to maintain the integrity of its personnel system and budget.

348. Further, the Commission delegation stated its interest in reinforcing bilateral relations with Japan in the area of competition. The two sides envisaged exploring the possibilities for a coop-

eration agreement similar to the EU agreements with the US (1991) and Canada (1999), as well as to the recent US–Japan agreement (1999). Besides talks on the possibilities for closer cooperation, the two sides discussed recent developments in the area of competition policy in the EU and Japan, and exchanged views on selected cartel and merger cases. They also discussed the progress of preparations for the WTO ministerial conference in Seattle, where they will both push for negotiations to be launched towards a multi-lateral framework for competition rules.

## 2.2. Turkey

349. Decision 1/95 of the EC–Turkey association council, implementing the final phase of the customs union being created between the Community and Turkey, and Article 7 of the Turkey–ECSC free trade agreement require the adoption of rules for the implementation of the competition provisions. These implementing rules should establish a framework for the application of the antitrust and State aid rules by *inter alia* specifying the respective functions of the Community's and Turkey's competition authorities, and by putting in place a structure for consultation and cooperation between those authorities. It is expected that substantive discussions between the Commission and the Turkish authorities will be launched in the near future, aimed at the adoption of such rules.

## 2.3. Russia, Ukraine and the other NIS

350. 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 EU–Russia, EU–Ukraine and EU–Moldova PCA joint committees have now established subcommittees, with the task of overseeing *inter alia* the fulfilment of the commitments in the field of competition and State aid; these subcommittees met on several occasions during 1999. A number of Tacis projects, with the task of providing relevant expertise, are also being undertaken.

## 2.4. Mediterranean countries

351. An association agreement was concluded between the EU and Egypt during the course of

1999. Agreements have already been concluded with Tunisia, Israel, Jordan and the Palestinian Authority. Others are being negotiated with Algeria, Lebanon, and Syria. The provisions on competition contain clear commitments aimed at bringing the competition policies of the countries concerned into line with the Community arrangements. Proposed implementing rules for the competition provisions in the association agreements are being prepared, and it is expected that these will be forwarded to the Community's Mediterranean partners during the course of 2000. Likewise, in the context of 'the Euro-Mediterranean partnership and the single market', seminars aimed at furthering cooperation with the MED countries are planned for next year.

## 2.5. South Africa

352. The European Union and South Africa concluded a free trade agreement in 1999. The agreement contains provisions concerning competition and State aid, including provisions on cooperation between the EU and South African competition agencies, and provides in particular for positive and traditional comity. This means that the EU and South Africa have the possibility of requesting each other to take enforcement action, and that they must take into account each other's important interests in the course of their enforcement activities.

353. New South African competition legislation came into force during 1999. The legislation includes provisions relating to merger control, as well as prohibitions on anticompetitive restrictive arrangements and on the abuse of a dominant position. A new independent enforcement agency, the Competition Commission, has been established, as well as a specialised Competition Tribunal and Competition Appeal Court.

## 2.6. Latin America

354. A free trade agreement between the EU and Mexico was concluded during 1999. The agreement provides for a mechanism of cooperation between the competition authorities of both parties. This mechanism provides for: coordination of certain enforcement activities; the exchange of information; the investigation of allegedly anti-competitive behaviour in one party's territory when it prejudices the interests of the other party; and technical cooperation. This cooperation



mechanism will ensure more transparency in competition enforcement, and should improve the effectiveness of that enforcement.

355. During 1999, the Commission received a mandate from the Council of Ministers to open negotiations with Mercosur and Chile aimed at the conclusion of a free trade agreement. It is envisaged that this agreement should contain provisions on competition, and on cooperation and coordination between competition authorities. Negotiations commenced in November, and will continue for some time. Moreover, proposals for technical assistance to Mercosur and the Comunidad Andina will be made during the course of next year, on the basis of a report compiled during 1999. It should also be added that, thanks to the intervention of the Commission, a first meeting was held during 1999 between the member countries of Caricom, to examine draft competition rules for the Caribbean common market.

## C — Multilateral cooperation

### 1. WTO: Trade and competition policy

356. The WTO working group on the interaction between trade and competition policy held three formal meetings in 1999 (19–20 April, 10–11 June and 14 September). At the meetings in April and June, consideration was given to the full range of topics called for in the decision of the WTO General Council:

- (i) the relevance of fundamental WTO principles of national treatment, transparency, and most-favoured-nation treatment to competition policy and vice versa;
- (ii) approaches to promoting cooperation and communication among Members, including in the field of technical cooperation; and
- (iii) the contribution of competition policy to achieving the objectives of the WTO, including the promotion of international trade.

