

# European Community competition policy

XXXth Report on competition policy



2000

European Commission  
Directorate-General for Competition

A great deal of additional information on the European Union is available on the Internet.  
It can be accessed through the Europa server (<http://europa.eu.int>).

Cataloguing data can be found at the end of this publication.

Luxembourg: Office for Official Publications of the European Communities, 2001

ISBN 92-894-0826-X

© European Communities, 2001

Reproduction is authorised provided the source is acknowledged.

*Printed in Belgium*

PRINTED ON WHITE CHLORINE-FREE PAPER

## FOREWORD BY MARIO MONTI

Member of the Commission in charge  
of competition policy



### Introduction

The year 2000 has been a crucial year for competition policy in many respects.

The way firms conduct business and compete with each other is rapidly evolving and competition authorities need to respond to these changes. Much of the activity in year 2000 was devoted to adapting competition policy to the new social and economic environment and to preparing it for the challenges ahead.

In taking up my functions I was aware that competition enforcement was not a static exercise and committed myself to improve our policy on issues which I felt were of key importance: greater involvement of consumers in competition matters; enhanced transparency of our policy, notably on State aid; modernisation of our rules through better integration of economic reasoning in the legal framework; and, finally, an increased awareness of the international dimension of competition.

In presenting this year's Annual Report on Competition Policy I would like to emphasise the progress achieved in those areas.

### Competition policy and consumers

On many occasions I expressed my concern that consumers are not sufficiently aware of the implications of competition policy on their welfare. While it is generally understood that competition policy improves overall economic efficiency, it is surprising that its most evident effect, that on consumers, is often neglected. Consumers should be better informed of, more closely taken into account and more directly involved in competition matters. In turn, this helps competition policy to focus more clearly on actions, which are ultimately beneficial to consumer's interests.

### European Competition Days

Our efforts towards this objective have led to a number of concrete initiatives. The most important was the decision to organise, in association with the European Parliament, a European Competition Day every six months in the country holding the Council Presidency. The purpose being that of informing the public about the benefits that competition policy can bring them in terms of lower prices, diversity of supply, improved product and service quality and to listen to consumers' comments and concerns on specific markets for goods and services.

The first European Competition Day was staged in Lisbon on 9 June and the second in Paris on 17 October. The conferences were open to all interested parties, but individual consumers and consumer organisations were particularly welcome participants. The debate concerned issues and sectors of great interest to the consumer — the liberalisation of the telecom sector and the concentration in the retail distribution industry — although the focus was sometimes more on 'consumer protection' than on strictly competition issues. I hope that in time the European Competition Day will become an established forum in which to exchange views with the consumer organisations on important aspects of competition policy. This would not only give citizens a better understanding of competition policy, but also help competition authorities to identify possible anticompetitive practices and take advantage of the consumers' experience of the markets.

### Impact on consumers of individual decisions

Apart from ad hoc initiatives, we also tried to highlight the benefit to the consumers of single decisions in our press releases and publications. In this annual report, we chose to select a small number of decisions, which could provide useful exam-

ples of how consumers can profit from competition policy.

In the case of *Opel Nederland*, complaints by consumers prompted the Commission to investigate practices restricting parallel trade in motor vehicles. The ensuing decision reaffirms the right to buy a car without impediment in Member States where prices are lower. This case is important because it shows that consumers are not only passive beneficiaries of competition policy, but can also provide impulse to the Commission's action.

In the *Telefónica/Sogecable/Audiovisual Sport* case, involving the relatively new market of pay-TV rights to football matches, the Commission intervened to put an end to an agreement to fix the price for watching football matches in Spain. As a result, some cable operators reduced significantly their prices and later the Spanish digital terrestrial operator cut pay-per-view football prices by up to 50 %. Consumers will also benefit from a much broader choice: football rights previously available only to digital satellite operators will be accessible also to other broadcasters, giving rise to a wide range of football transmissions on all three digital delivery systems (satellite, terrestrial and cable).

Even in merger cases, where issues may appear distant from the concerns of final consumers, competition policy can considerably affect their welfare. In the case of the merger between *TotalFina* and *Elf Aquitaine*, the operation was made conditional on the sell-off of transport and storage facilities with a view to preserve competition in the retail market for domestic heating fuel and for LPG and, therefore, maintain downward pressure on prices. On the market for motor fuel on motorways, the required divestment of 70 petrol stations will allow the entry of a large retail operator (Carrefour) into the market, which should develop competition not only on prices, but also on the supply of additional services to consumers.

### **Enhanced transparency of competition policy**

Better information to consumers should be part of a wider commitment to transparency towards citizens. In this context I pursue the practice of having regular contacts with the European Parliament to constantly update the democratic representation of the European citizens on the latest competition policy developments.

### **State aid register and scoreboard**

Transparency not only responds to a general need for Community policy to be open to scrutiny, but it can also improve the effectiveness of this policy. I am thinking in particular of the possibilities to enhance, through increased transparency, awareness about the need for the application of the Union's strict control rules and to strengthen the process of peer review. With these objectives in mind, the Commission has already opened a public register on the Union's server, Europa and will establish a State aid scoreboard, which will also be available on the Internet. The register contains factual information on all State aid decisions taken by the Commission since January 2000 and has been available online since March 2001. The scoreboard, which will give a detailed evaluation of the State aid situation in the EU, will be ready by July 2001.

These initiatives make the system more transparent and support the call of the Stockholm European Council on Member States to demonstrate a downward trend in their State aid in relation to GDP.

### **Notice on remedies in merger proceedings**

I would also mention another initiative aimed at increasing the transparency of our policy, this time in the field of merger control. In December, the Commission adopted a notice on the subject of remedies that parties to a merger operation can propose to eliminate competition problems raised by a certain operation. The Commission is the first competition authority to issue any such guidelines or advice on this subject. The notice aims to set out clearly and objectively the administrative and substantive principles on which the Commission will base its assessment of remedies and follows extensive consultations carried out with the Member States and with the business and legal communities. I believe this to be an important development, particularly in light of the fact that in the last two years alone there have been around 50 cases in which the Commission has accepted remedial commitments from merging parties before allowing transactions to proceed.

### **Modernisation of competition rules**

The ongoing process of updating our rules and procedures is driven by the need to strengthen the enforcement of EC competition law throughout the European Union. We believe that this final

objective requires a simplification of procedures, a more economic approach to the analysis of cases, a greater involvement of national competition authorities and national courts in the application of EU competition law.

Last year I already had the opportunity to report — including in my foreword to the annual report — on this ambitious programme of reforms. This work has continued in the year 2000 leading to tangible and — I hope — very beneficial progress.

### *Reform of the implementing rules of Articles 81 and 82*

Following the large debate opened by the White book of 1999 the Commission was able to adopt, on 27 September 2000, a proposal for a new regulation designed to replace Regulation No 17 of 1962. I believe this can be described as the main legislative initiative in Europe in the competition field, since the adoption of the merger regulation in 1989. I am particularly glad that the main orientations of the project could earn the support of the European Parliament and of the Economic and Social Committee and benefit from the opinions of a wide range of interested parties, including experts from the Member States' and EFTA competition authorities, from academics and practitioners in the field as well as from the general public. I hope that the fruitful cooperation and effective work with the European Parliament and Council will continue and allow approving the reform in 2001.

### *Vertical and horizontal agreements*

The work on vertical agreements, having led to the adoption, on 22 December 1999, of a new block exemption regulation, was complemented in 2000 by a set of guidelines on vertical restraints approved on 24 May. The guidelines will help undertakings assess the compatibility with the Treaty rules of agreements not covered by the regulation. Later, on 29 November 2000, the Commission adopted new regulations dealing with categories of specialisation and research and development agreements. Guidelines on the applicability of Article 81 of the Treaty to a wider range of horizontal cooperation agreements were also issued. While the new regulations replace two existing block exemption regulations, the guidelines extend significantly the scope of previous notices and cover a wider range of the most common types of horizontal agreements.

The full set of regulations and guidelines on vertical and horizontal agreements establishes a comprehensive framework for the application of competition rules to the great majority of agreements between undertakings. It also responds to the intention to bring the competition analysis more in line with economic reasoning, to give economic operators a clearer understanding of competition issues and concepts and to relieve enterprises from burdensome administrative obligations.

What is also important to underline, is that in the present year we were already able to harvest some of the benefits of the new approach. The number of notifications fell by nearly 40 % over the previous year, undoubtedly following the new rules on vertical and horizontal agreements. On the other hand, almost 30 % of the new cases were opened *ex officio*, compared to only 20 % in 1999. These developments are fully in line with the policy objective of dealing with standard agreements through legislative action, while using the available resources to pursue a more proactive policy and concentrate on the most dangerous anticompetitive practices.

### **The international dimension of competition policy**

Economic and technological factors, together with political developments — such as the enlargement of the EU — are causing world markets to increasingly integrate. These processes need to be carefully monitored and governed.

The enlargement of the European Union has profound social and political implications and we have a duty to create the conditions for it to be a success, without undermining the *acquis* of the Community. At the same time, the globalisation of markets, while having the potential for expanding and disseminating economic welfare, raises the concern that it might favour the stronger players, to the detriment in particular of consumers and less developed countries. Competition policy can help to avoid abuses and create the framework for a sound operation of market mechanism at international level.

### *Enlargement*

Following the Commission's 'Enlargement strategy paper' of November, the EU is expected to assess the situation in the candidate countries in the

---

second half of 2001, with a view to the provisional closure of the competition chapter when the conditions are met.

The EU has consistently taken the view that the candidate countries can be considered to be ready for accession only if their companies and public authorities have become accustomed to a competition discipline similar to that of the Community well before the date of accession. This is necessary to ensure that the economic actors in the candidate countries would be able to withstand the competitive pressures of the internal market resulting from the full and direct application of the competition *acquis* upon accession.

This leads me to a general remark on the role of competition policy. I believe effective competition enforcement is an essential part of a functioning market economy, and it clearly plays a central role in the internal market of the European Union. As we have experienced, businesses have learnt to respect the rules and consumers are increasingly aware of its benefits. For their successful integration in the Union, the candidate countries need a competition culture too. As accession approaches, it is, indeed, timely and essential to encourage the development of such a culture also in the candidate countries.

During this year we have made special efforts to help the candidate countries in meeting these requirements. In addition to the daily technical assistance to the competition offices of the candidate countries, we also organised intensive joint training sessions on antitrust and State aid, as well as annual conferences between the Commission and the candidates' competition offices to help them prepare for the moment of accession.

When looking at the actual track record of the candidate countries two issues stand out clearly.

Firstly, the difference between the State aid and antitrust fields. Whereas most candidate countries already have a functioning antitrust regime, proper State aid discipline is often lacking. The candidate countries that have not yet established the necessary legal framework or the functioning administrative structures for State aid control should now do so without delay.

Secondly, there is a gap between the legal framework and the actual enforcement. The situation in the State aid field gives particular cause for concern. Several candidate countries notably use

incompatible fiscal aid regimes to attract foreign investment or to keep non-viable businesses alive. This not only negatively influences the accession negotiations, but also places investors in a situation of legal and economic uncertainty. Furthermore, aid regimes used to prop up ailing industries risk jeopardising proper economic restructuring of key sectors of the candidate countries' economies, thereby rendering them unprepared for the internal market.

To conclude, tremendous progress has been achieved in legislative approximation and in the creation of market systems in the candidate countries. However, to make accession a success for the candidate countries and to ensure the proper functioning of our internal market after enlargement, there is still some important work to be done.

#### *WTO and the Global Competition Forum*

The rapid globalisation of the world economy brings major limitations — both legal and practical — to our ability to apply our own rules extra-territorially. Even when this possibility is not prevented, there are many drawbacks in doing so: it can give rise to conflicts, or to incoherence, with the rulings of foreign agencies or courts, and even to conflicts with foreign laws. As a result, undertakings operating on a global environment may be able to escape those rules that are essential to govern economic and social processes.

The main policy response available to competition authorities is one that calls upon them to establish networks and instruments of global governance ensuring that the international integration of markets leads to maintained competitive outcomes, thus making the globalisation process both economically more efficient and socially more acceptable. In this context, competition policy — and specifically international cooperation on competition policy — has an important role to play, if we are to avoid resentment against globalisation and a protectionist backlash.

The Commission has reacted to these challenges by establishing successful forms of cooperation with foreign competition agencies, in particular with the US and, more recently, with the Canadian authorities. We have also reached an understanding on the substance of an agreement with Japan that we hope can be initialled in 2001. Since we cannot realistically expect to build the same intensive cooperative relationship with all of our counterparts around

the world, we are also convinced of the need to put in place a WTO framework agreement ensuring the respect of certain basic competition principles.

All these aspects are discussed in the international section of the report; there is one initiative, though, that I would especially like to point to here. It concerns the idea of creating some kind of a broadly based global forum for the general discussion of competition policy issues. I am convinced that the creation of such a forum would put in place a focal point for discussion between those responsible for the development and management of competition policy worldwide. There are today over 80 countries that have enacted some form of competition law regime — many of them having done so only recently — while more are considering doing so in the future. There is a clear need for a place where the whole range of competition policy issues — substantive, systemic and enforcement-related — can be debated. The end-objective should be to achieve a maximum of convergence and consensus between participants through dialogue, and to exchange experiences on enforcement policy and practice.

In February 2001, I joined a number of like-minded senior competition law officials and professionals at an informal gathering, for a first ‘brainstorming’ on how we should set about the launching of what has become known as the ‘Global Competition Forum’.

We agreed that the forum should not be a new international institution, and that it should involve a minimum of permanent infrastructure, with support primarily provided by its participants. It should be first and foremost a competition authority forum, but would draw together all interested parties — both public (for example, other international organisations) and private (for example, business, professional, consumer and academic bodies), who could all be appropriately associated with the forum, as participants and ‘facilitators’.

I should add that the forum is not being proposed as an alternative to a multilateral competition law

framework at the WTO. Rather, the two avenues can be followed in parallel, and be mutually reinforcing in their pursuit of the same ultimate competition policy objectives.

The global forum, and indeed a WTO competition agreement, will — in my view — be of particular benefit to developing countries. Closed and opaque markets and the absence of effective competition between enterprises, are obstacles to economic growth in much of the developing world. The pursuit of a robust competition policy by developing countries should be an important ingredient in any economic reforms designed to promote growth: it encourages industrial competitiveness by rewarding efficiency and innovation, thereby fostering investment.

### Conclusion

I have so far highlighted some of the initiatives taken in those areas which I believe constitute today’s priorities for competition policy. None of these initiatives would have been possible without the devoted and professional attitude of the services of the Directorate-General for Competition. I would like to express here my deepest appreciation for their hard work during the last year.

To sum up, the processes of economic integration and liberalisation are releasing powerful market forces. These forces can be disruptive, but can also be profitably channelled toward the achievement of greater social welfare. Competition policy is actively helping to govern these processes, but for it to be effective, a ‘competition culture’ needs to develop at all levels. This is why it is important to achieve deeper consumer involvement, enhanced transparency and greater international cooperation. I am confident that the work carried out in these areas, together with the modernisation of our legislative framework, places the Commission in a better position to deal with the changing needs of the social and economic environment.







XXXth Report on competition policy  
2000

(Published in conjunction with the *General Report  
on the Activities of the European Union — 2000*)

SEC(2001) 694 final



## CONTENTS

Introduction .....	13
Statistics on Commission activity in applying Community competition law in 2000 .....	14
<i>Box 1: European Competition Day in Lisbon and Paris</i> .....	15
I — Antitrust: Articles 81 and 82; State monopolies and monopoly rights: Articles 31 and 86 .....	17
A — Modernisation of the legislative and interpretative rules .....	17
1. New Commission competition rules in the field of vertical restraints .....	17
2. New Commission competition rules in the field of horizontal cooperation agreements ..	18
3. Proposal for a new regulation implementing Articles 81 and 82 of the EC Treaty .....	20
B — Enforcement of Articles 81, 82 and 86 .....	24
1. Article 81 .....	24
2. Articles 82 and 86 .....	28
<i>Box 2: The impact of competition policy on consumers</i> .....	30
C — Sector-based survey .....	31
1. Basic industries, consumer and investment goods .....	31
2. Network industries .....	34
<i>Box 3: Services of general interest in Europe and competition</i> .....	44
3. Services .....	46
<i>Box 4: Web-based business-to-business (B2B) trading and B2B electronic marketplaces</i>	48
D — Statistics .....	52
II — Merger control .....	55
A — Introduction .....	55
<i>Box 5: The simplified procedure</i> .....	57
B — Application of the dominance test .....	58
1. Single dominance .....	58
<i>Box 6: MCI WorldCom/Sprint</i> .....	59
2. Collective dominance .....	63
3. Potential competition .....	64
C — Remedies .....	64
D — Cooperation .....	66
1. Cooperation with Member States .....	66
2. The international dimension of merger control .....	67
E — Other procedures .....	67
1. Fines; Articles 14 and 15 of the merger regulation .....	67
2. Prevention of barriers to cross-border mergers; Article 21 of the merger regulation .....	68
F — Statistics .....	69
III — State aid .....	71
A — General policy .....	71
1. Modernising State aid control .....	71
2. Increased transparency .....	72
3. Aid for environmental protection .....	72
B — Concept of aid .....	72
1. Origin of resources .....	73
2. Advantage to a firm .....	74
3. Specificity .....	75
4. Effect on trade between Member States .....	75

C — Assessing the compatibility of aid with the common market .....	76
1. Horizontal aid .....	76
2. Regional aid .....	79
3. Sectoral aid .....	80
D — Procedures .....	87
1. Rights of third parties .....	88
2. Recovery of aid .....	88
<i>Box 7: State aid to the Magefesa group — Recovery of aid</i> .....	89
3. Protection of legitimate expectations .....	90
4. Non-execution of previous Commission decisions .....	90
5. Commission's obligation to start proceedings .....	90
6. Preliminary notification obligation .....	90
7. Other provisions of the Treaty .....	90
E — Statistics .....	92
IV — International activities .....	95
A — Enlargement .....	95
1. Accession negotiations .....	95
2. Progress in alignment of competition rules .....	95
3. Implementing rules under the Europe agreements .....	96
4. Extension of Article 87(3)(a) status under the Europe agreements .....	96
5. Technical assistance to the applicant countries .....	97
6. Turkey .....	97
B — Bilateral cooperation .....	97
1. United States .....	97
2. Canada .....	99
3. Japan .....	99
4. Other OECD countries and the EEA .....	100
5. Mediterranean countries .....	100
6. Latin America .....	100
7. Russia, Ukraine, Moldova and the other NIS .....	101
C — Multilateral cooperation .....	101
1. WTO: Trade and competition policy .....	101
2. OECD .....	102
3. Unctad .....	102
4. International Competition Forum .....	102
V — Outlook for 2001 .....	103
1. Legislative and regulatory activities .....	103
2. Supervisory activities .....	103
3. Mergers .....	104
4. State aid .....	105
5. International activities .....	105
Annex — Cases discussed in the report .....	107

## INTRODUCTION

---

1. Competition policy is one of the pillars of the European Commission's action in the economic field. This action is founded on the principle, enshrined in the Treaty, of 'an open market economy with free competition'. It acknowledges the fundamental role of the market and of competition in guaranteeing consumer welfare, in encouraging the optimum allocation of resources and in granting economic agents the appropriate incentives to pursue productive efficiency, quality and innovation. However, the principle of an open market economy does not imply an attitude of blind faith or, possibly, indifference towards the operation of market mechanisms; on the contrary, it requires constant vigilance aimed at preserving those mechanisms. This is particularly true in the present context of markets evolving at a fast pace and becoming increasingly integrated at global level. Besides, at a European level, the 2000 Review of the Internal Market Strategy adopted on 3 May gave a fresh impetus to the creation of a regulatory and institutional framework which stimulates innovation, investment and economic efficiency<sup>(1)</sup>. Promoting competition by improving the business environment is also one of the targets set out in the strategy.

2. Both technological developments and policy initiatives are reshaping the economic environment. Economies are increasingly based on knowledge, as evidenced by the growth of the service sector. Information systems have forced companies to re-evaluate and adapt their commercial relationships with both customers and suppliers and have enabled them to adopt more tightly managed and efficient business practices. We are now beginning to see the emergence of business-to-business (B2B) exchanges that are in the process of revolutionising the management of supply chains. Institutional changes have been added to technological developments. The single market programme culminated in the adoption of a single currency, further integrating markets and enhancing competition between firms. The liberalisation of the network industries has opened many crucial sectors previously closed to competition. These developments affect all aspects of competition policy.

3. The year was marked by intense activity aimed at adapting the rules and practice of competition policy to the new environment. This activity has led to the adoption of new block exemption regu-

lations in the field of horizontal agreements, supplemented by a set of guidelines, while further progress was made towards modernising the rules implementing Articles 81 and 82. New guidelines were issued on vertical restraints to supplement the block exemption regulation adopted in December 1999. More particularly, in the area of car distribution, an evaluation report was issued on the present regulation<sup>(2)</sup>, which will serve as the basis for a review of the car distribution regime in the near future. In the merger field, a simplified procedure for certain categories of cases not giving rise to competition concerns, as well as a notice on remedies, were adopted by the Commission. The Commission also introduced three regulations on the application of the *de minimis* rule to State aid, on aid to small and medium-sized enterprises and on aid for training. Finally, considerable progress was made with Japan in the preparation of a cooperation agreement in the area of competition policy. It is expected that the agreement will be concluded during 2001.

4. Enforcement of competition rules reflected the reality of new markets and business practices. The creation of electronic marketplaces and the use by certain industries of voluntary agreements with environmental aims are just two examples of emerging practices which led to Commission decisions. A large part of the Commission's enforcement activity in 2000 was focused on recently liberalised markets, where a competitive environment is not yet fully established.

5. Competition has as its corollary the constant reallocation of resources from declining firms or sectors to the emerging and fast growing ones. In the realm of the 'new economy' — characterised by its largely intangible nature and by its foundation on knowledge and technology — this process has become extremely rapid. It is of paramount importance that this reallocation should not be hindered and that transformation and restructuring should be allowed to take place smoothly, through mergers, joint ventures and acquisitions. This process is, however, not without danger. Mergers may result in a market structure that is too concentrated, with poorer choice for the consumer and greater scope for collusion between a few remaining producers.

6. In a context where markets are tending to become wider and where the critical mass that is

---

(1) COM(2000) 257 final, 3.5.2000.

(2) Commission Regulation (EC) No 1475/95 of 28.6.1995.

necessary to be an active player is tending to increase, the number and complexity of mergers and alliances that fall under the Commission's scrutiny have been constantly growing during the last few years. In 2000, the Commission took 345 decisions, up by 18 % on 1999. A number of these cases raised substantive issues, which led to developments in the Commission's analytical tools, in particular in the practical application of economic theory.

7. In an ever more competitive and integrated environment, it is particularly important that State aid should not introduce unwarranted distortions into the functioning of markets. In addition to the initiatives to update and rationalise the legislative framework described above, the Commission is convinced of the need to increase transparency in this field and to introduce, to this end, a public register of State aid and a scoreboard. In parallel with the new initiatives, the Commission has focused on the correct application of its decisions, notably concerning the recovery of illegal aid.

8. Two considerations on the international dimension of competition policy are worth noting: first, the fact that the geographical scope of competition cases is widening means that more commercial transactions are falling within the jurisdiction of the growing number of countries that have adopted competition rules. To analyse these cases properly and avoid conflict, the Commission often has to liaise closely and exchange information with other competition authorities. Secondly, the Commission has to pay close attention to the competition aspects of the forthcoming enlargement. Enlargement should not create a major imbalance in terms of State aid or competitiveness. Hence the importance of working with the applicant countries and making sure that the same rules apply with equal effectiveness throughout an enlarged Union.

### Statistics on Commission activity in applying Community competition law in 2000

9. In 2000, the total number of new cases was 1 206, comprising 297 antitrust cases (under Articles 81, 82 and 86), 345 merger cases, and 564 State aid cases. Comparable figures for 1999 were a total of 1 249 new cases, comprising 388 antitrust cases, 292 merger cases, and 569 State aid cases. The slight decrease in the overall number of cases was, there-

fore, due to the reduction in the antitrust field, while the number of State aid cases remains stable and that of merger cases continues to increase and has doubled in the course of the last three years.

10. The remarkable reduction in the number of new antitrust cases can be attributed to recent policy developments. The new block exemption on vertical restraints has drastically reduced the need for notification of this type of agreement. Similarly, the new guidelines on vertical agreements and the publicly debated proposals for new rules on horizontal agreements have clarified the framework for assessment under the competition rules and may have reduced the need for bringing cases to the Commission's attention.

11. A second factor in the reduction of new cases is the drop in the number of complaints. However, the number of complaints has fluctuated widely over the years (112 in 2000, 149 in 1999, 192 in 1998, 177 in 1997, 159 in 1996, 114 in 1995, 170 in 1994 and 110 in 1993), so it is difficult to draw any conclusions.

12. It is interesting to note that almost 30 % of the new cases were opened ex officio. In absolute terms, moreover, ex officio procedures increased over the previous year (from 77 to 84). Taken together with the reduction in notifications, this development is in line with the policy objective of dealing with standard agreements through legislative action, while using the available resources to pursue a more proactive policy and concentrate on the most dangerous anticompetitive practices.

13. The total number of cases closed was 1 209, comprising 379 antitrust cases, 355 merger cases, and 475 State aid cases <sup>(1)</sup>. Comparable figures for 1999 were 1 321 cases closed, comprising 582 antitrust cases, 279 merger cases and 460 State aid cases <sup>(2)</sup>. The intense legislative action and some resource-intensive cartel cases had the effect of slowing down the antitrust activity; nevertheless, the number of cases closed (379) was considerably higher than that of new cases (297), further reducing the backlog.

14. As witnessed already in 1999, the globalisation of markets, the introduction of the euro, the

<sup>(1)</sup> The figure for State aid is based on the number of decisions taken by the Commission. Given that some decisions cover more than one case, the figure is a slight underestimate of the number of State aid cases closed by Commission decision.

<sup>(2)</sup> The figure for State aid in 1999 was revised after the 1999 Competition Report was published.

completion of the single market and the forthcoming enlargement continued to generate high levels of merger activity in Europe. Overall, 345 new cases were notified during 2000 (+ 18 %) and in total, 345 formal decisions were taken during the year, 28 % up on 1999.

15. In the field of State aid, the number of notifications remained remarkably stable compared with

1999 (469 in 1999 and 2000); this was also true of the number of proceedings initiated (67 against 68 in 1999) and negative final decisions (26 against 33 in 1999). The number of cases pending, however, has increased significantly (564 against 428 in 1999), which can be partly explained by the numerous proceedings initiated since 1997 taking up a large amount of resources.

### **Box 1: European Competition Day in Lisbon and Paris**

When he took up office, Commissioner Monti informed Parliament of a series of measures to provide the public with more information on competition policy and to make Commission activities more transparent and accessible to consumers, savers, public service users and employees in the Community. The public needed to be better informed about the benefits that competition policy could bring them in terms of diversity of supply, improved product and service quality and a downward trend in prices. This was the background to the decision to hold a European Competition Day every six months in the country holding the Council Presidency.

#### *European Competition Day in Lisbon (9 June 2000)*

The first European Competition Day took place in Lisbon in June 2000, and was deemed a success by its organisers.

It formed part of a larger event concerning competition policy which lasted two days, the first day being devoted to national issues.

The first round table followed on from Mr Monti's opening address devoted to the positive impact of competition policy on the day-to-day lives of EU citizens. A speech by Ms Randzio-Plath, Chair of the European Parliament Committee on Economic and Monetary Affairs, expressed strong support for the views expressed by Mr Monti. She put particular emphasis on the part played by suppliers of general interest services in a market economy in which competition rules applied.

Matters of a more specific nature were also discussed at the European Day, i.e. motor vehicle distribution in Europe and the application of competition rules to the professions.

Some 250 people attended, representing the groups usually interested in competition policy, e.g. lawyers, business representatives, competition authorities, embassy staff, etc. Consumer associations were less well represented.

This inaugural event made it possible to introduce the public to several information tools: a video on competition policy, explanatory posters and display panels and a new information brochure for the general public entitled 'Competition policy in Europe and the citizen'.

#### *European Competition Day in Paris (17 October 2000)*

The second Competition Day took place in Paris on the morning of 17 October 2000.

Commissioner Monti opened the event by calling on consumers and their associations to be responsible players in the market. Paraphrasing Pierre Mendès France, he said that 'To consume is to choose. Freely and responsibly'.

The first round table on the liberalisation of telephony assessed the positive effects of opening up the sector to competition, apart from the controversial impact of the increase in telephone subscription charges. A

---

very broad consensus was reached on the view that competition and solidarity were not incompatible. And that regulated competition was the best guarantee for Union citizens. Lastly, some anxiety about the convergence between telecoms, the media and the Internet was expressed by consumers.

The second round table dealt with retail products. One of the major points arising out of the discussion was the negative impact on the individual consumer of the increase in the purchasing power of the retailing and distribution industry: curtailed supplies, standardised goods, etc.

The amphitheatre at the conference centre was filled with over 300 people. A good half of those present was composed of representatives of consumer associations. The Belgian, Swedish, United Kingdom and German authorities attended the discussions, as did a representative of BEUC (European Bureau of Consumers' Unions).

The representatives of the consumer associations played an active part in the discussions. They made statements and asked a number of questions. The number and vigour of the statements lent a decidedly 'consumerist' tone to the exchanges with participants, even if the questions did not always concern the 'competition' aspects but 'consumer protection'.



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

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

16. On 27 September, the Commission adopted a proposal for a regulation designed to modernise the procedural rules for implementing Articles 81 and 82 of the Treaty, which lay down the Community competition rules applicable to restrictive practices between businesses and abuses of a dominant position. This is the most important legislative initiative in Europe in the competition field since the adoption of the merger regulation in 1989. It will greatly facilitate the strengthening of a common competition culture in the EU.

17. Clarification and review of the substantive rules is an essential pillar in the overall reform process. The review is aimed at simplifying the rules and reducing the regulatory burden for companies, especially companies lacking market power, while ensuring more effective control of agreements implemented by companies holding significant market power. The Commission has recently completed work in the field of vertical agreements with the adoption of a new block exemption regulation and guidelines concerning distribution. These cover all sectors with the exception of car distribution.

18. In the area of horizontal agreements the Commission has adopted revised block exemption regulations for research and development agreements and specialisation agreements. These regulations are complemented by guidelines on the applicability of Article 81 to horizontal cooperation agreements. The horizontal guidelines recognise that companies need to respond to increasing competitive pressure and a changing marketplace driven by globalisation, the pace of technological progress and the generally more dynamic nature of markets. Cooperation can often be a way of sharing risk, saving costs, pooling know-how and launching innovation faster.

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

19. On 22 December 1999, 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 prac-

tices <sup>(1)</sup>. The new block exemption regulation has a wide scope and block exempts, up to a market share threshold of 30 % and subject to a limited number of conditions and the exclusion of ‘hard-core’ restrictions, all vertical agreements and concerted practices between two or more undertakings <sup>(2)</sup>. Above the 30 % threshold, agreements are not presumed to be illegal but may require individual examination. In order to assist undertakings in carrying out such an examination, the Commission approved on 24 May a set of guidelines on vertical restraints <sup>(3)</sup>.

20. The guidelines explain:

- which vertical agreements generally do not distort competition and therefore fall outside Article 81(1). This concerns in particular agreements between SMEs, true agency agreements and agreements where neither the supplier nor the buyer holds a significant degree of market power;
- which vertical agreements benefit from the safe haven created by the block exemption regulation. This is achieved by describing the conditions for application of the regulation;
- which circumstances may require the benefit of the block exemption regulation to be withdrawn by the Commission or by Member State authorities. Withdrawal may in particular be necessary when access to the relevant market is significantly restricted by the cumulative effect of parallel networks of similar vertical agreements applied by competing suppliers or buyers. It may also be required when, in the context of exclusive supply or exclusive distribution, the buyer has significant market power on the downstream market where he resells the goods or provides the services;
- a number of market definition and market share calculation issues that may arise when companies apply the 30 % market share threshold for application of the block exemption regulation;
- the enforcement policy of the Commission in cases above the 30 % market share threshold not covered by the block exemption regulation. A general framework of analysis is provided

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

<sup>(2)</sup> See points 8–19 of the 1999 Competition Report.

<sup>(3)</sup> Commission notice — guidelines on vertical restraints (OJ C 291, 13.10.2000).

and applied to the most important specific vertical restraints, such as single branding, exclusive distribution and selective distribution.

## 2. New Commission competition rules in the field of horizontal cooperation agreements

### 2.1. Introduction

21. On 29 November, the Commission adopted Regulation (EC) No 2658/2000 on the application of Article 81(3) of the Treaty to categories of specialisation agreements <sup>(1)</sup>, Regulation (EC) No 2659/2000 on the application of Article 81(3) of the Treaty to categories of research and development agreements <sup>(2)</sup>, and guidelines on the applicability of Article 81 of the Treaty to horizontal cooperation agreements <sup>(3)</sup> <sup>(4)</sup>. The new regulations replace the two existing block exemption regulations on specialisation agreements <sup>(5)</sup> and on research and development (R & D) agreements <sup>(6)</sup>, which expired on 31 December 2000. The guidelines, while replacing two existing notices (these provided guidance on certain types of cooperation agreement falling outside Article 81 <sup>(7)</sup> and the assessment of cooperative joint ventures <sup>(8)</sup>), cover a wider range of the most common types of horizontal agreement and complement the block exemption regulations on R & D and specialisation.

22. Companies need to respond to increasing competitive pressure and changes in the marketplace driven by globalisation, the pace of technological progress and the generally more dynamic nature of markets. Cooperation can be a means of shar-

ing 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 marketplace. Consumers will share these gains, provided that effective competition is maintained in the market. This review was necessary not only to adapt the rules to new market developments and economic thinking but also, in the context of modernisation, with a view to giving clear guidance to courts and national authorities. The common objective is to simplify the rules and reduce the regulatory burden for companies, especially companies lacking market power.

23. The new rules embody a shift from the formalistic regulatory approach underlying the current legislation towards a more economic approach in the assessment of horizontal cooperation agreements. The basic aim of this new approach is to allow collaboration between competitors where it contributes to economic welfare without creating a risk for competition.

### 2.2. The block exemption regulations

24. Compared with the existing regulations, the new regulations have been revised to make them more user-friendly and to increase their scope and clarity. The old block exemptions for R & D and specialisation not only defined categories of agreements that were covered, but also listed the exempted clauses. These so-called 'white lists' are deleted from the new block exemption regulations, which instead exempt all R & D and specialisation agreements, subject to certain conditions and the exclusion of hardcore restrictions. The new instruments thus move away from a clause-based approach and give the parties to such agreements greater contractual freedom.

25. In addition to this increase in flexibility, the following principal changes have been incorporated in the new R & D block exemption regulation:

- deletion of the requirement to draw up a framework programme prior to entering into R & D agreements;
- increase in the market share threshold for exemption from 20 to 25 %. This increase recognises that R & D collaboration is particularly conducive to the creation of efficiencies, while on the other hand restrictive effects

<sup>(1)</sup> OJ L 304, 5.12.2000, p. 3.

<sup>(2)</sup> OJ L 304, 5.12.2000, p. 7.

<sup>(3)</sup> OJ C 3, 6.1.2001.

<sup>(4)</sup> The two block exemption regulations and the guidelines are available on the Competition DG's web site at: <http://europa.eu.int/comm/competition/antitrust/legislation/>.

<sup>(5)</sup> Commission Regulation (EEC) No 417/85 of 19 December 1984 on the application of Article 85(3) of the Treaty to categories of specialisation agreements (OJ L 53, 22.2.1985), as last amended by Regulation (EC) No 2236/97 (OJ L 306, 11.11.1997).

<sup>(6)</sup> Commission Regulation (EEC) No 418/85 of 19 December 1984 on the application of Article 85(3) of the Treaty to categories of research and development agreements (OJ L 53, 22.2.1985), as last amended by Regulation (EC) No 2236/97 (OJ L 306, 11.11.1997).

<sup>(7)</sup> Commission notice concerning agreements, decisions and concerted practices in the field of cooperation between enterprises (OJ C 75, 29.7.1968).

<sup>(8)</sup> Commission notice concerning the assessment of cooperative joint ventures pursuant to Article 85 of the EEC Treaty (OJ C 43, 16.2.1993).

- are less likely than for other types of cooperation;
  - if the agreement provides for joint distribution of products that have been jointly developed, the market share threshold will be increased from 10 %, as at present, to 25 %;
  - increase in the safety margin for market share fluctuations from 2 to 5 %;
  - increase in the period during which joint exploitation of jointly developed products is covered irrespective of market share. This period has been increased from five to seven years in view of the fact that there are a number of industries where R & D investments are unlikely to be recouped within five years. The same seven-year period is allowed for certain restrictions that accompany joint exploitation;
  - deletion of the non-opposition procedure. This procedure is no longer necessary as all non-hardcore restrictions are exempted subject to certain conditions;
  - a provision has been added which allows the withdrawal of the block exemption in those cases where an agreement would eliminate effective competition in R & D on a particular market. This is necessary to protect competition in innovation, as it would not be feasible to apply the normal market share thresholds of the regulation to totally new products.
26. As regards the new specialisation block exemption regulation, the principal changes are as follows:
- extension of the scope of the regulation to cover unilateral specialisation between competitors. This is a form of outsourcing, where one party agrees to cease manufacture of certain products and to purchase them from another party, who agrees to manufacture and supply them. Unilateral specialisation between competitors has been covered because of its increased importance in many industries and its potential to create efficiencies. Unilateral specialisation between non-competitors is, subject to certain conditions, covered by the vertical block exemption regulation <sup>(1)</sup>;
  - in the case of reciprocal specialisation, there is a requirement to incorporate a cross-supply obligation so that no party leaves the market downstream of production. This is necessary to prevent parties from partitioning markets under the guise of a reciprocal specialisation agreement;
  - deletion of the turnover threshold;
  - increase in the safety margin for market share fluctuations from 2 to 5 %, as in the R & D block exemption regulation;
  - possibility of exclusive supply or exclusive purchase obligations.
27. Both regulations provide for a transitional period of 18 months during which agreements which do not satisfy the conditions of the new regulations but which satisfy the conditions for exemption provided for in the old regulations continue to be covered.

### 2.3. *The guidelines*

28. The guidelines complement the block exemption regulations. They describe the general approach which should be followed when assessing horizontal cooperation agreements. They are thus applicable to R & D and production agreements not covered by the block exemptions as well as to all other common types of competitor collaboration. The following types are covered: R & D, production, purchasing, marketing, standardisation and environmental agreements. The guidelines describe the general approach which should be followed when assessing horizontal cooperation agreements and set out a common analytical framework. This will help companies to assess with greater certainty whether or not an agreement restricts competition and, if so, whether it would qualify for an exemption.

29. All types of horizontal cooperation agreement covered are analysed according to a common analytical framework. This framework can be summarised as follows: a horizontal cooperation agreement is only able to restrict competition if it is likely to reduce competition in the market to such an extent that negative market effects as to prices, output, innovation or the variety or quality of goods and services can be expected. To cause a restriction of competition the parties normally need appropriate tools to coordinate their behaviour and a degree of market power. Consequently, coopera-

<sup>(1)</sup> Commission Regulation (EC) No 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices (OJ L 336, 29.12.1999).

tion has to be assessed in its economic context taking into account both the nature of the agreement and the parties' combined market power, which determine — together with other structural factors — the capability of the cooperation to reduce overall competition to such a significant extent.

30. These two criteria normally have to be assessed together. There are, however, some instances where the nature of the cooperation indicates from the outset that it is caught by Article 81(1). This concerns primarily agreements that have the object of restricting competition by means of price fixing, output limitation or sharing of markets, customers or sources of supply. These so-called 'hardcore' restrictions are considered to be the most harmful, because they directly interfere with the outcome of the competitive process. It can therefore be presumed that these restrictions have negative market effects and do not result in any efficiency gains or benefits to consumers. They are therefore almost always prohibited.

31. On the other hand, there are also some horizontal agreements regarding which it can be said from the outset Article 81(1) does not generally apply. These include agreements between non-competitors, agreements between competing companies that cannot independently carry out the project or activity covered by the cooperation, or cooperation concerning an activity which does not influence the relevant parameters of competition. These cooperation agreements could only come under Article 81(1) if they involve firms with significant market power and are likely to cause foreclosure problems vis-à-vis third parties.

32. All other agreements need to be examined in the light of each of the two criteria (nature of the agreement and market power and market structure) in order to decide whether they fall under Article 81(1).

33. The discussion by category of agreement makes it easier to take account of specific competition problems related to the different forms of cooperation. It also addresses the most common types of combination, e.g. joint R & D with subsequent joint production.

34. In the absence of hardcore restrictions and below a certain level of market power, defined in terms of market share, the guidelines provide so called 'safe havens' for purchasing agreements and marketing agreements. Similar to coverage by a block exemption regulation, once inside these

safe havens, economic operators do not normally have to assess the impact of their agreements on the market.

