European Commission

XXVIIIth Report on Competition Policy 1998

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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.

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Notice to the Reader

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

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

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

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

Globalisation and the threat posed by anticompetitive practices

The ever-increasing integration of the world economy is creating an unprecedented inter-dependence between countries. Over the past decade, with the successful conclusion of the Uruguay Round, we have seen an acceleration in the progressive dismantling of trade barriers. Business is taking advantage of this openness, and there has been a huge growth in the volume of trade. In many industries, companies are competing in worldwide markets, and are becoming larger and multinational as a result. The past year has seen a series of so-called “mega-mergers” between companies based in different parts of the world, creating new corporations of truly global dimensions. Where companies are not already present in several countries, they are often forming strategic alliances which enable them to penetrate foreign markets together with international partners. This is particularly true in high-technology sectors such as the telecommunications, information technology, entertainment, air transport and pharmaceutical industries. The Commission has had to keep pace with the increasing globalisation of markets and its analyses of competition problems are, to an increasing extent, taking into account market data from outside the European Union.

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

The need for cooperation in enforcement

The removal of barriers to market integration resulting from anticompetitive commercial practices is nothing new for the European Union. Since 1958, the Community's competition rules have served as an indispensable tool in carrying out the task of creating a single European market, and in helping to ensure that it becomes and remains a reality. In the absence of such control over restrictive and abusive behaviour by companies, or without merger control, national markets would remain much more difficult for newcomers from both inside and outside the Community to penetrate. Where such practices are carried on outside the Community, however, combating them is much more complicated.

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

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

In my view, the advantages of such cooperation will not accrue to the industrialised countries of the world alone. Indeed, I believe that developing countries can benefit substantially from enhanced cooperation of this kind. 1998 has been a year of turmoil and uncertainty for many of the world's “emerging” economies, particularly in Asia. It is generally accepted that one of the main causes of the problems experienced by these economies is the lack of genuine market openness. So-called “crony capitalism” meant that competition between firms was very often foregone in favour of opaque arrangements having little to do with market forces. I am convinced that the pursuit of a robust competition policy, at both the national and the international level, would provide an important antidote to such tendencies by promoting the competitiveness of industry, decentralising commercial decision-making, fostering innovation and maximising consumer welfare.

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

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

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

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

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

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

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

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

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

Bilateral cooperation with other countries

The 1995 Customs Union Agreement with Turkey is one of the best examples in recent years of a bilateral agreement containing detailed provisions dealing with competition and state aid. Free trade agreements concluded between the Community and third countries, such as the Association Agreements concluded over the last few years with several Mediterranean countries, have also usually included such provisions. The Community has recently concluded a series of so-called Partnership and Cooperation Agreements (PCAs) with Russia, Ukraine, and several of the other ex-Soviet states. These agreements, while less ambitious than the Europe Agreements, none the less involve a commitment by these countries to move progressively towards an approximation of their competition and state aid legislation with that of the Community. There is as yet no formal bilateral framework for the Community’s cooperation in the field of competition with its other principal trading partners, most notably Japan. Notwithstanding this, regular contacts — including an annual high-level bilateral meeting and the reciprocal notification of cases affecting each other’s important interests — take place between the Commission and the Japanese Fair Trade Commission.

Multilateral cooperation — the need for a new worldwide framework

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

The OECD’s 1995 recommendation concerning competition cooperation, and the recommendation on “hard core” cartels which it adopted earlier this year, represent important guidelines for the shape which bilateral cooperation should take, particularly when several member countries are grappling with the threat posed by an international cartel. The recommendations are addressed only to OECD member countries, however, and are not binding even on them. Nor are the current WTO rules adequate for dealing with competition problems. The WTO Panel’s ruling in April 1998 on the dispute between the USA and Japan, which involved allegations of anticompetitive behaviour by Fuji aimed at denying its US rival Kodak access to the Japanese market for photographic film and paper, provided a clear illustration of this inadequacy.

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

Such negotiations could focus on the following four proposals for possible agreement: firstly, the members could agree to each adopt domestic competition rules, and to the establishment of appropriate enforcement bodies. This would mean the adoption of basic rules for dealing with restrictive business practices, abuse of market power and mergers, together with adequate enforcement provisions, and a right of access for companies to the enforcement authorities and courts. Secondly, the members could at the same time agree on a common set of core principles for addressing anticompetitive practices with an international dimension. Initially, it would seem reasonable to concentrate on practices whose harmful nature is generally recognised — in particular horizontal restrictions such as price and output fixing, market sharing, bid rigging and export cartels. Agreement on other practices, such as abuse of market power and vertical restraints may prove more difficult, but could be envisaged in the longer term. Thirdly, the elements of an instrument for multilateral cooperation could also be developed. This would be designed to facilitate cooperation between enforcement authorities, and could include provision for consultation, avoidance of conflicts, exchanges of non-confidential information, reciprocal notification and comity. Finally, it would also seem logical to provide for a mechanism to enable the settlement of disputes in clearly specified circumstances. This could involve the adaptation of the present dispute mechanism of the WTO to that purpose by, for example, ensuring that patterns of failure to enforce competition law affecting trade between member countries are dealt with. To extend such a mechanism to settlement in individual cases, however, would not be appropriate.
These proposals should not be interpreted as a call for the establishment of a new international organisation, with its own powers of investigation and enforcement. Rather, they are intended to form a basis for the creation of a new multilateral framework whose purpose would be to strengthen the world trading system by ensuring that liberalisation and market access are not circumvented by anticompetitive commercial practices. With that objective in mind, I believe that the proposals are modest, but reasonable and coherent, and likely to prove effective in grappling with one of the most important challenges faced by the economies of the world as the new millennium approaches.
Part One

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INTRODUCTION

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

1. Competition policy: defending and facilitating the single market

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

1.1. Invigorating the single market

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

It exercised particular vigilance with regard to practices that tend to partition markets. It fined the motor manufacturer Volkswagen ECU 102 million for obstructing trade within the Community by preventing its Italian dealers from selling Volkswagen and Audi cars to foreign customers. It also penalised the abuse of a dominant position by the Italian Amministrazione Autonoma dei Monopoli dello Stato, which had been favouring the cigarettes it manufactured itself over cigarettes manufactured abroad.

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

¹ International cooperation is not discussed here as it already forms the subject-matter of Mr Van Miert’s foreword.
Discriminatory abuses of dominant positions are likewise practices which weaken the health of the single market, because they inhibit the development of firms that find themselves dependent on the dominant company and of others that might wish to enter a particular market, such as a network industry that may be in the process of liberalisation. The Commission acted against such abuse in several cases, for example in air and sea transport.

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

The monitoring of state aid also makes a major contribution to this effort to assist the development of the single market. The Commission takes the view that unjustified state aid leads to market distortion and inefficient resource allocation. The effect is to increase barriers to trade and hence put at risk the achievements of the single market. The continuing disparities in the levels of aid between Member States jeopardise the objective of economic and social cohesion. The Commission therefore continued the strict exercise of its responsibility to control state aid. The number of cases it had to decide decreased, but unfortunately remained high. A sizeable proportion of cases (about 20%) were cases where Member States failed to comply with the obligation to notify new aid measures to the Commission. This confirmed the Commission in its view that it must consistently order the recovery of non-notified aid that is incompatible with the Treaty. Without such a practice, Member States would not have sufficient incentive to observe their procedural obligations. Major aid cases concerned additional aid to Crédit Lyonnais (between ECU 8 billion and ECU 15 billion, which is quite unprecedented) and the aid package for the construction of the Channel Tunnel Rail Link. This latter case is exemplary in addressing the implications of the construction and provision of transport infrastructure by private investors.

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

1.2. Refocusing the Commission’s supervisory work

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

5. There was intense supervisory activity once again in 1998, in all the Commission’s spheres of responsibility. The total number of new cases was 1 198, comprising 509 under Articles 81, 82 or 86, 245 mergers and 444 state aid cases; this total was down substantially on 1997, by 134, owing to a drop in

2 Including 10 ECSC decisions.
the number of state aid cases. In conventional antitrust cases the number of notifications is tending to stabilise, which is an encouraging development, and is no doubt partly the result of the new de minimis notice. The number of complaints lodged with the Commission continues to be high. The explosion in merger notifications which the Commission had expected as a result of the revision of the Merger Regulation (Regulation No 4064/89), and more especially the new powers which that regulation gives to the Commission in respect of cross-border transactions, did not in fact materialise; but the total number of transactions notified under the regulation nevertheless rose by 36%, or 5 points more than in 1997, when the corresponding figure was 31%. This increase has to be seen against the background of the current international environment, which tends to encourage mergers, and of the girding-up of markets for economic and monetary union. The total number of new state aid cases over the year showed a spectacular fall by comparison with 1997, down 32%, taking it lower than it has been in the last three years. The number of cases terminated was 1 279, comprising 581 under Articles 81 and 82, 238 mergers and 460 state aid measures; this is an increase of 119 cases closed by comparison with last year. These figures bear witness to the Commission’s desire to speed up the handling of cases wherever possible.

2. Modernisation of competition law

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

2.1. Antitrust policy

7. The communication from the Commission on the application of the Community competition rules to vertical restraints, which was approved on 30 September, is in many ways a major innovation in the Commission’s approach to antitrust policy. It breaks with a method which was differentiated by industry and category of agreement, and had become extremely complex. It is based on the economic analysis of the effects of vertical restraints; exemption is to depend on the market power of the firms involved. Simplification of procedures, realistic analysis and greater involvement of courts and competition authorities in the Member States are the fundamental principles of the Commission’s new approach, and will continue to guide it in the months ahead.

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

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

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

11. To pursue this policy the Commission will have to obtain new legislative powers from the Council. The Commission has submitted a proposal for a Council regulation amending Regulation No 19/65/EEC so as to authorise the Commission to adopt a block exemption regulation of the new type. The Commission has also put forward a proposal to amend Council Regulation No 17 of 6 February 1962 so as to enlarge the scope of the exemption from notification laid down in Article 4(2).

2.2. State aid

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

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

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

3. The liberalisation process

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

3.1. Telecommunications

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

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

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

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

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

3.2. Energy

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

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

For the organisation of access to the system, Member States may choose either or both of two
procedures, known as negotiated access and regulated access. Both must operate in accordance with
objective, transparent and non-discriminatory criteria. Upstream pipelines are as a general rule to be
open too, but the procedure here is to be determined by the particular Member State.

23. The Commission may allow certain derogations where companies which have concluded “take-
or-pay” gas-supply contracts encounter difficulty as a result of liberalisation. The directive also
provides for derogation where a Member State is not directly connected to the system of any other
Member State and has only one external supplier, for emerging markets and regions in Greece and
Portugal, and for areas where the gas infrastructure is still being developed.

Insert 1: The euro and competition

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

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

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

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

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

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

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

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

Competition policy therefore needs to remain vigilant to ensure that the euro can deliver its full benefits. Both Community and national competition policy have a vital role to play in ensuring that product and service markets are flexible so that European consumers will truly benefit from the common currency.
I — ANTI TRUST — ARTICLES 81 AND 82
State monopolies and monopoly rights — Articles 31 and 86

A — Modernisation of the legislative and interpretative rules

24. For the last two years the Commission has been modernising its competition policy to ensure that it reflects contemporary economic realities and, in particular, to prepare it for the challenges of economic and monetary union and Community enlargement.3 One of the main aims of modernising the rules and practice is to ease the administrative burden on firms, particularly those without market power, and to refocus the Commission’s efforts on cases of clear relevance to Community competition policy. In 1997, the Council adopted a revised Merger Regulation and the Commission adopted several notices designed to clarify and modernise its practice as regards antitrust legislation. In 1998, the Commission took a major step forward when it published its communication on vertical restraints.

1. Assessment of the first measures to refocus efforts

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

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

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

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

3 1997 Competition Report, points 36 to 50.

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

30. The notice on cooperation between the Commission and national competition authorities in handling cases caught by Articles 81 and 82 began to make itself felt. The Commission rejected fifteen complaints for lack of Community interest; these cases were handled by the authority of the Member State most affected by the practice complained of. It should also be noted that 89 requests for information changed hands between national authorities and the Commission regarding cases handled by both bodies on a joint basis. Lastly, it should be noted that the Commission was consulted on ten cases handled by the competition authorities acting alone and that it encountered three cases of dilatory notification as defined by the notice. This first set of instances of application of the notice reflects increased cooperation between Community and national authorities and illustrates their common determination to implement Community antitrust legislation on a decentralised basis. However, it is clear that even more intensive use could be made of this notice.

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

32. The number of cases closed in 1998 was 581 (the corresponding figures for 1997 and 1996 were 517 and 388 respectively). The number of formal decisions grew substantially, rising from 27 in 1997 to 42 in 1998. Of special significance, apart from decisions rejecting complaints and non-opposition decisions in the transport field, were 11 formal decisions based on Articles 81(1) and 82, most of which were coupled with fines. This increase in the number of cases closed reflects a commitment on the Commission's part to speed up the handling of antitrust cases. However, this improvement cannot conceal the slow processing of certain cases. On the basis of the 11 formal decisions referred to above, the average length of proceedings was four years and 10 months, the shortest duration being two years and one month and the longest eight years. The length of proceedings was essentially due to complex procedures which entailed delays. For that reason the Commission reviewed a number of procedural regulations during the year, including Regulation No 99/63/EEC on hearings, with a view to streamlining and speeding up the processing of cases. This streamlining is an ongoing process.

4 Law of 22 May 1997, which entered into force on 1 January 1998 (Mededingingswet).
5 Act of 9 November 1998, which will enter into force on 1 March 2000.
33. In view of the stabilisation in the number of notifications and the development of cooperation with national competition authorities, the impact of measures to refocus efforts may be described as encouraging, even if the results are still limited as yet. The review of the policy on vertical restraints should allow further progress to be made. Nevertheless, the Commission will continue its work on this subject and will put forward new modernisation proposals during 1999.

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

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

35. This communication and the related proposals follow the publication of the Commission’s Green Paper on vertical restraints in EC competition policy in January 1997, and the very wide-ranging debate that ensued. Subject to the adoption of two proposed Council regulations, the Commission intends to enact a new type of block exemption regulation for vertical restraints, complemented by a set of guidelines. New competition rules for the distribution of goods and services should be in place for the year 2000.

2.1. Outline of the policy proposal

A more economics-based approach

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

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

7 COM(96) 721 final.
8 The block exemption regulation on car distribution, which expires in 2002, is not covered by the current proposal.
Companies with market shares above the thresholds of the block exemption will not be covered by the safe harbour. It must, however, be stressed that, even in such circumstances, their vertical agreements will not be subject to any presumption of illegality. The market share threshold will serve only to distinguish those agreements which are presumed to be legal from those that may require individual examination. To assist companies in carrying out such an examination, the Commission intends to issue a set of guidelines basically covering two issues: the application of Articles 81(1) and 81(3) above the market share threshold and the Commission's policy on withdrawal of the benefit of the block exemption, particularly in cumulative effect cases. In most cases, these guidelines should allow companies to make their own assessment under Articles 81(1) and 81(3). The objective is to reduce enforcement costs for industry and to eliminate, as far as possible, notifications of agreements that do not give rise to any serious competition problem.

**Market share threshold(s)**

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

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

**Hardcore restraints**

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

**No sector-specific rules**

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

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

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

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

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

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

Withdrawal of the benefit of the block exemption

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

These proposed regulations provide for two major changes:

(a) Extension of the Commission’s powers under Council Regulation No 19/65

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

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

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

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

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

53. The proposal is designed to extend the scope of Article 4(2) of Regulation No 17 with a view to granting dispensation from the prior notification requirement in respect of all vertical agreements. The practical advantage of the proposed amendment is to enable the Commission, even in cases of late notification, to consider whether the agreements in question satisfy the conditions of Article 81(3) and, if so, to adopt an exemption decision taking effect on the date on which the agreement was entered into. In this way the legal certainty afforded to firms would be strengthened without jeopardising the enforcement of Article 81(1) in respect of anticompetitive agreements.

3. Review of the policy on horizontal agreements

54. In 1997\(^9\) the Commission’s departments decided to begin assessing the policy on horizontal agreements. The fact-finding exercise carried out that year revealed that the existing notices and block exemption regulations in this field\(^{10}\) were not much used, were partly outdated and entailed a number

\(^9\) 1997 Competition Report, points 46 and 47.

\(^{10}\) Block exemption regulations concerning specialisation and R&D agreements and notices on cooperation between companies (1968) and cooperative joint ventures (1993).
of notifications, and should therefore be reviewed. The Commission’s departments took the view that
this exercise should be seen as an important complement to the project on vertical restraints.

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

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

4. Review of procedural regulations

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

certain proceedings under Articles 85 and 86 of the EC Treaty

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

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

12 Chapter II: Hearing of parties to which the Commission has addressed objections; Chapter III: Hearing of
applicants and complainants; and Chapter IV: Hearing of other third parties.
procedure, and to the right of access to the file without, however, pre-empting the Commission’s further intentions in this field.

59. The regulation makes provision for the applicant\textsuperscript{13} or complainant\textsuperscript{14} to be provided with a copy of the non-confidential version of the objections and to be given a date by which it may make its views known in writing. This applies in cases where the Commission raises objections.

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

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

4.2. Commission Regulation (EC) No 2843/98 of 22 December 1998 on the form, content and other details of applications and notifications provided for in Council Regulations (EEC) No 1017/68, (EEC) No 4056/86 and (EEC) No 3975/87 applying the rules on competition to the transport sector\textsuperscript{15}

61. In 1994 the Commission modernised the rules for notifying restrictive agreements in sectors other than transport by adopting Regulation (EC) No 3385/94 and Form A/B.\textsuperscript{16} Commission Regulation (EC) No 2843/98 and the new Form TR (Annex I to the regulation) have introduced similar rules for companies which wish to notify restrictive agreements in the transport sector. Form TR specifies the information that must be provided by companies when applying for exemption under the three transport regulations and for negative clearance under Regulation (EEC) No 3975/87. It has replaced the previous Form II (transport by rail, road and inland waterway), Form MAR (maritime transport) and Form AER (air transport). Form TR(B) (Annex II to the regulation) has replaced Form III for crisis cartels notified under Article 14(1) of Regulation (EEC) No 1017/68.

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

\textsuperscript{13} Applications made under Article 3(2) of Regulation No 17.


B — Consolidating the single market

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

1. Cartels

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

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

Pursuant to Article 65 of the ECSC Treaty, the Commission prohibited a price-fixing agreement in the steel sector. Six producers of stainless-steel flat products, accounting for more than 80% of European production of stainless-steel finished products, had decided on a concerted increase in stainless steel prices by changing the method for calculating the ‘alloy surcharge’. The Commission decided to fine the members of the cartel a total of ECU 27.3 million. 18

The Commission also prohibited an agreement between four sugar producers. British Sugar, Tate & Lyle, Napier Brown and James Budgett, which together controlled 90% of the white granulated sugar market in the United Kingdom, had developed a collaborative strategy of higher pricing for that product on the industrial and retail markets. Fines totalling ECU 50.2 million were imposed on the participating companies, including ECU 39.6 million on British Sugar. 19

The Commission also took action on an agreement between producers of district heating pipes which was characterised by the variety of competition restrictions involved: price fixing, market sharing and bid rigging. The cartel began in Denmark and soon extended throughout the Union, thus cartelising

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17 Most of the cases which gave rise to a positive approach on the part of the Commission are discussed in the following section (C - Sector-based policies).
18 OJ L 100, 1.4.1998.
19 OJ L 284, 19.10.1998

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the whole of the European market. The Commission imposed fines totalling ECU 92.21 million on the
ten companies involved, including ECU 70 million on ABB. A particularly aggravating factor was that
the cartel continued for nine months after the Commission had discovered its existence\textsuperscript{20}.

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

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

66. The Commission concluded from the above proceedings that its notice of 10 July 1996 was
beginning to bear fruit.\textsuperscript{21} The notice, which provides for fines to be reduced or even waived for firms
which denounce cartels in which they have taken part, was applied in the sugar case.

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

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

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

2. Opening-up of markets

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

\textsuperscript{20} OJ L 24, 30.01.1999

\textsuperscript{21} OJ C 207, 18.7.1996; 1996 Competition Report, points 34 and 35.

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69. 1998 was a year in which the Commission clearly demonstrated its determination to promote the opening-up of markets, a prime example of this being the Volkswagen case. Since 1995 the Commission had received numerous complaints from European consumers, particularly from Germany and Austria, who had been confronted with various difficulties when attempting to buy new Volkswagen and Audi cars in Italy. These consumers wanted to benefit from the price differentials between their Member State and Italy, where prices were particularly advantageous. Following a series of inspections at the offices of Volkswagen AG, Audi AG and Autogerma SpA, which is a subsidiary of Volkswagen and the official importer for both makes in Italy, and at the offices of a number of Italian dealers, the Commission concluded that Europe’s largest motor-manufacturing group had been pursuing a market-partitioning policy in the Union for about ten years. Volkswagen AG had systematically forced its dealers in Italy to refuse to sell Volkswagen and Audi cars to foreign buyers, especially from Germany and Austria. The Commission fined Volkswagen ECU 102 million, the largest fine ever imposed on a single company.

70. The case of Amministrazione Autonoma dei Monopoli dello Stato (AAMS) provided a further indication of the Commission’s determination to open up national markets, in this particular instance by means of Article 82. AAMS, an Italian cigarette producer and distributor which had a dominant position on the Italian market for the wholesale distribution of cigarettes, imposed on foreign producers wholesale distribution contracts containing numerous restrictive clauses which limited the access of foreign cigarettes to the Italian market and favoured its own production. The Commission fined AAMS ECU 6 million and ordered it to put an end to the infringements.

Insert 2: Motor vehicle distribution: a consumer-oriented policy

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

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

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

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

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

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

In addition to such direct action, the Commission continues to increase price transparency by publishing twice-yearly reports on car prices in the Union. Growing consumer demand for this report — about 8 000 copies are distributed annually — illustrates that consumers are increasingly aware of the benefits that the single market can provide. The introduction of the euro, which will increase price transparency and facilitate comparisons, is expected to reinforce this behaviour within the European Community.

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

3. **Undertakings in a dominant position**

71. Article 82 prohibits undertakings in a dominant position on a given market from abusing this situation to the prejudice of third parties. Such abuse consists, *inter alia*, in limiting production, charging excessive prices, discriminatory or predatory pricing, tied sales or other commercial practices not based on the principle of economic efficiency. The Commission takes the view that such practices, which undermine competition, are particularly dangerous when they are carried out by undertakings with the power to shield themselves from competitive pressure and eliminate their competitors without significant damage to themselves or to block market access by new entrants to a significant degree. In the context of further development of the single market, these practices are particularly damaging because they lead to market partitioning and delay the integration of the Member States’ economies. In addition, in recently liberalised markets there is a danger that they will wipe out the expected
benefits in terms of restructuring, innovation or job creation. This is why the Commission is particularly alert to the effects of dominant positions on these processes. The number of formal decisions pursuant to Article 82 has increased steadily over the last two years. In 1998 the Commission concluded six cases under that article.

72. Two cases concerned the airports at Frankfurt and Paris, which are operated by companies in a dominant position. The abuses identified by the Commission concerned groundhandling and self-handling services, which were liberalised under a directive adopted in 1996. In addition to the direct anticompetitive effects on the suppliers involved, the Commission showed that there were repercussions on non-domestic airlines, with market partitioning occurring as a result. The abuses also slowed down the liberalisation of groundhandling services.

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

In the Alpha Flight Services/Aéroports de Paris (ADP) case, the Commission found that the operator of the two Paris airports had abused its dominant position as operator by imposing discriminatory commercial fees on suppliers or airlines providing groundhandling or self-handling services such as catering, cleaning and freight handling. ADP charged different levels of fees to the two third-party suppliers, AFS, the plaintiff, and OAT, a subsidiary of Air France. In addition, the fee charged by ADP to airlines providing catering services for passengers via specialist subsidiaries was either zero or less than that charged to companies providing similar catering services for third parties. There was no objective justification for the differences, which distorted competition between suppliers since some benefited from lower operating costs. The Commission therefore ordered Aéroports de Paris to bring its fee arrangements to an end.

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

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

22 Including the AMMS case discussed under point 2.
24 Since the TACA case also involved application of Article 81, see the comments on the case in the section on sector-based policies (I-C-4).
Nordion, a Canadian company operating on the world market for the production and sale of molybdenum 99, a base product for radiopharmaceuticals used in nuclear medicine, concluded exclusive, long-term supply agreements with its customers, with the result that the main competitor, the Belgian company IRE, which was the complainant in this case, was prevented from developing and ultimately even from maintaining its presence on the market. This situation also made the entry of potential new competitors impossible. After receiving a statement of objections charging it with abusing its dominant position, Nordion undertook to renounce the exclusivity clauses in its contracts. The Commission then decided to terminate the proceedings.25

Van den Bergh Foods, a Unilever subsidiary, holds more than 85% of the Irish ice cream market. The company has an extensive network of freezer cabinets which are provided to retailers free of charge on condition that they are used exclusively for the storage of Unilever’s products. The Commission found that, in the circumstances of the Irish market, the provision of cabinets on exclusive terms constituted a real barrier to market entry for Unilever’s competitors. Given the reluctance of Irish retailers to replace Unilever cabinets, or to install additional ones, 40% of retail outlets in Ireland offered Unilever products only. By virtue of its dominant position on this market, Unilever had been able to encourage retailers to enter into exclusive arrangements with it. The Commission took the view that this practice constituted an abuse of a dominant position and issued a decision condemning Unilever.26

Insert 3: Commission policy on fines

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

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

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

Aggravating circumstances include repeated infringements, refusal to cooperate or the role of leader in the infringement. In the Volkswagen case, the Commission took into account when setting the fine the fact that the company had failed to take appropriate action when instructed to put an end to a serious infringement. It took account of similar behaviour in the case concerning the pre-insulated pipe cartel, which continued to operate for nine months after the investigation carried out by the Commission’s inspectors. In the case of the restrictive agreement in the UK sugar industry, the

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25 Proceedings were also instituted against IRE/Nordion in Japan, with the result that the Commission cooperated with the Japanese authorities (JFTC). See Chapter IV-International cooperation.

26 The Commission also took the view that the exclusivity condition constituted a restriction of competition which infringed Article 81.
The aggravating circumstance found against British Sugar was that the company was the instigator of the infringement and, throughout the relevant period, remained the driving force.

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

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

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

C — Sector-based policies

1. Telecommunications

1.1. The process of supervised liberalisation

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

27 See also Insert 7, Chapter II (Mergers), which discusses several decisions affecting the telecommunications sector.

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

1.1.1. Monitoring the implementation of the directives

76. The ‘1998 joint Team’ (the body responsible for implementing Community telecommunications legislation), comprising officials drawn from the Directorates-General for Competition and Telecommunications, working together with the Legal Service, continued the work it had begun in 1997.29 It prepared two reports on progress in implementing the directives, which were adopted by the Commission on 18 February30 and 25 November.31 The first was based on the results of bilateral meetings with the Member States, while the second summarised the findings of a survey carried out by the Commission among the Member States (questionnaires and contacts with the competent national authorities) and the audit findings of independent consultants on the actual implementation of the new regulatory framework in each of the Member States.

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

78. That notwithstanding, the Commission was obliged to institute new infringement proceedings against Member States which had failed to transpose the directives in full, in addition to the 35 infringement proceedings pending at the start of the year, some of which it was able to wind up following the recent notification of measures adopted by the Member States concerned. Apart from problems associated with legislative or regulatory delays, the main difficulties concern the non-compliance of certain specific conditions for licences in some Member States (obligation to allocate a certain amount of investments or turnover to R&D, obligation to obtain a bank guarantee for the completion of business plans, etc.). In addition, some Member States had failed to ensure that operators published their standard terms and conditions governing interconnection. In some Member States (Austria and Italy), the prices put forward by the operator were approved by the regulatory authority only towards the end of the year. However, about half of the tariffs published were within the range recommended by the Commission as regards charges for call termination.32

1.1.2. Price surveys

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

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29 1997 Competition Report, point 102.
made by users of fixed-line networks to mobile phones. Interconnection charges for call termination, which are set by operators, have a tangible impact on the level of charges for calls between fixed-line and mobile phones.

80. In the light of this survey in the fifteen Member States, the Commission found that there were preliminary indications that excessive or discriminatory prices were indeed being charged and that, accordingly, in-depth investigations needed to be carried out. In five of these cases, the Commission suspended proceedings so as to allow the national supervisory authorities to take action. In the ten others, namely two cases on call termination charges made by mobile telephone operators in Italy and Germany and eight cases concerning income retained by operators of public switched telephone networks (PSTNs), namely Belgacom, Telecom Éireann, British Telecom, P&T Austria, Telefónica, KNP Telecom, Telecom Italia and Deutsche Telecom, on calls from fixed-line telephones to mobile telephones, the Commission launched an enquiry based mainly on tests to detect excessive and/or discriminatory prices. It found that four PSTN operators charged higher call termination tariffs to mobile operators than to fixed-line operators. The Commission also found anomalies in mobile operators’ call termination charge structures, particularly in Italy and Germany. Lastly, it demonstrated that the income retained by PSTN operators for calls from fixed-line telephones to mobile telephones where these operators were present on both markets appeared to be significantly higher than the benchmark established by the Commission with the assistance of an external auditor as part of the enquiry.

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

82. Last year the Commission started proceedings against dominant telephone operators in respect of the accounting rates (transfer prices) which they charge for transferring international telephone calls. Following this initial phase of the investigation, the Commission decided to focus on the charging practices of seven operators which possibly derived excessive margins from the accounting rates: OTE Greece, Post & Telekom Austria, Postes et Télécommunications Luxembourg, SONERA (formerly Telecom Finland), Telecom Éireann, Telecom Italia and Telecom Portugal. The Commission invited the national regulatory authorities of the Member States concerned to investigate these charging practices.

1.2. Clarifying the legal framework

1.2.1. Notice on access agreements

83. On 31 March, after carrying out a wide-ranging consultation of interested parties, the Commission adopted a notice on the application of the competition rules to access agreements in the telecommunications sector. The notice, which is addressed primarily to telecommunications

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33 1997 Competition Report, point 78.
companies and to the national authorities responsible for regulating the industry or competition, is designed to clarify the way in which the principles of competition law as derived from Commission decisions and Court of Justice case-law are applied to agreements governing access to telecommunications infrastructure. The Commission believes that it is vital for easy, non-discriminatory access to this infrastructure to be guaranteed for new entrants to the liberalised telecommunications markets so that they can take advantage of open access and pass on the benefits to users.

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

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

85. On 7 January the Commission adopted a notice concerning the status of voice communications on the Internet pursuant to Directive 90/388/EEC. The adoption of this notice followed the publication for comment, on 2 May 1997, of an initial draft and a public consultation procedure.

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

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

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

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

35 Bull. 1/2 –1998, point 1.3.55; OJ C 95, 30.3.1998.
36 1997 Competition Report, point 105.
87. Anticipating its adoption, some Member States and dominant companies have already begun to implement the principles enshrined in the draft directive. For instance, Deutsche Telekom announced in May that it would create a structural separation between its telephone network and cable networks.

1.3. Individual cases

SNCF/Cégétel

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

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

Restructuring of Inmarsat

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

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

2. Postal services

92. Following the adoption of the postal services directive and the Commission notice in late 1997, the Commission has made preparations for the second step of the liberalisation process.

38 Commission notice pursuant to Article 19(3) of Council Regulation No 17 (OJ C 293, 22.9.1998).
According to the postal services directive, the Commission should table a proposal for further liberalisation of the sector before the end of 1998, following a comprehensive review. By 1 January 2000 Parliament and the Council are to decide on the further gradual and controlled liberalisation of the postal market.

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

93. The Commission also pursued its examination of the REIMS II agreement on terminal dues, which is the term used for the fees that a postal operator sending cross-border mail has to pay to the receiving postal operator for delivering the mail to its final addressee. In a memorandum sent to the notifying parties, the Commission expressed its concerns regarding certain provisions in the agreement. Following a series of consultations with the Commission, twelve of the parties entered into a supplementary agreement amending and clarifying the original agreement. In November the contents of the amended REIMS II agreement were published in the Official journal. In that notification, the Commission stated that it intended to take a favourable view of the agreement in the light of improvements to benefit customers. Before doing so, it invited third parties to send in their comments.

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

3. Media

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

3.1. Digital platforms

96. In several Member States, digital platforms for television and interactive services have been set up and are being examined by the Commission. In this sector, two decisions were taken in 1998 to prohibit planned mergers in Germany, namely Bertelsmann/Kirch/Premiere and Deutsche Telekom/Betaresearch. In two other cases, the United Kingdom’s British Interactive Broadcasting (BIB) and

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


43 See Chapter II (Mergers) for further details of these two cases.
France’s Télévision Par Satellite (TPS), final decisions are expected early in 1999. These will spell out how the Commission plans to support innovation and the development of new services to exploit technological advances in the sector whilst also ensuring that the competing alternatives are able to develop. The Article 19(3) notices published for both these cases outline this approach.

### Télévision par satellite (TPS) 44

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

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

### British Interactive Broadcasting (BIB) 45

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

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

### 3.2. Broadcasting rights for sports events

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

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44 Commission notice pursuant to Article 19(3) of Council Regulation No 17 (OJ C 65, 28.2.1998).

COMPETITION REPORT 1998
4. Transport

4.1. Air transport

*Transatlantic airline alliances*

101. On 30 July the Commission published notices\textsuperscript{46} concerning the alliances between British Airways and American Airlines and between Lufthansa, SAS and United Airlines. The notices set out measures that the Commission could appropriately address to the companies in a Commission proposal under Article 85(1) of the Treaty. The draft measures were designed to address infringements of EC competition rules identified by the Commission. The companies themselves, and interested third parties, were invited to submit their comments on the draft measures.

102. The carriers of the Lufthansa, SAS and United Airlines alliance asked for a hearing, which took place on 14 and 15 December. As had occurred during the hearing in the British Airways and American Airlines case in February, the parties took the opportunity to give an extensive presentation of their views on the Commission’s legal assessment of the case, including its draft measures. A large number of third parties also submitted comments on the draft measures.

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

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

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

### Insert 4: European competition policy and airports

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

The growth of the market has created new needs in terms of airport services and has aggravated congestion at major airports. Airport access has therefore become an important factor influencing the development of airlines. The growth of hubs has increased demand for slots and is thus likely to give rise to tougher competition in airports already suffering from congestion problems. In such a context, the advantage conferred on carriers solidly established in congested airports is becoming ever bigger in view of the grandfather rights rule recognised by the code of conduct. In addition, the

\textsuperscript{46} OJ C 239, 30.7.1998.
costs generated by airport services have become crucially important as cost-cutting intensifies. It is therefore important to ensure that these services, too, are brought into the competitive arena and that no companies are discriminated against.

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

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

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

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

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

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4.2. Maritime transport

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

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

The Commission found that several of the agreement’s clauses were caught by Article 81(1). These concerned price fixing for maritime transport services between Europe and the United States, price fixing for inland transport services supplied within the territory of the Community, agreement on the terms and conditions under which they entered into service contracts with shippers and the fixing of prices paid to freight forwarders.

The first of the agreements fell within the scope of the block exemption for liner conferences. The Commission refused to grant individual exemption for the remaining three agreements.

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

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

47 For Article 82 aspects, see I-B-3.

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

4.3. Application of Article 86 to the transport sector

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

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

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

5. Insurance

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

111. In September 1997, in order to provide insurance pools with a degree of certainty as to whether the block exemption regulation (Regulation No 3932/92) applied to them and to clarify the Commission's policy regarding pools not covered by the block exemption, the Directorate-General for Competition started investigating an entire segment of the insurance industry, namely aviation. Extensive requests for information were sent to thirteen aviation pools in Europe. The Commission had been informed of eight of these pools pursuant to Regulation No 17; the other five had not been notified.

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

50 Case C-155/97 Commission v Belgium.
113. The enquiry into aviation insurance pools showed that the geographic market is mainly international. Aviation pools on this market do not present any competition problem. Even if most pools count among their membership almost all insurance companies established in the Member State in question, they cover only a very minor share of the international market and, in any case, do not exceed the thresholds of the block exemption regulation.

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

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

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

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

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

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

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

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

6. Energy

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

The contribution of the directive

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

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

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

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

123. The granting of a right of ‘eligibility’ to certain customers would only have a symbolic value if access to the network by those same customers were not organised and guaranteed. It is not surprising that half of the directive’s chapters deal with subjects relating to the organisation and operation of

52 Chapters IV, V, VI and VII.
the network. The practical arrangements governing access may, according to the directive, take one of three forms. 53 The choice of one or other of these options is left to the Member State but must, in all cases, give rise to an equivalent result in terms of opening-up of the market.

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

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

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

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

A competition policy geared to liberalisation

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

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

It will therefore be necessary to ensure that tariffs do not result from the knock-on effect of excessive or uncontrolled costs or from the invoicing of services which have not been used. Particular attention should be paid to the latter point in cases of transmission between Member States. Transmission prices could also be fixed using a tariff method involving anticompetitive effects, such as one favouring producers with substantial, varied capacity as opposed to new producers entering the market. Lastly, it cannot be ruled out that refusals may be given because of insufficient capacity.

53 Negotiated access, regulated access and single buyer procedure without purchase obligation accompanied by negotiated or regulated access.
In cases concerning access, the Commission will analyse the situation of the system manager in terms of his independence vis-à-vis the other activities of the integrated group to which he belongs. In general, it would not necessarily be in the interest of an independent system manager to refuse to carry out a transmission. On the contrary, he should seek to make maximum use of his capacity, even to the point of creating new capacity in order to meet demand.

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

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

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

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

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

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

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

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

7. Competition and the environment

129. At the Cardiff European Summit, the Member States recalled the provisions of the Treaty of Amsterdam\textsuperscript{54} stipulating that Community policies should take account of environmental protection with a view to achieving sustainable development, an approach which was endorsed at the Vienna Summit. In its XXVth Report on Competition Policy, the Commission spelt out its position regarding implementation of the Community competition rules in the environmental field. In particular, it stated: ‘When the Commission examines individual cases, it weighs up the restrictions of competition arising out of an agreement against the environmental objectives of the agreement, and applies the principle of proportionality in accordance with Article 85(3). In particular, improving the environment is regarded as a factor which contributes to improving production or distribution or to promoting economic or technical progress.’\textsuperscript{55} In that connection, 1998 was marked by four cases reflecting the Commission’s commitment to take a positive approach to environmental issues in its competition analyses.

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

131. The Association of European Automobile Manufacturers (ACEA) has undertaken, on behalf of its members, to reduce CO\textsubscript{2} emissions from passenger cars. This effort is in line with the Community policy of reducing CO\textsubscript{2} emissions into the atmosphere.\textsuperscript{56} ACEA has set a reduction target of 25\% by 2008. The Commission and the Member States will monitor the efforts made to achieve that target. The Commission also took the view that this agreement between European automobile manufacturers did not infringe the competition rules. ACEA determines an average reduction target for all its members, but each of them is free to set its own level, which will encourage them to develop and introduce new CO\textsubscript{2}-efficient technologies independently and in competition with one another. Accordingly, ACEA’s voluntary agreement does not constitute a restriction of competition and is not caught by Article 81(1).

\textsuperscript{54} Article 6 of the consolidated Treaty.

\textsuperscript{55} 1995 Competition Report, points 83 to 85.

\textsuperscript{56} Communication from the Commission to the Council and the European Parliament of 29.7.1998, ‘Implementing the Community strategy to reduce CO\textsubscript{2} emissions from cars : an environmental agreement with the European Automobile Industry’ (COM (1998) 495 final).
132. In the EUCAR case, the Commission adopted a favourable stance on a cooperation agreement between Europe’s leading motor manufacturers which is designed to boost research in the motor industry, particularly on environmental issues. Most of the projects that will be developed involve experimental research on, for example, limiting noise or emission pollution caused by motor vehicles. The products obtained from this research may not be directly usable in a specific type of vehicle. The Commission therefore took the view that the research was at the pre-competitive stage and that the agreements did not infringe Community law.

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

134. Following its examination of Valpak’s membership agreements, the Commission concluded that the agreements restricted competition within the meaning of Article 81(1) because they obliged businesses wishing to join the scheme to transfer the totality of their obligations in all packaging materials. This ‘all or nothing’ approach, which transposes a regulatory provision, restricts the extent to which Valpak and other schemes will be able to compete against one another on a material-specific basis. The Commission went on to consider whether the notified arrangements could benefit from exemption under Article 81(3). In view of the emerging nature of the market and the likelihood that Valpak and other schemes would be obliged to invest in the United Kingdom’s collection and/or reprocessing infrastructure in order to meet their members’ obligations in the future, the Commission concluded that an ‘all or nothing’ approach was necessary, at least in the short term, if schemes such as Valpak were to succeed in securing sufficient funding to allow the necessary investment to take place. The Commission informed Valpak at the same time that it reserved the right to re-examine the case after three years.

| Insert 5: Globalisation of markets and competition analysis |

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

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

57 These obligations were introduced in March 1997 by government regulations implementing the requirements of the EU directive on packaging and packaging waste (94/62/EC).
In determining the geographical confines of the relevant market, the Commission takes account of a number of factors, such as the reactions of economic operators to relative price movements, the sociocultural characteristics of demand and the presence or absence of barriers to entry, such as transport costs. It should also be mentioned that the Commission tends to focus on demand trends in its analyses and that this has an impact on the geographical dimension of the relevant market.

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

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

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

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

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

Figure 1:
New cases

Cases opened on Commission's own initiative
Complaints
Notifications

Figure 2:
New cases

Formal decisions
Informal procedure
Figure 3:
End-of-year stock of cases over time
II — MERGER CONTROL

A — Introduction

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

136. Against this background, therefore, it is unsurprising that the first keynote of the year has been a continuation of the significant upward trend in the number of mergers examined by the Commission. This has grown by substantially more than 10% in each of the last four years. This year, the annual total number of notifications received under the Merger Regulation58 exceeded 200 for the first time. The year’s total of 235 represents an increase of 36% on last year’s, a rate of growth equal to last year’s record level and well above the rate for any other year. Similarly for decisions. The year’s total of 238 “final” decisions is also by a large margin the highest ever, and shows an increase of over 66% on last year, reflecting the continuing very high rate of growth.

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

138. Nor has the complexity of the Commission’s caseload reduced. The year’s total of 12 decisions to open more detailed investigations (“phase II proceedings” — Article 6(1)(c) of the Merger Regulation) remains stable, though slightly below last year’s as a proportion of the total caseload. There were also slightly fewer cases decided at phase II. That should not, however, be taken as an indication that the proportion of large-scale mergers which have potentially serious anticompetitive effects on trade in the Community is declining. Account needs also to be taken of the significant number of cases where the Commission’s new powers to accept formal remedies in the first stage of investigation (Article 6(1)(b) as amended) have been used — twelve in all, over the nine months since the powers were introduced. In addition, there have been several cases, including some (e.g. KPMG/Ernst & Young,59 Wienerberger/Cremer und Breuer,60 Wolters Kluwer/Reed Elsevier61 and LHZ/Carl

59 Case No IV/M.1044.
60 Case No IV/M.1047.
61 Case No IV/M.1040.
Zeiss) where the phase II investigation was already under way, where the parties decided to abandon their merger plans ahead of a potentially adverse final decision.

1998 also saw the first imposition by the Commission of a financial penalty on an enterprise for failure to notify a concentration in time.

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

139. The trend towards “globalisation” — the creation of businesses with worldwide leadership in particular product areas, in contrast to the diversification and conglomeracy that were features of the merger “wave” of the 1980s — also appears to have continued. The need for competition authorities to be capable (whether alone or jointly) of effective action across national boundaries has likewise intensified. In the light of experience, the Commission has developed methods for ensuring that cooperation with non-member countries — in particular the USA — on merger control matters is efficient and constructive; it will continue to keep them under review.

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

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

62 Case No IV/M.1246.
63 Case No IV/M.920, Samsung/Ast.
64 Case No JV.15.
66 See, for example, case No IV/M.1016, Price Waterhouse/Coopers and Lybrand, also discussed below.
67 Cases Nos IV/M.993 and IV/M.1027.
142. In Worldcom/MCI, foreclosure of another relatively new product area — the Internet — was also the main issue. Here, a satisfactory solution was found, involving the divestment of MCI’s Internet activities to a new entrant. This divestment was at the time the largest ever to result from antitrust action. After a full investigation the Commission found that both parties to this very large merger, covering a wide range of telecommunications activities, were significant suppliers of “universal connectivity” — the ability to offer access throughout the Internet without having to pay others to complete the connections. They would together become dominant on that market, with the ability to dictate terms to competitors needing this important service. Another significant feature of this case was that, like a growing number of others, it involved a carefully coordinated assessment and negotiation of remedies with the US competition authorities, in this instance the Department of Justice (DoJ).

**Insert 6: Merger review**

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

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

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

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68 Case No IV/M.1069.
Revised Commission notices on various aspects of the regime were also published in March, and work on the important task of producing a revised version of the notice on restrictions ancillary to a concentration continued throughout the year. Other changes that were introduced following the review — notably regarding the treatment of full-function joint ventures — are discussed elsewhere in this Report.

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

B — New developments

1. Market definition

Internet infrastructure and access services

143. The Commission dealt,ring the year with a number of cases concerning the supply of Internet services. Some of these cases also involved full-function joint ventures which required an examination of the possibility of substantial coordination of the activities of the parents, under the new procedures adopted as part of the review of the Merger Regulation. These cases are discussed in more detail in Insert 7. From the viewpoint of market definition, however, Internet services raise a number of interesting issues, some of which were analysed by the Commission in the above-mentioned Worldcom/ MCI case. As a newly emerging sector, it was necessary for the Commission to construct an approach to market definition on the basis of information assembled especially for the purpose. Reliable and comprehensive information on, for example, market shares was not publicly available, and — together with the US DoJ — the Commission organised the collection of information and views on the merger from the many businesses active in the sector as well as from the parties themselves. This was in itself a considerable task, albeit greatly facilitated by the ability — via the Internet — to communicate and exchange data rapidly worldwide with a large number of third parties.

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

**Accountancy services**

145. In analysing, for the first time, two major concentrations in the sector, the Commission was required to develop an approach to market definition in the provision of accountancy services. The proposed mergers between Price Waterhouse and Coopers and Lybrand (cleared after a phase II investigation\(^{69}\)) and between KPMG and Ernst & Young (subsequently abandoned) would have revealed little cause for concern if measured in terms of overall market share, whether nationally or on a wider geographic basis. However, in an assessment which bore certain similarities to that of the Internet sector just discussed, the Commission found that at the highest levels of this sector’s pyramidal structure there was a very high degree of concentration. Third party contacts confirmed the existence of a separate market for the supply of accountancy services (and, in particular, statutory audits) to very large, usually multinational, firms. For these customers it was essential to be able to provide a comprehensive service from a worldwide network of offices and staff with the necessary locally recognised qualifications and specialist expertise. Together with the importance of choosing a firm with an established reputation in order to maintain shareholder confidence in the financial results, this meant in effect that, for many large companies, the market was restricted to the so-called “Big Six” accountancy firms — which would reduce to four if the two proposed mergers went ahead.

**Insurance markets**

146. The insurance company sector is one in which mergers have rarely been found to give rise to competition problems, even though in recent years the sector has become more concentrated. Insurance (and reinsurance) for large risks tends to be carried out on an international basis, with customers able to choose (either on their own or with the aid of a broker) between a number of suppliers in various countries. At the level of supply to the small business or private consumer, markets remain predominantly national owing to issues of language, custom and local laws and taxation provisions. In most such markets there is, again, a satisfactory range of suppliers, large and small, and entry is not generally difficult, at least for established financial institutions such as banks. Moreover, supply-side substitution between products is generally relatively easy, so that most large insurers can offer a full product range and move into new product areas without difficulty. In Allianz/AGF\(^{70}\), however, the Commission found that certain products constituted distinct markets, notably so-called “delcredere” credit insurance (i.e. insurance against the risk that, as a result of the insololvency of the buyer, a supplier will not be paid). Delcredere insurers require a detailed knowledge of the (predominantly national) markets and buyers in and for which they offer cover. This can take a long time to develop, since it can as a rule only be acquired through experience, and meanwhile the insurer is exposed to risks which, in contrast to those of many other types of insurance underwriting, cannot be accurately quantified. Entry barriers were therefore found to be sufficiently high for this product area to constitute a separate market. Subsequent analysis identified a risk that the merger would create a dominant position in this market, and the parties gave undertakings to divest AGF’s holding in a subsidiary active in it, in order to resolve this problem.

\(^{69}\) Case No IV/M.1016.

\(^{70}\) Case No IV/M.1082.
2. Dominance assessment

joint/collective dominance

147. The most significant development in the Commission’s approach to this subject was the delivery, in March, of the judgment of the ECJ in the *Kali und Salz* case. The judgment, in response to applications by the French Government and the French parties to the merger, dealt with various procedural and substantive points, and concluded that the Commission’s (1993) decision to allow the merger, but subject to certain undertakings, should be annulled. It was, however, also notable as the first instance in which the ECJ had had to examine the Commission’s approach to the analysis of oligopoly (“collective dominance”) as opposed to the more classical dominance by a single firm (or, at most, two firms). In the Court’s view, to establish collective dominance in a merger situation the Commission needed to establish that the notified operation would lead to a significant reduction in competition between the parties to the merger and one or more third parties by giving them collectively the ability, as a result of the existence of “correlative factors” amongst them, to adopt a common policy on the market(s) concerned and to act substantially independently of other competitors, customers and consumers. These correlative factors need not, it appears, include structural links, in the strict sense of cross-shareholdings, contracts etc. between the alleged dominant firms, although where such links are cited, it is necessary to show how they would lead to the elimination of competition between the firms concerned. But whatever factors are employed should at the least provide, as well as support for the existence of a typical oligopoly market structure and trading conditions, convincing evidence of the existence among the firms concerned of a common interest in not competing actively against each other. This common interest might be demonstrated by an analysis of factors such as the degree of symmetry of the market shares, production capacities and cost structures of the alleged dominant firms. The Commission considered all these factors, to some extent, in its original decision. The Court, however, whilst recognising the difficulties of analysis and evidence-gathering posed by the short timescales for investigation under the Merger Regulation, found that they had not been sufficiently well established to properly motivate the decision, and accordingly annulled it. It was then necessary for the Commission to re-examine the case in the light of the judgment, and an account of that action is given elsewhere in this Report (see “Rules and procedures” below).

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

149. In *Price Waterhouse/Coopers & Lybrand*, the relevant product market, for auditing and accountancy services to large firms (see above under “Market definition”), was found to be highly concentrated, although there was not found to be a single dominant firm. Combined market share post-merger would be below 40% in any Member State and four other competitors would remain. To analyse the oligopoly aspects of the case, the Commission based its approach on the criteria used previously in, among others, the *Gencor/Lonrho* case of 1996, which also appear to have been broadly accepted by the Court in *Kali und Salz*. Essentially, these are that collective dominance is more likely to arise in heavily concentrated markets where there are in addition features likely to

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71 Case No IV/M.1225.
72 Case No IV/M.619.
further restrict competitive behaviour — such as homogeneous products, transparent pricing, high entry barriers, mature technology, static or falling demand, links between suppliers, absence of countervailing buyer power, etc. In these conditions there are likely to be incentives for suppliers to engage in parallel pricing and other oligopolistic behaviour. The Commission found that several of these characteristics were present. For example, demand was static, innovation unlikely, and prices relatively transparent (in some countries, audit fees had to be published in the audited company's accounts). However, it was considered that the number of remaining competitors post-merger was relatively large to support an effective oligopoly — the larger the number of participants, the harder it becomes to maintain and, if necessary, enforce coherence of competitive behaviour among them. Customers did not consider that oligopolistic behaviour was already occurring before the merger, and there was evidence that customers were willing and able to move their business between suppliers in order obtain improved terms, notwithstanding the long-term nature of most audit relationships.

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

151. In Enso/Stora, the oligopoly issue concerned the markets for newsprint and magazine paper. The merging parties — Enso of Finland and Stora of Sweden, together constituting the largest integrated paper and board group in the world — were two of only six significant suppliers of newsprint (accounting together for around three quarters of total capacity) in the EEA market. The combined group would become the largest of these. The market structure in magazine paper was only slightly less concentrated. The Commission's detailed investigation found that these markets displayed many of the characteristics of an anticompetitive oligopoly — low demand growth, concentrated supply side, homogeneous products, mature technology, high entry barriers, similar cost structures. The merger would significantly increase the level of concentration in both markets. However, the Commission also found that other key oligopoly characteristics were not present: in particular, there was no market transparency — information on prices and quantities supplied was not readily available to competitors, and indeed there were secret discounts. Moreover there was evidence that customers — principally, large publishing groups — could exercise a measure of countervailing power. Accordingly the Commission concluded that this aspect of the merger would not lead to the creation or strengthening of a dominant position which would significantly impede competition in the common market or a substantial part of it.

Foreclosure through ties with customers/suppliers

152. Two phase II cases completed in the year dealt with the creation of a dominant position via ties with customers and/or suppliers. In Hoffmann-La Roche/Boehringer Mannheim, the relevant markets were in the sector of certain clinical chemistry test products. Competition concerns arose in regard to in vitro diagnostics because not only would the merged company have a combined share of between 40% and 80% (depending on the national market involved) in the products themselves, but

73 Case No IV/M.950.
also it would benefit from the parties’ unequalled strength in the “installed base” of instruments on which the in vitro tests are performed. There was a risk that customers would become “locked in” to supplies of the test products from the merged company — and other suppliers excluded — because of their dependence on it for service, maintenance, etc. of the instruments. Consequently the Commission accepted a remedy whereby Roche undertook to divest the majority of its clinical chemistry products business in certain Member States.

153. In Agfa-Gevaert/Du Pont, the Commission found competition concerns to arise in the markets for negative plates for offset printing. In this EEA market, Agfa and, Pont — each of which already had substantial market shares — also had various finance arrangements with plate manufacturers and exclusive dealing arrangements with the main distributors of its plates and related equipment. Again, the concern was that competitors would be unable to gain access to supplies or to distribution of their products, enabling the parties to raise prices above the competitive level. To address this concern, Agfa offered to terminate its exclusive arrangements with equipment suppliers and distributors; this would allow competitors to offer their own plates to distributors and thereby develop their sales. The Commission accepted this remedy and the operation was approved on that basis.

**Dominance in neighbouring markets**

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

**Vertical links**

155. The two, linked, German digital pay-TV cases — Bertelsmann/Kirch/Premiere and Deutsche Telekom/Betaresearch — already referred to, gave rise to concerns over the creation of dominance through vertical market links, rather than the traditional horizontal overlaps. In order to supply a complete “package” of digital pay-TV services to consumers, various elements are needed — notably, “set-top box” technology (to decode the programmes being sold and to record details for charging purposes), broadcasting facilities, access to cable and/or satellite networks, and programming content. The proposed operations would have brought together leading suppliers of all these elements to the

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74 Case No IV/M.986.
German market. They involved the development of Premiere as a joint digital pay-TV channel and marketing platform. Premiere would use Kirch’s current digital TV activities and its “d-box” technology (the set-top decoder box that is required for digital reception), together with the related technical services (provided by Deutsche Telekom) and content (from an existing joint venture involving Bertelsmann and Kirch CLT-UFA).