357. The principal purpose of the meeting held on 14 September was to review and adopt the working group's report (1999) to the General Council.

358. In preparation for the third WTO ministerial conference in Seattle (3.12.1999) the EU

tabled proposals for the launching of negotiations towards a multilateral framework of competition rules. Negotiations should focus on three main elements:

- first, all WTO members should introduce basic competition rules and enforce them;
- second, core common principles should guarantee a degree of coherence and commonality between WTO members, and
- third, cooperation between competition agencies in member countries should be possible through a multilateral instrument.

359. The Council conclusions on October 26 1999, regarding the ministerial conference in Seattle included the following passage on competition: 'The WTO should begin negotiations on a basic framework of binding core principles and rules on domestic competition law and policy and its enforcement. The WTO principles of transparency and non-discrimination would provide key foundations for the development of such core principles and rules. The WTO should also aim at developing common approaches on anticompetitive practices with a significant impact on international trade and investment as well as on the promotion of international cooperation. The development dimension should also be at the centre of the considerations of such a multilateral framework by combining possible transitional periods together with technical assistance and flexibility in the rules.'

360. No agreement was reached between the WTO members at the ministerial conference in Seattle regarding the launch of a new round of multilateral trade negotiations. Consequently, no actual negotiations are taking place at this point in time regarding trade and competition.

However, the WTO working group on trade and competition is expected to continue its meeting activities during the year 2000 and the Community and its Member States will continue to further clarify its position on the need for multilateral competition rules.

### 2. OECD

361. The Commission played an active part in the work of the Committee on Competition Law and Policy of the OECD, especially in the round

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tables and working party meetings organised in 1999 (promoting competition in postal services, oligopoly, professional services, guidelines for multinational enterprises, enforcement priorities of competition authorities, airline mergers and alliances). The Commission took part also as examiner (together with Greece) in the review of the Hungarian regulatory reform in the area of competition policy which took place on October 21.

### **3. Unctad**

362. The Commission issued on 15 September a working document (COM(1999) 451 final) with guidelines for participation in the 10th United Nations Conference on Trade and Development (Unctad X).

363. The purpose of the working document was to help prepare the position of the European Union at the conference to be held in Bangkok, Thailand, from 12 to 19 February 2000. As regards competition, the working document stresses in point 23 that development requires above all the smooth functioning of fair and competitive markets for products, services and other

resources including credit, land and genetic resources. In this respect, it is essential to contain arbitrary action of governments against business, to combat corruption and to prevent the collusion between public authorities and rent-seeking oligopolists or monopolists by rigorous competition policies. Further, the development dimension will also have to be addressed in negotiating multilateral rules on competition (point 35). Finally, Unctad should continue to conduct analyses and to provide a forum for debate at intergovernmental and at expert level on competition policies and rules, in order to raise developing countries' awareness and to allow them to share their experience. Unctad could in particular analyse the importance of State-owned and private monopolies in emerging markets, the relations between investment and competition, the types of regulation adapted to different levels of market development. Unctad could also undertake analysis in support of the negotiations of multilateral rules on competition, giving particular attention to the specific needs and conditions of developing countries in this context. Unctad could carry on technical cooperation activities aimed at assisting developing countries in the definition and implementation of competition rules and policies (point 54).



## V — OUTLOOK FOR 2000

### 1. Legislative and regulatory activities

364. The Commission will pursue the process ensuring that the Community's competition policy is applied taking full account of the rapidly evolving nature of the market place. As markets integrate, both in the EU and globally, it is vital that this evolution is reflected in the procedural and substantive rules of the Community. The Commission will therefore continue the revision of its procedural and substantive rules for the enforcement of Articles 81 and 82.

365. In the area of procedural rules for antitrust, the objective of 2000 is to have the Commission adopt a proposal for a new draft regulation containing rules on the implementation of Articles 81 and 82 of the EC Treaty for transmission to the Council, which could start discussions of that draft regulation towards the end of 2000.

366. In the field of vertical restraints, the objective of 2000 is to have the Commission adopt a set of guidelines complementing the new block exemption regulation adopted in 1999 and which enters into force on 1 June 2000. The guidelines will assist companies in the assessment of their distribution agreements when these are not covered by the new block exemption regulation.