35. In the case of purchasing agreements, while recognising that there is no absolute threshold which indicates that buying cooperation creates some degree of market power and thus falls under Article 81(1), the guidelines stress that in most cases it is unlikely that such market power exists if the parties to the agreement have a combined market share of less than 15 % on the purchasing market(s) as well as a combined market share of less than 15 % on the selling market(s). Where an agreement below these market share thresholds falls under Article 81(1), the guidelines state that below those levels of market share it is likely to fulfil the conditions of Article 81(3) <sup>(1)</sup>.

36. In the case of marketing agreements which do not involve the fixing of prices, the guidelines stress that, in most cases, it is unlikely that a sufficient degree of market power exists if the parties to the agreement have a combined market share of less than 15 %. Where an agreement below this level of market share falls under Article 81(1), the guidelines state that below this level of market share it is likely to fulfil the conditions of Article 81(3) <sup>(2)</sup>.

### 3. Proposal for a new regulation implementing Articles 81 and 82 of the EC Treaty

37. On 27 September, the Commission adopted a proposal for a new regulation implementing Articles 81 and 82 of the EC Treaty <sup>(3)</sup>. The new regulation is designed to replace Regulation No 17 of 1962 as well as the procedural rules contained in Regulations (EEC) Nos 1017/68, 4056/86 and 3975/87 regarding transport. The implementation of the competition rules in the agricultural sector is to remain governed by Regulation No 26 of 1962.

38. The proposal for a new implementing regulation follows on from the Commission's White Paper of 28 April 1999 on the modernisation of the rules implementing Articles 85 and 86 (now

<sup>(1)</sup> See paragraph 130 of the guidelines.

<sup>(2)</sup> See paragraph 149 of the guidelines.

<sup>(3)</sup> COM(2000) 582, not yet published.

Articles 81 and 82) of the EC Treaty <sup>(1)</sup>, which launched a large-scale public and academic debate. While preparing the proposal, the Commission consulted a large number of interested parties. In particular, the Commission held in-depth discussions on a range of topics related to the implementation of the White Paper proposals with a working group of experts from the Member States' competition authorities. Experts from the EFTA Surveillance Authority and the EFTA member countries' competition authorities were included in the consultations. In drafting the proposal, the Commission also took into account the results of the public consultation following the White Paper and, in particular, the views expressed on the White Paper in the resolution adopted by the European Parliament on 18 January 2000 and the opinion delivered by the Economic and Social Committee on 8 December 1999. Both institutions supported the Commission's approach in the White Paper while underlining the importance of ensuring consistent application of Community competition law in a system of parallel powers and maintaining an adequate level of legal certainty.

39. The general thrust of the proposal for a new implementing regulation is based on the White Paper. In particular, the Commission's proposal aims at bringing about the transition from the notification and authorisation system of Regulation No 17, which has become inefficient for the protection of competition in the Community, to an implementing system based on the direct applicability of Article 81 as a whole. The changeover to the new system is provided for in Articles 1 and 6 of the proposal: Article 1 lays down the principle of the direct applicability of Article 81 as a whole, and Article 6 confers on national courts the power also to apply Article 81(3) when Article 81(1) is invoked.

40. In the light of the large-scale debate and taking into account concern about the risk of 'renationalisation' of competition law (voiced in particular by the European Parliament) as well as fears about legal certainty for companies in the new system, the Commission refined its proposals in a number of respects. As a result, the proposed new regulation focuses on three major objectives:

- more efficient enforcement;
- a more level playing field in the single market;

- an appropriate degree of legal certainty for companies.

### 3.1. *More efficient enforcement*

41. The proposed system will result in increased enforcement of Community competition rules. A larger number of enforcers will apply the rules as — following the removal of the Commission's exclusive powers to take an exemption decision under Article 81(3) — not only the Commission, but also national competition authorities and national courts will be able to apply Articles 81 and 82 in their entirety. In addition, the abolition of the notification and authorisation system will allow the Commission to focus on the detection and prosecution of the most serious infringements.

42. Specific elements of the proposal are aimed at reinforcing the overall effect of the transition to a legal exception system. For example, the Commission's proposal makes provision for more efficient enforcement by national authorities through horizontal cooperation. Article 12 of the proposal creates a legal basis for the exchange of all kinds of information between the Commission and the Member States' competition authorities, and for using such information as evidence in proceedings which apply EC competition law.

43. In order to guarantee the protection of competition, it is also necessary to ensure that the Commission's powers of investigation are sufficient and effective. From the time the White Paper was published and in the light of the reactions it elicited, the Commission's thinking in this area has evolved on several points. The proposal contains three main improvements to ensure more effective application of Articles 81 and 82.

44. First, it is proposed that the powers available to Commission officials in carrying out inspections should be adapted. The experience of the national competition authorities and the Commission shows that incriminating documents are more and more frequently kept at and discovered in private homes. Under the proposed regulation, Commission inspectors will therefore be empowered, subject to judicial authorisation by the responsible national court, to search the private homes of company employees if it is suspected that business documents are being kept there. It is further proposed that Commission inspectors should be empowered to seal cupboards or offices in order to ensure that documents are

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

not removed and destroyed during inspections. Finally, Commission inspectors should be entitled to ask oral questions relating to the subject matter of the inspection.

45. Secondly, abandoning the idea set out in the White Paper of centralised judicial review by the Court of First Instance, the Commission now proposes to codify the rules governing judicial orders at national level. This will apply in circumstances where an undertaking refuses to permit the Commission to carry out an inspection, and will clarify the scope for intervention by national judges in accordance with the limits already established by the Court of Justice.

46. Thirdly, as announced in the White Paper, the Commission proposes to adapt the fines for breaches of procedural rules and the periodic penalty payments, which were set in absolute terms in the 1960s. A system based on turnover percentage figures is considered the appropriate solution.

### *3.2. Regulating the relationship between Articles 81 and 82 and national competition laws*

47. The public consultation as well as Parliament's resolution and the Economic and Social Committee's opinion identified the need to ensure a level playing field throughout the single market as a major challenge of the reform.

48. In the light of these concerns and taking into account the scope for more efficient enforcement, the Commission has proposed a new article, on the basis of Article 83(2)(e) of the EC Treaty, to regulate the relationship between Articles 81 and 82 and national competition laws (Article 3 of the proposal). This article stipulates that when an agreement or practice is capable of affecting trade between Member States, only Community competition law applies.

49. The rationale behind this article in the proposal is as follows: in the present system, the same agreement or conduct may be subject to Community competition law and several national competition laws. In accordance with the principle of primacy of Community competition law, established by the Court of Justice in *Walt Wilhelm* <sup>(1)</sup>, national law can be applied only in so far as it does not prejudice the uniform applica-

tion of the Community competition rules throughout the single market. The primacy principle resolves clear conflicts in favour of Community law. It is not, however, effective in preventing inconsistencies and differences in the treatment of agreements and practices affecting trade between Member States under different national laws.

50. Article 3 ensures that agreements and practices capable of affecting cross-border trade are scrutinised under a single set of rules, thereby promoting a level playing field throughout the Community and eliminating the costs which the parallel application of Community law and national laws create for both competition authorities and business. The provision does not limit the scope for action by national competition authorities, which will be able to apply Community law. Experience gained at national level can contribute to the development of Community competition policy within the network of competition authorities.

51. The article also ensures that all cases concerning agreements and practices affecting trade between Member States are subject to the cooperation machinery inside the network, and eliminates the risk that the proper functioning of the network might be jeopardised by the concurrent application of Community competition law and national competition law.

### *3.3. Cooperation in the network between the Commission and the national competition authorities*

52. With regard to national competition authorities, the creation of a network in which all members apply the same law and policy will greatly promote efficiency, consistency and a level playing field throughout the single market. The formal basis for establishing the network is to be found in Article 11 of the proposed regulation.

53. The Commission is confident that close cooperation in the network will foster the development of a common competition culture throughout the Community. Given the crucial importance of consistent application, certain formal mechanisms have additionally been proposed. Article 11(4) of the proposed regulation requires national competition authorities to consult the Commission before adopting prohibition decisions, decisions accepting commitments and decisions withdrawing the benefit of a block exemption regulation. All such decisions have direct repercussions for the

<sup>(1)</sup> Case 14/68 [1969] ECR I.

addressees. It is therefore important to ensure that they are consistent with the general practice of the network. In the event of substantial disagreement within the network, the Commission retains the power to withdraw a case from a national competition authority by itself initiating proceedings in that case.

54. The Commission has no intention of using the mechanisms of the proposed Article 11 as a basis for becoming involved in the detail of Member State competition authorities' decisions in a systematic manner. These mechanisms are intended as a safety net to detect and remedy serious problems of inconsistent application.

55. In order to clarify further the basis for cooperation in the network, the Commission is in the process of preparing a draft notice on cooperation in the network, including in particular clear but flexible arrangements for case allocation based on the concept of the best-placed authority. This will replace the notice currently in force. Subsequently, an in-depth discussion with the Member States' competition authorities should lead to the adoption of a commonly shared understanding that will enable the network to start functioning.

#### 3.4. *Enhanced cooperation with national courts*

56. The Commission's proposal is also aimed at reinforcing cooperation between the Commission and national courts in order to promote consistent application of Articles 81 and 82.

57. Article 15 of the proposed regulation entitles national courts to obtain information in the Commission's possession which they need for the purpose of applying Articles 81 and 82. They can also ask the Commission for an opinion on questions relating to the application of the Community competition rules. The Commission will set out detailed rules on its practice in this field in a notice, to replace the existing notice on cooperation between national courts and the Commission. These rules will include a deadline within which the Commission must reply to requests from national courts.

58. The same article would introduce a right for the Commission and national competition authorities to make submissions to national courts in written or oral form. In the case of national competition authorities, the power is limited to the courts

of their own Member State. The Commission may act under this provision only in the Community public interest (as *amicus curiae*), i.e. not in the interest of one of the parties. This provision is aimed in particular at permitting the Commission and national competition authorities to draw the courts' attention to issues of considerable importance for the consistent application of Community competition law. Using this mechanism the Commission would for example be able to bring to the attention of the courts cases from other Member States in which an identical or a similar problem was raised. The national courts are not bound to follow an opinion expressed by the Commission or a national competition authority. The information from the Commission may however be useful to courts when considering whether to make a reference to the European Court of Justice.

#### 3.5. *Ensuring an appropriate level of legal certainty for companies*

59. Under the existing Regulation No 17 an agreement or decision caught by Article 81(1) can become valid, i.e. enforceable before a civil court, only if it is notified to and exempted by the Commission. In practice, most notified cases are closed by a non-binding administrative letter from the Commission departments ('comfort letter').

60. The proposed regulation removes the bureaucratic obstacles connected with the notification and authorisation procedure while maintaining an adequate degree of legal certainty. In particular, under the proposed new system agreements and decisions which satisfy the conditions of Article 81(3) are valid and enforceable *ab initio* with no administrative decision to that effect being required. Undertakings can therefore rely on civil enforceability as an element of improved legal certainty independently of any action by an administrative authority.

61. The proposed regulation does not remove the need for undertakings to assess their business transactions in order to verify whether they are in compliance with the competition rules. Under the present Regulation No 17, this analysis is carried out by undertakings when preparing a notification. The proposal treats the application of the Community competition rules in the same way as other areas of law where undertakings are required to ascertain themselves that their behaviour is lawful.

62. In the field of Community competition law, the companies' task of assessing their behaviour is facilitated by block exemptions and Commission notices and guidelines clarifying the application of the rules. Alongside the current reform, the Commission commits itself to making an even greater effort in this area. In this context, Article 28 of the proposed regulation confers on the Commission a general power to adopt block exemption regulations. This power will ensure that the Commission is in a position to react sufficiently swiftly to new developments and changing market conditions.

63. In addition, under the new system, with a larger number of decision-makers applying Article 81(3), case-law and practice on the interpretation of that provision will rapidly develop where it does not yet exist, thereby inherently reinforcing the framework for assessment. The Commission will further contribute to this development by continuing to set policy through its own decisions in individual cases. In addition to prohibition decisions, the proposed regulation provides that in cases where it is in the Community public interest to do so, the Commission, acting on its own initiative, can adopt decisions finding that no infringement has been committed. This will permit the Commission to set out its position in a landmark case so as to clarify the law for all companies that find themselves in similar situations.

64. To address the rare situations in which a genuine problem of legal predictability arises, the Commission will remain open to discussing specific cases with undertakings where necessary. In appropriate cases the Commission envisages furthermore to provide guidance to companies in the form of opinions. This possibility must remain at the discretion of the Commission so as not to jeopardise the intended refocusing of the Commission's enforcement activities. The Commission is in the process of preparing a notice on the mechanism for further guidance that will set out the criteria under which the Commission will examine requests for opinions as well as the practical arrangements for these requests.

### *3.6. State of play in the legislative process*

65. The Commission proposal has been transmitted to the Council, the European Parliament and the Economic and Social Committee.

66. A Council working group has been discussing the proposal since the beginning of October. On 5 December, the Industry Council took note of progress in the working group. Work will continue under the Swedish presidency in 2001.

67. The European Parliament has referred the proposal to its Committee on Economic and Monetary Affairs, and Mr Evans (PPE/UK) has been appointed rapporteur. The Committee on Economic and Monetary Affairs held a first exchange of views on 21 November. A public hearing took place on 27 February 2001. The European Parliament expects to adopt its resolution in June 2001.

## **B — Enforcement of Articles 81, 82 and 86**

### **1. Article 81**

#### *1.1. Cartels*

68. Cartels are secret horizontal agreements concluded by the main economic operators in a given market in order to eliminate competition between them, artificially raise prices and restrict output. These attempts to replace a competitive environment — the driving-force of a market economy — with coordinated and centrally controlled regulation of the market are by far the most destructive infringements of competition law.

69. Cartel participants conspire to maintain an illusion of competition while in reality customers have no effective choice and must pay higher prices. This has an immediate effect on the whole chain of supply and ultimately affects the end consumer. International cartels are estimated to represent a drain of hundreds of millions of euros on the European economy. Moreover, since cartel prices are commonly fixed in line with the costs of the least competitive producer, they create disincentives for more efficient companies to improve product quality, technology and generally rationalise production and sales methods.

70. In a context of economic globalisation where the potential damage caused by cartels is increasingly severe, the Commission reaffirmed its commitment to detecting and punishing them with the utmost determination. In this respect, after the creation of a specialised cartel unit in December 1998, the far-reaching reform of Regulation No 17, cur-



rently under discussion, will be a major element in stepping up the European Community's fight against cartels. Indeed, the Commission is proposing a significant reinforcement of its powers of investigation so as to be better equipped to meet the challenge of increasingly active and sophisticated cartels.

71. Since 1998, the number of cartel cases investigated by the Commission has increased dramatically. Most of these investigations were still ongoing in 2000 and are likely to result in prohibition decisions in the course of 2001. This significant increase in the number of cases is largely due to the positive effects of the Commission's 1996 notice on the non-imposition or reduction of fines in cartel cases (the 'leniency notice')<sup>(1)</sup>. An increasing number of companies that are or have been involved in hardcore anticompetitive activities are now considering the benefits they could receive through the leniency programme by cooperating with the Commission.

72. While cartel investigations remain in principle confidential until a final decision is adopted, press releases may be issued in specific circumstances, where appropriate. The Commission may, for instance, do this when an investigation was triggered by complaints, and/or when it wants to bring a case to third parties' attention. In this respect, the Commission confirmed in July the existence of an ongoing cartel investigation in the vitamins sector. It also announced in the same month the opening of proceedings against nearly 120 banks and banking associations with regard to their possible participation in price-fixing activities concerning charges applicable to the exchange of currencies in the euro zone.

73. Three formal decisions prohibiting cartels were adopted in 2000, in the maritime sector, the animal feed industry and the chemicals industry.

#### FETTCSA

74. On 16 May, the Commission imposed fines totalling just under EUR 7 million on 15 liner shipping companies for agreeing not to offer discounts on their published tariffs. The companies were members of the now defunct Far East Trade Tariff Charges and Surcharges Agreement (FETTCSA) and comprised the members of the Far Eastern Freight Conference (FEFC) liner shipping con-

ference as well as the FEFC's principal competitors. They included Hapag-Lloyd (Germany), Maersk Sealand (Denmark) and P&O Nedlloyd (UK). The addressees of the decision discussed possible ways of aligning their commercial practices concerning charges and surcharges. This led to an agreement not to discount public tariffs<sup>(2)</sup>.

75. The Commission found that that agreement infringed the cartel prohibition enshrined in Article 81 of the EC Treaty and rejected the companies' contention that FETTCSA was merely a 'technical agreement' permitted under the competition rules applicable to shipping services.

76. The Commission calculated the fines with reference to its published guidelines. However, whereas a horizontal price agreement between competitors with high market shares should normally be considered a 'very serious' infringement attracting fines of at least EUR 20 million per company, it was found appropriate in this case to class the infringement as simply 'serious'. An agreement not to discount was ultimately considered less harmful than actually fixing prices. The fact that any harmful effects were likely to have been of short duration was also taken into account.

77. The Commission also took account of the fact that the FETTCSA agreement was abandoned immediately after the companies received a statement of objections in 1994 and that no more meetings had taken place after a warning letter was sent to the companies by the Commission in 1992. Further considerations were the fact that the Commission had received a limited amount of cooperation from the parties and the length of the proceedings, due largely as this was to the existence of other, more important, cases in this sector.

#### The lysine cartel

78. On 7 June, the Commission imposed fines totalling EUR 110 million on five companies for operating a global price-fixing cartel for lysine, the most important amino acid used in animal foodstuffs for nutritional purposes (amino acids are the building blocks of proteins). The Commission's investigation found that Archer Daniels Midland Co (United States), Ajinomoto Co (Japan), Cheil Jedang (Korea), Kyowa Akko (Japan) and Sewon (Korea) fixed lysine prices worldwide, including in the European Economic Area. In order to main-

<sup>(1)</sup> OJ C 207, 18.7.1996.

<sup>(2)</sup> OJ L 268, 20.10.2000.

tain the fixed prices, the five companies also fixed sales quotas and exchanged sensitive information from at least July 1990 to June 1995 <sup>(1)</sup>.

79. The interest of the decision lies primarily in the methodology that the Commission followed to set the fines at the above levels. This is borne out by the fact that the major part of the decision's legal assessment deals with the question of fines and the arguments advanced by the parties concerning this issue. In the decision, the Commission not only applied the principles set out in its 1998 guidelines concerning the method of setting fines (the 'methodology guidelines') <sup>(2)</sup>; it also applied for the first time its 1996 notice on the non-imposition or reduction of fines in cartel cases (the 'leniency notice'), to take account of cooperation offered by two cartel participants from the very beginning of its investigation, as well as lesser degrees of cooperation later offered by the other participants <sup>(3)</sup>.

80. The conspiracy prohibited by the Commission's decision is a straightforward, hard-core price and sales quota cartel that is per se illegal. None of the companies actually contested the facts. They operated the cartel from at least July 1990 to June 1995. Two participants joined the cartel only in mid-June 1992 (ADM and Cheil Jedang). The Commission started its investigation in July 1996, shortly after the US antitrust authorities had charged several cartel participants with engaging in an illegal conspiracy. It did so when one of two ringleaders of the cartel (Ajinomoto, the other one being ADM) decided to inform the Commission about the existence of the cartel between June 1992 (when ADM entered the EEA lysine market) and June 1995.

81. In order to set the basic amount of the fines, the Commission first of all assessed the gravity of the infringement. In this respect, it classes the cartel as a very serious infringement with a real impact on the relevant EEA market in so far as it has led to price levels which were higher than would have been the case under normal conditions of competition. The Commission explains, however, that there are grounds for differential treatment of the five cartel participants. It indeed takes account of the considerable disparity between their size and thus between their capacity to cause significant

damage to the EEA customers. Worldwide turnover is taken as the basis for comparing their relative size because it is this turnover that enables the Commission to assess the real resources and importance of the companies involved. On this basis, the Commission groups together, on the one hand, ADM and Ajinomoto and, on the other hand, the other three, much smaller, companies. In the context of gravity, the Commission also explains that it does not take account of the criminal fines imposed by the US and Canadian antitrust authorities because — according to the information provided by those authorities — those fines only took account of the anticompetitive effects that the worldwide cartel produced in their own areas of jurisdiction. Apart from gravity, duration is, according to the 1998 guidelines, the other parameter for setting the basic amount of the fine. In the present case, the duration is medium (three to five years), each extra year adding a further 10 % — again according to the 1998 guidelines — to the amount of the fine.

82. As far as aggravating and mitigating circumstances are concerned, the Commission's observations are as follows. It takes the view that both ADM and Ajinomoto have been ringleaders. This aggravating factor leads to an increase of their fine by 50 %. The Commission identifies few mitigating circumstances in the decision. Cheil Jedang's passive role in the final stages of the cartel earns that company a small reduction of its fine and all cartel participants obtain a decrease of 10 % for having terminated the infringement as soon as a public authority (in this case the US antitrust authorities and the FBI) intervened.

83. Under the leniency notice, the Commission can decide not to impose or to reduce the fines for parties who have cooperated with it in the course of the proceedings. In the present case, the companies cooperated with the Commission at different stages of the investigation and in relation to different periods covered by the investigation into the infringement. For reasons explained at length in the decision, none of the companies meets the conditions for obtaining immunity from fines, a 'very substantial' reduction of the fine (i.e. at least 75 %) or even a 'substantial' reduction (i.e. between 50 and 75 %). All companies obtain, however, a 'significant' reduction of their fine (i.e. between 10 and 50 %) for their cooperation.

84. Ajinomoto and Sewon are the two companies which cooperated most with the Commission.

<sup>(1)</sup> Commission Press Release IP/00/589, 7.6.2000.

<sup>(2)</sup> OJ C 9, 14.1.1998.

<sup>(3)</sup> OJ C 207, 18.7.1996.

Ringleader Ajinomoto handed over decisive (though not complete) information about the cartel before the Commission had started its investigation. Sewon came in later and furnished complete, decisive evidence, essentially in response to the Commission's formal request for information. For these reasons, the Commission grants both companies the highest possible reduction of the fine, i.e. 50 %.

85. Kyowa Hakko Kogyo and Cheil Jedang also provided some material, though not decisive, evidence of the cartel's existence. This earns them a 30 % reduction in the fine.

86. Finally, ADM did not cooperate with the Commission during the fact-finding phase of the procedure. Following the receipt of the Commission's statement of objections, however, it informed the Commission that it did not substantially contest the facts set forth in that document. The Commission considers that ADM qualifies for a reduction in the amount of the fine of 10 %.

87. Since the adoption of the decision, all the companies involved except Ajinomoto have brought an action for annulment before the Court of First Instance <sup>(1)</sup>.

### Re-adoption of decision annulled on procedural grounds

88. On 13 December, the Commission re-adopted a decision imposing a fine of EUR 3 million on the Belgian company Solvay SA for its participation in the soda ash cartel in the late 1980s. Soda ash is a chemical used in the manufacture of glass. During the period considered, Solvay had concluded an agreement with a German company guaranteeing the latter a minimum volume of sales, with Solvay itself buying up any unsold quantity, so as to keep the price of soda ash artificially high in Germany. This constituted an infringement of Article 85 (now 81) of the EC Treaty <sup>(2)</sup>.

89. The original decision imposing a fine on Solvay and the German company was adopted on 19 December 1990, but was finally struck down by the Court of Justice on purely procedural grounds: the decision was authenticated by the signatures of the Commission's President and Secretary-General only after its notification to the addressees. When

a decision is annulled by the Court on purely procedural grounds, the Commission is entitled to re-adopt the decision as far as it remains substantively unchanged. The Commission therefore re-adopted the decision imposing the fine on Solvay. The German company did not appeal against the original decision and has paid its fine of EUR 1 million.

### 1.2. Other forms of agreement

90. Article 81 deals not only with cartels, but also with other forms of agreement between undertakings that restrict or distort competition. This can be the case with cooperation agreements between competitors or distribution agreements between producers and retailers. While such agreements could nevertheless be exempted from the ban imposed by Article 81 — if the conditions set out in Article 81(3) are fulfilled — there are cases when the advantages to consumers of such agreements are not enough to justify the loss of competition that they entail. In those cases the Commission would ask the parties to modify or withdraw their arrangements. Ultimately the Commission may require the arrangements to be dismantled if they have been already implemented, as well as impose fines.

#### 1.2.1. Airline alliances

91. The airline sector is characterised by a number of alliance agreements. This can be explained by the regulatory barriers that currently make it difficult for airlines from different Member States to merge their activities in other ways. The Commission has carried out a number of investigations into agreements between European airlines leading, in the year 2000, to formal steps in the case of the *Qualifyer* alliance and the cooperation between Lufthansa, SAS and Austrian Airlines. These cases are discussed in greater detail in the air transport section of this report <sup>(3)</sup>. The Commission's investigations into a number of other airline alliances are continuing, including some of the transatlantic airline alliances.

#### 1.2.2. Distribution agreements

92. In the case of distribution agreements, the Commission is particularly concerned with the risk that they may result in partitioning of the EU

<sup>(1)</sup> Cases T-224/00 *ADM*, T-220/00 *Cheil*, T-223/00 *Kyowa* and T-230/00 *Sewon*.

<sup>(2)</sup> Press Release IP/00/1449, 13.12.2000.

<sup>(3)</sup> Section I.C, Chapter 2.5.1 on air transport.

market, thereby jeopardising the single market objective.

### *Opel*

93. The right for consumers to buy products more cheaply in other Member States is one of the main benefits of the single market. The Commission showed its determination to guarantee this right by deciding to impose a fine of EUR 43 million on Opel Nederland <sup>(1)</sup>. The Dutch importer of cars of the Opel brand obstructed exports of new cars to final consumers from other Member States, between September 1996 and January 1998. This is the second major Commission decision, following that taken in *Volkswagen* in January 1998, where complaints from consumers prompted the Commission to investigate practices of car manufacturers and their importers and to impose heavy fines <sup>(2)</sup>. It was therefore confirmed that measures taken by undertakings that undermine the proper functioning of the single market constitute a very serious infringement of European competition rules and are dealt with severely.

### *JCB*

94. On 21 December, the Commission adopted a decision finding that the company JCB Service, the parent company of the UK-based JC Bamford Group, had infringed Article 81 of the EC Treaty <sup>(3)</sup>. The distribution agreements for JCB construction and earthmoving equipment concluded between the JCB Group and its network of exclusive distributors were aimed at walling off the French, UK, Irish and Italian markets within the Community. The agreements included a number of measures designed to restrict sales by distributors outside their exclusive territories. The Commission decision requires JCB Service to put an end to the infringement and to pay a fine of EUR 39.6 million.

## 1.2.3. Environmental agreements

### *CECED*

95. Article 6 of the EC Treaty stipulates that Community policy on the environment must be

integrated into the other Community policies. Environmental concerns are in no way incompatible with competition policy, provided that restrictions of competition are proportionate and necessary for achieving the environmental objectives pursued.

96. This principle is clearly illustrated by the *CECED* decision <sup>(4)</sup>, in which the Commission approved for the first time an agreement to stop production with a view to improving the environmental performance of products. The participants in the agreement, nearly all the European producers and importers of domestic washing machines, will stop producing or importing into the EU the least energy-efficient machines in order to reduce the energy consumption of such appliances and thereby reduce pollutant emissions from power generation.

97. Although participants restrict their freedom to manufacture and market certain types of washing machine, thereby restricting competition within the meaning of Article 81(1) of the EC Treaty, the agreement fulfils the conditions for exemption under Article 81(3): it will bring advantages and considerable savings for consumers, in particular by reducing pollutant emissions from electricity generation. The Commission decision to exempt the agreement takes account of this positive contribution to the EU's environmental objectives, for the benefit of present and future generations.

## 2. Articles 82 and 86

98. 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, discriminatory or predatory prices, tying sales, and imposing supplementary obligations unrelated to the product or service sold. The Commission takes the view that undertakings which are free from competitive constraint commit a particularly dangerous abuse when they block or delay — through unfair practices — the entry of competitors into the market. For this reason the Commission is particularly alert to the effects of dominant positions in recently liberalised markets, where there is a danger that the behaviour of the incumbent company will deny the benefits expected

<sup>(1)</sup> Decision of 20 September (OJ L 59, 28.2.2001); IP/00/1028, 20.9.2000. On 1 December, Opel brought an action for the annulment of the Commission's decision before the Court of First Instance (Case T-368/00).

<sup>(2)</sup> See also Section I.C, Chapter 1.1.1 on motor vehicles.

<sup>(3)</sup> Press Release IP/00/1526, 21.12.2000.

<sup>(4)</sup> F-1/36.718; OJ L 187, 26.7.2000; Press Release IP/00/148, 11.2.2000.

from these processes in terms of restructuring, innovation or job creation.

99. Article 86 specifies that competition rules also apply to public undertakings and undertakings to which Member States grant special or exclusive rights, in so far as the application of such rules does not obstruct the performance of the particular tasks assigned to them.

100. Details of decisions adopted or formal proceedings opened in pursuance of Article 82, and Article 86 read in conjunction with Article 82, are given in the sectoral part of this report on postal services <sup>(1)</sup> and air transport <sup>(2)</sup>.

*Selective rebates in the chemical industry:  
re-adoption of decision*

101. On 13 December, the Commission re-adopted two decisions, one imposing a fine of EUR 20 million on the Belgian company Solvay SA and the other a fine of EUR 10 million on the UK company Imperial Chemicals Industries (ICI) plc, with respect to their abuse of their dominant position on the soda ash market during the 1980s. Soda ash is a chemical used in the manufacture of glass. During the period in question, Solvay and ICI had established a system of rebates designed to avoid any danger of real competition in their respective ‘territories’, that is to say western continental Europe in the case of Solvay and the United Kingdom and Ireland in the case of ICI.

102. ICI and Solvay each set up a system of what were called ‘top-slice’ rebates aimed at keeping competitors off the market. Most glass manufacturers, the major users of soda ash, have one main supplier for their core requirements, but like to have a second supplier so as not to be completely dependent on the first. To minimise the competitive impact of second suppliers of this kind Solvay and ICI developed a two-tier pricing system. The core tonnage was sold at the normal price, but the additional quantities that the customer might otherwise have bought from another supplier — the ‘top slice’ — were offered at a substantial (and secret) discount.

103. In some cases this meant that Solvay and ICI offered the marginal tonnage at virtually half price. It was made clear to customers that the special price for the top slice depended on their agreeing to take most, if not all, of their requirements from the dominant producer. The effect was to prevent other producers from entering into genuine competition with Solvay and ICI. In order to compete, they would have had to offer very large discounts on their entire sales volume, whereas Solvay and ICI were doing this only on the top slice. The Commission took the view that these were very serious infringements of Article 86 (now Article 82) and adopted on 19 December 1990 two decisions imposing what were considered heavy fines at the time. The Court of Justice annulled these decisions on purely procedural grounds: in such cases the Commission is entitled to re-adopt the decision as far as it remains substantively unchanged <sup>(3)</sup>.

---

<sup>(1)</sup> Section I.C, Chapters 2.4.3, 2.4.4 and 2.4.5.

<sup>(2)</sup> Section I.C, Chapter 2.5.2.

<sup>(3)</sup> See also point 88.

## Box 2: The impact of competition policy on consumers

Consumers are not the only beneficiaries of competition policy, but they can be regarded as important ones. When competitive conditions are in place, producers try to attract customers by offering them a lower price, higher quality or better service than their competitors. Consumers also benefit in the long run when efforts made by firms to overcome their competitors eventually lead to greater innovation and efficiency in the production of certain goods or services. However, it is not always easy or, indeed, possible to quantify the impact on consumers of competition policy decisions. As pointed out, firms compete not only on prices and there are many other ways in which consumers could gain from certain policy decisions, e.g. by way of greater product variety or better contractual terms. In other cases, competition policy decisions concern an intermediate stage of production, so that the final consumer is not directly involved. When that is the case, antitrust decisions may increase competition in the input markets, creating the conditions for lower end-product prices; it is, however, hard to quantify how much the final consumer is likely to gain.

In this report the reader will find references to many antitrust and merger decisions. Here below we would like to point out a few of them which we believe can illustrate the sort of benefits that consumers can expect from competition policy.

The decision against *Opel Nederland* <sup>(1)</sup> is the second main case concerning obstacles to parallel trade in cars, after that taken in *Volkswagen* in 1998 <sup>(2)</sup>. The decision requires the Dutch importer of Opel cars to lift measures preventing or restricting consumers from other Member States from buying new cars of the Opel make for immediate re-export. This decision is aimed at guaranteeing the right for consumers to buy a car without impediment in the Member State where prices are low. Should parallel imports attain a substantial level, they will exert some pressure on car manufacturers to reduce prices for cars in those Member States where they are higher. Parallel imports would also create the incentive for car dealers to improve service and provide other benefits.

In the *Telefónica/Sogecable/Audiovisual Sport* case <sup>(3)</sup>, involving the market in pay-TV rights to football matches in Spain, the Commission's action has put an end to the agreement to fix the price for watching football matches in Spain in pay-per-view. In the early days of September 2000, when the new football season began, there was evidence of very strong competition between the broadcasters in the form of promotions based on the transmission of football matches. While these offers focused on new subscribers, there was also evidence that some cable operators reduced significantly the prices they charged all categories of customer. Later, the Spanish digital terrestrial operator cut pay-per-view football prices by up to 50 %. Thanks to the Commission's action consumers will also benefit from a much broader choice: football rights previously available only to digital satellite operators will be accessible also to other broadcasters, giving rise to a wide range of football transmissions on all three digital delivery systems (satellite, terrestrial and cable).

In the case of the merger between the German electricity companies *Veba* and *Viag* <sup>(4)</sup>, the operation was made conditional on full compliance with strict divestment undertakings by the parties. This was to ensure that competition in the recently liberalised German electricity market would not be impeded by a dominant duopoly between *Veba/Viag* and their biggest competitor RWE. In dealing with the case, the Commission cooperated closely with the German Bundeskartellamt, which had to investigate the parallel merger of RWE and VEW and cleared it under similar conditions. As a result, German electricity consumers will continue to benefit from competition in electricity supply, which has already led to significant price cuts for both industrial and household consumers since regional monopolies of power utilities were legally abolished two years ago. Without the far-reaching conditions imposed by the Commission and the Bundeskartellamt, the two mergers would have led to a situation where, in the absence of effective competition, prices in Germany would

<sup>(1)</sup> See also point 106.

<sup>(2)</sup> OJ L 124, 23.4.1998.

<sup>(3)</sup> See also point 220.

<sup>(4)</sup> See also point 261.

have been likely to increase again towards the previous level, cancelling out the benefits of liberalisation. Enhanced competition in electricity supply as a result of liberalisation may also lead to improvement of the services offered by utilities (e.g. multi-utility services, more consumer choice as regards sources of supply — ‘green’ power, etc.).

The Commission has also imposed conditions on the merger between *TotalFina* and *ElfAquitaine* <sup>(1)</sup>, which would have risked impeding effective competition on several product markets in France. These included such vital markets for consumers as the wholesale market in domestic heating fuel, the retail market in liquefied petroleum gases (LPG) and the sale of motor fuel on French motorways. The required sell-off of a large proportion of the merged entity’s investments in transport and storage logistics will allow non-integrated producers to remain competitive in the retail market for domestic heating fuel and for LPG and, therefore, exert downward pressure on prices. On the market for motor fuel on motorways, the required divestment of 70 petrol stations will preserve conditions of effective competition and allow the entry of a large retail operator (Carrefour) into a sector traditionally monopolised by energy groups. This latter aspect should develop competition not only on prices, but also on the supply of additional services to consumers.

<sup>(1)</sup> See also point 257.

## C — Sector-based survey

### 1. Basic industries, consumer and investment goods

#### 1.1. Motor vehicles

104. Under Regulation (EC) No 1475/95 <sup>(1)</sup> motor vehicle distribution agreements between manufacturers and dealers for vehicle sales and servicing are exempted from the ban enshrined in Article 81. The method of distribution covered by the regulation is a combination of exclusive and selective distribution. Vehicles are only sold through authorised dealers, who are allocated an exclusive sales territory (or a territory in which the number of other dealers belonging to the same network is limited), and sales to intermediaries who are not authorised by the manufacturer are prohibited. The block exemption was granted on the assumption that inter-brand and intra-brand competition was effective in the motor vehicle sector, that the commercial independence of distributors would be strengthened and that the system would be advantageous to consumers. The exemption granted by the regulation expires on 30 September 2002.

105. The regulation contains many provisions aimed at stepping up competition in the distri-

bution of vehicles and spare parts in order to enable consumers to take advantage of all the potential benefits of the single market, in particular by being able to make cross-border purchases.

#### 1.1.1. Application of the block exemption regulation in 2000: infringements

106. Despite these provisions, the Commission found in *Opel Nederland* <sup>(2)</sup> that motor vehicle distribution agreements are not always advantageous to consumers. Between September 1996 and January 1998, the importer of Opel cars in the Netherlands, Opel Nederland BV, a subsidiary of General Motors Nederland BV, put into effect measures restricting or preventing export sales by its dealers to both final customers and intermediaries, thereby very seriously undermining the proper functioning of the single market, one of the Community’s fundamental objectives. Given the seriousness and duration of the infringement, the Commission fined Opel Nederland EUR 43 million. Coming after the *Volkswagen* case <sup>(3)</sup>, this is the second major decision finding against a motor vehicle manufacturer since Regulation (EC) No 1475/95 came into force.

<sup>(1)</sup> Commission regulation of 28 June 1995 on the application of Article 81(3) of the Treaty to certain categories of motor vehicle distribution and servicing agreements (OJ L 145, 29.6.1995).

<sup>(2)</sup> Decision of 20 September 2000 (OJ L 59, 28.2.2001); Press Release IP/00/1028, 20.9.2000. On 1 December, Opel brought an action for the annulment of the Commission’s decision before the Court of First Instance (Case T-368/00).

<sup>(3)</sup> Decision of 28 January 1998 (OJ L 124, 25.4.1998); Press Release IP/98/94, 28.1.1998.

107. In its judgment of 6 July in *Volkswagen* <sup>(1)</sup> the Court of First Instance confirmed the seriousness of infringements of this kind, which prevent consumers from benefiting fully from the advantages offered by the single market. The CFI upheld the substance of the Commission decision but found that it had not adduced sufficient proof of the existence of two of the five measures with which it found fault. The CFI based its assessment of the fine on a duration of three years instead of the 10 years taken into account in the decision, and reduced the fine from EUR 120 million to EUR 90 million.

108. In the same vein, the Commission is continuing to investigate other cases involving motor vehicle manufacturers to whom it sent statements of objections in 1999, and is also investigating other cases in which measures were taken to prevent or restrict cross-border trade.

109. One distinctive feature of the *Opel* and *Volkswagen* cases and of the other investigations in hand is that they were prompted by complaints. Each year, the Commission receives hundreds of letters from consumers and authorised intermediaries complaining of difficulties encountered when buying a motor vehicle in another Member State. The Commission has performed several surprise inspections at the premises of various manufacturers on the basis of information supplied by these complainants.

### 1.1.2. General assessment of the application of the regulation

110. Article 11 of Regulation (EC) No 1475/95 requires the Commission to evaluate the impact of the exempted system of distribution on price differentials between the different Member States and to draw up a report on the evaluation of the regulation before the end of 2000.

111. As regards the differences between the pre-tax prices charged in the various EU Member States, the Commission produces a twice-yearly report <sup>(2)</sup>

assessing these differentials on the basis of information supplied by the manufacturers in May and November each year. The Commission found that, over the period from November 1999 to May 2000, there were still large differences in pre-tax prices for new cars within the European Union, amounting on average to around 20 %.

112. The Commission also carried out its evaluation of the block exemption regulation, adopting its report on 15 November <sup>(3)</sup>. The aim of the evaluation is to determine whether the assumptions which prompted the Commission to adopt the regulation are still valid and to assess the impact of the exempted system of distribution on the evolution of price differentials, on the quality of service offered to consumers and, more generally, on the functioning of the single market for the sale and servicing of new cars.

113. The evaluation report was drafted on the basis of replies to questionnaires that the Commission sent to vehicle manufacturers, consumer associations, associations representing dealers, independent repairers, independent importers and intermediaries, producers of spare parts and certain businesses operating on the Internet. It also drew on recent studies of the motor industry and motor vehicle distribution, on its twice-yearly report on price differentials between EU Member States and on its experience in dealing with the competition problems it has encountered while monitoring the application of Articles 81 and 82 of the Treaty <sup>(4)</sup>.

114. The evaluation report finds that the block exemption regulation has only partly achieved the expected results. Some of the assumptions which led the Commission to adopt the regulation are furthermore open to debate. The report also sees the exempted system as liable to considerably impede the emergence of new methods of distribution, in particular via the Internet.

115. Following the adoption of the report, all interested parties were invited to give their views; in particular at a hearing held on 13 and 14 February 2001. The Commission also invited all interested

<sup>(1)</sup> Case T-98/273 (Press Release IP/00/725, 6.7.2000). On 14 September, Volkswagen submitted an appeal against the CFI's decision to the Court of Justice (Case C-338/00).