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

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

Potential competition

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

75 Case No IV/M.970.
Countervailing buyer power

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

3. Remedies

Phase I

160. As has already been noted, there was a significant number of cases in which it proved possible to use the Commission’s new powers to resolve possible issues of dominance at phase I by means of a formal undertaking, without the need for the expense and delay of a phase II investigation. As remarked above, this procedure is not suitable for all cases which raise competition problems. If the problem, and a satisfactory solution for it, cannot be readily identified, if the remedy cannot be speedily implemented, or if the parties are unwilling or unable to cooperate with the Commission in achieving a solution within the short timescale allowed, then the normal process, i.e. a full phase II investigation, will be appropriate. It is, of course, essential that parties wishing to offer an undertaking at phase I do so within the prescribed time limit of three weeks from the date of notification. The time limit also means that it is vital that the remedy proposed is a genuine attempt by the parties to clearly resolve the competition problem as identified by the Commission, and thus remove the grounds for the “serious doubts” about the operation’s compatibility with the common market which are the basis for opening phase II proceedings, rather than some kind of “opening offer” which might be improved on later if the Commission insists. There is very little scope for substantive revision of proposals under this procedure. Where phase I undertakings are offered, the Commission needs, among other things, to ensure that Member States have an opportunity to comment on the remedy and, if appropriate, “market test” it with interested third parties before deciding whether or not to accept it. The Commission is not obliged to accept any remedy at phase I, and it will not allow the process to be abused by parties holding back from offering a fully effective remedy until the last moment, in the hope that something less might prove sufficient.

161. Given the general framework laid down in the revised regulation, it was to be expected that the remedies adopted in most cases where phase I undertakings were accepted would be relatively simple and straightforward divestments of overlapping businesses, and such was the result. The first case of this kind — *Owens-Illinois/BTR Packaging*77 — was in many respects typical. This large transaction

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

77 Case No IV/M.1109.
affected many sectors of the packaging industry. But the Commission found competition problems likely in only one area — namely the glass container (bottles, jars, etc.) market in the UK and Ireland — due to the significant overlap between the parties in this highly concentrated sector. The remedy agreed upon was that BTR would divest the whole of its glass container business, carried on at four plants operated by its subsidiary Rockware, together with its interest in an associated glass recycling business, to an appropriate third party.

162. In Pakhoed/Van Ommeren, by contrast, agreement could not be reached on satisfactory undertakings, and the parties abandoned their merger plans. Overlaps of concern were found in regard to the supply of tank storage for various products in the harbours of Amsterdam, Rotterdam and Antwerp (collectively known as the ARA area). Following discussion with the Commission, satisfactory divestments were agreed for all these except petroleum products, where there would, however, have been a combined share post-merger of some 90% at Rotterdam. Whether or not this was the appropriate geographic market — as, in contrast to the parties, third parties considered it to be — was in the Commission’s view a complex issue, which could only be properly clarified in the course of a full phase II investigation. In the event, however, the parties decided, shortly before the deadline for a phase I decision, to abandon the merger rather than offer further divestment to address the Commission’s concerns.

Phase II

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

164. In Worldcom/MCI, the remedy adopted — divestment of the overlap in the market of concern — was not itself a novel one. However, the undertaking also contained some additional provisions, designed to ensure the effectiveness of the divestment and to coordinate the process with the US authorities who were also examining the operation. It was important to ensure that the divestment was made to a new entrant, rather than to an existing player; otherwise customer choice would still be substantially reduced. In addition, there were requirements designed to prevent the merging parties from setting up a new business which competed with the one divested (and which, given the parties’ overall strength, could rapidly have neutralised it) and to provide the buyer of the divested business with the services necessary to operate it effectively. These included servicing/maintenance of the acquired network, and unrestricted access to the remaining Worldcom/MCI network through so-called “peering” arrangements. The parties offered the same undertaking jointly to the Commission and the US DoJ, and the means of enforcement had to reflect the differing procedures of the two investigating authorities. Thus, although the Commission took, as usual, powers to appoint an independent trustee to oversee and, if necessary, carry out the divestment, the powers were held in

78 Case No IV/M.1145.
79 Case No IV/M.942.

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reserve while the parties were given an opportunity to complete the divestment, under the supervision
of the DoJ, before closing the merger. This helped to ensure that the divestment was completed in a
matter of months — a short timescale for such a major divestment. The adoption of these provisions
also reflects the particularly close cooperation with the US authorities in this case, as regards remedies
and also other aspects. DoJ observers attended the hearing of the Commission case in Brussels, and
there were also joint Commission/DoJ meetings with the parties — the first time such meetings had
taken place.

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

166. As already mentioned, Enso/Stora was cleared without conditions or obligations. The
Commission took account of certain undertakings which had been offered by the parties (some of
them in the course of the first phase of the investigation) in order to address concerns about the
position of Elopak and Combibloc in the more concentrated market for liquid packaging that would
result from the merger. These were as follows. Enso would divest its shareholding in a joint conversion
operation with Elopak, since this vertical link could weaken Elopak’s countervailing power. The
merged company would offer Elopak and Combibloc a price protection arrangement. Broadly, under
this arrangement any changes in the prices charged to all three buyers will be the same unless justified
by objective cost data; a measure designed to ensure that the smaller customers are not subject to
unjustified price discrimination in comparison with Tetra Pak. Finally, the parties undertook not to
oppose an application for a duty-free quota for liquid packaging board from outside the Community.
The adoption of such a quota would make imports more competitive and thus encourage other
suppliers.

4. Referrals to Member States

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

168. In Vendex/KBB the request was made by the Dutch authorities, on the basis that the
operation threatened to lead to the creation of a dominant position in non-food retailing in the
Netherlands. The Commission accepted that consumer tastes and habits were important factors for
competition in retailing markets, and that they showed marked national, and possibly even regional or
local characteristics. Non-food retailing in the Netherlands could accordingly be considered a “distinct
market within a Member State” as required by Article 9. Both Vendex and KBB had major shares of
such a market; they were, for example, the only retailers in the Netherlands who owned department

80 Case No IV/M.1157.
81 Case No IV/M.1060.
stores there. There was accordingly a risk that a dominant position or positions would be created or strengthened by the merger. The precise boundaries of the geographic and product markets affected by the merger, and the precise impact of the merger on competition in those markets, could only be determined by a more detailed investigation, which, given the sector and area concerned, could best be carried out by the relevant national competition authority rather than by the Commission. The merger had no significant effects in other Member States. Accordingly the Commission concluded that the criteria for reference back to a Member State under Article 9 of the Merger Regulation had been met, and that there were no other factors which could make it appropriate for the Commission to retain it. It therefore referred the case to the national authorities as regards the non-food retail sector in the Netherlands, and cleared the remainder of the operation.

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

170. In *Alliance Unichem/Unifarma*, the Italian authorities requested referral of this merger in the area of pharmaceutical wholesaling, because of the risk that it would create or strengthen a dominant position in this market in certain parts of Italy, notably in the North-West. The Commission found pharmaceutical wholesaling to be a market essentially regional or local in scope (as in previous cases in the sector), although the precise boundaries in a given case could only be established after more detailed analysis — which the Italian authority was better placed to undertake. The merger would create the largest wholesaling group in the North-West of Italy, with a substantial share both in absolute terms and relative to that of competitors. Moreover there were shareholding links between the parties and some of their competitors. The nature of the market, with its requirements for a substantial stock and frequent and regular delivery service to pharmacies even in remote areas, made entry difficult, and there was no significant countervailing buyer power. Accordingly the Commission decided to refer the whole of the operation to the Italian authorities.

82 Case No IV/M.1153.
83 Case No IV/M.1220.
5. Rules and procedures

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

Revised notices

171. As part of the Merger Regulation revisions, the Commission introduced a new Implementing Regulation and a modified notification form (Form CO)\(^\text{84}\) and published revised versions of its notices on the concept of undertaking concerned, the concept of concentration, turnover calculation, and full-function joint ventures.\(^\text{85}\) For the most part the changes are technical or clarificatory and stem from the changes to the regulation itself. Perhaps the main substantive change concerns the ending of the distinction between “concentrative” and “cooperative” joint ventures as determinative for the applicability of the Merger Regulation. Jurisdiction will now be determined by applying the criterion of full functionality, on which the relevant notice gives some further guidance. It is intended that guidance on the substantive issues concerning cooperative aspects of full-function joint ventures will be issued in the course, after the Commission has had sufficient experience in dealing with them.

Incomplete notifications

172. The total number of notifications concerning merger cases which have been declared incomplete by the Commission (pursuant to Article 4 of the Implementing Regulation) remains small, but has undergone a certain increase in recent years. The Commission is keen to find ways of reducing the number of incomplete notifications. Accordingly it was pleased to enter into discussions on this matter with representatives of the legal community, as a result of which some “Best Practice Guidelines” have been drafted and published on the Directorate-General IV website on the Internet.\(^\text{86}\)

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


\(^{85}\) OJ C 66, 2.3.1998.

they arguably could, and therefore should, have been — and on which further information was required which could not be provided and/or properly assessed within the time remaining.

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

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

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

176. The regulation (Article 10(5)) provides that, where the Court of Justice makes a judgment annulling a Commission decision in whole or in part, the time periods laid down in the regulation for initial examination of the case and for taking a decision on it are to start again from the date of the judgment. However, in the Commission’s view it did not follow that the timetable would restart automatically. Article 10(1) provides that the initial examination period begins on the day after receipt of the notification or, if the notification is incomplete, on the day after receipt of a complete one. If the sole basis for that examination was the situation obtaining at the time of the original notification (so-called ex tunc basis), then other things equal, no further information would be necessary for the Commission to carry out its assessment and the original notification could be regarded as complete. If, on the other hand, the current situation has to be examined (ex nunc basis), then — in view of the passage of time and the possibility that relevant facts (e.g. market shares, number of competitors, etc.) had changed meanwhile — the original notification would not necessarily contain all the information that was likely to be required, and in that case it would be incomplete until the appropriate revised or additional information was provided.

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

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

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

Fine imposed for breach of the regulation

180. The Commission this year imposed the first fine on a company for failure to notify a concentration under the regulation in time, and for putting it into effect without the Commission’s authorisation. In February, the Korean company Samsung was fined a total of ECU 33 000 in respect of the acquisition of AST Research Inc. (AST). The operation was notified to the Commission in April 1997. According to information in the Commission’s possession, however, Samsung had already acquired control of AST for the purposes of the Merger Regulation in, or before, January 1996. The regulation (Article 4) requires that a notifiable concentration be notified not more than a week after the event — such as the acquisition of a controlling interest — giving rise to the concentration. Moreover it must not be implemented until it has been authorised, whereas this acquisition had been completed and implemented for some time before it was notified. In setting the amount of the fine, the Commission took into account, in mitigation, the fact that no damage to competition had resulted, that the infringement had not been intentional and the parties had eventually notified the operation, and that Samsung had recognised the breaches and cooperated with the Commission in its investigations. Nevertheless the breaches had continued for a considerable period. Moreover, as an important company with significant European activities, Samsung could be expected to be aware of the Community’s merger control rules. The relatively small amount of the fines imposed took account of these factors and also of the fact that this was the first time that the Commission had taken such action.

87 Case No IV/M.920.
The new Merger Regulation came into force on 1 March 1998, incorporating a number of amendments which extended the regulation’s scope to include joint ventures known as full function cooperative joint ventures. This amendment brings into the ambit of the Merger Regulation a number of joint ventures which would formerly have been examined under Regulation 17/62.

Article 2(4) applies to all joint ventures constituting a concentration within the meaning of Article 3, albeit only “to the extent that [they have as their] object or effect the coordination of the competitive behaviour of undertakings that remain independent”. In 1998, 13 of the 76 joint venture cases decided under the amended Merger Regulation necessitated an analysis under Article 2(4). The most in-depth analyses were made in cases within the telecommunications and Internet areas. So far, remedies to settle Article 2(4) concerns have been included in only one case (Case No IV/M.1327 — Canal+/CDPQ/BankAmerica of 3 December 1998, see below). A second-phase examination was opened in one other case (Case No JV.15 — BT/AT&T, see below).

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

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

The Commission dealt with four cases in the Internet field.

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

In its analysis of the case, the Commission found that the supply of gateway services in themselves did not amount to a market as such, but that advertising on web pages and paid-for content could be considered relevant markets. These two markets were relevant markets for the purposes of dominance, as was the production of web sites. Web site production was also considered to be a
candidate market for the analysis of coordination under Article 2(4) as the joint venture and two of the parent companies (Telia and Telenor) were present on this market. The other candidate market was the provision of dial-up Internet access where both Telia and Telenor (through its stake in the Swedish telecommunications company Telenordia) were present.

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

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

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

The Commission’s first cases to have included an examination of Article 2(4) effects have already displayed some common themes. The relative size of the Article 2(4) market and the joint venture’s market, which is assessed for dominance purposes, has been important in assessing the likelihood of coordination. Normally, the commercial incentives, and hence the risk of coordination, are smaller if the joint venture’s market is significantly smaller than the Article 2(4) market. However, this cannot be considered a sufficient condition for the absence of coordination between the parent companies. The nature of the markets themselves will also play a part in the Commission’s assessment. The nature of existing links between the parent companies is also relevant for the determination of causality between the notified operation and the Article 2(4) effects, though their existence does not automatically imply that there is no effect. Again, other factors would have to be taken into account before that analysis can be made.
Figure 4: Number of final decisions adopted each year since 1992 and number of notifications

1 The Commission has modified the set of figures concerning final decisions (Regulation (EEC) No 4064/89) to take account of decisions adopted under Article 9(3) (partial referral to Member States): +1 decision in 1992, +1 decision in 1994, +6 decisions in 1997.
Figure 5:
Breakdown by type of operation (1992-98)

- Joint venture/control: 48%
- Acquisition of majority: 38%
- Takeover bid: 8%
- Others: 6%
III — STATE AID

A — General policy

1. Improving the efficiency of state aid monitoring

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

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

183. The aim of the modernisation drive is to improve transparency and legal certainty, to make the state aid monitoring system more efficient, to reinforce vetting, in particular in cases involving large volumes of ad hoc aid, and to simplify the monitoring system for more minor cases. In 1998 the Commission focused its efforts on simplifying and clarifying the procedural rules and on concentrating resources on closer monitoring of the most important cases. It used Article 89 for the first time since the Treaty entered into force. This article provides that the Council, on a proposal from the Commission, may make any appropriate regulations for reviewing state aid. The Commission presented proposals for two such regulations: on 16 November the Council agreed a Commission proposal for a procedural regulation, and on 7 May it adopted the Commission proposal for a regulation enabling the Commission to exempt certain categories of horizontal, or cross-industry, aid from the notification requirement.

184. In addition to these regulations, the Commission adopted a notice on the application of the state aid rules to measures relating to direct business taxation on 11 November and a framework on

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training aid on 22 July.\footnote{OJ C 343, 11.11.1998.} In June the Council adopted a regulation laying down new rules on aid to shipbuilding.\footnote{OJ L 202, 18.7.1998.} The multisectoral framework on regional aid for large investment projects is to apply from 1 September for a period of three years.\footnote{OJ C 107, 7.4.1998.}

2. **Block exemptions for state aid**

185. On 7 May the Council adopted a regulation which forms the legal basis on which the Commission, by adopting regulations, may exempt en bloc certain types of horizontal state aid measures from the notification requirement.\footnote{Council Regulation (EC) No 994/98 of 7 May 1998, referred to above.} Aid for SMEs, R&D, environmental protection and employment and training, together with regional aid schemes may thus be declared exempt. In addition, the Commission may adopt a regulation in connection with the \emph{de minimis} rule. The Commission has started to prepare the block exemptions.

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

3. **Procedural regulation**

187. The most important legislative effort in the area of state aid policy in 1998 was the codification of the rules on the Commission’s procedures for monitoring state aid. On 18 February the Commission adopted, pursuant to Article 88 of the EC Treaty, a proposal for a regulation\footnote{Proposal for a Council Regulation (EC) laying down detailed rules for the application of Article 93 of the EC Treaty, referred to above.} which seeks to codify the various aspects of the procedure for reviewing aid, while strengthening the Commission’s monitoring powers where appropriate. On 16 November the Council meeting on industrial affairs reached political agreement on the regulation. The Council will be able to adopt it formally at the beginning of 1999, once Parliament has delivered its opinion. Thus for the first time, there will be a basic instrument on Community monitoring of state aid which incorporates all procedural rules in a single, coherent text.

188. The regulation is important for two reasons. First, it codifies the various procedures already in use which are based on Commission practice and on the case-law of the Court of Justice. Thus, all these fragmentary rules will from now on be replaced by a transparent, binding instrument. Codifying all the procedural rules in one regulation will doubtless have an impact on state aid policy in the medium to long term. In addition to providing legal certainty, the regulation will make the rules more accessible...
and give this area of policy a higher profile. This should result in all those concerned being more familiar with the rules and becoming more involved. However, the regulation does more than simply codify the procedures already in place. It will also enable the Commission to intensify its monitoring of aid in certain respects; it gives the Commission new powers which should better equip it in its work to combat unlawful aid and aid misuse.

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

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

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

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

4. State aid contained in tax systems

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

192. The document indicates that, to fall under the state aid rules, a tax benefit must be specific in the sense of benefiting certain enterprises or the production of certain goods. The tax benefit may be provided in various forms, including lower rates of taxation, tax deductions, accelerated depreciation and tax debt cancellation. Under the notice, a tax benefit will be regarded as specific where it derives from an exception to the generally applicable tax rules, unless this exception is justified by the nature of or rationale for the system, or from a discretionary practice on the part of the tax authorities. Tax

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rules that are, for example, aimed at a certain region, a certain sector or a certain function within an enterprise (such as financial services) will be regarded as specific under the state aid rules. In the Irish corporation tax cases, the Commission made clear that it no longer considers the preferential treatment of manufacturing over services to be a general measure. Developments in the concept of state aid over time and a stricter interpretation of Article 87 of the EC Treaty may lead to a revision of earlier Commission decisions, in which case the Commission will propose appropriate measures under Article 88(1) of the EC Treaty.

B — Concept of aid

193. Any state aid that falls foul of all four tests in Article 87(1) of the EC Treaty is in principle incompatible with the common market. More specifically, to be caught by Article 87(1), the aid must (i) confer an economic advantage on the recipient, (ii) be granted by the State or through state resources, (iii) be granted selectively to “certain undertakings” or to “the production of certain goods” and thus distort competition, and (iv) affect trade between Member States. The form in which the aid is provided (grant, interest rebate, tax relief, loan guarantee, etc.) is not relevant to the application of Article 87.

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

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

1. Advantage to a firm or firms

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

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

197. In its decision concerning rescue aid to Case di Cura Riunite,\(^{101}\) the Commission considered that the provision of a state guarantee to this Italian health institution did not confer an economic advantage. Given that the recipient’s weak financial situation would not allow it to obtain credit on the market, the Commission considered that the aid element equalled the entire amount of credit obtained as a result of this guarantee mechanism. However, the State was Case di Cura’s main customer and owed the company a significant amount derived from normal commercial transactions, exceeding by more than four times the guaranteed credit. Since the State could not be subjected to liquidation proceedings, as opposed to any other debtor in similar circumstances, Case di Cura was at a significant disadvantage compared with its competitors selling services to private customers. The guarantee was granted only until such time as the State should repay its outstanding debts. In this case, the State was not granting any unjustified support to the undertaking but only reducing some of the financial disadvantages which it itself had caused the undertaking by not repaying its outstanding debts.

198. An economic advantage may be gained as a result of the terms on which undertakings have access to or exploit infrastructures. Undertakings allowed to benefit from an infrastructure development, e.g. by moving to a business park, obtain a gratuitous advantage if they do not pay a fee. In its decision to initiate proceedings under Article 88(2) in respect of a package of aid granted by the Austrian authorities to Lenzing Lyocell,\(^{102}\) the Commission noted that certain infrastructure developments were made specifically for the benefit of this enterprise and questioned whether a private investor operating a business park would provide company-specific development free of charge.

199. In particular with regard to site decontamination, the Commission takes into account the polluter pays principle and, when applicable, the Community guidelines on state aid for environmental protection.\(^ {103}\) In a case involving state funding provided to an Austrian company carrying out decontamination work on a site,\(^ {104}\) the Commission decided that an economic advantage was conferred on the site owner in the form of savings on decontamination costs. Under domestic law, the landowner bears subsidiary liability after the polluter. In the case in point, the polluter was being wound up and had ceased trading. It was thus possible to conclude that the polluter could no longer derive any advantage from the decontamination.

200. In the wider context of the provision of state assistance to property developers, it was considered in the case of the English Partnerships scheme\(^ {105}\) that funding provided in order to cover the estimated gap between the value of the undeveloped asset plus the cost of its development and the allegedly lower value of the finished project constituted state aid within the meaning of Article 87(1). The funding made available under this scheme is meant to provide a quantifiable incentive to investors/developers to carry out work on a site whose unattractive condition or location discourages private investors.

\(^{101}\) Case N 461/97 (OJ C 149, 15.5.1998).
\(^{102}\) Case C 61/98 (ex NN 189/97), (OJ C 9, 13.1.1999).
\(^{103}\) OJ C 72, 10.3.1994.
\(^{104}\) Case C 24/98 (ex N 663/97) Kiener Deponie Bachmanning (OJ C 201, 27.6.1998).
\(^{105}\) Case E 2/97.
201. The private investor principle has been applied regularly by the Commission. On the basis of this criterion, the Commission assesses whether the State, when assisting public undertakings or private undertakings partially owned by it, does so on more favourable terms than would a private investor operating under normal market conditions. If so, the State’s action involves state aid within the meaning of Article 87(1). The Court of First Instance delivered two rulings which refer to the application of this criterion. In *Cityflyer Express*, it held that, where the Commission concludes that a private investor would not have acted on the terms on which the State has acted, it must further examine which terms would have been satisfactory to the private investor. In *BP Chemicals*, the Court ruled that, even if the State has already twice acquired stakes in a company, thereby twice granting state aid to that company, this should not automatically mean that a third capital injection may not be considered on its own merits as an autonomous investment and be examined in the light of the private investor criterion. In the case in question, however, considering that the first two capital injections were not profitable, the Court asked the Commission to determine whether a private investor would have made a third capital injection.

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

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

204. In deciding to initiate Article 88(2) proceedings in respect of the granting of preferential electricity tariffs by the French public enterprise EDF to certain paper mills, the Commission examined, among other issues, whether there was any commercial logic in EDF’s behaviour. The Commission doubted whether this discriminatory behaviour was justified by a commercial rationale, i.e. vying with competitors for customers while at the same time managing to cover at least variable and certain fixed costs.

205. In two cases involving companies entrusted with the operation of a service of general economic interest (the construction of the natural gas network and gas distribution in Denmark) the Commission concluded that a series of tax-relief measures granted to these companies constituted state aid within the meaning of Article 87(1). The tax relief was offered to enterprises which had not been

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107 Case T-11/95 *BP Chemicals Ltd v Commission*, not yet reported.
108 Case C 32/97 *Porcelanas del Norte SAL (Ponsal)/Comercial Europa de Porcelanas SAL (Comepor)*, not yet published in the *Official Journal*.
109 Case NN 83/98 *Preussag Stahl AG*, acquisition of the company by the German authorities, not yet published in the *Official Journal*.
110 Case C 39/98 (ex NN 53/98), not yet published in the *Official Journal*.
111 Cases N 449a/97 and NN 50/98, not yet published in the *Official Journal*.
chosen by a public tendering procedure, in order to offset their initial investment in the construction and expansion of the natural gas system. However, the Commission decided to approve this aid on the basis of Article 86(2) of the EC Treaty since it was demonstrated that application of the competition rules would hinder performance of the particular tasks assigned to the recipients. In applying Article 86(2), the Commission accepted that trade would not be affected to an extent contrary to the Community interest, mainly because the measures in question would be renotified after 2000 in the context of the implementation of the EU directive aimed at liberalising the internal gas market.112

2. Origin of resources

206. On the topic of conferring an advantage through legislation, the Court of Justice examined a number of joined cases in which an undertaking was exempted from compliance with the generally applicable legislation on fixed-term employment contracts.113 The Court concluded that this exemption did not transfer state resources directly or indirectly to the undertaking in question.

3.Specificity criterion

207. It is important, especially in the case of taxation or social policy measures, to distinguish between the situation whereby the beneficiaries are certain undertakings or the production of certain goods, as specified in Article 87(1), and that whereby the measures in question have a cross-sectoral impact and are intended to favour the whole of the economy. In the latter case, there is no state aid within the meaning of Article 87(1), but a general measure.

208. In the Ladbroke judgment114 the Court of First Instance had the opportunity to elaborate on the specificity criterion. The fact that aid awarded to an economic actor may indirectly benefit other actors whose activities depend on the activity of the recipient does not suffice to conclude that the aid is a general measure not caught by Article 87(1). It may possibly afford scope for allowing a derogation on the basis of Article 87(3)(c) (aid to promote the development of certain economic activities). The undertaking Pari Mutuel Urbain is exclusively competent to organise a specific type of betting on horse racing in France and is subject to a tax regulation which is specific to the horse racing sector in France. The Court agreed with the Commission that the special regulations which were being examined in this case should not be regarded as a derogation from the general tax rules, but should be viewed in the context of the tax system applied in the horse racing sector. Furthermore, it ruled that the temporary or permanent nature of the measures was of no relevance to the interpretation of Article 87(1). Also, the fact that the measures did not address an ad hoc operation was irrelevant in the light of the established case-law that only the effects of aid matter in order to characterise it as state aid, and not its causes or aims.

209. Payments made to the redundant workers of an insolvent company after termination of their employment contracts, in order to ensure more suitable unemployment cover for them constitute a measure which gives them additional coverage going beyond the company’s legal obligations. The Commission concluded in one case115 that such a measure did not amount to state aid to the insolvent

114 Case T-67/94, referred to above.
115 Case C 44/97 (ex NN 78/97), aid in favour of the Spanish company Magefesa and its successors, not yet published in the Official Journal.
company, but to extraordinary assistance having a basic positive effect on the social protection position of the workers.

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

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

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

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

213. Aid to enterprises in support of foreign direct investment may affect trade between Member States. It is possible that competitors of the recipient may be trying to increase their market share in the third country in question unaided. This position was confirmed in the Commission’s negative final decision on the first notified case of foreign direct investment aid granted to a large enterprise. The Commission examined whether the derogation in Article 87(3)(c) could apply. It should be noted that it is the Commission’s practice to authorise foreign direct investment aid to small and medium-sized enterprises if it is granted within the terms of the guidelines on state aid to SMEs.

118 Case N 153/98, not yet published in the Official Journal.
119 Case C 77/98 (ex 99/97), direct investment in China by the Austrian company LiftGmbH, not yet published in the Official Journal; see Chapter C 3 below.
C — Assessing the compatibility of aid with the common market

1. Horizontal aid

1.1. Research and development

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

215. In the Sican case, the Commission, following complaints, found that aid of more than ECU 100 million had been disbursed without having been notified by the German authorities. Moreover, the information provided by those authorities was not such as to enable the Commission to assess the aid’s compatibility with the Community framework on R&D aid. In the Océ case, the Commission decided to launch a formal investigation as it had serious doubts about whether the work which had been carried out could be defined as research and development: the information provided to the Commission suggested that the aid planned by the technical authorities was for work which was very close to the market and which could not therefore be defined as research and development within the meaning of the Community framework. The Austrian authorities decided to abandon their plans for KNP Leykam. The German authorities also decided to withdraw their notification in the Biotec case, finding that part of the aid came under a scheme previously approved by the Commission and deciding to withdraw the rest of the aid.

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

120 OJ C 45, 17.2.1996.
121 Case C 20/98 (ex-NN 166/97, NN 169/97 and NN 170/97) (OJ C 307, 7.10.1998).
1.2. Employment and training

217. One of the major challenges facing the Community is finding ways to improve the employment situation. Promoting a “high level of employment” has become a matter of common concern to Member States. The new Title on employment that is to be inserted in the EC Treaty requires Member States to develop a coordinated strategy for employment and for promoting a skilled, trained and adaptable workforce and labour markets responsive to economic change. The important part played by training, both in enhancing the Community’s competitiveness and in creating and maintaining jobs, has encouraged Member States to promote investment in training. The Commission has set up various initiatives in the training sphere. It has endeavoured to integrate the training dimension and its favourable approach thereto into other Community policies, including competition policy.

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

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

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

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

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

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1.3. Environment

221. In 1998 the Commission had various opportunities to further clarify its interpretation of the guidelines on state aid for environmental protection.\textsuperscript{128} On one occasion, it stressed that environmental considerations did not justify aid exceeding the intensity authorised for regional aid where the recipient did no more than adapt its plant to the legal requirements, notwithstanding the fact that those requirements were particularly strict because the plant was situated in a nature reserve.\textsuperscript{129}

222. The Commission authorised for limited periods of up to five years operating aid for the use of renewable forms of energy.\textsuperscript{130} Also, in several Dutch cases with regard to environmental taxes on waste treatment,\textsuperscript{131} the Commission applied its practice of approving under certain conditions operating aid for environmental purposes.

1.4. Rescue and restructuring aid

223. Aid for rescuing and restructuring firms in difficulty accounts for a high proportion of the aid given to individual recipients on an ad hoc basis. The sixth state aid survey,\textsuperscript{132} published in July and covering the period 1994-96, found that the high levels of ad hoc aid in the manufacturing, financial services and air transport sectors reported in the fifth survey had continued. The Commission remains concerned at this trend, given the particular distortions which can be caused by the maintenance in existence of firms which would otherwise exit the market.

224. The Commission continued to work on tightening the guidelines on aid for rescuing and restructuring firms in difficulty. Pending completion of this process the Commission extended the validity of the existing guidelines\textsuperscript{133} until March 1999.\textsuperscript{134} In applying the guidelines the Commission has in many cases made clear that aid for restructuring cannot be found compatible with the common market if there is no viable restructuring plan.

2. Regional aid

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

\textsuperscript{128} OJ C 72, 10.3.1994.
\textsuperscript{129} Case C 41/96, Netherlands, aid in favour of the construction of a hydrogen peroxide factory (OJ L 171, 17.5.1998).
\textsuperscript{130} Cases N 752/97, green electricity, not yet published in the \textit{Official Journal}, and N 153/98, non-fossil-fuel obligation for renewables, not yet published in the \textit{Official Journal}.
\textsuperscript{131} Cases N 513, 755 and 754/97 (OJ C 156, 21.5.1998) and Case N 813/97, not yet published in the \textit{Official Journal}.
\textsuperscript{133} OJ C 368, 23.12.1994.
\textsuperscript{134} Act of extension published in OJ C 74, 10.3.1998.

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

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

3. Aid to outward foreign direct investment

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

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

With this decision the Commission has no intention of prejudging its future policy on state aid in support of foreign direct investment. It does not rule out the possibility that foreign direct investment by large undertakings may be eligible for state aid where it can be established that the project in question does not create an incompatible distortion of competition within the EEA. Furthermore, in this context, any potential element of export subsidisation should be carefully examined in the light of the Community’s international obligations and, in particular, the prohibition of export subsidies contained in the WTO Agreement on Subsidies and Countervailing Measures (ASCM).

137 N 482/98, not yet published in the Official Journal.
139 C 77/98 (ex 99/97), referred to above.
4. Sectoral aid

4.1. Sectors subject to specific rules

4.1.1. Shipbuilding

230. The Commission’s commitment to phasing out operating aid for shipbuilding was impeded by the continued absence of ratification of the OECD shipbuilding agreement by the United States. In June the Council therefore adopted a regulation establishing new rules on aid to shipbuilding\(^{140}\) to succeed the seventh Council Directive on aid to shipbuilding. It will enter into force on 1 January 1999 and will apply until 31 December 2003. It will lead to a shift away from operating aid (which will be abolished at the end of 2000) to other forms of support such as closure aid, aid for research and development and environmental protection, restructuring aid, regional investment aid for improving the productivity of existing installations, and investment aid for innovation. The current ceilings for operating aid of 9% (4.5% for smaller vessels and conversions) will be maintained until their abolition on 31 December 2000. The regulation provides for the Commission to undertake a regular review of the market situation.

231. On 21 January and on 29 July the Commission submitted its first two monitoring reports to the Council on the restructuring of the publicly owned shipyards in Spain and of MTW-Schiffswerft and Volkswerft Stralsund in Germany.\(^{141}\) The reports provided information on the progress made in implementing the restructuring plans and on compliance with the conditions attached to the Commission’s approval of the associated aid such as capacity reductions and limitations on production.

With respect to compliance with capacity limitations the Commission found reason to initiate the procedure provided for in Article 88(2) of the Treaty to examine the exceeding of new building capacity limitations by the German yard Kvaerner Warnow Werft.\(^{142}\)

232. One of the few opportunities the Commission has had to address the misuse of previously approved aid by the recipient was in the negative final decision concerning the misuse of ECU 400 million by Bremer Vulkan Group.\(^{143}\) Bremer Vulkan had received the aid on condition that it be used exclusively for the restructuring of its two East German shipyards MTW Schiffswerft Wismar and Volkswerft Stralsund. In fact, the ECU 400 million was used for other purposes, mainly for the benefit of other subsidiary companies of Bremer Vulkan Verbund AG that had become insolvent in the meantime. The Commission decided that the German Government should recover the misused aid as part of the insolvency proceedings. In addition, the German Government should take all suitable steps to recover any partial amounts from companies previously belonging to the Bremer Vulkan Group.

233. The Commission also placed under scrutiny the control of development aid in shipbuilding, where it is often not easy to verify whether the conditions are subsequently complied with. In February the Commission partly terminated the procedure with a negative decision in a case in which Germany had granted development aid in connection with the building of a dredger by Volkswerft Stralsund and


\(^{142}\) Case C 66/98 (ex NN 113/98), not yet published in the *Official Journal*.

\(^{143}\) Case C 7/96.

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its sale to PT Rukindo in Indonesia. The development project had been approved by the Commission in 1994 on condition that the vessel be used only in Indonesia. However, since 1995 the vessel had been employed in Malaysia for more than 300 days. The Commission considered that the aid had been misused and that it was incompatible with Article 4(7) of the shipbuilding aid Directive. It therefore requested that the development aid be repaid with interest.

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

4.1.2. Steel

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

4.1.3. Coal

236. On 3 June the Commission took three decisions concerning the coal industry in Spain. First, it authorised Spain to grant supplementary financial assistance for the 1994, 1995 and 1996 financial years totalling ECU 416.7 million (ESP 67 053 million). Of this amount, ECU 127.1 million (ESP 20 452 million) was linked to current production, while ECU 289.6 million (ESP 46 601 million) went to cover inherited liabilities. Furthermore, the Commission authorised the grant of financial assistance for the 1997 financial year totalling ECU 1 068.3 million (ESP 177 234 million). Of this amount, ECU 704.5 million (ESP 116 877 million) was linked to current production, while
ECU 363.8 million (ESP 60 357 million) went to cover inherited liabilities. Finally, it approved\(^\text{150}\) aid for 1998 totalling ECU 1 164.8 million (ESP 193 817 million). Of this amount, ECU 762.3 million (ESP 126 855 million) is linked to current production, while ECU 402.4 million (ESP 66 962 million) covers inherited liabilities.

237. On 20 July the British coal producer RJB Mining plc filed an action before the Court of First Instance of the European Communities to obtain annulment of the decisions concerning Spain.\(^\text{151}\)

238. On 10 June the Commission authorised\(^\text{152}\) Germany to grant financial assistance for the 1997 financial year totalling ECU 5 331.2 million (DEM 10 470.4 million). Of this amount, ECU 4 919.1 million (DEM 9 661.2 million) was linked to current production, while ECU 412.1 million (DEM 809.2 million) went to cover inherited liabilities. On 20 July RJB Mining filed an action against this decision also before the Court of First Instance to obtain its annulment.\(^\text{153}\)

239. On 29 July the Commission, following two complaints lodged by a British anthracite producer, declared\(^\text{154}\) illegal the use of ECU 7.1 million (DEM 13.55 million) in state aid granted by Germany and originally authorised\(^\text{155}\) for the 1996 financial year. ECU 3.5 million (DEM 6.8 million) in state aid granted by Germany for the 1997 financial year before the relevant Commission decision had been taken has also been declared illegal. The recipients (Preussag Anthrazit GmbH and Sophia Jacoba GmbH) have been paying back the aid.

240. On 29 July the Commission authorised\(^\text{156}\) the acquisition of Saarbergwerke GmbH and Preussag Anthrazit GmbH by Ruhrkohle AG. The new company, Deutsche Kohle AG, will control all German coal production. On 29 September RJB Mining brought a further action before the Court of First Instance for annulment of this decision.\(^\text{157}\)

241. On 2 December the Commission, having examined the German coal industry restructuring plan for the years 1998-2002, authorised\(^\text{158}\) Germany to grant financial assistance for the 1998 financial year totalling ECU 4 803.6 million (DEM 9 427 million). Of this amount ECU 4 288.4 million (DEM 8 416 million) is linked to current production, while ECU 515.2 million (DEM 1 011 million) covers inherited liabilities.

4.1.4. Motor vehicle industry

242. In 1998 the Commission applied the new Community framework for state aid to the motor vehicle industry.\(^\text{159}\) Among the decisions taken in the course of 1998, the following may be mentioned.

\(^{151}\) Case T-111/98 R.
\(^{152}\) Decision 98/687/ECSC, OJ L 324, 2.12.1998).
\(^{153}\) Case T-110/98 R.
\(^{154}\) Decision not yet published in the *Official Journal*; see also 1997 Competition Report, point 241.
\(^{156}\) Decision not yet published in the *Official Journal*.
\(^{157}\) Case T-156/98 R.
\(^{158}\) Decision not yet published in the *Official Journal*.
\(^{159}\) OJ C 279, 15.9.1997.
The Commission decided\textsuperscript{160} not to raise any objections to training aid granted by the Portuguese Government to AutoEuropa, a joint venture set up in 1991 by Ford and Volkswagen near Setubal. The Commission had approved regional investment aid and training aid for the plant to be built and brought into operation. The implementation of the 1991 decision approving this aid was monitored and it was found that the company had continued to receive training aid after the launch of production in 1995. With the cooperation of the Portuguese authorities and the company, the sums paid out in excess of those allowed under the framework on training aid have been recovered.

The Commission approved regional aid totalling ECU 38 million to be granted to LDV Ltd for an investment project involving the manufacture of a new range of vans in a joint venture with Daewoo.\textsuperscript{161} The investment will be made in an LDV plant in Birmingham, United Kingdom. This is the first decision adopted under the current motor vehicle industry framework involving an alternative site in a central or eastern European country. Instead of concentrating all its European production of light commercial vehicles at its plant in Lublin, Poland, Daewoo has decided to use LDV’s existing facilities in Birmingham to manufacture some of the vehicles.

The Commission continued to monitor the restructuring plans for Seat SA\textsuperscript{162} and Santana Motor SA\textsuperscript{163} in Spain, together with major investment projects whose implementation is spread out over several years, and payments made by the national authorities in the Fiat Mezzogiorno\textsuperscript{164} case in Italy.

4.1.5. Synthetic fibres industry

In 1998 the Commission continued to be vigilant in applying the latest code on state aid to the synthetic fibres industry, which came into force in 1996 for a period of three years.\textsuperscript{165} The Commission decided on 16 December to extend the validity of the code until August 2001, at which point a decision could be taken on whether or not to bring the industry within the scope of the multisectoral framework on regional aid to large investment projects.\textsuperscript{166} Among the decisions taken this year the following may be mentioned.

The Commission decided to terminate the Article 88(2) proceedings it had initiated in March 1997 in respect of the Portuguese Government’s proposal to award aid for investments by the rope and cord producer Cordex SA.\textsuperscript{167} In the course of the proceedings the Portuguese authorities agreed to modify their original notification by omitting from the list of eligible costs those activities which came within the scope of the code, including support for new capacity for the extrusion of polypropylene filament yarn. Since the project fell within an approved scheme, the Commission was able to authorise aid totalling ECU 2.69 million.

On 25 March the Commission decided to initiate Article 88(2) proceedings in respect of the Spanish authorities’ proposal to award state aid amounting to ECU 1.2 million to the synthetic fibres

\textsuperscript{160} Case NN 36/97 (OJ C 208, 4.7.1998).
\textsuperscript{161} Case N 420/98, not yet published in the Official Journal.
\textsuperscript{162} Case C 34/95, 96/257/EC (OJ L 88, 5.4.1996).
\textsuperscript{163} Case C 1/95, 97/17/EC (OJ L 6, 10.1.1997).
\textsuperscript{164} Case C 45/91 (OJ L 117, 13.5.1993).
\textsuperscript{165} OJ C 94, 30.3.1996.
\textsuperscript{166} OJ C 24, 29.1.1999.
\textsuperscript{167} Case C 17/97(ex N 639/96) (OJ C 207, 3.7.1998).
producer Brilén SA. The investment project concerned the technological rationalisation and upgrading of the company’s polyester yarn production plant. Since the project appeared to involve an increase in capacity for one of the fibres covered by the code on aid to the synthetic fibres industry (polyester filament yarn), the Commission had doubts about whether the proposed aid would fulfil the authorisation criteria laid down in the code.

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

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

4.1.6. Textiles and clothing

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

4.1.7. Transport

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

Air transport

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

254. On 3 June it decided not to object to payment of the second instalment, worth ECU 258.23 million (ITL 500 billion), of an increase in the capital of Alitalia. This decision followed the positive decision adopted on 15 July 1997 with regard to a capital increase for the company totalling ECU 1420.26 million (ITL 2 750 billion) payable in three instalments provided certain conditions were met, ensuring in particular that the restructuring plan was monitored, that

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169 Case C 63/98 (ex N 362/98), not yet published in the Official Journal.
170 Case C 68/97 (ex NN 118/97), not yet published in the Official Journal.
171 OJ C 107, 7.4.1998.

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arrangements for its implementation were transparent and that Alitalia’s problems were not passed on to its competitors. While stressing the importance of making good the delays in cost reductions, particularly with regard to crews, the Commission found that the restructuring plan had been implemented satisfactorily and that Italy had given further undertakings intended both to ensure that the aid would not be used to finance promotional campaigns and to enable competing airlines to benefit from traffic rights to non-EEA countries.

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

256. Following the annulment by the Court of First Instance of the Commission decision of 27 July 1994 authorising the recapitalisation of Air France to the tune of ECU 3.05 billion (FRF 20 billion), owing to insufficient reasoning on two points, one relating to the purchase of new aircraft and the other to the competitive position of Air France on routes outside the European Economic Area, the Commission decided on 22 July to adopt a new decision authorising the same amount and clarifying its position regarding the two points raised by the Court. It stressed first of all that the aid was granted in the context of a restructuring plan considered convincing by the Court, that the air transport sector was expanding rapidly, that there was no change in the number of seats offered by Air France and that all the aid granted to the airline was intended to reduce its debt burden and not to finance the purchase of new aircraft. Secondly, the Commission pointed out that the general conditions laid down offered sufficient guarantees in themselves with regard to the non-EEA routes, in particular since they involved a reduction in market share throughout the world, since the aid had a much greater effect on the competitive situation for intra-EEA routes than for other routes, and since too tight a restriction on Air France’s capacity on non-EEA routes would essentially benefit the airlines of non-member countries.

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

— on 29 July, pursuant to Article 87(2)(a), social aid to residents of the Canary and Balearic islands for intra-archipelago flights; a similar decision was adopted on 27 August in respect of aid granted to residents of Madeira for flights between the island and the rest of Portugal; and

— on 11 November, under the Community guidelines on state aid for environmental protection, a grant of ECU 150 944 (NLG 332 637) awarded by the Netherlands to Martinair for the installation of new equipment designed to reduce pollutant emissions.

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

(BEF 4.5 million) corresponding to the financing by the Flemish Region of a campaign to promote Ostend and Antwerp airports.

Sea transport

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

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

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

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

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

Port sector

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

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

Road transport

261. In the road transport sector, the Commission decided on 4 February to initiate proceedings under Article 88(2) of the Treaty in respect of a toll-relief system on the Tauern motorway in Austria, since the measures constituted operating aid. It also decided on 25 March to initiate proceedings in respect of aid to road haulage and combined transport in Italy, given its doubts about the admissibility of the measures under Article 87(3)(c) of the Treaty.

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

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

4.1.8. Agriculture

264. In 1998 several new rules entered into force regarding state aid in the agricultural sector: Community guidelines for rescuing and restructuring firms in difficulty,\textsuperscript{179} and rules on aid for research and development\textsuperscript{180} and on subsidised short-term operating loans in agriculture.\textsuperscript{181} Concerning aid for rescue and restructuring, it is interesting to note that no Member State, when notifying these aid measures, has so far requested the application of the special rules devised for the agricultural sector (point 3.2.5. of the Community guidelines). The few notifications concerning this type of aid were based on the general rules applicable to all sectors.

265. No particular problems were raised by the application of the new rules for research and development, requiring compliance with the following criteria: 1) general interest of the project for the specific sector concerned; 2) need to spread information in adequate publications at least of national relevance and not restricted to members of specific organisations; 3) availability of the results of the work to all interested parties; and 4) compliance with the conditions laid down in Annex II (“Domestic support: the basis for exemption from the reduction commitments”) to the Agreement on agriculture concluded in the course of the Uruguay Round of multilateral trade negotiations.\textsuperscript{182}

266. More problematic was the entry into force of the rules concerning subsidised short-term operating loans. By letter dated 19 December 1997\textsuperscript{183} the Commission informed the Member States that, starting from 30 June 1998, the Commission communication on subsidised short-term loans in agriculture,\textsuperscript{184} as interpreted by Commission letter dated 19 December 1997,\textsuperscript{185} would enter into force again and that the procedure pursuant to Article 88(2) of the EC Treaty would be initiated in respect of the aid which would come into or remain in force after 30 June 1998 and which did not comply with the new rules. This, strictly speaking, meant that the new rules would be applicable to national contributions to pay interest on short-term loans expiring after 30 June 1998. Notwithstanding the request of a Member State, the Commission refused to postpone again the entry into force of the communication, and initiated the procedure provided for in Article 88(3) of the EC Treaty against an Italian regional aid scheme which did not seem to comply with the new rules, as interpreted by the Commission. Other national regional draft schemes were notified, but their examination, for the time being, is still pending.

4.1.9. Fisheries

267. The guidelines for the examination of state aid to fisheries and aquaculture form the basis on which the Commission has been able to assess both planned aid and aid which has existed since 1985. The guidelines were based to a large extent on the currently applicable structural legislation, Council Regulation (EC) No 3699/93 of 21 December 1993 laying down the criteria and arrangements

\textsuperscript{180} Commission communication amending the Community framework for state aid for research and development (OJ C 48, 13.2.1998).
\textsuperscript{181} Commission Communication on subsidised short-term loans in agriculture (OJ C 44, 16.2.1996, as interpreted by Commission letter dated 19 December 1997 (SG(97)D/10801)).
\textsuperscript{183} SG(97)D/10801.
\textsuperscript{184} OJ C 44, 16.2.1996.
\textsuperscript{185} SG(97)D/10801.

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regarding Community structural assistance in the fisheries and aquaculture sector and the processing and marketing of its products.\textsuperscript{186}

4.2. Specific sectors not subject to special rules

4.2.1. Financial sector

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

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

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

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

(ii) Aid granted to certain credit institutions in order to perform special tasks on behalf of the State, e.g. granting social housing loans, might fall under Article 86(2) of the EC Treaty. An examination will take place on a case-by-case basis.

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

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

270. Regarding specific cases of state aid to the banking sector, the Commission approved supplementary restructuring aid, estimated at between ECU 8 billion and ECU 15 billion (FRF 53 billion and FRF 98 billion), granted by France to Crédit Lyonnais\textsuperscript{187} in addition to the aid of ECU 6.8 billion (FRF 45 billion) and of some ECU 600 million (FRF 4 billion) already granted in 1995 and 1996. Such aid amounts are unique in the history of the Community. The aid was approved on condition that Crédit Lyonnais reduce its balance sheet by ECU 47.26 billion (FRF 310 billion) in


\textsuperscript{187} C-47/96 (OJ L 221, 8.8.1998).
Europe and worldwide, over and above the reductions imposed on the bank in 1995, which would entail a total reduction in its balance sheet by more than a third since 31 December 1994. These compensatory measures were considered all the more necessary since, in the banking sector, aid corresponding to a capital injection relaxes the solvency constraints to which other banks making losses and not receiving aid are subject, which constraints would normally oblige them, if their own funds did not exceed the solvency requirement, to reduce their liabilities and their activity. Crédit Lyonnais will also have to reduce the number of its branches in France to 1 850 by the year 2000. Lastly, the French Government has undertaken to privatise Crédit Lyonnais by October 1999, by means of an open, transparent and non-discriminatory procedure.

271. On 29 July the Commission approved aid granted to Banco di Napoli by the Italian Government for its restructuring and privatisation. The estimated net cost to the State of this aid is somewhere between ECU 1.14 billion and ECU 6.14 billion (ITL 2 217 billion and ITL 11 895 billion) (the maximum amount of the state guarantee). As a compensatory measure, the bank will have to sell or close 18 branches in addition to the already completed sales of 59 branches and seven subsidiaries or offices abroad which the Commission took into account in assessing the aid’s compatibility with the common market.

4.2.2. Audiovisual sector

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

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

4.2.3. Cultural sector

274. The Commission had the opportunity to apply Article 87(3)(d) in three cases where it concluded that the aid measure in question served the purpose of promoting culture and heritage conservation in a reasonable way. In decisions of 3 June, 29 July and 25 November it confirmed its approach as already expressed in cases N 3/98 and N 486/97, not yet published in the Official Journal. The level of aid is limited to 50% of production costs.

188 Case C-40/96, not yet published in the Official Journal.
189 Case T-95/96 Gestevision Telecinco SA v Commission, not yet reported.
275. The derogation under Article 87(3)(d) also gives room for supporting the export of books. Unlike the film industry, book publishing and distribution in Europe is, in principle, not dependent on public support. The Commission authorised in June, in a case concerning aid to Coopérative d’Exportation, Livre Français (CELF),\textsuperscript{191} the granting of aid for the exporting of books to non-French-speaking countries, provided it is intended to offset the extra cost involved in handling small orders. In May 1993, the Commission did not raise any objections to the aid to CELF. This decision, however, was partly annulled by the Court of First Instance on the ground that, given the competition in the book market, the Commission had failed to fully analyse the impact of the aid on the common market.\textsuperscript{192} In its new decision, the Commission applied the cultural derogation. It concluded that this aid measure only pursues a cultural objective and does not support the other, commercial, activities of CELF.

4.2.4. Energy sector

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

277. On 3 June, the Commission decided to initiate proceedings under Article 88(2) of the EC Treaty in respect of this scheme.\textsuperscript{193} It has doubts whether the \textit{de minimis} rule is applicable in this case.\textsuperscript{194} Even if each service station could be considered a separate undertaking for the purposes of the \textit{de minimis} rule, the rule may not apply if the aid has an effect on trade and competition between Member States. In the present case, the possibility cannot be ruled out that the measure affects trade and competition with at least one Member State (Germany).

D — Procedures

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

1. Rights of third parties

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

\textsuperscript{191} Case C 39/96.
\textsuperscript{194} See Chapter IV.B.4 above.
280. In a judgment given on 2 April the Court of Justice clarified the legal rules on complaints which denounce national measures as state aid and which are lodged with the Commission by third parties; in particular, the Court set out the extent of the Commission’s obligations to investigate such complaints.

First, the Court established the principle that the Commission is required, in the interests of sound administration of the basic Treaty rules on state aid, to conduct a diligent and impartial examination of the complaints it receives, which may make it necessary for it to examine matters not expressly raised by the complainant. However, this principle does not imply that the Commission is under any obligation to examine of its own motion objections which the complainant would certainly have raised had it been aware of the information obtained by the Commission in the course of its investigation.

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

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

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

282. In a judgment given on 15 September the Court of First Instance held that, once the Commission has terminated proceedings under Article 88(2) with a decision to approve aid subject to conditions, it is not entitled to depart from the scope of that initial decision without reinitiating the proceedings. It follows that, if one of the conditions to which approval of an aid measure was subject is not satisfied, the Commission may not normally adopt a decision derogating from that condition without reinitiating Article 88(2) proceedings and thus giving notice to the parties concerned to submit their comments, unless it is a relatively minor deviation from the initial condition, leaving the Commission in no doubt as to whether the aid at issue is still compatible with the common market.

283. The concept of party concerned within the meaning of Article 88(2) of the Treaty was defined more closely. In an order of 18 February the Court of First Instance recognised that organisations representing the workers of an undertaking which is receiving aid might, as interested parties, submit their comments on considerations of a social nature which could be taken into account if appropriate

197 Case T-140/95 Ryanair Limited v Commission, not yet reported.
by the Commission in its assessment of whether or not aid within the meaning of Article 88(1) is compatible with the common market.

284. As regards the admissibility of actions for annulment of Commission decisions brought by interested third parties, the Court of First Instance held in Cases T-11/95 199 and T-189/97 200 that the fact that a third party is concerned by a case is not sufficient in itself for that party to be regarded as individually concerned in the same way as the addressee of the final decision. It follows from the definition given by the Court of Justice in the *Intermills* judgment 201 that the concept of parties concerned within the meaning of Article 88(2) of the Treaty covers an indeterminate group of natural and legal persons such that a third party’s being concerned is not sufficient for it to be concluded that it is individually concerned by a final decision within the meaning of the fourth paragraph of Article 230.

Consequently, in its order in Case T-189/97 202 the Court of First Instance held that organisations representing the workers of an undertaking which is receiving aid cannot claim on that basis to be individually concerned, within the meaning of the fourth paragraph of Article 230, by a negative final decision.

285. In Case T-95/96 203 the Court of First Instance examined the conditions under which an action for failure to act brought by a third party is admissible. The Court ruled that an action for failure to act brought by a complainant in respect of the Commission’s failure to adopt a decision in response to the complaint is admissible if, the Commission having begun a preliminary investigation in accordance with the procedure under Article 88(3) of the Treaty, the complainant is directly and individually concerned, within the meaning of the fourth paragraph of Article 230, by a negative final decision.

286. The implications for the rights of interested third parties of the requirement to provide a statement of reasons laid down in Article 253 of the Treaty were also spelled out. In joined Cases T-371/94 and T-394/94, 204 the Court of First Instance found that, where the Commission authorises aid, the requirement to provide reasons is not determined solely on the basis of the interest which the Member State to which that decision is addressed may have in obtaining information. Thus, even though it is not required in its statement of reasons to discuss all the issues of fact and law raised by interested parties during the administrative procedure, the Commission must none the less take account of all the circumstances and all the relevant aspects of the case so as to make clear both to the Member States and to the persons concerned the circumstances in which it has applied the Treaty.

2. Recovery of aid

287. At 20% of all cases dealt with by the Commission, the number of state aid measures that have not been notified to the Commission is still too high. It is therefore significant that the Community courts have confirmed the Commission’s policy of consistently ordering the recovery of aid that has been granted in breach of the notification obligation and is incompatible with the common market.

199 BP Chemicals Ltd v Commission, not yet reported.
200 Referred to above.
202 Referred to above.
203 *Gestevision Telecinco SA v Commission*, not yet reported.
204 Referred to above.
The Commission also examines, in line with the *Deggendorf* decision of the Court of Justice, the cumulative effect of former unlawful aid and new aid, if the unlawful aid has not yet been repaid.

288. In a judgment given on 29 January the Court of Justice ruled that the authorities of a Member State may not plead that it is absolutely impossible for them properly to implement a Commission decision ordering them to recover unlawful aid without taking any step whatsoever to recover the aid from the undertakings in question and without proposing to the Commission any alternative arrangements for implementing the decision which would enable the difficulties to be overcome. Although insuperable difficulties may prevent a Member State from complying with its obligations under Community law, mere apprehension of such difficulties cannot justify a failure by a Member State to apply Community law correctly.

289. In Case T-67/94 the Court of First Instance confirmed that it is not for the Member State concerned, but for the recipient undertaking, in the context of proceedings before the public authorities or before the national courts, to plead the existence of exceptional circumstances on the basis of which it had entertained legitimate expectations leading it to decline to repay the unlawful aid. Consequently, the Commission may not give as a reason for limiting in time a Member State’s obligation to recover unlawful aid the fact that the contents of a national court’s ruling were such as to give rise to a legitimate expectation on the part of the recipient of the aid that the latter was lawful.