367. Revision of policy towards horizontal cooperation agreements continues to be another priority for the Commission. Moreover, the exercise is an important complement to the reform of vertical restraints and to the modernisation of antitrust procedures.

368. In 1999, the Competition DG drafted revisions of the current block exemption regulations on research and development and specialisation. In parallel, a set of draft guidelines setting out the principal policy lines for the application of Article 81 to horizontal agreements has been drafted. In 2000, it is the Commission's objective to conduct extensive consultations with the experts of the Member States, industry, consumer organisations and other interested parties.

369. The 1997 *de minimis* notice, which gives guidance on the concept of agreements of minor importance not falling under Article 81, will have to be revised to take account of the abovementioned changes in policy for vertical restraints and horizontal cooperation. Work is scheduled to commence on this review in 2000.

370. In the motor vehicle sector the Commission has to draw up an evaluation report regarding block exemption Regulation (EC) No 1475/95 on car distribution. The evaluation report will be an essential document for deciding on future competition policy for motor vehicle distribution.

371. As a complement to the above reform projects, impact assessment studies will be launched, the general aim being to improve the effectiveness of competition policy by measuring the impact of interventions by the Commission on markets and by identifying sectors where competition needs to be spurred.

372. In the field of mergers the year 2000 will be a particularly active year. The merger regulation requires the Commission to report to the Council before 1 July 2000 on the operation of the thresholds and criteria set out in the merger regulation, which determine the jurisdictional scope of Community merger control. The Commission may also take the opportunity to examine other aspects of the regulation including, in particular, the referral processes between Member States and the Commission (Articles 9 and 22).

373. The Commission also plans to adopt three guidance notices which have already been the subject of widespread public consultation in 1999, namely a new (replacement) notice on ancillary restraints, a notice on the simplified treatment of routine cases under the merger regulation, and a notice on commitments submitted under the merger regulation. The subject of remedies will also be the focus of a joint EU-US working group established between the Commission and US regulatory authorities at the end of 1999. In addition the Commission intends to develop formal guidance on oligopolistic dominance, an issue of growing importance in the context of increasing European, and even global consolidation of certain industries.

374. In the field of State aid policy the Commission intends to revise the guidelines on State aid for environmental protection, the guidelines on aid to employment and the framework for State aid in the motor vehicle sector. Furthermore, it intends to adopt three block exemption regulations concerning State aid to SMEs, for training and the *de minimis* rule.

### 2. International field

375. The ever-increasing integration of the world economy is creating an unprecedented



interdependence between countries. 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. In these circumstances, competition problems are also taking on global dimensions which necessitates ever-closer international cooperation between competition authorities in different countries.

376. In view of the above and actuated by its communication to the Council of 28 June 1996 ('Vers l'établissement d'un cadre international de règles de concurrence'), the Commission will pursue a dual policy of continued bilateral cooperation with the Community's main partners and examining ways to expand multilateral cooperation in the field of competition. Modalities for such multilateral cooperation in the area of competition law could usefully be adopted within the framework of the WTO as part of an agreement which would also set out certain core principles to be contained in the domestic competition laws of the individual WTO members.

377. In addition to these two basic objectives, it is clear that the preparation for enlargement will have a significant impact on the Commission's priorities for 2000 in the international field. The Commission will continue its technical assistance to the countries of central and eastern Europe, Cyprus and Malta. The objective being to ensure, prior to enlargement, the setting-up and the implementation of viable competition law systems based on the principles and main criteria of EC competition law and the establishment of well-functioning and credible competition authorities. Special attention shall be paid to the adoption of State aid rules and effective enforcement of the rules by the State aid monitoring authorities in these countries.

378. In respect of bilateral cooperation (other than in the context of enlargement) the main priorities will be to ensure that the 1991 cooperation agreement with the US, the 1998 'positive comity agreement' concluded with the US and the new administrative arrangements on attendance are fully functional.

379. The Commission will also implement the new cooperation agreement with Canada which entered into force on 17 June 1999. Concerning Japan, it will explore possibilities of strengthening

cooperation. The Commission also intends to fully implement the PCA with Russia which entered into force in December 1997 and where, with regard to competition policy, it is envisaged to cooperate in the development and implementation of competition rules, in particular in the area of State aid.

### 3. Supervisory activities

380. In the context of enforcing the competition rules in the antitrust area, the main part of the Commission's work consists in dealing with concrete cases, be it notifications, complaints or *ex officio* investigations. The Commission will continue its efforts to focus its resources on the most important cases giving rise to major legal, economic or political interest for the EU. This implies a sustained effort to strengthen and improve cooperation with national competition authorities and national regulatory authorities.