<sup>(2)</sup> Available from the Commission's offices in the Member States and on the car sector page on the Competition DG's web site: [http://europa.eu.int/comm/competition/car\\_sector/#prices](http://europa.eu.int/comm/competition/car_sector/#prices). The Commission also publishes press releases setting out its findings on the evolution of price differentials (IP/00/121, 7.2.2000; IP/00/781, 13.7.2000).

<sup>(3)</sup> Report on the evaluation of Regulation (EC) No 1475/95 on the application of Article 85(3) of the Treaty to certain categories of motor vehicle distribution and servicing agreements (COM(2000) 743 final, 15.11.2000). Also available on the car sector page on the Competition DG's web site: [http://europa.eu.int/comm/competition/car\\_sector/](http://europa.eu.int/comm/competition/car_sector/).

<sup>(4)</sup> See also 1999 Competition Report, points 145 and 146.



parties to comment on two studies of motor vehicle distribution carried out by consultants <sup>(1)</sup>.

116. Before the end of 2001, the Commission intends to publish, proposals for new rules on the distribution and servicing of new vehicles, which will take effect when Regulation (EC) No 1475/95 expires.

### 1.1.3. Structural change in the sector

117. The motor vehicle sector is also the focus of increasingly frequent link-ups between manufacturers. For example, General Motors and Fiat, notified a reciprocal exchange of shareholdings, as well as plans to cooperate in the powertrain field, in the joint purchase of car components and spare parts, in the organisation of financial services to their dealers and customers, and in the development of common platforms and R & D programmes linked to the production of passenger cars and light commercial vehicles. The Commission took the view that the conditions for exemption from the Community competition rules were met <sup>(2)</sup>.

118. This process of structural change is also evident from the number of mergers and acquisitions and new joint ventures between component suppliers <sup>(3)</sup>, as well as from the continuing trend towards consolidation among motor vehicle manufacturers <sup>(4)</sup>. Another noteworthy development is the establishment of Internet business-to-business (B2B) platforms between vehicle and component manufacturers with a view to achieving the best possible economies of scale in purchasing, as well as optimising the supply chain and production processes on both the component production and vehicle assembly sides. For example, the Covisint platform will group together General Motors, Ford, Daimler Chrysler, Renault, Nissan and Toyota, on the one hand, and BASF, Delphi Automotive, Federal Mogul, Johnson Controls, Lear Corporation and Yazaki International, on the other. Given that significant players and in particular major motor manufacturers are involved, the creation and oper-

ation of Covisint will be carefully scrutinised by the Commission.

### 1.2. Motor fuel

119. The dramatic increase in the price of motor fuel during the year sparked a public debate on competitive conditions in the sector. The Commission and the national competition authorities met and discussed application of the competition rules in this sector at national and Community level. A first meeting was held on 29 September at which the national authorities and the Commission exchanged details of their experiences, and this was followed by a second meeting on 29 November <sup>(5)</sup>. The national authorities in several Member States took action during the year against competition law infringements in the motor fuel sector within their territories. The Italian and Swedish competition authorities both carried out successful cartel prosecutions and the German competition authority adopted a decision concerning discriminatory pricing <sup>(6)</sup>.

120. It was agreed that national authorities should focus on cartel prosecution since experience shows that, where price cartels exist in this sector, they operate at national or regional level. The national competition authorities were also invited to examine the issue of vertical restraints in their national markets, and in particular the level of foreclosure. The motor fuel sector in Europe is characterised by exclusive supply agreements between retailers and suppliers. The cumulative effect of these contracts may prevent new entrants and non-integrated, independent companies from entering the market (foreclosure effect). The new block exemption regulation on vertical restraints <sup>(7)</sup> has shortened the maximum duration of non-compete clauses from ten to five years, and it is hoped that this will help to open up the market. The Commission and the national authorities will cooperate in this assessment.

121. For its part, the Commission, started an investigation with a view to assessing the position of non-integrated independent companies in several Member States. It is important to ensure that independent companies are genuinely able to enter the motor fuel markets, since markets where inde-

<sup>(1)</sup> Available on the car sector page on the Competition DG's web site: [http://europa.eu.int/comm/competition/car\\_sector/](http://europa.eu.int/comm/competition/car_sector/). The study entitled 'The natural link between sales and service' was carried out by Autopolis and the study 'Car price differentials in the European Union: An economic analysis' by Hans Degryse and Frank Verboven (K.U. Leuven and CEPR).

<sup>(2)</sup> Press Release IP/00/932, 16.8.2000.

<sup>(3)</sup> Merger Cases M.1870 *ZF/Brembo/DFI*, M.1929 *Magneti Marelli/Seima*, M.2036 *Valeo/Labinal*, M.2046 *Valeo/Robert Bosch*, M.2066 *Dana/Getrag* and M.2102 *Magneti Marelli*.

<sup>(4)</sup> Merger Cases M.1998 *Ford/Land Rover* and M.1847 *GM/Saab*.

<sup>(5)</sup> Memo/00/55, 20.9.2000; Press Releases IP/00/1090, 29.9.2000; IP/00/1391, 30.11.2000.

<sup>(6)</sup> Fuller details of these investigations may be found in the reports of the national competition authorities concerned.

<sup>(7)</sup> See also Section I.A, Chapter 1.

pendent companies have a significant presence (e.g. France, United Kingdom and Germany) are more competitive than retail markets where vertically integrated suppliers have a strong presence.

## 2. Network industries

### 2.1. Gas

122. Significant progress was made during the year towards the creation a single gas market. The gas directive (Directive 98/30/EC) had to be transposed into national law by 10 August. Amongst other things, it provides for:

- the abolition of monopoly rights (such as import monopolies);
- the introduction of a third party access regime (allowing eligible gas customers to use the existing gas network);
- the gradual opening-up of the market (at least 20 % of the total annual consumption of the national gas market had to be liberalised by August 2000);
- the unbundling of vertically integrated companies (the minimum requirement being that a gas undertaking keeps separate internal accounts for transmission, distribution and storage).

123. The aim of liberalisation is to introduce competition into the gas markets by making it possible for customers to switch suppliers. This opening-up of gas markets in the Community will have an impact on competition policy equivalent to that which followed the liberalisation of electricity markets. Community competition policy will complement internal market policy so that liberalisation becomes a reality for consumers.

124. In total, 11 of the 15 Member States implemented the gas directive on time. Three did not fulfil their obligation at all (France, Luxembourg and Portugal) and one did not implement the directive completely (Germany). The Commission therefore decided to initiate proceedings against those four Member States.

125. Of the Member States which transposed the directive, most chose its procompetitive options with regard to access to the network. The majority chose a regulated third party access (TPA)

regime, while the remaining Member States opted for negotiated TPA or a combination of both systems.

126. Many Member States opened up their markets to a greater extent than the minimum required by the directive. Instead of the 20 % minimum requirement, countries like the UK and Germany committed themselves to a 100 % market opening. In the coming years a number of Member States, namely Belgium, Spain, Italy, the Netherlands, Austria and Sweden, are expected to follow this example and open up their markets completely. As of August 2000, on average, approximately 80 % of total gas demand was liberalised.

127. However, although a promising start has been made in gas market liberalisation and a high average level of market opening is an encouraging sign and a very important first precondition for customers to be able to exercise their right to choose their supplier, it is not in itself a guarantee that a competitive gas market will be achieved in Europe, and not enough to ensure that customers will benefit fully from liberalisation. Much work therefore remains to be done to make the single European gas market a reality.

128. Most Member States have decided in favour of creating an independent regulator to monitor the gas industry and in particular TPA. The Commission is closely collaborating with these newly created authorities. Along the lines of the Florence Forum, it established an EU Gas Regulatory Forum, which met twice in Madrid in the course of the year. The forum brings together representatives from all Member States, national regulators, transmission system operators and gas companies and provides the framework for discussions on the harmonisation of industry standards and regulatory practice. During the year the forum dealt mainly with the creation of an independent European association of transmission system operators and with network issues, such as TPA services and cross-border tariffication as well as technical interoperability questions. The forum also decided to create a working group in order to step up the discussions on, among other things, transmission fees, balancing and access to storage.

129. At its meeting in Lisbon on 23 and 24 March the European Council decided 'to speed up liberalisation in areas such as gas' <sup>(1)</sup>. The Commission

<sup>(1)</sup> Presidency conclusions, Lisbon, 23–24 March 2000.

will therefore table a new proposal for a directive at the European Council meeting in Stockholm in March 2001 <sup>(1)</sup>, calling for completion of the internal market for gas.

130. As regards competition law enforcement, in 2000 the Commission dealt mainly with cooperation agreements among producers and providers of ancillary services and with long-term supply agreements <sup>(2)</sup>.

131. In the course of its investigations, the Commission established that the structure of the European gas markets is currently not favourable to competition. The markets are characterised by horizontal and vertical demarcation; a situation partly brought about by the long-term supply contracts signed between the members of a well-established vertical supply chain, from gas producers to end users.

132. Vertical demarcation means that each operator has its well-defined function and place in the supply chain and generally refrains from entering the markets of its customers and/or suppliers (e.g. no direct sales by producers to end users). Horizontal demarcation means that each importer/wholesaler and/or regional/local distributor has its traditional supply area and — for the time being at least — generally does not enter the neighbouring supply area.

133. The Commission also found that most upstream markets (exploration, production, sales to wholesalers) are characterised by various forms of cooperation between competitors. Most downstream markets (distribution, transmission and storage) currently appear to be at most national in scope. These are generally dominated by former monopolists, so-called national champions. These national champions are generally vertically integrated and control the pipelines, which are normally and will in all likelihood remain natural monopolies.

134. When setting priorities for future enforcement policy, the Commission will take the current market structure into account. The Commission is of the view that competition in the gas markets can only be introduced if three conditions are met, namely:

- suppliers are free to compete for customers;
- customers are free to change suppliers;
- an effective, non-discriminatory and cost-reflective TPA regime is introduced and maintained.

135. In the coming years, the Commission will investigate as a matter of priority those cases which assist in creating competitive market conditions. Priority will thus be assigned to cases that will help put an end to joint marketing activities on the upstream markets (e.g. joint sales). Priority will also be given to cases where the buyer's ability to sell gas outside a certain territory or to certain users is limited. These cases are of particular importance for the creation of the single gas market.

136. Priority will also be given to network issues. Without an effective third party access regime, customers cannot switch suppliers and suppliers cannot deliver gas to customers willing to switch suppliers. In line with general principles of EC competition law, cross-border issues will be the main focus of the Commission, while national authorities are encouraged to deal with cases of national scope.

## 2.2. Electricity

137. This was the second year of electricity liberalisation. Eleven Member States have fully implemented the 1996 directive. Of the other four, three have not yet completed all the legislative instruments necessary for market participants to know the framework in which they operate. One Member State is still exempted from the directive until 2001. Commission proceedings under Article 226 of the EC Treaty are still pending against those Member States which are either late or have only incompletely implemented the directive.

138. On 10 May, the Commission adopted a proposal for a Parliament and Council directive on the promotion of electricity from renewable energy sources in the internal electricity market <sup>(3)</sup>. The strategic objective of the proposal is to create a framework for a significant medium-term increase in renewable sourced electricity in the EU and to facilitate its access to the internal electricity market. In order to achieve the directive's aim, Member States would be required to take the necessary measures, including measures of public support,

<sup>(1)</sup> See communication from the Commission to the Council and the European Parliament on recent progress with building the internal electricity market (COM(2000) 297 final, 16.5.2000).

<sup>(2)</sup> See also Part Two on *GN/Endesa*.

<sup>(3)</sup> COM(2000) 279 final.

to ensure that electricity produced from renewable energy sources accounts for around 22 % of total electricity consumption in the Community by 2010.

139. Community competition law enforcement concentrated on two types of case. First, cases involving contractual links between electricity generators which have become competitors through liberalisation. In particular, an investigation was undertaken on the links between *Electricité de France* and *Compagnie Nationale du Rhône*, respectively the former French monopolist and a small local electricity generator.

140. A second relevant issue was access to congested interconnectors, i.e. the lines used to connect together the electricity systems of different Member States <sup>(1)</sup>. Improvements were made in access to the cables linking the high-voltage electricity grids of Scandinavian countries with Germany following the Commission's intervention. The Commission will also deal with other congested interconnectors between EU Member States, such as those at the UK–French, the Belgian–Dutch, the German–Dutch and the French–Spanish borders.

141. The Commission examined its first major merger case affecting electricity markets <sup>(2)</sup>.

142. The guidelines for the treatment of stranded costs under the State aid rules have not yet been finalised. The Commission expects to adopt these in the first half of 2001.

143. The European Council decided in Lisbon on 23 and 24 March 'to speed up liberalisation in areas such as [...] electricity' <sup>(3)</sup>, just as it did with gas markets. The Commission will therefore table a new proposal for a directive at the European Council meeting in Stockholm in March 2001 <sup>(4)</sup>, calling for completion of the internal market for electricity.

### 2.3. Telecommunications

#### 2.3.1. Consolidation of the liberalisation directives

144. On 12 July, as part of the general review of the sectoral directives, the Commission adopted a

draft directive grouping together in a single text all the non-obsolete provisions of Directive 90/388/EEC, as subsequently amended by Directives 94/46/EC, 95/51/EC, 96/2/EC, 96/19/EC and 1999/64/EC. Since the process of liberalising telecommunications markets in Europe has to a large extent been completed, the only provisions to be retained will be those still necessary to ensure that the directive's aims continue to be fulfilled. The draft directive does not seek to impose any new obligations on Member States. Several definitions have been updated to reflect the latest technological advances in the telecommunications sector.

145. The Commission will definitively adopt the new directive in parallel with six other harmonisation directives which were also adopted, in draft form, on 12 July.

#### 2.3.2. Sixth report on the implementation of the directives

146. On 7 December, the Commission adopted its sixth report on the implementation of the telecommunications regulatory package <sup>(5)</sup>, which takes stock of the situation with regard to application of the liberalisation and harmonisation directives in all the Member States.

147. After three years of full liberalisation of telecommunications services, the report confirms that competition has fostered increased penetration of GSM mobile telephony, which is now as high as 70 % in one Member State and is over 39 % in all others. The market situation shows how tariffs for residential and business users are continuing on a downward path. On the wholesale market, overall prices for leased lines are still falling, particularly where there is competitive pressure. While leased line prices have decreased significantly since 1997, annual rentals for both national and international lines vary greatly from one Member State to another. Since liberalisation, interconnection charges have decreased by 6.5 % for single transit and by 20.2 % for double transit and have remained stable for interconnection at local level.

148. In the report, the Commission highlights a number of problems that still need to be overcome. Licensing procedures are still lengthy and bureaucratic in several Member States and licence fees often remain high. This creates a barrier to market

<sup>(1)</sup> See report on *Skagerrak Cable* and Press Release IP/01/30, 11.1.2001.

<sup>(2)</sup> See *VEBA/VIAG* case, paragraph 261.

<sup>(3)</sup> Presidency conclusions, Lisbon, 23–24 March 2000.

<sup>(4)</sup> See communication from the Commission to the Council and the European Parliament on recent progress with building the internal electricity market (COM(2000) 297 final, 16.5.2000).

<sup>(5)</sup> COM(2000) 814 final.

entry. As regards interconnection, new entrants complain that regulators do not always have the powers to check that charges applied by incumbent operators are cost-oriented. Very few Member States have ensured that appropriate accounting tools are in place. Lastly, there are still serious problems in some Member States where line rental charges have not been rebalanced, resulting in a price squeeze as regards charges for access to the local loop.

### 2.3.3. Voice communications on the Internet

149. In its 1998 notice on the status of voice communications on the Internet, the Commission announced that it would review the notice in 2000 in the light of market developments. The Commission carried out a public consultation exercise to that end and adopted a new communication on 20 December <sup>(1)</sup>. The new communication is not intended to replace the 1998 notice, whose conclusions remain valid until the entry into force of the new regulatory framework, scheduled for 2002; its main aim is to clear up a number of ambiguities.

150. The Commission continues to consider that telecommunications services on the Internet normally fall outside the definition of voice telephony and cannot therefore be made subject to the sectoral legislation. Where, on the other hand, thanks to its quality and reliability the service offers a perfect substitute for voice communications provided by traditional means, there is no reason why the operator should not have to comply with the regulatory regime applicable to voice telephony.

### 2.3.4. Monitoring of the implementation of directives

151. The Commission kept up its efforts to ensure that the liberalisation directives were effectively implemented in the Member States and that the regulatory framework was set in place in Greece, where the transitional period for introducing competition expired on 31 December.

152. Although substantial progress had been made by the Member States, as of the end of the year 21 infringement proceedings were still pending against Member States which had not properly transposed the liberalisation directives based on Article 86(3) of the Treaty or had not notified any implement-

ing measures. The Commission pressed ahead in particular with infringement proceedings initiated in previous years against Member States which had failed to transpose the liberalisation directives correctly. The case against France concerning calculation of the cost of the universal service was referred to the Court of Justice in April; the evaluation methods and calculation rules introduced by France in 1997 are considered by the Commission to be non-transparent and to result in overstatement of the cost of the universal service.

153. The Commission also continued with proceedings against Member States in which the rebalancing of line rental charges in accordance with Directive 96/19/EC was not complete (Germany, Italy and Spain, and France in the context of the proceeding relating to the universal service). It is essential that this rebalancing should take place before unbundling of the local loop in order to avoid price squeezes, i.e. situations in which new entrant operators would have to incur intermediate costs (those of the unbundled lines in the case in point) in order to be able to compete effectively with the retail prices charged by the dominant operator, which also happens to be the supplier of the intermediate good. The Commission thus issued reasoned opinions to Italy and Spain and sent Germany a letter of formal notice. The Italian authorities having subsequently adopted in December measures enabling Telecom Italia to adjust the line rental charge by a sufficient proportion, the infringement proceeding against Italy was suspended.

154. The Commission also issued a reasoned opinion to Luxembourg, which discriminated against new entrants with regard to rights of way <sup>(2)</sup>, and sent eight letters of formal notice to Member States that had not communicated any measures implementing Directive 1999/64/EC, which is aimed at ensuring that telecommunications networks and cable television networks owned by a single operator are separate legal entities.

### 2.3.5. Communication and sector inquiry on local loop unbundling

155. The low level of competition in the local loop (i.e. the last copper pair lines between the incumbents' exchanges and end-users' premises) remains a source of concern. In most Member States incum-

<sup>(1)</sup> OJ C 369, 22.12.2000.

<sup>(2)</sup> The case was brought before the Court of Justice on 27 February 2001.

bent operators hold market shares of between 95 and 100 % in access retail services and local communications, for which the control of the local loop places them in a gatekeeper position. On 26 April, the Commission adopted a communication on unbundled access to the local loop <sup>(1)</sup>, in which it indicated that, even in the absence of specific regulatory requirements, the imposition by an incumbent operator of discriminatory conditions or the outright refusal to grant access to the local loop may amount to an abuse of a dominant position in violation of Article 82.

156. On 12 July, when announcing its proposal for a new regulatory framework for the telecommunications services industry <sup>(2)</sup>, including a regulation on local loop unbundling, the Commission also indicated that it had launched a sector inquiry on local loop access. This inquiry deals with competition over the local loop and investigates possible abuses of a dominant position by incumbent operators.

### **2.3.6. Initial results of the sector inquiry on leased lines**

157. At a hearing held on 22 September, the Commission presented the initial results of the sector inquiry on leased line charges. The main findings are that leased line charges have fallen considerably since the sector was opened up to competition, particularly for long-distance and international leased lines. Strong competitive pressure appears to exist at retail level, as witnessed by the substantial discounts granted by incumbent operators. There is also spectacular growth in demand for leased lines, fuelled above all by the Internet. The situation varies greatly from one Member State to another, however. The relative weight of income from leased lines in the total turnover of the incumbent operators varies widely (between 1 and 17 % for national leased lines and between 3 and 27 % for international leased lines). Potentially excessive prices have been observed for the 2, 34 and 155 megabytes per second (Mbps) bandwidths. The inquiry has also revealed the existence of possible non-tariff-related abuses such as strategic discounts and discriminatory waiting times for the provision of leased lines.

158. In order to examine the reasons for possibly excessive international leased line prices, the Commission opened five ex officio investigations, regarding Belgium, Greece, Spain, Italy and Portugal. As a first step, the Commission is holding bilateral meetings with the national regulatory and competition authorities of the Member States concerned.

### **2.3.7. Sector inquiry on roaming**

159. The sector inquiry on roaming was based on formal information requests concerning costs, prices and commercial practices related to mobile roaming that were addressed to almost 200 mobile network operators, service providers and national authorities in the EU. Both wholesale and retail markets were found to remain predominantly national, with a near-absence of transnational retail offers. The inquiry established concentration ratios of over 90 % for the two incumbent operators in most national wholesale roaming markets, and a pervasive lack of cost-orientation and of competitive offers in particular at wholesale level throughout the EU.

160. The Commission discussed the findings of its inquiry with the national competition authorities and experts from the national telecommunications regulatory authorities of the EU Member States at a meeting that took place in Brussels on 24 November. At that meeting, the Commission discussed possible initiatives to be taken to deal with a number of likely cases of collusion and/or abuse of single or joint dominance by mobile network operators identified during the inquiry. The Commission will also use its findings to evaluate standard and preferential roaming agreements, as well as discounting practices concerning wholesale and retail roaming rates, and it intends to provide both national authorities and undertakings with guidance on the application of the competition rules on this basis.

### **2.3.8. Individual cases dealt with under Articles 81 and 82**

#### *Unisource*

161. On 29 December, the Commission adopted a decision <sup>(3)</sup> repealing the exemption decision it had taken in 1997 <sup>(4)</sup> regarding *Unisource*, a broad,

<sup>(1)</sup> OJ C 272, 23.9.2000.

<sup>(2)</sup> European Parliament and Council Regulation (EC) No 2887/2000 of 18 December 2000 on unbundled access to the local loop, adopted pursuant to Article 95 of the EC Treaty (OJ L 336, 30.12.2000).

<sup>(3)</sup> Press Release IP/01/1, 3.1.2001.

<sup>(4)</sup> Commission decision of 29.10.1997 (OJ L 318, 20.11.1997).

global telecommunications alliance between three incumbent telecommunications operators, namely KPN (the Netherlands), Telia (Sweden) and Swisscom (Switzerland).

162. The parties had informed the Commission that due to market developments and the losses accumulated by Unisource, the shareholders had decided to severely reduce the range of activities of their joint venture, which now provided only value-added telecommunications services to multinational companies. Furthermore, the non-compete clauses preventing the parent companies from competing with the joint venture had been abandoned, as had the exclusive distribution arrangements.

163. Given these changes, the parties asked for a review of the 1997 decision, in order in particular that they might be released from the extensive conditions and reporting requirements that were imposed as part of the exemption.

### 2.3.9. Cases dealt with under the merger regulation

*JV.46 — Callahan Invest/Kabel Nordrhein-Westfalen and JV.50 — Callahan Invest/Kabel Baden-Württemberg*

164. In two decisions, taken on 19 June and 1 August, the Commission authorised the sale of Deutsche Telekom's (DT's) regional cable TV network in North Rhine-Westphalia (KNW) and Baden-Württemberg (KBW) to *Callahan Invest Limited* <sup>(1)</sup>. The aim of these operations is to create more competition in the different markets for the provision of communications services. In its assessment of the notified mergers, the Commission found that the operations would not create or strengthen a dominant position.

165. The Commission found that, while immediately after the transaction KNW and KBW will have a de facto monopoly for cable operations in their territory, the transaction itself does not create or strengthen a dominant position on the market for pay-television services in Germany, as KNW and KBW are simply taking over the positions previously held by DT. After upgrading the cable TV network, KNW and KBW will be in a position to compete with DT by offering local telephony and Internet access services to end-customers.

166. KNW and KBW will enter into a number of agreements with DT's subsidiary Media Services GmbH (MSG) to obtain content, technical services, and certain marketing and sales services associated with the offering of pay-television services by KNW to subscribers in North Rhine-Westphalia. These agreements are not, however, covered by the Commission decision to clear the operation.

*JV.48 — Vodafone, Vivendi and Canal+ (Vizzavi)*

167. On 20 July, the Commission approved the creation of the Vizzavi Internet portal joint venture between Vodafone, Vivendi and Canal+. The clearance was made possible after the companies submitted commitments to ensure that competing Internet portals would have equal access to the parent companies' set-top boxes and mobile handsets.

168. Vizzavi will develop, market, maintain and provide a branded multi-access Internet portal throughout Europe, providing customers with a seamless environment for web-based interactive services, across a variety of platforms, such as fixed and mobile telephony networks, PCs and palm-tops, as well as television sets. The decision ensures that the current competitive model of Internet services, where consumers can choose their content provider independently of their access provider, is carried over into the developing markets of Internet provision via mobile phones and televisions.

169. The Commission's investigation concluded that the joint venture would have given rise to competition concerns in the emerging national markets for TV-based Internet portals and emerging national and pan-European markets for mobile phone-based Internet portals. In order to address the competition concerns identified by the Commission, the parties provided undertakings to ensure that the default portal on the mobile phone or set-top box could be changed, should the consumer so wish. The undertakings will allow consumers to access third party portals, to change the default portal themselves, or to authorise a third party portal operator to change the default setting for them.

## 2.4. Postal services

### 2.4.1. Commission proposal for further market opening

170. On 30 May, the Commission tabled its proposal to amend the postal directive, in which the

<sup>(1)</sup> Press Releases IP/00/637, 20.6.2000 and IP/00/905, 2.8.2000.

Commission put forward a number of measures that would open up a substantial share of the postal services market to competition by 2003 <sup>(1)</sup>. Further market opening would follow in 2007. The proposed step-by-step approach is intended to lead to more competition in postal services while providing safeguards to ensure a universal postal service throughout the European Union.

171. As of 1 January 2003, the Commission proposes to increase the range of services that Member States must open up to competition. These would include postal items weighing more than 50 grams and items below 50 grams where the price is at least two and a half times the price of a standard letter. All outgoing cross-border mail and express mail would also be subject to competition. The total market opening resulting from this first step is estimated to represent on average approximately 20 % of the universal service providers' revenues from postal services. In addition, the proposal formulates a precise definition of special services, which cannot be reserved under the present directive, and requires the transparency and non-discrimination principles to be applied to special tariffs.

#### 2.4.2. Monitoring of the REIMS II agreement

172. On 15 September 1999, the Commission adopted a decision under Article 81(3) exempting the REIMS II agreement until 31 December 2001 <sup>(2)</sup>. In REIMS II, 16 European postal operators agree on remuneration for delivering each other's incoming cross-border mail. Remuneration increases are linked to improvements in the quality of the receiving postal operator's delivery service. In its decision, the Commission imposed a number of conditions and obligations on the parties to ensure that the agreement is beneficial to consumers.

173. In 2000, as a follow-up to its decision, the Commission monitored price and quality of service developments in the markets for intra-Community mail. In the last few years, the quality of service for intra-Community cross-border mail has increased significantly, albeit from a very low level in some Member States. The

Commission also held a dialogue with the parties to the agreement in order to ensure that they complied with the conditions and met the obligations set out in the decision. Meetings were also held with other interested parties such as consumer and user organisations.

#### 2.4.3. Interception and surcharging of cross-border mail

174. The Commission is currently examining a number of complaints alleging that *Deutsche Post AG* is contravening Article 82 by intercepting, delaying and surcharging ordinary, incoming cross-border mail. Following a complaint filed by the UK Post Office, the Commission initiated formal proceedings against Deutsche Post on 25 May <sup>(3)</sup>. The Commission considered that a number of mailings — intercepted and then charged as domestic mail by Deutsche Post AG on the basis of the inclusion of a German reply address in the contents of the mailings — were normal cross-border mailings posted in the UK. The Commission therefore came to the preliminary conclusion that Deutsche Post had abused its dominant position in the market for incoming cross-border mail by charging the full domestic tariff for these mailings. The Commission also considered that significant delays resulting from the interception of such mailings might be regarded as infringements of Article 82.

#### 2.4.4. Mail order parcels

175. On 8 August, the Commission opened formal proceedings against *Deutsche Post AG* in a case concerning the latter's pricing policy for the delivery of mail order parcels <sup>(4)</sup>. In its statements of objections, the Commission considered that Deutsche Post was abusing its dominant position by employing a combination of fidelity and target rebates that foreclosed competition <sup>(5)</sup>. The Commission also examined the high letter tariffs applicable in Germany. International comparisons, taking into account factors such as population density and quality of service, indicate that standard letter tariffs in Germany are by far the highest in the European Union. In order to examine whether

<sup>(1)</sup> Proposal for a European Parliament and Council Directive amending Directive 97/67/EC with regard to the further opening to competition of Community postal services (COM(2000) 319 final).

<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> Case COMP/36.915 — *Deutsche Post — Interception of cross-border mail* (Press Release IP/00/562, 31.5.2000).

<sup>(4)</sup> Joined Cases COMP/35.141 *UPS/Deutsche Post* and COMP/37.121 *DVPT/Deutsche Post* (Press Release IP/00/919, 8.8.2000).

<sup>(5)</sup> The statement of objections issued on 8 August 2000 was followed by a supplementary statement of objections on 4 October 2000 (Press Release IP/00/1108, 4.10.2000).



these tariffs are excessive, i.e. if the prices charged by Deutsche Post bear a reasonable relationship to the actual costs or the value of the service provided, the Commission has requested additional cost information from Deutsche Post.

176. On 19 October, Deutsche Post announced that it had annulled all clauses in its agreements with mail order companies which contain target and fidelity rebates objected to by the Commission and stated that alternative arrangements were being negotiated.

#### 2.4.5. New postal services

177. On 21 December, the Commission adopted a decision on the provision of new postal services in Italy offering specific added value elements, in particular a guarantee that items created electronically will arrive at a predetermined date or time <sup>(1)</sup>. The decision follows a complaint lodged against Italy on the ground that the delivery phase of hybrid mail (in which postal items are generated electronically) had been reserved in all cases for the incumbent operator. The Commission takes the view that Italian Legislative Decree No 261 of 22 July establishing those arrangements, which prevents private suppliers from offering new hybrid mail services with distinctive features, is incompatible with Article 86(1), read in conjunction with Article 82 of the Treaty. No Member State apart from Italy has reserved for the incumbent operator the delivery phase of hybrid mail with guaranteed remittance at a predetermined date or time.

178. The delivery phase of hybrid mail may entail a series of added value elements, such as a guarantee that electronically created items will arrive at a predetermined date or time. The incumbent operator in Italy does not offer that new service at present. Delivery at a predetermined date or time is a separate market which is very different from traditional delivery services (universal service). There are therefore no grounds for reserving it for a universal service provider that does not offer that service. In addition, the range of services provided by the incumbent operator does not at present include guaranteed remittance at a predetermined date or time, so it would not suffer any losses if this service were to be allocated to another operator.

## 2.5. Air transport

### 2.5.1. Alliances

179. Consolidation in the air transport sector continues apace, and the Commission examined a number of alliances and mergers during the year. In general, the Commission believes that airline alliances bring benefits for passengers by extending networks and improving efficiency. However, alliances can also significantly restrict competition on individual routes and remedies may need to be imposed to mitigate this.

180. On 28 February, the Commission sent a warning letter to Swissair, Sabena, TAP, AOM and Crossair, members of the Qualiflyer alliance, regarding an agreement that allowed them to coordinate fare prices. The warning letter gave the parties three weeks to confirm to the Commission that the agreement had been terminated. Otherwise, the airlines faced the initiation of formal infringement proceedings possibly leading to the adoption of a decision finding that an infringement had been committed and imposing fines. Following this warning letter, the parties terminated the pricing agreement as regards the routes between Portugal and Belgium, between Portugal and Switzerland and between Paris (Orly) and Brussels, which are operated only by Qualiflyer group members. The Commission therefore decided not to open formal infringement proceedings.

181. In October, the Commission sent letters to Lufthansa and SAS setting out serious doubts concerning their cooperation with Austrian Airlines, which was notified to the Commission in December 1999. The Commission believes that, as they currently stand, the cooperation agreements would eliminate competition on a large number of routes between Austria and Germany and between Austria and Scandinavia. The issue of these letters was the first formal step in the Commission's investigation, which is ongoing. It could lead to a prohibition decision unless the companies address the Commission's concerns.

182. The Commission's investigations into a number of other airline alliances are continuing. A decision on the cooperation between British Midland, Lufthansa and SAS is expected in early 2001.

183. The Commission also examined the *US Air/United* merger. After the parties had accepted a number of undertakings the Commission took a decision clearing the merger in early 2001.

<sup>(1)</sup> Press Release IP/00/1522, 21.12.2000.

## 2.5.2. Airports

184. The Commission has been examining landing fees at all European airports since 28 June 1995, when it ruled that the system of discounts operated at the main Brussels airport infringed EU law. Since then, most Member States have changed their system of landing fees in order to end discrimination. Decisions were taken against the Portuguese and Finnish airport authorities in 1999. The Portuguese authorities are challenging the Commission decision before the Court of Justice but the Finnish authorities have undertaken to comply with the Commission decision and to change their system of landing fees by January 2001.

185. In July, the Commission took a decision under Articles 86 and 82 <sup>(1)</sup> finding that a system of discounts and different landing fees according to the origin of the flight, as prescribed by the Spanish Government, discriminated in favour of national airlines. For all categories of aircraft, the Spanish system provided for higher fees for intra-Community flights than for domestic ones; it also provided for discounts that increased with the number of landings per month. The discounts went from 9 % up to 35 %. De facto, this system favoured national carriers, in particular Iberia, Binter Canarias and Spanair, which received average discounts of 20 to 25 %. There was no objective justification for such discriminatory treatment. The Spanish authorities subsequently informed the Commission that their system of landing fees had been brought into line with Community law.

186. At the same time a letter of formal notice was sent to the Italian authorities as a first step in the Commission's procedure possibly leading to a formal decision. As in the Spanish case, the Commission found that the Italian system discriminated against foreign carriers and in favour of Italian airlines, in particular Alitalia. Landing fees in Italy are set by law. Under a decree of 27 October 1998 domestic flights benefited from rebates of between 57 and 64 % on the standard landing fees applying to international flights, depending on the type of aircraft. Following the letter of formal notice the Italian authorities informed the Commission that their system of landing fees had been brought into line with Community law.

187. By asking the Spanish and Italian Governments to abolish their systems, the

Commission has taken the final steps to eliminate discriminatory landing fees throughout the European Economic Area.

188. On 11 June 1998, the Commission adopted a decision <sup>(2)</sup> under Article 82 of the EC Treaty requiring Aéroports de Paris (ADP) to introduce a non-discriminatory system of commercial fees for groundhandling services. ADP lodged an application for annulment of that decision in August 1998.

189. On 12 December 2000, the Court of First Instance dismissed <sup>(3)</sup> ADP's application on all seven grounds. The CFI's judgment is important in at least three respects: it clarifies which procedural regulation applies to transport infrastructure; it classes the operation of an airport as a business activity and the airport operator as an undertaking; and it confirms, following on from the judgment in *Corsica Ferries* <sup>(4)</sup>, that the undertakings in question do not have to be operating on the same markets to be caught by Article 82.

190. The judgment upholds the policy pursued by the Commission in relation to transport infrastructure, and more particularly non-discriminatory access to that infrastructure.

## 2.5.3. Reservation systems

191. In July, the Commission closed an Article 82 investigation into Air France's alleged discrimination against Sabre, an American computerised reservation system (CRS), after the French airline agreed to a code of conduct offering Sabre terms equivalent to those offered to its partly owned CRS Amadeus, as well as to other CRSs. This successful investigation was the first to have been initiated by a request from the United States Department of Justice made in accordance with a bilateral cooperation agreement between the European Union and the United States.

## 2.6. Maritime transport

### 2.6.1. Block exemption for liner shipping consortia

192. On 19 April, the Commission adopted Regulation (EC) No 823/2000 <sup>(5)</sup> renewing the

<sup>(1)</sup> OJ L 230, 18.8.1998; 1998 Competition Report, p. 144.

<sup>(2)</sup> Case T-128/98, not yet reported.

<sup>(3)</sup> Case C-18/93 [1994] ECR I-1783.

<sup>(4)</sup> OJ L 100, 20.4.2000; Press Release IP/00/404, 25.4.2000.

<sup>(5)</sup> Press Release IP/00/874, 27.7.2000.

block exemption for liner shipping consortia embodied in Commission Regulation (EC) No 870/95 <sup>(1)</sup>, the five-year validity of which expired on 25 April.

193. The Commission's favourable view of consortia is due to the advantages of this form of cooperation. In general, by rationalising the activities of the member companies and achieving economies of scale, consortia help improve both the productivity and the quality of liner transport services offered to transport users.

194. The new regulation, which extends the block exemption for a further five years, includes amendments designed to clarify it in line with the Commission's interpretation of Regulation (EC) No 870/95. Regulation (EC) No 823/2000 thus provides *inter alia* that the block exemption also applies to consortia operating on more than one trade (Article 1(1)) and that the market share thresholds are required to be met in respect of each market on which such a consortium operates (Articles 6 and 7).

195. The most important change that Regulation (EC) No 823/2000 makes to the block exemption as compared with Regulation (EC) No 870/95 is in referring to market share thresholds instead of trade share thresholds (i.e. the share of trade held by the consortium between the pairs of ports that it actually serves). Market share is the usual indication of market power used in competition legislation. The trade share criterion was adopted in the previous regulation because shipping companies had considered that market shares would be difficult to calculate; experience had however shown that shipping companies were able to provide market shares.

196. Eleven consortia were exempted under the opposition procedure of Regulation (EC) No 870/95 for a period lasting until the expiry of that regulation. The procedure enabled the Commission to check that the consortia were subject to effective competition. There was no indication that circumstances had changed such that the consortia were shielded from effective competition. In order to avoid the burden of renewed notifications, Regulation (EC) No 823/2000 therefore provides that such consortia continue to be exempted (Recital 27; Article 13(2)); the agreements remain subject to obligations (Article 9) and to the Commission's power to withdraw the exemption (Article 12).

### 2.6.2. Grand Alliance Consortium

197. In March, the Commission granted an exemption to the Grand Alliance Consortium, an agreement between Hapag-Lloyd Container Linie, Malaysia International Shipping Corporation, Nippon Yusen Kaisha, Orient Overseas Container Line Limited and P&O Nedlloyd. The consortium provides a joint liner shipping service between ports in northern and southern Europe and ports in the Far East. Having examined conditions on the markets covered by the consortium service, the Commission concluded that the consortium met the criteria for exemption under Regulation (EC) No 870/95. It noted in particular that the parties had made considerable investments in the consortium service and that there was evidence that the consortium would remain subject to effective competition from other shipping lines.

### 2.6.3. FETTCSA

On 16 May, the Commission adopted a decision finding that the members of the Far East Trade Tariff Charges and Surcharges Agreement (FETTCSA) had infringed the cartel prohibition enshrined in Article 81(1) of the EC Treaty. This case is discussed in the cartels section of this report (Section I.B, Chapter 1.1).

## 2.7. Railways

198. Over the last 30 years, rail transport has been in steep decline in the Community in spite of the fact that during this period both passenger and freight transport in general have grown by 2.5 to 3 % annually. Cross-border freight transport in particular has enjoyed strong growth with the creation of the single market. Unfortunately, however, the rail sector has not benefited from this development. During the period 1990–98, measured in tonnes/kilometres, freight transport by road increased by 35 % while rail freight transport actually fell by 6 %. It is striking that rail's market share has even decreased in a market segment where it should be particularly competitive, namely long-haul transport of voluminous goods.

199. While there are a number of reasons for this development, the sector suffers from the fact that a single market in railways has yet to be created. So far, the impact of Directive 91/440/EEC on the introduction of competition in the railway market has been negligible. While national flag carriers cooperate in cross-border traffic, newcomers have

<sup>(1)</sup> OJ L 89, 21.4.1995.

found it difficult to enter the market. In view of the slow pace of liberalisation, Member States have agreed in principle to open up further the EC freight railway transport market, and agreement on a new infrastructure package was reached between the Council and the European Parliament in November. These measures may be expected to allow the railway sector to gain momentum. As

a result, competition policy should in future play a more important role in this sector. Flag carriers have taken the initiative to merge in the cargo field. The Commission has also recently received complaints from new competitors operating in both the passenger and the freight rail transport sectors. A number of these complaints are currently being investigated.

### **Box 3: Services of general interest in Europe and competition**

On 20 September, responding to an invitation made by the European Council at its meeting in Lisbon in March, the Commission adopted an updated version of its communication on services of general interest in Europe. The new text marks a significant step forward in the Commission's efforts to explain more clearly the relevant EC rules and its policy in applying them. An important aim of the new communication is to address as concretely as possible the concerns which gave rise to the European Council's request and to improve legal certainty for operators of services of general interest.

To that end, the new communication illustrates the scope of existing EC law, as well as the flexibilities which the current legal framework offers in order to take account of the special features of services of general interest in the Member States. This is of particular significance given the fact that many concerns have been expressed that EC competition law and single market law could destroy services of general interest that are functioning satisfactorily, particularly at local and regional level. From this point of view, the most important aspects of the new communication are as follows.