3. Consequences of a judgment annulling a decision

290. Lastly, in a judgment of 12 November the Court of Justice clarified the consequences of one of its judgments partially annulling a final decision on the ground that the Commission had wrongly dispensed with examining the compatibility of an aid measure in the light of Article 87(3). Since the investigation measures taken by the Commission as part of the procedure laid down in Article 88(2) of the Treaty allowed an exhaustive analysis to be made of the compatibility of the aid having regard to Article 87(3), the procedure for replacing the annulled decision could be resumed at that point with a fresh analysis of the investigation measures, the reliability of which had not been challenged.

4. Application of the state aid rules by national courts

291. Although the Commission has primary responsibility in the state aid field, national courts may, under various circumstances, also be called upon to rule on aid-related matters. The Commission has already drawn attention to the scope for action at national level, particularly as regards unlawful aid.

292. The main conclusion reached by a study on the practice of national courts commissioned by the Commission was that the number of state aid cases referred to national courts is very small. In some countries there has not been a single case yet. Moreover, most (76%) of the 115 cases covered by the study did not involve actions brought by competitors; of those which were brought by competitors,........

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206 Case C 44/97 *Aid in favour of Magefesa*, not yet published in the *Official Journal*.
207 Case C-280/95 *Commission v Italy* [1998] ECR I-259.
209 Case C-415/96 *Spain v Commission*, not yet reported.
210 Commission notice on cooperation between national courts and the Commission in the state aid field (OJ C 312, 23.11.1995).
only three yielded the result desired by the competitor. This state of affairs would appear to be due in particular, to a lack of transparency as regards the rules of state aid law and thus a limited knowledge of them among national judges and lawyers. Since legal instruments exist at national level, better use should therefore be made of them.
E — Statistics

Figure 6:
Trend in the number of aid cases registered (other than in agriculture, fisheries, transport and coal) between 1994 and 1998

Figure 7:
Trend in the number of decisions taken by the Commission (other than in agriculture, fisheries, transport and coal) between 1994 and 1998
Figure 8:
Number of decisions by Member State (other than in agriculture, fisheries, transport and coal)

European Union
Belgium
Denmark
Germany
Greece
Spain
France
Ireland
Italy
Luxembourg
Netherlands
Austria
Portugal
Finland
Sweden
United Kingdom

0 100 200 300 400 500

460
154
77
38
28
15
8
14
18
IV — INTERNATIONAL ACTIVITIES

A — Enlargement

1. Pre-accession

1.1. Implementing rules

293. With a view to further completing the legal framework for relations between the Community and the ten associated countries of central and eastern Europe (CEECs) in the field of competition, two sets of Implementing Rules have been negotiated with the CEECs. The first concerns the implementation of the competition provisions of the Europe Agreements applicable to undertakings. The second relates to the rules concerning state aid.

294. Implementing Rules for the competition provisions applicable to undertakings have already been adopted for five CEECs, namely the Czech Republic, Poland, the Slovak Republic, Hungary and Bulgaria. The Commission has presented its proposal to the Council for Implementing Rules for the three Baltic States and Romania. These are expected to be adopted in early 1999. The wording of the Implementing Rules is basically the same for all of the associated countries. They contain mainly procedural-type rules, i.e. rules regarding competence to deal with cases, procedures for notification of cases to the other party, consultation, comity and the exchange of information.

295. On 24 June the EU-Czech Association Council approved Implementing Rules for state aid in the Czech Republic. It is the first associated country where such rules are now formally in force in the field of state aid. The Implementing Rules constitute a two-pillar system of state aid control. On the Community side, the Commission assesses the compatibility of state aid granted by EU Member States on the basis of the Community state aid rules. On the side of the Czech Republic, the Czech national monitoring authority is to monitor and review existing and new public aid granted by its country, on the basis of the same criteria as arise from the application of the Community state aid rules. The Implementing Rules include procedures for consultation and problem solving, rules on transparency (i.e. the Czech Republic is to draw up and thereafter update an inventory of its aid programmes and individual aid awards), and rules on mutual exchange of information.

296. Generally, the adoption and proper application of implementing rules for state aid is, apart from wider policy considerations, also seen as an important step towards reducing any trade friction between the Community and the third country in question as it may, if properly implemented, eliminate the need for either party to have recourse to action under the WTO Agreement on Subsidies and Countervailing Measures (ASCM) to deal with subsidisation issues, e.g. the imposition of countervailing measures.

1.2. Enhanced pre-accession strategy

297. A major element of the enlargement process is the so-called enhanced pre-accession strategy which centres on Accession Partnerships and increased pre-accession aid. The Accession Partnership serves as a new single framework which covers in detail for each applicant the priorities to be observed in adopting the Union acquis, or existing body of rules, and also the financial resources available for that purpose, in particular the PHARE programme. Legislative alignment, enforcement and institution building in the field of competition are among the most important short-term (1998) and medium-term priorities which the Commission has identified in the different Accession Partnerships. The same applies to the so-called National Programmes for the Adoption of the Acquis which were adopted by each associated country on the basis of the Accession Partnerships.

1.3. Progress in alignment of competition rules

298. The Commission agreed to report regularly to the European Council on progress made by each of the candidate countries towards accession. The first progress reports for the ten CEECs, Cyprus and Turkey were submitted at the end of 1998. The reports take into consideration progress since the delivery of the Commission Opinions of 1997.\footnote{1997 Competition Report, point 323.}

299. In the past year, most of the CEECs have taken decisive steps to adopt or prepare new legislation, or amendments to existing legislation, in order to further align their legislation with Community law. This is certainly the case in the field of antitrust. For example, new competition acts came into force in Hungary, Bulgaria, Estonia and Latvia. The competition authorities of the CEECs have also now gained some experience in the enforcement of the law. However, on several occasions the Commission has emphasised the need to further strengthen the CEEC competition authorities, in particular with regard to their investigative and fining powers, their independence and their resources.

300. In contrast to antitrust policy, the introduction of state aid control in the CEECs has proven to be much more controversial and difficult to bring about. While a number of countries have started introducing or preparing rules on the control of state aid, a lot of work remains to be done. The most urgent priority is to create transparency in the granting of state aid by establishing a state aid inventory of all existing direct and indirect aid. While, ring 1998 some CEECs provided reports to the Commission on their respective state aid schemes, the Commission has generally been critical of the lack of a comprehensive picture of the state aid situation in most CEECs.

301. A second priority is the setting-up or strengthening of an independent state aid monitoring authority, and of a system for implementing this monitoring. Most of the CEECs have now established such a monitoring authority. However, legal procedures and the necessary powers to ensure genuine control of new and existing state aid in these countries are still lacking.

302. Finally, with respect to approximation of legislation, while certain countries have taken steps to lay down or prepare substantive and procedural rules in this field, the Commission has noted that they are generally lagging behind the level that is required for this stage in the run-up to accession.
1.4. Technical assistance

303. In view of these remaining shortcomings, technical assistance in the field of competition remains an essential tool to prepare the candidate countries for accession. While it is for the candidate countries themselves to devote the necessary resources to focused and cost-efficient implementation of competition law, Community assistance serves as a catalyst. Along with specific actions in the framework of the national PHARE programmes, DG IV has pursued a proactive policy of further intensifying its contacts with the competition authorities of the CEECs and between those authorities.

304. New electronic information links are in place which will intensify mutual exchange of information. Cooperation includes consultation on new policy developments. For example, the CEECs were consulted on the Commission’s Green Paper on vertical restraints (both in writing and at an oral hearing).

305. DG IV continued with PHARE support for the organisation of multi-country technical assistance programmes in the field of competition. In particular, joint training sessions for experienced and non-experienced competition officials from the candidate countries took place in December 1997-January 1998 and in November-December 1998. These programmes include lectures by Commission experts and discussion on practical cases presented by the participants.

306. Most of the candidate countries have established some form of working group structure with DG IV which facilitates informal and technical discussions at expert level on competition approximation, institution building and enforcement. These informal meetings, but also the numerous personal contacts between officials, have contributed to the enhancement of both the legal framework and the enforcement practice of the candidates’ competition authorities. In view of the problems regarding state aid described above, assistance will in the future be focused on the establishment of a state aid inventory, regional aid maps and a proper framework for aid to sensitive sectors, and on the assessment of individual cases.

307. The fourth Competition Conference of the CEECs and the European Commission took place on 25-26 May in Bratislava. The delegations included high-level officials from the competition and state aid authorities of the CEECs and the Commission. The annual conference serves as a forum for the exchange of views and experience in the field of approximation of legislation and enforcement. It also served to establish and strengthen professional contacts between officials responsible for competition in the Community and in the CEECs.

2. Accession negotiations

308. Following the opening of the Intergovernmental Conference on 30 March the screening exercise started on 3 April with the first multilateral meeting involving all of the candidate countries. On 9-19 October, six candidate countries, namely the Czech Republic, Estonia, Hungary, Poland, Slovenia and Cyprus, participated in the screening of the competition chapter, i.e. the analytical examination of the acquis in the competition field. The objective of the exercise was to inform, during a day of multilateral screening — the applicants fully about the Community acquis and — at subsequent bilateral meetings — to identify, within each applicant country, possible substantive problems that could arise, during the accession negotiations proper.

309. On 11 May a multilateral screening meeting on competition policy took place with five other countries, namely Bulgaria, Latvia, Lithuania, Romania and Slovakia. The screening of the Article 86
Directives, in particular in the field of telecommunications, took place on 28 April-7 May for the first six countries, and on 23 June for the other five countries, as part of the screening of the entire telecommunications chapter.

B — Bilateral cooperation

1. North America

1.1. United States

1.1.1. Implementation of the 1991 Cooperation Agreement\textsuperscript{217}

310. The Commission adopts each year a report to the Council and the European Parliament on its cooperation activities with the US under the 1991 Agreement. There have been three such reports up to now:

— the first covered the period from 10 April 1995 (date of entry into force of the 1991 Agreement) to 30 June 1996;\textsuperscript{218}

— the second covered the period from 1 July 1996 to 31 December 1996;\textsuperscript{219}

— and the third covered the period from 1 January 1997 to 31 December 1997.\textsuperscript{220}

During 1998 the Commission cooperated with the US DoJ and the US FTC in a substantial number of cases. Beyond the specific case-related benefits arising out of this intensive cooperation for both competition authorities and private parties involved (in terms of a more rapid and coherent management of the case on both sides of the Atlantic), the close daily contact between case teams in the Commission (DG IV) and the US DoJ and FTC is conducive to mutual confidence building and trust, accrued knowledge of the substantive and procedural rules of the partner, convergence by example and, finally, the development of ‘best practices’ in all phases of the procedure.

311. One of the most interesting transatlantic cooperation cases so far involved the WorldCom/MCI merger, which received clearance in July 1998. The notified merger plan did not raise concerns about transatlantic cable capacity holding in the same acute form as the proposed BT/MCI merger (scrutinised by the Commission in 1996 and finally abandoned by the parties), but it did raise issues regarding competition among providers of Internet access and connectivity. The Commission’s investigations, and negotiations of remedies, were undertaken in parallel with the examination of the case by the US DoJ. The process was marked by a considerable level of cooperation between the two authorities, including exchanges of views on the analytical method to be used, coordination of information gathering and joint meetings and negotiations with the parties. The timetable for divestiture afforded the parties the opportunity, subject to clearance from the US DoJ and the Commission, to agree a sale in advance of, but conditional on, the merger. Under the terms of their

\textsuperscript{217} 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).

\textsuperscript{218} Adopted on 8 October 1996, COM(96) 479 final; see 1996 Competition Report, pp. 299 to 311.

\textsuperscript{219} Adopted on 4 July 1997, COM(97) 346 final; see 1996 Competition Report, pp. 312 to 318.

undertakings submitted the parties sought the consent of the two competition authorities to the proposed buyer of the divested activities. The two authorities continued to cooperate until the undertakings were fully implemented and exchanged formal letters to this effect in accordance with the 1991 EC/US Agreement. Remedies included the possibility for the Commission, in appropriate circumstances, to appoint a trustee to oversee compliance with the undertakings and, if necessary, to ultimately take control of the sale process (i.e. finding a buyer and drawing up an agreement).

312. Another example of successful EU/US cooperation was the Dresser/Haliburton merger cleared by the Commission in July. The merger involved two US-based companies. Halliburton is one of the largest energy services companies in the world. Dresser, which is active in the same range of activities, is smaller in size and more specialised. The parties had overlapping activities in the oilfield services industry, in particular in drilling fluids, directional drilling services and completion products and services. Within the latter two segments the combined market shares were not substantial, whereas there are a number of competitors with comparable strength and a number of customers with effective countervailing buyer power. As far as the market for drilling fluids was concerned, however, the concentration would result in significant market shares. The parties had already negotiated a divestiture plan with the US DoJ, as a result of which the market overlap would be removed. On this basis, the Commission did not have any further concerns about the drilling fluids market. In this respect the case is an interesting example of coordinated merger review procedures in the EU and the US and, to some extent, of work allocation between the two authorities.

313. Other cases where close transatlantic cooperation occurred were Price Waterhouse/Coopers & Lybrand, Exxon/Shell, Daimler-Benz/Chrysler, Seagram/Polygram, Hercules/Betz Dearborn, Marsh Mc Lennan/Sedgwick and BP/Amoco. Details on the substance of these cases are given in Part II of the Report. (Case-related EC/US cooperation is further discussed in detail in the 4th Report to the Council and the European Parliament for 1998 221).

1.1.2. Adoption of the 1998 EC/US Positive Comity Agreement222

314. On the basis of a mandate from the Council, the Commission negotiated with the United States an agreement which strengthens the relevant provisions of the 1991 Agreement as regards the exercise of positive comity. The product of these negotiations, the 1998 EU-US Positive Comity Agreement, was signed in Washington and entered into force on 4 June. It spells out more clearly the circumstances in which a request for positive comity will normally be made and the manner in which such requests should be treated. In contrast to the 1991 Agreement, the EU rules on merger control are in principle not within the scope of the 1998 Agreement, e to EC and US merger legislation, which would not allow a deferral or suspension of action as envisaged by the Agreement.

1.2. Canada

315. Following negotiations, the draft Competition Cooperation Agreement between the European Communities and the Canadian Government was finalised in May of this year. On 4 June the Commission adopted a proposal for the joint adoption by the Council of Ministers and the Commission of a decision to conclude the agreement. The European Parliament has now approved the Commission proposal. It is expected that the agreement will shortly be adopted by the Council and Commission,


222 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).
and that it will be signed and come into effect, ring 1999. In the meantime, the Commission and the Canadian Competition Bureau will discuss bilaterally the practical logistics of future cooperation between the authorities within the framework of the agreement.

316. The proposed agreement is designed to facilitate increased cooperation between the European Communities and Canada with respect to the enforcement of their respective competition rules. An increasing number of cases are being examined by both competition authorities, and there is consequently a growing recognition of the importance, on the one hand, of avoiding conflicting decisions and, on the other, of coordinating enforcement activities to the extent that this is considered mutually beneficial by both parties.

317. In substance, the proposed agreement is very similar to the one entered into between the EU and the US in 1991. Essentially, it provides for (i) the reciprocal notification of cases under investigation by either authority, where they may affect the important interests of the other party; (ii) the possibility of coordination by the two authorities of their enforcement activities, and of rendering assistance to each other; (iii) the possibility for one party to request the other to take enforcement action (positive comity), and for one party to take into account the important interests of the other party in the course of its enforcement activities (traditional comity); and (iv) the exchange of information between the parties, while not affecting either party’s confidentiality obligations with respect to such information.

2. Other countries

2.1. Japan

318. The Commission finalised a new list of proposals for further deregulation in Japan. The list included a series of proposals for deregulation in the area of competition. The new package was given to Japan on 12 October, ring an EU-Japan ministerial meeting in Tokyo. The proposals were also discussed with Japan at a high-level mission to Tokyo on 3-6 November.

319. During the annual bilateral meeting between the Commission and the Japanese Fair Trade Commission (JFTC) in Brussels on 24 November, positive developments in the area of deregulation of competition policy were acknowledged (elimination of most exemptions and exceptions from Japanese competition rules, increased budgetary resources and staff for the JFTC).

320. However, the Commission repeated its main proposals to the Japanese Government for:

— competition advocacy by the JFTC in government measures,

— JFTC review of existing and new administrative guidance,

— tougher investigative action by the JFTC, particularly in the distribution area,
— deterrent sanctions for antitrust infringements, and

— better chances for victims to seek injunctive judicial relief and damages in court.

321. The OECD Recommendation, issued in 1986 and last revised in 1995, establishes so far the basic framework for cooperation between the Commission and the JFTC. In the period from 1993 to 1998 the Commission made 30 notifications to the JFTC and received from the JFTC 7 notifications in return. This would indicate that the Commission deals with more cases involving Japanese companies or other Japanese interests, whereas the JFTC deals with fewer cases involving European companies or other European interests. In turn this could be explained by the fact that European firms have more difficulties penetrating the Japanese market, than Japanese firms the EU market.

In the Nordion case, the Commission cooperated with the JFTC. Following Nordion’s undertaking to abandon the exclussivity clauses contained in its sales contracts with European customers, the Commission decided to suspend a proceeding under Article 82 of the EC Treaty against Nordion for abuse of a dominant position in the market for the production and sale of molybdenum 99 (Mo-99), a base product for radiopharmaceuticals used in nuclear medicine. The enquiry carried out in Japan by the JFTC led to identical results for the Japanese market. The JFTC adopted a Recommendation requesting Nordion to put an end to the exclusivity clauses tying Japanese customers. Nordion accepted the JFTC recommendation and, thus, the Japanese competition authority issued the formal decision on this case in September 1998. The final decision has the same content as the recommendation.

2.3. Mediterranean countries

322. Agreements have already been concluded with Tunisia, Israel, Jordan and the Palestinian Authority. Others are being negotiated with Algeria, Lebanon, Egypt and Syria. The provisions on competition contain clear commitments aimed at bringing the competition policies of the countries concerned into line with the Community arrangements. A first conference bringing together representatives of the Community and of the national competition authorities of the Member States and of the Mediterranean countries was held this year in Tunis. Only Tunisia and Algeria have asked for technical assistance. As regards Tunisia, a preliminary report identifying a technical assistance programme was drawn up in September. It is being studied by the Tunisian authorities.


2.4. Latin America

324. Ever since there has been a comprehensive framework of agreements with the countries of Latin America, the Commission’s strategy has been one of strengthening relations with groups of countries (Mercosur, the Andean Community and the Central American isthmus). In this connection, specific cooperation actions have been initiated, namely compilation of the competition laws of the countries of Latin America and the Caribbean, the drawing-up of a list of competition authorities and institutions to facilitate contact between those responsible for implementing competition policy and

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223 Revised Recommendation of the Council concerning Cooperation between Member Countries on Anticompetitive Practices affecting International Trade, 27 and 28 July 1995, C(95)130/FINAL.
the business community, and publication of a Boletín Latinoamericano de Competencia, which is distributed through the Internet.  

325. The Commission has started negotiations with Mexico with a view to introducing free trade arrangements. In the interim agreements of 1997 it is stipulated that the European Community and Mexico will have cooperation machinery at their disposal which will extend to technical cooperation.

326. In recent years there has been a strengthening of relations between DG IV and the competition authorities of the Mercosur countries — Argentina and Brazil in particular — and of Chile, which has an association agreement with Mercosur. A comparative study has been made of the laws of Mercosur, Chile and the European Community, and it has proved very useful as a means of gaining an insight into the position of, and problems facing, these countries when it comes to developing a comprehensive legal framework in the competition sphere.

327. The prospect of the possible opening of liberalisation negotiations with Mercosur and Chile is another major factor militating in favour of establishing a cooperation framework. In principle, the development and effective application of competition rules in Mercosur ought to afford firms operating in this market greater legal certainty. In a recent communication to the Council, the Commission indicates that the negotiations will also cover competition rules, including machinery for cooperation and coordination between the authorities responsible for their implementation.

2.5. Russia, Ukraine and the other NIS

328. The Partnership and Cooperation Agreements (PCAs) which the EU has concluded with Russia, Ukraine, Moldova and most of the other former Soviet Republics contain — to a greater or lesser extent — a commitment by these countries to move towards an approximation of their competition and state aid legislation with that of the Community. Although progress is slow, the joint Committees established under the PCAs with Russia and Ukraine are expected to set up subcommittees, ring the first half of 1999 to deal with competition and state aid. A number of TACIS projects, with the task of providing relevant expertise, are also being undertaken.

329. In the wake of the economic turmoil experienced by Russia this year, the State Anti-monopoly Committee was integrated into a new ministry incorporating a range of diverse competencies. It is not yet clear what implications this will have for competition law enforcement in the Russian Federation.

C — Multilateral cooperation

1. WTO: Trade and competition policy

330. The European Community has taken the initiative of putting competition on the international agenda. The Commission communication of June 1996 inspired the Singapore ministerial meeting to set up a WTO working group on the interaction between trade and competition policy.

331. Under the guidance of its chairman, Professor Jenny, the group has attracted a remarkably high degree of interest and participation. This is reflected in the large number of submissions presented by

\[224\] These documents are available on the Internet at the following address: http://europa.eu.int/comm/dg04/interna/other.htm.
WTO members and in the quality and openness of the discussions held on the different items on its agenda. Particularly noteworthy has been the active participation of developing countries, many of which have made presentations on their experiences relating to the introduction and enforcement of competition law. The group has been remarkably free of ideological controversies or North/South divisions. Differences of opinion about the scope of the group’s mandate have not prevented a substantive discussion of the various issues raised by members.

332. The discussions have been essentially analytical in nature. The points on which there appears to be a large degree of consensus include:

— the need to proceed in parallel with a process of trade liberalisation, elimination of unnecessary regulations and a strengthening of competition law and policy;

— the importance, from the development point of view, of adopting a competition policy as part of the process of market-oriented reform;

— the increasing importance of international cooperation to address effectively the interaction between trade and competition policies.

333. The group has also made considerable progress in identifying those elements of competition law and policy which may be of particular relevance for the multilateral trading system. These include (a) the type of anticompetitive practices subject to competition law disciplines; (b) the extent of sectoral or regulatory derogations from the application of competition law; and (c) mechanisms for enforcement, including the role of administrative authorities and the courts.

334. There is a general recognition that certain types of anticompetitive practices by business can create barriers to entry or otherwise upset the equality of competitive opportunities. It is also generally acknowledged that competition and trade can be significantly affected by regulatory policies, the activities of enterprises with exclusive or special rights, and by a wide array of trade policy measures.

335. The work in the group was confined to an educational process and the group will continue this exploratory work into 1999. The WTO will also have to answer the question whether there is a political will among its members to go ahead and open negotiations in 1999 on the establishment of a multilateral framework of competition rules.

336. In April the WTO Dispute Settlement Body adopted the final report of the GATT panel regarding access to the Japanese market for photographic film and paper. The panel ruling dismissed the US claims as they had failed to establish a causal link between measures adopted by the Japanese Government and an upsetting of the competitive relationship between domestic and imported products. The Kodak/Fuji panel was established at the request of the United States. The EU intervened as a third party in view of its economic interest in the case.

337. The issue of whether anticompetitive practices have a negative impact on trade falls outside the scope of current WTO rules. Accordingly the Panel did not pass judgment on this and focused exclusively on whether nullification of trade benefits could be attributed to measures taken by the Japanese Government, but in this case there were many competition issues which would have been addressed in a more satisfactory way within a competition law framework.

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338. In this connection, Sir Leon Brittan, European Commission Vice-President, and Mr Karel Van Miert, Commissioner responsible for competition, said that “The adoption of the report clearly illustrates the need to supplement the current framework of WTO rules with a WTO framework of competition rules”.

2. OECD, Unctad

339. The Commission played an active part in the work of the Committee of Competition Law and Policy of the OECD, especially in the round tables organised in 1998 (positive comity, insurance, procurement markets, relationship between regulators and competition authorities, boycott, broadcasting and buying power). The recommendation on hard-core cartels, adopted by the Committee in May, is also of particular interest. This document seeks to strengthen the effectiveness and efficiency of members’ law enforcement against hard-core cartels by eliminating or reducing statutory exceptions that create gaps in the coverage of competition law, and by removing the legal restrictions that deny competition agencies the authorisation to provide investigative assistance to foreign competition agencies.

340. The Commission also played an active part in the work of Unctad in the area of competition policy and in particular in the Expert Meeting on Competition Law and Policy which met from 29 to 31 July.
V — OUTLOOK FOR 1999

1. Legislative and regulatory activities

341. The coming year will see the Commission giving further thought to refocusing its departments’ efforts on cases of manifest interest to the Community. Despite the hopes founded on the new provisions on vertical restraints, the ineffectiveness of the first refocusing measures adopted in 1997 will induce the Commission to take fresh steps to ensure that its legal instruments and resources are geared more closely to present needs and the challenges ahead.

342. The Commission will have to implement the new arrangements regarding vertical restraints of competition. Regulation No 19/65 and Article 4(2) of Regulation No 17 should be amended in 1999. The Commission will then get down to drafting the new exemption regulation and guidelines on vertical restraints, which will probably not be ready for adoption before 2000.

The Commission is also likely to adopt a new notice on commercial agents.

343. The process of modernising Community competition law is set to continue and the Commission is considering proposing a review of Regulation No 17, which lays down detailed rules for the application of Articles 81 and 82 of the Treaty. The proposal should be the high point of the modernisation exercise.

344. After a record year for fines, the Commission is considering reviewing in the light of the experience gained some of the provisions of the guidelines on setting fines so as to correct certain aspects deemed not to accord with the objectives pursued.

345. In the merger control field, the Commission is contemplating adopting a new notice on ancillary restraints inasmuch as the existing one dates back to 1990 and is no longer entirely consistent with current practice. A notice on remedies making it possible to remove the Commission’s doubts about the compatibility of a notified operation with the common market is also to be adopted next year.

346. The Commission will continue its work on drawing up Community instruments in the state aid field, in particular notices designed to increase transparency and simplify the monitoring of cases of minor importance. It thus intends to adopt two block exemption regulations, one on small and medium-sized enterprises and the other on training aid. The guidelines on employment aid are to be reviewed in 1999. 1999 should also see the formal adoption of the procedural regulation following the reaching of agreement on it in principle at the Council meeting of industry ministers on 16 November.

2. International field

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

With a view to enlargement of the Union the Commission will concentrate on fostering a competition culture in the countries of central and eastern Europe. It will be especially vigilant regarding the effective application of competition rules in these countries. It will renew its call for an efficient supervisory system for state aid to be set up as quickly as possible. In this connection it will continue its
work on drawing up guidelines for state aid in these regions which will take account of the special circumstances of economies in transition.

As part of its bilateral cooperation with the countries of north America, the Commission will apply itself to implementing the EU-US positive comity agreement, and it will support adoption of the draft cooperation agreement with Canada.

In the multilateral cooperation sphere it will continue to participate actively in the work of the WTO on the interaction between trade and competition.

3. Supervisory activities

348. The Commission intends to redouble its efforts in 1999 to promote competition in the European Community so as to ensure the successful introduction of the euro. This will involve, among other things, waging a ruthless campaign against the emergence of cartelisation phenomena which might be seen in some old-established industries as a means of putting off the evil day when cost cutting and restructuring have to be carried out following the inevitable boost to competition caused by the euro’s introduction. The Commission will therefore attach particular importance to the formation and operation of its anti-cartel unit, which already has a number of cases in its in-tray. It will nevertheless remain vigilant in its other areas of activity, including that of the monitoring of abuses of dominant positions. It even intends adding to its corpus of decisions in such new sectors as the environment, sport and the professions, where major cases are in the pipeline. Important decisions are awaited in the financial, data processing and air transport sectors.

349. As far as merger control is concerned, the Commission does not expect the number of cases notified to stabilise in view of, firstly, the worldwide restructuring drives that are taking place in a number of industries and, secondly, the impact of the introduction of the single currency in Europe on 1 January 1999. It expects to receive between 230 and 250 notifications in 1999.

350. The success of the liberalisation policy will depend on a strict application of Community competition law. The Commission will have to ensure that the liberalisation directives are duly transposed into national law and that their provisions are applied by Member States in accordance with Article 86. It will pay particular attention to monitoring the implementation of full competition in telecommunications markets, acting in conjunction with national regulatory authorities and, if necessary, national competition authorities. It will also closely monitor implementation of the postal services directive. Lastly, after the adoption of the liberalisation directives in the energy sector (first stage for electricity markets in February 1999), it will apply itself to rendering effective the application of the competition rules to this sector, which is to be gradually opened up to competition.

351. Energy sector liberalisation will also have an impact on the number of state aid cases investigated by the Commission.

352. An important step in the field of aid policy will be the implementation of the procedural regulation. This instrument, which makes the procedural rules more transparent, should improve compliance with them. It also provides the Commission with new weapons in its fight against unlawful aid measures and the misuse of aid.
The fall in the number of new aid cases in 1998 was probably temporary and cyclical. 1999 should see numerous notifications of aid measures linked to the new regional maps or to training aid.

Lastly, the Commission intends to continue pursuing its policy of firmness towards unlawful aid, as attested to in 1998 by the record number of negative decisions.
### ANNEX — CASES DISCUSSED IN THE REPORT

#### 1. Articles 81, 82 and 86

<table>
<thead>
<tr>
<th>Case</th>
<th>Publication</th>
<th>Point</th>
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<tbody>
<tr>
<td>ACEA</td>
<td>OJ L 100, 1 4 1998</td>
<td>131</td>
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<tr>
<td>Stainless steel</td>
<td>OJ L 216, 1995</td>
<td>3,65, insert 3</td>
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<td>Brussels Airport</td>
<td>OJ L 216, 1995</td>
<td>110</td>
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<tr>
<td>Cologne/Bonn Airport</td>
<td>OJ L 173, 14 1 1998</td>
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(Report prepared under the sole responsibility of DG IV in conjunction with the Twenty-eighth Report on Competition Policy 1998 — SEC (99)743 final)
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A — Case summaries

1. Prohibitions

1.1. Horizontal agreements

*Price cartel in the stainless steel sector*

On 21 January the Commission adopted a decision prohibiting an agreement between, and imposing fines on, six producers of stainless-steel flat products: Acerinox SA, ALZ NV, Acciai Speciali Terni SpA, Avesta Sheffield AB, Krupp Thyssen Nirosta GmbH and Usinor SA.¹ These firms account for more than 80% of European production of stainless-steel finished products.

At a meeting in Madrid on 16 December 1993 the parties decided on a concerted increase in prices, to be achieved by changing the method for calculating a price supplement known as the ‘alloy surcharge’, a surcharge based on the alloying elements used in stainless steel.

Some of the firms involved claimed that the transparency requirements of Article 60 of the ECSC Treaty forced suppliers to provide general information on their pricing intentions. Whilst it is true that that article requires undertakings to make public ‘the price lists and conditions of sale applied by undertakings within the common market’, prices and conditions must be determined independently by each firm. They should not in any case be communicated to interested parties before being notified to the Commission.

The Commission decided that this price agreement constituted a serious infringement of Article 65 of the ECSC Treaty and fined the firms a total of ECU 27.3 million.

This decision, like the earlier ‘Beams’ decision² of 1994, forms part of efforts to combat illegal agreements in the steel sector.

It marked the first time that the Commission had applied the guidelines for the calculation of fines³ and the Commission notice on the waiving or reduction of fines in cartel cases (‘leniency notice’).⁴

The fines were thus calculated on the basis of an absolute amount determined according to the gravity of the infringement and weighted according to the duration of the infringement for each of the firms involved. This basic amount was increased or reduced to take account of the aggravating or attenuating circumstances specific to each firm. Finally, the above-mentioned leniency notice was applied.

¹ OJ L 100, 1.4.1998.
² OJ L 116, 6.5.1994.

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This decision shows how the objective of transparency targeted by the guidelines can be achieved, an aspect which is particularly important as far as the cooperation of firms is concerned. In this case, all the firms invoked the notice, dealing as it does with cooperation, but only two of them actually cooperated, one of them by bringing the infringement to an end and the other by supplying important information to the Commission in the course of the investigation. By dint of the detailed calculation presented in the published decision, the firms have been able to appreciate the difference in treatment afforded by the Commission between those which genuinely cooperated and those which merely declared their intention to do so.

British Sugar + Tate & Lyle + Napier Brown + James Budgett

On 14 October the Commission adopted a decision fining sugar producers British Sugar and Tate & Lyle and sugar merchants Napier Brown and James Budgett for an infringement of Article 81(1) of the EC Treaty. The Commission found that the companies had sought to restrict competition by coordinating their pricing policy on the white granulated sugar market in the United Kingdom. The Commission therefore imposed fines of ECU 39.6 million on British Sugar, ECU 7 million on Tate & Lyle, ECU 1.8 million on Napier Brown and ECU 1.8 million on James Budgett.

The decision concerns the collaborative strategy of higher pricing by British Sugar, Tate & Lyle, Napier Brown and James Budgett on the industrial white granulated sugar market in the United Kingdom and a similar strategy pursued by British Sugar and Tate & Lyle on the retail white granulated sugar market in the United Kingdom.

These infringements took place from 20 June 1986 to 2 July 1990 with respect to British Sugar and Tate & Lyle, and from late 1986 to 2 July 1990 with respect to Napier Brown and James Budgett. During this period, the four companies accounted for some 90% of the entire white granulated sugar market in the United Kingdom.

The Commission found evidence of numerous meetings between the parties, which took place at regular intervals throughout the relevant period. In an initial meeting between British Sugar and Tate & Lyle on 20 June 1986, the principles of the future anticompetitive conduct were established. The merchants Napier Brown and James Budgett became involved in this conduct before the end of 1986.

A total of eighteen further meetings about industrial white granulated sugar took place between all four parties. During these meetings, British Sugar informed Tate & Lyle, Napier Brown and James Budgett of target prices it intended to obtain with respect to industrial sugar. Concerning retail sugar, a further eight meetings took place between British Sugar and Tate & Lyle, in which British Sugar revealed to Tate & Lyle its pricing policy and in which the two companies discussed their respective discount policies towards large retail customers.

While the Commission did not have sufficient evidence that prices to be charged to individual buyers of industrial or retail sugar were jointly fixed, the systematic participation of all four parties in regular meetings concerning industrial sugar, and of British Sugar and Tate & Lyle concerning retail sugar, led to an atmosphere of mutual certainty as to the participants’ intentions concerning their future pricing behaviour. Each of them could rely, if not on the precise price levels of the other participants, then at least on their intentional pursuit of the collaborative strategy of higher pricing.

5 IV/33.708/F3, IV/33.709/F3, IV/33.710/F3, IV/33.711/F3.
For all the participants this mutual assurance was of interest particularly — though not exclusively — in the price range above the break-even point, for which price competition was possible while remaining profitable.

The fines were calculated on the basis of the Commission’s published guidelines for the calculation of fines. The Commission took account of the fact that the infringements were serious and of medium duration. Considerable differentiations with regard to the individual contributions of the four parties to the infringement were made:

— the participation of British Sugar, on account of its high share of the relevant markets for industrial and retail sugar and its position as price leader on those markets, was an essential element in the operation of the cartel;

— Tate & Lyle, on account of its share on the relevant markets, was the second most important member of the cartel;

— the merchants Napier Brown and James Budgett did not participate in the key meeting of 20 June 1986; they joined the cartel only several months later and from then onwards only participated in the infringements concerning industrial sugar.

Because they were dependent on supplies from the two domestic sugar producers — British Sugar and Tate & Lyle — for a significant part of the sugar they sold in their capacity as merchants, their influence on the relevant market and their scope for exercising power on that market were limited.

Moreover, with regard to British Sugar, several aggravating factors were found:

— British Sugar was the instigator of the infringements and, throughout the relevant period, remained the driving force. In fact, after having waged a price war against its competitors, it took the initiative, by arranging the meeting of 20 June 1986, of replacing this price war with a collaborative strategy of higher pricing with its competitors.

— British Sugar acted in a manner contrary to the clear wording of the comprehensive compliance programme it presented to the Commission in October 1986 in the course of a proceeding brought in response to a complaint by Napier Brown, and which the Commission took into account as a mitigating factor when setting the fine in the Napier Brown decision.

— Back in July 1988, in its Napier Brown decision, the Commission had already fined British Sugar for attempting to squeeze a merchant out of the retail market on the white granulated sugar market in the United Kingdom. On the same relevant market, British Sugar pursued the collaborative strategy of higher pricing at issue in the present decision for two years in parallel with the Commission proceeding leading up to the Napier Brown decision.

As for Tate & Lyle, the Commission substantially reduced the fine under its notice on the waiving or reduction of fines in cartel cases, in order to take account of the fact that Tate & Lyle cooperated with

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the Commission, in particular by submitting two self-incriminating letters to it. Indeed, these two letters provided decisive evidence of the cartel’s existence and allowed the Commission to intervene in this case.

**Greek ferries**

By decision of 9 December the Commission fined seven ferry operators for entering into price-fixing collusion in relation to roll-on/roll-off services on routes between Greece and Italy.

Six of these companies — Minoan, Anek, Strintzis, Ventouris, Karageorgis and Marlines — are based in Greece. One company — Adriatica — is established in Italy.

Following receipt of a letter from a member of the public, the Commission carried out investigations without prior warning at the offices of six ferry operators, five in Greece and one in Italy, in July 1994. Strong evidence of an infringement of Article 81 was discovered. The Commission concluded that these ferry companies had participated in a price-fixing cartel for several years. This was an ongoing agreement described by the companies as “the usual practice”. The cartel operated in the form of regular meetings and an exchange of correspondence involving the collective readjustment of prices for passengers and vehicles.

The relevant market is limited both geographically and in size. It concerns three out of five routes on the Adriatic. This is a relatively small seasonal market compared with other markets in the EU.

The Commission would normally regard such an infringement as very serious. Nevertheless, the infringement had a fairly limited actual impact on the market. The parties did not apply in full all the specific price agreements, and fares were kept at a low level compared with other routes within the common market for maritime transport from one Member State to another. In the light of these considerations, the Commission concluded that the infringement should be qualified as serious.

The Commission imposed fines totalling ECU 9.1 million.

Almost all the firms in question cooperated with the Commission and benefited from reductions in fines. The Commission believes that, after its intervention, normal conditions of undistorted competition have been re-established on this market.

**Price-fixing, market-sharing and bid-rigging cartel in pre-insulated pipes**

On 21 October the Commission decided to impose fines totalling more than ECU 92 million on ten companies which had been engaged in a clandestine market-sharing, bid-rigging and price-fixing cartel covering the whole European market for pre-insulated pipes used in district heating systems. The ringleader of the cartel, ABB Asea Brown Boveri Ltd, the Swiss-Swedish engineering group, was fined ECU 70 million.

The Commission investigations were carried out in June 1995 following a complaint from Powerpipe of Sweden, the only producer not involved in the cartel, that it had been the object of systematic reprisals from the others as a result of its refusing to join their unlawful enterprise. Tangible evidence of the

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The cartel began in Denmark, where most of the producers are located or have their headquarters, in late 1990 and was gradually extended to other markets, particularly Germany, the largest individual national market for district heating. From 1994 onwards, the cartel covered the entire west European market, worth more than ECU 400 million annually. Managing directors or chief executives determined the joint policy and allocated market quotas to each participant. In each national market ‘contact groups’ of sales managers carried out the decisions and monitored the cartel’s implementation. Most contracts for district heating are awarded by competitive bidding and public tendering and, for the larger projects, EU rules on public procurement apply. In Germany and Denmark, where the most sophisticated arrangements were in place, each new project announced was secretly allocated by the cartel to a ‘favourite’ which decided the price it would bid; the other producers then put in higher offers to ensure it was awarded the contract.

When Powerpipe won a large contract in Germany against the cartel, the other producers decided to force it out of business by organising a boycott and ensuring that its supplies were cut off.

The fact that the ten producers involved deliberately continued the cartel for almost a year after the investigations constitutes a particularly aggravating feature of this infringement. When determining the fines, the Commission applied its guidelines, which provide for a minimum fine of ECU 20 million for very serious cases. Even though the infringement was prolonged, the Commission reduced the fines imposed on most participants to take account of the fact that they had cooperated.

In the case of ABB, the fine reflects the fact that senior group management was involved in the cartel.

1.2. Vertical agreements

**Volkswagen — Audi**

The Commission imposed a fine of ECU 102 million on Volkswagen AG — Europe’s largest motor-manufacturing group — for an infringement of Article 81(1) of the Treaty. In particular, it found that Volkswagen had systematically forced its authorised dealers in Italy to refuse to sell Volkswagen and Audi cars to foreign buyers, mainly from Germany and Austria. Since 1995 the Commission had been receiving a large number of complaints from consumers who had had difficulty buying new cars in Italy. In its decision of 28 January, the Commission found that Volkswagen AG, its Italian subsidiary Autogermana SpA and Audi AG had devised, in concert with their Italian dealers, a strategy aimed at preventing, or at least substantially restricting, sales from Italy to other Member States, especially Germany and Austria. Volkswagen was given two months to take the steps required by the Commission in order to put an end to the practices involved.

In October 1995 the Commission had carried out inspections at Volkswagen’s offices in Wolfsburg, at Audi’s offices in Ingolstadt, at Autogermana’s offices in Verona (Autogermana is a wholly owned subsidiary of Volkswagen, and the official importer for both makes in Italy) and at the offices of a number of VAG dealers in the north of Italy. Papers found in the course of those inspections provided clear evidence of a market-partitioning policy pursued by Volkswagen, Audi and Autogermana.

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In its decision, the Commission found that the conduct of Volkswagen/Audi was a threat to the proper functioning of the single market and a very serious infringement of Community competition law. On the basis of the measures it took, Volkswagen successfully sought to impose an export prohibition/restriction. The measures in question, whether viewed as a whole or individually, were liable significantly to restrict competition. Trade between Member States was affected in that the export prohibition/restriction imposed by Volkswagen restricted cross-border trading. This resulted in trade between Member States being affected significantly.

In setting the fine, the Commission took account of the duration of the infringement — more than ten years — and of the fact that, among other things, the companies in the Volkswagen group set up the system of restrictive practices by exploiting the economic strength they enjoyed in their relationship with their networks of authorised dealers in Italy. It also held that the infringement was aggravated by the fact that Volkswagen did not take the appropriate action when told by the Commission to put an end to what was a serious infringement.

This decision marks an important step in the Commission’s practice in this field in that the fine involved is the highest it has ever imposed on a single firm. The size of the fine is an indication that the Commission will not tolerate practices of this kind and will act with similar determination against other manufacturers who set out to partition the market. This case should also be seen in the context of the monitoring of the block exemption Regulation for car distribution.11 Article 11 of this Regulation requires the Commission to evaluate the application of the Regulation, particularly as regards the impact of the exempted system of distribution on price differentials and on the quality of service to final users.

The Regulation allows the industry to establish a number of competition-restricting clauses and practices within the contractual relationships with their dealers. In return, manufacturers are required to comply with a number of rules laid down in the Regulation, for instance not to restrict the freedom of final consumers and other network dealers to acquire cars in the Member State of their choice. Non-compliance with this condition is considered by the Commission to be a very serious infringement of the competition rules, and is punished accordingly. The Commission is aware that obstacles to parallel trade still exist in some Member States and it will consequently not hesitate to take measures against manufacturers who break the rules.

Van den Bergh Foods

On 11 March the Commission adopted a decision, based on an assessment under Articles 81 and 82 of the Treaty, condemning Unilever’s practice of “freezer exclusivity” in Ireland with a view to facilitating access by other suppliers to the “impulse” ice cream market. A Unilever subsidiary, Van den Bergh Foods Limited, is the leading supplier of ice cream in Ireland, with a market share in excess of 85%. The company has an extensive network of freezer cabinets which are placed at the disposal of retailers free of any direct charge but on condition that they are used exclusively for the storage of Unilever’s products.

The Commission found that, in the circumstances of the Irish market, the provision of cabinets on exclusive terms results in many of the recipient outlets only being in a position to offer for sale the ice cream products of Unilever. Market research relied on by the Commission demonstrates that retailers are very unlikely either to replace incumbent cabinets, in particular those installed by Unilever, or to

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install additional ones, particularly alongside Unilever cabinets. Unilever’s competitors are consequently denied access to these outlets, with the result that their products are not offered for sale from some 40% of retail outlets in Ireland. The outlets foreclosed in this way account for roughly the same proportion of total sales in the relevant market.

The Commission therefore found that the exclusivity condition, as applied in relation to outlets whose only ice cream cabinets have been provided by Unilever, infringed Article 81 of the EC Treaty. It held, moreover, that Unilever was abusing its position of market dominance in Ireland, in breach of Article 82 of the EC Treaty, by inducing retailers to enter into exclusive arrangements of this sort.

Competition concerns arising from the distribution of ice cream products were first brought to the Commission’s attention in 1991 with a complaint by Mars. In 1992 the Commission took a decision outlawing the use of so-called “outlet exclusivity” by the two market leaders on the German ice cream market, before turning to the more widespread problem of “freezer exclusivity”. In the light of objections first made by the Commission in 1993, Unilever made a number of modifications to its distribution arrangements in Ireland. In particular, a scheme allowing retailers to buy freezer cabinets from Unilever on a hire-purchase basis was introduced in 1995 as an optional alternative to the traditional method of cabinet provision. It was expected that these changes would render Unilever’s distribution arrangements compatible with the competition rules by facilitating a trend towards wider freezer cabinet ownership by retailers. This would have enabled retail outlets to offer for sale the products of any supplier, thereby contributing to a real opening-up of the Irish impulse ice cream market. The changes did not, however, succeed in bringing about such a trend, a failure confirmed by a comprehensive market survey carried out on behalf of the Commission in the summer of 1996, and a new set of objections was accordingly put to Unilever in 1997.

Unilever has appealed against the Commission decision before the Court of First Instance. Pending the Court’s ruling on this appeal, the President of the Court decided, upon application by Unilever, to suspend the effects of the Commission decision. The principal reason cited by the President for granting the application was the existence of parallel proceedings before the Irish Supreme Court concerning Unilever’s use of freezer exclusivity. The suspension seeks to avoid any legal uncertainty arising from the possibility of conflicting rulings by the two courts.

1.3. Abuse of dominant position

*Amministrazione Autonoma dei Monopoli dello Stato*

On 17 June the Commission adopted a decision finding that the Amministrazione Autonoma dei Monopoli dello Stato (AAMS), which had a dominant position on the Italian market for the wholesale distribution of cigarettes, had infringed Article 82 of the EC Treaty by engaging in abusive practices aimed at protecting its cigarettes to the detriment of those manufactured in other Member States. The Commission fined the AAMS ECU 6 million.

The AAMS is a body answering directly to the Italian Ministry of Finance which performs the functions of a firm (production, import/export and wholesale distribution of tobacco products) and of a public authority (exercise of powers to ensure compliance with the Italian rules governing the tobacco products sector). The AAMS has the exclusive right to produce tobacco products in Italy and has a

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de facto monopoly on the Italian tobacco products wholesale market, being at present the only company to carry on this activity in Italy.

The decision stated that the AAMS had abused its dominant position by imposing, for many years, on foreign producers (which manufactured their cigarettes in other Member States) wholesale distribution contracts containing numerous restrictive clauses which seriously limited the access of foreign cigarettes to the Italian market. Firstly, those contracts limited the opportunities for launching new foreign cigarettes in the Italian market. Secondly, they restricted the scope for expanding sales of foreign cigarettes already present in the market. And finally, they imposed on foreign cigarettes a number of unjustified control and presentation requirements.

The AAMS also abused its dominant position by taking unilateral measures to promote its cigarettes at the expense of foreign ones. These measures affected both foreign producers and Italian retailers.

The decision ordered the AAMS to put an immediate end to infringements still ongoing and to refrain from continuing or from repeating the abusive conduct. The size of the fine reflected the fact that the conduct constituted a serious, long-standing infringement.

**AFS/ADP**

This case concerned a complaint by AFS (Alpha Flight Services), an in-flight caterer, about commercial fees at Paris airports (Orly and Roissy Charles-de-Gaulle). AFS and OAT, a subsidiary of the Air France group, compete for the supply of catering services at Orly. ADP (Aéroports de Paris) charged different levels of commercial and occupancy fees respectively. Had AFS been charged on the same basis as OAT, its fee would have been smaller by some FRF 3.5 million. The fee for airlines providing their own groundhandling services was either zero or less than that charged to third-party suppliers. There was no objective justification for the differences, which discriminatorily reduced the net cost of providing the services for certain suppliers. Competition was distorted not only between groundhandling service suppliers but between air carriers, as some enjoyed cost advantages either through distortions between third-party suppliers or through the unfairly favourable treatment of self-handling.

Article 82 provides that a firm in a dominant position in a substantial part of the common market may not apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage. The Commission decision of 11 June found that ADP had infringed that article by using its dominant position as the Paris airports operator to impose discriminatory commercial fees at the Paris airports of Orly and Roissy-Charles de Gaulle on service providers or airlines providing groundhandling or self-handling services such as catering, cleaning and freight handling.

This fees system mainly benefited the carriers with the best sites within the airport. Less well-located carriers, mainly those from other Member States, were therefore abusively discriminated against by the airport operator, which was in a dominant position. The decision sought to put an end to the system, which impaired the smooth functioning of the single air transport market.
**Groundhandling at Frankfurt/Main Airport**

On 14 January the Commission adopted a decision under Article 82 finding that the groundhandling monopoly held by the operator of Frankfurt/Main Airport (Flughafen Frankfurt/Main AG — FAG) was the result of an abuse of a dominant position and ordering the firm to bring it to an end. 13

FAG made use of its position as airport operator to deny runway access to any independent providers of groundhandling services and to prohibit airlines using the airport from providing their own groundhandling services. After having rejected the technical arguments put forward by FAG (in particular those relating to space constraints), the Commission found that FAG’s decision to grant itself a monopoly of the activities in question constituted an abuse of a dominant position and asked the firm to submit a detailed plan for opening up the market.

There was a risk, however, that this Commission decision might be circumvented by FAG’s offering long-term contracts to its best customers for periods of three to ten years. This would have had the effect of cornering the groundhandling-services market and preserving the substance of FAG’s monopoly. Thus, alongside the formal proceedings against FAG, the Commission also informed the firm that the contracts in question were contrary to Community law.

FAG finally agreed to comply with the Commission’s wishes. It refrained from appealing against the decision, submitted a plan to open up the market as from 1 January 1999 and announced that it would be making substantial changes to its policy on long-term contracts. On 28 July the Commission informed FAG that these measures brought the infringement to an end.

**Trans-Atlantic Conference Agreement**

On 5 July 1994 the parties to the Trans-Atlantic Conference Agreement (TACA) submitted an application to the Commission for exemption under Article 81(3) of the EC Treaty. The TACA is a revised version of the Trans-Atlantic Agreement (TAA), of which the Commission was originally notified on 28 August 1992. The Commission adopted a decision prohibiting the TAA on 19 October 1994. The liner shipping companies comprising the TAA were all parties to the TACA, with the addition of Hanjin Shipping Co. Ltd and Hyndai Merchant Marine Co. Ltd, two Korean shipping lines which had previously been absent from the transatlantic trade.

On 16 September 1998 the Commission adopted a decision finding that the TACA comprised the following elements, which had the object or effect or preventing, restricting or distorting competition within the meaning of Article 81(1) of the EC Treaty and Article 53(1) of the EEA Agreement:

(a) the price agreements between the parties to the TACA relating to maritime transport;

(b) the price agreement between the parties to the TACA relating to inland transport services supplied within the territory of the Community to shippers in combination with other services as part of a multimodal transport operation for the carriage of containerised cargo (‘carrier haulage services’) between northern Europe and the United States of America;

(c) the agreement between the parties to the TACA as to the terms and conditions under which they could enter into service contracts with shippers; and

(d) the agreement between the parties to the TACA relating to the fixing of maximum levels of freight forwarder compensation.

Only the first of those agreements falls within the scope of the block exemption for liner shipping conferences contained in Article 3 of Regulation 4056/86, and in the decision the Commission refused to grant individual exemption for the remaining three agreements.

The Commission also found that the TACA parties were in a joint dominant position and that they had abused that position in two ways. First, by imposing two kinds of restriction on the availability of service contracts. Individual service contracts were openly banned by the TACA parties in 1995 and highly restrictive conditions applied to other service contracts after that date.

Second, the TACA parties abused their joint dominant position by inducing potential competitors to join the conference, thereby altering the competitive structure of the market. The TACA parties did this in a number of ways, in particular by agreeing that shipping lines which were not traditionally conference members should be allowed to charge a lower price in service contracts than the traditional members. The purpose and effect of the TACA's agreement to enter into dual-rate service contracts was to limit competition from independent shipowners by bringing them within the fold of the conference.

In addition, the traditional conference members abstained from competing for certain contracts, thereby leaving that part of the market to shipping lines which were not traditional conference members.

Fines totalling ECU 273 million were imposed on the TACA parties for the two breaches of Article 82. The seriousness of the second infringement was partly related to the significance of the potential competition in liner shipping markets. The fines were calculated using the Commission's published guidelines on the imposition of fines.

The Commission decided on 26 November 1996 to lift immunity from fines in respect of inland rate-fixing which the TACA parties may have enjoyed by virtue of the agreement having been formally notified, and may decide to impose fines at a later date in respect of this infringement.

2. Authorisations

2.1. Horizontal agreements

a) Strategic alliances

Finnair/Maersk Air

The Commission has decided not to raise any serious doubts about the joint venture set up between the Finnish carrier Finnair and the Danish-based carrier Maersk Air with a view to offering air-transport services between Stockholm and Copenhagen. In practice, this decision means that the Commission has authorised Finnair and Maersk Air to continue their joint operations on this route for a period of
six years. The joint venture was authorised because it enhances competition on this route, which was previously dominated by one carrier.

Finnair and Maersk Air started to offer regular scheduled flights between Copenhagen and Stockholm in April 1997. At that time the market was suffering from a lack of competition: despite the fact that traffic on the route exceeded a million passengers a year, one carrier in practice enjoyed a virtual monopoly and prices were high.

The Commission recognised that the cooperation between Finnair and Maersk Air had brought the monopoly situation on the Stockholm-Copenhagen route to an end. It considered that this positive effect of the agreement between Finnair and Maersk Air largely outweighed the restrictive effects of a number of its provisions (such as code-sharing and coordination of fares), and that consumers would take full advantage of the new market situation. In this respect, the Commission also noted that the level of prices had decreased significantly since the entry of the second operator.

b) Joint ventures and other forms of cooperation

Canon/Kodak

This case related to cooperation between five manufacturers of photographic equipment with a view to developing and exploiting under licence a new advanced photographic system (APS) as an alternative to previous systems and electronic imagery. The project involved the production of new types of cameras, films and photo-finishing equipment.

Back in 1991, Kodak (with Fuji, one of the world’s leading film manufacturers), Canon, Minolta and Nikon had concluded an agreement on the development of a system of this nature. Difficulties in perfecting the system made it necessary to link up with Fuji.

In 1993, the parties notified to the Commission the agreements which had been concluded; although these were not all entirely complete, the cooperation between the parties continued both on a technical level and on that of finalising the legal documents governing their relations.

Following lengthy negotiations, the parties supplemented their notification at the beginning of 1997, in so doing taking account of the Commission’s desire for certain aspects it considered unacceptable from a competition point of view to be eliminated.

The Commission therefore published an Article 19(3) notice in the Official Journal,¹⁴ which did not give rise to any comments from third parties. The procedure was then completed by consulting the Advisory Committee and sending a comfort letter of the exemption type on 24 March.

As for the merits of the case, it was, from the outset, clear to the notifying parties that, if the APS were to be successful or indeed become a new standard, they would have to ensure that it became widely available not only on the basis of their own products but by granting licences to competitors.

The notifying parties therefore took great pains to conclude licensing agreements with their competitors by holding information meetings and seminars. The result was that a large number of such agreements were concluded well before the APS was first marketed in Europe in April 1996.