381. The identification, prohibition and, where appropriate, fining of hard-core cartels will continue to be given the highest priority in the antitrust field. In a number of important cases, proceedings have already reached an advanced stage and it is therefore the objective to adopt several important cartel prohibition decisions with fines in 2000.

382. The Commission is also determined to continue, as a top priority, with its work of eliminating abuses of dominant positions. Such abuses have the effect of limiting, or even destroying, the ability of competitors to affect the dynamics of the market or for potential competitors even to enter the market. Such practices are particularly damaging, since they lead to market partitioning and delays in market integration. It will therefore continue to be particularly alert to abusive behaviour by dominant firms and formal decisions with fines for infringement of Article 82 are likely to be adopted in 2000 in a number of cases, where the investigation is already quite advanced.

383. Success in the area of liberalisation policy continues to depend on a strict application of Community competition law and monitoring of the liberalisation directives. With respect to liberalisation in the telecommunications area, the main task will continue to be monitoring the effective implementation of Community legislation in the Member States. In the postal sector, efforts will be focused on the follow-up of the



implementation by Member States of the Commission's liberalisation directive adopted in December 1997. The next step in the liberalisation process is a revision of the directive, for which the Commission intends to submit a proposal before the end of the year. Year 2000 will be Year 2 for the liberalisation of the European electricity market, as monopoly rights were successfully abolished in 11 Member States in February 1999. The remaining four Member States are expected to do the same in 2000 (France, Belgium and Ireland) and 2001 (Greece). The objective of the Commission is to make liberalisation on electricity markets a reality throughout the Community. The transposition of the gas directive will take place in 2000. The Commission will concentrate on network issues and on the contractual arrangements concluded between producers and importers, with a view to achieving effective liberalisation.

384. Since many Member States intend to grant financial aid to electricity companies to make up for investments or commitments which cannot be honoured in a liberalised system, the Commis-

sion has decided to establish a guideline for the treatment of such stranded costs under the State aid rules.

385. In the area of merger control, the main task of the Commission is to continue ensuring the effective regulation of mergers notified under the merger regulation by preventing the creation or reinforcement of dominant positions as a result of which effective competition would be significantly impeded in the common market or a significant part of it. Given current economic indicators this casework is likely to continue to increase in the same proportion as in previous years, with even greater emphasis on the international character of mergers.

386. In the field of State aid, priority will be given to measures increasing the transparency of the Commission's State aid monitoring and Member States' State aid practice. The Commission will start to set up a State aid register. In the interest of increasing efficiency of State aid control, it will follow up more systematically its recovery orders concerning illegal aid.





## ANNEX — CASES DISCUSSED IN THE REPORT

### 1. Articles 81, 82 and 86

Case	Publication	Point
Aeroportos e Navegação Aérea-Empresa Publica (Portuguese airports)	OJ L 69, 16.3.1999	59, 88
Airtours/First Choice	IP/99/695	Box 3
Alitalia/KLM	IP/99/628	93, 187
AT&T/IBM	IP/99/259	Box 4
Bosman		
British Interactive Broadcasting Ltd	IP/99/686	54, Box 4
CNSD	OJ L 203, 13.8.1993	Box 5
COAPI	OJ L 122, 2.6.1995	Box 5
Coca-Cola/Orangina		Box 2
Deutsche Telekom		67
Dutch pension funds		131–137
EPI	OJ L 106, 23.4.1999	Box 5
Europe–Asia Trades Agreement (EATA)	OJ L 193, 26.7.1999	99, 100
France Télécom		67
Ilmailulaitos/Luftfartsverket (Finnish airports)	OJ L 69, 16.3.1999	58, 88
Irish Sugar	OJ L 258, 22.9.1997	63, 64
Microsoft Internet Explorer	IP/99/317	55, Box 4
Mouscron	IP/99/965	140
MSG		Box 4
Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied (FEG)	OJ L 39, 14.4.2000	46, 47
P&I clubs	OJ L 125, 19.5.1999	103, 111
REIMS II	OJ L 275, 26.10.1999	Box 3, 81– 83
Revised TACA (Trans-Atlantic Conference Agreement)	OJ C 125, 6.5.1999	95–98
Seamless steel tubes	IP/99/957	48, 49
Telia/Telenor	IP/99/746	Box 4, 67,
The 1998 Football World Cup	OJ L 5, 8.1.2000	61–62, 140
Trans-Atlantic Agreement (TAA)	OJ L 376, 31.12.1994	99, 100
Virgin/British Airways	OJ L 30, 4.2.2000	60, 94
Vlaamse Televisie Maatschappij	OJ L 244, 6.9.1997	85, 87