- The Commission first explains that market mechanisms often provide satisfactory services of general economic interest and that the application of competition and single market principles does not endanger and often even improves the provision of these services. This does not prevent the State imposing by way of non-discriminatory regulation certain standards of security, quality and regularity on all operators if and as long as they want to provide services of general economic interest.
- Moreover, the communication confirms Member States' general freedom, subject to checks by the Commission for manifest errors, to define what they regard as services of general economic interest within the meaning of Article 86(2) of the EC Treaty and to entrust the provision of such services to specific undertakings. In this context, the options open to Member States for ensuring the operation of these services by specific measures which are compatible with the EC Treaty are set out in detail. The communication also recalls that, in accordance with Article 295 of the EC Treaty, the Community is neutral as to the public or private ownership of undertakings.
- Finally, the communication explains the full range of reasons why services of general interest can fall outside the scope of the EC competition rules (and the single market rules) or can be deemed compatible with those rules. This is the case where the activities in question:
  - are of a non-economic nature, or
  - have no effect on trade between Member States (or no cross-border aspects), or
  - come under a *de minimis* rule, or
  - qualify for a special exception (such as Article 87(3)(d) for State aid to promote culture and heritage conservation), or
  - come under Article 86(2) in which any conflict with the EC competition rules or the EC single market rules is settled in a way which allows the service of general economic interest to continue in operation.

On this basis, the new communication shows how within its scope of application Community law guarantees for the benefit of citizens the satisfactory operation of services of general economic interest of a high standard and combines this with the advantages of more open and competitive markets.

In this context, the new communication highlights the case-law of the Court under which compensation granted by the State to an undertaking for the performance of services of general economic interest constitutes State aid which can be compatible with the EC Treaty if all the requirements of Article 86(2) are met. This means in particular that the compensation must not exceed the net extra costs of the particular task assigned to the recipient undertaking. For the transport sector, this approach is specifically laid down in Article 73 of the Treaty. Moreover, the Commission states in its communication that whenever the compensation is fixed for an appropriate period following an open, transparent and non-discriminatory procedure, it will presume that such aid is compatible with the State aid rules of the Treaty. This approach avoids distortions of competition and ensures that services of general economic interest entrusted to an undertaking function correctly.

The new communication also develops ideas on how, building on the new Article 16 of the EC Treaty and respecting both the principle of subsidiarity and Member States' freedom to define services of general economic interest, the Community can develop a proactive policy at European level, in partnership with local, regional and national authorities, to ensure that all citizens in Europe have access to the best possible services.

Finally, the new communication describes experience with the liberalisation of certain services of general economic interest (telecommunications, transport, energy) and the state of play in further individual sectors. The communication shows how:

- in its efforts to open up markets and introduce competition, the Commission always adapts its approach, as well as the pace of its proposals and actions, to the specific features of the sector in question and the requirements of public service tasks in that sector;
- this method of liberalising markets has maintained and often even improved the quality and affordability of services of general economic interest.

Following its adoption, the new communication was favourably received at the two internal market Council meetings, which agreed a statement on services of general economic interest. The statement stresses the importance of Article 16 of the EC Treaty, without prejudice to Articles 73, 86 and 87 of that Treaty, and welcomes the Commission's communication for its basic approach and the detailed explanations it contains. However, the statement once again emphasises the need for services of general economic interest to perform their tasks under conditions of legal certainty and economic viability. In this context, it calls for further clarification of the relationship between methods of funding services of general economic interest and application of the rules on State aid.

At its meeting in Nice on 7–11 December the European Council approved the Council's statement and invited the Council and the Commission to continue their discussions within the framework of these guidelines and the provisions of Article 16 of the EC Treaty. Against the background of point 36 of the communication, the European Council noted the Commission's intention to consider, in close cooperation with the Member States, ways of ensuring greater predictability and increased legal certainty in the application of competition rules relating to services of general interest. In this context, the European Council voiced its expectation that the Council and the Commission would report on the implementation of these guidelines for the European Council in December 2001.

### 3. Services

#### 3.1. Financial services

200. On 1 January 1999, a single currency was introduced in 11 Member States. Introduction of the euro will greatly enhance competition in financial services. The most immediate effect is to remove the obstacles to trade represented by the foreign-exchange risk and transaction costs associated with converting one currency into another. As a result, trade flows between the participating Member States are likely to increase, thereby deepening the single market and strengthening the need for further integration within the Union. In this context, it is more vital than ever to improve the flexibility and efficiency of the market so as to overcome structural weaknesses on the supply side.

201. Competition policy is a fundamental lever in this respect, with a view to taking full advantage of the benefits of economic and monetary union.

202. To take one sector as an example, the single currency, in combination with the introduction of new technologies, will enable banks to compete for retail deposit business in countries where they have no physical presence. On the assets side, within the euro zone, lending operations in any Member State can be financed from deposits obtained in any other Member State. Competition should therefore intensify in homogenised segments of the loan market, where direct customer contact is less important (consumer credit, standard mortgage loans). All in all, stronger competition in the financial sector should lead to easier access to and lower cost of funding. This should provide further incentives to firms to increase investment or entrepreneurial activity.

203. The process cannot, however, be left to unfold alone. There is a risk that companies might react by attempting to reduce the level of competition. This conduct will be made easier by the introduction of the euro, as increased price transparency will facilitate the monitoring of competitors' prices. It will also be more difficult to deviate from agreed prices and hide this fact behind exchange-rate fluctuations. It is the Commission's responsibility to challenge these practices. Greater competition in the financial sector already benefits customers, who suffer most from suppliers' market power and restrictive practices. Enhanced competition in the financial sector will have positive spillover effects in other sectors.

204. During the year the Commission showed its determination to take action against prohibited

agreements and improve competition in the financial sector. As already mentioned <sup>(1)</sup>, proceedings were opened against nearly 120 banks and banking associations with regard to their possible participation in agreements concerning charges applicable to the exchange of currencies in the euro zone. Another example of this is the *Cartes bancaires* case concerning the rules and internal decisions of this card group.

#### Groupement des cartes bancaires

205. On 30 October, the Commission sent Groupement des cartes bancaires a comfort letter announcing the closure of its investigation into a number of rules and internal decisions notified by the grouping and adopted between 1988 and 1998. Groupement des cartes bancaires is the main payment card organisation in France; it adopts the rules governing the 'CB' payment card system and manages its infrastructure. Cards issued by banks that are members of the grouping account for over 90 % of card payment transactions in France.

206. The comfort letter was sent only after certain changes had been made to the notified agreements. First, Article 10 of the contract setting up the grouping was clarified: paragraph 5 was amended to make it clear that approval by the Board of Directors of the grouping, which member banks have to obtain before issuing new cards, concerns only conformity of the card in question with the CB rules, with special reference to its appearance. Paragraph 7, as amended, stipulates that the necessary approval by the Board of Directors of any agreement between a member bank and another card network is intended solely to prevent any damage to the image, integrity and security of the CB system.

207. A decision taken by the Board of Directors in 1995 concerning the cross-border issue of cards was amended to clarify the conditions in which transactions by means of a card issued by a foreign bank may be processed using the grouping's infrastructure (infrastructure referred to as 'the CB system'). Where such cards are used in the CB system on a minority basis in relation to their total use, the issuing bank is not required to join the grouping; from the moment that most of the payments made using the card are processed within the CB system, the issuing bank is required to join the

<sup>(1)</sup> See also point 72.

grouping, comply with its internal rules and pay the appropriate fees for use of the CB system. The Commission has established that the CB system is not an essential facility and therefore that the grouping can decide whether or not to grant access to its competitors (provided that it does not discriminate between them).

208. As regards the interbank payment commission payable between the two banks involved in processing a payment transaction using a CB card, the Commission found that Article 81 is not applicable since the commission is charged at a purely domestic level and does not affect trade between Member States.

### 3.2. Information society and the Internet

209. The Commission's overall priority with regard to Internet markets is to create the conditions for an open, competitive environment for the development of the Internet, thereby ensuring that it remains an open medium. It should be made clear that the Commission's basic approach to Internet and related cases is that developments are often procompetitive, but that the fundamental goals of competition policy are nevertheless relevant to the old and new economy alike. Competition problems can and do arise in the new economy.

210. The majority of cases which have raised concerns relate to the infrastructure used for electronic commerce or the control of upstream content. Concerns over infrastructure have focused particularly on telecoms infrastructure, but concerns also became apparent in the area of domain names. Avoiding speculative, discriminatory and abusive registration of Internet domain names is crucial for securing the removal of geographic barriers to competition. Competition concerns have not so far focused on the electronic commerce services themselves.

211. The lack of competition in the local access market in all Member States is a major issue that must be tackled to ensure the success of the Internet in Europe. The Commission communication <sup>(1)</sup> (adopted on 26 April), the regulation on unbundled access to the local loop <sup>(2)</sup> (adopted

on 5 December), and the sector inquiry launched on the issue are important policy steps in this respect. The same holds true for the sector inquiry on leased lines, as leased lines are vital to the creation of e-Europe as they provide the underlying transmission capacity for the Internet.

212. Specific cases involving telecommunications infrastructure concerns include *MCI Worldcom/Sprint*, and the *Vizzavi* joint venture. In the latter case, although the concern was the potential creation of dominance in a market on the boundary between infrastructure and e-commerce (that for portals), the source of the concern was the parties' control over infrastructure — the mobile networks of Vodafone and the set-top box infrastructure of Canal+. Cases involving the control of upstream content, with the concern that it could be leveraged into downstream markets, include *AOL/Time Warner* and *Vivendi/Seagram*.

213. E-commerce services provided via domestic television sets, mobile phones or PCs lead to difficult market definition questions, and the Commission will, independently of specific cases, be examining these in more detail in the coming year.

214. Both business-to-consumer (B2C) and business-to-business (B2B) services have the potential to increase competition and boost efficiencies. Developing a clear understanding of the possible benefits of B2B/B2C is therefore an important prerequisite to any antitrust analysis (see Box 4 below). With the exception of some high-profile cases where competition concerns were raised, such as *AOL/Time Warner*, *Vizzavi* and *Vivendi/Universal*, the majority of cases have been unproblematic, leading to positive outcomes under either the merger regulation or Regulation 17.

215. However, moves by manufacturers to protect their traditional distribution channels from the pro-competitive effects of electronic commerce will be challenged. In this context it can be mentioned that in December the Commission opened formal proceedings against B&W Loudspeakers Ltd as, among other things, this company prohibits its authorised dealers from engaging in distance selling — including sales over the Internet — without objective reasons. Such behaviour prevents the benefits of electronic commerce from being fully

<sup>(1)</sup> OJ C 272, 23.9.2000.

<sup>(2)</sup> European Parliament and Council Regulation (EC) No 2887/2000 on unbundled access to the local loop, adopted under Article 95 of the EC Treaty (OJ L 336, 30.12.2000).

achieved. The Commission is investigating similar cases in the area of consumer electronics and its position can be expected to be clarified in the course of 2001.

#### **Box 4: Web-based business-to-business (B2B) trading and B2B electronic marketplaces**

The Commission is increasingly called upon to assess the competitive impact of B2B electronic marketplaces. These are software systems that allow buyers and sellers of similar goods to carry out procurement activities using common computer systems. The Commission has already assessed and cleared a number of such marketplaces in a wide variety of industries. Examples include electronic markets for aircraft components (*MyAircraft.com* — *UTC/Honeywell/i2*), services to the chemical industry (*Chemplorer.com* — *Bayer/DT/Infraserv Hoechst*), office equipment (*emaro.com* — *Deutsche Bank/SAP*), public administration services (*Governet.com* — *SAP/Siemens*), foreign currency options (*Volbroker.com* — *Deutsche Bank/UBS/Goldman Sachs/Citibank/JP Morgan/Natwest*), and mutual funds (*Cofunds.com* — *Newhouse/Jupiter/Scudder/M&G*).

There are four general market types, all with numerous variations: buyer-managed exchanges are set up by large buyers, often in conjunction with technology partners. Supplier-managed exchanges are set up by suppliers. Market-makers are independent exchanges not controlled by buyers or sellers. They tend to be backed by venture capital and were often early innovators. Content aggregators are sites that go beyond setting up a mere exchange. Instead they build and maintain multi-vendor catalogues which allow customers to access the offerings of several suppliers using a common search structure.

B2B electronic markets can have major procompetitive effects. Their main effect will be to increase market transparency. This will not only exert downward pressure on prices, it will also contribute to further integration of separate geographic markets, as the Internet removes the geographic barriers to buyers and sellers efficiently discovering each other. Online exchanges that allow buyers to aggregate their demand may be of particular benefit to small and medium-sized enterprises. In addition, B2B electronic marketplaces are expected to be a source of substantial efficiencies, as they allow transaction costs to be reduced and inventory management to be improved.

These positive effects could, however, in certain cases be offset by possible competition concerns. They are in fact not new; the question is to what extent these concerns stemming from the old economy are valid in the new economy. The following non-exhaustive list of possible competition problems can be drawn up.

- (a) *Network dominance*: Network effects and potential problems of network dominance are present when the value of a system to the individual user increases with the number of users. They can lead to market 'tipping' and the creation of a dominant position if the network effects are strong enough to induce all market participants to use the same network. This problem could potentially arise in the context of B2B electronic marketplaces as the benefits will often increase with the number of buyers and suppliers linked to the same system.
- (b) *Exchange of information*: This concern relates to the ability of the buyers or sellers to exchange or discover sensitive information on prices and quantities. It is linked to the design of the system, in particular its openness in terms of individual data originating from other parties.
- (c) *Joint purchasing/joint selling*: This concern relates to the question whether the participants in an electronic market can effectively bundle purchasing or selling volumes. If this is the case, a competition concern would arise if they were able to coordinate their behaviour as buyers or sellers. This concern can in principle arise equally in 'normal' joint purchasing or selling. The discussion of these questions in the new horizontal guidelines would therefore constitute a good starting-point for the assessment.



(d) *Discrimination/foreclosure*: This concern relates to the ownership of B2B electronic marketplaces and the rules governing them. These rules could be used, for instance, to exclude certain participants from the most efficient marketplace, thus putting them at a competitive disadvantage. An issue of discrimination could arise if certain market participants (e.g. the founders) received privileged information about transactions in the market. This issue arose in the *Volbroker* case, the first B2B exchange cleared under Article 81. In this case, six major banks set up a joint venture offering an electronic brokerage service for trading foreign currency options. The case raised concerns regarding the access to confidential information by the parent companies. To deal with this concern, the owners of the *Volbroker.com* exchange gave the Commission the assurance that they would set up ‘Chinese walls’ to impede any information flows between the parent companies and the joint venture.

The competition assessment of B2B exchanges is still evolving. The Commission will need to analyse carefully the workings of any proposed B2B trading system and its effects on the market. In view of the global nature of many exchanges, this will be done in close cooperation with other competition authorities.

### 3.3. Media

216. The past 12 months have seen an increase in merger and antitrust activity in the media sector.

217. The preparation and development of digital television services, often combined with interactive services, has led to a number of joint ventures combining resources and skills of two or more companies — such as *Kirch/BSkyB* and *Microsoft/Telewest*. The trend towards vertical integration has also increased, as illustrated by cases such as *AOL/Time Warner* and *Vivendi/Universal*. Finally, in the field of interactive services, the increased scope for such services being made available via television sets, mobile phones and PCs led to the *Vizzavi* joint venture between *Vodafone*, *Vivendi* and *Canal+*. A number of these cases have led to concerns that market power at one level of the market could be used to create or strengthen dominance at other levels, and stringent conditions were imposed to guard against this.

218. In the antitrust field this concern is mirrored in a number of other cases and the Commission will be scrutinising developments in the coming year to ensure that existing market power is not used to foreclose the development of new markets.

219. The Commission has, for example, received an increasing number of informal complaints in relation to the licensing of rights to various forms of media and media-related content for use in new services, including on the Internet. These new services are clearly challenging existing market struc-

tures and licensing arrangements: the Commission will be examining these problems very carefully, ensuring that the interests of rightholders and new service providers are being adequately addressed.

220. The licensing of sports broadcasting rights has again proved to be a major source of competition concerns. Apart from *Formula One*, there has been considerable work in the football sector. The most prominent of these cases has been *Telefónica/Sogecable/Audiovisual Sport*, in which the Commission adopted a statement of objections, pursuant to Article 15(6) of Regulation 17, with a view to lifting the immunity from fines which *Telefónica* and *Sogecable* enjoyed as a result of having notified their agreement. Following the statement of objections, the parties entered into a number of sublicensing arrangements, which removed the need for a formal decision. Examination of the substance continues.

### 3.4. Professions

221. At the European Competition Day held in Lisbon in June, the Commission had an opportunity to highlight the advantages for consumers of its competition policy towards the professions.

222. The Commission’s policy, geared to maintaining purely ethical rules while abolishing restrictions on prices and advertising in particular, is widening the range of prices and service quality on offer, making services more accessible to citizens and improving the provision of information, enabling the user to make a conscious and objective choice of practitioner.

223. The Commission took advantage of the opportunity in order to call on the Member States to press ahead with liberalisation of the sector, clarifying the legislation so that it is not applied solely in order to protect the economic interests of members of the professions without guaranteeing the quality of services; it urged practitioners to continue along the path of healthy, effective competition by setting their prices individually and freely, giving precise information on the terms under which they provided their services and on their specific skills, innovating in the services they provided and the way they provided them, and penetrating cross-border markets; it called on professional associations to stop putting pressure on the public authorities in a bid to prevent liberalisation and hold on to economic advantages which were not sustainable in the long run given the evolution of services markets worldwide; and it invited consumers and consumer associations to become more demanding as regards the information available on professional services and prices thereof with a view to being able to compare them before taking a decision, and also to report practices that distorted competition to the national competition authorities or the European Commission.

224. By order dated 22 February 2000, the Court of First Instance rejected an application, by the French-speaking Brussels bar association, for permission to intervene in Case T-144/99 *EPI v Commission*, a case in which the Institute of Professional Representatives before the European Patent Office (the EPI) is seeking a partial annulment of the Commission decision of 7 April 1999 (Case No IV/36.147 — *EPI code of conduct*) <sup>(1)</sup>. The CFI took the view that, any interest that the professional association in question had in the case, was indirect and remote and was therefore not sufficiently manifest to justify it intervening in the dispute. In support of its decision, the CFI made it clear that each case and each sector called for a specific assessment. In the instant case, even a judgment confirming the Commission decision would have no direct bearing on the members of the professional association making the application, since the sector represented by that association was entirely different to the sector subject to the Commission decision (paragraphs 15 to 17 of the order).

225. In its judgment of 18 June 1998 <sup>(2)</sup> the Court of Justice declared that, by adopting and maintaining in force a law requiring the National Council of Customs Agents (Consiglio Nazionale degli Spedizionieri Doganali — CNSD) to set a tariff for all customs agents, Italy had failed to fulfil its obligations under Articles 5 and 85 of the Treaty. After receiving a reasoned opinion from the Commission, Italy complied with the Court judgment by adopting Law No 213 of 25 July 2000. The provision of the Law of 22 December 1960 requiring the tariff to be drawn up by the CNSD was repealed. The tariff in question was also the subject of a Commission decision, adopted on 30 June 1993 <sup>(3)</sup>, finding that it infringed the Community competition rules. The CNSD's appeal against that decision was dismissed by the Court of First Instance on 30 March 2000 <sup>(4)</sup>.

### 3.5. Sport

226. In applying the EC Treaty competition rules to this sector, the Commission has continued to put into practice the general principles outlined in its report to the European Council on sport <sup>(5)</sup>.

227. Although certain restrictive practices of sporting organisations are still being investigated, the Commission's actions to date demonstrate it recognises the specific nature of sport and that it takes account of sport's social, educational and cultural dimensions with a view to preserving sport's social role. The Commission also attaches the utmost importance to encouraging the training and protection of young sportsmen and women, solidarity between large and small clubs or between amateur and professional sport, preserving the integrity of competitions and guaranteeing the uncertainty of the outcome of competitions.

228. Through its action in the competition field the Commission ensures that these legitimate objectives are achieved by the least restrictive means in accordance with the provisions of the EC Treaty, and in particular by means that do not disproportionately restrict the freedom of movement of players within the EEA. With this in mind, it has entered into a constructive dialogue with the sporting organisations some of whose rules have been challenged, with a view to reaching solutions that are satis-

<sup>(2)</sup> Case C-35/96 *Commission v Italy* [1998] ECR I-3851.

<sup>(3)</sup> Commission Decision 93/438/EEC in Case IV/33.407 *CNSD* (OJ L 203, 13.8.1993).

<sup>(4)</sup> Case T-513/93.

<sup>(5)</sup> COM(1999) 644 final.

<sup>(1)</sup> OJ L 106, 23.4.1999.

factory for all the parties concerned as well as improving legal certainty in the field of sport.

229. Lastly, the Commission applies the competition rules in this sector in a manner that does not undermine the regulatory authority of the sporting organisations with respect to sporting rules per se, i.e. rules which are intrinsic to a particular sport or are necessary for its organisation or for the organisation of competitions. It therefore takes account of the principles derived from the Court's

judgments in *Delière* <sup>(1)</sup> and *Lehtonen* <sup>(2)</sup> and thus shares the general principles outlined by the European Council in its declaration on the specific characteristics of sport <sup>(3)</sup>.

---

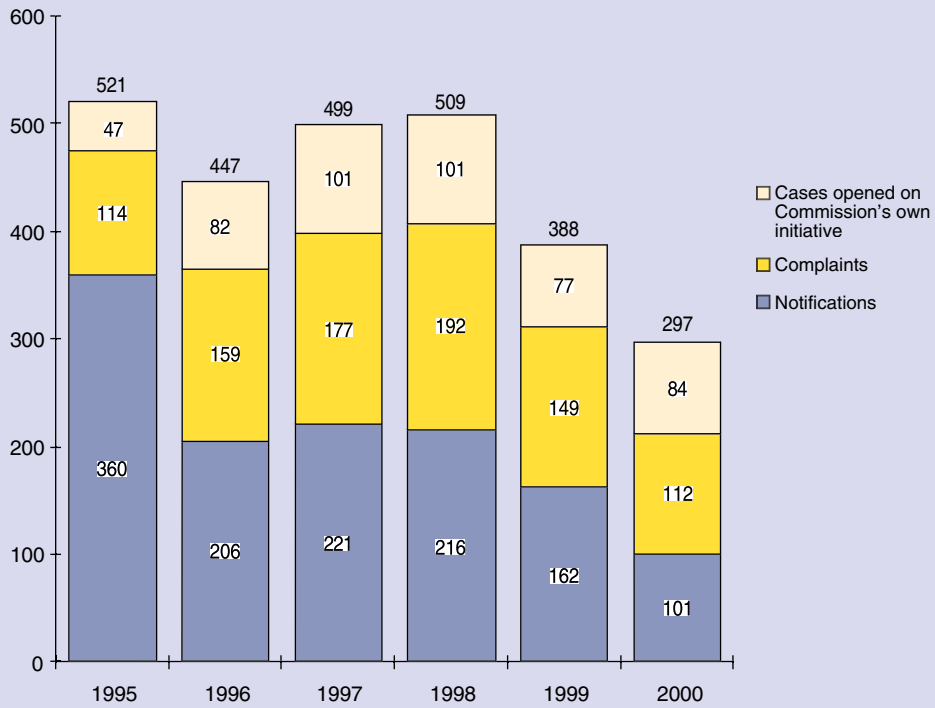
<sup>(1)</sup> Judgment of 11 April 2000 in Joined Cases C-51/96 and C-191/97 [2000] ECR I-2549.

<sup>(2)</sup> Judgment of 13 April 2000 in Case C-176/96 [2000] ECR I-2681.

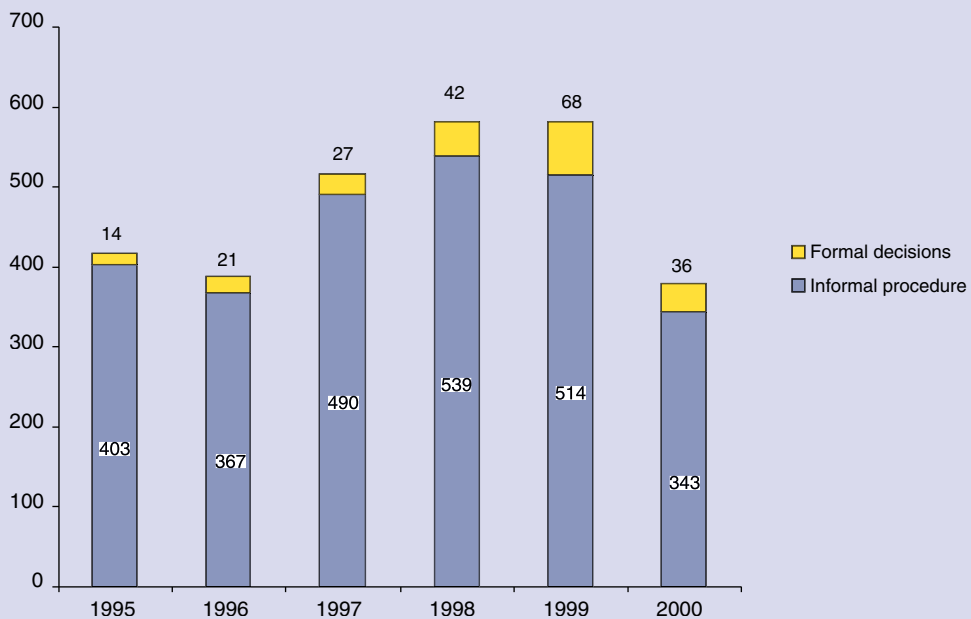
<sup>(3)</sup> Annex IV to the Presidency conclusions, Nice, 7, 8 and 9 December 2000.

## D — Statistics

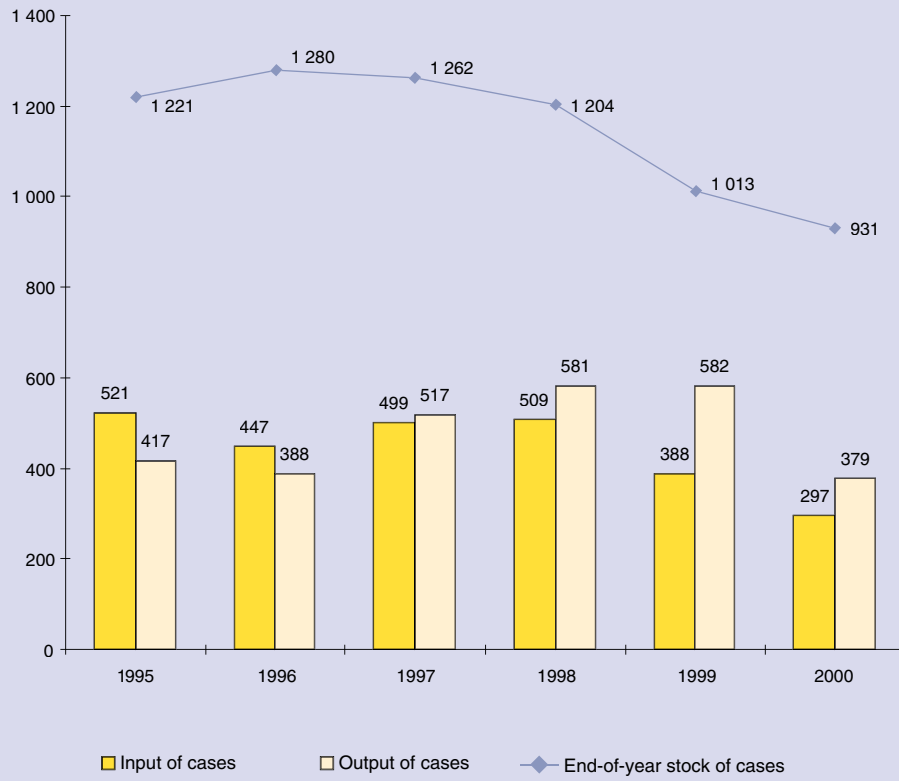
**Figure 1**  
New cases



**Figure 2**  
Cases closed



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





## II — MERGER CONTROL

### A — Introduction

230. Many of the features highlighted in last year's annual report remain as relevant now as they did then. The number of cases is high and continues to grow; the cases have involved an increasingly wide range of different products and services, and the increasingly global effects of the mergers have meant that more of the cases required cooperation with competition authorities in other countries.

231. The statistical results of merger activity are as follows. Overall, 345 new cases were notified during 2000 (+ 18 %) and in total, 345 final decisions were taken during the year, 28 % up on 1999. Of these, 321 were cleared in Phase I (+ 26 %), 28 of which were cleared conditionally (+ 47 %), in other words cleared but with undertakings attached (Article 6(2) decisions), and 293 were cleared unconditionally (Article 6(1)(b) decisions). During the year, the Commission took 17 decisions following an in-depth investigation, up from 10 in 1999. Three of these cases were cleared unconditionally, 12 cleared with conditions attached, and two were prohibited. In addition, six Phase II cases were withdrawn before a final decision was taken.

232. As this statistical review of the year 2000 indicates, the Commission's experience in applying the dominance test has necessarily continued to expand. Whilst there have not been any judgments from the Court of First Instance that have led to revolutionary substantive or analytical developments <sup>(1)</sup> in the Commission's analysis, development has continued on an evolutionary, case-by-case, basis.

233. Technological development and the commercial developments that accompany it have continued to impact on the nature of the Commission's work. For example, this year has seen the first cases involving business-to-business, or B2B, electronic marketplaces on the Internet <sup>(2)</sup>. These exchanges can lead to substantial efficiencies and have pro-competitive impact, but can also have negative implications for competition, such as enabling incumbents to exclude individual companies or to impose joint selling or purchasing conditions on others. Assessment of these factors will therefore continue to be an important part of the Commission's analysis in future cases.

234. Experience in assessing remedies has also continued to grow rapidly. In 2000, remedies were offered and accepted in 40 cases, 28 in Phase I and 12 in Phase II. Remedies were offered but not accepted in both *Volvo/Scania* and *MCI Worldcom/Sprint*. The Commission's understanding of how to ensure that the remedies offered are implemented has also grown considerably during the year, as the total number of cases with undertakings to implement and monitor has continued to rise. Much of this experience in both assessing and monitoring remedies is reflected in the notice on the Commission's treatment of remedies which was adopted in December 2000 <sup>(3)</sup>. The significance of the notice can be seen in the fact that no other competition authority elsewhere in the world has issued any guidelines on how they deal with remedies. The aim of the notice is to set out clearly and objectively not only the procedural, but also the substantive principles on which the Commission will base its assessment of remedies. The main points in the notice are discussed in the section on remedies below.

235. This year has seen evidence of the growing public profile of the European merger regime. Some of this debate has focused on the Commission's analysis of particular cases, such as the dual investigation into the proposed deals between Time Warner and both AOL and EMI. The prohibition decisions that have been taken this year have also led to some criticism. For example, following *Volvo/Scania*, criticisms were raised about bias against mergers between large companies operating in smaller Member States. And following its prohibition of the *MCI WorldCom/Sprint* deal, some concerns were expressed that the regime, and the way it is implemented, is biased against mergers between non-European, and in particular US-based, companies.

236. The same reply can be made to both these concerns, namely that the purpose of any competition-based merger control system is to ascertain the absence of negative effects on any relevant market that is either in the EEA or includes the EEA. This is regardless of that market's size or of the country in which the companies involved in the proposed deal are based. The crucial factor is that the need for industry restructuring does not justify any harm to the consumer, and that when

<sup>(1)</sup> The CFI judgment in *Airtours/FirstChoice* has not yet been delivered.

<sup>(2)</sup> Case M.1969 — *UTC/Honeywell/i2/MyAircraft.com*; Case M.2027 — *Deutsche Bank/SAP/IV*.

<sup>(3)</sup> Commission notice on remedies acceptable under Council Regulation (EEC) No 4064/89 and under Commission Regulation (EC) No 447/98 (OJ C 68, 2.3.2001).

business needs to restructure, there are ways and means to achieve this without damaging competition. Companies seeking to restructure have to recognise the importance that the Commission places on protecting competition in the EU, whether it takes place on a local, national, European or even global basis.

237. There has also been a considerable degree of comment about the pressures that the Commission faces in relation to its merger regime and the possible adverse effects that the current pressure on resources could have on the quality and therefore the credibility of the regime. Relief from this pressure is arriving from two sources. Firstly, the Merger Task Force is continuing to seek ways to improve the efficiency of its operations. This year has seen an important development in this respect, namely the adoption on 26 July of the notice on a simplified procedure <sup>(1)</sup>, which aims to simplify the treatment of certain categories of cases which do not create competition concerns. Full details of the categories of cases covered by the simplified procedure are given below in Box 5. Since it was introduced, the Commission has taken 41 decisions under the simplified procedure.

238. The second source of relief from pressure on resources will come following the Commission's peer review process, completed in June. As a result of the review, the Commission has decided that the Directorate-General for Competition will be given increased resources to support its commitment to a strong competition policy, in particular to implement the merger regulation. The additional resources will enable the MTF to employ additional case handlers over the next two to three years. As Commissioner Monti stressed in his speech to the conference organised to celebrate the merger regulation's 10th anniversary, President Prodi's active support is an acknowledgement of the vital role that the application of competition law has played — and continues to play — in driving forward the single market.

239. The conference, held in September, provided an excellent opportunity not just to take a retrospective look at the first 10 years of EC merger control, but also to look to the future.

The conference was organised jointly by the Commission and the International Bar Association. A book including all the papers prepared for the conference and the speeches made at the conference will be published early in 2001.

240. The conference also provided a further opportunity to discuss a wide range of issues, many of which are now being explored in the context of the merger review. The review followed the report that the Commission made to the Council in June, providing an initial examination of the turnover thresholds incorporated in the regulation. The report fulfilled the legal obligation introduced when the merger regulation was last amended in June 1997. During the process of preparing the report, it became clear that there were a number of fundamental issues which warranted further review. As a result, the Commission launched a wide-ranging review exercise with the aim of ensuring that the merger regulation is as relevant and adequate a tool as it can possibly be. The following questions are examples of the types of issue that are being examined: are the turnover thresholds that are established in the merger regulation set at the most appropriate level? How can the potential benefits of the work-sharing arrangements incorporated in the referral systems (Articles 9 and 22) be maximised? Is the concept of a 'concentration' as established in the merger regulation still adequate in a world of strategic alliances, minority shareholdings and production joint ventures?

241. In relation to the turnover thresholds, the assessment must be seen in the light of one of the fundamental principles underlying the EU merger regime, namely the 'one stop shop' principle for the examination and control of mergers and other concentrations that affect markets in Europe. In particular, the Commission is concerned that there appears to be a significant number of operations with cross-border effects that continue to fall outside the scope of the regulation. To give an example, two stock exchange cases (Euronext and iX) — both of which clearly have a European interest — either did not, or would not have been regarded as having a Community dimension on the basis of the thresholds in the merger regulation. From the Commission's viewpoint, this raises the question whether such transactions involve a Community interest and, if so, whether this interest is adequately preserved. From an industry viewpoint, this raises concerns mainly relating to having to deal

<sup>(1)</sup> Commission notice on a simplified procedure for treatment of certain concentrations under Council Regulation (EEC) No 4064/89 (OJ C 217, 29.7.2000). Also available on [http://europa.eu.int/comm/competition/mergers/legislation/simplified\\_procedure/](http://europa.eu.int/comm/competition/mergers/legislation/simplified_procedure/).



with multiple notifications, which increases legal uncertainty as well as effort and cost.

242. The 1997 amendments to the merger regulation also included changes to the referral procedures between the Commission and national competition authorities (Articles 9 and 22 respectively). These provisions were designed to enable the Commission to fine-tune its work-sharing practices with the Member States. However, the fact that not a single joint reference under Article 22 has been made since this option was introduced in March

1998 is a clear indication that the system is not working as it was intended.

243. The Commission is now at the fact-finding stage of the process, in consultation with Member States and, significantly, with the applicant countries, as well as with the business and legal communities. During 2001 the Commission will produce a formal consultation document setting out its conclusions and recommendations for change. This will then form the basis of a further round of consultations before any of the recommendations are implemented.

### Box 5: The simplified procedure

The introduction of the simplified procedure aims to increase the efficiency with which the Commission deals with certain categories of mergers that do not normally raise competition concerns. The system was introduced by the adoption of a notice, and it was put into practice on 1 September. The full text of the notice is available on the Commission's web site: [http://europa.eu.int/comm/competition/mergers/legislation/simplified\\_procedure/](http://europa.eu.int/comm/competition/mergers/legislation/simplified_procedure/).

The Commission notice on a simplified procedure for treatment of certain concentrations under Council Regulation (EEC) No 4064/89 identifies three categories of cases which would qualify for a short-form decision adopted by the Commission at the end of the usual one-month review. The notice applies to concentrations where:

- two or more undertakings acquire joint control over a joint venture, provided that the joint venture has no, or negligible, actual or foreseen activities within the EEA territory (turnover of less than EUR 100 million and assets of less than EUR 100 million in the European Economic Area);
- none of the parties is engaged in business activities in the same product and geographic market (horizontal relationships), or in a product market which is upstream or downstream of a product market in which any other party to the concentration is engaged (vertical relationships);
- two or more of the parties are engaged in business activities in the same product and geographic market or upstream or downstream market, provided that their combined market share is not 15 % or more for horizontal and 25 % or more for vertical relationships.

The short-form decision will contain information about the parties, the nature of the concentration and economic sectors concerned together with a statement to the effect that the concentration is declared compatible with the common market because it falls within one or more of the categories contained in the notice, with the applicable category(ies) being explicitly identified. As with all full clearance decisions, the Commission will publish a public version of the decision. There will be no press release, but clearance will be announced in the Commission's Middy Express.

The simplified procedure can reduce the administrative burden on notifying parties. It will still give the Member States and third parties the same opportunities to comment or intervene as under the ordinary procedure. The Commission may also, if necessary, revert at any time to the ordinary investigative procedures.

## B — Application of the dominance test

244. As laid down in Article 2(3) of the merger regulation, a concentration which creates or strengthens a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it must be declared incompatible with the common market. The Commission has applied this test in cases where the concentration would result in a single dominant market player but also in cases in which the proposed operation would create collective dominance.

### 1. Single dominance

#### *Volvo/Scania*

245. The creation of single dominance was analysed in *Volvo/Scania* <sup>(1)</sup>, one of the year's most prominent cases. Having established that, for a number of reasons (different technical requirements and purchasing habits as well as significant price discrimination even in neighbouring countries), markets for heavy trucks and buses are still national in scope, the Commission's investigation revealed that the new entity would reach a market share of 90 % in Sweden and of between 50 % and 70 % in Ireland, Norway and Finland. In this straightforward case of classical horizontal overlaps and large market shares, the unilateral effects of the concentration were also carefully investigated on the basis of sophisticated econometric tools. The proposed concentration would have brought together two companies with stable and largely symmetrical market positions in the past. Besides leading to the creation of a company several times stronger than its closest competitor, the operation would have eliminated competition between two particularly close competitors. In this decision the Commission also made it clear that the consistent application of the dominance test to any relevant geographic market independently of its size, besides being within the letter and the spirit of the merger regulation, guarantees consumers protection from the effects of dominance, in small and large markets alike. As regards the commitments proposed by Volvo, the Commission's investigation showed that they would not resolve the

competition concerns raised by the concentration in question. The Commission finally prohibited the operation. Following the prohibition both companies have successfully found alternative partners (Renault and Volkswagen respectively).

#### *Framatome/Siemens/Cogéma*

246. On 6 December, the Commission cleared a joint venture combining the nuclear activities of Framatome SA of France with those of Siemens AG of Germany. The joint venture, as initially notified, also involved the participation of Cogéma, a second French company active in the nuclear sector. In its original form, the joint venture operation threatened to create or strengthen dominant positions in the markets for fuel assemblies used in nuclear reactors. Regulatory clearance was possible after it was agreed that Cogéma would not be part of the joint venture. A statement by France that it would ensure that Electricité de France divested its holding in Framatome and would open up its procurement policy for fuel assemblies was a further alleviating factor. In this way, Europe's largest nuclear electricity market, France, becomes accessible to competitors of the new joint venture.

#### *AstraZeneca/Novartis*

247. The Commission also authorised this year an important merger between the agrochemical businesses of AstraZeneca and Novartis into a newly incorporated company, Syngenta. Against the background of a rapidly concentrating industry, the Commission found it necessary to open a Phase II investigation into the creation of Syngenta, the world's largest company in the sector. In close cooperation with the FTC, authorisation was given after substantial commitments had been offered. As initially notified, the operation would have led to the creation or strengthening of dominant positions on 39 markets for crop protection products, the most important ones being the markets for cereal fungicides and maize herbicides. In reaching this conclusion, the Commission did not rely exclusively on the existing market position of the parties, but focused also on the projected future developments of their product portfolios. The determination of the relevant product markets proved particularly difficult in this case (as in related Case No M.1932 — *BASF/American Cyanamid*), as it involved the determination of 'chains of substitution', issues of 'one-sided substitution' and the competitive position of multi-purpose products.

<sup>(1)</sup> Case M.1672, 14.3.2000.