The Commission’s aim was to ensure that, once licences had been granted, third parties could arrive on the market with licensed products in time to compete with the five firms involved.

Following the Commission’s intervention, licensing policy was liberalised somewhat. More technical know-how and assistance were offered to licensees than originally proposed, either for a fee or free of charge. Moreover, clauses limiting the licensees’ industrial freedom were to be phased out in such a way that cooperation between licensees would be completely unrestricted by 2004.

Accordingly, after various technical meetings with the Commission departments, it was felt that the five firms had shown their readiness to take whatever measures were necessary to afford licensees access to the market in good time and on terms which no longer gave rise to competition concerns.

**Pripps/Tuborg**

On 26 June the Commission approved a licensing agreement between Tuborg International A/S (“Tuborg”) and AB Pripps Bryggerier (“Pripps”) for Tuborg beer in Sweden, but only after the licence had been made non-exclusive and a second licensee had been appointed.

Pripps belongs to the Norwegian Orkla group and is the leading brewer on the Swedish market. Tuborg is part of the Danish Carlsberg group, which is Denmark’s leading brewer and is also present on the Swedish market through its holdings in Falcon Bryggerier AB (“Falcon”). The Carlsberg group’s leading brands are Carlsberg and Tuborg. Pripps has held an exclusive licence for Tuborg beer in Sweden since 1975, while the licence for Carlsberg beer is held by Falcon.

The Tuborg licensing agreement was notified to the Commission following Sweden’s accession to the EU. The Commission informed the parties that this long-term exclusive cooperation between competitors, with its likely foreclosure effects, gave rise to serious concern regarding compatibility with Article 81 of the EC Treaty. Other restrictions on Pripps (including *inter alia* an obligation not to cooperate with certain foreign brewers and a guarantee that Tuborg would be the largest foreign brand in Pripps’s portfolio) had already been withdrawn by the parties following their initial discussions with the Commission.

The parties have since restructured arrangements for the Tuborg brand in Sweden. Their continued cooperation is based on a non-exclusive right (from 1998 to 2002) for Pripps to manufacture, sell and distribute Tuborg beer in Sweden. In order to avoid an abrupt negative impact on Pripps’s production capacity utilisation, Tuborg has agreed, under certain conditions, to purchase a steadily decreasing quantity of Tuborg class III beer from Pripps in the event of the latter failing to sell this minimum volume on the market.

Following these changes to the agreement, and the appointment of a second licensee (Falcon), the parties have obtained a comfort letter.
P&O Stena Line

On 26 February the Commission approved a joint venture between P&O and Stena, which operate cross-Channel ferry services. The two companies have merged their ferry interests on the short sea routes on the English Channel to form the joint venture, P&O Stena Line. The Commission’s decision exempts the joint venture under Article 81(3) of the EC Treaty until 9 March 2001.

On 31 October 1996, P&O and Stena notified their proposal to the Commission with a request for exemption under Article 81 of the EC Treaty. Following the publication of a summary of the application on 13 March 1997 in the Official Journal, the Commission sent the parties on 10 June of that year a letter expressing serious doubts and explaining why it would continue its investigations. On 6 February 1998 the Commission published a notice in the Official Journal stating its intention to exempt the joint venture, which started operating on 10 March 1998.

In its letter the Commission expressed concern that the creation of the joint venture could lead to a duopolistic market structure conducive to parallel behaviour by the joint venture and Eurotunnel on the short sea route tourist market. After further investigations, the Commission concluded that the characteristics of the market were such that the joint venture and Eurotunnel could be expected to compete with each other rather than acting in parallel to raise prices.

The case also posed difficulties because of uncertainties as to future developments in the cross-Channel ferry services market, including the impact of the ending of duty-free concessions in mid-1999. As a result of those uncertainties, the Commission, acting on a proposal from Mr Van Miert, has decided to limit the duration of the exemption to three years, starting from the date of implementation of the agreement, namely until 9 March 2001. This will enable the Commission to re-examine the impact of the joint venture on the cross-Channel ferry market after the 2000 summer season.

The joint venture has also been approved under national merger control rules in France and in the United Kingdom.

British Digital Broadcasting (BDB)

BDB, now operating under the trade name of ON Digital, is a joint venture between Granada and Carlton, two UK broadcasting companies. The joint venture established and operates a platform for digital terrestrial television in the UK.

BDB won an open competition for a 12-year licence to operate 3 pay-TV terrestrial digital multiplexes, giving it a minimum capacity of 15 channels or, potentially, interactive services. All the existing UK free-to-air terrestrial broadcasters have their own multiplexes. Reception for both these channels and BDB’s channels is via a set-top box. The cost of this was subsidised to promote rapid growth of the customer base and to compete with the BSkyB digital satellite set-top box, which was also subsidised.

The parties had originally been in partnership for the operation of the platform with BSkyB, the joint venture’s main competitor. Action by the national regulatory authority resulted in BSkyB selling its shareholding and entering into a seven-year programme supply agreement with BDB. Of the 16 channels initially offered by BDB, BSkyB would guarantee the supply of at least three premium and one basic channel. These agreements were notified to the Commission.
Given the position in the pay-television market of both BDB and BSkyB, the programme agreement was considered very carefully and several alterations were made. These included reducing the length of the agreement to five years. Attention was also paid to the fact that Granada had a shareholding in BSkyB. Safeguards were necessary to ensure that this was not a restraint on BDB competing with BSkyB in the digital platform market and in the acquisition of programme rights to produce new, competing channels.

The programme agreement with BSkyB was also the subject of a complaint from DTN, a rival joint venture which lost out to BDB in the open competition for the licence. The complaint was rejected by Commission decision on 30 April. This was then followed by an exemption by comfort letter for the joint venture agreements on 25 May.

c) Other horizontal agreements

**EUCAR**

On 17 September the Commission sent a comfort letter approving R&D agreements in the European motor industry.

This case related to the EUCAR — European Council for Automotive Research and Development — Agreement between Europe’s leading motor manufacturers (Fiat, Peugeot, Renault, VW, BMW, Mercedes, Porsche, Volvo, Opel and Ford).

The remit of EUCAR is to step up the European motor industry’s joint research effort in the economic, technical and ecological fields through projects aimed at improving the industry’s competitiveness and promoting long-term protection of the environment. The Agreement concerns the choice of projects relating to activities in the automotive sector and the terms and means of implementing them. Most of these projects involve experimental research rather than the development of a specific type of product. Research must be at the pre-competitive stage, which means that the products obtained from it may not be directly usable in a specific type of vehicle. Examples of acceptable research projects would be those relating to the use of ceramics in engines or aimed at limiting noise or emission pollution caused by motor vehicles.

A project will be adopted by EUCAR only if at least two members from different European countries are involved. The individual members otherwise remain free to undertake their own research programmes.

The EUCAR Agreement is part of a master plan drawn up by the association involving motor manufacturers, component producers, laboratories and universities. This plan identifies three areas of technological cooperation for 2000 and beyond:

i. the product: for example, electric motors, hybrid vehicles, the environmental impact of the motor car and consumer interests;

15 The decision was not published in the *Official Journal*.

16 Notice pursuant to Article 19(3) of Council Regulation No 17 (OJ C 185, 18.6.1997) and IP/98/832.
ii. vehicle construction: manufacturing processes, work organisation, stock efficiency and throughput, the social situation of workers;

iii. transport as a whole: the acceptability of the private car, public transport, multimodal transport, etc.

EUCAR has undertaken to supply the Commission at regular intervals with information on the current research programme.

The Commission’s attitude in this matter confirms its favourable stance on cooperation between firms in the area of research, provided the limits imposed by the Community competition rules are respected.

ACEA

On 11 September the Association of European Automobile Manufacturers (ACEA) notified to the Commission, on behalf of its members, a commitment to reduce carbon dioxide (CO₂) emissions from passenger cars. This collective effort by the European automotive industry will enable a significant reduction in CO₂ emissions to be achieved in line with the objective of the European Union. The Commission stated in a communication of 29 July 1998 to the Council and the European Parliament entitled ‘Implementing the Community strategy to reduce CO₂ emissions from cars: An environmental agreement with the European automobile industry’, that the ACEA commitment was consistent with the Community’s strategy on CO₂ emissions from cars.

Under the terms of its commitment, ACEA undertakes to make a significant reduction in CO₂ emissions from new passenger cars sold in the EU. On behalf of its members, ACEA undertakes to attain an average target of 140g CO₂/km for new passenger cars by 2008. This represents a reduction of 25% compared to 1995. The commitment will be jointly monitored by the Member States and the Commission. Member States will provide the Commission with publicly available data on trends in the average CO₂ emissions of new passenger cars. On the basis of this data, the Commission will be able to determine whether the average target has been met. The Commission has announced that it will consider introducing binding legislation if the target is not reached.

The commitment does not impose a target on individual manufacturers but an overall average target for all ACEA members. Individual ACEA members are free to apply more stringent or less stringent levels of CO₂ emissions provided the average target is met. Under the commitment, car manufacturers will develop and introduce new CO₂-efficient technologies independently and in competition with one another.

The Commission took the view that the commitment did not restrict competition within the meaning of Article 81(1) and sent a comfort letter of the negative clearance type to ACEA on 1 October.

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17 IP/98/865.
Sixteen major manufacturers of television sets and video cassette recorders making up the European Association of Consumer Electronics Manufacturers (EACEM) have made a voluntary commitment to reduce the electricity consumption of televisions and video recorders when they are in “standby” mode.

The vast majority of televisions and video recorders in use are operated using a remote control and are typically turned off using such a control rather than disconnected totally from their power supply. Turning a television or video recorder off using a remote control switches it to a standby mode where it continues to consume electricity at a rate that can exceed 10W. The consumer electronics industry was aware that televisions and video recorders are typically left in this standby mode for long periods of time and that their design could be improved to reduce this standby power use. A report prepared for the Commission’s DG XVII (Energy) quantified this power use and found that, simply by reducing average standby power use to 6W, total power use could be reduced by 3.2 TWh\(^{18}\) a year by 2005 and by 4.9 TWh a year by 2010. The maximum cost per unit of reducing the standby power use of a television or video recorder was estimated at ECU 3.

No individual firm in the industry felt able to introduce lower power use in its products. Margins are low in the industry and the firms feared that consumers would not be prepared to pay in advance for power savings, although they would save money in the long term. The consumer electronics industry therefore devised the voluntary scheme in consultation with Commission departments. The manufacturers who entered the scheme — and membership is open to additional firms — have undertaken to meet certain targets on power use. In order to avoid any exchange of confidential information between the member firms, which could have a negative effect on competition, an independent consultant will gather information from the firms on their sales and the power use of units sold, and simply report the names of manufacturers not meeting their commitment.

Under the scheme, the manufacturers have undertaken that, by 1 January 2000, the TVs and VCRs they sell will consume no more than 10W of power when in standby mode and that the average power consumption of all the TVs and VCRs they sell will be no more than 6W in standby mode.

Such an agreement to act in a coordinated way is a restriction of competition and falls under the prohibition of Article 81(1) of the EC Treaty. However, the Commission felt that the energy saving and environmental benefits of the scheme clearly represented technical and economic progress and, by their nature, would be passed on to consumers. Moreover, competition would not be eliminated in the affected markets, and the restrictive effect of the scheme was essential to achieving its full benefits. Accordingly, the case was closed by means of a comfort letter.

Valpak

On 26 January the Commission approved, by means of a comfort letter, the membership agreements of Valpak, a non-profit-making industry-led compliance scheme operating in the UK which has been set up to discharge the packaging waste-recovery and recycling obligations of its members. Those obligations were introduced in March 1997 by government regulations implementing the requirements of the EU directive on packaging and packaging waste (94/62/EC).

\(^{18}\) TWh = terawatt/hour = 1 000 000 000 000 watts/hour.
The legal framework set up in the UK to implement the directive provides scope for competition in the market for compliance-scheme services which seek to fulfil recovery and recycling obligations on a business’s behalf. While Valpak is currently the largest compliance scheme operating in the UK, other competing schemes exist and have notified the Commission of their arrangements.

Following its examination of Valpak’s membership agreements, the Commission concluded that the agreements restricted competition within the meaning of Article 81(1) because they obliged businesses wishing to join the scheme to transfer the totality of their obligations in respect of all packaging materials. This ‘all or nothing’ approach, which reflects the requirements of UK legislation, restricts the extent to which Valpak and other schemes will be able to compete against one another on a material-specific basis.

The Commission went on to consider whether the notified arrangements could benefit from exemption under Article 81(3). In view of the emerging nature of the market and the likelihood that Valpak and other schemes would be obliged to invest in the UK’s collection and/or reprocessing infrastructure in order to meet their members’ obligations in future, the Commission concluded that an ‘all or nothing’ approach was necessary, at least in the short term, if schemes such as Valpak were to succeed in securing sufficient funding to allow the necessary investment to take place.

The Commission was therefore able to provide Valpak with a comfort letter informing it that the conditions laid down in Article 81(3) had been fulfilled. Given that the restrictive effects of the ‘all or nothing’ approach may, in the medium to long term, outweigh its benefits, however, the Commission informed Valpak at the same time that it reserved the right to re-examine the case after a period of three years.

**Stack**

A number of European, North American and Japanese companies in the information technology sector have created or joined Stack International, a non-profit company registered in the United Kingdom. Its activities consist in:

— defining a generic specification for components such as integrated circuit (IC) memory circuits, memory modules, logic circuits and the like, which has been recognised as a de facto industry standard throughout the world;

— certifying compliance with that specification by individual products;

— defining a standard, “S/0001”, for manufacturers of such components;

— certifying compliance by individual manufacturers with that standard, based on audits with the emphasis on quality and reliability testing; and

— monitoring prices paid by member companies for such components and reporting the resulting benchmark prices to them.

Stack’s members are major purchasers of the products concerned, which they incorporate into a vast range of IT or telecom products that they sell. The object of the operation is to promote quality.
reliability and price transparency while reducing transaction costs in the merchant market for these widely used components.

An earlier version of the agreement was concluded and notified to the Commission in 1976. Updated agreements, and a wider membership list, were notified in 1997.

Salient features of the system are that:

— it involves no restriction on the competitive choices of member companies as to what components they will buy, or from which suppliers; suppliers in turn are free to seek certification or not, and are not required to give any particular consideration to Stack member companies;

— it does not involve any exchange of commercially sensitive information (a point on which the Commission’s departments were particularly attentive when examining the case):

  firstly, Stack’s activities concern only basic components, the nature of which cannot reveal the product plans of the members purchasing them;

  secondly, the agreement requires individual members’ price information to be kept strictly confidential by Stack;

— it is not exclusive: associate membership of Stack is open to any interested company that is willing to observe appropriate rules, and indeed even non-member companies can benefit from the existence of generic specifications and certified suppliers.

The assessment by Directorate-General IV was that the Stack organisation is likely to improve the production and distribution of goods that are vital to today’s markets, without bringing about any restriction of competition. In particular, the agreement does not provide for any exchange of commercially sensitive information between competitors. The case was accordingly closed by means of a negative clearance-type comfort letter.

**Inmarsat**

The Commission has approved restructuring proposals presented by Inmarsat, the major international mobile satellite operator, which is currently an intergovernmental treaty organisation. Restructuring will transform the operating parts of Inmarsat into a public company. As part of its restructuring proposals, Inmarsat envisages a public offering of shares (IPO). The Commission regards this public offering as very important and has indicated to Inmarsat that it should take place within three years. The approval of this model of conversion to a public company followed by an IPO within a short period of time should be seen in the light of the ongoing restructuring plans of the other intergovernmental satellite organisations.

Inmarsat, established in 1979, has over 80 member countries (parties). Each country has a signatory (normally the incumbent national telecom provider) which owns a share in the organisation proportional to its usage of the Inmarsat system. The signatories also act as distributors of the Inmarsat services to users or to sub-distributors. Following the restructuring, Inmarsat will be constituted as a public company, and the signatories will become shareholders in the new company. It is envisaged that
there will be an IPO within two years of the restructuring. The IPO will dilute the shareholdings of the signatories and will reduce the possible conflict of interest between their role as shareholders and as distributors of Inmarsat’s services respectively.

The Commission has closed the case by means of a negative clearance-type comfort letter. The letter specifies, however, that its view of the case is based on the assumption that an IPO will take place within three years. Any delay could lead to the file being reopened.

The Commission regards this case as a model for the reform of the other intergovernmental satellite organisations. In particular, the organisations should not be in a privileged position on the market, and the easiest way of achieving this is to create a public company, which clearly has no immunities from competition law. The position of the current signatories in the other intergovernmental organisations should not be preserved longer than is absolutely necessary and therefore the shareholding should be diluted, such as via an IPO, as soon as possible after the restructuring.

**DHLI**

This case concerned an application to renew the exemption granted by the Commission in 1990 for the arrangements between Lufthansa, Japan Airlines and Nissho Iwai relating to the international courier company DHL International, whereby Lufthansa, Japan Airlines and Nissho Iwai each acquired shareholdings in DHLI from its US parent, DHL.

DHLI’s new and original shareholders agreed, for a maximum duration of ten years, that they would neither engage in international door-to-door collection and delivery of documents and packages nor acquire any new interest in any entity engaged in those activities using its own ground transport and courier network. This was without prejudice to any of their existing activities. Lufthansa and JAL agreed to grant DHLI most preferred customer status and vice versa.

On 19 September 1996 the parties applied to the Commission for the exemption to be renewed. On 30 October 1997 the Commission published a notice pursuant to the procedure established by Article 5(2) of Regulation No 3975/87 and Article 12(2) of Regulation No 1017/68 summarising the application for renewal of the exemption and inviting interested parties to submit their comments within thirty days of publication. No comments from third parties were received within that deadline.

On 21 January 1998 the Commission informed the parties that it had decided not to object to renewal of the exemption. The arrangements are therefore exempt for a period of six years for those activities falling within Regulation 3975/87 and for a period of three years for those activities falling within Regulation 1017/68. These periods started to run as from 30 October 1997.

The Commission took the view that the reasons underpinning its decision not to oppose exemption in 1990 remained valid and that several factors indicated that competition on the market was as strong as in 1990, if not stronger.

First, the express delivery market has grown rapidly for more than two decades and there are few signs of this development slowing in the foreseeable future. DHLI faces competition from three large global operators: TNT, Federal Express and United Parcel Service (UPS). There is also competition from

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local courier companies, which remain significant in many countries. Demand for express services is growing due to increasing globalisation of manufacturing activities and ever-tightening supply-chain schedules, and there is therefore likely to be even more competition from other express delivery operators in future.

Furthermore, the abolition of customs duties on intra-Community freight movements has made road transport a more competitive option for the delivery of packages, even where next-day delivery is required. Technical improvements in, and the greater availability of, telecopying and electronic mail have also strengthened these forms of communication as competitive alternatives to courier delivery of documents. Moreover, the market on which DHLI operates, i.e. the market for express delivery services, is increasingly defined as international if not global. In Case No IV/M.843 PTT Post/TNT/GD Express Worldwide, the Commission found that international express delivery, international express freight, domestic express delivery, domestic express freight and logistics, which had previously been considered separate markets, had now been largely integrated into one. Furthermore, the markets for the provision of these services have become international as a consequence of the single market and of the fact that courier companies often have global accounts.

**Verbändevereinbarung**

The legislation transposing the electricity directive into German law provides for the electricity market to be opened up immediately and without restriction. To that end, it envisages a system of negotiated access to transmission and distribution networks while allowing the government to regulate access where required.

Following the decision to opt for negotiated access to networks in Germany, where the market is shared between several hundred network operators, the German Government encouraged the bodies representing the main interested parties to conclude a framework agreement setting out joint principles for the calculation of tariffs. The Directorate-General for Competition examined this agreement (known as the ‘Verbändevereinbarung’ or ‘VV’) on an ex officio basis in 1998. A letter along the following lines was sent to the parties:

**Substance of the Verbändevereinbarung**

The VV was concluded on 22 May 1998 between representatives of the electricity industry (Vereinigung Deutscher Elektrizitätswerke eV — VDEW) and of industrial consumers/producers of electricity (Verband der Industriellen Energie- und Kraftwirtschaft eV — VIK and Bundesverband der Deutschen Industrie eV — BDI). It is due to expire on 30 September 1999.

The agreement lays down the different tariffs applicable depending on the characteristics of each transmission scenario. Tariffs reflect the cost of using the network for each voltage level, the cost of conversion from one voltage level to another and the cost of ‘system maintenance’ services (voltage control, frequency control, etc.). A system of flat-rate billing is used for these tariffs (‘stamp’ principle), adjusted in accordance with a factor linked to the time for which installations are used.

The prices corresponding to flat-rate tariffs are not set on a joint basis but are determined by each network operator on the basis of the costs specific to it, with reference to joint criteria. Where

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20 Decision of 8 November 1996.
21 Paragraph 25.
transmission involves a number of networks belonging to different operators, billing is restricted to an average price for each tariff and so the prices for each network are not added together.

The VV also sets the price of an additional component indexed by distance and billed in cases of high-voltage transmission over a distance of more than 100 km. In that case, an amount of DEM 12.50/kW*100km*per annum must be added to the cost of transmission.

**DG IV’s analysis**

The VV is an agreement between associations of companies which has the object and effect of establishing common principles for calculating tariffs and — as regards high-voltage transmission over more than 100 km — a common price. The agreement has a horizontal component (sellers of the transmission service within the VDEW) and a vertical component (sellers and some of their buyers).

In its analysis, the Directorate-General for Competition took the view that the sellers of the transmission service were engaging in competition and that any restrictions of competition were likely to affect trade between Member States in so far as they covered the whole of Germany.

The Directorate-General for Competition — following the example of the Bundeskartellamt (Federal Cartel Office), which also investigated the VV — notified the parties of its positive assessment in principle while also expressing a number of reservations concerning certain elements examined below. It should be noted that the investigations took place before the VV had been implemented in practice and that a prudent approach was called for in the light of the complexity of the rules laid down in the agreement and the incalculable impact of their implementation on a market in the process of opening up to competition. The short duration for which the VV was concluded would seem to indicate that the parties themselves regarded it as part of an ongoing process rather than a definitive agreement.

**A positive agreement ...**

First, the agreement is a tangible move to bring together network operators and some users in a bid to organise the practical arrangements for access. Discussions were based on the assumption that electricity transmission is a service like any other provided on a market. This is in itself a large step forward compared with the previous situation, when access by third parties to the network was disputed.

In addition, coordination between network operators in establishing joint principles for calculating tariffs should benefit users. The basic principles underlying coordination are as follows:

— negotiations between users and network operators are to be restricted in number. Operators are to resolve between themselves the problems associated with electricity transmission via more than one network. This means that users will not have to negotiate with several network operators, thus promoting the development of competition;

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22 Only the feed-in and extraction networks (i.e. two networks) are taken into account; transit networks are disregarded.

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— flat-rate tariffs are to be shared between the feed-in network and the extraction network for transmission via more than one network. In this way, the individual costs of each network involved in transmission are not simply added together;

— only the tariffs applicable to the extraction phase are taken into account. This also avoids the addition of costs.

Lastly, the principles governing the calculation of tariffs selected by the associations are clear, cost-based and easily identifiable.

...which gives rise to a number of reservations

These reservations can be divided into three main categories:

(a) the fact that competitors are setting a joint price (distance over 100 km)

Price-fixing agreements are one of the restrictions specifically referred to in Article 81(1) and are not exempted in principle pursuant to Article 81(3). However, in the case in point, the Directorate-General for Competition took the following facts into account:

— the exceptionally high transmission costs which would result from individual negotiations between transmission service users and each of the sellers they would be obliged to deal with if there were no VV;

— the wording of the electricity Directive, which specifically provides for the German Government to regulate transmission tariffs, and which would give rise to a comparable situation to that resulting from the VV, i.e. a uniform tariff method for the whole country.

(b) principles underpinning tariff calculation methods

The aspects likely to give rise to doubts as regards compatibility with Articles 81 and 82 of the Treaty are as follows:

— indexation of tariffs on high-voltage transmission over distances in excess of 100 km might prove dissuasive. As such, it could have a negative impact not just on the German electricity market but also on cross-border trade;

— the use of a weighted minimum distance in cases of multiple network feed-in and extraction points. This might give an edge to electricity producers with access to a large market spread over a wide geographical area (e.g. major producers already present on the market). Equally, a distance-based weighting could result in the market being partitioned into geographical areas which it would not be viable for non-local producers to enter. In addition, electricity traders who had built up a diversified portfolio of production contracts might use the method to reduce their transmission costs.

These two aspects should be seen in the context of the German situation, in which most network operators are also electricity producers and therefore potentially sensitive to developments on the electricity market.
(c) the price levels resulting from implementation of these principles

The simulations presented by the parties point to price levels which are a priori higher than those charged in other Member States for comparable transmissions. This is thought to be due to the chosen method of determining costs.

Conclusion

The Directorate-General for Competition has conveyed its reservations to the parties to the VV but has not launched proceedings to have the agreement declared illegal. It has decided to observe the agreement’s practical impact before deciding whether its reservations — which are theoretical at this stage — prove founded, in which case it would be obliged to take action.

TÜV/Cenelec

Cenelec (Comité Européen de Normalisation Électrotechnique - European Committee for Electrotechnical Standardisation) is a private association for the harmonisation of technical standards for electrical equipment within the Community. Cenelec created a commonly agreed mark of conformity for household and similar electrical appliances (in short “Keymark”). Under the rules and regulations, only one member per country was admitted, which excluded the complainant (TÜV — Technischer Überwachungsverein), a body empowered by the German authorities to issue certificates of compliance. In a series of negotiations and exchanges of letters, an agreement with Cenelec was reached whereby access to the “Keymark” was opened up to all qualified certifiers who might apply and ensuring that their applications could be dealt with in an open and transparent manner. These fair proceedings will serve as a model for application procedures in related fields. The TÜV has withdrawn its complaint.

2.2. Vertical agreements

Sony

As in previous years, the Commission has paid close attention to the licensing schemes and distribution systems existing in the video games area. Thus in 1998 it completed its investigation of the licensing agreements used by Sony Computer Entertainment Europe, a leading supplier of video game consoles and compatible games.

In order to allow independent software companies to develop and publish games compatible with its console systems, Sony set up a licensing scheme granting independent software companies access to certain of its intellectual property rights. Under the original agreements in question, developers and publishers were obliged to obtain Sony’s prior approval of the project before they were allowed to develop or launch their games. Licensed developers and publishers were not allowed to have their games developed or published by a company not authorised by Sony. Sony’s licensees were also obliged to have their games manufactured by Sony.

The Commission found that the agreements restricted competition and had an appreciable effect on trade between Member States. It therefore notified its objections to Sony. Following consultations with the Commission, Sony decided to modify its licensing agreements.
Sony’s new licensing policy does not restrict the development, marketing and manufacturing activities of the licensees. The approval rights imposed on publishers before the commercial release are non-restrictive, and all game software will be tested either by an independent testing service or by Sony’s testing service, and only for compliance with clear, non-objectionable specifications and well-defined criteria.

On the basis of the above, the Commission terminated the proceedings.

With the closure of this case and of the previous cases concerning Sega and Nintendo,\(^{23}\) the Commission has satisfied itself that all three significant video game console suppliers license their technology in accordance with the competition rules. As a result, competitive structures across the market have been significantly improved, to the benefit of independent developers of video games and of European consumers.

**Danish Tennis Federation (DTF)**

The Commission has approved the sponsorship agreements between the Danish Tennis Federation and its tennis ball suppliers.

On 26 March the Commission informed the DTF that its sponsorship agreements with tennis ball suppliers no longer raised competition problems.\(^{24}\) This is the first time the Commission has come to a formal conclusion on the contents of a sponsorship contract for sports goods.

Approval follows agreement by the DTF to amend its contracts along the lines suggested by the Commission. An Article 19(3) notice was published in the Official Journal on 9 May 1996 (OJ C 138), in which the Commission announced that it intended to grant negative clearance.

The DTF has agreed to call for tenders every two years to choose a sponsor. Selection will be transparent, open and non-discriminatory. The selected sponsor will be granted the denomination “sponsor of the DTF” (but not “official”) and will be the only tennis ball supplier of the DTF for a two-year period. In exchange, it will supply a quantity of balls at a preferential price.

In the past, exclusivity contracts were granted unilaterally by the DTF and balls obtained outside the official network — by means of parallel imports — could not be used. This is no longer the case. In addition, denominations such as ‘official ball’ or ‘official sponsor’, which may mislead consumers, have been abolished.

**SICASOV**

On 14 December the Commission adopted a decision\(^{25}\) exempting, pursuant to Article 81(3) of the EC Treaty, standard agreements covering the production and sale of seeds protected by plant variety rights in France. These agreements are concluded between Sicasov (Société Coopérative d’Intérêt Collectif Agricole Anonyme à Capital Variable, Paris) and multipliers. Sicasov groups together the breeders of plant varieties protected in France, and its role is to manage plant varieties entrusted to it

\(^{23}\) 1997 Competition Report, point 80.


\(^{25}\) OJ L 4 of 8.1.1999
by breeders (or their assignees). This entails concluding seed-production contracts with multipliers, which are the enterprises which multiply seed in order to meet farmers’ needs.

The products in question are seeds protected by plant variety rights (under French law or the relevant Community law). Community and national provisions lay down detailed rules governing seed production and sale. On the basis of those provisions, seeds can be sub-divided as follows:

— basic seed: seed which is not intended for sale to farmers for sowing but is intended solely for producing additional seed. As such, it can be compared to intermediate industrial machinery;

— certified seed: seed which is generally intended for sale to farmers for sowing. As such, it is to some extent comparable to a finished industrial product covered by a patent;

— technical seed: certified seed which, in some countries, may lawfully be used to produce new certified seed (and thus serves the purpose of basic seed), whereas, in other countries, it may only be sold to farmers (and thus serves the purpose of certified seed).

In order to be lawfully marketed, seed must belong to a variety which has been entered in one of the national catalogues on a prior basis, in accordance with the rules applicable in the various Member States. After a certain period of time, the variety is entered in the common catalogue, which enables the seed of the variety in question to circulate freely within the European Community without restriction.

Sicasov has notified the Commission of standard agreements by which it granted multipliers (referred to hereinafter as ‘licensees’) a non-exclusive licence to reproduce and sell seed in France (or, in the case of seeds protected by a Community scheme for plant variety rights, throughout the Community).

First, the standard agreements contain a series of clauses which make basic seed and technical seed subject to Sicasov’s controls. Thus the agreements prohibit licensees from carrying out (direct and indirect) exports of basic seed and require them to ‘reclassify’ technical seed before exporting it. The decision states that these clauses are covered by plant variety rights and, as such, are not covered by Article 81(1) of the EC Treaty (cf. Court of Justice judgment in Case 27/87 Erauw Jacquery v La Hesbignonne [1988] ECR 1919).

Second, the standard agreements contain clauses prohibiting the export of certified seed to countries which are not Member States or to countries which do not grant legal protection for plant varieties. The decision finds that this obligation is not covered by the prohibition provided for in Article 81(1) of the EC Treaty.

Lastly, the standard agreements contain a clause whereby the licensee may not export certified seed directly to Member States other than France in so far as the variety to which the seed in question belongs has been entered in the common catalogue for less than four years. The decision finds that this obligation is designed to restrict competition and that it is therefore covered by Article 81(1) of the EC Treaty. It also takes the view that the agreements do not form an integral part of a national market.

27 Reclassification effectively prevents exported seed from being used for reproduction acts (beyond the control of the breeder) in the country of destination.
organisation and that they are not necessary for the attainment of the objectives set out in Article 33 of the EC Treaty. Accordingly, the decision states that an exception under Article 2 of Regulation No 26/62 must be ruled out and that, by the same token, Article 81(1) of the Treaty is applicable. However, under the decision, the obligation in question can be exempted pursuant to Article 81(3) of the Treaty in so far as it facilitates the dissemination of new varieties in Member States other than France. Firms in those Member States will be encouraged to conclude licence and distribution agreements for new varieties since they will be sure that they will not be subject to direct exports by French licensees for four years. Accordingly, even if this obligation restricts exports, it must be exempted because it helps to promote technical progress and the distribution of new products to the benefit of consumers.

On the basis of the above considerations, the Commission decided to adopt an exemption decision under Article 81(3) of the EC Treaty which will apply until 26 October 2004.

3. Rejections of complaints

**NALOO, SWSMA, JW Soils Suppliers**

On 22 April and 28 July the Commission decided not to act on complaints concerning alleged past infringements of the ECSC Treaty.

The complaints:

Before 1990, the state-owned British Coal Corporation (BCC) accounted for around 95% of coal production in the United Kingdom. The remaining 5% was produced by private mines which, under the 1946 Coal Industry Nationalisation Act, had to pay the BCC royalties on each tonne produced. When the Central Electricity Generating Board (CEGB) was privatised, new supply contracts were concluded for coal purchases between the privatised generating companies, BCC and the mines in the United Kingdom. These new contracts took effect on 1 April 1990.

The day before, the National Association of Licensed Opencast Operators (NALOO) had lodged a complaint with the Commission alleging that the price paid to its members was too low and that the royalty set by BCC was excessive. Similar complaints were lodged by the South Wales Small Mines Association (SWSMA) and JW Soils Suppliers, a coal producer.

The complainants relied inter alia on:

— Article 63 ECSC, prohibiting systematic price discrimination. The parties alleged that the generators had infringed that article in that they offered better conditions to BCC than to other coal mines.

— Article 66(7) ECSC or Article 82 EC, prohibiting abuse of a dominant position. NALOO alleged that BCC had infringed Article 66(7) ECSC by imposing excessive royalties on private mines.

28 The CEGB was the monopoly power producer in the UK. Its assets have been split up between National Power and PowerGen, amongst others.
— Article 65 ECSC or Article 81 EC, prohibiting agreements restricting competition. NALOO alleged that the contracts between BCC and the private mines restricted competition in that the rate of royalties set out in those contracts was excessive.

The Commission took action on the private mines’ complaints and ruled that as of 1 April 1990 the price received by private mines should be increased and the royalties charged by BCC reduced. On 23 May 1991 the Commission rejected the complaints relating to the situation after 1 April 1990.29

NALOO was not satisfied with the reduced royalty set by BCC and challenged the Commission’s decision.30 Furthermore, two of the NALOO and SWSMA members brought actions before the British courts for damages for past injuries allegedly suffered before 1 April 1990. These actions led to two preliminary rulings: Banks31 in 1994 and Hopkins32 in 1996, in which the claims were rejected.

After the Banks judgment was handed down, NALOO lodged a new complaint with the Commission concerning alleged infringements before 1 April 1990 (excessive royalties and discriminatory pricing). Reacting to NALOO’s new complaint, BCC called on the Commission to rule under Article 35 ECSC that it had no jurisdiction to hear NALOO’s complaint or, alternatively, to reject the complaint on legal grounds without examining its merits. When the Commission did not reject NALOO’s complaint within the two-month period stipulated in Article 35 ECSC, BCC brought an action before the Court of First Instance for annulment of the implied decision of refusal resulting from the Commission’s failure to reject NALOO’s complaint outright. BCC’s application was, however, dismissed by order of the Court on 29 April 1998.33

Subsequently the Commission decided, on 27 April and 28 July 1998, to take no action on the NALOO and SWSMA complaints. NALOO and SWSMA are challenging these Commission decisions in two actions brought on 8 June 199834 and 6 October 1998 respectively.

Required prospective effect

The Commission did not publish the decision to take no action on the complaint lodged by NALOO in 1994, taking the view that:

— the imposition of allegedly excessive royalties did not constitute an infringement of Article 65 ECSC;

— it was not empowered to deal with past infringements under Articles 63(1) and 66(7) ECSC;

— NALOO had not provided sufficient evidence in support of its complaint.

The issue of “evidence” is not specific to the ECSC Treaty and will not be developed further.

33 Case T-367/94 BCC v Commission, Order of the Court of First Instance of 29 April 1998.
Application of Article 65

The Commission did not accept NALOO’s contention that BCC’s licence agreements infringed Article 65 in that the rate of royalties set out in those agreements was excessive. It drew a parallel between the competition rules of the EC Treaty and those of the ECSC Treaty. It then relied on the case-law of the Court of Justice on the imposition of excessive prices, which is based exclusively on Article 82 EC.

Application of Articles 63(1) and 66(7) to past infringements

The Court judgment in Hopkins refers to the prospective wording of Article 63(1), which empowers the Commission to make appropriate recommendations when it “finds that discrimination is being systematically practised by purchasers”. The wording of Article 66(7) is also prospective in that the Commission may make recommendations to undertakings in a dominant position in order to “prevent the position from being so [for purposes contrary to the Treaty] used” (paragraph 17).

In paragraph 19 the Court expressly addresses the issue of applying Article 63(1) to restrictive practices in the past:

“In order to ensure the effectiveness of the prohibition laid down in Article 4(b), the powers conferred by Article 63(1) on the Commission must be such as to enable it, not only to oblige the authorities of the Member States to bring to an end for the future any systematic discrimination which the Commission has found to exist, but also, on the basis of that finding, to draw all the consequences as regards the effects which such discrimination may have had in relationships between purchasers and producers within the meaning of Article 4(b) even before the Commission took action. That same finding may be relied on by the persons concerned before the national courts.”

The Commission interpreted this statement as follows:

— it can recommend that Member States bring to an end for the future any systematic discrimination it has found to exist. This merely confirms the prospective interpretation of Article 63(1);

— it can deal with discrimination occurring in the past only if this is necessary to ensure the effectiveness of the prohibition laid down in Article 4(b).

In the NALOO complaint, for example, the Commission was called upon to intervene in 1994 with regard to alleged infringements that took place between 1973 and 31 March 1990. The Commission found that it was not empowered to deal with these infringements under Article 63(1) as this was not necessary in order to ensure the effectiveness of Article 4(b). The same reasoning, applied mutatis mutandis, underlies its decision not to act under Article 66(7).

This does not, of course, mean that the Commission could never be competent to deal with infringements of Article 63(1) and 66(7) that occurred in the past. It merely makes such intervention conditional upon the necessity to ensure the effectiveness of Article 4, a condition that was not met in the cases at issue in the decisions.
**IFCO**

The Commission has given the green light to the IFCO (International Fruit Container Organisation) packaging system. The IFCO system is a way of packing fruit and vegetables using standardised, collapsible and reusable plastic crates. The boxes are produced by subsidiaries of the firm Schoeller Plast Holding GmbH and are used for the transportation of goods between producers, grocers and shops by twelve big German food trading companies. The crates were introduced at the end of 1992, when the trading chains informed their suppliers that they would prefer goods to be packed in plastic crates. Two members made their use obligatory.

Following complaints lodged by some of the traders and fruit producers, the Commission examined the IFCO system in the light of the competition rules of the EC Treaty. In the course of the procedure the Commission demanded substantial modifications to the system. Accordingly, mandatory use of the crates and other aspects, such as fixing standard contracts, lump-sum payments to IFCO, an arbitration system for users and the obligation for the food traders to exchange detailed information about trade flows were abolished.

In a press release dated 3 June 1993 (IP(93)430) and in letters to food traders, the Commission informed the public of these modifications.

The Commission closely observed developments in the relevant sectors and carried out extensive market research. On the basis of this analysis and taking account of the aforementioned modifications, the Commission concluded that the IFCO system did not contain any competition restrictions under Article 81(1) of the EC Treaty, in particular because the use of the crates was unilaterally organised by IFCO/Schoeller, which lent their products to users on a bilateral contract basis. The IFCO system is therefore in direct competition with other packaging systems, i.e. those based on plastic, wood or cardboard, and Article 81(1) is inapplicable.

The Commission also ruled out a dominant position by IFCO members in the light of their market share.

On the basis of the above considerations, the complaints of two associations have been rejected.

**EUDIM**

On 17 September the examination of the agreements notified by EUDIM (European Distributors of Installation Materials) in November 1995 was concluded with the dispatch of a comfort letter. EUDIM, which is based in Switzerland, is an association of wholesalers in plumbing, heating and sanitary (bathroom) equipment, generally one per country, which are leaders in their home markets.

The notification of the agreements was a stage in the proceedings initiated by the Commission in February 1991 following the lodging of a complaint by Van Marcke NV. The Commission sent EUDIM a statement of objections in February 1995 in which it raised the issue of a gentlemen’s agreement in respect of information sharing whereby each member of EUDIM refrained from entering the market of the other members without prior authorisation. While denying the existence of a market-sharing agreement, EUDIM agreed to supplement and clarify its agreements so as to bring them into line with...
the competition rules. The Commission reacted favourably to the notified agreements, publishing a summary of their contents. 35

In its decision to reject the complaint, the Commission provided an in-depth evaluation of the conditions of competition on the relevant market which had led it to conclude that any competition restrictions on the part of EUDIM were not appreciable. The Commission also confirmed its policy of not adopting a formal decision of negative clearance on notified agreements unless this was deemed in the Community interest. Apart from the fact that any restrictions were regarded as not appreciable in the case in point, account was also taken of the existence of competition-law guidelines on cooperation between wholesalers such as that which took place within EUDIM, the publication of a notice pursuant to Article 19(3) of Regulation No 17 and the renewal of healthy competition following the Commission’s intervention, together with the fact that the Commission is not obliged to take action on complaints where the practice in question has ceased.

**Micro Leader/Microsoft**

On 15 October the Commission decided to reject a complaint lodged by the French company Micro Leader Business against Microsoft Corporation and its subsidiary Microsoft France.

Micro Leader is a French software and hardware distribution company which purchased French-language Microsoft software packages in Canada and then resold them in France. The software distributed in Canada was sold with a licence for use exclusively in Canada. Microsoft took action together with the French customs authorities to try and prevent this resale in Europe and to protect its copyright. Micro Leader lodged a complaint with DG IV on 24 September 1996, claiming that Microsoft’s actions to prevent the parallel import of its software into Europe from Canada infringed Articles 81 and 82 of the EC Treaty. According to Micro Leader, the actions taken by Microsoft’s subsidiaries and their distributors in Canada and France constituted agreements and concerted practices designed to prevent, by illegal means, the import of products into the EEA and to set their resale prices within that territory, and as such were also abuses of a dominant position.

The Commission took the view that Microsoft’s actions to prevent the import of copies of its products from Canada could not be regarded as resulting from an agreement or concerted practice between Microsoft and its resale agents to fix resale prices. Computer programs are protected by copyright in the European Union as defined by the directive on the legal protection of computer programs (Council Directive 91/250/EEC of 14 May 1991, OJ L 122 of 17 May 1991). This directive states that the first sale in the Community of a copy of a program by the rightholder, or with his consent, exhausts the distribution right within the Community of that copy. The purchase of a copy of a computer program does not exhaust the legal protection provided for in the above-mentioned directive. Thus any attempt to use or to sell such a copy in the Community would be an infringement of copyright, and any action by Microsoft to prevent the import of such copies would constitute an attempt to enforce its legitimate rights rather than an agreement or concerted practice between Microsoft and its distributors, whether in Canada or in the Community. In addition, there is no evidence to suggest that Microsoft sought to influence the prices at which its products were resold by its distributors.

The Commission also took the view that Microsoft’s actions to prevent the import of copies of its software for which no user licence has been granted in the Community and which, accordingly, benefit from legal protection in the Community, constituted legitimate enforcement of its copyright and could

35 OJ C 111, 17.4.1996.
not be deemed to be an abuse pursuant to Article 82 of the EC Treaty. The Commission did not consider it necessary to issue a ruling on a possible dominant position by Microsoft on the relevant market.

**Greene King/Roberts**

Mr and Mrs Roberts operate a pub owned by Greene King. In May 1997 they lodged a complaint with the Commission to the effect that the beer tie (the obligation in their lease to buy most of the beer they sell exclusively from Greene King, their landlord/brewer) infringed Article 81. A ruling in the Roberts’ favour would allow them to buy beer from the suppliers of their choice, thereby benefiting from substantial discounts.

The assessment in this case is based on two tests set out in the *Delimitis* judgment whereby it can be decided whether the cumulative network of agreements of individual brewers is caught by the EC competition rules.

The first test is whether the relevant market is foreclosed. The Commission takes the view that, in the light of the information currently available, the UK on-trade beer market continues to be foreclosed. In 1997 between 50 and 58% of throughput on the UK on-trade beer market was covered by restrictive agreements.

The second test is whether the network of agreements of an individual brewer contributes significantly to that foreclosure. The Commission has concluded that Greene King is too small to contribute significantly to the foreclosure of the UK on-trade beer market, given that the company’s sales in its managed, tenanted and loan-tied estate account for only 1.3% of the UK on-trade market. This is considerably less than the 5% (or more) that each of the big UK brewers (Scottish & Newcastle, Bass, Whitbread and Carlsberg-Tetley) realises in its tied network (including restrictive agreements with non-brewing pub companies).

The reasoning applied to Greene King is also valid for leases of other small and regional UK brewers and for leases of non-brewing pub companies supplied by more than one brewer. The decision of 6 November 1998 to reject this complaint can therefore be considered a clear precedent for the companies concerned and the pubs forming part of their tied networks.

**Tambue**

On 21 September the Commission decided to reject a complaint and a request for interim measures against Ordre national des avocats de Belgique (ONAB).

The Commission concluded that the complaint was not of sufficient Community interest owing to the fact that, first, the measures challenged — the ONAB rules on pupillage and vocational training, which require students to pass an examination before the end of the second year of training in order to obtain the certificate of aptitude for the practice of law (CAPA), together with the limitations imposed by the local bar associations on the number of trainees per pupil master and the conditions for becoming a pupil master — essentially take effect within a single Member State and, second, that the complainant had not exhausted the possibilities of applying to the national competition authorities and/or the

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national courts. The request for interim measures was rejected as the Commission can take such measures only if they are essential in order to prevent the right to take decisions granted by Article 3 from becoming ineffective or even a dead letter as a result of the actions of certain firms.

In short, the Commission took the view that its policy with regard to the professions, as recently upheld by the Court of Justice in its judgment in Case C-35/96 Commission v Italy ([1998 ECR I-3851], was sufficiently clear to leave the national competition authorities and/or national courts in no doubt that Articles 81 and 82 of the Treaty are applicable to the professions and may be applied directly by those authorities. The difficulties encountered by the complainant with the application of Belgian competition law to the professions were not regarded as automatically transferable to the direct application of the two Treaty provisions.

4. Rejection of application for interim measures

**Vickers/Rolls-Royce**

This case concerns the relationship between trade mark rights and the Community rules on competition. In rejecting an application for interim measures, the Commission pointed out that, at the stage of a preliminary appraisal, the assessment under competition law of a clause granting the trade mark owner the power to terminate a trade mark licence on a change of control of the licensee did not seem to be different from that of a provision preventing the licensee from assigning or sublicensing the benefit of the agreement to third parties. The Commission has normally not considered the latter to be anticompetitive, recognising instead that it is intended to provide the trade mark owner with the means to ensure that the quality associated with the mark is maintained.

In January, Vickers plc, the ultimate parent company of the Rolls-Royce Motors Group, lodged a complaint in which it alleged that the agreements between Rolls-Royce Motors Group and Rolls-Royce plc, relating to the licensed use by the former of the Rolls-Royce name and relevant trade marks, infringed Article 81(1).

In this connection it should be recalled that Rolls-Royce Motors Group, which manufactures and sells luxury motor cars under the ‘Rolls-Royce’ and ‘Bentley’ names and trade marks, and Rolls-Royce plc, which manufactures, in particular, gas turbine and nuclear propulsion systems, are two separate and unconnected undertakings, although both use the name ‘Rolls-Royce’ in their company name. In March 1973, Rolls-Royce (1971) Limited, now named Rolls-Royce plc — to which ownership of the Rolls-Royce name and trade marks was assigned after the old Rolls-Royce Limited went into receivership — and Rolls-Royce Motors Group notified to the Commission a number of agreements whereby Rolls-Royce (1971) Limited granted Rolls-Royce Motors Group the right to use the Rolls-Royce trade marks on motor cars and engines manufactured by the latter. At that time the notification was settled by the sending of a comfort letter in which the Commission indicated that it was closing the file since the agreements did not restrict competition.

In the present complaint, Vickers objected to a clause in the licence agreements which gave Rolls-Royce plc the right unilaterally to terminate the Rolls-Royce Motors Group’s right to use the Rolls-Royce name and trade mark in the event of the motor car business coming under the control of a non-UK resident, including a company or individual resident in another EEA country (residence clause).

As Vickers was proposing to dispose of the Rolls-Royce Motors Group, it requested the Commission, as a matter of urgency, to adopt interim measures. In particular, it requested an order restraining Rolls-
Royce plc from enforcing or seeking to enforce the residence clause. Vickers alleged that the threat by Rolls-Royce plc to exercise that clause would disrupt the open and fair competitive auction of Roll-Royce Motors Group and that Vickers would be denied the opportunity of receiving valuable consideration for it.

By decision of 6 April the Commission rejected Vickers’ application for interim measures, taking the view that, on the evidence provided, the criteria for the adoption of such measures were not met.

For the reason given above, the Commission concluded that the provision at issue was not likely prima facie to constitute an infringement of the Community competition rules. This was all the more so as, even in the market identified by Vickers as the relevant market, i.e. the luxury car sector, it was not clear that the clause objected to had a significant impact on the conditions of competition by preventing a non-UK resident purchaser from acquiring the Rolls-Royce Motors Group. In particular, Vickers had failed to show that the purchase of an existing player was the only way for a company to increase its share of, or enter, that market.

Lastly, given that Rolls-Royce plc supported the sale of Rolls-Royce Motors Group to a non-UK resident, it did not seem that, in the present case, the residence clause would have had the significance which Vickers claimed.

The Commission also pointed out that, in so far as Vickers disputed the ownership of the Rolls-Royce name and trade mark, such a dispute fell within the remit of the national courts and not of the Commission.

As regards the risk of serious and irreparable damage establishing an urgent need to adopt interim measures, the Commission took the view that this condition had not been met either. In fact, Vickers did not say anything about the need for it to sell its interests in Rolls-Royce Motors Group or about the impossibility of continuing to operate the Rolls-Royce business. The urgency appeared to be entirely of Vickers’ own making in the light of its decision to dispose of the Rolls-Royce Motors Group, and was therefore subjective rather than objective.

In the event, on 3 July Volkswagen acquired the Rolls-Royce Motors Group from Vickers. This transaction was notified to the Commission pursuant to Article 4 of Council Regulation (EEC) No 4064/89. Subsequently, BMW AG acquired the rights to the Rolls-Royce name and trade mark for use in motor cars from Rolls-Royce plc and granted a licence to Rolls-Royce Motors Group, now owned by Volkswagen, to use the Rolls-Royce name and trade mark until 31 December 2002.

Subsequent to this acquisition, the complaint was withdrawn in September and the case was closed.

5. Settlement

IRE/Nordion

The Commission has terminated proceedings it initiated under Article 82 of the EC Treaty against Nordion for abuse of a dominant position. Nordion is a Canadian company active on the world market for the production and sale of molybdenum 99 (Mo-99), a base product for radiopharmaceuticals used in nuclear medicine. The product is used primarily for the early detection and diagnosis of cancer, cardiovascular disease and AIDS.

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The Commission’s decision followed the undertaking given by Nordion to formally renounce the exclusivity clauses in its sales contracts with European customers. The Commission took the view that withdrawing the exclusivity clauses would restore and guarantee competition in the sector. The opening-up of the market should have an immediate positive impact in so far as European purchasers are henceforth completely free to buy Mo-99 from any other supplier.

In 1996, the Commission received a complaint from a Belgian company, IRE (Institut National des Radioélements), Nordion’s main competitor, which was directed in particular against the conclusion of exclusive, long-term supply agreements for Mo-99 between Nordion and its principal worldwide customers. Following this complaint, the Commission initiated Article 82 proceedings in February 1997 and sent a statement of objections to the Canadian producer for abuse of a dominant position. In this it was stated that the conclusion of the exclusive contracts prevented the sole European competitor, IRE, from developing, at the risk of ultimately eliminating it from the market, and made the entry of potential new competitors impossible.

After the Commission had made its objections known, Nordion decided not to enforce its exclusive rights through its contracts with its European customers.

IRE thereupon withdrew its complaint.

In addition, the Commission learnt of the enquiry carried out in Japan by the Japanese Fair Trade Commission, which led to a recommendation being adopted by that authority on 24 June to the effect that exclusivity clauses between Nordion and its Japanese customers should be annulled.

The Commission will closely monitor the situation to ensure that Nordion’s renunciation of its exclusive rights is strictly adhered to in practice, and that there is no resulting distortion of competition in this important public health sector.

**SPEGNN**

In 1992, SPEGNN[^37] lodged a complaint alleging that Gaz de France (GDF) had abused its dominant position. The complaint centred on GDF’s alleged attempts to prevent independent municipal distribution companies from expanding their gas distribution businesses in parts of France not covered by GDF. The question of law at issue stemmed from the application of the French 1946 nationalisation law granting GDF a monopoly for the distribution of gas in France. An exception from that monopoly was granted to a few municipal distribution companies which were not nationalised in 1946, some of which still operate independently today. These companies have encountered difficulties when seeking to expand with a view to satisfying demand in neighbouring areas. GDF argued that the distribution monopoly granted to it by the French nationalisation law prohibited independent municipal operators from expanding their activities.

The Commission prepared a decision establishing that France had infringed Article 86(1) in conjunction with Article 82 of the EC Treaty. By allowing GDF to invoke the provisions of the French nationalisation law to prevent independent municipal operators from meeting demand which it was not able to satisfy itself, the French authorities had enabled GDF to abuse its dominant position. The Commission adopted the decision on 9 July 1997 but delayed implementation. On 3 June 1998 the

[^37]: Syndicat Professionnel des Entreprises Gazières Non Nationalisées.
French Parliament adopted a new law to bring the infringement identified by the Commission to an end. The new law provides for the following framework:

— municipalities wishing to have a gas distribution network installed and operated in their territory by GDF must apply to the local authority within three months of publication of the implementing decree;

— a final list of municipalities in which GDF should, within three years of the list being adopted, build and operate a gas distribution network is to be drawn up by the Minister for Energy. The Minister will examine a business plan and study assessing the potential impact of the envisaged distribution on other energy sources;

— municipalities which have not applied to be included in the GDF distribution network and municipalities not featuring on the final list are free to conclude concession contracts, on their own or together with neighbouring municipalities, with the gas distribution network operator of their choice to operate a gas distribution network. This also applies to municipalities which wanted to be included in the GDF network, but for which GDF did not start building the network within the three-year time limit;

— any new operators, i.e. other than GDF or the existing independent municipal distributors, must be licensed by the Minister for Energy. At least 30% of the shares in such operators must be held by the State or by a public enterprise.

This framework should allow municipalities without a gas distribution network to enter into a concession agreement with the operator of their choice or to operate a gas distribution service themselves. The new law appeared to resolve the issues raised by the complaint. The Commission decided to close the file on the case after publication of the decree implementing the law.\(^{38}\)

B — New legislative provisions and notices adopted or proposed by the Commission

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\(^{38}\) Press release IP/99/291.

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40  1 = Negative clearance 81(1) or 82
2 = Individual exemption 81(3)
3 = Conformity with notice/block exemption.
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II — MERGER CONTROL: COUNCIL REGULATION (EEC) NO 4064/89
AND ARTICLE 66 OF THE ECSC TREATY

A — Summaries of decisions taken under Article 6(1)(b) of Council
Regulation (EEC) No 4064/89

1. Merger proposals where undertakings have been given by the firms involved

**ABB/Elsag Bailey**\(^{41}\)

ABB Transport Participations (ABB TP), a part of the ABB engineering and technology group, is
active in a range of engineering activities including process control. The target company, Elsag Bailey,
is a subsidiary of Finmeccanica SpA and active only in process control automation.

The Commission’s investigations showed that one particular type of product, namely the process
analyser known as an on-line gas chromatograph, should be considered a separate product market. The
relevant geographic markets were considered to be at least Europe-wide, given the legislative
harmonisation of standards and codes throughout Europe, public procurement obligations, low
transport costs and buyer power on the part of customers.