### 2. Merger control

Case	Publication	Point
Ahlström/Kvaerner	IP/99/665	150, 164
Airtours/First Choice	IP/99/695	151, 161, 175, Box 6 and 8
Alitalia/KLM	IP/99/628	187
BP Amoco/Atlantic Richfield	IP/99/712	150, 154, 172
BSCH/A. Champalimaud	IP/00/296	194–196
BT/AT&T	IP/99/209	185
Compagnie des Salins du Midi et des Salines de l'Est (CSME)/MDPA/SCPA	IP/99/391	191
Danish Crown/Vestjyske Slagterier	IP/99/165	152, 161, 170
Deutsche Post/ASG	IP/99/485	156
Deutsche Post/Danzas/Nedlloyd	IP/99/456	158
Deutsche Post/trans-o-flex	IP/99/318	156, 159, 167, Box 9
EdF/London Electricity	IP/99/49	193, 197
Exxon/Mobil	IP/99/708	150–151, 154–155, 161, 171–172, 192



Fujitsu/Siemens	IP/99/719	188
Gencor/Lonrho	IP/97/338	151, 160
Heineken//Cruzcampo	IP/99/632	191
Hoechst/Rhône-Poulenc	IP/99/626	182–183, 338
Honeywell/AlliedSignal	IP/99/921	150, 178–179, 338
Hutchison/RMPM/ECT	IP/99/618	167, Box 7
Imetal/China Clays	IP/99/263	150
Kali und Salz	IP/98/655	160
KLM/Martinair	IP/99/421	165–166, Box 9
Rabobank-Beeck/Homann	IP/99/220	Box 2, 191
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### 3. State aid

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Charbonnages de France	OJ C 280, 2.10.1999	274
Crédit Agricole		227
Customs house docks area (CHDA)	IP/99/1042	212, 265
Danish VaekstFonden	OJ C 245, 28.8.1999	246
Dieselmotorenwerk Rostock	OJ L 232, 2.9.1999	258
Dornier Luftfahrt GmbH	OJ C 40, 12.2.2000	247
Dutch petrol stations		244
Early retirement subsidies for road hauliers		243
Eli Lilly		251
Ferriere Nord		254
Fiat Mirafiori Meccanica	IP/99/1037	280
German ecological tax reform	OJ C 245, 28.8.1999	253
Graphischer Maschinenbau GmbH	IP/99/73	258
Hoogovens-Usines Gustave Boël	OJ C 245, 28.8.1999	231
Italian fiscal amnesty	OJ C 113, 24.4.1999	249
Kinderkanal/Phoenix	OJ C 238, 21.8.1999	226, Box 11
Kvaerner Warnow Werft	OJ L 274, 23.10.1999	269
Investment in Portugal	OJ C 375, 24.12.1999	213
Marina di Stabia		242
Mercedes Vitoria	OJ C 351, 4.12.1999	281
Nerefco	OJ L 6, 11.1.2000	254
Neue Maxhütte	OJ L 230, 31.8.1999	271
Pittler/Tornos Werkzeugmaschinen GmbH		258
RJB mining plc	PB C 86, 27.3.1999	276–278, 308
Rover Longbridge	OJ C 62, 4.3.2000	281
Saxonylon Textil GmbH	OJ L 268, 16.10.1999	283
Sécuripost		233
Shell Chemicals BV	OJ C 298, 16.10.1999	247



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Spindelfabrik Hartha	OJ L 145, 10.6.1999	258
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Verlipack/Heye-Glas	OJ C 288, 9.10.1999	259
Weida Leder GmbH	IP/99/502	258
Purchase of special vehicles		284
Restructuring of the road haulage sector in Italy	IP/99/307	285
Spanish regional measures	IP/99/1041	287
Danish scheme to subsidise the transport of goods	IP/99/238	290
Tirrenia		294
French ports		295
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Manchester Airport		299
Elba Airport		299
Crédit Foncier de France	IP/99/416	305
Banco di Sicilia	IP/99/833	305
Westdeutsche Landesbank Girozentrale	IP/99/471	234, 306
BBC		Box 11





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