248. The dominance test has proved to be a suitable tool with which to examine the effects of concentrations not only in the classic, old economy markets, for instance those involving manufacturing industry, but also in various service sectors, most notably telecommunications, the Internet and the media (including the various cross-sector combinations). In such markets, merger control instruments should always be applied with a view to safeguarding progress achieved with liberalisation and allowing space for the flow of innovation, both aims ultimately to the benefit of consumers.

249. Vertical integration situations and the ensuing market foreclosure effects also had to be looked at closely. Besides reinforcing the new entity's position at one level of the supply chain, thus foreclos-

ing other suppliers' access to one or more vertically related markets, vertical integration often changes the economic incentives of the merging companies, leading to a substantial change in the functioning of the market. Most characteristically in the services mentioned above, where access to networks is essential for the provision of a wide range of services, the so-called 'gatekeeper' effects can become a major concern. The Commission has been confronted this year with such 'gatekeeper' effects resulting from both horizontal and vertical operations. The prohibited WorldCom/Sprint concentration is a good example of a case where the gatekeeper effect is produced by a horizontal overlap, i.e. the combination of two operators' networks (see below the analysis in Box 6).

### Box 6: MCI WorldCom/Sprint

#### *Introduction*

The Commission decided on 28 June to prohibit the proposed merger between the two US telecommunications companies MCI WorldCom and Sprint because it would have created a dominant position for the merged entity on the market for the provision of top-level or universal Internet connectivity.

#### *Top-level or universal (Internet) connectivity*

The proposed merger raised similar issues to the 1998 merger between WorldCom and MCI <sup>(1)</sup> where the Commission found that the merger between WorldCom and MCI would have created a dominant position on the market for the provision of top-level or universal (Internet) connectivity.

The notifying parties argued that the market definition used by the Commission in the WorldCom/MCI decision needed to be reconsidered given the dramatic changes during the last few years in the Internet sector. These alleged changes were, in particular, the liberalisation of the EC telecommunications markets with the resulting increase in the number of European Internet service providers (ISPs) and content providers; increased use of multihoming (the use of at least two connectivity providers to obtain Internet connectivity); content delivery techniques (such techniques enable the regulation and limitation of the flow of Internet traffic that is exchanged over the Internet) and lowered leased lines prices. As a result, the parties argued, the Internet could not be identified as being hierarchical and European ISPs were no longer dependent on the largest (US) Internet connectivity providers to obtain global Internet connectivity.

The Commission's investigation showed, however, that none of the factors raised by the notifying parties had had any significant impact on the structure of the market. The Commission acknowledged that there had been some decrease in the dependence on top-level connectivity providers and that due to increased European content and build out of European networks, more Internet traffic was intra-European. However, even the largest European Internet connectivity providers were still very dependent on the top-level providers for global connectivity and were unable to place any competitive constraint on the top-level providers. The

<sup>(1)</sup> Case M.1069 — WorldCom/MCI (8.7.1998).

---

Commission concluded that the Internet had maintained its hierarchical structure and the relevant market for the purposes of the assessment of the case was the market for the provision of top-level or universal (Internet) connectivity.

With regard to competition in this market, the Commission's investigation showed that MCI WorldCom had kept its leading position as a provider of top-level Internet connectivity, with Sprint being one of its main competitors. The investigation also showed that the merger would, through the combination of the merging parties' extensive networks and large customer base, have led to the creation of a company of such absolute and relative size compared to its competitors that both competitors and customers would have been dependent on the new company for universal Internet connectivity. This would have allowed the merged company to behave independently of both its competitors and customers and given it the ability to control technical developments, raise prices and discipline the market by selective degradation of its interconnections with competitors. The Commission therefore concluded that the merger, as originally notified, would have raised serious competition concerns by creating a dominant position or strengthening the dominant position of WorldCom in the global market for the provision of top-level Internet connectivity. Given the hierarchical structure of the Internet and the global nature of the market, this would have affected consumers everywhere in the world.

In order to remedy the Commission's concerns, the parties proposed to divest a Sprint Internet business from Sprint's other activities. This undertaking was broadly similar to the undertaking accepted by the Commission in the WorldCom/MCI decision. In the previous case, the Commission accepted the divestiture of an MCI Internet business to remedy its concerns. However, drawing from the experience gained from this divestiture and from the investigation in the MCI WorldCom/Sprint case, the Commission found that the proposal was insufficient to resolve the competition concerns resulting from the merger. In particular, the Commission found that the proposal failed to ensure with enough certainty that the remedy would restore effective competition in the market for top-level Internet connectivity. The parties withdrew their proposed remedies at a late stage in the proceedings.

### *Other markets*

During the course of its investigation, the Commission also examined other potential competition concerns relating to the provision of global telecommunications services and international voice telephony services. Other than certain issues to which the Commission drew the US authorities' attention in relation to these markets, no competition concerns affecting Europe were discovered. The issues examined, and the Commission's conclusions in relation to these other markets, are explained in more detail in the press release available on MTF's web site.

### *Procedure*

The day before the Commission was scheduled to take its decision on the proposed merger, the parties withdrew their proposed undertaking and their notification to the Commission. However, given that the parties only withdrew the notification but did not abandon the underlying agreement which triggered the obligation to notify the proposed transaction, the Commission felt compelled nevertheless to adopt its decision.

### *Cooperation with the US Department of Justice*

The proposed merger between MCI WorldCom and Sprint was dealt with in parallel by the European Commission and the US Department of Justice. Pursuant to the bilateral agreement of 1991 on antitrust cooperation between the European Commission and the United States of America, the two authorities conducted independent and separate investigations but the Commission and the US Department of Justice enjoyed a good working relationship at all stages of the procedure. For example, representatives of the US Department of Justice attended the oral hearing in Brussels, and a representative of the Commission was present in one

of the pitch-meetings that took place at the US Department of Justice. On 27 June, the Department of Justice filed a complaint in a US court where it opposed the proposed merger on grounds that included the market for the provision of top level connectivity.

#### *Subsequent developments*

On 13 July, MCI WorldCom and Sprint announced that they had cancelled their merger agreement.

On 27 September, MCI WorldCom (now WorldCom) filed an application under Articles 230 and 231 of the EC Treaty for the annulment of the Commission's decision.

#### *Vodafone-Airtouch /Mannesmann*

250. Another case that is also in this category is *Vodafone/Mannesmann*, which raised competition concerns on the emerging market for pan-European seamless mobile telephony services. The provision of these services is heavily dependent on the ability of operators to precisely locate their customers when the latter are outside reach of their own network. The Commission investigation showed that there is an emerging demand for such services from internationally mobile customers, in particular large corporations with substantial amounts of European cross-border business. The merger would give the new entity a unique footprint in the common market, with sole control of mobile operators in eight Member States and joint control in three. Through the large footprint it appeared that the merged entity would be in a unique position to build an integrated network which would enable a quick implementation of the provision of advanced seamless pan-European services, at least in those Member States where it had sole control. On the other hand, the merged entity's competitors, because of their segmented footprints and the difficulties in integrating their networks into a seamless one, would not be able to duplicate this in the short or medium term (on average three to five years). The concentration was finally cleared following undertakings given by the parties. The remedy accepted in relation to this specific problem consisted in other mobile operators being given the possibility of providing pan-European advanced seamless services to their customers by using the integrated network of the merged entity. Due, however, to the fast developments in the sector, especially the award of UMTS licences and the fact that competitors will in all likelihood try to build

up alternative infrastructure, this undertaking has been limited to a period of three years.

#### *AOL/Time Warner*

251. In cases of vertical integration, it is important to recognise that foreclosure effects may arise, especially where one of the merging parties enjoys significant market power in an upstream or downstream market. In the *America Online Inc (AOL)/Time Warner* case the Commission was concerned that AOL, because of the merger with Time Warner (which in turn had planned to merge its music recording and publishing activities with EMI), and because of its European joint ventures with Bertelsmann, would have controlled the leading source of music publishing rights in Europe. AOL is the leading Internet access provider in the US and the only such provider with a pan-European presence. Time Warner is one of the world's biggest media and entertainment companies with interests in television networks, magazines and book publishing, music, filmed entertainment and cable networks. The concentration created the first Internet vertically integrated content provider, distributing Time Warner's branded content (music, news, films, etc.) through AOL's Internet distribution network.

252. Because of AOL's structural and contractual links with Bertelsmann, the new entity would also have preferred access to Bertelsmann's content and, in particular, to its large music library. As a result, the new company would have controlled the leading source of music publishing rights in Europe, a market of which one third is held by Time Warner and Bertelsmann together. In these circumstances it was likely that the new entity would have become dominant in the emerging

market for Internet music delivery online by becoming a ‘gatekeeper’ and thus being able to dictate the conditions for the distribution of audio files over the Internet. It would also have been possible for the new entity to format Time Warner’s and Bertelsmann’s music in such a way as to be compatible only with AOL’s music player (Winamp), but not with competing music players. On the other hand Winamp would have been able to play the music of competing record companies which generally use non-proprietary formats. Thus, because of the technical limitations of other players, the new entity would also have been able to impose Winamp as the dominant music player.

253. The Commission was able to approve the transaction thanks to a package of commitments aiming principally at severing the links between Bertelsmann and AOL. This will be done gradually, under the supervision of an appointed independent compliance monitor. A series of interim measures will ensure that the relationships between the two companies will be kept at arm’s length until Bertelsmann’s exit has been completed.

#### *Vivendi/Canal+/Seagram*

254. Similar problems of vertical integration and foreclosure were raised in *Vivendi/Canal+/Seagram*. The Commission’s competition concerns focused on the markets for pay-TV (in which Canal+ is Europe’s dominant player), on the emerging pan-European market for portals and on the emerging market for online music. In the pay-TV market the Commission found that Canal+’s likely exclusive access to the premium films <sup>(1)</sup> produced and co-produced by Seagram’s Universal would have strengthened its existing dominant position in France, Spain, Italy, Belgium and the Netherlands and created a dominant position in the same market in the Nordic region.

255. The package of commitments offered includes access for competitors to Universal’s film production and co-production. The parties undertook in particular not to grant to Canal+ the so-called ‘first-window’ rights <sup>(2)</sup> for more than 50 % of Universal’s production and co-production. This

commitment applies in certain European countries and has a five-year duration.

256. By adding Universal’s music content to Vivendi’s multi-access portal (Vizzavi) the transaction also raised serious doubts as to the creation of a dominant position on the emerging pan-European market for portals and on the emerging market for online music. This problem was remedied by Vivendi’s offer to give rival portals access to Universal’s online music content for five years.

#### *TotalFina/Elf*

257. Vertical integration concerns have been equally raised in old economy concentrations. The takeover of Elf-Aquitaine by TotalFina called for an analysis of the single dominance issue as raised through the regrouping of first league national players and the risk of the creation of real ‘national champions’. The Commission’s concern was to identify and eliminate activity overlaps and also bottlenecks that would enable the new entity to partition the market to its advantage by controlling import logistics and the transport and distribution of refined petroleum products. In particular, in the wholesale fuel and domestic heating oil markets, the new entity, besides endangering the balance of competition in the French market, would also have effectively controlled the ‘logistical chain’, i.e. most French import depots, the three main pipelines supplying every corner of France and a substantial number of local depots. In addition, the combined entity would have gained a dominant position on the market for the sale of motor fuel on French motorways. In the market for liquefied petroleum gases (LPG) the new entity would have acquired a dominant position in the market, in particular through its control of the logistical infrastructure for imports, storage and bottling which would make it completely independent across the whole of France, freeing it from the need to have recourse, as is normal practice in the sector, to infrastructure-access swaps with its competitors. The operation also called for careful assessment due to its expected significant impact upon vital markets for consumers, i.e. the markets for motor and domestic fuels and energy resources in general. Remedies for the various competition concerns, besides those mentioned above, allowed the Commission to clear the case. TotalFina has mainly undertaken to sell off a large proportion of its investments in transport and storage logistics (an operation which is expected to lead to a

<sup>(1)</sup> In order to compete effectively in the pay-TV market, pay-TV operators must acquire key inputs such as premium films.

<sup>(2)</sup> Premium films showed on pay-TV shortly after cinema exhibition and video rental are said to be released on ‘first window’, that is before they are available more widely on television.

fundamental transformation of oil logistics in France), to give up 70 service stations on motorways and to sell off Elf Antargas, which will have the effect of eliminating any overlap between the merging parties' LPG activities. At the end of 2000, most of these divestments had taken place.

258. On 13 September, the Commission rejected a package of purchasers proposed by TotalFina Elf to purchase the motorway service stations it had undertaken to divest. In view of the market structure resulting from the proposed package, the Commission decided that two of the proposed purchasers did not provide enough certainty as to their viability as potentially or actually present in the markets in question and their ability to maintain and develop effective competition. On 7 November, the Commission accepted a new list of purchasers proposed by TotalFina Elf that included a new entrant in the market, the supermarket chain Carrefour. One of the two companies, Le Mirabellier, initially rejected by the Commission, was not retained by TotalFina Elf in its final list of proposed purchasers. It filed an application under Article 230 of the EC Treaty for the annulment of the Commission's decision and for interim measures asking for the suspension of the contested decision and requiring the Commission to order TotalFina Elf to suspend the execution of its commitments. The application for interim measures was rejected by the Court on 17 January 2001.

## 2. Collective dominance

259. The Commission has applied the dominance test as laid down in Article 2(3) of the merger regulation in cases where the result of the concentration would be the creation of collective dominance. The Court of Justice and the Court of First Instance have supported the Commission's approach. In examining collective dominance and its effects, the Commission is conscious of the particularities of each sector and very much sticks to an analysis carried out without preconceptions and on a case-by-case basis. An interesting corpus of precedent is being built up which will eventually form the basis of a forthcoming notice on collective dominance.

260. The issue of collective dominance was discussed in a number of cases this year including cases in the services sectors such as *Veba/Viag* and the withdrawn operation *EMI/Time Warner*.

### *VEBA/VIAG*

261. The Commission considered the *Veba/Viag* case in parallel with the Bundeskartellamt's investigation of RWE/VEW. Following these two operations the two new entities would have controlled well over 80 % of the German market for electricity delivered from the interconnected grid. A series of factors would have established a market structure conducive to coordinated effects, notably the total homogeneity of the product, the market transparency, similar cost structures owing to a similarly composed stock of power stations and a number of jointly operated large power stations, numerous interrelationships between Veba/Viag and RWE, expected slight growth in demand and low price elasticity of electricity as a product. Both operations were cleared due to commitments given by the parties to the respective authorities. The undertakings given consisted mainly in divestments affecting numerous holdings especially in the eastern part of Germany, thus severing important links between the two new groups, and transforming VEAG, a major electricity producer jointly controlled by the duopolists, into an independent competitor. The undertakings also provided for improvements to the basic rules governing transmission through the network operated by the two leading interconnected entities.

### *Outokumpu/Avesta Sheffield*

262. The Commission does not automatically apply the criteria for the assessment of collective dominance (i.e. criteria aimed at establishing whether the market is prone to collective dominance such as degree of market concentration, market transparency, product homogeneity, market growth, barriers to entry, countervailing buyer power, structural links, etc.). In *Outokumpu/Avesta Sheffield*, the operation would have resulted in a reduction in the number of producers of hot and cold rolled flat steel products in the EU from six to five. Despite the relatively transparent market and high entry barriers, the Commission's investigation highlighted a high growth rate (over 5 % a year) resulting in growth of capacity utilisation. It was concluded that these factors in combination with the different cost structures of the companies would not have been conducive to the emergence of coordinated effects on the market.

### *Alcan/Pechiney/Alusuisse*

263. A series of mergers in the aluminium sector which came under scrutiny this year, although raising mainly problems of single dominance, allowed the Commission to refine its thinking in relation to coordinated effects in the market and collusion issues. In *Alcan/Pechiney*, the Commission's assessment was essentially based on the idea that the merging parties could use an existing structural link, in this case a joint venture, with a competitor, as a retaliation mechanism to dissuade this competitor from engaging in a price war.

264. The three-way merger between Alcan, Pechiney and Alusuisse would have brought together companies involved in all aspects of the aluminium industry and would have created the second largest aluminium producer worldwide. Due to Alcan's share-exchange offers towards the two other companies, one merger could happen without the other and the Commission was able to investigate in depth the two cases separately and on their own merits. The *Alcan/Pechiney* operation did not go through and was abandoned by the parties in view of a prohibition decision which the Commission was considering adopting. On the other hand, the Commission approved, subject to divestment undertakings, the *Alcan/Alusuisse* operation.

### *Alcoa/Reynolds, Rexam/American National Can*

265. In another case involving single dominance (*Alcoa/Reynolds*) valuable experience was acquired in the functioning of bidding markets. This experience, as applied in *Rexam/American National Can*, enabled the Commission to conclude that a collective dominance situation could be created and sustained in markets where business is done by way of frequent tenders.

## 3. Potential competition

### *Air Liquide/BOC*

266. Finally, it should be mentioned that the Commission has had the opportunity to analyse a so-called indirect effect of a merger, i.e. its impact upon potential competition in the *Air Liquide/BOC* case. Timely, likely and sufficient potential competition is put forward as a defence

argument which could militate in favour of the approval of a merger.

267. It was found that the proposed merger would have strengthened BOC's dominant position in the United Kingdom and Ireland by removing the threat of entry from the most likely challenger and by reducing the likelihood of entry by other suppliers. BOC's dominance was extremely strong, since in some product markets it almost reached a 100 % market share. Both parties were found to hold a number of additional advantages in their home market, not least through vertical integration. Another effect of the merger was that the new entity would have created an unparalleled distribution network in Europe, which would have given it additional power to deter others from market entry. Against this background, the removal of Air Liquide as the most credible potential entrant to the UK market was found to strengthen the dominant position held by BOC. The deal was eventually abandoned by the parties following unsuccessful negotiations on remedies with the Federal Trade Commission in the US.

## C — Remedies

268. In December, the Commission adopted a notice on the subject of remedies <sup>(1)</sup>, thereby becoming the first competition authority to issue any such guidelines or advice on this subject. The notice aims to set out clearly and objectively the administrative and substantive principles on which the Commission will base its assessment of remedies and follows extensive consultations carried out over recent months with the Member States and with the business and legal communities.

269. While the notice sets out the underlying principles, it should be noted that the Commission's practice in the remedies area is evolving very fast and that in order to deal with the issues on a case-by-case basis the Commission must retain a degree of flexibility. In addition, the sheer number of merger cases involving remedies is growing at such a fast pace that it is becoming increasingly difficult to keep abreast of developments in this area. To put the following discussion into context, in the last two years alone there have been around 50 cases in which the Commission has accepted

<sup>(1)</sup> OJ C 68 of 2.3.2001, p. 3. The notice is available on the Internet: <http://europa.eu.int/comm/competition/mergers/legislation/>.



remedial commitments from merging parties before allowing transactions to proceed.

270. The notice underlines the general principles that underpin the Commission's procedures. In particular, it stresses that, while it is for the Commission to show that a concentration creates or strengthens a dominant position, which can impede competition, it is the responsibility of the parties to show that the remedies they offer will eliminate the problems identified by the Commission.

271. The Commission must take into account a variety of factors in reaching a conclusion on whether or not the remedy will restore competition. The type of remedy proposed is one vital factor, but the Commission must also consider the risk that a proposed remedy will not be able to be implemented in full and in a timely fashion.

272. As the experience in dealing with remedial proposals has shown, remedies must not only appear appropriate to restore competition, but they must do so effectively. For example, it is no longer sufficient for the Commission to accept that the divestment of overlapping assets will necessarily solve competitive problems brought about by a particular merger. Even if suitable assets can be identified, a commitment simply to divest those assets — regardless of who buys them — may not be adequate. Not only must the assets to be divested represent an ongoing business, but they must also be sold to someone who has the right incentives to compete in the market.

273. One case from this year (*TotalFina/Elf Aquitaine* <sup>(1)</sup>) clearly illustrates both these points. Firstly, the Commission rejected a group of buyers proposed by TotalFina Elf because they did not have the incentives to bring competition effectively to the market for French motorway petrol sales. Secondly, the parties had proposed to sell several assets to eliminate competition concerns in the LPG industry. However, on account of negative feedback from the Commission's market test about the viability of the proposed remedies, they had to undertake to divest a full subsidiary, a remedy which went clearly beyond the elimination of the overlap.

274. There are cases where the viability of the divestiture package is, according to the assets con-

cerned, to a large extent dependent on the identity of the purchaser. In such circumstances, the Commission may not clear the merger unless the parties agree not to complete the notified operation until they have entered into a binding agreement with a purchaser for the divested business (known as the 'upfront buyer'), approved by the Commission. The first and, so far only case in which the Commission imposed this condition was *Bosch/Rexroth* <sup>(2)</sup>. To address the Commission's concerns about potential pre-sale weakening of the business, as well as concerns about the very existence of a strong buyer, Bosch agreed to find an 'upfront buyer'.

275. The notice recognises that while divestiture is the preferred remedy, it is not the only type of remedy acceptable to the Commission. There might be situations where divestiture is not possible or where the competition problems in question derive from specific features of the deal such as the existence of exclusive agreements, the combination of networks, or the combination of key patents. An example of a case where the remedies package incorporated such factors in addition to divestments was *Astra Zeneca/Novartis* <sup>(3)</sup>, a concentration which led to the world's leading crop protection business. In order to obtain clearance, the parties to that case submitted an extensive package of remedies. This consisted not only of divestitures of products, representing total sales worldwide in excess of EUR 250 million this year, but also of out-licensing of products and the termination of distribution agreements for third-party products.

276. Another example of a case where a solution was found to a problem which could not have been solved by divestiture but by lowering entry barriers occurred in *Vodafone Airtouch/Mannesmann* <sup>(4)</sup>. In this case, the remedy was aimed at solving the problems with the emerging seamless pan-European mobile telecommunications service market for corporate customers and the markets for pan-European wholesale roaming. These concerns were addressed by undertakings aimed at giving other mobile operators the possibility of providing these services to their customers by using the integrated network of Vodafone Airtouch/Mannesmann. Owing to rapid develop-

(1) Case M.1628, 9.2.2000.

(2) Case M.2060, 13.12.2000.

(3) Case M.1806, 26.7.2000.

(4) Case M.1795, 12.4.2000.

ments in the sector, the award of third generation UMTS licences and the fact that competitors will try to build up alternative infrastructures, the commitments have been limited to a period of three years.

277. The degree of complexity of transactions increases the uncertainties attached to assessing the effectiveness of proposed remedies. Parties, therefore, should hesitate before making a package of remedies too complex. To do so can cast doubt on the viability of the whole exercise. An important principle which has been emphasised by Commissioner Monti several times during the year is that the solution cannot be more complex than the problem it is trying to solve.

278. An additional feature of some of the remedies accepted this year is that the Commission has insisted on eliminating minority shareholdings or links among competitors that could prevent effective competition in certain markets. This was done in *Vivendi/Canal+/Seagram* <sup>(1)</sup> by eliminating the shareholding in BSKyB, and in *AOL/Time Warner* <sup>(2)</sup> by severing the link with Bertelsmann. This is an issue that also arose in *Generali/INA* <sup>(3)</sup>, where approval was contingent on the elimination of minority shareholdings in competing insurance undertakings, and in *Volvo/Renault VI* <sup>(4)</sup>, which was cleared only after Volvo agreed to sell the minority stake that it had bought in Scania, its major competitor in the Nordic countries.

## D — Cooperation

### 1. Cooperation with Member States

279. An achievement that has become so much a matter of fact that it is easily overlooked is the special way in which EU merger control incorporates the approaches and views of the competent competition authorities of the EU's 15 Member States. In Phase I investigations (4–6 weeks) Member States are forwarded a copy of each notification under the merger regulation, are informed about any commitments submitted by companies to address competition problems and can express their views

at any point during the proceedings including the possibility of asking for referral of a case if the criteria of Article 9 of the merger regulation are met. In 2000 the Commission took six Article 9 decisions during the year, two full referrals <sup>(5)</sup> to the UK authorities, and four partial referrals, to France, Spain and the UK <sup>(6)</sup>.

280. Cooperation in Phase II investigations (an additional four-month period) is even closer. Member States are kept closely informed about the Commission's decision to initiate Phase II proceedings, about the Commission's objections and the parties' reply to it, are invited to the hearing, informed of any remedies proposed and the Commission's views on them and, finally and most importantly, are consulted on the draft decision on each Phase II case at an Advisory Committee meeting. An Advisory Committee meeting is also held for important non-case-related aspects such as Commission notices providing guidance and defining the Commission's policy on various aspects of the merger regulation and for cases involving fines. In 2000, no fewer than 18 Advisory Committee meetings (sometimes combining more than one case or issue) were held.

281. In 2000, the combined efforts of the Commission and Member States have resulted in a vast majority of the votes taken on individual merger cases by the Advisory Committee unanimously supporting the Commission's position, the remaining points being approved by simple majority (measured by votes on individual points). In more than half of the cases the Advisory Committee agreed with the Commission unanimously on all points, while in others it agreed on some points unanimously and on some by majority.

282. There are numerous cases in which an individual Member State has a particular interest and in which it therefore remains in close contact with the Commission. In many of these cases Member States have provided useful input into the competition assessment. An outstanding example of collaboration between a Member State and the Commission in 2000 was the *Veba/Viag* case. In that case, the German Bundeskartellamt and the Commission in fact achieved an extraordinary

<sup>(1)</sup> Case M.2050, 13.10.2000

<sup>(2)</sup> Case M.1825, 11.10.2000.

<sup>(3)</sup> Case M.1712, 12.1.2000.

<sup>(4)</sup> Case M.1980, 1.9.2000.

<sup>(5)</sup> Case M.1779 — *Anglo American/Tarmac* and M.1827 — *Hanson/Pioneer*.

<sup>(6)</sup> Two in Case M.1684 — *Carrefour/Promodès*, one to the French authorities, one to the Spanish authorities; Case M.2044 — *Interbrew/Bass* and Case M.2154 — *C3D/Rhône/GoAhead*, both to the UK.

twinning of cases, the Bundeskartellamt investigating in parallel a closely linked case in the electricity sector, *RWE/VEW*. The fruits of this close cooperation were fully consistent and satisfactory results which will have a major positive impact on the liberalisation process in this sector. Another example was *Generali/INA*, in which the Italian side very much supported the Commission's investigation, particularly as regards the assessment of the proposed remedies.

## 2. The international dimension of merger control

283. Owing to the combined effects of internationalisation, technological change and restructuring, the global increase in merger activity has continued, giving further impetus to the need to strengthen the international dimension of EC merger control. More than 60 countries now have pre-merger notification requirements and the steadily rising number of competition authorities applying national laws to merger operations has resulted in some firms having to seek clearance for proposed operations from up to 40 different authorities; this not only raises the firms' transaction costs significantly but also increases the risk of inconsistent rulings. Calls for promoting effective international cooperation, particularly in the field of mergers, were made on various occasions in 2000 on both sides of the Atlantic <sup>(1)</sup>.

### 2.1. Cooperation with the United States and Canada

284. Close bilateral cooperation with the competition authorities of the EU's main trading partners, most notably with the US Department of Justice and Federal Trade Commission and with the Canadian Competition Bureau, continued during 2000. These issues are discussed in more detail in Chapter IV (International activities).

<sup>(1)</sup> See Commissioner Monti's speech at the Japan Foundation Conference, Washington DC on 23 June; Assistant Attorney General Joel Klein's, Director-General Schaub's and Commissioner Monti's speeches at the 10th Anniversary Conference of EC Merger Control in Brussels on 14–15 September; Commissioner Monti's and DoJ Acting Assistant Attorney General Melamed's speeches at Fordham, New York on 19–20 October and Commissioner Monti's speech at the European University Institute in Fiesole on 27 October. The need to take a fresh look at the problems arising from multi-jurisdictional merger filings was also examined in some depth by the US International Competition Policy Advisory Committee, which presented its final report to US Attorney General Reno and US Assistant Attorney General Klein in February.

### 2.2. Cooperation with EFTA countries and applicant countries

285. EU merger control encompasses not only the competition systems of its 15 Member States but also to a large extent, via cooperation with the EFTA Surveillance Authority, those of the other European members of the European Economic Area, Norway, Iceland and Liechtenstein. In regard to in-depth Phase II investigations, that cooperation reached its highest level ever in 2000.

286. Contacts with applicant countries have been further developed. Their competition authorities have also been invited to comment in the context of the Merger Review 2000 exercise and have offered valuable contributions. The coming years will see a further strengthening of this cooperation, which is viewed by the Commission as an important step towards eventual accession.

## E — Other procedures

### 1. Fines; Articles 14 and 15 of the merger regulation

287. On a separate note, for the first time the Commission imposed fines on a non-notifying party for failing to supply information under the merger regulation. The fines were imposed on *Mitsubishi Heavy Industries* for failing to supply information on a joint venture last year between Kvaerner and Ahlström. The first fine, of EUR 50 000, was for failing to comply with the Commission decision pursuant to Article 14(1)(c) of the merger regulation. The second fine was a periodic penalty payment totalling EUR 900 000. This is the first time the Commission has fined a company other than a notifying party (or a party failing to notify) in merger proceedings. It is also the first time that a periodic penalty payment has been imposed on a firm in such proceedings. The action was taken because the Commission considered that Mitsubishi's behaviour was a very serious infringement of EU law as the information requested was necessary for the proper assessment of the *Ahlström/Kvaerner* operation. In adopting this decision, the Commission wanted to stress its determination to enforce the merger control rules in the European Union, which presupposes the supply of correct information by both merging parties and competitors requested to assist it in its task.

---

## 2. Prevention of barriers to cross-border mergers; Article 21 of the merger regulation

288. The Commission is also vigilant in preventing mergers of a Community dimension from being blocked by Member States for protectionist or other unacceptable reasons. In this context, the Commission adopted a decision under Article 21 of the merger regulation against measures taken by the Portuguese authorities. This followed similar action taken against the Portuguese Government last year in the *BSCH/A. Champalimaud* case <sup>(1)</sup>. In the decision taken this year, the Commission found that, in blocking the proposed acquisition by Secil Companhia Geral de Cal e Cimentos SA and

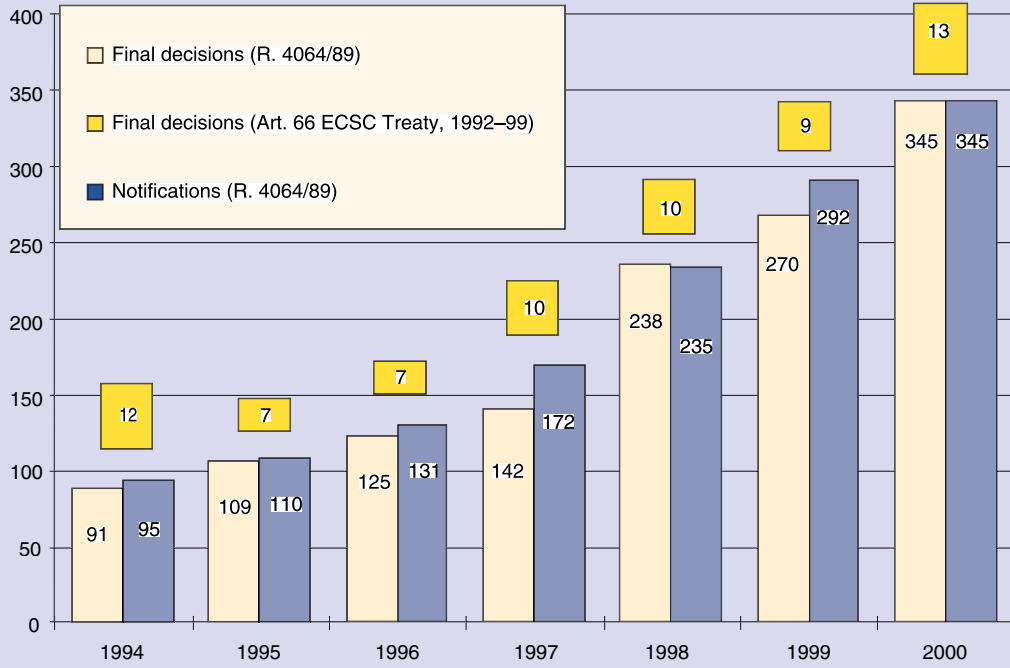
Holderbank of the Portuguese company Cimpor Cimentos de Portugal SGPS, the Portuguese Government had breached its obligations under Article 21 of the merger regulation. The Commission found that the ministerial decisions opposing the bid were not meant to protect any legitimate interest as recognised under Article 21 of the merger regulation. Both the above cases clearly indicate that the Commission intends to protect its exclusive right to review mergers with a Community dimension and that it will challenge any other similar infringements.

---

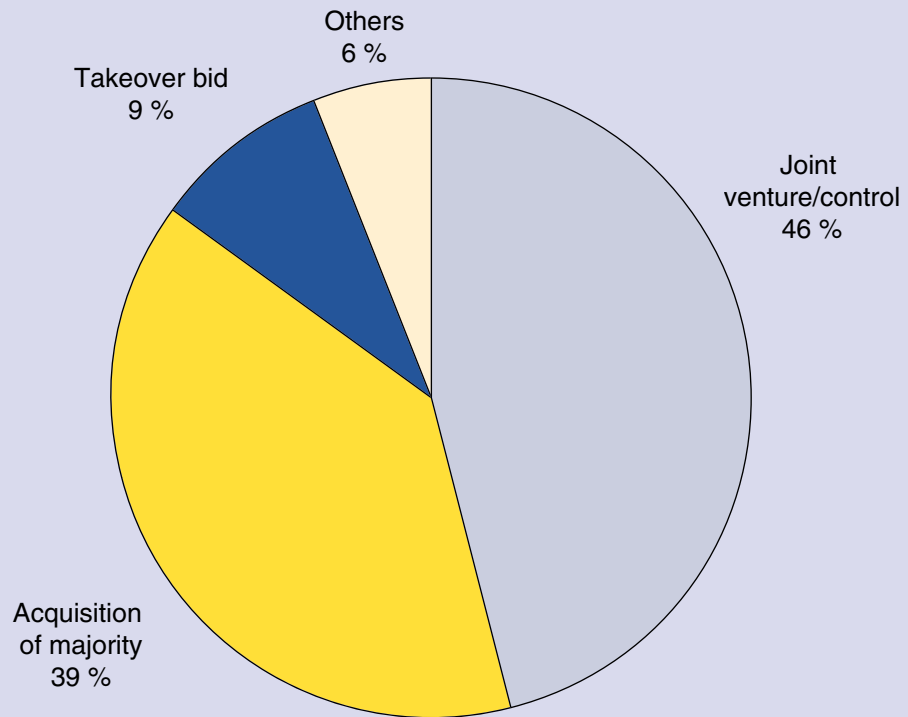
<sup>(1)</sup> Case M.1616.

F — Statistics

**Figure 4**  
 Number of final decisions adopted each year since 1994 and number of notifications



**Figure 5**  
Breakdown by type of operation (1993–2000)



### III — STATE AID

#### A — General policy

289. In the field of State aid, the Commission continued throughout 2000 its rationalisation and modernisation activities initiated in previous years, giving them an increased focus. In this area its adoption of three regulations on aid to small and medium-sized enterprises, aid for training and the application of the *de minimis* rule, is making a major contribution to the attainment of its objectives (see below). In addition to this rationalisation and modernisation, it has also emphasised the proper enforcement of Commission decisions, particularly concerning the recovery of State aid that has been unlawfully granted (see Box 7).

290. The eighth survey of State aid in the Union <sup>(1)</sup>, adopted by the Commission in April, covers the years 1996–98. During that period, grants of aid amounting to an average of EUR 93 billion per

year were paid by the 15 Member States to the manufacturing, agricultural, fisheries, coal mining, transport and financial services sectors. While this constitutes a considerable amount in absolute terms it nevertheless represents a reduction of 11 % in relation to the previous period, 1994–96.

291. In relation to the previous period, the manufacturing sector remains the principal beneficiary of grants of aid, receiving EUR 33 billion as an annual average, equivalent to 2.3 % of value added (EU-15). In the period 1996–98, 57 % of aid granted to the manufacturing sector was for regional development purposes. Aid for horizontal objectives and for particular sectors represented 35 % and 8 % of aid to the manufacturing sector. Moreover, aid granted on an ad hoc basis to specific enterprises now accounts for less than 10 % of aid to the manufacturing sector.

	1994–96	1996–98
Overall State aid (billion EUR)	104.2	93.1
State aid to the manufacturing sector (billion EUR)	38.5	32.6
State aid as a percentage of value added in the manufacturing sector	2.8	2.3

292. However, despite the downward trend that has developed over several years, the eighth survey stresses that in absolute terms the level of aid remains high. The differences between Member States, in terms of the relative levels of aid paid, remain significant. Between the various Member States, the aid granted to the manufacturing sector varies from 0.7 % to 4.9 % of value added. Those differences are even more significant if the criterion taken is the amount of aid paid per employee, which varies from EUR 188 to EUR 1 955.

#### 1. Modernising State aid control

293. On 6 December, the Commission agreed in principle to the adoption of three regulations on the basis of the enabling provisions in Regulation (EC) No 994/98 <sup>(2)</sup>, which allows the Commission to target its activities in the modernisation of State aid control measures. These instruments consist of two regulations creating exemptions for aid to

small and medium-sized enterprises <sup>(3)</sup> and training aid <sup>(4)</sup> and a regulation codifying the application of the *de minimis* rule <sup>(5)</sup>. Member States will therefore be able in future to grant aid that meets the conditions fixed by those regulations without the need for giving prior notification to and securing the agreement of the Commission. The regulation on the *de minimis* rule codifies the application of that rule, which was initially set out in the form of a Commission notice on 6 March 1996. Under that rule, aid to an enterprise that is below the threshold of EUR 100 000 over a period of three years is not considered State aid for the purposes of the Treaty provided that it does not affect trade or distort competition. Such aid is thus exempt from the obligation of notification.

294. The positive effects of these regulations are not of benefit to the Commission alone but also extend to the Member States, which can grant aid covered by the regulations much more quickly than before. However, this procedural simplifica-

<sup>(1)</sup> COM(2000) 205.  
<sup>(2)</sup> OJ L 142, 14.5.1998.

<sup>(3)</sup> Regulation (EC) No 70/2001 (OJ L 10, 13.1.2001).  
<sup>(4)</sup> Regulation (EC) No 68/2001 (OJ L 10, 13.1.2001).  
<sup>(5)</sup> Regulation (EC) No 69/2001 (OJ L 10, 13.1.2001).

tion does not entail a lesser degree of control in or a relaxation of the rules on State aid: Member States remain under an obligation to inform the Commission, regarding each aid award, of the detailed provisions involved and to submit summary reports each year on all aid they have granted. Moreover, in so far as the regulations, which are directly applicable in the Member States, fix accounting criteria that must be met, the monitoring role of the national courts will be expanded.

295. The reduction in the number of notifications will in time allow the Commission to reinforce its monitoring in the field of State aid, especially by enabling it to concentrate its resources on really serious cases of distortion of competition.

## 2. Increased transparency

296. The monitoring of State aid cannot be reinforced without introducing greater transparency into the Commission's activities. With that in view, the Commission is establishing a public register and a scoreboard for State aid. This initiative forms part of the policy of reducing the volume of State aid reaffirmed at the Lisbon European Council, when the Commission, the Council and the Member States were invited to proceed with their efforts to foster competition and reduce the general level of aid. The Council meeting on the internal market on 16 March made suggestions along the same lines, proposing in its conclusions that a strategy should be developed for reducing the general level of aid, paying particular attention to monitoring, the level of aid and the calculation of its economic impact, especially by means of statistics.

297. Transparency in the accounting of some enterprises will also be necessary if the Commission is to cope with the increasing number of cases involving cross-subsidies. Thus the amendment introduced on 26 July <sup>(1)</sup> to Commission Directive 80/723/EEC of 25 June 1980 on the transparency of financial relations between Member States and public undertakings <sup>(2)</sup> requires enterprises operating services of general economic interest (for which they receive compensation) and carrying on ordinary commercial activities, to keep separate accounts for those different activities.

298. However, in order to avoid imposing disproportionate burdens, this amendment, which applies to both public and private enterprises, does not affect small and medium-sized enterprises, enterprises providing services that cannot distort competition or affect trade and enterprises for whom the amount of compensation for the operation of services of general economic interest has been fixed on the basis of an open, transparent and non-discriminatory procedure.

## 3. Aid for environmental protection

299. Environmental protection is a major concern of the European Union. The Commission has long recognised that the grant of State aid for environmental protection may be necessary, in certain circumstances, as an incentive for enterprises to take action in this area.

300. By giving its agreement in principle on 21 December for the adoption of new Community guidelines on State aid for environmental protection, the Commission, as well as clarifying the application of the 'polluter pays' principle, aims to provide a greater incentive to protect the environment by means of State aid. Thus, although the new guidelines no longer allow the grant of aid that is designed to facilitate an enterprise's compliance with new Community standards, except for aid for SMEs for a limited period, they expressly allow the grant of aid for firms improving on existing standards.