Two factors led the Commission to raise serious concerns with regard to a dominant position of the
parties. First, on either geographic definition, the acquisition would give the new entity a very strong
position. The parties would reach combined market shares of at least three times those of their nearest
competitor, and at most over two thirds of the market. Second, there was hardly any competitor
capable of operating across the full range of technical applications for which the relevant ABB TP and
Elsag Bailey products could be used.

In order to remove these concerns ABB TP submitted a proposal for modification of the operation in
accordance with the terms of Article 6(2) of the ECMR. This proposal involved an undertaking to
divest the Analytical Division of Elsag Bailey’s subsidiary, Applied Automation Inc., based primarily
in the United States, but with some relevant operations in Europe and Asia. The AAI business
activities to be divested are based mainly in the US, and cover Elsag Bailey’s interest in gas
chromatographs as well as in the development of a mass spectrometer product.

**Johnson & Johnson/ Depuy**\(^{42}\)

The activities of Johnson & Johnson (J&J) include a wide range of hygiene products, pharmaceuticals
and professional high-tech medical products used by hospitals and doctors. The target company DePuy
is a subsidiary of Roche and is active in the development, production and sale of orthopaedic products.

The Commission found significant overlaps in one segment of the spinal implants market, namely the
segment of reconstructive implants for hips and knees.

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\(^{42}\) 28.10.1998

COMPETITION REPORT 1998
The geographic market was defined by the parties as being EEA-wide due to the ongoing legal harmonisation and accelerated price approximation. The Commission, however, defined national markets, reasoning that customers’ requirements included training and assistance for which the maintenance of national representations was indispensable. Moreover the Commission found that national public reimbursement systems in a number of countries had partitioned off the markets.

The Commission concluded that the operation would have a significant impact in Ireland. Several circumstances led the Commission to raise serious concerns regarding common market compatibility. First, the Irish market is a small market where the public tender procedures are not yet fully developed. Second, combined market shares of the merging entity would be extremely high with a considerable distance to the next competitors, who would have only a marginal position. In addition, the new entity would acquire uncontested leadership in both hip and knee implants.

To remove these competition concerns, J&J undertook to divest its orthopaedic sale and distribution business in Ireland to a competitor in the hip and knee implant sector independent of the parties. The sale will comprise inventory, all contracts in Ireland, know-how, technical and commercial information and other assets required by the purchaser to promote the marketing and sale of the products in Ireland.

**Akzo Nobel/Courtaulds**

Akzo Nobel, a Dutch corporation, is an international manufacturer of coatings, fibres, chemicals, and healthcare products. The target company, Courtaulds, produces coatings, sealants, chemicals, fibres and polymer products.

Akzo’s and Courtaulds’ activities are largely complementary. Competition concerns, however, were found to arise from the operation in the markets for aerospace coatings and sealants. Aerospace coatings are highly specialised coatings supplied to aircraft manufacturers, maintenance companies, airlines, etc. Aerospace sealants are used to seal joints in aircraft, notably in fuel tanks.

The parties argued that the geographic scope of the markets for aerospace coatings and aerospace sealants is at least the EEA. The Commission did not proceed to a final definition. It confirmed that the markets for aerospace coatings and aerospace sealants are at least EEA-wide markets, but found that there were indications that both markets could be global markets.

Competition concerns invoked by the Commission were based on existing high market shares and the significant increment as a result of the merger. In aerospace coatings, Courtaulds and Akzo Nobel, through its joint venture ADAF with the American company Dexter, are the two leading suppliers in Europe. Their combined market share would comprise more than 3/4 of the whole market size in the EEA. In aerospace sealants Courtaulds is the world leader with more than 2/3 of the market. Moreover, there are very high barriers to entry to the markets in question. Further concern was related to the presence of ADAF in an R&D project which seeks to develop, inter alia, sealants that could compete with Courtaulds’ current products.

Following negotiations with the Commission, Akzo Nobel undertook to divest the whole of Courtaulds’ worldwide aerospace coatings and sealants business to an independent purchaser who would need to be approved by the Commission. Alternatively, Akzo Nobel had the possibility to

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propose a sale of all its interest in ADAF to its current partner Dexter. Whichever alternative Akzo proposes to adopt the Commission will need to satisfy itself that customers will continue to benefit from competition in the markets of concern, before giving its approval.

Alcatel/Thomson CSF-SCS

Alcatel heads a group of companies active in all types of telecommunication equipment. Thomson-CSF produces electronic systems for both civil and military applications. Alcatel and Thomson notified an operation by which the French undertakings Alcatel, Thomson-CSF and Aérospatiale would contribute their activities in the manufacture of satellites to a newly created joint venture, SCS. SCS will be active in the manufacture of satellites.

Global shares of the parties in the market for travelling waves tubes (TWTs) for satellites were significant. The market for satellites tubes is highly concentrated. The Commission’s investigation showed that there are relatively scarce capacities due to the increasing demand for telecommunication satellites. The market entry barriers are significant.

The Commission found that Thomson’s subsidiary Thomson Tube Electronique (TTE) was by far the most influential supplier and already had a dominant position in the global satellite market. Competitors expressed concerns that TTE could use its market power to apply discriminatory prices to competitors and distort competition in the downstream market for satellites.

In order to dismiss these concerns the parties proposed to undertake to insert an arbitration clause into the general sales terms and conditions of their Satellite JV. The clause provides for an independent third party (the European Space Agency) to act as arbitrator. This arbitrator will settle any litigation that might arise between TTE and any of its customers concerning the sale or delivery of TWTs. The arbitrator will intervene at the request of this customer. It will be empowered to make an award within one month. Under French civil law, both Thomson and the complainant will be bound by the award. Such an award can include injunctions, such as an order to deliver the ordered TWTs, and damages. The arbitrator will also be empowered to carry out any investigation or cross-survey it might find necessary to perform its task.

Thyssen/Krupp

The German firms Thyssen AG (Thyssen) and Krupp are both active mainly in the areas of production and processing of steel and other materials and manufacturing of escalators and elevators. The Commission’s investigations showed that the merger would lead to a serious competition problem only in the market for escalators. The geographic market was defined as EU-wide because all major suppliers of escalators are active throughout the Community and competitive conditions do not differ to a sizeable extent.

This market for escalators is highly concentrated. Besides Thyssen, there are only three other major suppliers in Europe. These are the undertakings Kone, Otis and Schindler, with nearly equal market shares. Since the sale of its escalators business to Kone, Krupp itself is not active on this market any more. Nevertheless, there were some problematic links between Thyssen/Krupp and Kone since Krupp held a 10% shareholding in Kone, had privileges regarding the acquisition of further Kone shares and a

45 2.6.1998.

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seat on the board of directors of Kone. Furthermore, non-competition clauses existed between both companies. In the Commission’s view, the merger as originally notified would therefore lead to a unification of the escalator business of Thyssen with the links of Krupp with Kone.

In the course of the proceedings, Krupp proposed to give up permanently its right to nominate a member of Kone’s board of directors. Krupp committed itself further to enter into negotiations with Kone to annul the non-competition clauses and to give up the privileges regarding the acquisition of further shares in Kone. Thus, in future there will be four independent competitors on this market.

**Neste/IVO**

Neste Yhtymä Oy (Neste) notified the acquisition of sole control of Imatran Voima Oy (IVO). Neste is active in the oil, energy (natural gas) and chemical businesses. IVO’s main business activities consist of power and heat generation, power trading and electricity distribution. The Finnish State controls both companies.

The product markets affected were the markets for natural gas and electricity. Agreeing with the parties, the Commission found that the geographic market followed the location of gas pipelines in Finland.

The Commission found that IVO and Neste had vertical relations in the field of electricity generation that presented competition problems. Neste, through its subsidiary Gasum Oy (Gasum), is the only importer, supplier and seller of natural gas for electricity generation. Gasum controlled by Neste has already prior to the concentration a de facto monopoly on sales of natural gas in Finland. IVO is active in the market for the generation, wholesale and distribution of electricity. The operation as notified would have threatened to create or strengthen Neste-IVO’s dominant position on the market for wholesale sales of electricity in Finland. Following the merger, the Commission concluded that Neste-IVO would have been in a position to control, or at least exert significant influence over, both electricity and gas prices in Finland due to its strong position in both the electricity and the natural gas market.

To address these concerns Neste-IVO undertook to give up its control of Gasum and to reduce its share to a non-controlling minority interest. The shares will be sold to Finnish and European entities independent of Neste-IVO, with a possibility for the State to acquire a maximum of 24%. Through these undertakings, Neste-IVO’s position in Gasum will change from one of sole control over the company to one of a minority owner.

**Allianz/AGF**

The German Allianz group is leader of a group of insurance companies and one of the largest industrial insurers in Europe. The target company, Assurances Générales de France (AGF), is a French insurance company active in life and non-life insurance and reinsurance in the EEA and worldwide.

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46 2.6.1998.
47 8.5.1998.
The product market mainly affected by the merger was credit, and in particular “delcredere”, insurance (domestic, export and capital credit insurance market). The Commission had to appraise the operation at both a European and a national level.

The Commission’s investigation showed that the merger between the number one and number two credit insurers in Europe would produce rather high market shares. Those shares are produced in a niche market with a high degree of specialisation where few global players are active. On a European level, the new entity will have, on the credit insurance market, well over twice the shares of the second and more than three times the shares of the third competitor. A similar situation can be observed in Italy where parties already enjoy a dominant position and there is a considerable distance in market shares to the next significant competitor. Nevertheless, those elements as such were not sufficient to raise serious doubts, given the existence of several globally active competitors and evidence of recent market entries, together with the negligible increment in market shares that will result from the merger in Italy. However, the additional impact of existing links between AGF and Coface, the main competitor in delcredere, raised serious concerns with regard to their impact on effective competition.

Consequently, the parties submitted undertakings according to which the structural links between AGF and Coface would be changed to the effect that the two companies compete on the delcredere market as independent entities. According to these commitments AGF, after clearance of the operation, would sell a certain percentage of its shares in Coface to buyers not belonging to the AGF/Allianz group. Furthermore, any personal links existing between companies owned/controlled by one of the parties and companies belonging to Coface would be removed.

Owens-Illinois/BTR Packaging

Owens-Illinois, an American corporation, is an international manufacturer of glass containers, machinery and plastic packaging products and a worldwide licensor of glass technology. The target company, BTR, is a global engineering company and manufactures glass containers in the UK through its subsidiary BTR Packaging.

Along the lines of its previous findings in cases IV/M.603 — Crown Cork & Seal/Carnaud MetalBox and IV/M.081 — VIAG/Continental Can, the Commission confirmed that, due to the lack of interchangeability of the different packaging materials, the relevant product market in the present case was the market for glass containers used to package food products, beverages, wines and spirits. The relevant geographic markets were defined as being national due to lack of cross-border competition, local supply structures and significant price differences between countries.

The Commission concluded that the proposed operation, as originally notified, would have created or reinforced Owens-Illinois’s dominant position in the glass container market in the UK and Ireland. This finding is based on the high market shares of the parties, the low market shares of the remaining competitors, and the lack of competitive pressure from outside the UK due to high transport costs.

To dismiss these concerns Owens-Illinois undertook to divest the whole of the glass container business carried on by BTR Packaging through its subsidiary Rockware Group Limited (Rockware) at its four plants in the UK. Owens-Illinois also undertook to divest Rockware’s 50% interest in a glass recycling joint venture, British Glass Recycling Company Ltd, which was jointly owned with Owens-Illinois.
These commitments completely eliminate the overlap between Owens-Illinois and BTR Packaging in the UK glass container market.

**RAG/Saarbergwerke**

After a detailed investigation under Article 66 of the ECSC Treaty, under which the Commission examines concentrations in the coal and steel industries, the Commission authorised, subject to conditions, the acquisition of Saarbergwerke AG (Saarbergwerke) and Preussag Anthrazit GmbH (Preussag) by RAG Aktiengesellschaft (RAG). The three companies are the only three remaining German coal producers. In addition, both RAG and Saarbergwerke are active in coal importing. The companies also have other activities not falling under the ECSC Treaty. These aspects of the proposed operation had already been cleared by the Federal Cartel Office.

The Commission identified competition concerns arising from the proposed operation, particularly in relation to imported coal in Germany. However, following discussions with the Commission, RAG has given commitments to address these concerns. These include the divestment, to an independent third party, of all of Saarbergwerke’s coal importing activities and the complete separation of the sales of domestic coal from the sales of imported coal.

These undertakings would ensure that RAG’s position as an importer of third-country coal is not strengthened. As a result of the complete separation of the marketing of German coal and the marketing of imported coal, there is likely to be no distortion of competition between RAG and its competitors in respect of sales of imported coal in Germany and the transparency of the German market will be improved. Lastly, the Saarbergwerke import operations to be sold include certain transshipment, storage and transport facilities which will further strengthen the position of its future purchaser in the importing of hard coal.

**B — Summaries of decisions taken under Article 8 of Council Regulation (EEC) No 4064/89**

1. **Merger proposals where undertakings pursuant to Article 8(2) of the ECMR have been given by the firms involved**

**Skanska/Scancem**

Skanska is active in building construction, production and distribution of building materials and real estate management. The target company Scancem is active in production and distribution of building materials, primarily cement and other mineral-based materials.

The relevant product markets identified by the Commission were cement, aggregates, ready and dry mixed concrete, pre-cast concrete products and construction. The Commission assessed the operation on the basis of the parties’ national activities, concerning ready-mixed concrete and aggregates. It also assessed the competitive impact of the deal at a regional and local level.

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49 29.7.1998.
50 11.11.1998.
The Commission found that the notified transaction would give rise to the strengthening of a dominant position of the parties in the Swedish market for cement, and possibly also in Finland and Norway. Moreover, it would create a dominant position on the Swedish markets for ready-mixed concrete, dry concrete and pre-cast concrete products. The combined entity would account for over 4/5 of the cement market and for 2/5-3/5 of the other markets. On all these markets the negative effects would follow partly from the superior market power of the combined entity, as evidenced by its high market shares in relation to its smaller and weaker competitors. However, these effects would be substantially reinforced by the vertical effects, resulting from the combined activities of Skanska and Scancem on the raw material markets (cement and aggregates), the construction materials markets (concrete and other construction products) and, finally, on the construction market itself. The combined entity’s wide-ranging activities would also serve as a significant barrier to entry at every level of its activities.

In order to resolve the Commission’s concerns relating to Scancem, Skanska promised to procure the divestiture of Scancem’s cement business in Finland, and also to divest Skanska’s entire shareholding in Scancem. These measures will open up the market by creating an additional independent source of supply, where high-quality cement can be obtained. Moreover, Skanska’s undertaking to divest its shareholding in Scancem will remove the competitive concerns relating to the vertical integration between the companies.

**Hoffmann-La Roche/Boehringer Mannheim**

Hoffmann-La Roche (Roche) is a Swiss company mainly active in the production and distribution of pharmaceuticals, diagnostics, flavours and fragrances. Boehringer Mannheim (BM) is a manufacturer and distributor of diagnostics, pharmaceuticals and biochemicals. DePuy is a manufacturer and distributor of orthopaedic products and devices.

The affected markets where a possible impact on effective competition was identified were in vitro diagnostics (IVD tests used to identify and measure substances in patients’ tissue, blood or urine samples) and DNA probes. In their notification the parties indicated that the markets for in vitro diagnostics are worldwide or at least the EEA. Given the need for a local presence for suppliers, the lack of interchangeability for customers with other products and national distribution systems of major competitors, the Commission found that the markets for in vitro diagnostics and DNA probes remain essentially national.

The Commission concluded that the merger in its notified form would create or strengthen dominant positions in the fields of classical clinical chemistry and immunochemistry diagnostics and DNA probes in a number of national markets.

For classical clinical chemistry and immunochemistry diagnostics the combination of Roche’s and BM’s installed bases would strengthen BM’s dominant position in some countries and facilitate the creation of a dominant position in others. Roche and BM after the merger would have a strong advantage in terms of having the greatest installed bases of instruments.

Furthermore, the merger would remove Roche as a competitor from the market. In some markets Roche would have been among the leading challengers of BM. Existing competitors in the respective countries are already not in a position in terms of market share and installed base to effectively challenge the leadership of Roche/BM. Nor was there sufficient countervailing buying power, because

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51 4.2.1998.

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not even the largest customer of the parties accounts for a substantial amount of either party’s sales. As for the DNA probes market, Roche has a very strong position based mainly on its extensive patent portfolio relating to the main DNA probe technology, the polymerase chain reaction (PCR) technique. The research licences granted by Roche do not give the licensees any right to commercialise products or equipment using the patented PCR technology.

To dismiss the competition concerns raised by the Commission, Roche undertook to divest the most important installed base (Cobas Mira) in the respective countries and to sell it to a single purchaser who is a viable competitor in the clinical chemistry business. Roche undertook further to give access to the PCR technology for all in vitro diagnostic applications to interested market participants on non-discriminatory terms (most-favoured-customer clause). The commitment significantly reduces the addition of installed base and market share in clinical chemistry and will enable the purchaser to immediately act as a full-range supplier. The undertaking will also ensure that there will be several entries from large IVD producers in the DNA probes market.

**Agfa-Gevaert/Dupont**

Both Agfa and DuPont are active worldwide in the production of graphic arts film and offset printing plates.

In defining the product markets the Commission distinguished between the graphic arts film sector and the offset printing plates sector. Within the latter, four different product markets were identified: positive and negative offset printing plates, plates for computer-to-plate technology and electrostatic plates. Due to substantial trade flows and the absence of legislative barriers, geographic markets were defined as being EEA-wide.

The Commission found that the proposed deal in its notified form would lead to the creation of a dominant position of the parties in the market for negative offset printing plates. These offset plates are sold either to printing and publishing firms, such as, for example, newspaper printers or printers of packaging, or to distributors and retailers. The creation of a dominant position was caused not only by the high market shares in the EEA but also by several additional factors.

Most competitors offering negative offset printing plates usually enter into package deals with their customers whereby they agree to provide equipment for free and the customer agrees to purchase its consumables for a certain time from the supplier. Agfa, however, had entered into relations obliging suppliers of equipment to sell certain equipment to Agfa only. These exclusivity contracts reduced the ability of most competitors to offer similar package deals to their customers because the majority of them lack equipment production of their own. Consequently the new entity would enjoy much easier access to customers than its main competitors.

Moreover, Agfa and DuPont concluded exclusivity arrangements with a number of important dealers who were only allowed to offer Agfa or DuPont products respectively.

In order to remove the competition concerns of the Commission, Agfa undertook to cancel its exclusivity arrangements with dealers and suppliers. Afga-Gevaert would release all of its OEM-suppliers of processing equipment for negative plates from any contractual provisions whereby such suppliers of Agfa-Gevaert would be prevented from selling such processing equipment to any third

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52 11.2.1998.
party of their choice. With regard to negative plates, Agfa-Gevaert would release all existing exclusive dealers and distributors of DuPont. This undertaking will allow dealers to sell products of competitors and this will increase inter-brand competition.

Worldcom/MCI II

WorldCom and MCI are publicly quoted telecommunications companies offering the normal range of telecommunications services. Both are also active in the supply of Internet-related services.

Whatever the configuration of the final user’s system, access to the Internet is usually obtained by subscribing for access services provided by an internet service provider (ISP). ISPs offer Internet access services on a commercial basis to paying subscribers.

Within the Internet sector the Commission found that various types of service provision could be distinguished, ranging, for example, from small operators providing little more than retail dial-up services, to bigger players running local networks, and still larger operators running international long distance international networks, which provide the overarching structure of the Internet. The only organisations which are capable of delivering complete Internet connectivity entirely on their own account are the top-level ISPs. If the top-level networks increased the price of their Internet connectivity services the cost base of resellers would be increased by the same amount, and that increase would have to be passed on to the customer. Secondary peering ISPs are not entirely captive to the prices charged by the top-level networks. If they wanted to offer complete connectivity, however, they could not avoid continuing to buy some transit from the top-level networks. Therefore neither pure resellers nor secondary peering ISPs can provide a competitive constraint on the prices charged by the top-level network. Therefore, the relevant market on which the merging parties are active was defined as the market for the provision of top-level or ‘universal’ Internet connectivity.

The parties belong to a small group of internet service providers who have the ability to provide connectivity anywhere on the Internet solely through their own peering agreements and without having to rely on the purchase of a transit service from any other provider. WorldCom is currently the leading player in the market, with MCI one of its principal competitors. After the merger the combined entity would have a share of some 50% of the relevant market. MCI/WorldCom could control market entry by denial of new peering requests, foreclosure or the threat of foreclosure of peering agreements, and/or their replacement with paid interconnection. Moreover, the combination of the Internet backbone networks of WorldCom and MCI would create a network of such absolute and relative size that the combined entity could behave to an appreciable extent independently of its competitors and customers. The Commission therefore concluded that the operation in its notified form would have created or strengthened a dominant position of the parties.

To meet these competition concerns the parties proposed remedies which involved the divestiture of a package including all of MCI’s Internet interests. This commitment was considered sufficient to enable the acquirer to take over the position of MCI as a player in this market.

8.7.1998.

The purchase of a transit service may be described as a right on the part of an ISP to have its traffic treated as the traffic of the transit provider’s network for the purpose of exchange across a peering interface.
2. Merger proposals approved without undertakings

*Price Waterhouse/Coopers & Lybrand*\(^{55}\)

Price Waterhouse (PW) and Coopers & Lybrand (C&L) are two of the so-called Big Six audit and accounting organisations worldwide (the other four being Arthur Andersen (AA), Deloitte Touche Tohmatsu International (DTTI), KPMG, and Ernst & Young (EY)). Both groups are active in the provision of auditing and accounting services, tax compliance and advisory services.

The Commission’s substantive analysis focused on the provision of audit and accounting services to large companies. Such companies are dependent for such services on the Big Six, since only the latter have the necessary depth of resources and expertise, the requisite geographic spread and a sufficiently strong reputation in the financial markets. The Commission found this market to be national in geographic scope in view of national regulatory requirements for statutory audits and professional qualifications, and the need on the part of the service provider for a local presence.

The Commission found that the market in question was characterised by many elements which would be conducive to the creation of collective dominance, such as slow demand, homogeneous products and the fact that suppliers are interlinked via self-regulatory professional organisations. Despite these market characteristics, the Commission found no conclusive proof of the creation/strengthening of dominance given the likely continued participation of these five suppliers in the tender offers and the improbability that a situation of collective dominance at the level of five service providers would be stable over time.

*TKS/ITW Signode/Titan*\(^{56}\)

The Commission had to deal with a joint venture between TKS (a joint venture between Thyssen Stahl and Krupp-Hoesch Stahl) and US-based Signode System GmbH (Signode). TKS produces and distributes quality steel flat products. Titan, a subsidiary of Krupp-Hoesch, has activities in steel strapping, balelocks and seals. The business activity of Signode essentially consists of the production and distribution of strapping band made of steel and plastic.

The Commission concluded that the relevant geographic market for steel and plastic strapping is limited to the EEA area and Switzerland (Western Europe) because the conditions of competition in this area are sufficiently homogeneous and can be distinguished from neighbouring areas and because, taken together, the transport costs and duty payable place imports at a significant disadvantage compared with producers based in the EEA.

The Commission’s investigation showed that ITW Signode and the joint venture would together have between 35% and 40% of the combined market for steel and plastic strapping in the Western European market. The Commission concluded that the operation would not strengthen or create a dominant position for a number of reasons, including the fact that the overall market for strapping was growing, the parties were comparatively weak in plastic strapping, which is growing rapidly, whereas they are stronger in steel strapping, which is in long-term decline. There are a large number of active competitors and barriers to entry into the growing plastic sector are low.

\(^{55}\) 20.5.1998.
\(^{56}\) 6.5.1998.
On this basis the Commission decided not to raise any objections to the notified joint venture and to declare the operation compatible with the common market and with the functioning of the EEA Agreement.

*Enso/Stora*\(^{57}\)

Enso is an international industrial group the activities of which consist mainly in wood procurement and paper merchandising. Stora produces pulp, paper and board.

The three product markets mainly addressed by the investigation were the market for newsprint, the market for magazine paper and the market for liquid consumer packaging boards. The parties stated that all these markets had a global dimension. The Commission admitted that some aspects, such as the phasing-out of customs duties, might point to a gradual shift towards a market which is wider than the EEA. However, the Commission found that those factors were not sufficient to prove this conclusively.

In the markets for newsprint and magazine papers, the deal would cause the concentration of most of the supply in the hands of five major suppliers. The Commission, however, found that neither market was transparent on such key parameters as supplies and prices. Some countervailing purchasing power of the largest buyers appeared to exist, too. Therefore, the Commission found that the change from six to five members of the oligopoly was not sufficiently significant to lead to the creation or strengthening of an oligopolistically dominant position.

In the market for liquid packaging board the new entity would be the leading producer in the EEA with a very high market share with only limited potential competition. However, the demand side is as concentrated as the supply side, and the countervailing buyer power of the main buyers, in particular Tetra Pak, meant that the operation would not lead to the creation or strengthening of a dominant position in the market for liquid packaging board.

The concentration was declared compatible with the common market under Article 8(2) of the ECMR without the attachment of any conditions or obligations. In reaction to the Commission’s statement of objections, the parties, however, undertook to provide a price-protection mechanism for smaller customers. Any increase in their prices to the largest customer would not be less, in percentage terms, than any increase in the prices to the smaller customers. Similarly, any percentage price decrease to the largest customer will not be greater than any percentage price decrease to the smaller customers. The parties also undertook to use their best efforts to facilitate the opening of a duty-free quota on imports of liquid packaging board if requested by one or more Community processors or manufacturers. Thirdly, Enso promised to sell its entire interest in these activities to Elopak. Such a sale would remove any concerns that this link would reduce the countervailing buyer power of Elopak. The Commission took note of these undertakings.

\(^{57}\) 25.11.1998.

*COMPETITION REPORT 1998*
3. Merger proposals declared incompatible with the common market under Article 8(3) of the ECMR

Bertelsmann/Kirch/Premiere

The parties to the proposed merger were CLT-UFA, a joint venture between Bertelsmann AG and Audiofina SA, and Kirch, the leading supplier of cinema films and TV entertainment programmes in Germany. They would have acquired joint control of the German pay-TV provider Premiere and the German company BetaDigital. In a second part of the operation, CLT-UFA, Kirch and Deutsche Telekom would have taken over the German company BetaResearch. The concentrations were notified separately but later on handled in parallel because together they would have set the framework for digital pay-TV in Germany.

After a preliminary examination of the operation the Commission concluded that the proposed operations would have led to the creation or strengthening of dominant positions on the markets for pay-TV, technical services for pay-TV and cable networks.

Currently Premiere and DF1 are the only providers of pay-TV in Germany. Through the merger Premiere would have achieved a dominant position on the market for pay-TV in Germany and in the German-speaking area. With regard to the market for technical services for pay-TV, BetaDigital would have attained a lasting dominant position on this market for the satellite sector. With regard to the market for cable networks, Deutsche Telekom continues to hold a dominant position on this market since it controls the major share of the cable network on netlevel 3. Broadcasting of cable TV takes place on netlevel 3 and netlevel 4 of the cable network. On netlevel 3 Deutsche Telekom supplies 16.5 million out of a total of 18.5 million cable TV households.

At a very late stage in the proceedings the parties proposed several commitments concerning pay-TV programmes, decoder technology and a possible marketing of Premiere “bouquets” by cable operators. However, they made a possible marketing of Premiere “bouquets” subject to some far-reaching restrictive conditions with the result that a realistic chance for the establishment of an alternative programme and marketing platform in the cable network would have been excluded. These commitments were not sufficient to allow a clearance of both operations.

The Commission, after having completed a detailed investigation into these proposed operations, decided to prohibit both of them.

C — Decisions pursuant to Article 2(4) of the ECMR (joint venture cases)

Telia/Telenor/Schibsted

Telia, a Swedish telecom operator, Telenor a Norwegian telecom operator and Schibsted, a Norwegian publishing and broadcasting company, formed a joint venture to provide Internet gateway services and offer web site production services. Internet gateway services enable users to access content more easily. This content, provided by the gateway service provider or third parties, can be for free to the user or be content for which the user has to pay.

58 27.5.1998.
59 27.5.1998.
There were two markets which had to be examined under Article 2(4): the market for web site production, where both the joint venture and two of the parent companies were active, and the market for provision of dial-up Internet access, where both Telia and Telenor (through its share in the Swedish telecoms company Telenordia) were present.

On the market for web site production the Commission, due to the very low combined market shares of the parents and the joint venture, concluded that, even if the parents were to coordinate their activities, it would not amount to a sizeable restriction of effective competition.

In the case of the market for dial-up Internet access in Sweden, the Commission found that the market was characterised by high growth, low entry barriers and low switching costs. Even if the combined shares of Telia and Telenordia were relatively high, the Commission’s investigation showed that these shares were of limited importance in a strongly growing market and that the market structure was not conducive to coordination of competitive behaviour. The Commission therefore concluded that there would be no likelihood of the parent companies coordinating their competitive behaviour on this market.

**Exante/Canal+/Numericable**

BankAmerica Investment Corporation (BankAmerica), controlled by BankAmerica Corporation, and Capital Communications CDPQ inc. (CDPQ), a subsidiary of Caisse de dépôt et placement du Québec, proposed to acquire through an acquisition vehicle (Exante) joint control over Numericable Holding (NCH) with Canal+. NCH operates cable television networks in France.

No negative impact on competition was found to result from the transaction in France since neither BankAmerica nor CDPQ were active in that market. The Commission established, however, in the course of its investigation that the operation would give rise to a risk of coordination in the Spanish pay-TV market due to the parent companies’ interests in that market.

In Spain Canal+ has joint control (with Prisa) over Sogecable, a company which occupies a very strong position in the pay-TV market and which is a leading distributor of content (it holds exclusive rights to most of the Hollywood majors and the most important pay-per-view football rights). BankAmerica and CDPQ are also present on the pay-TV market with the joint venture Cableuropa, a licensed operator of cable pay-TV and telecommunications services in 14 regions in Spain.

The Commission ruled out the possibility of horizontal coordination between Sogecable and Cableuropa since the latter, being a new entrant to the Spanish pay-TV market, was deemed to be at a stage where it would have to attract as many subscribers as possible and would consequently be keen to compete on price. Furthermore, the product offered by Cableuropa is different from that offered by Sogecable since it consists of an unbundled package of services (Internet, telephony and pay-TV). The Commission concluded, however, that the operation would raise serious competition concerns as to the vertical relationship between Cableuropa and Sogecable, namely as regards content provision and such preferential treatment as Cableuropa might receive.

In order to meet such concerns, Canal+ and Sogecable gave an undertaking to the effect that any negotiations with Spanish cable operators with respect to theme or other television programming over which they had distribution rights would be conducted in a fair, non-discriminatory manner consistent

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with Community and national competition rules. The same principles would also govern the possible granting of exclusive rights. These undertakings would remain in force as long as the conditions in the Spanish market and the shareholdings of the notifying parties in Sogecable, Cableuropa and Numericable remained substantially the same. The Commission considered that these undertakings constituted a powerful incentive for Canal+ and its subsidiaries not to discriminate between, and to ensure fair and equal treatment of, cable pay-TV operators which need, to varying degrees, the content owned by Canal+ if they are to successfully operate in the pay-TV market.

**BT/AT&T**

British Telecommunications (BT) and AT&T, two of the world’s largest telecommunications operators, proposed to form a joint venture which would provide a variety of telecommunications services to multinational corporate customers and international carrier services to other carriers. The Commission opened a detailed enquiry concentrating on the effects of the joint venture on several global telecommunications markets and some in the United Kingdom.

After a preliminary examination the Commission raised competition concerns with regard to the parties’ combined market shares on the markets for the provision of global telecommunications services to large multinational companies and for international carrier services. Furthermore, it found that the joint venture might lead to the creation or strengthening of a dominant position for certain telecommunications services in the UK.

With regard to cooperative aspects assessed under Article 2(4) the Commission is examining potential coordination issues in the UK between ACC, a wholly owned subsidiary of AT&T and BT, and Telewest, in which AT&T through TCI will have a jointly controlling stake. The Commission’s investigation has not yet been completed.

**D — Commission decisions**

1. **Decisions under Articles 6 and 8 of Council Regulation (EEC) No 4064/89**

1.1. **Decisions under Article 6(1) of Council Regulation (EEC) No 4064/89**

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61 Following commitments of the parties the concentration was approved on 30 March 1999 based on Article 8 (2) of the Merger Regulation and Article 81 (3) of the ECT.
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| IV/M.1061 | ING / BBL                            | 22/01/98 | OJ C 40/10, 7 2 98 |
| IV/M.1081 | DOW JONES / NBC — CNBC EUROPE        | 22/01/98 | OJ C 83/4, 18 3 98 |
| IV/M.1089 | PARIBAS BELGIQUE / PARIBAS NEDERLAND | 26/01/98 | OJ C 136/19, 1 5 98 |
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| IV/M.1022 | CABLE I TELEVISIO DE CATALUNYA (CTC)| 28/01/98 | OJ C 101/31, 3 4 98 |
| IV/M.1091 | CABLEEUROPA / SPAINCO / CTC          | 28/01/98 | OJ C 97/8, 31 3 98 |
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| IV/M.1064 | BOMBARDIER / DEUTSCHE WAGGONBAU     | 29/01/98 | OJ C 49/13, 14 2 98 |
| IV/M.1072 | BERTELSMANN / BURDA / FUTUREKIDS    | 29/01/98 | OJ C 116/2, 16 4 98 |
| IV/M.1073 | METALLGESELLSCHAFT / KÖLN chemiehandel | 29/01/98 | OJ C 53/7, 20 2 98 |
| IV/M.1027 | DEUTSCHE TELEKOM / BETARESEARCH     | 29/01/98 | OJ C 37/4, 4 2 98 |
| IV/M.1056 | STINNES / BTL                        | 4/02/98  | OJ C 58/6, 24 2 98 |
| IV/M.1062 | ALPITOUR / FRANCOROSSO               | 4/02/98  | OJ C 188/4, 17 6 98 |
| IV/M.1088 | THOMSON CORPORATION / FRITIDSRER     | 4/02/98  | OJ C 92/16, 27 3 98 |
| IV/M.1044 | KPMG / ERNST &amp; YOUNG                | 4/02/98  | OJ C 70/14, 6 3 98 |
| IV/M.1085 | PROMODES / CATTEAU                   | 6/02/98  | OJ C 65/11, 28 2 98 |
| IV/M.1087 | PROMODES / SIMAGO                    | 6/02/98  | OJ C 70/14, 6 3 98 |
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| IV/M.1053 | MANNESMANN / PHILIPS                | 12/02/98 | OJ C 144/4, 9 5 98 |
| IV/M.1078 | BP / HÜLS                            | 13/02/98 | OJ C 71/26, 7 3 98 |
| IV/M.1043 | BAT / ZÜRICH                        | 16/02/98 | OJ C 92/17, 27 3 98 |
| IV/M.1065 | NESTLE / SAN PELLEGRINO             | 16/02/98 | OJ C 81/5, 17 3 98 |
| IV/M.1090 | GRE / PPP                           | 16/02/98 | OJ C 168/12, 3 6 98 |
| IV/M.1100 | CGEA / LINJEBUSS                     | 16/02/98 | OJ C 208/2, 4 7 98 |
| IV/M.1094 | CATERPILLAR / PERKINS ENGINES        | 23/02/98 | OJ C 93/23, 28 3 98 |
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| IV/M.1099 | OTTO VERSAND / ACTEBIS              | 26/02/98 | OJ C 79/3, 14 3 98 |
| IV/M.999  | CLT-UF / HAVAS INTERMÉDIAISON       | 26/02/98 | OJ C 85/2, 20 3 98 |
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1.2. Decisions under Article 8 of Council Regulation (EEC) No 4064/89
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1.1. Decisions under Article 6(1) of Council Regulation (EEC) No 4064/89

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<td>IP/98/157</td>
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<td>Commission clears the merger between Zürich and the financial services business of B.A.T. Industries</td>
</tr>
<tr>
<td>IP/98/158</td>
<td>17.02.98</td>
<td>Commission clears a concentration in local and regional passenger transport sector</td>
</tr>
<tr>
<td>IP/98/159</td>
<td>17.02.98</td>
<td>Commission clears the acquisition of San Pellegrino by Nestlé</td>
</tr>
<tr>
<td>IP/98/166</td>
<td>18.02.98</td>
<td>The Commission fines Samsung for late notification of a concentration</td>
</tr>
<tr>
<td>IP/98/181</td>
<td>24.02.98</td>
<td>The Commission approves Caterpillar’s acquisition of Perkins diesel engine business</td>
</tr>
<tr>
<td>IP/98/201</td>
<td>27.02.98</td>
<td>The Commission authorises the acquisition by British Steel of a part of the capital of Europipe</td>
</tr>
<tr>
<td>IP/98/202</td>
<td>27.02.98</td>
<td>Commission clears acquisition of ACTEBIS Holding GmbH by OTTO Versand</td>
</tr>
<tr>
<td>IP/98/205</td>
<td>02.03.98</td>
<td>Waste management: the UK group Shanks &amp; McEwan enters the Belgian market by acquiring some of the activities of the Suez-Lyonnaise des Eaux group</td>
</tr>
<tr>
<td>Date</td>
<td>Number</td>
<td>Description</td>
</tr>
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<td>-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>02.03.98</td>
<td>IP/98/206</td>
<td>Commission clears the take over of Havas Intermédiation by the group CLT-UFA</td>
</tr>
<tr>
<td>04.03.98</td>
<td>IP/98/213</td>
<td>Commission to carry out detailed inquiry into proposed merger between WorldCom and MCI</td>
</tr>
<tr>
<td>04.03.98</td>
<td>IP/98/215</td>
<td>Commission clears acquisition of Dutch real estate bank by the German Bayerische Vereinsbank</td>
</tr>
<tr>
<td>05.03.98</td>
<td>IP/98/216</td>
<td>Commission approves the merger between Schweizerische Bankgesellschaft (SBG) and Schweizerischer Bankverein (SBV)</td>
</tr>
<tr>
<td>10.03.98</td>
<td>IP/98/226</td>
<td>Commission approves joint venture TRANSRAPID between THYSSEN, ADTRANZ and SIEMENS to merge their magnetic levitation train activities</td>
</tr>
<tr>
<td>10.03.98</td>
<td>IP/98/230</td>
<td>Wolters Kluwer and reed Elsevier have announced that following the objections of the Commission, they have abandoned their projected merger</td>
</tr>
<tr>
<td>11.03.98</td>
<td>IP/98/243</td>
<td>Commission clears the take over of GUILBERT by the group PINAULT-PRINTEMPS-REDOUTE</td>
</tr>
<tr>
<td>11.03.98</td>
<td>IP/98/244</td>
<td>Commission has decided to refer partially to the Italian authorities the proposed acquisition of GS by PROMODES and SCHEMAVENTUNO for a detailed investigation. Commission has also cleared the rest of the operation</td>
</tr>
<tr>
<td>12.03.98</td>
<td>IP/98/248</td>
<td>The Commission approves merger in foundry equipment sector</td>
</tr>
<tr>
<td>12.03.98</td>
<td>IP/98/249</td>
<td>Commission approves joint venture in the modern retail sector (hard discount) in Italy</td>
</tr>
<tr>
<td>13.03.98</td>
<td>IP/98/252</td>
<td>The Commission approves the creation of a joint venture between CEREOl/EBS and SOFIPROTEOL in the sector of oilseed crushing and oil production</td>
</tr>
<tr>
<td>18.03.98</td>
<td>IP/98/261</td>
<td>Commission authorises the acquisition of a participation in ESTAG by EDF</td>
</tr>
<tr>
<td>19.03.98</td>
<td>IP/98/264</td>
<td>Commission has approved the creation of a joint venture between Sanofi and Bristol Myers Squibb for two new pharmaceuticals</td>
</tr>
<tr>
<td>19.03.98</td>
<td>IP/98/265</td>
<td>Commission clears a concentration between NORTEL and NORWEB in the telecommunications sector</td>
</tr>
<tr>
<td>24.03.98</td>
<td>IP/98/268</td>
<td>Commission clears acquisition of Digital by Compaq</td>
</tr>
<tr>
<td>24.03.98</td>
<td>IP/98/269</td>
<td>Commission clears hotel groups merger</td>
</tr>
<tr>
<td>26.03.98</td>
<td>IP/98/293</td>
<td>Commission clears UK plant hire joint venture by Tarmac and Bovis</td>
</tr>
<tr>
<td>26.03.98</td>
<td>IP/98/294</td>
<td>Commission clears UK music and bookshop joint venture</td>
</tr>
<tr>
<td>03.04.98</td>
<td>IP/98/318</td>
<td>Commission approves merger between ROYAL BANK OF CANADA (RBC) and BANK OF MONTREAL (BMO)</td>
</tr>
<tr>
<td>03.04.98</td>
<td>IP/98/326</td>
<td>Commission approves Nestle’s acquisition of the Spillers pet food business from Dalgety</td>
</tr>
<tr>
<td>06.04.98</td>
<td>IP/98/332</td>
<td>Commission decides that Deutag and Ilbau asphalt plant joint venture is not a merger</td>
</tr>
<tr>
<td>17.04.98</td>
<td>IP/98/362</td>
<td>Commission approves the formation of a joint venture between ARAG and Winterthur in Switzerland</td>
</tr>
<tr>
<td>17.04.98</td>
<td>IP/98/363</td>
<td>The Commission approves acquisition of Novalis and Nyltech by Rhodinyl, subsidiary of Rhône-Poulenc</td>
</tr>
<tr>
<td>21.04.98</td>
<td>IP/98/366</td>
<td>Wienerberger and Cremer &amp; Breuer withdraw their notification of creation of a joint venture</td>
</tr>
<tr>
<td>23.04.98</td>
<td>IP/98/369</td>
<td>Commission clears the acquisition of BTR PACKAGING by OWENS-ILLINOIS with undertakings submitted by OWENS-ILLINOIS</td>
</tr>
<tr>
<td>24.04.98</td>
<td>IP/98/370</td>
<td>The Commission clears take over of Royal Nederland Verzekeringgroep by assurances Générales de France</td>
</tr>
<tr>
<td>Ref</td>
<td>Date</td>
<td>Description</td>
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<tr>
<td>IP/98/389</td>
<td>29.04.98</td>
<td>Commission approves the GE SEACO joint venture between GE Capital Services and Sea Containers Ltd</td>
</tr>
<tr>
<td>IP/98/390</td>
<td>29.04.98</td>
<td>Commission approves the buy-out of BTR’s Formica business by three investment banks</td>
</tr>
<tr>
<td>IP/98/391</td>
<td>30.04.98</td>
<td>The Commission approves the creation of a joint venture between Banque Bruxelles Lambert and American Express, in the sector of business travel in Belgium and Luxembourg</td>
</tr>
<tr>
<td>IP/98/414</td>
<td>07.05.98</td>
<td>Commission approves the merger of Commercial Union and General Accident</td>
</tr>
<tr>
<td>IP/98/419</td>
<td>11.05.98</td>
<td>Commission clears take over of Assurances Générales de France by Allianz subject to the fulfilment of undertakings</td>
</tr>
<tr>
<td>IP/98/420</td>
<td>11.05.98</td>
<td>Commission clears the acquisition of Gist Brocades by DSM N.V. under the merger regulation</td>
</tr>
<tr>
<td>IP/98/439</td>
<td>15.05.98</td>
<td>Commission approves acquisition by KOCH of the oil refinery activities of EUROSPLITTER</td>
</tr>
<tr>
<td>IP/98/448</td>
<td>19.05.98</td>
<td>Commission approves acquisition by GEC Alsthom of Cegelec</td>
</tr>
<tr>
<td>IP/98/464</td>
<td>26.05.98</td>
<td>The Commission authorises the acquisition of joint control of Thomson C.S.F. by Alcatel and Thomson SA</td>
</tr>
<tr>
<td>IP/98/465</td>
<td>28.05.98</td>
<td>Commission authorises a merger in the Belgian banking and insurance sectors between Kredietbank/Cera/Fidelitas/ABB</td>
</tr>
<tr>
<td>IP/98/466</td>
<td>28.05.98</td>
<td>Commission approves new company in the mobile telecommunications sector in the Netherlands</td>
</tr>
<tr>
<td>IP/98/467</td>
<td>28.05.98</td>
<td>Commission clears acquisition by VAW Aluminium of the aluminium business of Reynolds</td>
</tr>
<tr>
<td>IP/98/468</td>
<td>28.05.98</td>
<td>Commission clears the acquisition of sole control by SHV Holdings N.V. of the scrap business of Thyssen Klöckner Recycling GmbH</td>
</tr>
<tr>
<td>IP/98/476</td>
<td>28.05.98</td>
<td>Commission clears joint venture for the provision of Internet services in Sweden</td>
</tr>
<tr>
<td>IP/98/478</td>
<td>28.05.98</td>
<td>Commission clears a joint venture between BT, ESB and AIG to provide telecommunications services in Ireland</td>
</tr>
<tr>
<td>IP/98/479</td>
<td>28.05.98</td>
<td>Commission approves a joint venture in the Finnish credit insurance sector</td>
</tr>
<tr>
<td>IP/98/480</td>
<td>28.05.98</td>
<td>Commission clears concentration in the Swedish electricity sector</td>
</tr>
<tr>
<td>IP/98/481</td>
<td>28.05.98</td>
<td>The European commission has authorised the acquisition of Atohaas by Atochem</td>
</tr>
<tr>
<td>IP/98/483</td>
<td>29.05.98</td>
<td>Commission approves acquisition of Steyr group by automobile supplier Magna</td>
</tr>
<tr>
<td>IP/98/484</td>
<td>02.06.98</td>
<td>Commission clears acquisition by Telecom Italia, Endesa and Union Electrica Fenosa of Telecommunications Madrid (CYC)</td>
</tr>
<tr>
<td>IP/98/491</td>
<td>02.06.98</td>
<td>Commission approves the acquisition of Inter Forward of Sweden by Dan Transport of Denmark</td>
</tr>
<tr>
<td>IP/98/493</td>
<td>02.06.98</td>
<td>Commission clears the acquisition of Alumax by world aluminium leader Aleoa</td>
</tr>
<tr>
<td>IP/98/494</td>
<td>02.06.98</td>
<td>Commission refers the Decision on the Merger between Vendex and KBB to the Dutch Competition Authorities</td>
</tr>
<tr>
<td>IP/98/503</td>
<td>03.06.98</td>
<td>Commission approves concentration between IVO and NESTE</td>
</tr>
<tr>
<td>IP/98/504</td>
<td>03.06.98</td>
<td>Commission clears THYSSEN / KRUPP merger</td>
</tr>
<tr>
<td>IP/98/508</td>
<td>04.06.98</td>
<td>Commission approves acquisition by TECH DATA of COMPUTER 2000</td>
</tr>
<tr>
<td>IP/98/509</td>
<td>05.06.98</td>
<td>The Commission authorises the creation of a joint venture between ALCATEL and THOMSON in the satellites sector</td>
</tr>
<tr>
<td>IP/98/511</td>
<td>08.06.98</td>
<td>Commission approves the acquisition by ETPM of assets from its joint venture with J. Ray</td>
</tr>
<tr>
<td>IP/98/528</td>
<td>12.06.98</td>
<td>Commission clears the venture between BAYER AG and GENERAL ELECTRIC in silicones sector</td>
</tr>
<tr>
<td>Reference</td>
<td>Date</td>
<td>Description</td>
</tr>
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<tr>
<td>IP/98/529</td>
<td>12.06.98</td>
<td>Commission approves two joint ventures in the fine paper sector</td>
</tr>
<tr>
<td>IP/98/527</td>
<td>12.06.98</td>
<td>Commission clears merger in process control equipment</td>
</tr>
<tr>
<td>IP/98/533</td>
<td>16.06.98</td>
<td>Commission clears the acquisition by Arco of Union Texas</td>
</tr>
<tr>
<td>IP/98/526</td>
<td>12.06.98</td>
<td>Commission authorises RWE-DEA’s acquisition of the surfactants and fat business of Hüls AG</td>
</tr>
<tr>
<td>IP/98/541</td>
<td>18.06.98</td>
<td>Commission approves the acquisition of sole control of the insurance company Royale Belge by the AXA-UAP group</td>
</tr>
<tr>
<td>IP/98/549</td>
<td>19.06.98</td>
<td>Commission approves the take-over by Sneema of Messier Dowty and IT Group’s overhaul services business</td>
</tr>
<tr>
<td>IP/98/550</td>
<td>19.06.98</td>
<td>Commission approves Kingfisher’s acquisition of the German electrical retailers Wegert and ProMarkt</td>
</tr>
<tr>
<td>IP/98/552</td>
<td>22.06.98</td>
<td>Commission approves CVC’s investment in Drum Holdings</td>
</tr>
<tr>
<td>IP/98/555</td>
<td>23.06.98</td>
<td>Commission partially refers Krauss-Maffei/Wegmann case to the Bundeskartellamt and otherwise clears the planned concentration</td>
</tr>
<tr>
<td>IP/98/557</td>
<td>23.06.98</td>
<td>Commission clears telecommunications joint venture in Italy</td>
</tr>
<tr>
<td>IP/98/566</td>
<td>24.06.98</td>
<td>Commission clears the acquisition of sole control of DMPC by DuPont</td>
</tr>
<tr>
<td>IP/98/567</td>
<td>25.06.98</td>
<td>Commission approves acquisition by CHS of Metrologie</td>
</tr>
<tr>
<td>IP/98/568</td>
<td>24.06.98</td>
<td>Commission clears CITIGROUP merger</td>
</tr>
<tr>
<td>IP/98/571</td>
<td>25.06.98</td>
<td>The Commission authorised the creation of a joint venture between the Commune of Lucca, CREA and CGE, in water supply sector</td>
</tr>
<tr>
<td>IP/98/572</td>
<td>26.06.98</td>
<td>Commission approves increase in Société Générale’s holding in Fortis AG</td>
</tr>
<tr>
<td>IP/98/573</td>
<td>26.06.98</td>
<td>Commission clears the acquisition of G-Bank by FORTIS</td>
</tr>
<tr>
<td>IP/98/576</td>
<td>26.06.98</td>
<td>Commission clears the acquisition by Johnson Controls of Becker</td>
</tr>
<tr>
<td>IP/98/583</td>
<td>30.06.98</td>
<td>Commission approves Deutsche Post’s participation in DHL</td>
</tr>
<tr>
<td>IP/98/584</td>
<td>30.06.98</td>
<td>Commission clears take-over of the Dutch insurance Company NCM by Schweizerische Rück</td>
</tr>
<tr>
<td>IP/98/601</td>
<td>01.07.98</td>
<td>Commission approves London airports cargo handling joint venture</td>
</tr>
<tr>
<td>IP/98/608</td>
<td>02.07.98</td>
<td>Commission clears the acquisition of COURTAULDS by AKZO NOBEL</td>
</tr>
<tr>
<td>IP/98/609</td>
<td>02.07.98</td>
<td>Commission clears take-over of Berlinische Lebensversicherung AG by Commercial Union</td>
</tr>
<tr>
<td>IP/98/624</td>
<td>03.07.98</td>
<td>Commission approves Magneti Marelli’s stake in Comnet</td>
</tr>
<tr>
<td>IP/98/633</td>
<td>06.07.98</td>
<td>Commission approves CVC’s and CINVEN’s investment in KNP BT</td>
</tr>
<tr>
<td>IP/98/636</td>
<td>07.07.98</td>
<td>Commission clears joint venture between MAERSK AIR and LUFTFARTSVERKET</td>
</tr>
<tr>
<td>IP/98/642</td>
<td>08.07.98</td>
<td>La Commission autorise la création d’une entreprise commune entre MAERSK AIR et LUFTFARTSVERKET dans le secteur des services d’escale</td>
</tr>
<tr>
<td>IP/98/643</td>
<td>08.07.98</td>
<td>Commission clears the merger of Halliburton and Dresser in the area of oilfield services</td>
</tr>
<tr>
<td>IP/98/644</td>
<td>08.07.98</td>
<td>Commission authorizes the acquisition of Echlin Inc. by Dana Corp.</td>
</tr>
<tr>
<td>IP/98/648</td>
<td>09.07.98</td>
<td>Commission gives conditional clearance to Exxon Shell joint venture</td>
</tr>
<tr>
<td>IP/98/655</td>
<td>13.07.98</td>
<td>Commission clears concentration between Kali+Salz/MdK/Treuhand after a new examination</td>
</tr>
<tr>
<td>IP/98/662</td>
<td>14.07.98</td>
<td>Commission approves the acquisition of UTA Telekom by VTOB and Swisscom</td>
</tr>
<tr>
<td>IP/98/668</td>
<td>15.07.98</td>
<td>The Commission opens detailed investigation into Skanska’s acquisition of Scancem</td>
</tr>
<tr>
<td>IP/98/674</td>
<td>17.07.98</td>
<td>Commission approves the acquisition of Macrotron by Ingram Micro Inc.</td>
</tr>
<tr>
<td>IP/98/696</td>
<td>23.07.98</td>
<td>Commission clears Daimler-Benz/Crysler merger</td>
</tr>
<tr>
<td>IP/98/697</td>
<td>23.07.98</td>
<td>Commission clears joint control of Teksid and Norsk Hydro over Meridian</td>
</tr>
<tr>
<td>IP/98/699</td>
<td>24.07.98</td>
<td>The Commission authorizes the creation of a joint venture between TPM and TES in the industrial gas turbine sector</td>
</tr>
<tr>
<td>IP/98/700</td>
<td>24.07.98</td>
<td>The Commission approves the operation between CARGILL Inc. and n.v. VANDEMOORTÈLE International, in the sector of edible oil</td>
</tr>
<tr>
<td>IP/98/712</td>
<td>28.07.98</td>
<td>Commission approves merger in the olefins and polyolefins sector</td>
</tr>
<tr>
<td>IP/98/735</td>
<td>29.07.98</td>
<td>Commission clears acquisition of control by Alliance Unichem of SAFA</td>
</tr>
<tr>
<td>IP/98/742</td>
<td>30.07.98</td>
<td>Commission refers to the Italian Authorities the acquisition of joint control of Unifarma Distribuzione by Alliance Unichem</td>
</tr>
<tr>
<td>IP/98/747</td>
<td>31.07.98</td>
<td>Commission approves acquisition by Valeo of part of ITT Industries</td>
</tr>
<tr>
<td>IP/98/748</td>
<td>31.07.98</td>
<td>Commission clears the acquisition of joint control in Cableuropa by Caisse de Dépôt et Placement de Quebec</td>
</tr>
<tr>
<td>IP/98/749</td>
<td>03.08.98</td>
<td>Commission opens an in-depth enquiry into the merger between Enso and Stora</td>
</tr>
<tr>
<td>IP/98/754</td>
<td>05.08.98</td>
<td>Commission clears joint venture between Wacker and Air Products in the field of dispersions and powders</td>
</tr>
<tr>
<td>IP/98/756</td>
<td>06.08.98</td>
<td>Commission approves Swedish electricity merger</td>
</tr>
<tr>
<td>IP/98/758</td>
<td>10.08.98</td>
<td>Commission approves acquisition of United States surgical Corp. by Tyco LTD</td>
</tr>
<tr>
<td>IP/98/759</td>
<td>11.08.98</td>
<td>Commission authorizes Glaverbel’s acquisition of the European float glass business of PPG</td>
</tr>
<tr>
<td>IP/98/764</td>
<td>14.08.98</td>
<td>Commission authorizes the creation of a joint venture by Fuchs Petrolub and DEA</td>
</tr>
<tr>
<td>IP/98/765</td>
<td>14.08.98</td>
<td>European Commission authorizes the creation of two joint ventures between Amoco, Repsol, Iberdrola and Ente Vasco de la Energía</td>
</tr>
<tr>
<td>IP/98/766</td>
<td>14.08.98</td>
<td>Commission gives green light to change of control of MSA Acquisitions Co Ltd, owner of the UK-based ‘Roadchef’ Motorway Service Area Business</td>
</tr>
<tr>
<td>IP/98/769</td>
<td>18.08.98</td>
<td>Commission authorises the creation of a joint venture by ELF and TEXACO in the field of engine coolants</td>
</tr>
<tr>
<td>IP/98/773</td>
<td>21.08.98</td>
<td>Commission approves Kingfisher’s acquisition of the French retailer BUT</td>
</tr>
<tr>
<td>IP/98/775</td>
<td>24.08.98</td>
<td>The Commission authorises the acquisition Bay Networks by Northern Telecom</td>
</tr>
<tr>
<td>IP/98/776</td>
<td>25.08.98</td>
<td>Commission clears take over of the Willis Corroon Group by KKR Associates</td>
</tr>
<tr>
<td>IP/98/777</td>
<td>25.08.98</td>
<td>Commission authorises the creation of a joint venture for the recycling of plastics by Rova, Reko and Hanze</td>
</tr>
<tr>
<td>IP/98/779</td>
<td>25.08.98</td>
<td>Commission clears the acquisition of Rolls-Royce/Bentley and Cosworth by Volkswagen</td>
</tr>
<tr>
<td>IP/98/780</td>
<td>27.08.98</td>
<td>Commission clears joint venture “Doyma” between Havas and Bertelsmann</td>
</tr>
<tr>
<td>IP/98/782</td>
<td>28.08.98</td>
<td>Commission approves Paribas’ and JDC’s investments in Gerflor group</td>
</tr>
<tr>
<td>IP/98/785</td>
<td>01.09.98</td>
<td>Commission approves Paribas’ and Ecureuil-Vie’s investements in the joint venture ICD</td>
</tr>
<tr>
<td>IP/98/791</td>
<td>04.09.98</td>
<td>Commission approves acquisition by KNP BT of Allium</td>
</tr>
<tr>
<td>IP/98/793</td>
<td>08.09.98</td>
<td>Commission clears joint venture in the Swedish real estate sector</td>
</tr>
<tr>
<td>IP/98/800</td>
<td>15.08.98</td>
<td>Commission clears a joint venture between ABITIBI CONSOLIDATED, NORSKE SKOG and HANSOL PAPER</td>
</tr>
<tr>
<td>IP/98/801</td>
<td>15.09.98</td>
<td>Commission authorizes a joint venture by Bosch and ZF Friedrichshafen</td>
</tr>
<tr>
<td>IP/98/821</td>
<td>21.09.98</td>
<td>Commission clears Allied Signals public takeover bid of AMP</td>
</tr>
<tr>
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III — STATE AID

A — Overview of cases

1. Regional aid

Germany

a) Teleworking

On 25 February the Commission took a negative final decision on aid intensities for teleworking under the 26th framework plan of the joint Federal Government/Länder scheme for improving regional economic structures. The programme allowed investments for the creation of teleworking jobs to receive aid at the intensity applicable in the area in which the investing company was situated, even if the teleworkplace was located in an assisted area with a lower regional aid intensity ceiling. The Commission considered this to be incompatible with the objectives of regional development aid. The maximum aid intensity allowed for the investment creating the teleworking job should be subject to the aid intensity ceiling applicable in the area where the job was created, even if there were a technological and economic link with an employer in an area qualifying for higher aid intensities.

b) Amendment to Section 52(8) of the German Income Tax Act

On 21 January the Commission took a negative final decision on the insertion in Section 52(8) of the German Income Tax Act of a provision amending Section 6(b) of the Act. The provision introduced a special tax-relief measure applicable from 1996 to 1998 for the reinvestment of profits otherwise subject to income tax in the equity capital base of firms having their registered office and central administration in one of the new Länder or west Berlin and employing a maximum of 250 people. The Commission found that the measure constituted state aid for firms in eastern Germany and Berlin since its effect was to facilitate the acquisition of equity stakes in those firms. Investors would acquire interests in the firms on more advantageous terms than would have been obtained without the amendment. Given that the acquiring of stakes in these firms was not necessarily linked to new investment, the aid had to be ranked as operating aid, which was not justifiable in west Berlin given its Article 92(3)(c) status. Furthermore, the measure was contrary to Articles 43 and 48 of the EC Treaty (freedom of establishment) since it applied only to enterprises established in the regions specified.

c) KfW subsidised loan scheme to promote holdings in firms in North Rhine-Westphalia and Saarland

On 18 February the Commission authorised a scheme aimed at making up for the shortage of risk capital in the financial markets of the Länder of North Rhine-Westphalia and Saarland, where coal subsidies had been significantly reduced. Under the scheme, the publicly owned bank Kreditanstalt für Wiederaufbau (KfW) might provide soft loans to any private intermediary (enterprise or natural person) wishing to invest in enterprises in the above regions. The Commission decided that the scheme

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62 C 52/97 (ex N 123/97).

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involved state aid in the form of capital injections in enterprises in the regions concerned. This aid could be approved as regional aid under Article 87(3)(c) since it was linked to investment and complied with the maximum intensities applicable in these regions. With regard to private intermediaries, the Commission took note of the fact that the scheme was open to any type of enterprise or any individual wishing to invest in the regions in question.

d) **Extension of the eligibility of intangible property acquisition costs for large firms**

On 6 May the Commission adopted a negative final decision on the deletion, under the 25th framework plan of the joint Federal Government/Länder scheme, of the clause excluding intangible property acquired by large firms from eligibility where such property accounted for more than 25% of the cost of the investment. Contrary to what had already been decided for SMEs, this extension of the base was incompatible with the common market inasmuch as it would have resulted in a substantial increase in permissible regional aid for large firms, thereby neutralising the effect of the Commission’s commitment to reducing aid intensities. The decision follows the new guidelines on regional aid.

e) **Thüringer Industriebeteiligungs-Fonds**

In a decision adopted on 27 July 1994 the Commission had authorised on certain conditions the Thüringer Industriebeteiligungs-Fonds aid scheme, the purpose of which was to acquire shareholdings in firms, including those in difficulty. Scrutiny of the annual reports on the scheme’s application having revealed possible irregularities, the Commission decided on 9 December to request the German Government to provide it with all such information as might be necessary for it to check whether the aid had in fact been granted in the manner and on the terms laid down when it authorised the scheme in 1994. The decision was based on the judgment of the Court of Justice of 5 October 1994 in the Italgrani case (C-47/91).

f) **Investment Allowance Act 1999 for the new German Länder, including Berlin**

On 9 December the Commission decided to initiate proceedings under Article 88(2) of the EC Treaty in respect of part of the Investment Allowance Act 1999 for the new German Länder, including Berlin, which covered a period of six years and had a budget of some ECU 15 billion. The Commission had serious doubts about the compatibility with the common market of a number of the scheme’s provisions, namely those on (1) operating aid (aid for replacement investment) in so far as it did not observe the degressivity principle, (2) aid for initial investment for firms in Berlin, to the extent that it was to be granted after 2000, (3) aid not in keeping with the multisectoral framework or the rules on sensitive sectors, and (4) a retroactive increase in aid intensities. However, the Commission decided not to object to the implementation of the scheme’s other provisions, although it proposed appropriate measures to ensure their subsequent compatibility with the common market.

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66 OJ C 74, 10.3.1998, point 4.6.
67 NN 120/98.
68 C 72/98 (ex N 702/97).
g) 27th framework plan of the joint Federal Government/Länder scheme for improving regional economic structures  

On 22 December the Commission decided not to raise any objections to implementation of this regional aid scheme as amended by the 27th framework plan, with the exception, however, of a new provision concerning the granting of investment allowances in the context of a ‘sell and rent back’ operation, in respect of which it initiated proceedings under Article 88(2) of the EC Treaty. It considered that the provision might contain an operating aid element which would be incompatible with the common market. The scheme’s budget for 1998-2002 came to ECU 12 754.4 million.

h) Consolidation scheme of 20 July 1993 and loans scheme of 24 January 1996  

The consolidation scheme of 20 July 1993 and the loans scheme of 24 January 1996 of the Land of Thuringia were wrongly considered by the German authorities to be covered by the de minimis rule, since the total amount of aid likely to be granted exceeded the authorised ceiling and since the sensitive sectors were not excluded. The schemes were therefore state aid schemes caught by Article 87(1) of the EC Treaty. The Commission had doubts about their compatibility with the common market. The aid for firms in difficulty available under the two schemes did not comply with the rules on the subject, and some of the aid provided under the 1996 scheme to healthy businesses constituted operating aid and did not comply with the relevant provisions. The Commission therefore decided on 22 December to initiate proceedings under Article 88(2) of the EC Treaty in respect of both measures.

Greece

Law No 2601/98 on regional development

On 22 December the Commission decided to approve this Greek law on regional development laying down the various types and intensities of regional aid which might be granted to companies according to the areas in which they were located. Although the aid intensity ceiling applied at the time (75%) would remain in force up to the end of 1999, the new law introduced significantly reduced authorised aid ceilings and made a major adjustment between the various areas for after the end of 1999. The Commission authorised the implementation of the law, having found it to be compatible with the new guidelines on national regional aid.

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69 C 84/98 (ex N 100/98).  
70 C 85/98 (ex NN 106/98).  
71 C 87/98 (ex NN 137/98).  
72 NN 59/A/98, not yet published in the Official Journal.  
73 OJ C 74, 10.3.1998.
Spain

a) Castile-La Mancha

On 21 January the Commission authorised the amendment of a regional investment aid scheme to promote R&D and assist SMEs in Castile-La Mancha. The annual budget totalled some ECU 21.06 million.

b) Mining — Andalusia

On 7 April the Commission authorised a regional aid scheme for developing the mining industry in Andalusia. The scheme comprised investment aid and aid for R&D. The budget for 1998-99 was ECU 32.08 million.

Netherlands

Aid for the construction of a hydrogen peroxide plant at Delfzijl

On 21 January the Commission decided to terminate Article 88(2) proceedings initiated in 1996 in respect of part of the regional aid granted to FMC for the construction of a hydrogen peroxide plant at Delfzijl, to the extent that the aid exceeded the authorised regional ceiling of 20% of investment costs. In the course of the proceedings, the Commission noted that the ceiling had been exceeded by aid in the form of grants and the sale of land at below market value amounting to a combined total of ECU 2.85 million. The Commission therefore considered this aid to be incompatible with the common market and ordered its repayment.

Austria

Regional aid map for 1999

On 28 October the Commission decided to renew the regional aid map for one year (1999), the only amendments being to certain aid intensities. In accordance with point 6 of the new guidelines on national regional aid, the Austrian aid map for 1999 was one of the last maps to be examined on the basis of the previously applicable regional aid rules, i.e. the method set out in the Commission’s 1988 notice.

74 N 266/97 (OJ C 103, 4.4.1998).
78 OJ C 74, 10.3.1998.
Finland

Accelerated depreciation on investments in “development areas”

On 29 July the Commission decided to initiate Article 88(2) proceedings in respect of the application of a Finnish scheme providing for accelerated depreciation on investments in “development areas”. Proceedings were opened only in respect of aid to companies operating in sectors where state aid was subject to specific Community rules and frameworks and aid to investments covered by the multisectoral framework on regional aid for large projects. The Finnish authorities had undertaken to notify individual cases in the sectors concerned. The scheme, however, was based on a law adopted by Parliament which was directly and, in principle, automatically applicable and which did not allow for administrative discretion in individual cases. At that stage the tax authorities’ commitment to ensuring compliance with the state aid rules was not sufficient for the Commission to conclude that the scheme was compatible with the common market in sensitive sectors. The Commission considered that the law needed amending in order to effectively prevent its being applied to such sectors.

Sweden

a) Map of “structural change areas”

On 21 January the Commission approved the regional aid map for the “structural change areas” in Sweden for the period 1998-99. The “structural change areas” consisted of 26 municipalities and two parishes and covered 4.5% of the population of Sweden. The investment aid intensity ceilings would be set at a maximum of 25% gross (18% net) for large enterprises and 35% gross (25.2% net) for SMEs. In the municipalities of Hagfors, Hällefors, Ludvika, Ljusnarsberg and Smedjebacken, investment aid up to a maximum of 30% gross (21.6% net) could be granted for large enterprises.

b) Regional aid scheme for “structural change areas”

On 17 June the Commission approved the scheme linked to the “structural change areas” for the period 1998-99. Modifications included adjustment in line with the SME guidelines and the R&D framework. Conditions were attached to the granting of training aid. The budget for regional development aid to the “structural change areas” could be estimated at about ECU 50 million (SKR 400 million) for the period concerned.

United Kingdom

English Partnerships

On 1 July the Commission proposed appropriate measures under Article 88(1) of the EC Treaty in respect of the activities of English Partnerships (EP) under the Partnership Investment Programme.

83 OJ C 213, 23.7.1996.
84 OJ C 45, 17.2.1996.
85 E 2/97.
This scheme assisted property development projects involving site regeneration, reclamation and development and the construction of industrial, commercial and residential buildings and premises. Development proposals and the developers’ applications for funding were vetted by EP’s internal valuers. Under the scheme as it stood, the grant or other assistance provided to such projects was not considered to constitute state aid within the meaning of Article 87(1) of the EC Treaty. Aid recipients (site owners, developers, end-users) could also be undertakings competing in intra-Community trade and, potentially, in sensitive sectors. Furthermore, as a rule EP financed developers with a continuing interest in the site as initial owners or end-users. In the Commission’s view, this raised a problem of transparency as regards identifying the real recipient of EP’s assistance and quantifying the amount of aid actually received. Among its appropriate measures the Commission proposed that EP’s assistance be granted directly to the real investor in the site (site owner/developer in cases of speculative development, or site end-user in cases of bespoke development) and be subject to the rules governing regional state aid and state aid to SMEs. The UK authorities were asked to communicate a modified scheme to the Commission.

2. Aid to specific industries

2.1. Steel

Monitoring of Article 95 ECSC steel aid cases

The Commission continued its monitoring of the implementation of its decisions in the above sectors in Spain, Italy, Ireland, Portugal, Germany and Austria. The ninth report on the subject was issued in May, \(^{86}\) and the tenth in November.\(^{87}\)

Germany

a) Eisen- und Stahlwalzwerke Rötzel\(^{88}\)

On 14 July the Commission adopted a negative final decision on aid in the form of a guarantee covering 80% of loans totalling ECU 7.6 million for the restructuring of Eisen- und Stahlwalzwerke Rötzel GmbH. The Commission decided that the guarantee was unlawful as it had been given without approval and was incompatible with the coal and steel common market pursuant to Article 4(c) of the ECSC Treaty. The national authorities were required to recover the full amount paid when the guarantee was called in, with interest running from the date on which the aid had been granted to the date of its recovery.

b) ESF Elbestahlwerk Feralpi GmbH\(^{89}\)

On 11 November the Commission decided to terminate with a negative final decision the proceedings it had initiated under Article 6(5) of the Steel Aid Code in respect of several aid payments made in the form of subsidies and loan guarantees to the steel company ESF Elbestahlwerk Feralpi GmbH (ESF). In March 1993 and January 1995 the Commission had authorised investment aid to the firm. However,

\(^{88}\) C 60/97 (ex NN 85/97).
\(^{89}\) C 75/97 (ex NN 108/97).
part of this aid, namely loan guarantees totalling ECU 6.14 million, had been deflected from its purpose and misused to cover operating costs, although operating aid was prohibited by the ECSC Treaty. The Commission concluded that this abuse of part of the aid previously authorised rendered that part incompatible with the common market and ordered that it be repaid with interest. Moreover, in 1995 and 1997 additional, non-notified aid had also been granted to ESF. The Commission found that this additional aid, totalling ECU 4.8 million in grants and ECU 6.14 million in loan guarantees, in addition to being unlawful, did not comply with the provisions of the Steel Aid Code or those of the ECSC Treaty and was therefore incompatible with the common market. Accordingly, it also decided to order that this aid be repaid with interest.

c) MCR Gesellschaft für metallurgisches Recycling

On 9 December the Commission decided to terminate the proceedings it had initiated under Article 6(5) of the Steel Aid Code and to authorise additional investment aid planned for MCR Gesellschaft für metallurgisches Recycling in the interests of environmental protection. It found in particular that the planned investment would significantly raise the standard of environmental protection, to a level well above the minimum required, and concluded that the aid could be authorised under Article 3 of the Steel Aid Code and under the guidelines on state aid for environmental protection.91

d) Neue Maxhütte

On 9 December the Commission decided to initiate proceedings under Article 6(5) of the Steel Aid Code in respect of aid totalling ECU 1.49 million to the steel company Neue Maxhütte Stahlwerke GmbH for investment in measures to prevent pollution from a slag heap used by the company. The Commission had serious doubts about the aid’s compatibility with the common market since, in accordance with the polluter pays principle, the cost of the investment should have been borne by the company itself.

On 16 December the Commission decided to initiate proceedings under Article 84 of the ECSC Treaty for Germany’s failure to fulfil its obligations.93 In 1995 and 1996 it had taken two negative decisions in respect of Neue Maxhütte, ordering ECU 37.75 million in unlawful aid granted to it to be repaid with interest and requiring the German authorities under Article 86 of the ECSC Treaty to take all appropriate measures in this respect. Since the German Government had not complied, the Commission formally requested it to provide it with all the information necessary for it to take a position.

Greece

SOVEL

On 16 December the Commission decided not to object to the granting of regional investment aid totalling ECU 10.2 million to the steel producer SOVEL. It found that the conditions contained in the
rules on aid to the steel industry were met, in particular since there was no increase in production capacity, that the aid was confined to an amount of less than ECU 50 million and that the aid intensity was in line with the Greek regional aid scheme.

Spain

**Inespal**

On 21 January the Commission decided that no state aid elements were involved in the privatisation of the Spanish aluminium group Industria Española de Aluminio (Inespal). The Spanish authorities had notified the Commission of the Inespal share purchase agreement between the seller, the state-owned holding company SEPI, and the buyer, the private company Aluminum Company of America (Alcoa). The result of the agreement would be the privatisation of Inespal. The Commission established that Alcoa was the only buyer interested in practically all of Inespal’s assets (it was noted that the sale of these assets as a unit made them more valuable), that Alcoa’s offer was the best one received and that the seller’s environmental liabilities and social commitments concerned only the period preceding the date on which the agreement was concluded. Finally, the Commission noted that the current electricity tariffs charged to Inespal (‘G4’ tariffs) were decided by the Government, were published in Spain’s official gazette and were applicable on a trans-sectoral basis to several large consumers which satisfied the same conditions with regard to energy demand. Furthermore, Spain would inform the Commission of any modification of the G4 tariffs.

Italy

**a) Tax relief, Law No 549/95**

On 13 May the Commission decided to terminate proceedings initiated in May 1997 and to find incompatible with the common market aid granted by Italy to the steel industry in the form of tax relief under Law No 549/95. More specifically, the Law offered firms investment aid in the form of tax exemptions on 50% of reinvested profits. This aid was not covered by any of the exceptions allowed under the Steel Aid Code for aid for R&D, environmental protection or closures. The Commission also decided to require that any aid already disbursed by the Italian authorities be recovered. In May 1997 the Commission had initiated Article 88(2) proceedings in respect of the same aid measure in other sensitive sectors (motor vehicles, synthetic fibres and shipbuilding), but it reserved its position at the present juncture regarding the compatibility of the aid in these sectors as it still had to consider the information which Italy had been formally requested to communicate.

**b) Acciaierie di Bolzano**

On 28 October the Commission decided to terminate the proceedings it had initiated under Article 6(5) of the Steel Aid Code in respect of environmental protection aid and aid for R&D which Italy planned to grant to the steel company Acciaierie di Bolzano. Having scrutinised the various projects with the Italian authorities and following a reduction in the amount of aid initially planned by the latter, the Commission concluded that the environmental protection aid of no more than ECU 5.73 million and

96 C 27/97.
97 C 46/98 (ex N 791/97).
the R&D aid of no more than ECU 0.4 million met the conditions of the relevant guidelines and were compatible with the common market. It therefore decided to authorise the aid within these ceilings.

**Luxembourg**

**ProfilARBED**

On 17 June the Commission adopted a negative final decision regarding, and ordered the recovery of, aid granted by Luxembourg to the steel company ProfilARBED. In December 1994 the Commission had adopted an initial decision authorising the aid which Luxembourg was planning to grant towards investment in environmental protection to be undertaken by ProfilARBED in its new steelworks at Esch-Schifflange. The Court of First Instance annulled that decision in a case brought by a competitor of Arbed. The Commission was therefore obliged to re-examine the aid in the light of the Court’s findings. In line with the judgment, it now concluded that observations put forward by the Luxembourg authorities were not in fact such as to alter the view of the case which it had taken at the very outset, when it initiated proceedings in June 1994, namely that the aid was not covered by any of the derogations from the general ban on aid laid down in Article 4(c) of the ECSC Treaty. Accordingly, the aid received by ARBED, totalling ECU 2.279 million (LUF 91.95 million), had to be considered incompatible with the common market and recovered with interest from the date of payment until the date of recovery.

**2.2. Non-ECSC steel products**

**Spain**

**A.G. Tubos Europa SA**

On 28 October the Commission decided to terminate proceedings it had initiated under Article 88(2) of the EC Treaty and to authorise the granting of ECU 7.02 million for the setting-up of Tubos Europa in Extremadura. Although there was general overcapacity in the production of traditional tubes, the Commission noted that the company was to produce, for the first time in Europe, very large cold-formed hollow sections (diameter in excess of 406.4 mm), a product for which there was growing demand. The Commission therefore concluded that the aid was compatible with the common market.

**2.3. Shipbuilding**

**Germany**

**a) Aid for Bremer Vulkan Marineschiffbau GmbH**

On 18 February the Commission initiated Article 88(2) proceedings in respect of aid granted to Bremer Vulkan Marineschiffbau GmbH, a subsidiary of Bremer Vulkan Verbund AG (BVV) in liquidation, in connection with its takeover by Lürssen Maritime Beteiligungen GmbH & Co. KG.

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98 C 25/94 (ex N 11/94).
100 C 13/98 (ex N 749/97).

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These proceedings concerned a public contribution towards the cost of employing former workers of another subsidiary of BVV, a waiving of debts by Hibeg, a company wholly owned by the Land of Bremen, and an intended contribution towards the cost of planned investment. In its decision, the Commission expressed doubts about whether these measures were indeed exempt from the provisions of Article 87 of the Treaty and the provisions of the Seventh Directive on aid to shipbuilding. While the activities of Bremer Vulkan Marineschiffbau GmbH were limited to naval shipbuilding, the Lürssen Group was active in merchant shipbuilding as well. If the capacities acquired were used for merchant shipbuilding or other civil marine activities, the rules under Article 87 of the Treaty would have to be applied.

b) Aid to Bremer Vulkan via Krupp GmbH and Hibeg

By a judgment delivered in October 1996, the Court of Justice annulled an earlier Commission decision taken in April 1993 declaring incompatible with the common market aid awarded by the German Government to Hibeg, a company wholly owned by the Land of Bremen, and by Hibeg via Krupp GmbH to Bremer Vulkan AG, which had facilitated the sale of Krupp Atlas Elektronik GmbH by Krupp GmbH to Bremer Vulkan. The Court ruled that the Commission’s decision contained insufficient reasoning on certain points. The Commission was therefore required to take a new decision to terminate the Article 88(2) proceedings which it had opened in May 1992. In the light of the Court’s ruling, the Commission adopted a revised decision on 25 February, in which it confirmed its view that the aid which the Land of Bremen had granted in 1991 to Bremer Vulkan (now in liquidation) towards the purchase of Krupp Atlas Elektronik, a manufacturer of electronic systems for shipping and defence, was incompatible with the common market.

Bremer Vulkan had purchased Krupp Atlas Elektronik for about ECU 175 million in a complex financial transaction. The Commission examined the measure to ascertain whether the aid qualified for exemption under Article 87 of the Treaty. However, the aid served only to facilitate the transfer of Krupp Atlas Elektronik from Krupp to Bremer Vulkan, without any change in the business being carried on. The aid affected competition with other enterprises in the Community and did not qualify for exemption under the rules of the Treaty. The Commission accordingly ordered the recovery of the aid.

c) Reprivatisation of Volkswerft Stralsund and of MTW-Schiffswerft, Wismar

The Commission decided on 25 February in the case of Volkswerft and on 29 July in the case of MTW-Schiffswerft to approve the privatisation agreements for these yards and to raise no objections to a second instalment of aid. Until 1996 the two shipyards, situated in the former GDR, had belonged to Bremer Vulkan Verbund AG. Following the latter’s insolvency they were taken over by the Bundesanstalt für vereinigungsbedingte Sonderaufgaben (BvS) and the Land of Mecklenburg-Western Pomerania. After a worldwide tendering procedure, both yards were sold under an asset deal in which the buyers did not take over any of the pending liabilities, which were primarily linked to the financing of shipbuilding contracts. Both yards had given guarantees to the shipowners concerning the expected yields from the ships in the first few years after delivery and the placement on the market of shares in the ships. Therefore, the Commission’s scrutiny of the sales concentrated on whether the agreements in question ensured that the sales were not coupled with any aid over and above the amounts to be

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102 C 14/92 (OJ L 316, 25.11.1998); for the initiation of proceedings see 1993 Competition Report, point 502.
granted under the restructuring plans notified when Council Regulation 1013/97, covering the authorisation of aid needed to continue the restructuring programmes, was adopted.

The Commission reached the conclusion that, even on the basis of an extremely conservative valuation of all actual and potential liabilities remaining with the residual companies, no additional aid was involved. In accordance with Article 6 of the Seventh Directive on aid to shipbuilding and with Council Regulation 1013/97, it therefore approved in both cases a second instalment of aid for the continuation of the restructuring.

d) Development assistance for Indonesia\(^{105}\)

On 25 February the Commission terminated in part, with a negative final decision, Article 88(2) proceedings initiated in respect of aid granted by Germany for the construction of a dredger by Volkswerft Stralsund. The aid had originally been approved as development aid under Article 4(7) of the Seventh Directive on aid to shipbuilding. The Commission came to the conclusion that the aid had been misused since the vessel had been employed outside Indonesia, in contravention of the conditions laid down in the authorisation decision.

e) Misuse of restructuring aid for MTW and Volkswerft in the Bremer Vulkan Group\(^{106}\)

On 22 July 1997 the Commission adopted a negative final decision concerning the misuse of ECU 400 million in aid granted for the restructuring of MTW-Schiffswerft, Wismar, and of Volkswerft Stralsund, in other undertakings of the Bremer Vulkan Group. Bremer Vulkan Verbund AG had acquired these two shipyards, located in eastern Germany, in 1992 and 1993 from the Treuhandanstalt. Large amounts of aid had been provided for their restructuring and comprehensive modernisation. In 1992 the Council had adopted a specific derogation under the Seventh Directive on aid to shipbuilding (90/684/EEC) for the restructuring of shipyards in the former GDR (Council Directive 92/68/EEC). According to this legislation, the aid had to be used exclusively for the restructuring of the yards in question. In view of this requirement and of the considerable amounts involved, the Commission had decided to authorise the aid in separate instalments only. The Commission learnt in the course of the proceedings that the notifications of the aid given in the context of the privatisations had been incomplete. Large amounts of aid had been disbursed in advance under side agreements between the Treuhandanstalt and Bremer Vulkan. Including interest, accruing up until the end of 1995, the two companies had received approximately ECU 166 million more in aid than the amount authorised by the Commission. The granting of this additional amount infringed the provisions on investment aid (Article 6) and on the maximum operating aid to be granted for restructuring (Article 10a) of the Seventh Directive as amended. The Commission therefore decided that this aid amount was incompatible with the Treaty. The parts of the aid which were not yet needed for the restructuring had been on-lent within the Bremer Vulkan Group, either on the basis of individual credit agreements, or, from 1994 onwards, through the group’s cash concentration system. In spite of extensive investigations it had been impossible to determine for certain the purposes for which the aid placed with the group had been used. There were two reasons for this. Contrary to normal commercial practice, the Treuhandanstalt had not ensured that provision was made in the privatisation agreements for any earmarking of the lump-sum cash subsidy or for any suitable monitoring procedures. From 1995 at the latest, the mixing of funds became irreversible owing to the multitude of transactions in the cash concentration system. When the cash concentration system was wound up in early 1996, the total

\(^{105}\) C 22/97.

\(^{106}\) C 7/96.

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claims of MTW and Volkswerft amounted to ECU 437 million (DEM 854 million), of which ECU 400 million originated in aid. According to the auditors’ report it was very likely that at least those subsidiary companies of Bremer Vulkan which had been the main debtors under the cash concentration system had received part of the misused aid. It could be said for certain that the ECU 400 million, which included the unauthorised amount of ECU 166 million, had not been used, as required, for the restructuring of the two shipyards but misused within the meaning of Article 88(2) of the Treaty. The Commission decided that the German Government should recover the misused aid from Bremer Vulkan Verbund AG as part of the insolvency proceedings concerning that company. In addition, the German Government should take all steps required by German law to recover any partial amounts from companies previously belonging to Bremer Vulkan, if suitable opportunities were to arise in the course of subsequent inquiries.

f) Kvaerner Warnow Werft GmbH

On 25 November the Commission decided to initiate Article 88(2) proceedings in respect of the exceeding of an annual new production ceiling imposed on the shipyard Kvaerner Warnow Werft GmbH in Warnemünde. In several decisions taken between 1993 and 1995 the Commission had approved restructuring aid totalling ECU 638 million (DEM 1 247 million) to the privatised eastern German shipyard, subject to an annual production limit of 85 000 cgt. A monitoring report completed in June indicated that this ceiling would be exceeded by a considerable margin in 1998 and 1999. It therefore seemed that the conditions laid down in the decisions authorising the aid were no longer met.

Italy

a) Investment aid for the opening of shipyards in Oristano and Belvedere Marittimo

On 22 April the Commission decided to initiate proceedings under Article 88(2) of the EC Treaty in respect of investment aid granted under Italian Law No 488/92 for the opening of two new shipyards, one in Sardinia (Oristano) and one in Calabria (Belvedere Marittimo). These projects would create new shipbuilding capacity and therefore came under Article 6(1) of the Seventh Directive, which provided that aid had to be directly linked to a corresponding irreversible reduction in the capacity of other yards in the same Member State over the same period. As matters stood, the Commission doubted whether this condition had been met.

b) Regional investment aid for shipyards

On 30 September the Commission approved the granting of investment aid for the restructuring of shipyards in six cases. It found that the requirements laid down in Article 6 of Directive 90/684/EEC on aid to shipbuilding were met, in particular since the restructuring plans did not lead to capacity increases.

107 C 66/98 (ex NN 113/98).
c) Aid to the shipyard INMA

On 11 November the Commission decided to terminate with a negative final decision proceedings initiated under Article 88(2) in respect of the Italian authorities’ plan to grant the INMA shipyard in La Spezia aid worth 9% of the contract price, i.e. double that authorised by the directive, for the refitting of two passenger vessels. It concluded that the aid was incompatible with the common market after finding that INMA had been placed in a more favourable position than the other Community shipyards competing for the contract and that there was no evidence to suggest either that the aid was necessary to enable the firm to win the contract in the face of competition from shipyards outside the Community or that, even without such a high level of aid, INMA would have been awarded the contract in preference to the other Community shipyards contacted.

2.4. Motor vehicles

Revision of the framework for the motor vehicle industry

Following its adoption in July 1997, the new framework for state aid to the motor vehicle industry had been accepted by all Member States except Sweden. Accordingly, the Commission initiated Article 88(2) proceedings in October 1997 against all existing Swedish schemes which could be the basis for state aid in the motor vehicle sector as from 1 January 1998. During the proceedings the Swedish authorities accepted the Commission’s position. The proceedings were therefore closed by decision taken on 21 January.

Germany

a) Daimler-Chrysler, Ludwigsfelde

On 9 December the Commission decided not to object to the granting of regional investment aid worth DEM 218 million (ECU 111.2 million) to Daimler-Chrysler for the production of a new commercial vehicle at its plant in Ludwigsfelde in the Land of Brandenburg, an area assisted under Article 87(3)(a). The Commission concluded that the aid, with an intensity of 35% of investment costs, met the requirements of the framework for state aid to the motor vehicle industry.

b) Opel Restrukturierungsgesellschaft mbH, Kaiserslautern

On 9 December the Commission decided not to object to the granting of regional investment aid worth ECU 44.4 million to Opel Restrukturierungsgesellschaft mbH for the production of direct injection engines at its Kaiserslautern plant. The Land of Rheinland-Pfalz, where the assisted investment would be made, was eligible for regional aid under Article 87(3)(c). The Commission concluded that the regional aid, with an intensity of 18% of eligible costs, could be authorised as ‘transformation’ aid within the meaning of point 3.2 of the framework for state aid to the motor vehicle industry and that the requirements of this framework as regards regional aid were met.

\[\text{\footnotesize 110 C 55/97.}\]
\[\text{\footnotesize 111 C 66/97 (OJ C 122, 21.4.1998).}\]
\[\text{\footnotesize 112 N 550/98.}\]
\[\text{\footnotesize 113 N 354/98.}\]
France

*Toyota, Valenciennes-Onnaing* \(^{114}\)

On 16 December, having found that the requirements of the framework for aid to the motor vehicle industry were met, the Commission decided not to object to the granting of regional investment aid totalling ECU 51.72 million to the Toyota group’s new plant at Valenciennes-Onnaing.

Portugal

*AutoEuropa* \(^{115}\)

The Portuguese authorities collaborated fully with the Commission in recovering training aid received by AutoEuropa (a Ford/VW joint venture company based in Setubal and producing multi-purpose vehicles) in excess of that allowed under the motor vehicle framework. The company had been created in 1991, when the Commission had also approved investment and training aid under the framework. The assisted training consisted in intensive pre-production courses at an independent training centre, jointly financed by the Portuguese authorities and AutoEuropa. During the monitoring process it had been noted that AutoEuropa was receiving public funds for training purposes even after the launch of production in 1995.

Sweden

*Volvo Truck Corporation* \(^{116}\)

On 25 March the Commission decided to terminate Article 88(2) proceedings initiated against Sweden in respect of transport aid granted to the Volvo Truck Corporation plant in Umeå. The decision reflected the fact that the Swedish authorities had accepted the Commission’s proposal that the aid be phased out between 1998 and 2003. The phasing-out of the aid would be monitored by the Commission to ensure that the conditions were met.

United Kingdom

*LDV Ltd* \(^{117}\)

On 11 November the Commission decided not to object to the granting of regional investment aid totalling ECU 38 million to the motor vehicle manufacturer LDV Ltd for the production at its Birmingham plant of a new range of medium and heavy vans in a joint venture with Daewoo. It had been agreed that LDV would produce vans in the United Kingdom and supply Daewoo with both vans and spare parts, while Daewoo would provide LDV with the technical support and assistance required to achieve optimum product quality and optimum use of production capacities. The Commission concluded that the aid was compatible with the common market after noting that it met the conditions laid down in the framework on state aid to the motor vehicle industry.

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\(^{114}\) N 438/98.

\(^{115}\) NN 36/97, Competition Policy Newsletter 2/98, p. 83.


\(^{117}\) N 420/98.
2.5. Synthetic fibres

Belgium

Decochim SA\textsuperscript{118}

On 25 November the Commission decided to initiate proceedings under Article 88(2) of the EC Treaty in respect of aid worth some ECU 8.2 million to the newly created synthetic fibres producer Decochim SA in connection with a ECU 27.2 million investment to produce flame-retardant polyester yarn. Although the Belgian Government sought to justify the investment by pointing to the high-tech nature of the product in a market segment that was operating at below capacity, the Commission doubted whether the product was genuinely innovative and needed to be satisfied that there was actually a structural shortage in the production of this type of polyester yarn at Community level.

Germany

Saxonylon Textil GmbH\textsuperscript{119}

On 28 October the Commission decided to initiate proceedings under Article 88(2) of the EC Treaty in respect of planned investment aid for Saxonylon Textil GmbH in the form of grants totalling ECU 21.56 million intended to assist the construction of a new synthetic yarn production line. The code on aid to the synthetic fibres industry was also applicable to developing regions. The Commission had serious doubts about compliance with the requirements of this code, which was also applicable in the new Länder, especially as regards the required significant reduction in production capacity in view of the overcapacity in the industry.

Spain

Brilén SA\textsuperscript{120}

On 25 March the Commission decided to initiate Article 88(2) proceedings in respect of a proposal by the Spanish authorities to grant state aid amounting to ECU 1.2 million to the synthetic fibres producer Brilén SA, located in Barbastro, Huesca (Aragon). The investment project concerned the technological modernisation and upgrading of the company’s polyester yarn production plant. According to the Spanish authorities, the investment would not result in any overall increase in production capacity. Instead there would be a switching of production from staple fibre to polyester textile filament yarn. The Commission had to examine the proposal in the light of the code on aid to the synthetic fibres industry. Since the project appeared to involve an increase in capacity for polyester filament yarn, a product of which there was no structural shortage of supply, the Commission had doubts about whether the proposed aid would be compatible.

\textsuperscript{118} N 263/98.

\textsuperscript{119} N 362/98.

Sniace

On 28 October the Commission decided to terminate with a partly negative decision proceedings initiated under Article 88(2) of the EC Treaty in respect of aid granted to the Spanish synthetic fibres manufacturer Sniace SA, of Torrelavega, Cantabria. As regards the aid in the form of non-market-related interest rates for the rescheduling of social security debts totalling ECU 21.79 million and for agreements concluded with the wage guarantee fund (Fogasa) worth ECU 10.2 million, the Commission concluded that these advantages constituted aid that was unlawful and incompatible with the common market since it did not meet the conditions laid down in the code on aid to the synthetic fibres industry. It therefore ordered the aid to be recovered with interest. The Commission’s decision did not specify the amount of aid but stated that it was at least equivalent to the difference between market-related interest rates and the interest rates agreed with the social security authorities and Fogasa.

As for the other measures, namely a guarantee on a loan of ECU 6 million, other financial measures relating to the construction of a waste processing plant, and a partial debt write-off, the Commission considered that they did not constitute state aid within the meaning of Article 87(1) of the EC Treaty and terminated the proceedings in relation to them. Lastly, the Commission would be taking a separate decision on the compatibility with the EC Treaty of Sniace’s non-payment of environmental protection levies between 1987 and 1995.

Austria

Lenzing Lyocell GmbH & Co. KG

On 14 October the Commission decided to initiate proceedings under Article 88(2) in respect of various aid measures which had either already been granted or which were to be granted to Lenzing Lyocell GmbH & Co. KG, some of them under approved aid schemes or aid schemes which existed prior to accession. The company was part of the Austrian group Lenzing, one of the largest synthetic fibre producers in the world. The aid, intended for investment, environmental protection, training and probably as operating aid, totalled at least ATS 1 034.7 million (ECU 74.7 million), some of the amounts not yet being clear (new investment aid, state guarantee and, probably, a substantial amount of operating aid). On the basis of the information available, the Commission had serious doubts about the compatibility of this aid with the common market. As regards the aid granted under existing or approved schemes, it was not able to establish whether the conditions and ceilings laid down by these schemes had been complied with and it therefore decided to adopt a decision requiring the Austrian Government to provide it with all the necessary information to enable it to take a position on the matter.

Portugal

Cordex SA

On 4 February the Commission decided to terminate Article 88(2) proceedings initiated in March 1997 in respect of the Portuguese authorities’ proposal to award aid under the PEDIP II programme to the

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121 C 68/97 (ex NN 118/97).
123 C 17/97 (ex N 639/96).
rope and cord manufacturer Cordex SA, located in Esmoriz (Ovar). The aid - granted in support of the company’s plans to expand and modernise its range of products made of natural and synthetic fibres, as well as of polyurethane foam for use in a number of products (mattresses and sofa materials, etc.) - was authorised under Article 87(3)(a) of the EC Treaty. The Commission had initiated the formal investigation on the grounds that part of the proposed aid appeared to infringe the Community code on state aid to the synthetic fibres industry. During the course of the Article 88(2) proceedings, the Portuguese authorities substantially modified their original notification. In particular, they agreed to omit from the list of eligible investment costs those activities falling within the scope of the code, namely support for the installation of new capacity in polypropylene yarn. The amount of proposed aid was reduced from ECU 3.47 million to ECU 2.69 million, including part-financing from the Community Structural Funds.

_Companhia de Têxteis Sintéticos SA (Cotesi)_ 124

On 14 October the Commission decided to initiate proceedings under Article 88(2) of the EC Treaty in respect of investment aid worth ECU 10 million for Cotesi, a synthetic fibres producer located in Grijó in the region of Carvalhos. The purpose of the aid was to modernise Cotesi’s production process. In order for the aid to be compatible with the common market, the investment had to comply with the conditions laid down by the code on aid to the synthetic fibres industry even if it was made in an area eligible for regional aid under Article 87(3)(a) of the EC Treaty. The Commission had serious doubts in this respect, in particular as regards the obligation to reduce production capacity significantly in exchange for the aid.

2.6. Financial services

_France_

_a) Société Marseillaise de Crédit (SMC)_ 125

On 14 October the Commission decided to terminate proceedings initiated under Article 88(2) and to approve a total of ECU 953 million in restructuring aid for the privatisation of SMC. The aid was approved on condition that SMC refocused its activities on its commercial banking network and that the restructuring plan presented by the private-sector purchaser, Banque Chaix, a subsidiary of Crédit Commercial de France, was implemented.

The Commission considered that, provided the efforts to make its operations more profitable continued, SMC was viable. It had sufficient own funds to meet its statutory obligations. It did not have own funds in excess of what was strictly necessary for the aid to be approved. The Commission considered that it was necessary for SMC to compensate competitors for the distortions of competition with which they were faced, chiefly by permanently divesting itself of five banking and financial businesses developed over the last ten years alongside its commercial banking business.

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125 C 42/96 (ex NN 194/95).

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b) Crédit Lyonnais\textsuperscript{126}

On 20 May the Commission approved supplementary aid granted by France to Crédit Lyonnais in addition to the aid instalments of ECU 6.8 billion (FRF 45 billion) and of some ECU 600 million (FRF 4 billion) authorised in 1995 and 1996 respectively. The additional aid related to an increase in the losses of Consortium de Réalisations (CDR), modification of the interest rate conditions attaching to the Crédit Lyonnais loan to Etablissement public de financement et de restructuration (EPFR) and abandonment of the subscription by EPFR to a zero-coupon bond issue which Crédit Lyonnais was to finance. The additional aid totalled between an estimated ECU 8 and 15 billion (FRF 53 and 98 billion) given the uncertainty surrounding the future losses of CDR.

The Commission considered that very significant quid pro quo measures had to be taken to compensate competitors for the overall distortion of competition. Accordingly, the aid was approved on condition that Crédit Lyonnais reduced its balance sheet by FRF 310 billion (ECU 47 billion) in Europe and worldwide, over and above the reductions imposed on the bank in 1995, i.e. that it achieved a total reduction in its balance sheet of more than a third as from 31 December 1994. Moreover, Crédit Lyonnais would have to reduce the number of its branches in France to 1 850 by the year 2000. The French Government had committed itself to privatising Crédit Lyonnais by October 1999. After privatisation, the bank’s expansion would remain limited to 3.2% per year up to 2001 and the bank would have to distribute 58% of its net surplus in the form of dividends until the year 2003.

c) Société de Banque Occidentale (SDBO)\textsuperscript{127}

On 22 July the Commission decided to terminate Article 88(2) proceedings initiated on 18 September 1996 and extended on 2 April 1997 in respect of recapitalisation measures and the reversion of part of SDBO to Crédit Lyonnais. It concluded that the increase in capital totalling some ECU 36.4 million granted by the French State via Consortium de Réalisations (CDR) to SDBO prior to the healthy part of its activities reverting to Crédit Lyonnais constituted unlawful state aid and was incompatible with the Treaty.

Italy

a) Banco di Napoli\textsuperscript{128}

On 29 July the Commission approved aid for the reform, restructuring and privatisation of Banco di Napoli provided for in Decree Law No 163 of 27 March 1996, converted into Law No 588 of 19 November 1996. The aid comprised in particular an increase in the capital of Banco di Napoli provided by the Treasury, advances from Banca d’Italia under the arrangements laid down in the Ministerial Decree of 27 September 1974 to cover the losses of Società per la gestione di attività, and tax-relief measures. The estimated net cost to the State was somewhere between ECU 1.14 billion and ECU 6.1 billion. The measures in question were authorised subject inter alia to Italy’s abiding by the undertaking that the bank would sell or close by the end of 1998 18 branches in northern and central Italy, in addition to the already completed sales of 59 branches and of seven branches or offices abroad, together with the Madrid subsidiary. However, the advances granted by Banca d’Italia to cover the winding-up of the banking subsidiary Isveimer would not be considered aid to Banco Di Napoli on

\textsuperscript{126} C 47/96 (ex NN 113/96) (OJ L 221, 8.8.1998).
\textsuperscript{127} C 44/96.
\textsuperscript{128} C 40/96.
condition that the bank did not repurchase any of Isveimer’s assets, unless it proved impossible to sell them to other parties or to realise them on more advantageous terms by liquidation.

b) Banco di Sicilia and Sicilcassa

On 11 March the Commission decided to initiate Article 88(2) proceedings in respect of restructuring aid to Sicilcassa and/or Banco di Sicilia. The Commission asked the Italian authorities for further information in order to determine whether the creation of a regional banking hub in Sicily was financed by state aid which was compatible with the Community competition rules. It was particularly concerned about measures to support the taking-over by Banco di Sicilia of the assets and liabilities of the bank Sicilcassa, which was put into compulsory liquidation in September 1997. The Commission requested further information regarding Banco di Sicilia’s restructuring plan and the integration of Sicilcassa in particular, in view of the position of both institutions on the Sicilian banking market. It also asked for information on Banco di Sicilia’s profit forecasts and the assumptions on which they were based.

2.7. Transport

a) Air transport

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

On 3 June the Commission decided not to object to payment of the second instalment, worth ECU 258.23 million (ITL 500 billion), of aid to Alitalia. This decision followed the positive decision adopted on 15 July 1997 with regard to a capital increase for the company totalling ECU 1.42 billion (ITL 2 750 billion) payable in three instalments provided certain conditions were met, ensuring in particular that the restructuring plan was monitored, that arrangements for its implementation were transparent and that Alitalia’s problems were not passed on to its competitors. While stressing the importance of making good the delays in cost reductions, particularly with regard to crews, the Commission noted that the restructuring plan had been implemented satisfactorily and that Italy had given further undertakings intended both to ensure that the aid would not be used to finance promotional campaigns and to enable competing airlines to benefit from traffic rights to non-EEA countries.

Following the annulment by the Court of First Instance of the Commission decision of 27 July 1994 authorising the recapitalisation of Air France to the tune of ECU 3.05 billion (FRF 20 billion), owing to insufficient reasoning on two points, one relating to the purchase of new aircraft and the other to the competitive position of Air France on routes outside the European Economic Area, the Commission decided on 22 July to adopt a new decision authorising the same amount and clarifying its position regarding the two points raised by the Court. It stressed first of all that the aid was granted in the context of a restructuring plan considered convincing by the Court, that the air transport sector was expanding rapidly, that there was no change in the number of seats offered by Air France and that all


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the aid granted to the airline was intended to reduce its debt burden and not to finance the purchase of new aircraft. Secondly, the Commission pointed out that the general conditions laid down offered sufficient guarantees in themselves with regard to the non-EEA routes, in particular since they involved a reduction in market share throughout the world, since the aid had a much greater effect on the competitive situation for intra-EEA routes than for other routes, and since too tight a restriction on Air France’s capacity on non-EEA routes would essentially benefit the airlines of non-member countries.

On 29 July, pursuant to Article 87(2)(a), the Commission authorised social aid to residents of the Canary and Balearic islands for intra-archipelago flights. A similar decision was adopted on 27 August in respect of aid granted to residents of Madeira for flights between the island and the rest of Portugal.

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

On 11 November, under the Community guidelines on state aid for environmental protection, the Commission authorised a grant of NLG 332 637 awarded by the Netherlands to Martinair for the installation of new equipment designed to reduce pollutant emissions.

b) Sea transport

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

On 7 April the Commission initiated Article 88(2) proceedings in respect of several aid measures connected with the restructuring of the French shipping company Brittany Ferries owing, firstly, to serious doubts about the positive effect of the measures on the company’s viability and, secondly, to the risk of distortion of competition between shipping companies from different Member States.

On 9 December the Commission decided to extend the Article 88(2) proceedings to include a plan to grant FRF 80 million more in aid to Brittany Ferries and any other additional aid granted in connection with the company’s restructuring.

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

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

c) Port services

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

d) Rail transport

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

e) Road transport

On 4 February the Commission decided to initiate proceedings under Article 88(2) of the Treaty in respect of a toll-relief system on the Tauern motorway in Austria, since the measures constituted operating aid.

On 25 March it decided to initiate proceedings in respect of aid to road haulage and combined transport in Italy, given its doubts about the admissibility of the measures under Article 87(3)(c) of the Treaty.

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

On 28 October the Commission decided to initiate proceedings in respect of the extension of the same scheme for 1997.
f) Combined transport

On 9 December the Commission decided, pursuant to Article 87(3)(c), not to object to aid granted by the Dutch authorities to increase the capacity of the combined transport terminal at Born.

On 22 December the Commission decided that measures designed to finance the construction of a new combined transport terminal in Wales did not constitute aid within the meaning of Article 87 of the Treaty.

g) Inland waterways

On 2 October the Commission authorised an amendment made by the French authorities to the economic and social plan for inland waterway transport for 1997 and 1998, which had been approved on 1 October 1997.

On 14 October the Commission authorised investment aid which the Dutch Government planned to grant for the setting-up of a coordination centre for inland container transport (barge control centre) in the port of Rotterdam. However, it initiated proceedings in respect of aid intended to cover the project’s operating costs, since this was considered to be operating aid.

2.8. Agriculture

Acting under the general ban on Member States’ granting pure operating aid, the Commission decided to initiate proceedings under Article 88(2) in respect of a Greek law writing off and consolidating debts for a significant number of agricultural holdings (over 200 beneficiaries) through the Agricultural Bank of Greece. The overall debt to be written off amounted to at least GRD 158.6 billion (about ECU 450 million) and the debt consolidation involved GRD 4.2 billion (about ECU 12 million). The debt was mainly incurred as a result of operational losses made by the holdings concerned; where this was the case, the Commission considered the aid measures to be operating aid, and thus not permitted under the state aid rules; they also seemed to be incompatible with the relevant provisions of the common market organisations. Other debts appeared to be linked to an ‘interventionist policy’ by the Member State; not knowing the exact details of this policy, the Commission had serious doubts about its compatibility with the common agricultural policy. Other financially less significant debts related to the setting-up and operation of infrastructures and to the reconstruction of assets affected by natural disasters. The Commission also initiated proceedings under Article 88(2) of the Treaty in respect of other aid measures included in the law, such as rebates on social security payments made by cooperatives, sales of public assets, investment aid, measures to support livestock production and assistance to one cooperative to pay wages. Following the adoption of a law subjecting national approval of the write-off to prior clearance by the Commission in accordance with Article 88(3), the Commission decided not to issue a suspension order against Greece. In October, on application by Greece, the case was referred to the Council under the procedure laid down in the third subparagraph of Article 88(2). This kind of application has the effect of suspending proceedings initiated by the Commission until the Council has made its attitude known. The Council may, acting unanimously, decide that the aid is to be considered compatible with the common market, in derogation from the provisions of Article 87, if such a decision is justified by exceptional circumstances. If, however, the Council does not make its attitude known within three months of the application by the Member State, the Commission must give its decision on the case.
The Commission decided to initiate Article 88(2) proceedings in respect of what also seemed to be operating aid granted by Ireland, in a case involving aid issues relating both to agriculture and transport. In particular, it involved payment of IEP 1 million (about ECU 1.298 million) in aid to the Irish company Gaelic Ferries for the operation of a ferry service open to transport of livestock from Ireland to continental Europe. The State’s intervention was triggered by the decision of a private ferry operator to discontinue its transport service for livestock for commercial reasons related to pressure from animal welfare groups. In its decision to initiate proceedings, the Commission noted that the professed objective and the effect of the state aid was to guarantee access to the continental market for Irish producers of livestock. By the same token, the exporters could be considered to be favoured within the meaning of Article 87(1) of the Treaty. The rates charged by Gaelic Ferries, although corresponding to the ones the exporters had had to pay previously, would have had no practical significance as it was only the additional payment by the Irish State that had induced a new carrier to start a service for livestock. For this reason the Commission considered that the aid might constitute operating aid since it relieved the exporters of a part of the transport costs which they would have had to bear had the State not intervened.

Concerning state aid for ‘exceptional occurrences’ under Article 87(2)(b) of the EC Treaty, a decision in a Belgian case (Wallonia) created a precedent for state aid to be granted in connection with mad cow disease outside the United Kingdom. For the first time the Commission deemed compensatory aid for damage suffered in the beef and veal sector as a result of the BSE crisis to be compatible with the common market under Article 87(2)(b), even though the damage had occurred outside the United Kingdom, on which an embargo had been imposed. The Commission took the same approach in a case concerning state aid granted by Italy.

In line with a trend already apparent in previous years, in 1998 the Commission continued to receive a substantial number of notifications from various Member States concerning aid granted in connection with natural disasters and exceptional occurrences. In a particularly interesting Greek case, the Commission adopted a negative final decision in respect of aid for lentil producers in Lefkada aimed at compensating them for damage caused by drought in 1996. While the Greek authorities had undertaken to apply the criteria of the Commission’s decision-making practice in relation to events which did not apparently fall directly under Article 87(2)(b), in this specific case compensation was calculated on the basis of the market value of lentils, which certainly would have lead to overcompensation. The Commission also decided to initiate Article 88(2) proceedings in respect of aid planned for melon and watermelon producers in the Thessaloniki region in order to compensate them for damage caused by field mice. The Commission took the view that this situation could not be described as an exceptional occurrence within the meaning of Article 87(2)(b) and that it did not meet the criteria of the Commission’s decision-making practice in similar cases.

In the area of aid for the processing and marketing of agricultural products, the Commission adopted a negative final decision against Germany in respect of aid which might be granted under existing regional aid schemes. In 1995 the Commission had proposed to the German authorities, and to the other Member States, guidelines and appropriate measures for state aid in connection with investments in the processing and marketing of agricultural products. These guidelines provided for a maximum aid rate of 75% for investments in Objective 1 areas and 55% in other parts of the Community. They also provided that no aid could be granted for investments falling within the scope of the sectoral restrictions laid down by Commission Decision 94/173/EC on the selection criteria to be adopted for improving the processing and marketing conditions for agricultural and forestry products. These sectoral restrictions, which were laid down by the Commission following an analysis of representative markets, generally precluded aid for investments in sectors subject to overcapacity at Community level. In their reply to the Commission’s proposal, the German authorities accepted the application of the
sectoral restrictions to aid measures granted under sectoral aid schemes, but stated that they could not accept the application of the sectoral limitations in the case of regional aid schemes. The German authorities considered that they should be able to avoid the sectoral limitations imposed by CAP policy objectives where this was justified by regional policy development objectives. Following the initiation of proceedings under Article 88(2) in July 1996 and having considered the comments made by the German Government, the Commission was unable to accept their arguments. The Commission noted that the sectoral restrictions already took account of regional policy objectives in that they permitted certain types of investment which would be prohibited elsewhere in the Community. In other cases, the Commission considered that investments in sectors which were in overcapacity at Community level would be unlikely to bring about lasting regional development, but could have an adverse effect on trade. Furthermore, the Commission noted that the distinction that the German authorities sought to make between sectoral and regional aid would enable the competent authorities to circumvent Community policy by reclassifying an aid measure under the relevant scheme. For these reasons, the Commission required the German authorities to amend their current regional aid schemes so as to ensure that no aid was given for investment in sectors covered by the restrictions laid down in Decision 94/173/EC.