301. Regarding renewable energy sources, which are given a high priority, Member States will in future be able to grant *inter alia* aid to cover the difference between the cost of producing energy from renewable sources and the market price of that energy up to the amount required for the depreciation on the installations in question. A flexible approach has been adopted regarding tax reductions. Member States' options include the grant of non-degressive exemptions for 10 years for enterprises that have signed voluntary agreements on environmental protection. While enterprises that have not signed voluntary agreements can in fact qualify for reductions, it is a condition that they continue to pay a significant part of the taxes in question.

## B — Concept of aid

302. According to the definition in Article 87(1) of the EC Treaty, State aid is incompatible with the

<sup>(1)</sup> OJ L 193, 29.7.2000.

<sup>(2)</sup> OJ L 195, 29.7.1980.



common market if it (a) is granted by a State through State resources, (b) distorts competition by conferring an economic advantage on the recipient and granting aid selectively to ‘certain undertakings’ or for ‘the production of certain goods’ and (c) affects trade between Member States. The form in which the aid is granted (interest rebate, tax relief, loan, guarantee, supply of goods or services on preferential terms, capital injections on terms not acceptable to a private investor, etc.) is irrelevant.

### 1. Origin of resources

303. For a measure to be considered aid, it has to be established that it confers an advantage which is State-financed. In addition, the Court of Justice held in *Ladbroke Racing and Commission* <sup>(1)</sup> that Article 87(1) of the EC Treaty covers all the financial means by which the public sector may actually support undertakings, irrespective of whether or not those means are permanent assets of the public sector. The fact that the sums involved remain constantly under public control, and therefore available to the competent national authorities, is sufficient for them to be categorised as State aid and for the measure to fall within Article 87(1).

304. The question whether public means are involved arises a fortiori where a Member State or a publicly owned holding corporation intends to take a holding in the capital of a company. The State is acting as a public investor, a role that in itself is perfectly legitimate under the Treaty. As State aid has to be assessed on the basis of its effects, the Commission developed the criterion of the private investor in a market economy: in each case it has to be established whether the public holding in the company’s capital is intended to earn a return, and has consequently been acquired by the State or public holding corporation in the same way as it might have been acquired by a private buyer, or whether it has been acquired in the public interest, so that the acquisition has to be considered a form of assistance by the State in its capacity as public authority. When public capital is to be injected into a business, the question arises whether a private investor would do the same. The test is satisfied where the capital invested can be expected to produce a normal return on the investment in the form of dividends or capital gains.

305. In *Parco Navi* <sup>(2)</sup>, the Commission decided that, since a capital injection by a public holding company was designed to earn a reasonable return on the capital invested within a reasonable time, it did not constitute State aid.

306. In *Électricité de France (EDF)* <sup>(3)</sup>, the Commission considered whether rebates granted to paper mills by EDF constituted State aid. It concluded that a private operator would prefer to sell an additional unit of electricity although he did not cover the total cost for that unit rather than not sell it at all. EDF’s behaviour was therefore considered justified on commercial grounds. However, the Commission stressed that the decision should be seen in light of the particular circumstances prevailing on the French market (the investigation concerned the period 1990–96, i.e. before the ongoing liberalisation of the electricity market. At that time, EDF had overcapacity in nuclear energy).

307. In *Siciliana Acque Minerali* <sup>(4)</sup> the Commission adopted a negative decision, since in the circumstances no private investor would inject capital to recapitalise the company for privatisation because it lacked any prospect of financial viability.

308. Regarding the recapitalisation of a Crédit Lyonnais subsidiary in *TASQ* <sup>(5)</sup>, the Commission again considered that the resources were public as the public shareholding allowed the State to exercise control over Crédit Lyonnais. It recognised that generally, without considering the timescale, the State assistance complied with the principle of sound management aimed at minimising losses and safeguarding the interests of the State and thus no State aid was involved.

309. In *Georgsmarienhütte und Gröditzter* <sup>(6)</sup>, the Commission opened the formal investigation procedure owing to its doubts whether a private investor would have agreed to the payment of a holding service fee, since Gröditzter was on the brink of insolvency.

310. The Commission initiated a procedure concerning *SEPI (Sociedad Estatal de Participaciones Industriales)* <sup>(7)</sup> as it doubted whether SEPI’s acqui-

<sup>(1)</sup> Case C-83/98 P [2000] ECR I-3271.

<sup>(2)</sup> Case N-132/99, Commission decision of 25.2.2000 (OJ C 162, 10.6.2000).

<sup>(3)</sup> Case C-39/98 (ex NN-52/98), Commission decision of 11.4.2000, not yet published.

<sup>(4)</sup> Commission decision of 21 June 2000 (OJ L 272, 25.10.2000).

<sup>(5)</sup> Commission decision of 3 May 2000 (OJ L 272, 25.10.2000).

<sup>(6)</sup> Case C-43/2000 (OJ C 3, 6.1.2001).

<sup>(7)</sup> Case NN-61/2000, Commission decision of 12.7.2000 (OJ C 328, 18.11.2000).

sition of shipyards and a diesel engine plant was a genuine market transaction and considered that it amounted to a capital injection constituting State aid since SEPI was already the ultimate shareholder of the assets acquired.

311. In *Kaha Porzellan* in Germany <sup>(1)</sup> the Commission doubted whether a market-economy investor would have provided financial support for a company on the brink of insolvency.

312. In its ruling in *Spain v Commission* <sup>(2)</sup> concerning aid in favour of Tubacex, the Court of Justice introduced the new criterion of a public creditor in order to determine whether a repayment and rescheduling agreement concluded by the State formed State aid. It noted that in such cases the State did not act as a public investor whose conduct must be compared to that of a private investor laying out capital with a view to realising a profit but as a public creditor who, like a private creditor, seeks to recover sums due to it. On the basis of this new assessment criterion, the Commission revised its recovery decisions concerning *Tubacex* <sup>(3)</sup> and *SNIACE* <sup>(4)</sup>, concluding that the public creditors had acted as a private creditor would have done in order to maximise the rate of interest on arrears by applying the legal rate of interest on debts. Consequently, it took the view that the measures did not constitute aid.

313. In *Ganzliner Beschichtungspulver* <sup>(5)</sup>, the Commission considered that the waiver of repayment of part of loans by public banks complied with the private creditor principle, as the settlement agreement produced a proportionate net gain for all creditors compared to the alternative of liquidation.

## 2. Advantage to a firm

314. Article 87(1) of the EC Treaty defines the source and effects of State aid but does not define aid or list the types of prohibited measures. The definition has, however, been mapped out by the Commission and the Court of Justice. The Court of Justice has specified that aid constitutes an

advantage conferred on a firm by the public authorities without payment or against a payment which corresponds only to a minimal extent to the figure at which the advantage can be valued. A definition of this kind covers the allocation of resources and the grant of relief on charges that the firm would otherwise have to bear, enabling it to make a saving.

315. The Court underlined in its ruling in *Germany v Commission* <sup>(6)</sup> concerning the German Income Tax Act that the origin of the advantage indirectly conferred on undertakings by the Act had to be seen in the renunciation by the Member State of tax revenue which it would normally have received, inasmuch as it was this renunciation which enabled investors to take holdings in undertakings on conditions which were more advantageous in tax terms. The fact that investors then take independent decisions does not mean that the connection between the tax concession and the advantage given to the undertakings has been eliminated since, in economic terms, the alteration of the market conditions which gives rise to the advantage is the consequence of the public authorities' loss of tax revenue.

316. An economic advantage may be conferred through a variety of means and circumstances, for example the terms on which undertakings have access to or exploit infrastructure, e.g. by erecting a business park and making such infrastructure available. The Commission found in the case of *Lenzing Lyozell (LLG)* <sup>(7)</sup> that no State aid was involved as the prices that LLG paid for basic process media including electricity, process-steam, process-water, cooling, pressurised air, water treatment, and waste disposal constituted normal market prices. Furthermore, it concluded that there was no State aid in the form of provision of specific infrastructure, since LLG paid its fair financial share for benefiting from the connections to the infrastructure.

317. In order to overcome a historically low demand creating low market values for property throughout Wales, which prevented private investors from obtaining a sufficient return leading to a market failure in the provision of business premises and an insufficient supply of suitable business property, the United Kingdom considered setting up a 'Business infrastructure devel-

<sup>(1)</sup> Case NN-142/99, Commission decision of 15.11.2000, not yet published.

<sup>(2)</sup> Case C-342/96 [1999] ECR I-2459.

<sup>(3)</sup> Case C-9/95, Commission decision of 31.10.2000, not yet published.

<sup>(4)</sup> Case C-5/2000 (ex C-68/97 and NN-118/97), Commission decision of 20.9.2000, not yet published.

<sup>(5)</sup> Case N-714/99, Commission decision of 4.10.2000, not yet published.

<sup>(6)</sup> Case C-156/98 [2000] ECR I-6857.

<sup>(7)</sup> Case C-61/98, Commission decision of 19.7.2000 (OJ L 38, 8.2.2001).

opment scheme' <sup>(1)</sup>. The Commission, proceeding on the basis of its communication on State aid elements in sales of land and buildings by public authorities <sup>(2)</sup>, came to the conclusion that no State aid was conferred, since the market price of the developed land and buildings was determined by public tender or through evaluation by independent experts.

318. The sale price for a public shareholding does not contain State aid elements when it is sold in an open, unconditional and non-discriminatory tender procedure. The Commission observed in its decision in *Kali und Salz* <sup>(3)</sup> that Member States are, however, not obliged to follow that procedure to dispose of their public shareholdings. Although there was no call for public tenders the final price was obtained following a procedure in which no potential investor was arbitrarily excluded from the sale. The negotiations between all interested parties acting with a view to their economic interests took place according to market principles.

319. Regarding support for the financing of cableway installations in the Province of Bolzano <sup>(4)</sup>, the Commission found that generally such aid has to be considered State aid to the owners and operators, since the objective of this service was tourism and as such clearly commercial and competitive. The financing of those facilities cannot be exempted under Article 86(2) of the EC Treaty as they normally do not provide a service of general economic interest in that they are not intended to satisfy the general and basic needs of the population but to generate profits from tourism.

### 3. Specificity

320. To be caught by Article 87(1) of the EC Treaty, a measure must not only be a State measure but must also be selective, thus affecting the balance between the recipient firm and its competitors. This selective character distinguishes State aid measures from general economic support measures which apply across the board to all firms in all sectors of economic activity in a Member State. As long as they do not favour a particular area of activity, such general measures derive from Member

States' power to determine their economic policy. Consequently, measures that have a cross-sectoral impact, being equally applicable throughout the territory of a Member State and favouring the whole economy, do not constitute State aid for the purposes of Article 87(1).

321. In 1992 the Commission considered that a Danish scheme <sup>(5)</sup> granting a lower flat rate for income tax constituted State aid, since it had the potential to confer benefits only on certain sectors of industry. However, the data submitted showed that the scheme was actually being applied to both the private and the public sector, to manufacturing, trade and services and to large companies as well as SMEs. Consequently, the measure did not in practice favour certain undertakings or the production of certain goods and the Commission therefore approved the Danish scheme as well as a Swedish scheme <sup>(5)</sup> to reduce the income tax base for experts recruited abroad.

322. Regarding the tax aid scheme concerning tax reductions to promote investment at Madeira <sup>(6)</sup>, the Commission held that the measures conferred a selective advantage as the tax relief could only be obtained if the beneficiary was registered in Madeira and reinvested his profits wholly or partially in the region of Madeira. Consequently, the measure constituted aid within the meaning of Article 87(1).

### 4. Effect on trade between Member States

323. Once it has been established that a measure confers an advantage, is State-financed and is selective in character, that measure is deemed to constitute State aid pursuant to Article 87(1) of the EC Treaty. For this article to apply, the measure must also distort competition and affect trade between Member States. In order to establish the impact of this distortion on trade between Member States it is sufficient that the beneficiary carries on activities, even partially, involving trade between Member States.

324. However, the effect on competition must be appreciable. The Court of Justice reiterated in its

<sup>(1)</sup> Case N-657/99, Commission decision of 6.12.2000, not yet published.

<sup>(2)</sup> OJ C 209, 10.7.1997.

<sup>(3)</sup> Case C-21/99 (ex NN-27/99), Commission decision of 13.6.2000, not yet published.

<sup>(4)</sup> Case NN-1/2000, Commission decision of 19.7.2000, not yet published.

<sup>(5)</sup> Commission decision of 3.5.2000 (OJ C 284, 7.10.2000).

<sup>(6)</sup> Case N-96/2000, Commission decision of 28.6.2000 (OJ C 266, 16.9.2000).

ruling in *Germany v Commission* <sup>(1)</sup> that the relatively small amount of aid or the relatively small size of the undertaking which receives it does not as such exclude the possibility that intra-Community trade may be affected. When aid granted by a State or through State resources strengthens the position of an undertaking compared with other undertakings competing in intra-Community trade, the latter undertakings must be regarded as affected by that aid. That was so in this case, since any undertaking other than those to which the measure in issue applied could increase its own resources only on less advantageous terms, whether it was established in Germany or in another Member State.

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

### 1. Horizontal aid

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

325. Regarding assistance for small and medium-sized enterprises, which is provided under various national aid schemes, doubts over the enterprise's real independence, measured against the criteria for aid to SMEs, led the Commission to suspect that there had been an infringement of the rules on aid. Consequently, it decided, in *Solar Tech* <sup>(2)</sup>, to reduce the aid intensity because the firm was closely linked to a large group. Since Solar Tech was directly and indirectly controlled by a large enterprise in the building sector, it was not affected by the typical handicaps of SMEs in its access to capital and credit, information sources, new technologies, etc. The Commission accordingly decided that the firm was not eligible for the 'bonus' under the relevant regional aid scheme as the criterion of independence in the SME guidelines had not been fulfilled.

#### 1.2. Research and development aid

326. In applying the 1996 Community framework for State aid for research and development, among the evidence requested by the Commission is that of the incentive effect of the aid. The closer research

and development is related to competition the more strictly that principle applies. Consequently fundamental research work carried out by public institutions does not constitute aid, whereas fundamental research carried out by companies falls under Article 87(1) of the EC Treaty. However, since this type of research is far from the market, it may comply with the Treaty if the results are in principle widely available for exploitation on a non-discriminatory basis.

327. The Commission affirmed the incentive nature of the measures in *Plan Technologique Ferroviaire* <sup>(3)</sup>, the *ITEA programme* <sup>(4)</sup>, the *German mobility and land transport research programme* <sup>(5)</sup> and *Tax Credit* <sup>(6)</sup>.

328. The *Plan Technologique* is designed to foster studies with a view to launching technologies to improve traffic safety. In *ITEA*, notified jointly by France and the Netherlands, the Commission recalled that it had underlined on a number of occasions the importance of the information-technology industry, which was crucial for the information society of the 21st century. Consequently, it considered that the programme at that stage was in the Community interest. The German programme will focus on the development of new transport structures, which, through inter-modal cooperation, can ensure mobility while reducing transport expenditure and relieve overall traffic pressure while increasing transport safety. In addition, new 'intelligent' information, communication and guidance technologies should be developed with the help of transport telematics. In *Tax Credit*, the UK granted a tax credit on expenditure on R & D. The Commission considered that the aid had an incentive effect, especially as it was exclusively for small and medium-sized enterprises.

329. The Commission initially had doubts about the proximity to the market and incentive effect of the project concerning colour ink-jet printing technology and therefore opened proceedings to carry out more detailed investigations. However, it concluded that the research undertaken by *Océ* <sup>(7)</sup> could be considered a pre-competitive develop-

<sup>(1)</sup> Case C-156/98, cited above.

<sup>(2)</sup> Case C-17/00, Commission decision of 15.11.2000, not yet published.

<sup>(3)</sup> Case N-676/99, Commission decision of 14.3.2000 (OJ C 272, 23.9.2000).

<sup>(4)</sup> Case N-73/2000, N-85/2000, Commission decision of 11.4.2000 (OJ C 284, 7.10.2000).

<sup>(5)</sup> Case N-743/99, Commission decision of 1.2.2000 (OJ C 232, 12.8.2000).

<sup>(6)</sup> Case N-802/99, Commission decision of 15.2.2000 (OJ C 162, 10.6.2000).

<sup>(7)</sup> Case C-18/1998, Commission decision of 18.10.2000, not yet published.

ment having an incentive effect on the company and as such compatible with the EC Treaty.

330. As to the compatibility of industrial research and development with the Treaty, the Commission found in the case *Fondo Speciale Rotativo per la Ricerca Tecnologica* <sup>(1)</sup> that it may be eligible under the framework on condition that it is ancillary to the pre-competitive stage of research.

### 1.3. Employment and training

331. As it had undertaken, on 21 December the Commission adopted a report on the application of the guidelines on aid for employment <sup>(2)</sup>. It pointed out that, although the application of the guidelines had not given rise to particular difficulties, many grants of State aid directly or indirectly aimed at promoting employment had been considered in another context, that of aid for investment. This provided some explanation for the relatively low numbers of schemes notified since 1995, on average 10 to 12 per year.

332. In addition to the relation between aid for employment and aid for investment, which can have the same objective, the report identifies three areas calling for clarification in future. These are the quantification of the terms for and the levels of permissible grants of aid, the definition of the specific categories of workers (long-term unemployed, young workers, etc.) eligible for more favourable conditions and the application of aid schemes applicable to employment in sensitive sectors (steel, motor vehicles, shipbuilding, etc.).

333. The Commission will have to take account of all those aspects in drawing up new provisions, which will consist either of new guidelines for notified cases of aid or of a regulation exempting Member States from notifying aid that meets certain criteria. The current guidelines will remain in force <sup>(3)</sup> until the Commission decides whether the latter approach, which has already been adopted for aid to SMEs, training and the *de minimis* rule (see above), is also appropriate to aid for employment.

334. The framework on training aid <sup>(4)</sup> provides that aid intensity must be tailored according to the

size of the beneficiary enterprise, the region in question, the type of training in view and the type of persons to be covered (disadvantaged workers). The Commission authorised the implementation of the French scheme entitled *Commitments for expanding training* <sup>(5)</sup> inasmuch as it met all the criteria and other conditions laid down in the framework.

### 1.4. Environment

335. The Commission had various opportunities during the year to explain its interpretation of the guidelines on State aid for environmental protection, which were extended until 31 December and are to be replaced by the new guidelines on which the Commission agreed in principle on 21 December (see above Section III.A.3) <sup>(6)</sup>.

336. With regard to a Swedish aid scheme for improving the environment inside buildings <sup>(7)</sup>, the Commission first stressed that, in so far as they were undertaken by individuals or public institutions, such measures did not fall within the scope of Article 87(1) of the EC Treaty, the beneficiaries not having any link with commercial activities. But the Commission expressed strong doubts as to the compatibility of the aid where it was intended for owners of real estate or public or private real estate agencies. The Commission started proceedings in order to scrutinise the measures with special reference to the objective of public health as set out in Article 152 of the EC Treaty (see also point 411 below).

337. On 29 March, the Commission decided not to raise any objections to a scheme concerning tradable CO<sub>2</sub> emission permits proposed by Denmark <sup>(8)</sup> to allocate emission permits to electricity producers established in Denmark on the basis of their historical emissions over the period 1994–98, on the grounds that the scheme would contribute to the development of environmental protection. The Commission assessed the scheme against the background of the Kyoto Protocol to the UN Framework Convention on Climate Change adopted in December 1997. Under the protocol, the European Community has committed itself to reducing its emissions by 8 % over the period

<sup>(1)</sup> Case N-445/2000, Commission decision of 21.12.2000, not yet published.

<sup>(2)</sup> OJ C 334, 12.12.1995.

<sup>(3)</sup> Commission communication on the guidelines on State aid for employment (OJ C 371, 23.12.2000).

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

<sup>(5)</sup> Case N-753/99, Commission decision of 28.6.2000 (OJ C 284, 7.10.2000).

<sup>(6)</sup> OJ C 37, 3.2.2001.

<sup>(7)</sup> Case C-2/2000 (ex N-718/99), Commission decision of 12.7.2000 (OJ L 295, 23.11.2000).

<sup>(8)</sup> Case N-653/99, Commission decision of 29.3.2000 (OJ C 322, 11.11.2000).

2008–12. Burden sharing has been agreed internally in the EU, which for Denmark implies a 21 % reduction during that period. At the same time, the Commission emphasised the importance of safeguarding the freedom of establishment. As the Danish authorities ensured that new entrants to the Danish electricity market would receive emission permits based on objective and non-discriminatory criteria, the Commission found the scheme compatible with the common market.

338. As regards environmental measures pursued through tax legislation, the Commission authorised continuation of the ecological tax reform <sup>(1)</sup> in Germany, recognising that the introduction of environmental taxes and charges may need to be accompanied by State aid because some firms may not be able to bear the extra financial burden immediately and may require temporary relief. The main feature of the extension is the gradual annual increase in electricity tax and fuel tax. The Commission approved the system taking into account the exceptional circumstances, especially the fact that at present not all EU Member States levy such comprehensive energy taxes, which can therefore affect the competitive position of the firms concerned.

339. In this context, the Commission also approved operating aid in the form of a five-year exemption of highly efficient gas and steam turbine power stations <sup>(2)</sup> from the mineral oil tax, in view of their achievements in terms of protecting the environment. The Commission came to the conclusion that aid was involved as not all market participants could benefit from the measure, as the regulation favoured particularly existing generating companies feeding power into the network. However, the tax exemption was considered compatible with the Treaty as it is aimed at creating incentives for investment in gas and steam power stations which are more energy-efficient and therefore contribute to environmental protection.

### 1.5. Rescue and restructuring aid

340. On 8 July 1999, the Commission adopted revised Community guidelines on State aid for rescuing and restructuring firms in difficulty <sup>(3)</sup>. By

this revision, the Commission intended to tighten up the rules in force especially with regard to repeated restructuring aid. The ‘one time, last time’ principle thus rules out any further payment of restructuring aid to a company, the rationale being to prevent situations where firms which would not normally survive in the market are artificially kept alive by continuous restructuring. It also stresses that new firms (including firms formed out of the assets of previous ones) are not eligible. Lastly, it put an end to the special treatment given to cases concerning companies in the new German *Länder*. The ‘one time, last time’ principle will apply in full after 31 December 2000.

341. The Commission had to deal with the question whether a company taking over all the assets of a bankrupt company could be defined as a new company or had to be held liable to reimburse incompatible aid. This was the case with *Graf von Henneberg Porzellan* <sup>(4)</sup> and *Kahla Porzellan* <sup>(5)</sup>. The Commission initiated proceedings as it had serious doubts that new companies were involved, given that they took over all the assets and still carried on the business under the same name.

342. As regards prolonged restructuring processes, the Commission had to assess whether they should be treated as a single ongoing restructuring operation or as a number of subsequent restructuring processes. In the *Lintra* case <sup>(6)</sup>, restructuring involved the holding company and eight subsidiaries. The restructuring plans for the surviving subsidiaries were clearly different from the original plan. The Commission therefore split up the process into several restructuring operations. In the case of privatisation measures involving the transfer of selected assets from *Babcock Wilcox* <sup>(7)</sup> to a private company, the Commission decided to extend the proceedings initiated in April 1998 <sup>(8)</sup> in order to assess whether the various restructuring programmes could be seen as one integrative measure, generally allowable only in the event of *force majeure*.

343. In several cases the Commission made it clear that the three key criteria, namely viability of

<sup>(1)</sup> Case N-575a/99, Commission decision of 15.2.2000 (OJ C 322, 11.11.2000).

<sup>(2)</sup> Case N-555/00, Commission decision of 22.11.2000 (OJ C 37, 3.2.2001).

<sup>(3)</sup> OJ C 288, 9.10.1999.

<sup>(4)</sup> Case NN-135/99, Commission decision of 13.6.2000 (OJ C 272, 23.9.2000).

<sup>(5)</sup> Case NN-142/99, Commission decision of 15.11.2000, not yet published.

<sup>(6)</sup> *Doppstadt* (Case C-39/2000) and *Ilka Mafa Kältetechnik* (Case C-38/2000). Commission decision of 12.7.2000 (OJ C 278, 30.9.2000).

<sup>(7)</sup> Case C-33/98 (ex N-220/2000), Commission decision of 13.6.2000 (OJ C 232, 12.8.2000).

<sup>(8)</sup> OJ C 249, 8.8.1998.

the restructuring plan, the absence of undue distortion of competition and proportionality of the aid, must be strictly respected. One of these conditions not being fulfilled, it opened proceedings in respect of *Hirschfelder Leinen und Textil* <sup>(1)</sup>, *SKL-Motoren und Systemtechnik* <sup>(2)</sup> and *Holzmann* <sup>(3)</sup>, while it approved aid to *Wildauer Kurbelwelle* <sup>(4)</sup> given the substantial increase in the investor's contribution, and to *Bau Union Ost* Group <sup>(5)</sup>, the aid being limited to the minimum required to implement the restructuring programme.

## 2. Regional aid

344. Regional aid is by far the largest single category of State aid in the Community. Between 1996 and 1998, Member States granted EUR 18.8 billion in State aid pursuing regional objectives. This represented 57.6 % of all State aid granted to industry and services in the Union. Over the years, the Commission has witnessed a sharp increase in regional aid measures throughout the Community.

345. With the introduction of the guidelines on national regional aid <sup>(6)</sup>, the Commission sought to tighten control of this important type of State aid. When adopting the new guidelines the Commission also proposed that Member States take appropriate measures in order to bring existing aid schemes into line with the new rules before 1 January 2000. It also invited Member States to adopt new regional aid maps with effect from 1 January 2000. At the same time, the Commission wanted to use the opportunity to implement a sizeable reduction in the coverage of the regional aid maps in the Community, notably to take into account recent economic developments in the Member States and also with a view to the forthcoming enlargement of the European Union.

346. All maps have been drawn up on the basis of a transparent and objective method ensuring equal treatment for all 15 Member States. At the same

time, the Commission has succeeded, with the help of the Member States, in reducing the population coverage of the regional aid maps from 46.7 % to 42.7 % of the Community's population. Strict application of the eligibility criteria has resulted in a tighter demarcation of the assisted regions. This has enabled Member States to focus their regional assistance on the regions suffering from the most severe economic problems.

347. The Commission has also reduced the maximum aid intensities applicable in regional aid areas. The 1998 guidelines provide that aid intensity ceilings in the least favoured regions (referred to as Article 87(3)(a) regions) should not normally exceed 50 % after tax (down from 75 % in the past). For other regional aid areas (known as Article 87(3)(c) regions), this ceiling is set at 20 % after tax (compared with 30 % in the past). In 1999 the Commission already approved the regional aid maps for the five new German *Länder*, Finland, Denmark, Ireland, Greece and the Article 87(3)(a) regions of Portugal. In 2000, the remaining maps were approved after the Commission was able to convince Member States to set the aid intensity ceilings at levels well below those upper limits. As a result, the average aid intensity ceiling during the period 2000 to 2006 will be limited to only 39 % in Article 87(3)(a) regions and to only 17 % in Article 87(3)(c) areas.

348. As regards operating aid under regional aid schemes, the Commission stressed the importance of aid being degressive and limited in time. The aid must moreover be justified by its incentive effect on regional development, its nature and its proportionality to the handicaps it is intended to overcome. The Commission thus opened the procedure concerning a Portuguese scheme of tax aid for the free-trade zone of Madeira <sup>(7)</sup> and adopted a negative decision on Article 29ter of the Walloon Region Decree of 25 June 1992 <sup>(8)</sup>, which provided for operating aid that was neither degressive nor limited in time. A negative decision was also taken on 21 December on a Swedish scheme reducing by eight percentage points social security contributions payable in respect of each person employed in an establishment in northern Sweden <sup>(9)</sup>. Here the Commission concluded that the key condition regarding transport aid, namely

<sup>(1)</sup> Case C-28/2000, Commission decision of 11.4.2000 (OJ C 272, 23.9.2000).

<sup>(2)</sup> Case NN-56/98, Commission decision of 26.7.2000 (OJ C 27, 27.1.2001).

<sup>(3)</sup> Case N-769/99, Commission decision of 18.1.2000 (OJ C 110, 14.11.2000).

<sup>(4)</sup> Case C-30/98, Commission decision of 13.6.2000 (OJ L 287, 14.11.2000).

<sup>(5)</sup> Case NN-19/98, Commission decision of 18.1.2000 (OJ C 121, 29.4.2000).

<sup>(6)</sup> OJ C 74, 10.3.1998.

<sup>(7)</sup> Case C-37/2000 (ex NN-60/2000), Commission decision of 28.6.2000 (OJ C 301, 21.10.2000).

<sup>(8)</sup> Case C-37/93, Commission decision of 29.3.2000 (OJ L 191, 27.7.2000).

<sup>(9)</sup> Case C-15/2000, not yet published.

that there had to be a direct link between the aid granted to individual beneficiaries and the additional transport costs they incurred, was not satisfied, and that the scheme could therefore not be accepted as its stood.

349. However, to take account of the entry into force of the new Article 299(2) of the EC Treaty concerning the outermost regions of the European Union, on 26 July the Commission revised the guidelines on national regional aid <sup>(1)</sup>. Operating aid which is not degressive and not limited in time may now be granted in outermost regions which are eligible for regional aid, where the aid is intended to compensate for the additional costs inherent in their specific handicaps.

350. In order to allow more systematic control of regional aid to large-scale mobile investment projects and avoid subsidy races between Member States, in 1998 the Commission adopted a multi-sectoral framework on regional aid for large investment projects <sup>(2)</sup>. The framework was introduced for a trial period of three years with the aim of limiting aid for large-scale projects to a level which avoided adverse effects on competition as much as possible but maintained the attraction of the assisted area. As provided by the framework, the Commission started to assess the experience it had gained since the rules entered into force with a view to deciding what adjustments should be proposed for after the framework expires in 2001 and whether it should be renewed, revised or repealed.

351. The Commission has taken 14 decisions on the basis of the multisectoral framework. In six cases the aid intensity was reduced after the pre-notification by between 2 and 10 %. In the *Solar Tech* case <sup>(3)</sup> the Commission decided for the first time to initiate proceedings, and reduced the aid intensity significantly in its final decision.

352. In the *Pilkington Glass France and Interpane Glass Coating France* case <sup>(4)</sup> the Commission applied two different competition factors, as there were two relevant markets (float glass and laminated coated glass). The project being a completely integrated plant, the Commission weighted the two factors, based on the respective additional capacities that would be put on the market, and

came to the conclusion that the envisaged aid intensity complied with the multisectoral framework.

### 3. Sectoral aid

#### 3.1. Sectors subject to specific rules

##### 3.1.1. Shipbuilding

353. In its third report on the situation in world shipbuilding, adopted on 15 November, the Commission noted that the industry was facing persistent difficulties and that price levels remained low despite the fact that orders had picked up. The report found that this was due mainly to the very low prices offered by South Korean shipyards. The Commission decided that, if an agreement could not be negotiated with South Korea by 1 May 2001, it would take the matter to the World Trade Organisation. With that in mind, it would also propose putting in place a defensive system of temporary support designed to counter unfair behaviour by South Korea, pending the outcome of the WTO procedure. On 29 November, the Commission reiterated its opposition to any extension of operating aid linked to shipbuilding contracts beyond 31 December 2000, the elimination of which is provided for by Council Regulation (EC) No 1540/98 establishing new rules on aid to shipbuilding <sup>(5)</sup>.

354. On 12 July, the Commission started a formal investigation into the acquisition by *Sociedad Estatal de Participaciones Industriales (SEPI)*, for EUR 60 million, of the Juliana and Cádiz shipyards and the Manises diesel engine plant belonging to its subsidiary Astilleros Españoles <sup>(6)</sup>. In the light of the information in its possession and in the absence of any reaction by the Spanish authorities to its repeated requests for information, the Commission takes the view at this stage that the transaction did not take place under normal market conditions and appears to be a capital injection possibly constituting State aid.

355. During the year the Commission adopted three decisions concerning the German company Kvaerner Warnow Werft GmbH (KWW), a subsidiary of the Norwegian group Kvaerner a.s. On 2 February it opened a formal investigation into aid

<sup>(1)</sup> OJ C 258, 9.9.2000.

<sup>(2)</sup> OJ C 107, 7.4.1998.

<sup>(3)</sup> Case C-17/2000, Commission decision of 15.11.2000, not yet published.

<sup>(4)</sup> Case N-291/2000, Commission decision of 26.7.2000 (OJ C 293, 14.10.2000).

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

<sup>(6)</sup> Case NN-61/2000 (OJ C 328, 18.11.2000).



received by the company in the context of its restructuring between 1993 and 1995 <sup>(1)</sup>. The EUR 262.2 million which the company received as part of the restructuring process in order to cover future losses exceeded the losses it actually incurred by EUR 61 million. The Commission therefore voiced doubts as to the compatibility of that excess payment. On 16 February, it required KWW to reimburse EUR 6.3 million as it had exceeded its maximum capacity by a wide margin in 1997 <sup>(2)</sup>. The company was made subject to capacity limitations as a condition for allowing it to receive DEM 1 247 million in aid when it was privatised in 1992. On 29 March, the Commission closed the formal investigations opened in 1998, finding that KWW had complied with the capacity limitations in 1999 <sup>(3)</sup>.

356. The Commission was also particularly attentive to application of the rules on development aid in the shipbuilding industry. On 18 January it therefore initiated a formal investigation into development aid which the Netherlands planned to grant Indonesia in connection with the supply of several vessels <sup>(4)</sup>. The decision was prompted by doubts as to the openness of the procedure whereby this development aid contract was awarded to several shipyards. Following the provision of documentary evidence and assurances by the Dutch authorities in the course of the procedure, the Commission decided on 13 December to authorise the aid project <sup>(5)</sup>.

### 3.1.2. Steel

357. The sixth steel aid code, which remains in force until the ECSC Treaty expires in July 2002, allows aid to be granted in only a limited number of cases, namely for research and development, for environmental protection and to finance social measures in connection with plant closures.

358. Under the code, the Commission decided on 15 November that the aid amounting to EUR 13.8 million paid by Belgium to Cockerill Sambre SA was incompatible with the common market <sup>(6)</sup>. The aid, which was intended to defray the additional cost incurred by the company as a result of a reduction in working hours, did not qualify for any of the exemptions allowed by the sixth

steel aid code. The Commission ordered the recovery of amounts already disbursed and the suspension of payments still outstanding.

359. Under the 1971 German law on the development of areas bordering on the German Democratic Republic and Czechoslovakia (*Zonenrandförderungsgesetz*), Salzgitter AG, Preussag AG and their subsidiaries enjoyed between 1980 and 1995 a number of tax benefits in the form of exempt reserves or accelerated depreciation. Although the Commission had approved the law under the relevant provisions of the EC Treaty, that approval did not concern steel firms, which are covered by the ECSC Treaty and the steel aid code. The Commission consequently found that the aid paid was incompatible with the common market and ordered it to be recovered from Salzgitter AG-Stahl und Technologie, the firm which now holds the assets of the above two companies <sup>(7)</sup>.

### 3.1.3. Coal

360. Four Member States currently produce coal in the EU; owing to unfavourable geological conditions most EU mines cannot compete with imported coal, but the Member States concerned chose to support their coalmining industry mainly on social and regional grounds. Aid to the coal industry is governed by Decision No 3632/93/ECSC, which lays down the terms and conditions under which such aid may be granted. The Member States notify the aid on an annual basis; the Commission carefully screens the applications and authorises them. This framework will remain in place until the ECSC Treaty expires.

361. During the year the Commission authorised State aid schemes allowing Germany <sup>(8)</sup>, France <sup>(9)</sup>, Spain <sup>(10)</sup> and the UK <sup>(11)</sup> to grant the necessary public funding for coal production. The combined amounts authorised exceeded EUR 6.8 billion for the year 2000. The aid covers the difference between production costs and the price of internationally traded coal and includes compensation for the payment of social security contributions and for some exceptional costs. On 13 December,

<sup>(1)</sup> Case NN-93/1999 (OJ C 134, 13.5.2000).

<sup>(2)</sup> Case C-46/1999 (OJ L 120, 20.5.2000).

<sup>(3)</sup> Case C-66/1998 (OJ L 156, 29.6.2000).

<sup>(4)</sup> Case N-233/1999 (OJ C 101, 8.4.2000).

<sup>(5)</sup> Case C-3/2000, not yet published.

<sup>(6)</sup> Case C-76/1999 (OJ L 71, 13.3.2001).

<sup>(7)</sup> Case C-10/1999, Commission decision of 28.6.2000 (OJ L 323, 20.12.2000).

<sup>(8)</sup> Case 2/1999, Commission decision of 21.12.2000, not yet published.

<sup>(9)</sup> Case 1/2000, Commission decision of 20.9.2000, not yet published.

<sup>(10)</sup> Case 2/2000, Commission decision of 13.12.2000, not yet published.

<sup>(11)</sup> Case 3/2000, Commission decision of 15.11.2000, not yet published.

the Commission cleared individual aid to the Longannet mine under the general scheme <sup>(1)</sup>.

362. Similar schemes were authorised in Germany <sup>(2)</sup> for the year 2001 as well as in France <sup>(3)</sup> for the period 1997–99. The approval of German aid involved lengthy discussions owing to differences of opinion as to the long-term viability of some mines. The Commission also withheld authorisation from France on account of allegedly undeclared aid. The Commission sent a letter of formal notice to the French Government on 9 July 1999; the issue was finally settled in September after complex negotiations.

363. On 18 January, the Commission sent a letter of formal notice to the German Government raising the issue of allegedly illegal State aid in connection with the merger of RAG and Saarbergwerke <sup>(4)</sup>. The Commission is currently investigating the case on the basis of information sent by the German Government at the turn of the year.

### 3.1.4. Motor vehicle industry

364. On 13 June, the Commission decided to extend for one year, i.e. until 31 December 2001, the period of validity of the Community framework for State aid to the motor vehicle industry <sup>(5)</sup>. This should enable the Commission to examine in detail the possibility of replacing it with the multisectoral framework on regional aid for large investment projects <sup>(6)</sup>.

365. If it is to be compatible with the common market, regional aid in the motor industry must be necessary to the implementation of the investment project in the assisted region concerned. Application of this principle prompted the Commission to take a negative decision on a plan to grant ITL 46 billion (EUR 24 million) in regional aid for modification of the Fiat plant at Rivalta (Piedmont). The location study forming the basis for Fiat's decision to invest at Rivalta was carried out in 1993–94. However, it was not until March 1995 that Rivalta was classed as an assisted area

qualifying for exemption under Article 87(3)(c) of the EC Treaty. The Commission therefore concluded that the Italian Government had not demonstrated that Fiat had regarded the grant of regional aid as a necessary condition for choosing the Rivalta site. A partly negative decision was adopted on the same grounds with regard to a plan to grant Fiat aid for its Mirafiori Carrozzeria plant <sup>(7)</sup>. The Commission prohibited the grant of EUR 2.9 million (ITL 5.63 billion) in aid but found that aid intended to finance innovative investments and amounting to EUR 3.56 million (ITL 6.9 billion) was compatible with the common market.

366. In addition to assessing the need for aid and the innovative nature of the investments, the Commission has to ensure that the aid is proportionate, that the costs are eligible and that the scheme does not increase production capacities. Doubting whether those conditions were fulfilled, the Commission decided on 20 September to open a formal investigation into the plan to grant GBP 40 million for the reorganisation of Nissan Motor Manufacturing Ltd's Sunderland plant <sup>(8)</sup>.

367. The Commission also decided to initiate formal proceedings in respect of an EUR 16.3 million (ITL 31.58 billion) R & D aid project for Iveco <sup>(9)</sup>, a Fiat subsidiary, on account of doubts as to the incentive effect of the planned aid and classification of the project as precompetitive research.

368. During the year the Commission terminated two formal investigations following withdrawal of the notifications. In the wake of the sale by the BMW group of the Rover car manufacturing business to the Phoenix consortium, the UK authorities informed the Commission that they were withdrawing their notification concerning the Rover Longbridge site <sup>(10)</sup>. The Commission opened a formal investigation into that project on 22 December 1999.

369. Also in response to doubts voiced by the Commission concerning a plan to grant regional aid to the Ford plant at Genk in the Region of Flanders <sup>(11)</sup>, the Belgian authorities withdrew their notification.

<sup>(1)</sup> Case 4/2000, Commission decision of 13.12.2000, not yet published.

<sup>(2)</sup> Case 1/2001, Commission decision of 21.12.2000, not yet published.

<sup>(3)</sup> Cases 3/1997, 2/1998, 1/1999, Commission decision of 20.9.2000, not yet published.

<sup>(4)</sup> OJ C 101, 8.4.2000.

<sup>(5)</sup> OJ C 279, 15.9.1997.

<sup>(6)</sup> OJ C 107, 7.4.1998.

<sup>(7)</sup> Case C-5/1999, Commission decision of 12.7.2000, not yet published.

<sup>(8)</sup> Case N-786/1999 (OJ C 354, 9.12.2000).

<sup>(9)</sup> Case C-41/200 (ex N-670/99), not yet published.

<sup>(10)</sup> Case C-79/1999, Commission decision of 20.9.2000, not yet published.

<sup>(11)</sup> Case C-29/2000, not yet published.