In a case involving aid granted by Italy for the processing and marketing of agricultural products, the Commission decided that the sectoral limits did not apply to national aid for investments in the retail sector or to investments planned by undertakings whose turnover from wholesale trading (sales to other traders) accounted for no more than 20% of their total turnover and whose turnover from trade in the agricultural products referred to in point 2 of the Annex to Decision 94/173/EC did not exceed 20% of their total turnover. These traders included, for example, large distribution outlets selling generally large quantities to final users, i.e. either families or professional users (service providers such as restaurants, doctors, hairdressers, etc.) and occasionally small shopkeepers. In taking this decision the Commission considered that such aid could be deemed to contribute to the development of the sector, in particular by improving conditions for the distribution of agricultural products, and that it was in line with the logic of the system introduced by the selection criteria referred to in the Annex to Decision 94/173/EC.

Concerning aid for rescue and restructuring, in 1997 the Commission had adopted a negative final decision regarding rescue aid in the form of a state guarantee for a debt consolidation loan granted to the publicly owned cereal trading company EPAC. The Portuguese authorities did not comply with this decision requiring that the aid be abolished, and the matter was now before the ECJ. Subsequently, Portugal had notified a restructuring and privatisation plan for EPAC involving the granting of additional aid to the firm amounting to PTE 15.5 billion (about ECU 77.5 million). At the same time, the Portuguese authorities notified a capital injection in SILOPOR aimed at covering a major part of the debts owed by this company to EPAC and currently amounting to PTE 31.35 billion (ECU 157 million). A programme to privatise the management of cereal silos accompanied this capital injection. Under this programme, the port silos would remain public property, but their operation would be transferred to private companies. The Commission decided to initiate the proceedings provided for in Article 88(2) in respect of these notifications since at that stage it was not possible to conclude that the aid to EPAC complied with the guidelines on restructuring firms in difficulty or that the capital injection in SILOPOR could be justified in the light of the private investor principle, as the Portuguese authorities claimed.

With regard to aid for restructuring firms in difficulty the Commission decided not to approve aid to Jaen Hijos de Andrés Molina SA (HAMSA), Andalusia, and ordered that the aid paid out be recovered. The recipient company, which had five production divisions (meat-based products, slaughterhouses, pig units, cheese making and animal feedingstuffs) and a workforce of 450, had been
The Instituto de Fomento de Andalucía (IFA) had controlled HAMSA since 1995 and in 1997 acquired an 80% shareholding. HAMSA had received assistance from the Spanish Government between 1993 and 1998 through IFA, in the form of guarantees totalling ECU 10.05 million and loans totalling ECU 36.6 million and in the form of remission of debts owed to state agencies (social security, taxes), worth ECU 8.18 million. The Commission took the view that this aid was unlawful and incompatible with the common market under Article 87(1) and did not qualify for exemption under Article 87(2) and (3). In particular the aid concerned was not in conformity with the Community guidelines on state aid for rescuing and restructuring firms in difficulty. As a result of the Commission’s decision concerning this aid, Spain had to terminate the loan contracts, revoke the guarantees which were still in effect and take the necessary steps to recover the aid already disbursed by way of the reimbursement procedure.

Concerning non-notified aid, having received many complaints from 1996 onwards, in 1998 the Commission initiated proceedings under Article 88(2) in respect of aid granted by the German Government under the Indemnification and Compensation Act. The Act provided for the setting-up of a scheme for the purchase of land at reduced prices in the former East Germany which amounted to state aid in the case of some of the beneficiaries. The Commission argued that while, for the categories made up of resettled farmers and legal entities with at least one resettled farmer as a partner, benefiting from a reduced-price purchase might be deemed compensation for a loss suffered (the expropriation of land and/or the possible deterioration of the farm’s assets), this did not apply to the newly settled farmers, the other legal entities and possibly other beneficiaries not included in the law in question. For the latter category the aid could constitute state aid under Article 87(1), given that they had not suffered expropriation or similar damage. The aid rate seemed too high by comparison with those which the Commission could normally accept for the purchase of farmland in ordinary areas (i.e. those not classified as less favoured). In addition, the aid in question appeared to be discriminatory and thus to infringe Articles 6, 40(3) and 45 given the condition that certain beneficiaries had to have been resident in the former East Germany on 3 October 1990, a condition that in practice could only be met by (East) German nationals.

Complaints were also at the origin of an investigation into non-notified aid measures possibly taken by the Italian Government as part of the operation and privatisation of the Centrale del Latte di Roma. The Commission decided to initiate proceedings under Article 88(2) as it seemed that, since 1992, the Centrale del Latte di Roma had had operational losses amounting to ITL 215.1 billion (about ECU 110 million) written off under a “public service” scheme. In initiating proceedings, the Commission considered that a “public service” argument could not be used to justify the writing-off of losses in a fully competitive market covered by a common market organisation. An investigation was also ordered into the support given to Lazio milk producers through the operation and subsequent privatisation of the Centrale del Latte. The Centrale del Latte was privatised in 1997. Since the original owner (the municipality of Rome) decided to proceed with the privatisation without organising a formal public tender procedure and included in the purchase contract a number of onerous conditions (maintenance of workforce, investment plan, supply from local producers), the Commission could not rule out the possibility that aid had also been given to the buyer.

As regards agrimoney compensatory aid, four cases were notified in 1998. The Swedish authorities notified a modification of the ECU 17.7 million scheme that the Commission had approved in 1997, involving a transfer of ECU 3.3 million from the beef to the milk sector, within the maximum losses recorded for each sector. The United Kingdom submitted two schemes in 1998, one concerning the beef sector and one the sheep sector. The beef scheme involved the granting of ECU 95.2 million to

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suckler cow producers (50 % of total beef output) for one year only. At the end of 1998 the United Kingdom notified an amendment to the approved scheme in order to grant a second instalment of ECU 63.3 million. Although the scheme concentrated aid to the beef sector on a restricted group of animals, the Commission considered that the aid was not distorting competition to an extent contrary to the common interest since the aid level did not overcompensate for the income losses suffered by suckler cow farmers for agrimonetary reasons. The sheep scheme involved compensating for the loss of CAP direct aid premiums as a result of the reduction of the green rate applied for CAP direct payments. The aid amount of ECU 15.4 million was distributed in respect of all animals having received the sheep premium in 1997 (18.8 million).

Unlike other Member States, Italy decided to grant ECU 247.3 million in Community aid for a programme consisting of three agricultural economy measures: (a) investment aid for processing and marketing agricultural products, pursuant to Council Regulation (EC) No 951/97 (20 % of the total amount); (b) investment aid for improving the effectiveness of agricultural structures, pursuant to Council Regulation (EC) No 950/97 (14 % of overall funds); and (c) a rebate on premiums for insurance against accidents at work (66 % of total aid).

Concerning promotional aid financed through parafiscal taxes, the Commission decided to initiate proceedings under Article 88(2) in respect of non-notified aid given by the Flemish Government for the promotion of agricultural products. The aid involved making a direct grant to a promotion agency (VLAM) and giving it the right to raise a parafiscal tax on primary products. The Commission decided to initiate proceedings because some of the promotional activities undertaken by VLAM appeared to place excessive emphasis on the origin of the products and thus constitute an infringement of Article 28 of the Treaty and of the framework for national aid for the advertising of agricultural products. The proceedings concerned in particular three labels or logos under which Flemish products were promoted: Flandria, Van Vlaanderen (From Flanders), and Duke of Flanders. Furthermore, the parafiscal levies for some of the products did not exclude levies on imports. For practical purposes the duties on cattle, sheep, goats, horses and pigs were collected at the slaughterhouse. The duties were divided into two parts: a part that had to be paid by the producer and a part that had to be paid by the buyer of the meat. On cattle, sheep, goats, horses and pigs that were imported no charges were levied on the producer. However, the buyer still had to pay his part of the levies on imported animals. According to the Court of Justice (see judgment in Case 47/69 France v Commission [1970] ECR 487), aid may not be financed by parafiscal charges which are also levied on products imported from other Member States. Such a method of financing has a protective effect which goes beyond actual aid in that, even if the rules ensure equal treatment for national and imported products, in practice the arrangements are bound to favour national producers, given that the measures are tailored to national specificity, needs and shortcomings. Consequently, at the stage the proceedings had so far reached, it appeared that the aid could not be considered compatible with the common market in view of the fact that it was financed from obligatory contributions which were also imposed on products imported from other Member States.

Concerning parafiscal taxes, in a decision on a Danish state aid case taken in 1998, the Commission confirmed its favourable approach towards parafiscal taxes levied to meet environmental objectives. When the case was examined in 1995 the Commission had declared increases in the Danish pesticide tax rates to be compatible with the rules on state aid with reference to Article 87(3)(c). Revenue from the Danish pesticide tax, although channelled through the general budget, was reserved for the benefit of the agricultural sector. In 1995 the Commission approved the basic pesticide tax system, involving an increase in the tax rates from 3% to 25 % on average at the wholesale level (up to 37% at the retail

level). Despite the fact that this parafiscal tax was levied on imported products, which in principle makes parafiscal taxes incompatible with the state aid rules, the Commission authorised the system on account of its environmental objectives which were explicitly in line with Community environmental policy and in particular the programme of policy and action in relation to the environment and sustainable development. According to the Commission’s 1995 decision, without imposing the tax on all pesticides used in Denmark the system could not have met its essentially environmental objective. The tax revenue was partly used for aid aimed at reinforcing the reduction in pesticide use. A condition for the Commission’s approval in 1998 was the continued compliance with the relevant Community tax rules, notably that the tax was levied in a non-discriminatory manner on both domestic and imported products.

Concerning aid for promotion and advertising, the Commission adopted in July a negative final decision with respect to the aid measures provided for by Law No 5/97 of the Region of Sicily (Italy), to the extent that the measures for the support and promotion of citrus fruit production in Sicily were to be implemented using mass media such as television, press, radio and posters. The three reasons for initiating proceedings under Article 88(2) were: (1) the absence of assurances of compliance with the guidelines contained in the Commission communication concerning state involvement in the promotion of agricultural and fisheries products; (2) the aid rate of 100%; and (3) the lack of adequate information on the nature of the intermediary operators or representatives of market operators responsible for implementing the advertising campaigns in the mass media. Aid for publicity campaigns in the mass media was subject to the provisions of the Community framework for national aids for the advertising of agricultural products and certain products not listed in Annex II to the EEC Treaty, excluding fishery products. During the Article 88(2) proceedings, the Italian authorities argued in particular that the measures concerned were to disseminate scientific knowledge through the mass media and that therefore the framework was not applicable. However, the Commission concluded that for the framework not to be applicable, it was essential that the promotional measures referred to the product in totally impartial and general terms and that the campaign did not contain any reference to the origin or particular designation of any product, which, on the basis of the information available, was not guaranteed in this specific case. On the subject of the intermediaries responsible for carrying out the advertising campaigns in the mass media, the Commission took the view that the comments submitted by the Italian authorities during the proceedings were not such as to remove doubts about the conformity of the aid measures with Directive 92/50/EEC and consequently their compatibility with the common market. The Italian authorities provided no information that would enable verification of the status (public or private sector) of the intermediaries referred to in Law No 5/97 or of the system used by the Italian authorities to determine the costs of the proposed measures in the event that the above Community directive was not applicable. Thus it could not be ruled out that there would be overcompensation and consequently that aid would be granted to intermediaries.

In April the Commission initiated Article 88(2) proceedings in respect of Article 2 of Italian Law No 341/1995 and the relevant implementing rules as applied to products listed in Annex II to the EC Treaty. The Commission initiated proceedings in respect of the following measures: guarantees and interest-rate rebates on debt consolidation operations, guarantees for equity loans, and guarantees for contributions from banks and other public or private institutions to the capital of SMEs. The aid

measures in the form of debt consolidation and equity investments could be combined. The Commission initiated proceedings in respect of the guarantees for loans and interest-rate rebates or a combination of these measures intended for the consolidation of the debts of recipient undertakings for the following reasons: (a) in the case of viable undertakings, the aid seemed to be operating aid as prohibited under the Treaty since it could not be considered to assist the development of agriculture to an extent compatible with the common market, causing as it did distortions in the sectors concerned through funding which did not seem to be justifiable under Article 87(3)(c); and (b) in the case of undertakings in difficulty, the measures in question did not appear to be compatible with Community rules laid down in the Community guidelines on state aid for rescuing and restructuring firms in difficulty. Concerning the aid measures in the form of guarantees for equity loans granted by banks and for public or private equity investments in undertakings, the Commission decided to initiate proceedings for the following reasons: (a) in the case of firms not in difficulty, the information available suggested that the aid measures did not only cover investments but could also take the form of operating aid, which was not allowed under the competition rules; and (b) in the case of firms in difficulty, the aid measures did not seem compatible with the Community rules on aid for firms in difficulty as laid down in the guidelines mentioned above.

Concerning new projects, it is interesting to note that a total reform of the Dutch pig-farming sector was in the process of being implemented which involved notification of various state aid measures to the Commission. Such reform must also be seen within the context of the implementation of Council Directive 91/676/EEC of 12 December 1991 concerning the protection of waters against pollution caused by nitrates from agricultural sources. The law on restructuring pig farming entered into force in the Netherlands. Upon the entry into force of this law, each pig farmer was allocated a number of pig rights, and within this amount a number of breeding sow rights. These rights were based on the number of pigs and breeding sows respectively held in 1996 or 1995. The law on the restructuring of pig farming provided for a reduction of 25% in the pig rights. This 25% reduction would occur in two stages: a 10% reduction as of 1 September 1998 and a 15% reduction as of 1 January 2000. The law further provided that pig rights would be reduced by 40% in 1998 and by 60% in 1999 upon each transfer of such rights. As of the year 2000, the reduction upon transfer would amount to 25%. No compensation would be granted for this reduction. Within the context of the reform of the Dutch pig-farming sector the following measures had been notified to the Commission: (a) pig levy: system of parafiscal taxes for combating diseases in the pig sector; (b) buying-out scheme: buying of manure production rights at market prices in areas affected by swine-fever; (c) socio-economic plan for pig farming: a project group had prepared a project plan, which provided for collective information (courses, seminars, etc.) together with individual assistance and information through company audits, help with drawing up operating plans, education, conversion and placements for individual farmers; (d) financial allowance for abandoning pig farming: pig rights would be reduced by 40% in 1998 and by 60% in 1999 upon each transfer of such rights; as of the year 2000, the reduction upon transfer would amount to 25%. No compensation would be granted for this reduction. Within the context of the reform of the Dutch pig-farming sector the following measures had been notified to the Commission: (a) pig levy: system of parafiscal taxes for combating diseases in the pig sector; (b) buying-out scheme: buying of manure production rights at market prices in areas affected by swine-fever; (c) socio-economic plan for pig farming: a project group had prepared a project plan, which provided for collective information (courses, seminars, etc.) together with individual assistance and information through company audits, help with drawing up operating plans, education, conversion and placements for individual farmers; (d) financial allowance for abandoning pig farming: pig rights would be reduced by 40% in 1998 and by 60% in 1999 upon each transfer of such rights; as of the year 2000, the reduction upon transfer would amount to 25%. The scheme aimed to provide financial compensation for the larger reductions in pig rights upon transfer in 1998 and 1999, i.e. 15% in 1998 and 35% in 1999; and (e) existing scheme for pig farmers located in certain areas: the aim was to improve the environment by reducing the manure output of intensive pig farming located in or near valuable nature reserves. Pig farmers located in these sensitive areas could cease all activities or transfer their activities to other areas. The cessation of pig farming activities led to the cancellation of pig rights. The transfer of activities led to a reduction in pig rights, pursuant to the new Dutch law on the restructuring of pig farming which entered into force on 1 September. To stimulate such moves, pig farmers located in these areas were entitled to compensation upon terminating or transferring their activities. Apart from the measure at (e), which was still under examination, the Commission approved all the other measures.

The Commission decided to close proceedings initiated in respect of investment aid for the company Agrana Stärke GmbH. It found that the notified measure constituted state aid which was incompatible with the common market and therefore decided that it could not be granted. Agrana Stärke GmbH, which had its registered office in Vienna, was a producer of starch and starch products. The planned investments, which were to increase its production capacity, were intended to allow Agrana to adapt to the changed economic environment after Austria’s accession to the European Union. In view of the existence of large structural surpluses in the starch sector, for which restitution had to be granted in order to allow exports to third countries, the Commission did not normally allow aid to this sector. A clause in the Austrian Act of Accession stipulated that the Commission should act flexibly with respect to transitional national aid schemes designed to facilitate restructuring in the agricultural products processing sector. In accordance with this clause, the Commission had previously allowed several cases of investment aid for restructuring Austrian production in the starch sector which did not entail an increase in capacity. However the investments involved in this case entailed a significant increase in starch production by the company concerned. For this reason, the Commission was unable to accept the Austrian arguments that the Commission should clear the aid in accordance with the flexibility clause. Article 87(3)(c) required the Commission to exercise discretion in determining whether state aid was in the common interest. After undertaking an investigation in accordance with the procedure laid down by Article 88(2), and considering the comments submitted by the Austrian Government and third parties, the Commission concluded that the provision of aid which would have the effect of further increasing capacity in the starch sector could not be considered compatible with the common interest. Furthermore, the Commission took account of the fact that the company had already made the investments and that the production facilities had become operational without state aid having been granted or a positive decision having been taken. The Commission concluded that the aid was therefore not necessary for the investments to be undertaken and the development of the sector to be facilitated. In fact, the free play of market forces had brought about the same result.

Concerning another new Member State, the Commission decided to give its approval to a Swedish state aid scheme involving a five-year (plus two possible extensions of two years) energy tax exemption granted to Agroetanol AB for the production each year of 50 000 litres of bioethanol worth between SEK 80 and 150 million (about ECU 9-17 million). It recommended that Sweden modify the scheme so that it would be possible to monitor the production cost differential of bioethanol and fossil fuels during the first five years of the exemption period and during any extension period so that it would be possible to react to changes in this differential, if necessary, by reducing the tax exemption so that state aid would not be granted to the company in excess of the extra production costs it incurred in producing bioethanol by comparison with the production costs of fossil fuels. Bioethanol is produced from renewable resources (cereals) and blended at low levels with traditional motor fuels. The mixture can be used in ordinary vehicles without any modifications having to be carried out. By comparison with fossil fuels bioethanol is more environmentally friendly, especially as regards its emissions impact; it is basically carbon dioxide neutral. In its decision the Commission reiterated the common interest in the development of renewable forms of energy, the future competitiveness of which would lead inter alia to a reduced import dependency on fossil energy sources and a reduction in emissions of greenhouse gases, of which carbon dioxide was the main one. In view of the assurances given by the Swedish authorities that they would monitor and evaluate the scheme and in view of the time-limit on the tax exemption as well as the relative volume of production by comparison with that of total fuel consumption in Sweden, the Commission accepted that the aid constituted a pilot project. This was a precondition for exempting such schemes from tax under Council Directive 92/81/EEC of 31 October 1992 on the harmonisation of the structures of excise duties on mineral oils. As regards the intensity of the aid, the Commission, which only had limited procedural powers under the state aid rules, applied the principle spelled out in the 1994 Community guidelines on state aid for environmental protection that state aid for renewable energy sources should not exceed the extra production costs involved by
comparison with fossil fuels. While the tax exemption was not likely to result in overcompensation for
the time being, the possibility could not be ruled out that the company might improve its cost efficiency
by, say, increasing the use of production capacity, technological development or selling an increased
share of bioethanol as an additive to petrol in relation to the share sold as diesel. In accordance with
Article 88(1), the Commission therefore decided to recommend that Sweden modify its aid measure in
order to take these factors into account.

Finally, as regards the recovery of state aid which is incompatible with the common market, it is worth
noting that in a case concerning aid for promotion in the sheepmeat sector granted by France in breach
of Article 28 of the EC Treaty, following the Commission’s 1997 negative decision requiring that the
disbursed aid be recovered (with interest from the date on which it was granted and calculated on the
basis of commercial rates), in 1998 the French authorities provided evidence of the recovery, so that
the case can now be considered closed.

2.9. Other industries

Chemicals

Germany

Infraleuna Infrastruktur und Service GmbH

On 25 November the Commission decided to terminate proceedings initiated under Article 88(2) in
respect of grants that the German authorities planned to make to Infraleuna Infrastruktur und Service
GmbH, a company set up not long previously on the Leuna chemical site whose production facilities
had been privatised and sold to one hundred or so different investors. The objective of Infraleuna,
whose shares were mostly owned by the public sector, was to set up and manage all the infrastructure
for the site for the benefit of the companies located there. It had also been given the task of clearing
the site, which was the responsibility of the public authorities, the latter having sold the plots at the
market price for a developed site. The Commission found that, since it was impossible to find a private
investor for the infrastructures, setting up Infraleuna was the only alternative to the various tasks being
carried out by the public authorities and that the initial capital injection for the company of
DEM 1 018 million (ECU 521.63 million) therefore did not constitute state aid pursuant to
Article 87(1). Although an unquantifiable part of the grant for environmental protection totalling
DEM 150 million (ECU 76.86 million) did constitute state aid, this was compatible with the
Community guidelines on state aid for environmental protection. The Commission also noted that no
aid was granted to the companies newly arrived on the site, which were paying the normal price for the
services provided by Infraleuna and in this way ensuring its subsequent funding.

137 C 18/97.
Textiles

France

Nouvelles Filatures Lainières de Roubaix

On 4 November the Commission decided to terminate the proceedings which it had initiated under Article 88(2) in respect of aid unlawfully disbursed to Les Filatures de Roubaix in the form of a grant and an equity loan. It concluded that, of the grant of FRF 22 million (ECU 3.35 million), only the FRF 7.7 million (ECU 1.17 million) which corresponded to the regional ceiling of 35% for SMEs could be justified as regional investment aid and that the equity loan of FRF 18 million (ECU 2.74 million) contained an operating aid element totalling FRF 1.46 million (ECU 0.22 million), i.e. the difference between the rate applied and the market rate. It therefore decided to authorise the portion of the grant amounting to FRF 7.77 million (ECU 1.17 million) and to order that the other aid be abolished by means of the recovery of FRF 14.23 million (ECU 2.17 million) with interest and the application to the equity loan of a rate corresponding at least to the reference rate of 8.28% applicable at the time the loan was granted.

Paper

France

Preferential conditions granted by EDF to certain companies operating in the paper industry

On 20 May, following a complaint, the Commission decided to initiate Article 88(2) proceedings in respect of presumed aid granted to the paper mills Condats, Cascades, Lancey, Gromelle and Sibille in the form of preferential conditions of electricity supply from the publicly owned company Electricité de France (EDF). As an incentive to acquire electrical infra-red drying equipment, the paper mills concerned were granted an advance from EDF when they installed a dryer. This advance corresponded to a rebate on the quantity of electricity which the dryer was estimated to consume during the period of validity of the supply contract, which was usually six years. The discounted total value of the rebates was at least ECU 6.45 million. In initiating these proceedings, the Commission hoped to clarify a number of questions which it could not answer on the basis of the information in its possession, namely (i) whether, by offering these rebates, EDF was covering the marginal cost and at least part of its fixed costs; (ii) whether, in so doing, EDF was not seeking to attract new customers from among the users of other energy sources; (iii) whether other electricity consumers in a comparable situation were being discriminated against; and (iv) whether there was any distortion of intra-Community competition between manufacturers of electrical and non-electrical drying equipment, between suppliers of electricity and suppliers of other forms of energy and between the paper mills benefiting and those not benefiting from an EDF advance.

138 C 50/97.
139 C 39/98 (ex NN 53/98).
Household appliances and electronics

Spain

Magefesa and its successors

On 14 October the Commission decided to terminate with a negative decision the proceedings it had initiated on 16 July 1997 under Article 88(2) in respect of aid received by the companies which were members of the Magefesa group and some of the companies which succeeded them. It concluded that the aid was incompatible with the common market and ordered its recovery. The Magefesa group had already received aid which was declared incompatible in 1989. In its 1998 decision, the Commission noted first of all that its 1989 decision had not been implemented in that the incompatible aid had not been claimed from the companies which had received it. This second negative decision was taken in respect of aid received by the companies in the group, after the adoption of the 1989 decision, in the form of systematic non-payment of taxes and social security contributions amounting to ESP 13 150 million (ECU 78.82 million) until those firms were declared insolvent or definitively ceased activity. Although some of the aid measures concerned might be in line with regional aid schemes, the cumulative effect of the non-recovered aid caught by the 1989 decision and the new aid would adversely affect trading conditions to an extent contrary to the common interest.

Italy

Seleco SpA

On 4 February the Commission decided to extend the Article 88(2) proceedings which it had initiated in 1994 in respect of aid granted to Seleco, a consumer electronics manufacturer. The proceedings were extended in respect of new financial transactions from which Seleco had benefited since 1994 and which might contain aid elements since they involved the public companies Italtel, Friulia SpA and Rel. These transactions were namely the acquisition of shares by Italtel and Friulia SpA, loans worth at least ECU 12.3 million and Seleco’s redemption for ECU 10.28 million of a debt to Rel totalling ECU 33.85 million.

Copper, lead and zinc

Italy

Enirisorse

On 25 November the Commission decided to terminate with a negative decision proceedings initiated under Article 88(2) of the EC Treaty in respect of new aid in the form of a capital injection worth ECU 68.67 million granted by the Italian authorities to the Enirisorse group, which was chiefly active in the copper, lead and zinc industries. The Commission found that the capital injection constituted state aid since the Italian authorities did not act as a normal private investor operating in a market economy would have acted, given the plans to wind up Enirisorse and the fact that no return could thus

140 C 44/97.
141 C 46/94 (OJ C 155, 20.5.1998); for the opening of the original proceedings see 1994 Competition Report, p. 559.
142 C 90/97.
be expected from the capital injection. It therefore concluded that the aid was incompatible and ordered that it be recovered, with interest running from the date on which it was granted.

State stationery and coinage

Italy

Instituto Poligrafico e Zecca dello Stato and the firms it controlled

On 28 October the Commission decided to initiate proceedings under Article 88(2) of the EC Treaty in respect of aid to the Poligrafico group, i.e. Instituto Poligrafico e Zecca dello Stato (Poligrafico) and the firms it controlled, which were engaged in the production of ordinary paper and paper for banknotes, the production of official stamps and collectors’ stamps, and the publication of official government documents and cultural and literary works of national interest. Without the aid, the recipient firms within the group would have incurred significant losses and been in difficulty. The aid consisted both in capital increases totalling ECU 156.5 million injected by Poligrafico into a group member, Cartieri Miliani, and in the payment of significantly excessive prices in connection with exclusive contracts concluded between the State and Poligrafico involving profits of between ECU 66 and 139 million, in particular with the company Verres. In order to be deemed compatible with the common market, the aid would have to comply with the conditions laid down in the guidelines on aid to firms in difficulty.

Energy

Denmark

Measures to assist the natural gas sector in Denmark

On 29 July the Commission approved a tax-relief measure in favour of the Danish natural gas sector. The five natural gas distribution companies and the publicly owned company Dangas had been benefiting from the relief measure in question since they began distributing natural gas in the early eighties. The price of natural gas paid by households corresponded to the price of oil but the regional companies and Dangas could retain what amounted to a ‘shadow tax’ as natural gas was not taxed. The tax concession was necessary in order to enable the construction and expansion of the natural gas system. None the less, the five regional companies and Dangas built up a heavy debt burden of ECU 2.35 billion (DKK 17.4 billion) owing to the fall in oil prices and the lower rate of households’ conversion from oil to gas. The Danish authorities had undertaken to renotify the system when the directive on gas liberalisation was implemented in 2000. In any event, the Commission would receive notification of the tax-relief measure in 2000, as its main component would expire on 31 December 2000. The Commission decided to approve the aid on the ground that the regional companies and Dangas had been entrusted by an official act with the operation of a public service (within the meaning of Article 86(2) of the EC Treaty), namely the construction of the natural gas network and the distribution of natural gas. The scrutiny carried out by the Commission departments had shown that the five regional companies and Dangas had not received and would not be receiving during the period up to 2000 any overcompensation as a result of the tax-relief measure. Finally, emphasis was placed on the fact that the measures would be subject to review before liberalisation of

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143 NN 95/97.

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the gas market started and that, by introducing the notified measures, the Danish Government had in fact reduced the economic benefit to the five regional companies and Dangas.

Germany

Lignite-fired heating plant in Cottbus

On 9 December the Commission decided to terminate proceedings initiated under Article 88(2) and to authorise aid worth DEM 49.5 million (ECU 25.2 million) for the construction of a lignite-fired heating plant for the town of Cottbus. The project applied new technology permitting the use of lignite as a fuel and had benefited from additional Community aid under the Thermie programme. The Commission found that it had a beneficial effect on regional development and employment, while its impact on the fuels market was negligible, and therefore concluded that it was compatible with the common market.

Ireland

Extension of the Irish natural gas network

On 6 May the Commission approved investment aid of ECU 72.3 million (IEP 57 million) for extending the Irish natural gas network by some 355 km, adding almost 50% to the existing network. The aid did not exceed the maximum levels acceptable for the relevant assisted areas in Ireland and was accordingly compatible with the common market.

Netherlands

Aid for 624 Dutch petrol stations situated near the German border

On 3 June the Commission initiated proceedings in respect of aid worth ECU 56.57 million granted by the Dutch Government to 624 Dutch petrol stations located near the German border in order to compensate their owners for the losses resulting from an increase in the excise duty on diesel from 1 January. The aid was based on the quantity of diesel sold and was in inverse proportion to the distance between the station and the border with Germany. The Commission doubted whether the de minimis rule was applicable since the Dutch Government had not shown that the stations receiving aid were all distinct undertakings and that the aid could not therefore have a cumulative effect, and considered that the measure was likely to have an effect on trade and competition between Member States.

Finland

Electricity cable from Sweden to Åland, Finland

On 14 October the Commission decided not to object to the granting of aid worth FIM 48 million (ECU 8 million) for laying a new electricity cable between Sweden and the Åland Islands in Finland to

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145 C 59/97.
replace the old cable in order to meet the islands’ requirements for the next twenty years. The aid was granted to the semi-public electricity company Kraftnät Åland, the owner of the cable, which was responsible for building the network, connecting consumers and supplying electricity. The Commission took account of the fact that the public service obligation on Kraftnät Åland was covered by the concept of a service of general economic interest under Article 90(2) of the Treaty and that the development of trade would not be affected to an extent contrary to the common interest since the new cable would be available to all suppliers and consumers wishing to purchase electricity in Sweden.

**Sweden**

**Aid schemes for R&D within the energy sector**[^149]

On 11 March the Commission approved three aid schemes with a total budget of ECU 607 million for various R&D measures in the energy sector. These measures formed part of a wide-ranging reorganisation of Swedish energy policy designed to improve the sustainable development of environmentally friendly energy sources. The schemes were intended to support basic research and precompetitive research projects by enterprises, research institutes and universities for the development of various renewable energy sources.

**Tourism**

**Austria**

**Kurzentrum Bad Windischgarsten GmbH&Co KG**[^150]

On 22 April the Commission approved investment aid of ECU 4.8 million for the construction of a sanatorium in Windischgarsten, a resort situated in an assisted area. The Commission came to its conclusion having found that there was no overcapacity in this specific market in this area or in neighbouring areas but that there was a lack of beds and that the aid did not exceed the maximum allowable aid intensities for this region.

**Italy**

**Sicilian Regional Law No 25/93**[^151]

On 3 June the Commission decided to terminate proceedings initiated under Article 88(2) of the EC Treaty in respect of Sicilian Regional Law No 25/93 on measures to promote employment (Articles 51, 114, 117 and 119). Regarding in particular the grants for the promotion of tourist transport to Sicily awarded to tour operators and to Italian and foreign travel agencies, the Commission found that, given the scheme’s arrangements, the direct effects of the aid in terms of financial advantages were effectively passed on, via the recipient agencies, to consumers, i.e. tourists. Despite this, the Commission was not able to rule out the existence of aid to the tourist industry as a whole in the region of Sicily within the meaning of Article 87(1) of the EC Treaty. It decided to approve the aid in question in view of Sicily’s eligibility for exemption under Article 87(3)(a) of the

[^151]: C 21/97.

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EC Treaty, and of the fact that the information provided by the Italian authorities demonstrated the inadequate development of the tourist industry in Sicily.

United Kingdom

Tourism challenge fund\textsuperscript{152}

On 22 December, having found that the regional aid ceilings were not exceeded, the Commission authorised the implementation of an aid scheme designed to support investments in tourism in Northern Ireland. The budget allocated to the scheme for the period 1998-2003 was ECU 135 million.

Health care

Italy

Rescue aid to Case di Cura Riunite srl\textsuperscript{153}

On 18 February the Commission decided to raise no objections to the Italian authorities’ proposal to grant a state guarantee to Case di Cura, a public provider of medical services, on new loans for a maximum amount of ECU 20.5 million. The guarantee would be paid under market conditions with a yearly charge of 1.35%. The Commission considered that the measure in question did not fall under Article 87(1) because it did not confer any economic advantage on the firm but only reduced some of the financial disadvantages which the State itself had caused it by not repaying its outstanding debts. Moreover, the Commission considered that there was limited distortion of competition, trade between Member States in the medical services market being negligible.

Telecommunication services

Belgium

Hermes Europe Railtel\textsuperscript{154}

On 7 April the Commission decided to initiate Article 88(2) proceedings in respect of a state guarantee to be given by the Flemish authorities in order to cover 50% of loans amounting to ECU 50 million granted by private banks to Hermes Europe Railtel (HER). HER, a joint venture between the American telecommunications services company GTS and the Dutch HIT Rail BV, aimed to become one of the leading pan-European carriers in a market which was liberalised only recently. HER intended to supply, via its network, a wide range of high-technology trans-frontier telecommunications services. HER would set up and operate along Europe’s rail system an optical fibre network which, by mid-1998, would interconnect six EU countries and Switzerland and, by the end of the project, would be operating all over Europe. The overall investment costs in non-assisted areas in Flanders would run to ECU 64 million. The Commission doubted whether the guarantee would be awarded under market conditions. If not, the Commission noted furthermore that the aid was not being granted to an SME and that the area concerned was not depressed or characterised by high unemployment. If these two

\textsuperscript{152} N 533/98.

\textsuperscript{153} N 461/97 (OJ C 149, 15.5.1998).

conditions had been met, the Commission would have been able to take a more favourable view of the state guarantee in question.

Postal services

*Italy*

**Ente Poste Italiane**\(^{155}\)

On 14 July the Commission decided to initiate Article 88(2) proceedings in respect of aid granted to the Italian national postal operator (Amministrazione delle Poste e Telecommunicazioni, later Ente Poste Italiane and, since February, Ente Poste SpA). Aid appeared to have been granted in various forms over the years. Ente Poste had no analytical accounting system allowing separation of the costs and revenues of reserved and competitive activities respectively. The Commission estimated that the resources granted by Italy to the postal operator over the last thirty years might exceed ECU 20 000 million. At least part of this aid might be compatible with the common market in that it either offset genuine extra costs incurred as a result of the postal operator’s public service obligations, or was granted before the liberalisation of the postal services. Having learned since initiating proceedings that Ente Poste had benefited from additional assistance in the form of a debt write-off worth ECU 2.65 billion, the Commission decided on 16 September to extend the proceedings to include this assistance.

Civil engineering

*Italy*

**Società Italiana per Condotte SpA**\(^{156}\) and **Italstrade SpA**\(^{157}\)

On 16 September the Commission decided to terminate the proceedings it had initiated under Article 88(2) of the EC Treaty in respect of aid received between 1995 and 1997 by the civil engineering firms Società Italiana per Condotte d’Acqua SpA and Italstrade SpA. The companies were subsidiaries of the Iritecnia/Fintecna group and, under the restructuring plan for the group, had previously been granted authorised aid totalling ECU 56 million and ECU 231 million respectively. However, in breach of the Commission decision in respect of Iritecnia, new aid had been granted to the two firms between 1995 and 1997 in connection with their privatisation, amounting to ECU 84 million in Condotte’s case and ECU 91 million in Italstrade’s. The Commission had taken the view that the compatibility of this new aid could only be assessed in the context of an overall examination of all aid granted and therefore that a re-assessment of the compatibility of the aid previously authorised was required.

In terminating the proceedings, the Commission concluded that, notwithstanding the breach of the decision concerning Iritecnia, both the aid measures previously authorised and the new aid measures could be considered compatible with the common market since they complied with the requirements of the guidelines on aid to firms in difficulty and were such as to allow restoration of the long-term


\(^{156}\) C 38/97.

\(^{157}\) C 39/97 (ex NN 59/97).
profitability of the two firms. The Commission therefore authorised the aid on condition, however, that the privatisation of the two firms via the sell-off of Fintecna’s last holdings in their capital, was completed within the specified deadline and that Italy provided regular reports on their economic and financial situation and on the progress made towards privatisation.

**Cinema and television**

**France**

**Aid scheme for film production**

On 3 June the Commission approved a new scheme to support French film production under Article 87(3)(d). The scheme had an annual budget of some ECU 60 million and granted automatic entitlement to aid to any film produced in France that was of cultural interest. The scheme, based on simplified and harmonised rules, facilitated international co-productions. The Commission assessed the notified scheme on the basis of three general criteria which struck a balance between the goal of cultural creation and the development of the audio-visual industry:

— the aid intensity should not exceed 50%, so as to promote commercial incentives which were usual in a market economy and to prevent outbidding by Member States;

— the aid should, as far as possible, avoid bias towards specific activities connected with film production and should not, therefore, provide bonuses for given activities;

— the producer had to be free to spend part (at least 20%) of the film’s budget in one or more other Member States without losing any aid on that part.

**Netherlands**

**Aid scheme for film production**

On 25 November the Commission decided not to object to an aid scheme for film production. The scheme, which involved a low intensity of aid, met the general criteria for approving aid to film production as laid down by the Commission in May in its decision on a French scheme, i.e. the intensity of the aid should not exceed 50% per film and the producer should be free to spend at least 20% of the production budget in other Member States without losing any of the aid. The scheme would apply for a period of five years and had a budget of NLG 15 million (ECU 6.275 million).

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159 N 486/97.
Books

France

Aid for Coopérative d'Exportation du Livre Français

On 10 June the Commission decided to terminate Article 88(2) proceedings initiated in respect of aid granted by the French Government to Coopérative d'Exportation du Livre Français (CELF) by approving the aid on the basis of the cultural derogation laid down in Article 87(3)(d). The aid was granted to CELF to enable it to handle small orders placed by foreign bookshops, thereby allowing readers in non-French-speaking countries to obtain works in French at reasonable prices. The Commission applied the above cultural derogation in view of its conclusion, following a thorough assessment of the relevant market and of CELF’s activities, that the aid was granted exclusively for cultural purposes and not in order to subsidise any other of CELF’s commercial activities.

Betting and gaming

France

Pari Mutuel Urbain

On 6 May the Commission decided to renew the investigation it had opened in 1991 in respect of a series of measures granted by France to Pari Mutuel Urbain and to racecourse undertakings. This decision followed the partial annulment by the Court of First Instance of the final decision taken by the Commission in 1993. At the time, the Commission had approved some of the aid on the basis of Article 87(3)(c) and had decided that some of the other measures did not constitute aid within the meaning of Article 87(1). The Court’s judgment confirmed the first part of the Commission’s decision but set aside the second part. In the light of the judgment, the Commission decided to extend the proceedings initiated in 1991 in respect of these measures.

Arms

Belgium

Aid for the civilian activities of the Herstal group

On 3 June the Commission approved aid of ECU 4 million for the civilian activities of the Herstal group, a military and civilian arms and ammunition manufacturer. The aid was intended for the downsizing plan connected with the reorganisation of the group’s activities and was compatible with the guidelines on aid for firms in difficulty.

160 C 39/96 (ex NN 127/92); for the initiation of proceedings see 1996 Competition Report, p. 243.

161 C 51/90 (ex 100/90) (OJ C 253, 12.8.1998); for the opening of the original proceedings see 1991 Competition Report, point 339.


3. Cross-industry schemes

3.1. Environmental protection and energy saving

Belgium

Sidmar\textsuperscript{164}

On 25 March the Commission authorised environmental protection aid for the steel company Sidmar. The aid took the form of a ECU 26.2 million grant towards ECU 179 million worth of investment in four projects designed to reduce the environmental impact of Sidmar’s activities in order to comply with new environmental standards.

Germany

a) Relief of Georgsmarienhütte GmbH from environmental obligations\textsuperscript{165}

On 29 July the Commission took a final decision on the relief of Georgsmarienhütte GmbH from its environmental obligations with regard to the recycling and disposal of industrial dust. In this decision, the Commission considered the non-notified aid of ECU 31.52 million (DEM 61.64 million) granted between 1994 and 1995 to be illegal and incompatible with the common market and therefore required that it be reimbursed. The Commission found that Georgsmarienhütte did not recycle the dust and was not going to do so since it had concluded that it was not economically viable.

b) Riedel-de Haën\textsuperscript{166}

On 22 December the Commission decided to terminate with a negative decision proceedings initiated under Article 88(2) in respect of investment aid totalling DEM 8 million (ECU 4 million) which had been unlawfully granted to the chemicals firm Riedel-de-Haën. Since the firm was a large company which was not located in an assisted area and therefore could not benefit from general investment aid, the German authorities presented the aid as environmental protection aid. The Commission found that the compatibility criteria laid down in the guidelines on environmental aid were not met since this was a new investment project and there was no evidence that some of the costs were incurred for purely environmental rather than economic considerations which would have prompted the recipient to undertake the investment in any case. It therefore decided to order that the aid be recovered, with interest running from the date on which it was granted.

Italy

a) Servola SpA\textsuperscript{167}

On 1 July the Commission decided to terminate Article 88(2) proceedings initiated in respect of aid totalling ECU 11.36 million (ITL 22 billion) which the Italian Government planned to grant to Servola

\textsuperscript{164} N 675/97.

\textsuperscript{165} C 46/97 (ex NN 86/97); for the initiation of proceedings see 1997 Competition Report, p. 213.

\textsuperscript{166} C 63/97 (ex NN 104/97).

\textsuperscript{167} C 22/96.
SpA for investment in environmental protection. In its decision to initiate proceedings, the Commission had raised doubts as to the compatibility of aid of up to ECU 7.23 million (ITL 14 billion), given that this amount was intended for investment which was not eligible under the Community guidelines on state aid for environmental protection. Since the Italian Government withdrew the aid for this part of the investment, the Commission was able to terminate the proceedings and to approve the rest of the aid.

b) Cartiere del Garda

On 29 July the Commission authorised ECU 1.9 million in aid to Cartiere del Garda for investment in environmental protection. The firm, located in a tourist resort, had decided to invest ECU 6.5 million in the purification of effluent discharged into Lake Garda and in action to reduce production-induced noise pollution. These measures enabled the firm to achieve higher levels of environmental protection than required by law without for all that increasing its productivity. The Commission therefore concluded that the aid was in line with the guidelines on state aid for environmental protection.

Netherlands

a) Green electricity

On 6 May the Commission approved an aid scheme aimed at stimulating the use of electricity generated from renewable energy sources. The scheme introduced a temporary (until 1 January 2003) zero rate instead of the standard energy tax. It would encourage energy distribution companies to offer green electricity to their customers. Green electricity included electricity generated by wind power, solar power, small-scale water power stations or installations running on biomass. The annual budget was estimated at ECU 13.5 million.

b) Investment aid for the Nerefco refinery for the reduction of CO2 emissions

On 17 June the Commission decided to initiate Article 88(2) proceedings in respect of ECU 6.7 million worth of investment aid for the installation of a process-integrated gas turbine at the Nerefco refinery. Using such gas turbines in heat-power stations considerably improves energy efficiency and produces lower CO2 emissions than the conventional, separate generation of heat and power. However, the Commission had serious doubts about whether the aid complied with the Community guidelines on aid for environmental protection, which stipulated that the aid had to be strictly confined to the extra investment costs necessary to meet environmental objectives. Furthermore, it would have to assess whether the energy savings due to the new system had been duly taken into account in the calculation of the aid to be granted.

c) Waste disposal system for car wrecks

On 29 July the Commission declared that the waste disposal system for car wrecks did not constitute state aid within the meaning of Article 87(1). The aim of this system for end-of-life vehicles was to

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ensure that car wrecks were disposed of with a minimum of environmental damage. The system was confined to the disposal of materials for which there was currently no environmentally friendly recycling system that was commercially viable. No gratuitous benefits were conferred on the recycling companies, which merely received a fair remuneration for their activities.

Austria

a) Schmid Schraubenwerke

The decision, taken on 17 June, concerned financial support of ECU 350 000 for rehabilitation of the Schmid Schrauben Hainfeld Ges.m.b.H. site, which had suffered past environmental damage as a result of the operation of a chromium-plating plant between 1965 and 1992. Tests carried out in April 1996 showed the soil to be severely contaminated. The Commission assessed the measures and came to the conclusion that the polluter pays principle, the basic tenet of Community policy on state aid for environmental protection, could not apply because the polluter had been liquidated. The site’s current owner had no control over the property at the time the damage occurred and the economic benefit resulting from the polluting activity had not passed to it. Furthermore, the new owner did not purchase the site on the basis that he knew about the pollution in question and would take responsibility for cleaning it up. Nor was there any reason to consider that the purchase should have been conducted on such a basis. In accordance with point 3.2.2 of its environmental aid guidelines, there being no benefit to Schmid Schrauben Hainfeld, the Commission decided that the measures did not constitute state aid within the meaning of Article 87.

b) Kiener Deponie Bachmanning

On 9 December the Commission decided to terminate Article 88(2) proceedings initiated in respect of aid granted to Atlas, the owner of a contaminated site in Upper Austria. The aid involved the State’s meeting the cost (amounting to some ECU 23 million in total) of the site’s decontamination by the specialised firm ASA, which was to coordinate the operation. The Commission found that the cost of the decontamination and ASA’s fee for the work were in line with market conditions. It therefore concluded that the financing provided by the State to meet the decontamination costs did not constitute state aid, provided that the amount was recovered from Atlas (the site owner) by all available legal means.

United Kingdom

Non-fossil fuel obligation for renewables

On 29 July the Commission approved the fifth non-fossil fuel obligation for renewables in England and Wales, extending the scheme in force, first authorised in 1990. The aid was provided through a contract between public electricity suppliers (containing a series of obligations relating to the purchase of electricity generated from renewables) and generators of electricity from renewables. The aid took the form of a subsidy and was limited to the difference between the cost of purchasing electricity generated from renewables and what that electricity would have cost had it been generated by a fossil-fuel generator. The Commission concluded that the aid in question was operating aid, but it was satisfied

that it would be progressively reduced, that the scheme would be renotified within five years from the date of the decision and that it complied with the Community guidelines on state aid for environmental protection. The scheme’s budget for the financial years 1997/98 and 1998/90 amounted to ECU 383 million.

3.2. Research and development

Germany

a) Sican Group and project partners, Lower Saxony

On 11 March the Commission decided to initiate Article 88(2) proceedings in respect of aid which the Sican group and its project partners had been receiving since 1990 for R&D activities in the microelectronics sector. The Commission doubted whether the aid in question fulfilled the conditions set out in the framework for aid for R&D, since, with the level of information then available, it was not possible to say to which research projects aid had been granted, to determine the stage of research financed, to quantify the amount and intensity of the aid or to demonstrate its necessity and incentive effect.

b) Marine research programme

On 11 March the Commission authorised a programme relating to the coordination of the various marine research activities being pursued in Germany and contributing to the development of a common conceptual framework with regard to such activities. The programme supported mainly basic research carried out by universities. Project-related support was also envisaged for enterprises, mainly SMEs. The programme’s budget was to amount to ECU 43.3 million, of which ECU 11.5-12.8 million was earmarked for project support.

c) Modification and extension of the scheme “Aid for market-oriented non-university research institutes”, Land of Saxony

On 1 July the Commission decided to authorise the extension up to the end of 1999, and the alignment with the new R&D framework, of a scheme (first approved in 1995) to improve the efficiency of non-university business-oriented research bodies in Saxony by modernising scientific equipment and technical infrastructure. The overall budget of the scheme for the years 1996-99 amounted to ECU 10.5 million.

175 C 20/98 (ex NN 166/97, NN 169/97 and NN 170/97 (OJ C 307, 7.10.1998); Competition Policy Newsletter 2/98, p. 86.
177 NN 31/98.
178 OJ C 45, 17.2.1996.

COMPETITION REPORT 1998
d) Modification and extension of the scheme “Innovative technology-oriented collaboration projects”, Land of Saxony

On 1 July the Commission authorised the extension of the above scheme up to the end of 1999, and its alignment with the rules of the new R&D framework and with the new definition of SMEs, with a view to stimulating effective cooperation in R&D between firms and public research bodies in order to contribute to the development of new products and processes in the field of future technologies. The overall budget for the years 1996-99 was ECU 90 million.

e) Aid to help increase SME’s capacity for innovation

On 16 September, having found that the requirements of the framework for aid to R&D had been met, the Commission decided not to raise any objection to the introduction of an aid scheme promoting the innovation capacity of SMEs. The scheme would apply until 2003 and the total budget planned was ECU 510 million. Up to 75% of the grants would go to companies, most of them SMEs, with the balance being awarded to research institutes working in cooperation with the companies concerned.

Spain

R&D regional aid scheme, Castile-Leon

On 18 February the Commission approved an aid scheme for R&D activities corresponding to all the stages of research delineated in the relevant Community framework. The scheme covered the years 1998-2000 and had an annual budget of ECU 12 million.

France

a) Tubes and shapes

On 18 February the Commission approved R&D aid to the “Tubes and Shapes” research centre for the development of a process for designing and manufacturing steel parts using the hydroforming technique with steel tubes and hollow steel profiles (non-ECSC steel). The research project was at the precompetitive development stage. The aid took the form of a repayable advance of ECU 1.74 million (FRF 11.4 million) with an intensity of 19.5%.

b) MEDEA T 601, Eureka 1535

On 6 May the Commission authorised ECU 14.95 million in state aid for R&D granted by France for the installation, under a Eureka programme, of pilot production lines for integrated circuits on 300 millimetre wafers, which are expected to become the manufacturing standard in microelectronics from 2002. Other Member States taking part in this Eureka project were Germany and the

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179 NN 30/98 (ex N 412/97).
180 OJ L 107, 30.4.1996.
184 N 38/98 (OJ C 244, 4.8.1998).
Netherlands. The companies receiving aid which were involved in the project were SGS-Thomson, Air Liquide, GRESSI, Incam and RECIF.

c) Eureka 1711 — ADTT Phase II

On 29 July the Commission approved a scheme to develop improved-quality digital television systems in two fields of electronics production: films and video communications. The scheme would run until the end of 1998 with a budget of ECU 15.5 million, the eligible costs being ECU 39.5 million. The recipients were Thomson Multimédia, Philips Electronique Grand Public, Philips Composants, Thomcast-Matra Communication, Enertec-Schlumberger Industries and Cril Ingénierie.

d) Recmes

On 22 December, having found that the requirements of the framework for aid for R&D were met, the Commission decided not to raise any objections to the granting of subsidies totalling ECU 220 million to a programme of basic and industrial research involving industrial firms and publicly owned research laboratories. The programme, entitled Recherche coopérative en micro-électronique silicium - Recmes, was intended to develop new generations of electronic circuits. The main industrial firms involved in the research were STMicroelectronics and Air Liquide, along with TCEC, SETEC and Alcatel.

France and the Netherlands

Commend (Eureka 1549)

On 7 April the Commission approved aid in connection with the Commend R&D project, adopted as Eureka project 1549 in July 1996. Commend’s objective was research into the interconnection for consumers of various kinds of digital equipment, networks and services (e.g. TV, PCs, digital video broadcasting, telecommunications networks, advanced cable networks and digital recordings). The research was to study the feasibility of those systems and to produce a proposal for a European standard, protocols and management structures. It was an industrial research project. The innovative aspect of Commend consisted in taking as the actual point of departure for research the interconnection of different categories of equipment, networks and services. Five countries were involved in the project (France, the Netherlands, Germany, Austria and Belgium). It would run until the year 2000, with the overall costs for the various partners estimated at ECU 126 million. The Commission approved the following aid amounts: for France, ECU 13 million for Thomson Multimédia and ECU 13.6 million for Philips Electronique Grand Public; for the Netherlands, ECU 13.4 million for Nederlandse Philips Bedrijven BV. The aid would take the form of direct grants up to a maximum of 50% of eligible costs.

186 N 264/98.
Italy

**Tax measures to promote R&D within industrial undertakings**

On 11 March the Commission approved a scheme of aid mainly for SMEs nationwide, designed to promote industrial and precompetitive R&D activities within industrial undertakings. The aid was to be provided in the form of tax credits, with a budget of ECU 178 million per year. The scheme would run from 1998 to 1999.

Netherlands

a) **Océ NV**

On 11 March the Commission decided to initiate Article 88(2) proceedings in respect of the Dutch Government’s proposal to grant aid of ECU 23 million to Océ NV for the development of colour ink-jet printers. In 1994 Océ had received a grant of ECU 3.2 million for an ink-jet project for the period 1994-96 under the “Business-oriented technology stimulation scheme”. The new project, to run from 1997 to 2001 and presented as being largely R&D, did not appear to be eligible for public funding under the R&D aid rules. The work described seems to correspond to a product-development work programme aimed at developing prototypes to maturity and preparing them for series production. The proposed aid did not have any demonstrable incentive effect, i.e. an inducement for the company to carry out research which it would not otherwise have pursued.

b) **Fokker 70 project**

On 17 June the Commission decided to close the file on R&D aid for the Fokker 70 project. The Commission took this decision because, following Fokker’s state of suspension of payments on 23 January 1996 and the company’s insolvency two months later, the Dutch Government undertook to recover, in accordance with the rules of Dutch law, the total of ECU 103 million in aid granted to the Fokker 70 project. The aid had been given to support the development of a civil transport aircraft (the Fokker 70, a derivative of the Fokker 100) whose total R&D costs had been estimated in 1993 at ECU 163 million.

c) **MEDEA T601 (Eureka 1535)/Atlas**

On 29 July the Commission approved aid of ECU 88 million for the MEDEA T601 (Eureka 1535/Atlas) project. The objective of the aid was to stimulate the participation of Dutch companies in this international collaborative R&D project. The recipients were ASML, ASMI and Philips Semiconductor. The aid took the form of grants and loans. The overall budget amounted to ECU 43.4 million for grants and ECU 45 million for loans.

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191 NN 28/94.
Austria

Siemens Bauelemente OHG

On 7 January the Commission decided to initiate Article 88(2) proceedings in respect of a plan to grant an aid package to Siemens for the conversion of its semiconductor production plant in Villach (situated in a non-assisted area) to power semiconductor production. The notified package of ECU 27 million comprised ECU 25.5 million for R&D and some ECU 1.7 million (ATS 23 million) for environmental and training measures. In the Commission’s view, the Austrian authorities had not demonstrated the incentive effect of the proposed R&D aid, the necessity of the aid or the eligibility of the project for funding as “precompetitive development activity”. As regards the environmental aid, the Austrian authorities would have to demonstrate that it was being granted for action extending beyond legal requirements. Furthermore, the nature of the training project (specific versus general vocational) remained to be established.

United Kingdom

Rolls-Royce large engine programmes

On 25 March the Commission authorised R&D aid which the UK authorities proposed to grant to Rolls-Royce for the development of a new generation of three high-thrust aero engines, derivatives of the existing Trent engines. The aid took the form of a reimbursable advance of ECU 297 million (GBP 200 million) to be granted over four years (1988-2001). The total cost of the R&D programmes was ECU 1 095 million (GBP 736 million). A precondition for obtaining government funding was achievement by the company of a number of performance milestones. Significant failures in key parts of the R&D programme could result in the withdrawal of further government funding. The Commission found that the terms of the planned investment would be as commercial as possible. On the other hand, it recognised that, given the risk of partial failure of the R&D programmes, the investment could not be considered as fully commercial. The Commission was satisfied with the aid’s incentive effect, considering that without government support the company would be unable to raise the moneys on the capital markets and proceed with the R&D programme.