### 3.1.5. Synthetic fibres industry

370. In view of the very short period of time in which the code on aid to the synthetic fibres industry will remain in force, as the extension of its validity will end on 31 August 2001, the Commission started to assess whether special treatment of this sector could still be justified. As the multisectoral framework on large investment projects is also to expire on the same date, the Commission began to reassess both frameworks in the light of the experience it has gained over the last three years.

371. With regard to a substantial investment by Delon Filament GmbH <sup>(1)</sup> in Germany, accompanied by a significant capacity reduction, the Commission adopted a positive decision on the grounds that although no structural shortage of supply had been identified in the relevant market, the aid resulted in a significant reduction of capacity.

372. Similarly, the Commission approved aid to Exporplás <sup>(2)</sup> in the polypropylene sector, since, although there is no structural shortage of supply of the product, the project will result in a reduction in the production capacity of the company concerned.

### 3.1.6. Transport

373. On 26 July, the Commission adopted two proposals for Council regulations dealing with public funding in the land transport area, which will transpose into secondary legislation the exemptions laid down in Article 73 of the EC Treaty.

374. The first instrument will replace Council Regulation (EEC) No 1107/70 <sup>(3)</sup> and is intended to provide a legal basis for the exemption of State aid in the context of the financing of transport infrastructure and the grant of aid in connection with the use of certain types of infrastructure. The second instrument, to replace Council Regulation (EEC) No 1191/69 <sup>(4)</sup>, will provide a framework tailored

to ongoing developments that are taking place in the passenger transport market with a view to meeting public needs. It will lay down rules for non-discriminatory market access and create transparent conditions for the public financing of such services.

#### 3.1.6.1. Inland waterway transport

375. One of the objectives of the common transport policy is to promote inland waterways as a safe, clean and energy-efficient means of transport offering considerable residual capacity. The development of activities redirecting goods transport away from road haulage and towards other transport modes such as inland waterway transport is in the common interest within the meaning of Article 87(3)(c) of the EC Treaty. A specific Community instrument has thus since 1999 encouraged Member States to take certain measures to promote inland waterway transport <sup>(5)</sup>.

376. Aid granted to the sector during the year, in particular by Belgium <sup>(6)</sup>, France <sup>(7)</sup> and Germany <sup>(8)</sup>, is intended to help carriers adjust to the full liberalisation of the market that came into effect on 1 January 2000 in accordance with Directive 96/75/EC.

#### 3.1.6.2. Air transport

377. The Commission continued to implement in the civil aviation sector the policy framed in the December 1994 guidelines. It cleared social aid schemes, investment aid and financial arrangements in connection with the restructuring of airlines.

378. On 1 March, the Commission decided that the social aid scheme introduced for certain categories of passenger, in particular all persons with their main place of residence in Corsica, on the eight 'shore-to-shore' links between Corsica and mainland France <sup>(9)</sup> was compatible with the EC Treaty.

379. On 4 October the Commission decided not to raise any objection to the payment of individual aid amounting to ESP 2 350 000 to the Spanish

<sup>(1)</sup> Case N-406/1999, Commission decision of 1.3.2000 (OJ C 134, 13.5.2000).

<sup>(2)</sup> Case N-440/2000, Commission decision of 21.12.2000, not yet published.

<sup>(3)</sup> Regulation (EEC) No 1107/70 of 4 June 1970 on the granting of aids for transport by rail, road and inland waterway (OJ L 130, 15.6.1970).

<sup>(4)</sup> Regulation (EEC) No 1191/69 of 26 June 1969 on action by Member States concerning the obligations inherent in the concept of a public service in transport by rail, road and inland waterway (OJ L 156, 28.6.1969), as last amended by Regulation (EEC) No 1893/91 of 20 June 1991 (OJ L 169, 29.6.1991).

<sup>(5)</sup> Council Regulation (EC) No 718/1999 of 29 March 1999 on a Community-fleet capacity policy to promote inland waterway transport (OJ L 90, 2.4.1999).

<sup>(6)</sup> Case N-567/1999, Commission decision of 12.7.2000 (OJ C 284, 7.10.2000).

<sup>(7)</sup> Case N-564/2000, Commission decision of 18.10.2000 (OJ C 380, 30.12.2000).

<sup>(8)</sup> Case N-180/2000, Commission decision of 16.5.2000 (OJ C 184, 1.7.2000).

<sup>(9)</sup> Case N-24/2000, not yet published.

firm Aero Transport Internacional SA <sup>(1)</sup> based in Catalonia.

380. The Commission examined the conditions in which the first phase of privatisation of the Portuguese carrier Transportes Aéreos Portugueses SA (TAP) <sup>(2)</sup> was carried out and found on 20 September that it did not involve any State aid.

381. By a decision it adopted on 4 October <sup>(3)</sup>, the Commission amended its previous decision of 14 August 1998 <sup>(4)</sup> on restructuring aid granted to the Greek carrier Olympic Airways.

### 3.1.6.3. Road transport

382. As in previous years the Commission pursued a policy favouring aid which facilitates the development of a sector and which can be exempted under Article 87(3)(c) of the Treaty. It regards as compatible with the common market aid for funding investments by small and medium-sized road transport companies both in the passenger and the goods market which help increase their overall economic efficiency and cooperation between them.

383. In a ruling on a Spanish State aid measure for the purchase of vehicles, *Renove I* <sup>(5)</sup> the Court of First Instance confirmed the Commission's policy of not allowing State aid to be granted for the purchase of vehicles in transport markets with surplus capacity.

384. The Commission took several decisions in the field of passenger and goods transport in line with the established State aid policy for those areas. The decisions concerned in particular a Dutch research and development scheme <sup>(6)</sup>, the financing of Dutch parking facilities accessible to the public <sup>(7)</sup> and a scheme allowing investment aid for public passenger transport in La Rioja <sup>(8)</sup>. On 26 July the Commission also took a final negative decision on several measures forming part of Spain's *Renove II* scheme and required Spain to recover aid for the purchase of commercial vehicles <sup>(9)</sup> which had been granted in 1997 in a way not considered compatible with the common mar-

ket. This case was the follow-up to the above-mentioned decision on the *Renove I* scheme, which covered the period from August 1994 until the end of 1996.

385. Aid to Asetra <sup>(10)</sup>, a non-profit-making association grouping together road and urban transport undertakings, to enable it to set up a system providing information and services in the transport field was cleared by the Commission on 31 March. In so far as Asetra is not an undertaking carrying on economic activities, measures supporting it cannot be classed as State aid.

386. Applying Article 86(2) of the EC Treaty for the first time to aid in the land transport sector, on 4 October the Commission decided not to raise any objection to the reform of the operating arrangements of the French motorway concessions <sup>(11)</sup>.

### 3.1.6.4. Combined transport and rail transport

387. As in previous years the Commission took a favourable view of aid which facilitates the development of the combined transport sector and has a positive impact on modal shift. It also allowed investment aid for building combined transport infrastructure.

388. On 31 October, the Commission closed the investigation which it had opened in 1999 into Dutch aid to NS Cargo for its Rotterdam–Prague shuttle <sup>(12)</sup>. The Dutch authorities had informed the Commission that NS Cargo had paid back the aid, which was held to be incompatible with the EC Treaty.

389. In a decision adopted on 14 September, the Commission raised no objections to a Dutch aid scheme for constructing inland terminals <sup>(13)</sup>. The aid intensities are based on commercial research and the scheme provides sufficient safeguards against distortions of competition between terminals.

390. The Commission cleared on 4 October an individual grant of aid by the Dutch Government to two intermodal terminal operators in the Port of Rotterdam <sup>(14)</sup>. Applying precedents, the Commission also raised no objection to two aid schemes set up by the Italian province of

<sup>(1)</sup> Case N-950/1999, not yet published.

<sup>(2)</sup> Case N-336/2000, not yet published.

<sup>(3)</sup> Case N-541/2000, not yet published.

<sup>(4)</sup> OJ L 128, 21.5.1999.

<sup>(5)</sup> Judgment of 29.9.2000 in Case T-55/99, not yet reported.

<sup>(6)</sup> Case N-183/2000 (OJ C 362, 16.12.2000).

<sup>(7)</sup> Case N-464/1999 (OJ C 134, 13.5.2000).

<sup>(8)</sup> Case N-694/2000 (OJ C 202, 15.7.2000).

<sup>(9)</sup> Case C-65/1998, not yet published.

<sup>(10)</sup> Case N-673/1999 (OJ C 184, 1.7.2000).

<sup>(11)</sup> Case N-540/2000 (OJ C 354, 9.12.2000).

<sup>(12)</sup> Case C-30/1999 (OJ L 38, 8.2.2001).

<sup>(13)</sup> Case N-208/2000 (OJ C 315, 4.11.2000).

<sup>(14)</sup> Case N-577/1999 (OJ C 354, 9.12.2000).

Bolzano <sup>(1)</sup> and the Italian region of Piedmont <sup>(2)</sup>. It thereby allowed investment aid to be granted for combined transport as well as to road transport companies.

391. Acting on a complaint, on 15 November the Commission opened proceedings with regard to the commercial and financial involvement of Deutsche Bahn in the freight-forwarding operator BahnTrans <sup>(3)</sup>, as it suspected that the transaction involved illegal State aid.

### 3.1.6.5. Maritime transport

392. In the maritime transport sector, the Commission authorised under the Community guidelines on State aid to maritime transport <sup>(4)</sup> a number of State aid measures designed to reduce the tax and social security burdens on shipping companies. The question of subsidisation for public service obligations was also examined by the Commission, which adopted the first decision based on Article 86(2) of the EC Treaty in the sector.

393. On 15 February, the Commission authorised the implementation of a Swedish State aid scheme for training seafarers <sup>(5)</sup>. A similar scheme in Finland <sup>(6)</sup> was authorised on 11 August.

394. On 12 July, the Commission cleared the UK's proposed tonnage tax regime <sup>(7)</sup>, a tax measure aimed at promoting the competitiveness of UK shipping in the global shipping market by creating a positive tax environment for shipping in line with other major maritime countries. For those companies subject to UK corporation tax which opt into the scheme, profits from qualifying shipping activities would be calculated by reference to the net tonnage of each of the ships they operate. The notional profit thus derived would replace the normal tax assessment of UK and foreign income from qualifying activities, and this notional profit would then be liable to UK corporation tax. This is the fourth such scheme to be introduced in the Community after those in Greece, the Netherlands and Germany.

395. On the same date, the Commission ordered Italy to provide information on an aid scheme in the port sector <sup>(8)</sup> to enable it to assess the compatibility of the scheme with the Treaty.

396. On 19 July, the Commission closed by means of a negative decision proceedings under Article 88(2) of the EC Treaty in respect of unnotified aid to Compañía Trasmediterránea <sup>(9)</sup>, finding that Spain had unlawfully implemented the aid contrary to Article 88(3) of the Treaty.

397. On 27 July, the Commission authorised Belgium to exempt merchant shipping, dredging and towing companies from paying the tax deducted at source on the wages of Community seafarers employed on board vessels flying the flag of a Member State <sup>(10)</sup>.

398. On 14 August, the Commission allowed Finland to grant, in respect of the year 2000 only, aid equivalent to 40 % of the contributions payable by shipping companies to the seafarers' pension scheme <sup>(11)</sup>.

399. On 15 November, the Commission decided not to raise any objections to the proposed modification and extension of a Danish maritime training aid scheme for seafarers <sup>(12)</sup>.

400. On 29 November, following annulment by the Court of First Instance of its decision of 7 June 1995, the Commission adopted a negative decision on aid to the ferry operator *Golfo de Vizcaya* <sup>(13)</sup>.

401. On 7 December, the Commission authorised France to extend beyond the year 2000 the arrangements for reimbursing the maritime part of business tax <sup>(14)</sup>, the introduction in 1990 and subsequent extensions of which had been approved by the Commission.

402. The Commission decided on 13 December to allow France to finance feasibility studies prior to launching new short-distance shipping routes <sup>(15)</sup>; on the other hand, it opened an investigation into

<sup>(1)</sup> Case N-755/1999, Commission decision of 15.11.2000, not yet published, and Case N-508/1999, Commission decision of 21.12.2000, not yet published.

<sup>(2)</sup> Case N-815/A/1999, Commission decision of 21.12.2000, not yet published.

<sup>(3)</sup> Case C-63/2000 (ex NN-102/2000), Commission decision of 15.11.2000 (OJ C 52, 17.2.2001).

<sup>(4)</sup> OJ C 205, 5.7.1997.

<sup>(5)</sup> Case N-819/1999 (OJ C 258, 9.9.2000).

<sup>(6)</sup> Case N-33/2000, not yet published.

<sup>(7)</sup> Case N-790/1999 (OJ C 258, 9.9.2000).

<sup>(8)</sup> Case C-81/2000.

<sup>(9)</sup> Case C-10/1998, not yet published. Corrigendum adopted on 21.12.2000.

<sup>(10)</sup> Case N-142/2000, not yet published.

<sup>(11)</sup> Case N-33/2000, not yet published.

<sup>(12)</sup> Case N-441/2000 (OJ C 380, 30.12.2000).

<sup>(13)</sup> Case C-32/2000, not yet published.

<sup>(14)</sup> Case N-593/2000, not yet published.

<sup>(15)</sup> Case N-697/2000, not yet published.

measures designed to cover operational expenditure linked to the creation of such routes <sup>(1)</sup>.

### 3.1.7. Agriculture

403. From 1 January, the Commission applied the Community guidelines for State aid in the agricultural sector <sup>(2)</sup> adopted on 24 November 1999 to new State aid measures introduced after that date. Consequently, Member States had to adjust their existing aid schemes to comply with the new rules during the year.

404. The new guidelines consolidate and simplify the rules applied by the Commission in the past. In addition, a number of important changes have been made to ensure that the State aid rules are consistent with the new rural development policy <sup>(3)</sup> introduced as part of the Agenda 2000 reforms.

405. The starting point for the new guidelines is that any State aid for the agricultural sector must be compatible with the EU's common agricultural policy and with the EU's international obligations, in particular the WTO Agreement on Agriculture. As the Council decided to rule out the possibility of individual Member States distorting the delicately balanced EU support for product prices or rural development schemes, any State aid which interferes with the mechanisms of the common market organisations is prohibited. In addition to these new guidelines, the Commission is reflecting on a new framework for aid for promoting and advertising agricultural products.

406. The Commission received during the year some 250 notifications of State aid planned in the agricultural sector and decided on 261 cases, most of which came from Italy, Germany, the Netherlands, Spain and France. The cases concerned mainly: (i) investments and other kinds of intervention, e.g. forestry reconstruction in France; the dioxin crisis in Belgium; the pig sector in France, Ireland, Portugal, the Netherlands and the United Kingdom, and the sugar, citrus and tobacco sectors in Italy; (ii) tax measures linked to environment-friendly initiatives in the Netherlands, and some cases of privatisation, rescue and restructuring in Germany and Portugal.

### 3.1.8. Fisheries

407. On account of its social and economic features, the fisheries sector is still receiving large amounts of public assistance both from the Community and from national sources.

408. The Commission examined the compatibility of national aid schemes in the light of the guidelines for the examination of State aid to fisheries and aquaculture <sup>(4)</sup>. With the entry into force in January of Council Regulation (EC) No 2792/1999 of 17 December 1999 laying down the detailed rules and arrangements regarding Community structural assistance in the fisheries sector <sup>(5)</sup>, the Commission revised the guidelines in order to bring them into line with the new structural rules.

409. The new guidelines spell out the rules more clearly in certain areas. They thus provide that the guidelines on national regional aid do not apply in the fisheries sector and that aspects of regional aid schemes that concern fisheries will be examined in the light of the fisheries guidelines. They also provide further details for assessing training aid, aid for consultancy services and aid to experimental fishing and set out more precisely the conditions for granting aid for rescuing and restructuring firms in difficulty. More detailed rules and conditions are likewise set out for aid intended to improve the management and control of fishing activities and aid in connection with the purchase of used vessels. As far as special cases are concerned, more detailed rules are set out for income aid (measures linked to exceptional circumstances are to be examined on a case-by-case basis, and for temporary cessations of activity reference is made to the relevant point of the guidelines), the point dealing with operating loans has been deleted and specific points have been added to cover aid to compensate for damage caused by natural disasters or other exceptional occurrences, insurance premiums, the outermost regions and employment aid. The new guidelines contain two annexes which will make for closer monitoring of approved schemes: one setting out the information to be supplied when aid schemes are notified, and the other specifying the information which must appear in the annual report to be submitted to the Commission on all existing aid schemes or all individual aid measures granted outside an approved scheme that are not made subject to a specific reporting obli-

<sup>(1)</sup> Case C-65/2000 (ex N-697/2000), not yet published.

<sup>(2)</sup> OJ C 28, 1.2.2000. Amended by OJ C 232, 12.8.2000.

<sup>(3)</sup> Council Regulation (EC) No 1257/1999 of 17 May 1999 on support for rural development from the European Agricultural Guidance and Guarantee Fund (EAGGF) (OJ L 160, 26.6.1999).

<sup>(4)</sup> OJ C 100, 27.3.1997.

<sup>(5)</sup> OJ L 337, 30.12.1999.

gation by a conditional decision. The Member States were consulted on the amended guidelines, which were adopted by the Commission in November. They will apply to all schemes notified from January 2001 onwards.

410. A large number of schemes were notified to the Commission, especially during the second half of the year, owing to notification of all national joint financing measures adopted under the Financial Instrument for Fisheries Guidance and as part of the preparatory work on measures implementing the new Community support frameworks.

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

#### 3.2.1. Public health

411. In the context of the approved Swedish environmental scheme <sup>(1)</sup>, the Commission found that the Community guidelines on State aid for environmental protection could not apply. But as the scheme was designed to contribute to improving public health in general, including the health and safety of workers, the Commission adopted a positive decision based on the provisions of the EC Treaty on the health and safety of workers, public health and environmental protection in general (Articles 137, 152 and 174 respectively), these being recognised as Community objectives.

#### 3.2.2. Financial sector

412. The Commission continued to strive for strict application of the State aid rules in the financial sector. For the first year since 1994 the Commission did not have to deal with cases of aid to an ailing institution and focused its attention on ongoing aid to banks in France, Italy and Germany.

413. In France, the Commission made significant steps forward in the particularly complex economic evaluation of the aid derived by *Crédit Mutuel* <sup>(2)</sup> from the monopoly right to distribute the *Livret Bleu*, a tax-free savings book. The restructuring of the *Caisse des Dépôts et Consignations*, by separation of its commercial from its public service activities, was brought to the Commission's attention. While welcoming the greater transparency

of the new organisation, the Commission considered that it was not necessary to comment on the guarantee mechanism, given that this would be examined at the appropriate time in the broader context of the European banking world.

414. In the case of Italy, the Commission decided on 4 October to initiate formal Article 88(2) proceedings against tax aid to Italian banks and banking foundations <sup>(3)</sup>. The aid measures, introduced by Law 461/98 and the related Decree 153/99, allow *inter alia* for tax benefits to banks which undertake a merger or similar restructuring.

415. As regards Germany, the Commission examined a complaint lodged by the European Banking Federation against the system of public guarantees for credit institutions governed by public law, i.e. mainly savings banks and *Landesbanken*. Although the examination was still continuing at the end of the year, the preliminary assessment indicated that the guarantee system did in fact constitute State aid within the meaning of Article 87(1) of the EC Treaty. The Commission intends to take appropriate action in the near future once the preliminary investigations have been completed.

#### 3.2.3. Exceptional occurrences

416. Following the disaster caused by the sinking of the oil tanker *Erika* <sup>(4)</sup>, the French Government proposed an aid scheme intended to assist small and medium-sized enterprises which had suffered damage in the course of the dispersion of the oil slick. The costs arising from the replacement of damaged facilities, the destruction of stocks and exceptional financial losses should be eligible for aid. The aid concerned the costs not covered by insurance. As the aid to remedy the damage suffered was deemed proportionate, the Commission approved the scheme under Article 87(2)(b) since the damage was caused by a natural disaster and the sinking of the oil tanker constituted an exceptional occurrence within the meaning of that provision.

## D — Procedures

417. Since the procedural rules were laid down in Council Regulation (EC) No 659/1999 <sup>(5)</sup> the

<sup>(1)</sup> Case C-2/2000 (ex N-718/99), Commission decision of 12.7.2000 (OJ L 295, 23.11.2000).

<sup>(2)</sup> Commission decision of 16.12.1997 (OJ C 146, 12.5.1998).

<sup>(3)</sup> Case C-54/2000 (ex NN-70/2000) (OJ C 44, 10.2.2001).

<sup>(4)</sup> Commission decision of 4.10.2000 (OJ C 380, 30.12.2000).

<sup>(5)</sup> Regulation of 22.3.1999 (OJ L 83, 27.3.1999).

Commission and the Court of Justice have had a number of opportunities to apply and spell out in greater detail the procedural rights of interested parties, the obligation on Member States to recover illegal aid and the Commission's obligation to proceed in the case of complaints.

## 1. Rights of third parties

418. On several occasions, third parties asked for access to the file in State aid cases. The Commission refused this on the grounds that the legal party to the proceedings is the Member State. This practice was explicitly confirmed by the Court of First Instance in *Ufex v Commission* <sup>(1)</sup>.

419. In *Comité d'entreprises de la Société française de production v Commission* <sup>(2)</sup>, the Court rejected an appeal by a works council and a trade union representing the sector in question against a Commission decision that, being persons other than those to whom the decision was addressed, they were not individually concerned within the meaning of the fourth paragraph of Article 173 of the EC Treaty. In the State aid field, an undertaking cannot therefore rely solely on its status as a competitor of the undertaking in receipt of aid but must additionally show that its circumstances distinguish it in a similar way to the undertaking in receipt of the aid, account being taken of the extent of its possible participation in the procedure and the magnitude of the prejudice to its position on the market. The status of negotiators with regard to the social aspects within the company constituted only a tenuous link with the actual subject-matter.

## 2. Recovery of aid

420. During the year the Commission was called on to give its opinion as to whether the obligation to recover illegal aid should follow the assets sold by the beneficiary of the aid to another company.

- (1) The separate sale of assets: the Commission takes the view that the obligation to repay State aid remains with the selling company, as the assets are replaced with cash which is available to repay the creditors, including the State.

- (2) Cases where the assets are sold on a 'going concern' basis: this second group of cases concerns the sale of the assets as a going concern with a view to continuation of the company's economic activity. A distinction can be drawn between two situations: (a) the buyer takes over some of the liabilities of the former company. In this context, the creditors whose liabilities are transferred are privileged in relation to the recovery of debt; (b) identity of ownership on both sides of the transaction, i.e. the assets of the insolvent company are acquired by its subsidiary or by another company in the same ultimate ownership. The Commission did not follow the 'pass through' theory, according to which the benefit of aid is passed through to future owners, as generally no transfer of advantage can be seen when the assets are sold on market conditions, but took the view that the recovery obligation would follow the assets, treating the transaction as analogous to a share sale. The obligation to repay the State aid therefore attaches to the buying company. However, as in the case of identity of ownership between buyer and seller combined with the impossibility of recovery from the parent beneficiary, neither of the two possible alternatives for remedying the distortion (recovery or re-establishment of market conditions via liquidation and sale of the assets to competitors) would take place, the Commission does not allow the consequences of a negative decision to be avoided using such an intra-group arrangement.

421. The latter approach was followed in the *System Microelectronic Innovation (SMI)* <sup>(3)</sup> and *CDA Compact Disc Albrechts (CDA)* <sup>(4)</sup> cases, in which the Commission ordered the German Government to recover the aid from the successor company, which was the real beneficiary of the aid since it used the assets of the insolvent company as improved by the aid (spillover). It was necessary in all cases to prevent Germany evading the consequences of the recovery decision. The Commission therefore decided to extend its decision to aid measures in favour of any other undertaking which continued the business of the initial enterprise by using the latter's assets and/or infrastructure.

<sup>(3)</sup> Case C-45/1997, Commission decision of 11.4.2000 (OJ L 238, 22.9.2000).

<sup>(4)</sup> Case C-42/1998, Commission decision of 21.6.2000 (OJ L 318, 22.11.2000).

<sup>(1)</sup> Judgment of 14.11.2000 in Case T-613/97, not yet reported.

<sup>(2)</sup> Case C-106/98 P [2000] ECR I-3659.



422. In the *Manufacture corrézienne de vêtements* case <sup>(1)</sup>, the Commission started an ex officio proceeding with regard to aid intended to support a company in difficulty. No sound restructuring plan

having been provided, the Commission considered the aid to be incompatible with the EC Treaty and ordered France to recover it from the insolvent company.

<sup>(1)</sup> Case C-29/99 (ex NN-20/99), Commission decision of 21.6.2000 (OJ L 293, 22.11.2000).

### Box 7: State aid to the Magefesa group — Recovery of aid

For the first time the Court of Justice confirmed <sup>(1)</sup> the Commission's view that the behaviour of public authorities with respect to a debtor company having ceased to honour its obligations, consisting in allowing it to pursue its activities, may, under certain circumstances such as in the case in point, lead to the conclusion that they have illegally granted State aid.

In 1987 a complaint concerning State aid to the Spanish group Magefesa was lodged with the Commission. By decision of 20 December 1989, the Commission declared that the aid was incompatible with the common market and ordered the Spanish Government to recover it. Following several complaints in 1997 concerning the advantage gained by Magefesa as a result of not reimbursing the aid received, the Commission started proceedings against the Magefesa group and its legal successor.

On 14 October 1998, the Commission declared the aid consisting in the non-payment of taxes and social contributions to be illegal, again ordering the Spanish Government to recover the aid with interest.

The Spanish Government appealed against that recovery decision before the Court of Justice. It argued that under Spanish law there was no obligation on a public creditor to seek a declaration of insolvency or the liquidation of an enterprise in order to obtain payment of amounts owed. Furthermore, so it claimed, the Magefesa group did not obtain any advantage from public sources as the public entities concerned had not waived the debts and had taken all legal measures at their disposal. In the Court proceedings, the Commission stressed that the Spanish authorities had not exhausted all possible legal remedies for recovering their claims. Although the national legislation at issue was applicable to all enterprises, and was thus a general measure, the Commission maintained that an advantage within the meaning of Article 87(1) of the EC Treaty may also consist in the public authorities refraining from taking measures in certain specific circumstances. As a result, the companies belonging to the Magefesa group were able to continue their activities without fulfilling either their tax or their social security obligations.

The Court rejected Spain's appeal, stating that the Spanish Government's failure to take all legal measures to recover the aid conferred an advantage on the company. The non-payment of taxes and contributions constituted illegal aid incompatible with the common market and Spain had to recover it.

<sup>(1)</sup> Judgment of 12.10.2000 in Case C-480/98 *United Kingdom v Commission*, not yet reported.

### 3. Protection of legitimate expectations

423. In a case concerning Italian Law No 95/79, which introduced a scheme derogating from normal insolvency proceedings <sup>(1)</sup>, the Commission found that the scheme was not compatible with the EC Treaty. As regards recovery of the aid granted illegally to some 500 enterprises over a period of 20 years, the Commission had due regard for the need for the recovery decision to be in line with the general principle of Community law expressed in Article 14(1) of Council Regulation (EC) No 659/1999, namely protection of the legitimate expectations that the Commission's attitude had raised in past years both with the Italian Government and among the beneficiaries. Consequently, the Commission decided not to require recovery of the aid granted illegally during its 20 years of implementation.

### 4. Non-execution of previous Commission decisions

424. In a case concerning *Westdeutsche Landesbank Girozentrale* (WestLB) <sup>(2)</sup> the Commission found that Germany had not correctly implemented its decision of 8 July 1999 <sup>(3)</sup> regarding capital injections on favourable terms. The State aid involved was to be recovered from WestLB immediately. The German authorities had submitted various proposals on how to implement the decision which proved to be unsatisfactory.

425. Concerning State aid in the form of special tax credits awarded to publicly owned merchant shipyards belonging to the State-owned holding Sociedad Estatal de Participaciones Industriales <sup>(4)</sup>, despite a number of reminders Spain did not comply with the recovery decision which had been communicated to it in December 1999. The Commission decided to refer both the above cases to the Court of Justice.

### 5. Commission's obligation to start proceedings

426. In *SIC v Commission* <sup>(5)</sup> the Court of First Instance began by recalling that the Commission,

when adopting a favourable decision, may confine itself to a preliminary investigation under Article 87(3) of the EC Treaty only if it is able to satisfy itself after an initial examination that the aid is compatible with the common market. In the case at issue, however, the Court deduced from the fact that in its letters to the Member State the Commission had repeatedly expressed serious doubts as to the compatibility of the aid with the EC Treaty that the Commission was under the obligation to initiate a detailed investigation under Article 88(3) of the Treaty. As to the duration of the preliminary investigation of unnotified aid, the Court recalled that, although the Commission was not required to carry out an initial examination of the measures in question within the two-month period envisaged by the judgment in *Lorenz* <sup>(6)</sup>, it was bound, where interested third parties submitted complaints, to conduct a diligent and impartial investigation with due dispatch.

### 6. Preliminary notification obligation

427. In *France v Commission* <sup>(7)</sup> the Court pointed out that Article 88(3) of the EC Treaty does not contain a simple notification obligation but the obligation to notify prior to implementation. This conclusion is to be drawn from the suspensive effect stipulated in the last sentence of Article 88(3). Consequently, the provision does not allow the dissociation of obligations which comprise jointly the notification obligation and the temporary suspension of execution of aid.

### 7. Other provisions of the Treaty

428. The Court recalled that it was clear from the general scheme of the Treaty that proceedings under Article 88 of the EC Treaty must never produce a result that is contrary to the Treaty's specific provisions. An aid scheme concerning German income tax <sup>(8)</sup>, of which certain conditions contravened other provisions of the Treaty, could not therefore be declared compatible with the common market. Although direct taxation was a matter for the Member States, the Member States nevertheless had to exercise their direct taxation

<sup>(1)</sup> Case C-68/99 (ex NN-96/99), Commission decision of 16.5.2000, not yet published.

<sup>(2)</sup> Commission decision of 11.4.2000 (OJ C 211, 22.7.2000).

<sup>(3)</sup> OJ L 150, 23.6.2000.

<sup>(4)</sup> Case C-3/99.

<sup>(5)</sup> Judgment of 10.5.2000 in Case T-46/97, not yet reported.

<sup>(6)</sup> Case C 120/73 [1973] ECR 1471.

<sup>(7)</sup> Case C-332/98 [2000] ECR I-4833.

<sup>(8)</sup> Judgment of 19.9.2000 in Case C-156/98, not yet reported.

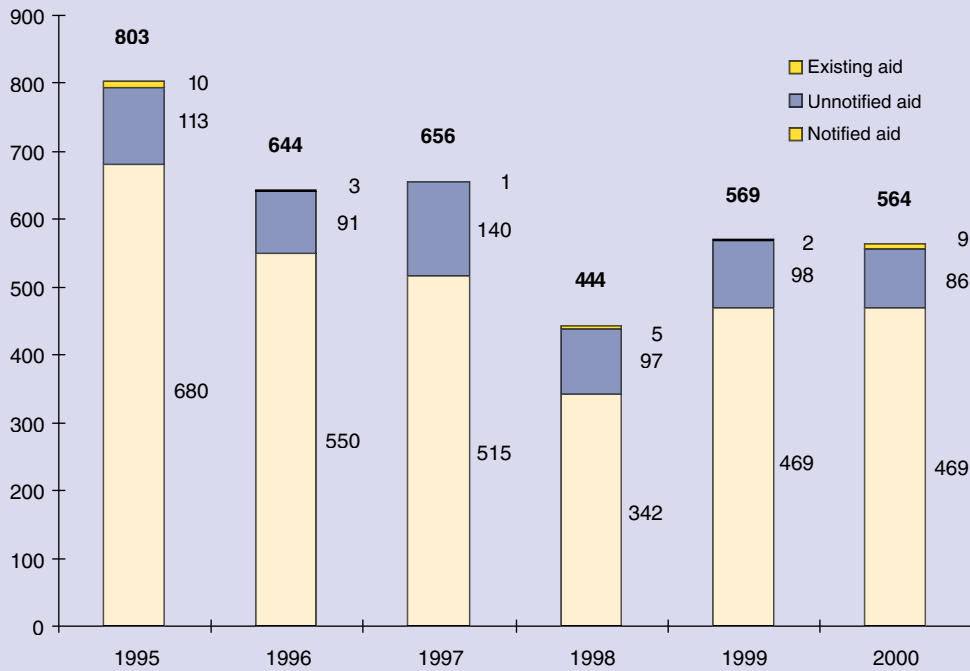
powers in accordance with Community law. The Court concluded that if a Member State granted, even indirectly, a tax advantage to undertakings having their registered office on its territory, refusing to allow undertakings having their registered office in another Member State to benefit from that advantage, the difference in treatment between the two categories would in principle be prohibited by Article 52 of the EC Treaty, provided that there

was no objective difference in situation. There was no such difference between a company established in a Member State other than Germany carrying on an economic activity in the new *Länder* through a branch, agency or fixed establishment, a company which could not claim the benefit of the contested measure, and a company having its registered office on German territory, which did benefit from the tax concession introduced by the measures.

E — Statistics (1)

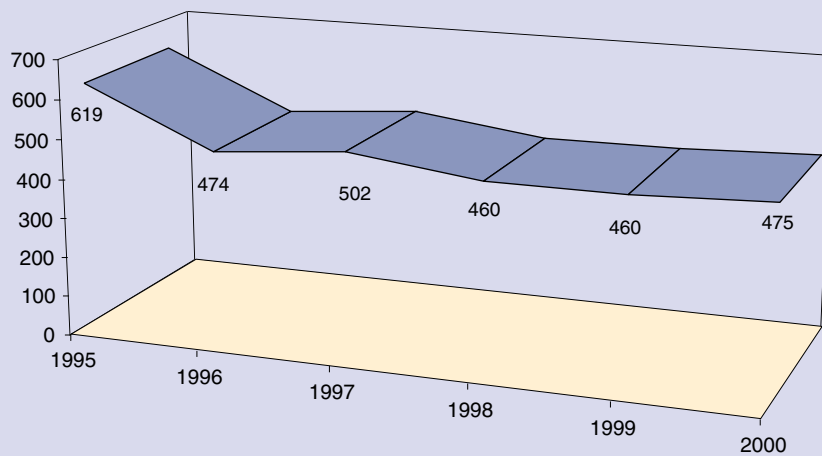
**Figure 6**

Trend in the number of aid cases registered (other than in agriculture, fisheries, transport and coal) between 1995 and 2000



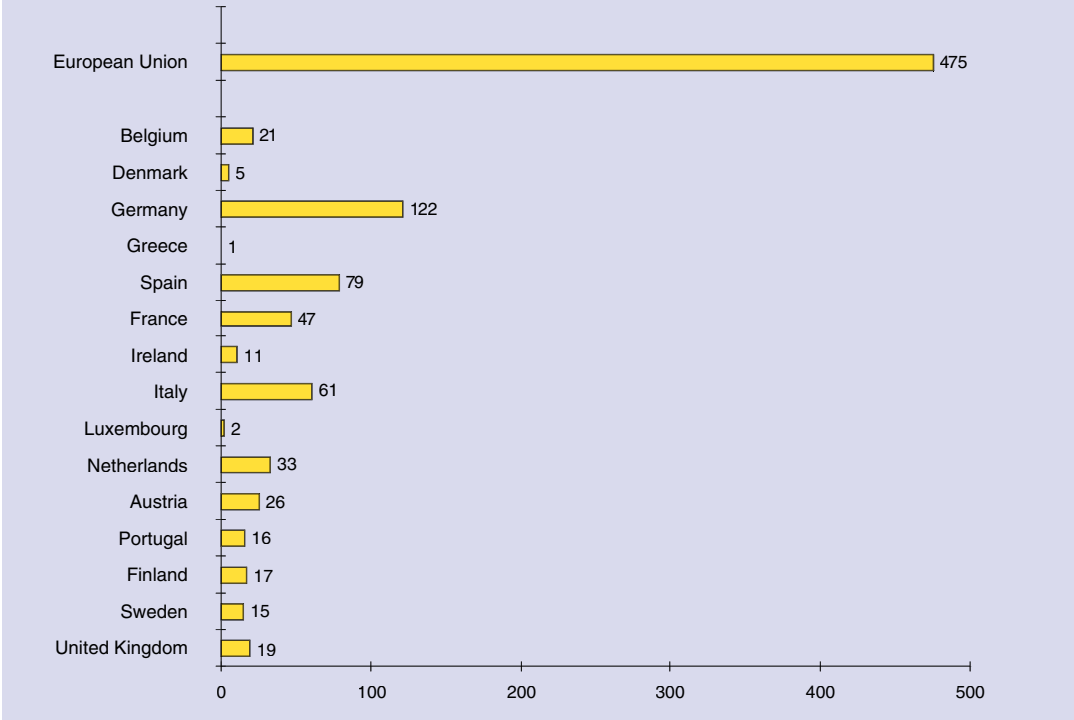
**Figure 7**

Trend in the number of decisions taken by the Commission (other than in agriculture, fisheries, transport and coal) between 1995 and 2000



(1) The 1999 data were revised after the 1999 Competition Report was published.

**Figure 8**  
Number of decisions by Member State  
(other than in agriculture, fisheries, transport and coal)





## IV — INTERNATIONAL ACTIVITIES

### A — Enlargement

#### 1. Accession negotiations

429. Following the Luxembourg European Council in December 1997, accession negotiations were opened in March 1998 with Cyprus, the Czech Republic, Estonia, Hungary, Poland and Slovenia. Negotiations on the competition chapter continued for all these applicant countries in 2000.

430. Following the Helsinki European Council in December 1999, accession negotiations were opened in February 2000 with Bulgaria, Latvia, Lithuania, Malta, Romania and Slovakia. The competition chapter was immediately opened for Latvia, Lithuania and Slovakia. For Malta and Romania, the competition chapter was opened in the autumn of 2000.

431. The EU's common negotiating positions make clear that, before the competition negotiations can be provisionally closed, three elements must be in place in the applicant countries: (i) the necessary legislative framework (for antitrust and State aid); (ii) the necessary administrative capacity; and (iii) a credible record of enforcement of the competition *acquis*.

These three conditions must be met well before accession. Applicant countries must show that their companies and authorities have become accustomed to operating in an environment such as that of the EU and would therefore be ready to withstand the competitive pressures of the single market.

432. At its meeting on 4 December, the Council (general affairs) welcomed the 'road map' presented in the Commission's enlargement strategy paper. According to that paper, the EU should have as its priority the definition of common positions, including positions on requests for transitional measures, in the second half of 2001 for a number of chapters including the one on competition policy. The Council regarded this as: '... an important reference frame which reflects the Union's commitment, for its part, to tackling problems raised by the negotiations, including requests for transitional arrangements, and to adopting negotiating positions on chapters of the *acquis* based on a given timetable, with a view to the provisional closure of the various chapters once the conditions are met'.

#### 2. Progress in alignment of competition rules

433. The Commission reports regularly on progress made by each of the applicant countries towards accession. The third regular reports for the 10 associated countries of central and eastern Europe (CEECs), Cyprus, Malta and Turkey adopted by the Commission in November assess progress made since the previous reports delivered by the Commission in 1999.

434. The achievements in the area of antitrust and mergers are generally satisfactory, both on the legislative side and with regard to the creation of the necessary administrative capacity. All the applicant countries have adopted basic competition laws, taking over the core elements of Articles 81 and 82 of the EC Treaty and most of them have also established merger control. The establishment of competition authorities has also taken place relatively quickly and without too much controversy.

435. The main challenge facing antitrust authorities in the applicant countries is now to allocate their resources so as to give priority to antitrust enforcement regarding the anticompetitive conduct that most seriously obstructs the proper working of the markets, such as cartels, monopolistic acquisitions, and exclusionary practices by dominant firms.

436. In contrast to the progress made in the field of antitrust policy, the introduction of State aid control in the applicant countries has proved much more controversial, slower and politically sensitive. The start of the accession negotiations has helped to speed up the creation of legal and procedural frameworks for State aid control. However, the concrete enforcement of State aid discipline is, in general, far from satisfactory.

437. Most applicant countries have created national State aid monitoring authorities. The Commission has emphasised that these authorities should effectively control new and existing State aid granted by all aid-granting authorities. Monitoring authorities should receive prior notification of all new aid measures. They should have the power to collect all information necessary to examine State aid from all aid-granting authorities. Moreover, they should have the power to give an independent opinion on the compatibility of all new aid measures with the Europe agreements before the aid is granted. However, not all monitoring authorities seem as yet to receive, on a systematic basis, infor-

mation on all new aid granted that would allow them to perform their duties in a comprehensive way.

438. To ensure the necessary transparency, several applicant countries still need to draw up comprehensive inventories of existing aid that are kept permanently up-to-date. In addition, the Commission has been working with the monitoring authorities of the applicant countries to ensure that their annual State aid reports conform to the methodology of the Commission's State aid survey.

439. The Commission has drawn the attention of several applicant countries to the need to bring their fiscal aid regimes, often used to attract foreign investment, and their State aid measures in the so-called special economic zones into line with the Community *acquis* well before accession.

### 3. Implementing rules under the Europe agreements

440. With a view to further completing the legal framework for relations between the Community and the 10 CEECs in the competition field, two sets of implementing rules have been the subject of negotiations with the CEECs. The first concerns the implementation of the competition provisions of the Europe agreements applicable to firms (antitrust) and the second relates to the rules concerning State aid.

441. Implementing rules for the competition provisions applicable to firms have already been adopted for nine CEECs, namely Bulgaria <sup>(1)</sup>, the Czech Republic <sup>(2)</sup>, Estonia <sup>(3)</sup>, Hungary <sup>(4)</sup>, Lithuania <sup>(5)</sup>, Poland <sup>(6)</sup>, Romania <sup>(7)</sup>, the Slovak Republic <sup>(8)</sup>, and Slovenia <sup>(9)</sup>. With regard to Latvia,

the Commission has presented its proposal on implementing rules to the Council. The wording of the implementing rules is basically the same for all 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. With regard to certain constitutional problems concerning the application of the implementing rules in Hungary, discussions have continued in order to try and resolve the remaining difficulties.

442. The Czech Republic is the only associated country where the implementing rules for State aid are currently in force <sup>(10)</sup>. The implementing rules constitute a two-pillar system of State aid control. On the Community side, the Commission assesses the compatibility of State aid granted by EU Member States on the basis of the Community State aid rules. On the side of the Czech Republic, the Czech national monitoring authority is to monitor and review existing and new public aid granted by its country, on the basis of the 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. After preparatory work in the Council in 2000, draft State aid implementing rules are awaiting approval by the respective Association Councils for Latvia, Lithuania, Estonia, Bulgaria, Romania, Poland, and Slovenia. The Commission has also presented to the Council its proposal on implementing rules for the Slovak Republic.

### 4. Extension of Article 87(3)(a) status under the Europe agreements

443. The Europe agreements provide that public aid granted by the associated countries must be assessed taking into account that they shall for a five-year period be regarded as areas identical to those areas of the Community described in Article 87(3)(a) of the Treaty establishing the European Community. After preparatory work in the Council, the EU-Bulgaria, EU-Lithuania, EU-Romania and EU-Estonia Association Councils have decided

<sup>(1)</sup> Decision 2/97 of the EU-Bulgaria Association Council of 7.10.1997 (OJ L 15, 21.1.1998).

<sup>(2)</sup> Decision 1/96 of the EU-Czech Association Council of 30.1.1996 (OJ L 31, 9.2.1996).

<sup>(3)</sup> Decision 1/99 of the EU-Estonia Association Council of 28.4.1999 (OJ L 144, 9.6.1999).

<sup>(4)</sup> Decision 2/96 of the EU-Hungary Association Council of 6.11.1996 (OJ L 295, 20.11.1996).

<sup>(5)</sup> Decision 4/99 of the EU-Lithuania Association Council of 26.5.1999 (OJ L 156, 23.6.1999).

<sup>(6)</sup> Decision 1/96 of the EU-Poland Association Council of 16.7.1996 (OJ L 208, 17.8.1996).

<sup>(7)</sup> Decision 1/99 of the EU-Romania Association Council of 16.3.1999 (OJ L 96, 10.4.1999).

<sup>(8)</sup> Decision 1/96 of the EU-Slovak Association Council of 15.8.1996 (OJ L 295, 20.11.1996).

<sup>(9)</sup> Decision 4/2000 of the EU-Slovenia Association Council of 21.12.2000 — not yet published.

<sup>(10)</sup> Decision 1/98 of the EU-Czech Association Council of 24.6.1998 (OJ L 195, 11.7.1998).



to extend this status for a further period of five years <sup>(1)</sup>. Similar decisions are awaited by the respective Association Councils for Latvia, the Czech Republic and Poland. The Commission has also presented to the Council its proposal on the extension of Article 87(3)(a) status for Hungary and Slovakia. With regard to Slovenia, a draft proposal was prepared for adoption by the Commission with a view to presenting it to the Council.

444. The Association Council decision adds that the associated country has to submit GDP per capita figures at NUTS II level. The State aid monitoring authority of the associated country and the Commission then jointly evaluate the eligibility of regions and the maximum aid intensities, in order to draw up the regional aid map on the basis of the Community guidelines on national regional aid. Thereafter, a joint proposal is submitted to the Association Committee, which takes a decision.

### 5. Technical assistance to the applicant countries

445. In view of these remaining shortcomings, technical assistance in the field of competition continues to be an essential tool in preparing the applicant countries for accession. Specific actions are taken under 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.

446. The Commission has pursued a proactive policy of further intensifying its contacts with the competition authorities of the applicant countries. On 25 and 26 September, the sixth annual competition conference between applicant countries and the Commission took place in Tallinn, Estonia. The delegations included high-level officials from the respective competition and State aid authorities. The annual conference serves as a forum for the exchange of views and experience. It also helps to establish and strengthen professional contacts between officials responsible for competition. This year’s conference concentrated on enforcement

practices and the importance of ensuring effective implementation of the rules in the fields of both antitrust and State aid.

447. The Directorate-General for Competition continued to hold various bilateral meetings with the competition and State aid authorities of applicant countries in 2000. Technical discussions at expert level were held on antitrust approximation, institution building and enforcement. Similar meetings also took place on legislative approximation in the State aid area, on the creation of State aid monitoring authorities and on specific State aid issues, such as the drafting of the annual State aid reports, regional aid maps, the State aid aspects of investment incentives and special economic zones, and the assessment of individual cases in the sensitive sectors.

### 6. Turkey

448. 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. After consultation with Member States, such implementing rules were formally proposed to the Turkish Government and subsequently discussed at expert level by the delegations of both sides. Considerable progress was achieved at a first joint reading of the draft text, and the few outstanding issues should be resolved in the very near future, thus enabling the rules to be adopted in good time.

## B — Bilateral cooperation

### 1. United States

449. Every year the Commission reports in detail to the Council and the European Parliament on its cooperation activities with the US under the 1991 Cooperation Agreement <sup>(2)</sup> and the 1998 Positive Comity Agreement <sup>(3)</sup>. The last report covered the

<sup>(1)</sup> Decision 1/2000 of the EU–Bulgaria Association Council of 28.2.2000 (OJ L 144, 17.6.2000); Decision 2/2000 of the EU–Romania Association Council of 17.7.2000 (OJ L 230, 12.9.2000); Decision 2/2000 of the EU–Lithuania Association Council of 24.7.2000 (OJ L 199, 5.10.2000); Decision 3/2000 of the EU–Estonia Association Council of 1.12.2000 (OJ L 21, 23.1.2001).

<sup>(2)</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>(3)</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).

period from 1 January to 31 December 1999 <sup>(1)</sup>. The report for 2000 will be published during the course of 2001.

450. During 2000 the Commission continued its close cooperation with the Antitrust Division of the US Department of Justice (DoJ) and the US Federal Trade Commission (FTC) in an ever greater number of cases. The trend towards the globalisation of markets continued apace during the year, as most vividly illustrated by the record number and scale of transnational mergers: the year 2000 saw a notable increase in the number of transactions notified to both the Commission and the US antitrust agencies. Bilateral cooperation was particularly intensive with regard to these global merger cases. Inter-agency discussions tend to focus on issues such as the definition of markets, the likely competitive impact of a transaction on those markets, and the viability of any remedies suggested by the merging parties.

451. Merger investigations involving close transatlantic cooperation included among others the *Alcoa/Reynolds*, *MCI Worldcom/Sprint*, *Novartis/AstraZeneca*, *Boeing/Hughes*, *AOL/Time Warner* and *Time Warner/EMI* cases. The Commission also cooperated closely with its US counterparts in a number of non-merger investigations, for example in the Commission's and US FTC's respective enquiries into the creation of the Covisint business-to-business joint venture between the manufacturers of automobile spare parts. Case-related EU-US cooperation is discussed in further detail in this report's chapter on merger control, and in the sixth report to the Council and the European Parliament for 2000, which will be published in 2001.

452. During the course of the Commission's cooperation with the US DoJ in the *MCI Worldcom/Sprint* case, a Commission official for the first time attended a 'pitch meeting' between the DoJ and the parties proposing to merge; such meetings are generally held shortly before the US agencies decide whether or not to take action to block a proposed merger. Representatives from both the US DoJ and FTC have already attended oral hearings in a number of Commission cases involving important US interests <sup>(2)</sup>. In 1999, the Commission had

agreed administrative arrangements with the US DoJ and FTC concerning mutual attendance at certain stages of proceedings in individual cases involving the application of their respective competition rules. The arrangements 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 is 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.

453. The first case to be initiated on the basis of a positive comity request was concluded during the course of the year. In July, the Commission decided to close an investigation into Air France for alleged discrimination against Sabre, an American computerised reservation system (CRS), after the French airline agreed to a code of conduct offering Sabre terms equivalent to those offered to its partly owned CRS Amadeus, as well as to other CRSs. At the origin of the investigation was a complaint originally filed with the US DoJ alleging that a number of companies linked to Amadeus (including Air France, Iberia, Lufthansa and SAS) had abused the dominance which they enjoyed in their respective markets. Invoking for the first time the 'positive comity' mechanism provided for in the 1991 EU-US competition cooperation agreement <sup>(3)</sup> (a mechanism subsequently elaborated on in the 1998 Positive Comity Agreement), the DoJ had requested the Commission to investigate the allegations under the EU competition rules. Positive comity makes it possible for the US antitrust agencies to request that the Commission investigate anticompetitive conduct allegedly taking place in Europe, and vice versa. This was the first (and to date the only) such request to have been made pursuant to either agreement.

454. There were numerous bilateral contacts between the Commission and the relevant US authorities during the course of 2000: Commissioner Monti paid a first, extensive official visit to Washington as Competition Commissioner in June, and took the opportunity to meet, among others, key members of the administration and congressional figures; the annual Commission/US DoJ/US FTC bilateral meeting was held in

<sup>(1)</sup> Adopted on 4.10.2000, COM(2000) 618 final; see 1999 Competition Report, pp. 319–332.

<sup>(2)</sup> Representatives from the DoJ and FTC attended several EU oral hearings during 2000 (*Time Warner/EMI*, *AOL/Time Warner*, *Worldcom MCI/Sprint*, *Alcoa/Reynolds*).

<sup>(3)</sup> See Article V.2.

Washington in July; meetings also took place during the course of the year between the Commission and the US Department of Transportation, the US Federal Communications Commission and the US Federal Maritime Commission (all of which US authorities have some responsibility for the management of competition policy issues in their respective sectors).

455. In 1999 the Commission, the US DoJ and the US FTC agreed to set up a working group designed to intensify transatlantic cooperation in the field of merger control. This working group was mandated to focus on (1) an in-depth study of the respective EU and US approaches to the identification and implementation of remedies (in particular, divestitures), and to post-merger compliance-monitoring; and (2) the scope for further convergence of analysis/methodology in merger cases being dealt with in both jurisdictions, particularly as regards the respective EU and US approaches towards oligopoly/collective dominance. The working group focused on remedies during the course of 2000, and its work on that topic is nearing completion. These discussions were particularly useful in the context of the preparation of the Commission's notice on remedies in merger cases adopted in December <sup>(1)</sup>. Next year the EU–US working group will study oligopolistic dominance.

## 2. Canada

456. In June 1999, the Competition Cooperation Agreement between the European Communities and the Canadian Government <sup>(2)</sup> entered into force. The year 2000 was the first full year in which the agreement was operational, and it can be concluded that it has facilitated a marked increase in the level of cooperation between the European Communities and Canada with regard to the enforcement of their respective competition rules. An increasing number of cases of mutual relevance to the EU and Canada is being examined by the competition authorities on both sides. Every year, the Commission reports in detail to the Council and the European Parliament on its cooperation activities with Canada. The first report covered the

period from June to December 1999 <sup>(3)</sup>. The report for 2000 will be published in 2001.

457. Contacts between the Commission and its Canadian counterpart, the Canadian Competition Bureau, have been frequent and fruitful. Discussions have concerned both case-related matters, and more general policy issues. The two authorities have, for example, discussed not only the assessment of global mergers notified to both agencies but also a number of legislative reforms being proposed or introduced in the two jurisdictions.

458. Worthy of particular mention were trilateral EU–US–Canadian teleconferences in the *Dow Chemical/Union Carbide* case, and a trilateral EU–US–Canadian meeting in Washington in the context of proceedings in the *Alcoa/Reynolds* merger case.

## 3. Japan

459. At the annual bilateral meeting between the Commission and the Fair Trade Commission of Japan in Tokyo on 28 and 29 October 1999, the Commission delegation stated its interest in reinforcing bilateral relations with Japan in the area of competition. The two sides therefore explored the possibility of concluding a cooperation agreement similar to the EU agreements with the US (1991) and Canada (1998), and to the US–Japan agreement (1999).

460. The Commission undertook intensive, informal exploratory talks with Japan and established that there was a mutual interest in strengthening bilateral cooperation in the area of competition. On 8 June, the Commission obtained a negotiating mandate from the Council, which enabled it to embark upon two extensive formal negotiation sessions with the Japanese authorities on 13 to 14 June and 3 to 4 July. The two delegations managed to resolve all issues and, in particular, the clauses relating to the use, disclosure and protection of confidential information and the communication of information by the Commission to competition authorities of Member States concerned by EU–Japan cooperation aspects.

<sup>(1)</sup> See also Section II.C of this report.

<sup>(2)</sup> Agreement between the European Communities and the Government of Canada regarding the application of their competition laws (OJ L 175, 10.7.1993).

<sup>(3)</sup> Report COM(2000) 645 final, adopted on 13.10.2000. See also 1999 Competition Report, pp. 333–335.

461. On 11 July, the Council working group expressed a favourable view of the negotiated text. It was thus possible to announce at the EU–Japan summit held in Tokyo on 19 July that the two sides had reached ‘a mutual understanding on substantial elements of their envisaged cooperation agreement in the area of competition’. It is expected that the agreement will be concluded during 2001.

462. The draft agreement covers, in particular, the exchange of information but does not derogate from the rules on confidentiality laid down in the regulations implementing Articles 81 and 82 of the EC Treaty. It includes provisions on communications from the Commission to the competent authorities of the Member States concerned. Such communications are aimed at informing the authorities about notifications and other information relating to cooperation and coordination of enforcement activities exchanged under the proposed agreement between the Commission and Japan. It also includes provisions organising the practical aspects of cooperation between the Commission and the Japanese competition authority and the coordination of their respective enforcement activities. Finally, the agreement includes provisions embodying the principles of negative and positive comity.

463. In addition to the numerous meetings and official contacts between the Commission and the Japanese authorities in the context of the agreement negotiations, the annual bilateral meeting between the Commission and the Fair Trade Commission of Japan took place in Brussels on 24 November.

464. The Commission finalised a new list of proposals for further deregulation in Japan. The list includes a series of proposals in the area of competition. The proposals were submitted within the framework of the two-way EU–Japan dialogue on regulatory reform, and in accordance with the call for comments from foreign governments under the 30 March 1999 revision of the three-year deregulation promotion programme.

#### **4. Other OECD countries and the EEA**

465. During 2000 the Commission engaged in cooperation with the competition authorities of a number of other OECD countries, most notably Australia, Korea, Norway and Switzerland. These contacts concerned both case-related and more general competition policy-related issues.

466. During the course of the year the Commission also continued its close cooperation with the EFTA Surveillance Authority, the agency with responsibility for the enforcement of the Agreement on the European Economic Area on behalf of Iceland, Liechtenstein and Norway.

#### **5. Mediterranean countries**

467. Only the Euro-Mediterranean agreements between the EU and Morocco, Tunisia and Israel are in force. Of the other Euro-Mediterranean agreements, the agreement with Jordan has not yet been ratified. Negotiations with Egypt were concluded and the agreement was initialled in January 2001. The interim agreement with the Palestine Authority will be the subject of a final renegotiation. Talks were held with Lebanon and Syria with a view to relaunching the Mediterranean policy. The competition provisions in all the signed and draft agreements include commitments aimed at bringing the competition policies of those countries into line with Community policy. The Directorate-General for Competition also took part in an initial seminar on competition in Morocco.

#### **6. Latin America**

468. The cooperation mechanism between competition authorities provided for in the agreement between the European Union and Mexico entered into force in July. It provides for exchanges of information, the coordination of certain activities, investigation of restrictions of competition in the territory of one party which have a negative impact on the interests of the other party, and a provision on technical cooperation. Provision is thus made for improved transparency of agreements between businesses and of abuses of dominant positions or mergers.

469. Negotiations took place between the European Union, Mercosur and Chile on the liberalisation of trade. After defining the objectives of the negotiations and the organisation of work, the question of competition was examined by Technical Group No 3. The aim is to ensure that the parties’ competition rules guarantee equivalent treatment to companies in each country. It will thus be possible to establish cooperation and coordination mechanisms between the respective competition authorities.

470. With regard to the Andean Community, a proposal was drafted by the Commission's Directorate-General for External Relations containing provisions on technical cooperation. The draft is being examined by the SCR and the Council working party on Latin American and Asian developing countries before the initiation of the procedure in 2001, for which the Directorate-General for Competition is providing its expertise.

471. Direct information on Community policy continued to be provided throughout the year, *inter alia* through the *Boletín Latinoamericano de Competencia*, and assistance was provided for the Unctad–Latin American seminar on competition in Costa Rica.

## 7. Russia, Ukraine, Moldova and the other NIS

472. 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. Some progress has been made with the implementation of the EU–Russia, EU–Ukraine and EU–Moldova PCAs over the past year. In particular, Ukraine and Moldova have informed the Commission about activities undertaken in order to fulfil their obligations under the agreements. A number of Tacis projects, with the task of providing relevant expertise, are also being undertaken and planned for the coming year. The Commission actively participated in international conferences organised by the Ukrainian and Russian competition authorities and held in Kiev and Moscow respectively.

473. Close cooperation was set up between the Commission and representatives of the Russian Federation, in particular with the Ministry for Antimonopoly Policy, in the context of the latter's fulfilment of its PCA obligations in the area of State aid control. In fruitful meetings, the Russian side informed the Commission about the progress of a Russian draft law establishing a State aid monitoring authority. The law is aimed at fulfilling the obligation in Article 53 of the PCA according to which the parties are required to jointly define categories and disciplines for State aid which has a distorting effect on trade and competition between the European Community and the Russian Federation.

## C — Multilateral cooperation

### 1. WTO: Trade and competition policy

474. The WTO working group on the interaction between trade and competition policy held three meetings in 2000 (15 and 16 June, 2 and 3 October and 21 November). At the June meeting, the Commission presented in detail the advantages of the future framework for developing countries (it would complement their economic and regulatory reforms, and enable them to deal with international anticompetitive practices which hamper their development) and addressed their main concerns (the need for flexibility and progressivity in putting the framework in place, for reinforced and coordinated technical assistance, and for aid in building the capacity necessary in order to participate meaningfully in international cooperation activities in the area of competition).

475. At the October meeting, the Commission presented its position in a form more acceptable to its trading partners, in particular the US and developing countries, in order to build the necessary alliances and to intensify efforts towards a framework of competition rules in the WTO.

476. WTO negotiations on trade and competition should be realistic and focus initially on what can be achieved in the context of a short global round. The scope of such negotiations should therefore be limited to three issues which appear ripe at this stage: core principles on domestic competition law and policy, basic cooperation arrangements, and the development dimension as an integral part of a multilateral framework on competition. A Competition Policy Committee to be established within the WTO will manage this basic framework. Further efforts will be necessary to deepen the educational and analytical work on more complex competition issues, in a longer-term perspective.

477. At the November meeting, the working group reviewed and adopted the group's report (2000) to the General Council (1).

(1) Report (2000) of the working group on the interaction between trade and competition policy to the General Council, WT/WGTCP/4, 30.11.2000.

---

## 2. OECD

478. The Commission continued to play an active part in the work of the OECD committee on competition law and policy, especially in the round tables and working party meetings organised in 2000 (competition in the pharmaceutical industry, mergers in financial services, airline mergers and alliances, leniency programmes, competition in the natural gas industry, joint ventures, electronic commerce, public and private dispute resolution mechanisms, and competition in road transport).

## 3. Unctad

479. The Commission played an active role at the 4th UN review conference on the set of multilaterally agreed equitable business principles and rules for the control of restrictive business practices ('RBP review') held in Geneva from 24 to 29 September. The resolution adopted calls for the continuation of the annual meetings of the inter-governmental group of competition experts ('IGE') and calls for a number of issues to be considered, such as cooperation regarding merger control and the interface between competition policy and intellectual property rights. Further, the resolution calls upon the Unctad Secretariat to continue to study a number of issues, including merger control, the benefits of competition law for consumers and in contributing towards poverty alleviation, and the links between competition and foreign investment. Finally, the resolution calls upon Unctad to clarify the ways in which possible international agreements on competition might apply to developing countries.

480. Unctad has proven generally sympathetic towards the EC position on trade and competition in the WTO, suggesting that current thinking by the EC on the issue of flexibility and progressivity for developing countries could be a way forward should other countries agree.

## 4. International Competition Forum

481. The increasing internationalisation of our economies presents major challenges for competition authorities around the world. In order to respond to these challenges, the Commission has intensified its bilateral relations with the competition authorities of the EU's major trading partners. But, as the EU and its Member States have recognised for some time, bilateralism has its limitations: it is also necessary to pursue multilateral approaches. One such approach consists in the pursuit of a multilateral competition law framework at the WTO.

482. At the same time, Commissioner Monti proposed, in a speech which he gave to the University Institute at Fiesole <sup>(1)</sup>, that a broadly based 'International Competition Forum' be set up which would meet the need for a focal point for discussion between those responsible for the development and management of competition policy worldwide. There are today over 80 countries that have enacted some form of competition law regime, many of which have only been introduced during the past decade, and more are in the pipeline. There is a clear need for a global forum in which experience in dealing with the whole range of competition policy issues (substantive, systemic and enforcement-related) can be shared and discussed.

483. The end objective should be to achieve maximum convergence and consensus between participants, through dialogue and an exchange of experience on enforcement policy and practice. Consensus should result from a common understanding about the best approach to substantive economic problems and to enforcement issues. Commissioner Monti has expressed his intention of pioneering this initiative during the course of 2001.

---

<sup>(1)</sup> Press Release IP/00/1230, 27.10.2000.

## V — OUTLOOK FOR 2001

### 1. Legislative and regulatory activities

484. As markets integrate, both in the EU and globally, it is vital that this trend be reflected in the procedural and substantive rules of the Community. The Directorate-General for Competition will therefore continue with the revision of the procedural and substantive rules for the enforcement of Articles 81 and 82.

#### *Proposal for a new regulation implementing Articles 81 and 82 of the EC Treaty*

485. In 2001 the work on the Commission's proposal for a new regulation implementing Articles 81 and 82 of the EC Treaty <sup>(1)</sup> will continue in the Council under the Swedish and Belgian presidencies. It is expected that the detailed work carried out at expert level will allow a substantive progress report to be submitted to the Council (industry) during the second half of the Swedish presidency. The European Parliament and the Economic and Social Committee will proceed with the examination of the proposal during the first part of 2001. The work on the proposed regulation in the other institutions will be complemented by the Commission preparing initial drafts of several future notices designed to accompany the new regulation.

#### *Vertical agreements*

486. Regulation (EC) No 240/96 sets out the conditions for the block exemption of technology transfer agreements, including patent and know-how licences. Pursuant to Article 12, the Commission is required to draw up an interim report on the operation of the regulation by the end of the fourth year following its entry into force. On the basis of that report, the Commission must assess whether any adaptation to the current rules is necessary, particularly in the light of the recent policy reforms in the field of vertical restraints and horizontal cooperation agreements. The Commission intends to publish its evaluation report before the end of 2001.

#### *Block exemption regulation on car distribution*

487. Block exemption Regulation (EC) No 1475/95 on car distribution expires on 30 September 2002. The Commission will con-

tinue its work on preparing for the regime for motor vehicle distribution, basing it on the evaluation report of November 2000 and reactions thereto.

#### *De minimis notice*

488. The Commission intends to revise its current *de minimis* notice <sup>(2)</sup> before the end of 2001. The notice describes the agreements the Commission considers to be of minor importance and not caught by Article 81(1). The aim of the revision is to ensure consistency between the *de minimis* notice and the recently adopted block exemption regulations on vertical and horizontal agreements <sup>(3)</sup>. It is intended to publish a draft text in the Official Journal for public consultation before the summer.

#### *Hearing officer*

489. A review of the mandate of the hearing officer is scheduled for adoption by the Commission in the first half of 2001.

### 2. Supervisory activities

490. The main part of the Commission's work on enforcing the antitrust rules will continue to consist in dealing with concrete cases. It will involve a sustained effort to build upon the already good cooperation with national competition and regulatory authorities. Top priority will be given to serious competition infringements, in particular abuses of dominance and cartels. Moreover, particular focus will be placed on the markets recently or in the process of being liberalised, such as the energy, air transport, telecoms and postal sectors, so to ensure that previous monopolists do not abuse their traditional position or collude to maintain or strengthen that position.

#### *Cartels*

491. In order to increase effectiveness both in the detection and the handling of cartel cases, the Commission adopted in 1996 a leniency programme ('Notice on the non-imposition or reduction of fines in cartel cases') <sup>(4)</sup>. Experience shows that this practice has led to a substantial increase

(1) COM(2000) 582 — OJ C 365 E, 19.12.2000.

(2) OJ C 372, 9.12.1997.

(3) Regulations (EC) Nos 2790/1999, 2658/2000 and 2659/2000.

(4) OJ C 207, 18.7.1996.

in the number of cartels that have been uncovered and punished. The programme will be further developed in order to increase its effectiveness and, if necessary, the 1996 notice will be updated and revised in the course of 2001.

492. Access to the file is one of the principal procedural guarantees intended to protect the rights of the defence. In order to take account of experience acquired to date under the Commission's notice on the internal rules of procedure for processing requests for access to the file <sup>(1)</sup>, and to adapt the notice to the recent case-law of the CFI — a revision of the notice will be undertaken in 2001.

### Liberalisation

493. Liberalisation is an essential objective of Community competition policy. It should be seen as a broad concept, i.e. the creation and safeguarding of fair and unrestricted market access in highly regulated sectors or sectors where special or exclusive rights are granted. In general, all competition enforcement should underpin specific liberalisation efforts so as to make these efforts effective for the benefit of the consumer.

494. In the telecommunications sector all national markets have now been liberalised. However, the pace of effective competition still differs appreciably between Member States and markets. Three major issues will determine the evolution of the industry.

- The incumbents are still in a position of 'de facto monopoly' in the local call market, with a market share of nearly 100 % in all Member States. The Commission will therefore ensure that the local loop is unbundled by ensuring access and by avoiding delaying tactics by incumbents and the distortion of prices.
- Competition in the mobile market has been limited mainly to the national retail market even if, recently, new pan-European operators have started to operate. Problems remain regarding access to and call termination on mobile networks and roaming charges. The Commission may therefore open proceedings against individual undertakings.
- The spread of the Internet in the Union should be fostered by ensuring that leased line prices

are substantially reduced throughout Europe and that the Internet remains an open medium.

495. In the postal sector, there have been several complaints that incumbent operators benefiting from a reserved area compete in markets open to competition without covering the additional cost of supplying competitive services. Private companies are concerned that incumbents compete with them without allocating costs in an appropriate manner to the competitive markets (cross-subsidisation). The Commission will endeavour to resolve these issues, notably by defining the relevant measure of cost an incumbent has to cover when entering competitive markets (the 'price floor'). Should this relevant measure of cost not be covered by the incumbent's revenue in the competitive market, the Commission must enforce the proper remedies. In this context, an examination of the prices applicable in the reserved area may become necessary in individual cases.

496. In air transport, the Commission will take a final position on important intra-EU and transatlantic alliances. It will also undertake a large and open-ended consultation on the possible anticompetitive effects of the current passenger tariff consultations in the IATA framework. These industry-wide arrangements are covered by Commission block exemption Regulation (EC) No 1617/93, which expires on 30 June 2001.

497. Beyond the further liberalisation necessary in the traditionally reserved areas referred to above, a linked objective is to ensure that the establishment of a single market in certain emerging sectors, which have not traditionally been open to competition, is not undermined by anticompetitive practices. Such is the case with waste management, e.g. the recycling of packaging materials. The application of competition rules to these new markets is aimed at ensuring that they are open and that competition takes place within a framework which maintains high levels of environmental protection.

### 3. Mergers

498. In the area of merger control, the Commission's priority for 2001 will be the continuation of the merger regulation review exercise following the Commission's report to the Council on this matter in June 2000. The results of the broader fact-finding exercise focusing on thresholds and referrals which was launched after that report will be analysed together with other poten-

<sup>(1)</sup> OJ C 23, 23.1.1997.



tial revision issues in the course of 2001. The purpose is to produce in 2001 a formal consultation document setting out the Commission's conclusions and recommendations for change.

499. Again in 2001, the Commission expects to finalise its work on the revision of the existing notice on ancillary restrictions (OJ C 203, 14.8.1990) with a view to enhancing the clarity and transparency of its meaning and scope. The Commission will also continue to prepare a new notice providing guidance on the concept and treatment of collective dominance under the merger regulation. As regards discussions with the US, these will be continued on the basis of two cooperation projects, one on remedies, the other looking at collective dominance, while further areas of cooperation in the context of the global competition initiative will be explored.

500. The Commission also intends to look at its internal working methods. Relevant action will include internal guidelines in order to ensure the effectiveness of commitments, as well as a standard text for trustee mandates and a system of electronic monitoring of the parties' compliance with commitments. In addition, the Commission will endeavour to improve its fact-finding methodology in merger investigations by drafting internal guidelines on information requests and standardised letters pursuant to Article 11 of the merger regulation.

#### 4. State aid

501. State aid continues to decrease as a percentage of GDP, but aid supporting individual sectors and companies still remains too high. Efforts will continue to ensure a reduction of distortions of competition in the EU caused by national aid measures, including the continuation of the strict policy on reimbursement of illegal and incompatible aid and improved monitoring of compliance with conditions and obligations imposed by the Commission in its State aid decisions. Particular emphasis will be placed on improving transparency through the progressive establishment of a publicly accessible register of State aid and a State aid scoreboard. This improved transparency should generate pressure between Member States to reduce the volume of State aid.

502. As regards horizontal issues, the Commission will continue its efforts to reform the legislative framework in order to streamline its procedures and focus its resources on the most important issues. This will involve, among other things, the revision of several frameworks and guidelines that are due to expire in 2001 or that need to be updated, in particular the Community framework on aid to research and development, the multisectoral framework on regional aid to large investment projects and the guidelines on employment aid. Following a request by the Member States at the informal Ecofin meeting held in Versailles in September 2000, the Commission also plans to clarify the application of State aid rules to measures relating to risk capital.

#### 5. International activities

503. In the international sphere, the Commission will continue to pursue its dual policy of enhancing bilateral cooperation with its foreign counterparts while at the same time exploring possibilities for expanding multilateral cooperation. Regarding the former, the Commission will strive to ensure that a cooperation agreement between the EU and Japan, providing for cooperation between the Commission and the Japanese Fair Trade Commission, is signed during the course of 2001, and it will also explore the possibility of negotiating and concluding further cooperation agreements with third countries. As regards multilateral initiatives, the Commission will continue to pursue its efforts aimed at the creation of a WTO competition law framework, in the first instance by ensuring that the subject is on the agenda for the next round of trade negotiations. Meanwhile, a particular priority will be the development of an International Competition Forum, as proposed by Commissioner Monti in 2000.

504. With the adoption of the enlargement strategy paper and the so-called 'road maps' by the European Council in Nice, the enlargement of the European Union is entering a crucial phase. The Commission's main priority in 2001 will be to assess the enforcement record of the applicant countries, including the examination of a number of test cases, both in antitrust and State aid, to see whether it will be possible provisionally to close the competition chapter with the applicant countries by the end of 2001.



## ANNEX — CASES DISCUSSED IN THE REPORT

### 1. Articles 81, 82 and 86

Case	Publication	Point
Aéroports de Paris	OJ L 230, 18.8.1998	188
B&W Loudspeakers	IP/00/1418, 6.12.2000	215
Callahan Invest Baden-Württemberg	IP/00/905, 2.8.2000	164
Callahan Invest North Rhine-Westphalia	IP/00/637, 20.6.2000	164
CECED	OJ L 187, 26.7.2000	96
Deutsche Post — Interception of cross-border mail	IP/00/562, 31.5.2000	174
EPI code of conduct	OJ L 106, 23.4.1999	224
FEFC	OJ L 268, 20.10.2000	74
FETTCSA	OJ L 268, 20.10.2000	74
Groupement des cartes bancaires		205
JCB Service	IP/00/1526, 21.12.2000	94
Joint cases UPS/Deutsche Post and DVPT/Deutsche Post	IP/00/919, 8.8.2000	175
Kirch/BSkyB	OJ C 110, 15.4.2000	217
Landing fees	IP/00/874, 27.7.2000	185
Lufthansa and SAS	IP/00/1159, 13.10.2000	181
Lysine	IP/00/589, 7.6.2000	78
Microsoft/Telewest	OJ C 94, 1.4.2000	217
New postal services in Italy	IP/00/1522, 21.12.2000	177
Opel	IP/00/1028, 20.9.2000	106
Qualifyer		180
Sabre	IP/00/835, 25.7.2000	191 and 453
Soda ash cartel	IP/00/1449, 13.12.2000	88
Solvay and ICI	OJ L 187, 26.7.2000	101
Telefónica/Sogecable/Audiovisual Sport	IP/00/1352, 23.11.2000	220
Unisource	OJ L 52, 22.2.2001	161
Vodafone, Vivendi and Canal+	IP/00/821, 24.7.2000	167

### 2. Merger control

Case	Publication	Point
Air Liquide/BOC	IP/00/46, 18.1.2000	266
Alcoa/Reynolds	IP/00/424, 4.5.2000	265, 451 and 458
America Online (AOL)/Time Warner	IP/00/1145, 11.10.2000	151 and 451
AstraZeneca and Novartis	IP/00/844, 26.7.2000	247 and 451
Boeing/Hughes	IP/00/1067, 27.9.2000	451
Bosch/Rexroth	IP/00/1457, 13.12.2000	274
BSCH/A. Champalimaud	IP/99/533, 20.7.1999 IP/99/610, 3.8.1999 IP/99/669, 9.9.1999 IP/99/749, 13.10.1999 IP/99/773, 20.10.1999 IP/99/774, 20.10.1999 IP/99/818, 3.11.1999 IP/00/21, 12.1.2000 IP/00/296, 27.3.2000	288
Framatome SA/Siemens/Cogema	IP/00/1414, 6.12.2000	246
Generali/INA	IP/00/29, 13.1.2000	278
MCI World Com/Sprint	IP/00/668, 28.6.2000	Box 6 and 451
Mitsubishi Heavy Industries	OJ L 4, 9.1.2001	287
Outokumpu/Avesta Sheffield	IP/00/613, 13.6.2000	262

Rexam/American National Can	IP/00/814, 20.7.2000	265
Secil Companhia Geral de Cal e Cimentos SA and Holderbank/Cimpo	IP/00/1338, 22.11.2000	288
TotalFina	IP/00/135, 9.2.2000	257
VEBA/VIAG	IP/00/613, 13.6.2000	261
Vivendi/Canal+/Seagram	IP/00/1162, 16.10.2000	254
Vodafone Airtouch/Mannesmann	IP/00/373, 12.4.2000	276
Vodafone/Mannesman	IP/00/373, 12.4.2000	250
Volvo/Renault VI	IP/00/962, 4.9.2000	278
Volvo/Scania	IP/00/257, 14.3.2000	245

### 3. State aid

Case	Publication	Point
Aero Transport Internacional		379
Asetra	OJ C 184, 1.7.2000	385
Babcock Wilcox	OJ C 232, 12.8.2000	342
Bau Union Ost Group	OJ C 121, 29.4.2000	343
Business Infrastructure Development scheme in the UK		317
CDA Compact Disc Albrechts	OJ L 318, 22.11.2000	421
Cockerill Sambre	OJ C 71, 13.3.2001	358
Commitments for expanding training in France	OJ C 284, 7.10.2000	334
Compañía Trasmediterránea	IP/00/808, 19.7.2000	396
Crédit Mutuel	OJ C 146, 12.5.1998	413
Danish maritime training aid scheme for seafarers	OJ C 380, 30.12.2000	399
Danish scheme granting a lower flat rate for income tax	OJ C 284, 7.10.2000	321
Delon Filament	OJ C 134, 13.5.2000	371
Deutsche Bahn	OJ C 52, 17.2.2001	391
Development aid to Indonesia	OJ C 101, 8.4.2000	356
Dutch aid scheme for constructing inland terminals	OJ C 315, 4.11.2000	389
Dutch aid to NS Cargo	OJ L 38, 8.2.2001	388
Ecological tax reform in Germany	OJ C 322, 11.11.2000	338
Électricité de France	IP/00/370, 11.4.2000	306
Erika	OJ C 380, 30.12.2000	416
Exporplás		372
Ferries Golfo de Vizcaya		400
Fiat Rivalta	OJ L 117, 18.5.2000	365
Finnish State aid scheme for training seafarers	OJ C 258, 9.9.2000	393
Fondo Speciale Rotativo per la Ricerca Technologica	IP/00/1517, 21.12.2000	330
French motorway concessions	OJ C 354, 9.12.2000	386
Ganzliner Beschichtungspulver		313
Georgsmarienhütte und Gröditz	OJ C 310, 28.10.2000	309
German mobility and land transport research programme	OJ C 232, 12.8.2000	327
Graf von Henneberg Porzellan	OJ C 272, 23.9.2000	341
Highly efficient gas and steam turbine power stations	OJ C 37, 3.2.2001	339
Hirschfelder Leinen und Textil	OJ C 272, 23.9.2000	343
Holzmann	OJ C 110, 14.11.2000	343
Island of Corsica		378
Italian banks and banking foundations	OJ C 44, 10.2.2001	414

## ANNEX — CASES DISCUSSED IN THE REPORT

Italian province of Bolzano		390
Italian region of Piedmont		390
ITEA programme	OJ C 284, 7.10.2000	327
Kahla Porzellan in Germany	IP/00/1305, 15.11.2000	311 and 341
Kali und Salz	OJ L 44, 15.2.2001	318
Kvaerner Warnow Werft	OJ C 134, 13.5.2000, OJ L 120, 20.5.2000, OJ L 156, 29.6.2000	355
Landesbanken		415
Lenzing Lyozell	OJ L 38, 8.2.2001	316
Lintra	OJ C 278, 30.9.2000	342
Magefesa	OJ L 198, 30.7.1999	
Manufacture Corrèzienne de Vêtements	OJ L 293, 22.11.2000	422
Nissan Motor Manufacturing Ltd	OJ C 354, 9.12.2000	366
Océ	IP/00/1176, 18.10.2000	329
Olympic Airways	IP/00/1113, 4.10.2000	381
Parco Navi	OJ C 162, 10.6.2000	305
Pilkington Glass France and Interpane Glass Coating France	OJ C 293, 14.10.2000	352
Plan Technologique Ferroviaire	OJ C 272, 23.9.2000	327
Port of Rotterdam	OJ C/354, 9.12.2000	390
Portuguese scheme of tax aid for the free-zone of Madeira	OJ C 301, 21.10.2000	348
Portuguese scheme of tax aid for the region of Madeira	OJ C 266, 16.9.2000	322
Scheme concerning tradable CO <sub>2</sub> emission permits proposed by Denmark	OJ C 322, 11.11.2000	337
Siciliana Acque Minerali	OJ L 272, 25.10.2000	307
SKL-Motoren and Systemtechnik	OJ C 27, 27.1.2001	343
Sociedad Estatal de Participaciones Industriales (SEPI)	OJ C 328, 18.11.2000	310 and 354
Solar Tech	IP/00/1304, 15.11.2000	325 and 351
Swedish aid scheme for improving the environment inside buildings	OJ L 295, 23.11.2000	336 and 411
Swedish scheme on social security contributions	IP/00/1510, 21.12.2000	348
Swedish scheme to reduce the income tax base for experts recruited abroad	OJ C 284, 7.10.2000	321
Swedish State aid scheme for training seafarers	OJ C 258, 9.9.2000	393
System Microelectronic Innovation	OJ L 238, 22.9.2000	421
TASQ	OJ L 272, 25.10.2000	308
Tax credit in the UK	OJ C 162, 10.6.2000	327
Transportes Aéreos Portugueses		380
Tubacex	OJ L 52, 22.2.2001	312
UK's tonnage tax regime	OJ C 258, 9.9.2000	394
Westdeutsche Landesbank Girozentrale	OJ C 211, 22.7.2000	424
Wildauer Kurbelwelle	OJ L 287, 14.11.2000	343
Zonenrandförderungsgesetz	OJ L 323, 20.12.2000	359



European Commission

**European Community competition policy — 2000**

Luxembourg: Office for Official Publications of the European Communities

2001 — 109 pp. — 21 x 29.7 cm

ISBN 92-894-0826-X