3.3. Rescue and restructuring aid

Belgium

Sunparks International NV

On 30 September the Commission decided not to raise any objections to restructuring aid for Sunparks International NV, an operator of all-weather holiday parks. The restructuring plan for the company was based on cost-reduction measures, a new strategic repositioning of the parks and financial restructuring. The Belgian authorities would provide a guarantee of 75% for two loans. The aid intensity was set at BEF 360 million (ECU 8.8 million). The Commission took into account the large contribution from the private sector and the viability of the restructuring plan. The Belgian authorities


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had given assurances that this would be the last time restructuring aid would be granted to the company.

Germany

a) Brockhausen Holze GmbH

On 4 February the Commission decided to initiate Article 88(2) proceedings in respect of aid worth ECU 2.5 million in the form of a sleeping partnership and a guarantee granted to the Brockhausen Holze foundry in Saxony. On the basis of the information in its possession, the Commission had serious doubts about the compatibility of the aid. Although granted under schemes previously approved by the Commission, it appeared not to comply with the conditions of those schemes.

b) Kranbau Eberswalde GmbH

On 11 March the Commission decided to initiate Article 88(2) proceedings in respect of aid - including ECU 30 million granted in 1997 and ECU 4.76 million which had not yet been disbursed - to Kranbau Eberswalde GmbH, a manufacturer of cranes and lifting equipment based in the Land of Brandenburg. On the basis of the information available, the Commission had serious doubts about the compatibility of the aid with the guidelines on state aid for rescuing and restructuring firms in difficulty, in particular with respect to the validity of the restructuring programme and the reduction of overcapacity.

c) Weida Leder GmbH and its subsidiary Schloßmühlenweg

On 11 March the Commission decided to initiate Article 88(2) proceedings in respect of aid worth ECU 18.5 million for the restructuring of Weida Leder GmbH and its subsidiary Schloßmühlenweg, both operating in the tanning industry and based in the Land of Thuringia. On the basis of the information at its disposal, the Commission had serious doubts about the compatibility of the aid with the guidelines on aid for rescuing and restructuring firms in difficulty.

d) Wildauer Kurbelwelle GmbH

On 7 April the Commission decided to initiate Article 88(2) proceedings in respect of aid totalling ECU 47 million for the privatisation and restructuring of Wildauer Kurbelwelle GmbH, a foundry located in the Land of Brandenburg. On the basis of the information available, the Commission had serious doubts as to the compatibility of the aid, firstly with respect to the application of the Treuhand arrangements, and secondly with regard to its compliance with the guidelines on aid for rescuing and restructuring firms in difficulty, in particular as far as the restoration of the firm’s viability was concerned.

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e) SHB Stahl- und Hartgußwerke Bösdorf AG

On 22 April the Commission decided to terminate Article 88(2) proceedings it had initiated in respect of restructuring aid totalling ECU 5.5 million granted to the by then insolvent SHB Stahl- und Hartgußwerke Bösdorf AG, a foundry located in the Land of Saxony. The Commission found that the conditions laid down by the guidelines on aid for rescuing and restructuring firms in difficulty had not been met, in particular as regards the devising and implementation of the restructuring plan. It therefore concluded that the aid was incompatible and required that it be recovered.

f) Triptis Porzellan GmbH

On 22 April the Commission decided to terminate Article 88(2) proceedings it had initiated in respect of aid in the form of debt relief worth ECU 4.1 million and state guarantees on up to 90% of loans totalling ECU 13 million to the by then insolvent Triptis Porzellan GmbH, a porcelain producer located in the Land of Thuringia. The Commission concluded that the aid was incompatible with the guidelines on aid for rescuing and restructuring firms in difficulty, in particular as regards the devising of the restructuring plan.

g) SKET — Herborn & Breitenbach, SKET EDV

On 13 and 20 May the Commission authorised restructuring aid for Herborn & Breitenbach and SKET EDV. In both cases, the Commission judged that the aid could be considered compatible with the guidelines on aid for rescuing and restructuring firms in difficulty. Herborn & Breitenbach (H&B) grouped together several companies which had belonged to the SKET Schwermaschinenbau Magdeburg GmbH (SKET SMM) group. H&B operated in the mechanical engineering sector. When ‘Gesamtvollstreckung’ proceedings (insolvency proceedings for firms in the new German Länder) were initiated against SKET SMM, H&B — a subsidiary of SKET SMM — was separated from the SKET SMM group and transferred to the Bundesanstalt für vereinigungsbedingte Sonderaufgaben (BvS). The Commission initiated Article 88(2) proceedings in respect of aid which had been granted to SKET SMM before the ‘Gesamtvollstreckung’ and took a negative final decision in 1997. This decision did not concern aid to H&B, which was not the subject of ‘Gesamtvollstreckung’ proceedings. The state aid proceedings were split following the negative decision and pursued so that the aid granted to H&B could be assessed separately. The Commission adopted a positive final decision in respect of grants of ECU 11 million and guarantees totalling ECU 1.6 million which had been provided during the restructuring process under H&B’s successive plans and which were due to cease with privatisation in 1998.

SKET EDV was set up after the ‘Gesamtvollstreckung’ proceedings were initiated. It was a continuation, as a separate legal entity, of the SKET SMM group’s data processing systems division. It was privatised by the BvS in the summer of 1997. The Commission decided not to raise any objections to grants of ECU 2.4 million intended to support a major restructuring of the company.

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200 C 9/97 (ex NN 2/97, ex N 645/96); for the initiation of proceedings see 1997 Competition Report, page 245; Competition Policy Newsletter 2/98, p. 86.

201 C 35/97 (ex NN 129/96); for the initiation of proceedings see 1997 Competition Report, p. 247; Competition Policy Newsletter 2/98, p. 87.

202 C 16c/95 (ex C 16a/95, ex NN 50/94, NN 46/93, NN 95/93).

203 NN 126/97.

COMPETITION REPORT 1998
h) **CD Albrechts GmbH**

On 3 June the Commission decided to initiate Article 88(2) proceedings in respect of aid of ECU 185 million granted for the restructuring of CD Albrechts GmbH, a manufacturer of compact discs and electronic equipment based in the Land of Thuringia. The information at the Commission’s disposal gave rise to serious doubts about the compatibility of the aid with the guidelines on aid for rescuing and restructuring firms in difficulty, particularly with regard to the restoration of the company’s viability.

i) **Graphischer Maschinenbau GmbH**

On 29 July the Commission decided to initiate proceedings in respect of restructuring aid in the form of a grant of ECU 4.65 million (DEM 9.31 million) to Graphischer Maschinenbau GmbH, Berlin, a subsidiary of Koenig & Bauer-Albert AG. Graphischer Maschinenbau GmbH manufactured printing machinery for newspapers. At that stage, the Commission doubted whether the measures proposed in the restructuring plan would ensure the firm’s long-term viability and whether some of them were absolutely necessary for its restructuring. And it considered that the proposed restructuring grant was not in proportion to the eligible costs and might not exclusively benefit a firm in difficulty within the meaning of the guidelines for rescue and restructuring aid. A detailed examination was accordingly required to assess the overall compatibility of the proposed aid with the common market.

j) **Ingenieur und Maschinenbau GmbH**

On 16 September the Commission decided not to object to the granting of rescue and restructuring aid for the engineering firm Ingenieur und Maschinenbau GmbH (IMG), Rostock, in connection with its privatisation. IMG, which specialised in automation systems for shipyards, belonged to the Bremer Vulkan group from 1993 to 1996, but was separated from the group following the latter’s insolvency. It had received aid in the form of state guarantees worth DEM 15 million (ECU 7.5 million) and a debt write-off worth DEM 13.5 million (ECU 7 million). The Commission concluded that this aid was compatible with the common market pursuant to the guidelines on aid for rescuing and restructuring firms in difficulty and given that the new owners would from then on be responsible for funding the firm’s activities.

k) **Rawe GmbH & Co**

On 30 September the Commission decided not to raise any objections to the granting of aid to the textile firm Rawe GmbH & Co in connection with its restructuring. The Commission found that the conditions laid down in the guidelines on aid for firms in difficulty were met. The aid would take the form of a state guarantee covering a loan of DEM 15.4 million (ECU 7.7 million).

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l) Rackwitz Aluminium GmbH

On 11 November the Commission decided not to raise any objections to restructuring aid to be granted to Rackwitz Aluminium GmbH. The company was located in eastern Germany and was active in the field of pressing and casting recycled aluminium. In 1993 it was privatised by the Treuhandanstalt. At the beginning of 1997 insolvency proceedings were initiated against it. In December 1997 Norsk Hydro Deutschland GmbH, a wholly owned subsidiary of the Norwegian firm Norsk Hydro ASA and a major aluminium producer, agreed to take over Rackwitz. The insolvency proceedings were suspended following the reaching of a composition arrangement. Norsk Hydro Deutschland developed a restructuring plan which would lead Rackwitz back to long-term viability. The investor would contribute a total of ECU 35 million (DEM 69.6 million) until 2001. The Bundesanstalt für vereinigungsbedingte Sonderaufgaben and the Land of Saxony waived claims against Rackwitz totalling ECU 5.5 million (DEM 10.8 million). The capacity of the pressing plant would be reduced by 55%; the aid measures were limited to the absolute minimum necessary to restore viability.

m) Draiswerke GmbH

On 25 November the Commission decided to terminate proceedings initiated under Article 88(2) and to authorise restructuring aid granted to Draiswerke GmbH, Mannheim. The aid comprised a ECU 0.4 million (DEM 0.8 million) loan provided by the municipality of Mannheim and a 50% state guarantee on a ECU 3 million loan granted by the publicly owned bank Landeskreditanstalt Baden-Württemberg. The firm concerned produced specialised machinery in a niche market and supplied the chemical, coating, food, paper, pharmaceutical, detergent and ceramic industries. The Commission considered the aid to be compatible with the guidelines on rescue and restructuring aid. The German Government had submitted a feasible restructuring plan, and Draiswerke had reduced its capacity and its product range and had viable long-term prospects.

n) Addinol Mineralöl GmbH, in Gesamtvollstreckung (insolvency) proceedings, and Addinol Lube Oil GmbH & Co. KG

On 25 November the Commission decided to terminate proceedings initiated under Article 88(2) in respect of further aid to Addinol Mineralöl GmbH (Addinol Old), in insolvency proceedings, and the new firm Addinol Lube GmbH & Co KG, which was set up to take over Addinol Old's lubricant distribution activities after the insolvency proceedings were initiated in respect of that company. The measures concerned comprised aid of up to DEM 7 million (ECU 3.6 million) already granted and planned aid totalling DEM 40.05 million (ECU 20.52 million). The Commission found that the aid did not meet the requirements of the guidelines on aid for firms in difficulty, in particular as regards the long-term viability of the recipients and the contribution from private shareholders, which was known to be insufficient by comparison with the State’s contribution. The Commission therefore ordered that the DEM 7 million be recovered with interest and prohibited the granting of the planned DEM 40.05 million. Given the existence of this new aid, the Commission also decided to reassess the compatibility of previously approved rescue aid to Addinol Old. It concluded that there was no reason to question the compatibility of that aid.

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208 NN 76/98.
209 C 27/98 (ex NN 41/97).
210 C 11/98.
o) *Maschinenfabrik Sangerhausen GmbH*\(^ {211} \)

On 9 December the Commission decided to terminate with a negative decision proceedings initiated under Article 88(2) in respect of aid totalling DEM 2 million (ECU 1 million) granted to Maschinenfabrik Sangerhausen GmbH with a view to ensuring the firm’s continued operation. It concluded that the aid did not meet the requirements of the guidelines on aid for firms in difficulty and ordered its recovery by all available legal means, with interest running from the date on which it was granted.

**Spain**

a) *Babcock Wilcox España*\(^ {212} \)

On 7 April the Commission initiated Article 88(2) proceedings in respect of aid granted unlawfully to the public undertaking Babcock Wilcox España, which supplied turnkey factories and industrial and environmental equipment. The aid, in the form of two capital contributions by public holding companies, amounted to a total of ECU 122 million. The Commission had serious doubts about its compatibility with the guidelines, particularly with regard to the restoration of the firm’s viability.

b) *Fabricantes Vascos de Herramientas SA*\(^ {213} \)

On 14 July the Commission took a partially negative final decision in relation to restructuring aid granted to Fabricantes Vascos de Herramientas SA (Favahé), a Basque manufacturer of hand tools which had filed for insolvency in 1995. The aid was granted in 1992 in the form of a state guarantee worth ECU 5 million. This guarantee was not notified to the Commission. In addition, the Commission suspected that aid could have been involved in the insolvency proceedings. In the course of the Article 88(2) proceedings, the Spanish authorities provided evidence that Favahé’s insolvency had been carried out in accordance with the applicable legislation. The Commission concluded that, in that respect, no aid was involved. As far as the guarantee granted in 1992 amounting to ECU 5 million was concerned, however, the Commission concluded that this measure constituted state aid which had been awarded illegally and which could not be considered compatible with the common market, notably since the Spanish authorities had not submitted a sound restructuring plan which allowed, on the basis of realistic assumptions, the long-term restoration of the firm’s viability. Given the financial difficulties of the enterprise, the overall amount of money covered by the guarantee had to be considered aid. The Commission ordered the Spanish authorities to recover the whole sum with interest.

c) *Porcelanas del Norte SAL*\(^ {214} \)

On 14 July the Commission took a partially negative decision in relation to restructuring aid granted to Porcelanas del Norte SAL (Ponsal), a porcelain producer in Pamplona. Ponsal was liquidated in 1995 and a new company Comercial Europa de Porcelanas SAL (Comepor) continued Ponsal’s activities. The measure in respect of which the Commission had initiated Article 88(2) proceedings consisted of a debt write-off of ECU 18.6 million granted by the authorities on the occasion of Ponsal’s insolvency, investment grants of ECU 3 000 per job created and a loan amounting to ECU 4.5 million. In the

\(^ {211} \) C 7/95.

\(^ {212} \) C 33/98 (ex NN 33/98) (OJ C 249, 8.8.1998).

\(^ {213} \) C 52/96 (ex NN 43/95, NN 44/95); for the initiation of proceedings see 1996 Competition Report, p. 239.

\(^ {214} \) C 32/97 (ex NN 188/95); for the initiation of proceedings see 1997 Competition Report, p. 255.
course of the Article 88(2) proceedings the Commission came to the following conclusions. In respect of the debt-write-off of ECU 18.6 million, there was no illegal aid involved since Spanish insolvency legislation had been fully complied with and alternative liquidation procedures would have entailed higher losses for Spain. The investment grants of ECU 3 000 per job created were based on an approved aid scheme and therefore involved existing aid. Concerning the ECU 4.5 million loan, however, the aid could not be considered compatible since it was not certain that the enterprise would see its viability restored in the long term. The Commission therefore ordered the Spanish authorities to recover the loan with interest.

France

a) Société française de production

On 21 January the Commission decided to terminate Article 88(2) proceedings initiated in respect of state aid granted to Société française de production (SFP) to support its restructuring. The aid consisted of ECU 182 million for industrial restructuring and ECU 197 million for financial restructuring. The Commission found that SFP would in future be run under market conditions and that the restructuring plan would restore the viability of SFP by the year 2000. Nevertheless, the aid was approved subject to conditions, one of them being the giving by the French authorities of an assurance that staff reductions would proceed as planned in the restructuring programme.

b) Restructuring aid for Gooding Electronique (GESa) and aid to Cofidur for the takeover of GESA

On 25 February the Commission decided to initiate Article 88(2) proceedings in respect of restructuring aid totalling ECU 5.44 million granted in 1994 to Gooding Electronique (GESa), which had been undergoing reorganisation under court supervision since 1995. Proceedings were also initiated in respect of ECU 0.69 million in aid granted to Cofidur for the takeover of the old GESA plant in the context of the same court-supervised reorganisation. In both cases, the Commission doubted whether the conditions for granting restructuring aid to firms in difficulty, as set out in the guidelines, had been met.

Italy

Restructuring aid for Keller SpA and Keller Meccanica SpA

On 1 July the Commission took a negative final decision in relation to a ECU 17.48 million (ITL 33 839 million) soft loan granted to Keller SpA and a ECU 3.36 million (ITL 6 500 million) soft loan granted to Keller Meccanica SpA and requested the Italian authorities to recover the aid element contained in these soft loans. Unlike the Italian authorities, the Commission considered that both soft loans had been granted outside the scope of approved regional aid schemes. The Commission therefore considered them to be new individual measures not covered by approved schemes. The soft loans could not be authorised as restructuring aid under the Community guidelines: completion of existing orders could not be considered a restructuring plan because it did not constitute a feasible, coherent and far-

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216 C 14/98 (ex NN 19/95) (OJ C 179, 11.6.1998); Competition Policy Newsletter 2/98, p. 84.
218 C 14/97 (ex NN 15/97).
reaching plan to restore a firm’s long-term viability. The aim of the measures was to maintain both companies in activity during a limited transitional period while a private purchaser was found. Moreover, the aid could not be authorised as rescue aid since it was not limited to a minimum period during which the companies’ future could be assessed.

Austria

Rescue aid to Actual Maschinenbau AG

On 1 July the Commission adopted a negative final decision on the extension of a rescue loan of ECU 1.1 million to Actual Maschinenbau AG, initially approved in 1997 for a period of six months only. Actual Maschinenbau was a large machine-tool manufacturer located in Ansfelden, a non-assisted area. Contrary to what was specified in the initial approval decision, the rescue loan had not been repaid by the end of July 1997. Furthermore, the Commission had insufficient evidence to conclude that exceptional circumstances might justify an extension of the rescue loan or that an extension would definitely allow the company to devise an appropriate restructuring plan. The Commission also had to take into consideration the fact that the relevant machine tools market was highly competitive internationally and had a high export content. Given the financial difficulties of the enterprise, the overall amount of the loan had to be considered as aid. The Commission therefore requested the Austrian authorities to recover the loan with interest.

Portugal

a) State guarantee scheme for bank loans

On 20 May the Commission approved an aid scheme (known as the SGEEB), comprising state guarantees for bank loans, designed to facilitate the funding of financial consolidation and industrial restructuring of firms in difficulty. The aid took the form of a state guarantee on bank loans to firms showing a financial imbalance, granted in the context of a restructuring plan which should ultimately put the firm back on a sound financial footing. Specifically, firms which had had a degree of financial independence below 15% for the last two financial years, financial charges of more than 6% of turnover for the last two financial years and/or accumulated losses for the last five financial years were eligible. Depending on the composition of the bank loans, the proportion guaranteed by the State would represent between 25% and 50% of the amount of the loan (principal and interest) not backed by security, up to a limit of ECU 5 million per recipient. The proportion guaranteed by the State might, however, be increased to 75% in the case of loans of less than ECU 0.5 million to small or medium-sized enterprises. The Commission considered that the scheme was genuinely directed at firms unable to recover on their own, whether by using funds obtained from their shareholders or by borrowing on market terms, and that the scheme was in keeping with the Community guidelines on state aid for rescuing and restructuring firms in difficulty.


b) Aid scheme for the modernisation of companies

On 22 December the Commission approved an aid scheme for the modernisation of companies (SIRME) designed to facilitate the financial consolidation and industrial restructuring of firms in difficulty by promoting their acquisition either by sound companies or by their own managers or workers. The aid available generally took the form of acquisitions of holdings in the firms acquiring the firms in difficulty under a contract for financial consolidation and industrial restructuring which should set the struggling firm back on a sound financial footing. The aid was limited to ECU 5 million per recipient. In addition, the holdings were acquired on a temporary basis (maximum eight years), were minority holdings (no more than 25% of the share capital and one third of permanent funds) and had to be accompanied by an equivalent capital injection made by the acquiring firms. The Commission considered that the scheme, designed to supplement the SGEEB scheme, met the conditions for authorisation of restructuring aid as laid down by the Community guidelines on state aid for rescuing and restructuring firms in difficulty.

3.4. Employment and training aid

Belgium

Techspace Aero and Cockerill Mechanical Industries

On 16 September the Commission decided to raise no objections to training aid for the employees of Techspace Aero and Cockerill Mechanical Industries facing unemployment owing to the companies’ conversions from military to civil activities. Techspace Aero was to receive BEF 12 500 391 (ECU 325 679) and Cockerill, BEF 22 587 681 (ECU 588 488), part financed by the European Social Fund and the Walloon Region. The Commission considered that the planned training measures would principally benefit the employees, offering them additional qualifications that could also be used in other companies.

Denmark

Aid scheme to promote the employment of people experiencing difficulty entering the labour market

On 6 May and 14 July the Commission authorised, on the basis of the guidelines on aid to employment, aid schemes of unlimited duration with a total budget for 1998 of ECU 127 million designed to support measures to help people experiencing particular difficulty to enter the labour market.

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221 NN 100/98 (ex N 393/98).
222 N 563/97.
Italy

a) Aid scheme to promote employment in Sicily

On 25 February the Commission decided to approve an aid scheme for businesses operating in Sicily which comprised exemptions from social security contributions designed to promote net job creation and the transformation of insecure jobs into permanent ones. The average aid amount was ECU 22 000 per job created or stabilised. The budget allocation for the scheme was ECU 76.5 million. The Commission found that aid for the net creation of new jobs in an assisted region was in line with the Community guidelines on aid to employment. As for the aid for stabilising insecure jobs, while it was not expressly provided for in the above guidelines, the Commission considered that it accorded with the principle of job stability enshrined in the guidelines and also in the conclusions of the European Council meeting on employment held in November 1997. On the basis of these considerations and bearing in mind the added value of the measures in terms of the net creation of secure jobs which did not previously exist, the Commission considered that they were compatible with the common market.

b) Subsidy scheme for safeguarding employment

On 25 November the Commission approved the extension for 2000 and 2001 of an Italian aid scheme granting reductions in social security contributions so as to safeguard the jobs of employees at risk. The scheme would be open to companies located in any of six regions (Calabria, Sicily, Sardinia, Basilicata, Apulia and Campania) and would provide subsidies for low-skilled workers only. The resources allocated for the scheme’s extension totalled ITL 1 700 billion (ECU 876 million), thus bringing to ITL 3 700 billion (ECU 1 910 million) the total amount allocated to the scheme originally authorised in 1997.

Sweden

a) Measures to promote employment

On 16 December the Commission decided not to raise any objections to a scheme which promoted employment by granting subsidies to encourage firms to take on long-term unemployed workers. It concluded that the measure in question did not constitute state aid within the meaning of Article 87(1) since it was applicable to all sectors and since any firm which met the criteria was automatically entitled to the subsidy.

b) Measures to promote training

Also on 16 December and for the same reasons the Commission decided that a Swedish scheme to promote training did not constitute state aid.

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224  N 692/97 (OJ C 130, 28.4.1998); Competition Policy Newsletter 2/98, p. 82.
226  N 52/98.
227  N 53/98.
3.5. Aid for small and medium-sized enterprises

Germany

a) Tax-free depreciation reserve for start-ups

On 29 July the Commission partially approved a scheme directed at SMEs and providing the incentives of a tax-free depreciation reserve and interest-free deferment of tax payment in order to encourage start-up investment. The revenue foregone for the years 1997-99 was estimated at ECU 104 million. However, the Commission also decided to initiate Article 88(2) proceedings in respect of the application of the scheme to sensitive sectors. Due to its character as a general tax provision, there were serious doubts about whether the German authorities had the legal means under their national law to effectively exclude enterprises in such sectors from the scheme.

b) Past misuse of the Thuringia programme for investments by SMEs

On 26 November 1993 the Commission had decided to authorise the Land of Thuringia to set up a programme supporting investments by SMEs. The granting of aid under this programme to firms in difficulty was formally excluded. Having doubts about whether the scheme had been properly applied in the past, the Commission, in its decision of 8 April authorising the scheme’s extension, formally requested the German Government to provide it with all the information necessary to carry out a check in this connection. In the absence of a satisfactory reply from the German authorities, the Commission decided on 25 November to initiate proceedings under Article 88(2) of the EC Treaty in respect of the scheme’s past application and instructed the German Government to provide it with all the information necessary for it to check whether the scheme had been misused in the past.

Greece

Operational Programme for Industry (regions in decline) and Community Initiative for SMEs

On 29 July the Commission authorised two aid schemes implementing measures under Structural Fund programmes in favour of SMEs in Greece in order to boost their technological innovation and administrative reorganisation. At the same time, the Commission decided to initiate Article 88(2) proceedings in respect of state aid for the setting-up and operation of distribution centres in any country outside the European Union. In the Commission’s view, this aid was prohibited export aid.

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229 C 69/98 (ex NN 118/98).
230 C 50/98 (ex N 607a/97).
3.6. Aid for foreign direct investment

Netherlands

Investment facility for emerging economies

On 6 May the Commission approved the scheme “Investment facility for emerging economies” designed to encourage Netherlands-based SMEs to invest in emerging markets and thus to contribute to the development of lasting economic cooperation with local enterprises. The aid took the form of subordinated loans provided by the Nationale Investeringsbank, a state-owned specialised financial institution. Credits might range between ECU 45 000 and ECU 2.2 million. The State provided a credit guarantee for 90-95% of the unsettled amount. The NIB compensated the Government for the guarantee by paying an annual provision of 1% of the guaranteed sum. The scheme had an overall budget of ECU 116 million.

Austria

LiftgmbH

On 14 October the Commission decided to terminate proceedings it had initiated under Article 88(2) of the EC Treaty in respect of aid planned for LiftgmbH, a subsidiary of the internationally active Austrian group Doppelmayr, and to prohibit the subsidised loan of ECU 1.8 million, of which the aid element would have amounted to ECU 0.13 million, which was to be granted to that firm under the ‘ERP Internationalisierungsprogramm’ for an investment project in China. The Commission concluded that the aid was incompatible with the common market since it was to be granted to a large company whose competitors were all European and which was already firmly established in China; it thus failed to meet the necessity criterion, particularly since LiftgmbH had already begun production using rented facilities. Given the strategic nature of the Chinese market, the aid was liable, despite the limited amount involved, to distort competition between Member States to an extent contrary to the common interest.

3.7. Aid in the form of tax measures

Ireland

Tax measures

In July the Commission addressed a series of appropriate measures to Ireland under Article 88(1) of the EC Treaty following an examination of various aspects of the Irish corporate tax system. The Commission concluded that the special corporation tax regimes in the Dublin International Financial Service Centre (IFSC) and in the Shannon Customs-Free Airport Zone (SCAZ) constituted operating aid which could no longer be authorised following Ireland’s loss of 87(3)(a) status. Furthermore, the Commission concluded that the preferential treatment of manufacturing over service companies in the

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232 C 77/97 (ex N 99/97).
wider Irish corporation tax (ICT) system, which it had previously considered a general measure, not only constituted state aid but also ranked as operating aid and therefore needed to be eliminated.

The measures proposed for the elimination of the various aspects of the Irish corporate tax regime recognised the rights acquired through legitimate expectation by existing companies. These rights would continue until 2010 for those benefiting from the preferential rate for manufacturing under the ICT and until 2005 for the IFSC and SCAZ. In addition, the measures provided for transitional arrangements under which limited numbers of new entrants to the schemes were allowed; however, they could benefit only until 2002.

**B — New legislative provisions and notices adopted or proposed by the Commission**

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N 55/98 03/06/98 Investment subsidy for non-industrial residual heat infrastructure OJ C 257, 15.8.1998
N 95/98 17/06/98 Biomass combined heat and power plant project at Lelystad OJ C 257, 15.8.1998
N 753/97 14/07/98 Exemption regulating energy taxes for waste-processing units OJ C 308, 8.10.1998
N 330/98 15/07/98 Modification of central investment aid scheme for the North of the Netherlands OJ C 279, 8.9.1998
N 342/98 22/07/98 Energy-efficiency and environmental consultancy services OJ C 300, 29.9.1998
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2. Cases in which the Commission found, without opening a formal investigation, that there was no aid element within the meaning of Article 87(1) of the EC Treaty or Article 1(2) of Decision 2496/96/ECSC

**Germany**


NN 83/98 14/10/98 Preussag Stahl AG - Purchase of the company by public authorities (Lower Saxony) OJ C 392, 16.12.1998

**Austria**

N 546/97 03/06/98 Aid to Mobil Oil Austria AG OJ C 290, 18.9.1998

N 856/97 17/06/98 Subsidy to a measure to repair past damage to the environment in favour of Schmid Schraubenwerke OJ C 409, 30.12.1998

**Belgium**

N 277/98 30/06/98 Social security arrangements for miners and the like OJ C 308, 8.10.1998
Spain

N 639/97 21/01/98 Agreement by which the state-owned Inespal group is sold to the Alcoa group OJ C 211, 7.7.1998

Italy

N 348/98 11/11/98 Measures to promote the construction and regulated letting of housing (Trento)

Netherlands

N 656/97 29/07/98 Extension of the waste disposal system for car wrecks OJ C 308, 8.10.1998

United Kingdom

N 624/98 22/12/98 Sales procedure for the sale of loans of the Student Loan Company Ltd

3. Aid cases in which the Commission initiated proceedings under Article 88(2) of the EC Treaty in respect of all or part of the measure

Germany

NN 54/97 (C 5/98) 04/02/98 Aid to Brockhausen Holze GmbH OJ C 144, 9.5.1998
N 237/97, NN 151/97 (C 8/98) 18/02/98 Aid to Biotec Biologische Naturverpackungen GmbH OJ C 219, 15.7.1998
N 783/96 N 225/97 25/02/98 Aid to Addinol Mineralöl GmbH iGV OJ C 186, 16.6.1998
NN 70/97 (C 11/98) 25/02/98 Aid to Kranbau Köthen GmbH OJ C 338, 6.11.1998
NN 30/97 (C 19/98) 11/03/98 Aid to Weida Leder GmbH OJ C 256, 14.8.1998
NN 166/97 NN 169/97 NN 170/97 (C 20/98) 11/03/98 Aid to the Sican group and its partners for R&D in the microelectronics field OJ C 307, 7.10.1998
NN 9/98 (C 22/98) 11/03/98 Aid to Kranbau Eberswalde GmbH OJ C 353, 19.11.1998
NN 41/97 (C 27/98) 25/03/98 Restructuring aid to Draiswerke GmbH OJ C 207, 3.7.1998
C 40/98 20/05/98 Multisectoral framework on regional aid to large investment projects OJ C 171, 5.6.1998
NN 54/95 (C 42/98) 03/06/98 Aid for setting up CD Albrechts GmbH OJ C 390, 15.12.1998
NN 45/97 (C 45/98) 17/06/98 Guarantee scheme operated during the period 1991-1995 by the Land of Brandenburg OJ C 369, 28.11.1998
NN 42/98 (C 56/98) 29/07/98 Tax-free depreciation reserve for company founders OJ C 334, 31.10.1998
N 362/98 (C 63/98) 28/10/98 Aid to Saxonylon Textil GmbH
NN 113/98 (C 66/98) 25/11/98 Excess capacity at Kvaerner Warnow Werft GmbH
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**Austria**

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**Belgium**

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**Spain**

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**Finland**

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**France**

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**Greece**

N 607a/97 (C 50/98) 29/07/98  SME aid scheme: Operational programme for industry (Measure 1.4.2: Regions affected by industrial decline) and Community Initiative for SMEs

**Italy**

NN 10/98 (C 16/98) 11/03/98  Aid to Banco di Sicilia and Sicilcassa  OJ C 297, 25.9.1998

NN 79/96 (C 26/98) 25/03/98  Measures to assist cooperatives  OJ C 382, 9.12.1998

N 783/97, N 160/98 (C 35/98) 22/04/98  Regional investment aid under Italian Law 488/92 for the creation of two new shipyards (Oristano and Belvedere Marittimo)  OJ C 307, 7.10.1998

NN 41/98 (C 47/98) 14/07/98  Aid allegedly granted to Ente Poste Italiane  OJ C 367, 27.11.1998

NN 60/98 (C 48/98) 14/07/98  Capital increases and other measures granted to several undertakings controlled by public holdings Emsa, Sigma and Intex  OJ C 403, 23.12.1998

NN 164/97, NN 75/98 (C 49/98) 22/07/98  Various laws containing measures to promote employment  OJ C 384, 10.12.1998

NN 95/97 (C 64/98) 28/10/98  Aid allegedly granted to Instituto Poligrapico e Zecca dello Stato and its controlled companies

N 693/97, NN 130/98 (C 71/98) 09/12/98  Arrangements for the takeover and completion of serviced small-business areas developed by Sirap SpA; rules issued to municipalities for the allocation of lots and industrial hangars

NN 128/98 (C 77/98) 09/12/98  Defrayment by the public holding company Italinvest (ex GEPI) of losses incurred by the INMA shipyard

NN 135/98 (C 86/98) 22/12/98  Aid to Sangalli Vetro SpA

**Netherlands**

N 939/96 (C 18/98) 11/03/98  Aid to Océ NV for the development of colour ink-jet printers  OJ C 270, 29.9.1998

N 558/97 (C 43/98) 03/06/98  Aid to 624 service stations located near the German border  OJ C 307, 7.10.1998


**Portugal**

N 196/98 (C 60/98) 14/10/98  Aid to Cotesi - Companhia de Textéis Sintéticos SA  OJ C 405, 24.12.1998

4. **Aid cases in which the Commission initiated proceedings under Article 6(5) of Decision 2496/96/ECSC in respect of all or part of the measure**

**Germany**

N 204/98 (C 41/98) 03/06/98  Environmental aid to ESF Elbestahlwerk Feralpi GmbH  OJ C 240, 31.7.1998

N 261/98 (C 73/98) 09/12/98  Aid to Neue Maxhütte Stahlwerke GmbH: environmental protection measures

**Italy**

N 791/97 (C 46/98) 01/07/98  Environmental protection aid and R&D aid to Acciaierie di Bolzano  OJ C 269, 28.8.1998
5. Aid cases in which the Commission initiated, in respect of all or part of the measure, proceedings under Article 84 of the ECSC Treaty for failure by a Member State to fulfil its obligations

**Germany**

C 55/94 and C 41/95  16/12/98  Aid to Neue Maxhütte Stahlwerke GmbH - recovery of illegal aid

6. Aid cases in which the Commission extended Article 88 (2) proceedings in respect of all or part of the measure

**Germany**

C 61/97  22/12/98  Aid to Elpro AG (Berlin)

**Spain**

C 76/97  06/05/98  Aid to Daewoo Electronics Manufacturing España SA (Demesa)  OJ C 266, 25.8.1998

**France**

C 51/90  06/05/98  Aid to Pari Mutuel Urbain (PMU)/racecourse undertakings  OJ C 253, 12.8.1998
C 42/96  14/07/98  Société Marseillaise de Crédit (SMC): capital injection of FRF 2 900 million and guarantee ceiling of FRF 400 million to cover any activating of the guarantee  OJ C 249, 8.8.1998

**Italy**

C 46/94  04/02/98  Aid to Seleco SpA, Pordenone  OJ C 155, 20.5.1998
C 47/98  16/09/98  Aid allegedly granted to Ente Poste Italiane  OJ C 367, 27.11.1998

7. Interim decisions requiring the Member State to supply the information needed by the Commission

**Germany**

NN 142/97  07/04/98  SME investment programme of the Land of Thuringia
C 63/97  03/06/98  Aid to Riedel-de Haën AG, a large undertaking located outside the assisted areas
NN 97/98  28/10/98  Aid to BCA (Bitterfelder Chlor-Alkali) GmbH
NN 120/98  09/12/98  Misuse of the Thüringer Industriebeteiligungsfonds scheme
8. Cases in which the Commission considered that the aid was compatible with the common market and terminated proceedings under Article 88(2) of the EC Treaty by way of a positive final decision

Germany

C 16c/95 13/05/98 Aid to Herborn & Breitenbach GmbH (ex Drahtziehmaschinenwerk)
C 24/97 01/07/98 Aid to Chemieanlagenbau Stassfurt AG
C 72/97 30/09/98 Aid to SKET Verseilmaschinenbau GmbH
C 5/97 and NN 102/97 28/10/98 Aid to Neptun Industrie Rostock GmbH
C 27/98 25/11/98 Restructuring aid for Draiswerke GmbH
C 59/97 09/12/98 Aid to a lignite power plant in Cottbus

Spain

C 13/98 28/10/98 Aid to AG Tubos Europa SA (large steel tubes)

France

C 39/96 10/06/98 Aid to Coopérative d'exportation du livre français
C 42/96 14/10/98 State financial support for Société Marseillaise de Crédit (SMC)

Italy

C 22/96 01/07/98 Aid for environmental protection to Servola SpA

Netherlands

C 59/96 29/07/98 Development of a digital high-volume photocopier: OS 120

Portugal

C 17/97 04/02/98 Aid in synthetic fibres sector to Cordex SA (Companhia industrial Textil SA)

Sweden

C 66/97 21/01/98 Acceptance of appropriate measure proposed in connection with the framework for the motor vehicle industry OJ C 122, 21.4.1998
9. Cases in which the Commission considered that the aid was compatible with the common market and terminated proceedings under Article 6(5) of Decision 2496/96/ECSC by way of a positive final decision

**Germany**

C 85/97 09/12/98 Environmental aid to MCR Gesellschaft für metallurgisches Recycling

**Italy**

C 46/98 28/10/98 Environmental protection aid and R&D aid to Acciaierie di Bolzano

10. Cases in which the Commission considered, subject to certain reservations, that the aid was compatible with the common market and terminated proceedings under Article 88(2) of the EC Treaty by way of a conditional final decision

**Germany**

C 18/97 25/11/98 Aid to InfraLeuna Infrastruktur und Service GmbH

**Austria**

C 24/98 09/12/98 Environmental aid to Kiener Deponie Bachmanning

**France**

C 13/97 21/01/98 Restructuring aid to Société française de production (SFP) OJ L 205, 22.7.1998

C 47/96 20/05/98 Aid to the Crédit Lyonnais group OJ L 221, 8.8.1998

**Italy**

C 21/97 03/06/98 Articles 51, 114, 117 and 119 of Regional Law 25/93 to promote employment (Sicily)

C 40/96 29/07/98 Consolidation, restructuring and privatisation of Banco di Napoli

C 38/97 16/09/98 Capital injections into and privatisation of Società Italiana per Condotte d’Acqua SpA (Condotte)

C 39/97 16/09/98 Capital injections into and privatisation of Italstrade SpA
11. Cases in which the Commission considered that the aid was incompatible with the common market and terminated proceedings under Article 88(2) of the EC Treaty by way of a negative or partly negative decision

**Germany**

- **C 16/97**
  - 21/01/98 Tax concessions under Section 52(8) of the German Income Tax Act
  - OJ L 212, 30.7.1998

- **C 14/92**
  - 25/02/98 Aid to Bremer Vulkan AG via Krupp and Hibeg
  - OJ L 316, 25.11.1998

- **C 22/97**
  - 25/02/98 Development aid to Indonesia in accordance with Article 4(7) of the seventh Directive on aid to shipbuilding

- **C 52/97**
  - 25/02/98 26th outline plan for the joint Federal Government/Länder programme for improving regional economic structures; intensity of aid for promoting the development of teleworking

- **C 9/97**
  - 22/04/98 Aid to SHB Stahl- und Hartgusswerke Bösdorf AG

- **C 35/97**
  - 22/04/98 Aid to Triptis Porzellan GmbH iGV

- **C 37/96**
  - 06/05/98 Extension of eligibility for regional aid for the acquisition costs of intangible property for large firms provided for in the 25th outline plan for the joint Federal Government/Länder programme for improving regional economic structures

- **C 40/98**
  - 14/07/98 Multisectorial framework on regional aid for large investment projects

- **C 7/96**
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- **C 46/97**
  - 29/07/98 Exemption of Georgmarienhütte GmbH (ECSC steel) from environmental obligations

- **C 11/98**
  - 25/11/98 Aid to Addinol Mineralöl GmbH

- **C 7/95**
  - 09/12/98 Aid to Maschinenefabrik Sangerhausen (Samag)

- **C 63/97**
  - 22/12/98 Aid to Riedel-de Haën AG

**Austria**

- **C 62/97**
  - 01/07/98 Extension of rescue aid to Actual Maschinenbau AG

- **C 77/97**
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- **C 52/98**
  - 22/12/98 Restructuring aid to Erggee Textilwerk GmbH

**Spain**

- **C 52/96**
  - 14/07/98 Restructuring aid granted to Fahave SA and to its successors

- **C 32/97**
  - 14/07/98 Aid to Porcelanas del Norte SAL (Ponsal)/Commercial Europa de Porcelanas SAL (Comepor)

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**France**

- **C 44/96**
  - 22/07/98 State aid, via Consortium de Réalisation (CDR), to part of Société de Banque Occidentale (SDBO)

- **C 50/97**
  - 04/11/98 Investment aid and restructuring aid to Nouvelle Filature Lamière de Roubaix
Italy

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C 14/97  01/07/98  Restructuring aid to Keller SpA and Keller Meccanica SpA
C 29/97, C 30/97, C 31/97  16/09/98  Measures to assist cooperatives under Law 49/85 (the "Marcora Law")
C 55/97  11/11/98  Increase in aid intensity for two ship conversion contracts
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Netherlands

C 41/96  21/01/98  Aid for the construction of a hydrogen peroxide works in Delfzijl  OJ L 171, 17.6.1998

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Germany

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C 75/97  11/11/98  Aid to ESF Elbestahlwerk Feralpi GmbH

Luxembourg

C 25/94  17/06/98  Aid (ECSC steel) to ProfilArbed SA for an environmental protection programme

13. Aid cases in which the Commission terminated proceedings under Article 88(2) of the EC Treaty after the Member State withdrew the proposed measure

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C 34/98  16/09/98  Restructuring aid to Torwegge Holztechnik GmbH & Co. KG, IMÅ Maschinenfabrik Klessmann GmbH and IMA Wehrmann; restructuring aid to Heinrich Nottmeyer Maschinenfabrik GmbH
C 25/97  28/10/98  Aid to Dörries Scharmann Technologie GmbH

Austria

C 23/98  09/12/98  Aid to KNP Leykam, Gratkorn

Italy


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Luxembourg

C 36/97 11/03/98 Research and development projects carried out by steel producers ProfilArbed SA and Ares SA in 1995/96 OJ C 125, 23.4.1998

Netherlands

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14. Aid cases in which the Commission terminated proceedings under Article 6(5) of Decision 2496/96/ECSC after the Member State withdrew the proposed measure

Germany

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15. Aid cases in which the Commission proposed appropriate measures under Article 88(1) of the EC Treaty

Ireland

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United Kingdom

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16. Cases in which the Commission noted the Member State’s agreement to ensuring the compliance of existing aid awards following the proposal of appropriate measures under Article 88(1) of the EC Treaty

Sweden

C 48/97 25/03/98 Aid to Volvo Truck Corporation in Umea OJ C 215, 10.7.1998

17. Aid cases which the Commission decided to refer to the Court of Justice under the second subparagraph of Article 88(2) of the EC Treaty

Belgium

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- 1.4.1998, Technical amendment to the special guideline on promotion of structures and Sales of wine (OJ C 188, 17.6.1998)

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- 8.5.1998, Aid and compulsory contributions to the Fund for animal health and production in the pigmeat sector (OJ C 188, 17.6.1998)

**Germany**

- 8.1.1998, Thuringia: Interest subsidies for operating loans to enterprises in agriculture and forestry (OJ C 147, 13.5.1998)
- 8.1.1998, Saxony: Measure to encourage investment in the construction of housing for animals (OJ C 147, 13.5.1998)
- 17.2.1998, Saxony: Measures for environmental improvement on farms (OJ C 149, 15.5.1998)
27.10.1998 Bavaria: Bavarian countryside programme (Kulap-A) OJ C 21, 26.1.1999
30.11.1998 Saxony: Promotion of farming methods compatible with the requirements of environmental protection OJ C 47, 20.2.1999

**Denmark**

23.1.1998 Aid for consultancy in the forestry sector OJ C 130, 28.4.1998
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17.2.1998 Castile-Leon: Aid for assistance to livestock markets OJ C 149, 15.5.1998
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25.2.1998 Balearic Islands: Measures to assist agricultural production OJ C 188, 17.6.1998
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19.3.1998 Castile-Leon: Aid to assist livestock holdings OJ C 188, 17.6.1998
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28.10.1998 Aid to improve processing and marketing conditions for Agricultural products OJ C 24, 29.1.1999
21.12.1998 Catalonia: Aid to the firm Indulerida SA OJ C 60, 2.3.1999
21.12.1998 Catalonia: Aid to the firm Azucares Especiales SAL OJ C 60, 2.3.1999
21.12.1998 Catalonia: Aid to the firm Agroles, SCCL OJ C 60, 2.3.1999

**France**

23.10.1998 Aid to improve the quality of pigmeat produced in mountain areas OJ C 16, 21.1.1999

**Finland**

24.2.1998 Promotion of organic products OJ C 149, 15.5.1998
30.9.1998 Aid for the processing and marketing of agricultural products (Åland) OJ C 21, 26.1.1999

**Greece**

26.2.1998 Aid to finance research infrastructure in the sugar beet sector Under Community Initiative Interreg II OJ C 149, 15.5.1998
28.10.1998 Compensation to producers following the destruction of potatoes Contaminated by a bacterium  OJ C 16, 21.1.1999
10.11.1998 Aid for farmers whose farms were damaged by fires in 1997  OJ C 21, 26.1.1999

Italy

8.1.1998 Advertising campaigns in the agricultural sector  OJ C 147, 13.5.1998
6.2.1998 Sicily: Aid for land improvement operations and construction of farm buildings  OJ C 147, 13.5.1998
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30.7.1998 Sicily: Measure to protect wild fauna and regulate hunting (Article 6 of Regional Law No 33 of 1 September 1997)  OJ C 329, 27.10.1998
7.8.1998 Aid for Parmacotto project — RIBS operation  OJ C 361, 24.11.1998
20.8.1998 Liguria: Aid to farms under the Leader II CIP  OJ C 329, 27.10.1998
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17.11.1998  National start-up aid scheme for young farmers  OJ C 47, 20.2.1999
21.12.1998  Compensation for destruction of dioxin-contaminated livestock

Luxembourg

30.1.1998  Premium for the maintenance of the countryside and the natural landscape  OJ C 181, 12.6.1998

Netherlands

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1.9.1998  Aid to fruit and vegetable growing  OJ C 329, 27.10.1998
3.11.1998  Takeover by the ‘Hoofdproductschap Akkerbouw’ (HPA) of measures run by the Landbouwschap  OJ C 21, 26.1.1999
10.11.1998  Farina potato fund and protection of farina potatoes  OJ C 21, 26.1.1999
21.12.1998  Measure to dispose of citrus pellets and animal feedstuff contaminated by dioxin

Portugal

12.1.1998  Aid for promoting regional products  OJ C 147, 13.5.1998
15.10.1998  Amendment to the Leader II programme  OJ C 21, 26.1.1999
26.10.1998  Measures to assist farms affected by the flooding in October and November 1997  OJ C 21, 26.1.1999
30.12.1998  Measures to promote fruit and vegetables  OJ C 42, 17.2.1999

Sweden

8.1.1998  Programme to promote biodiversity in agricultural areas  OJ C 147, 13.5.1998
**United Kingdom**

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1.2. Aid cases in which Article 88(2) proceedings were initiated

**Belgium**

10.11.1998 Flemish Region: Promotion of agricultural products

**Germany**

30.3.1998 Aid for the purchase of land in the former GDR

**France**

2.12.1998 Aid for pig production

**Greece**

20.5.1998 Aid for the repayment of debts to cooperatives and other enterprises

10.11.1998 Aid in the fruit and vegetable sector (1997)

4.12.1998 Aid to young farmers and new entrants

**Italy**

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12.2.1998 Valle d’Aosta: Extension of regional aid schemes for the processing and marketing of agricultural products

13.2.1998 Sicily: Guarantee fund for the fruit and vegetable sector

17.2.1998 Aid for the purchase of new machinery

8.5.1998 Aid to Centrale del Latte di Roma

20.5.1998 Guarantee fund for debt consolidation operations involving SMEs in Objective 1 areas (amendments)

17.8.1998 Veneto: Subsidised loans in agriculture

Ireland

25.2.1998 Measures promoting transport of Irish livestock by sea to Continental Europe OJ C 142, 7.5.1998

Portugal


1.3. Aid cases in which Article 88(2) proceedings were terminated by way of a positive decision

Italy

26.10.1998 Ravenna: Aid to Agriterminale SpA (Regional Law No 236/93)
20.11.1998 Molise: Aid for cooperatives

1.4. Aid cases in which the Commission took a conditional decision pursuant to Article 88(2) of the EC Treaty

Italy

17.8.1998 Regional aid
27.10.1998 Aid for the purchase of new machinery

1.5. Aid cases in which the Commission took a negative final decision pursuant to the first subparagraph of Article 88(2) of the EC Treaty

Germany

2.7.1998 Processing and marketing of agricultural products OJ L 60, 9.3.1999

Austria

27.10.1998 Aid to Agrana Staerke GmbH

Spain

14.12.1998 Aid to Hijos de Andres Molina SA (HAMSA)

Greece

1.9.1998 Aid for lentil producers in the Prefecture of Levkas OJ L 32, 5.2.1999
**Italy**

29.7.199 Lazio: Aid measures for farming under Laws Nos 44/89 and 57/92 OJ L 86, 30.3.1999
6.8.1998 Sicily: Initiatives to support and maximise the value of citrus production

1.6. Aid cases in which the Commission reviewed an existing scheme pursuant to Article 88(2) of the EC Treaty

**Sweden**

14.10.1998 Exemption of the company Agroetanol from the energy and carbon dioxide tax

1.7. Council Decisions under Article 88(2) of the EC Treaty

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**Germany**

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N 847/98 6.3.1998 Direct marketing OJ C 107, 7.4.1998
N 44/98 5.6.1998 Aid to Gottfried Friedrichs KG, Hamburg OJ C 213, 9.7.1998
N 476/98 17.11.1998 Promotion of the fisheries sector (Rheinland-Pfalz)

**Belgium**

N 365/97 11.2.1998 Aid for investment and new entrants in the fisheries and aquaculture sector OJ C 103, 4.4.1998

**Denmark**

N 74/98 3.4.1998 Modernisation and improvement of fishing vessels OJ C 156, 21.5.1998

**Spain**

N 180/98 2 8 98 Temporary cessation of fishing activities (Murcia) OJ C 308, 8.10.1998

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| N 173/98 | 24.7.1998 | Aid for salmon production |

### France

| NN 146/95 | 6.7.1998 | Modernisation of collective landing facilities and construction of a fish auction market (Provence-Alpes-Côte d’Azur) |

### Greece

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### Ireland

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### Italy

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| N 923/96 | 6.7.1998 | Aid to the fisheries and aquaculture sector (Sardinia) |
| N 819/97 | 18.8.1998 | Investment in bluefish businesses (Abruzzi) |
| N 825/97 | 15.5.1998 | Aid for mollusc fishermen (Abruzzi) |

### Netherlands

| N 765/97 | 17.11.1998 | Experimental fishing — Barents Sea |
| N 775/97 | 20.1.1998 | Aid for torque-measuring equipment to prevent fraud |
| N 2/98 | 8.7.1998 | Reduction of the fishing capacity in the Ysselmeer |
| N 37/98 | 1.4.1998 | Canadian pair-seining |
| N 425/98 | 14.10.1998 | Processing and marketing of fishery products |

### United Kingdom

| N 85/98 | 1.4.1998 | Aid for the fishing sector in south-west Scotland under the Pesca Community Initiative |
| N 147/98 | 6.4.1998 | Aid to the fisheries sector under the Pesca Community Initiative for Scotland (Aberdeenshire) |
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N 511/98  F  Termination of service of merchant marine personnel  28.10.1998
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N 231/98  NL  Environmental measures in aviation  #11.11.1998
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N 403/97  I  Restructuring of the road transport sector  25.3.1998
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NN 64/97  F  Brittany Ferries  7.4.1998
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</tr>
</tbody>
</table>

### 2. Court of Justice

<table>
<thead>
<tr>
<th>Case</th>
<th>Parties</th>
<th>Date</th>
<th>Publication</th>
</tr>
</thead>
<tbody>
<tr>
<td>C-53/97,</td>
<td></td>
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<td>C-54/97</td>
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<td>C-415/96</td>
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<tr>
<td>C-200/97</td>
<td>Ecotrade Srl v Altifornie e Ferriere di Servola SpA (AFS)</td>
<td>1.12.1998</td>
<td></td>
</tr>
</tbody>
</table>
### Enforcement of Commission decisions ordering the recovery of aid

#### 1. Commission decisions (DG IV) ordering the recovery of aid (1983-1997) not yet implemented

<table>
<thead>
<tr>
<th>MS</th>
<th>Name</th>
<th>Date of decision</th>
<th>Official Journal</th>
<th>Form taken by the aid</th>
<th>Amount to be repaid (ECU million)</th>
<th>Current status</th>
<th>Remarks</th>
</tr>
</thead>
<tbody>
<tr>
<td>B</td>
<td>Beaulieu II (Idealspun)</td>
<td>27.6.1984</td>
<td>L 283 (1984)</td>
<td>Capital injection</td>
<td>5.41</td>
<td>x</td>
<td>Action brought against MS for failure to fulfil obligations. CJ judgments finding that decision had not been implemented (9.4.1987, Case 5/86) and that its judgment in Case 5/86 had not been complied with (19.2.1991, Case C-375/89). Appeal pending before Court of Appeal. Amount to be repaid is in blocked account.</td>
</tr>
<tr>
<td>UK</td>
<td>Dean Dove</td>
<td>23.7.1984</td>
<td>L 238 (1984)</td>
<td>Grant</td>
<td>1.5</td>
<td>x</td>
<td>Company stopped trading in 1989 and was wound up in 1994. Actions before national courts against company's directors.</td>
</tr>
<tr>
<td>MS</td>
<td>Name</td>
<td>Date of decision</td>
<td>Official Journal</td>
<td>Form taken by the aid</td>
<td>Amount to be repaid (ECU million)</td>
<td>Current status</td>
<td>Remarks</td>
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<tr>
<td>D</td>
<td>BUG-Aluminium</td>
<td>17.11.1987</td>
<td>L 79 (1988)</td>
<td>Grant</td>
<td>1.05</td>
<td>x</td>
<td>Action brought against MS for failure to fulfil obligations. CJ judgment finding that decision had not been implemented (20.9.1990, Case C-5/89). Various national courts have confirmed that repayment is due. Appeal pending before the Federal Administrative Court.</td>
</tr>
<tr>
<td>G</td>
<td>Exemption from taxes on exports</td>
<td>3.5.1989</td>
<td>L 394 (1989)</td>
<td>Tax exemption on earnings from exports</td>
<td>Not specified</td>
<td>x</td>
<td>Action brought against MS for failure to fulfil obligations. Judgment of Court of Justice finding that decision had not been implemented (10.6.1993, Case C-183/91)</td>
</tr>
<tr>
<td>I</td>
<td>Ferriere acciaierie sarde SpA</td>
<td>5.6.1991</td>
<td>L 298 (1991)</td>
<td>Grant</td>
<td>0.96</td>
<td>x</td>
<td>Judgment of Court of Justice upholding decision (5.3.1993, Case C-102/92)</td>
</tr>
<tr>
<td>E</td>
<td>Piezas y Rodajes (Pyrsa)</td>
<td>14.3.1995</td>
<td>L 257 (27.10.1995)</td>
<td>Grant; loan guarantee; interest subsidy; gift of land</td>
<td>Not specified</td>
<td>x</td>
<td>Judgment of Court of Justice upholding Commission decision (14.1.1997, Case C-169/95). Company has suspended payments. Appeal by company against the administrative decision ordering the reimbursement.</td>
</tr>
<tr>
<td>MS</td>
<td>Name</td>
<td>Date of decision</td>
<td>Official Journal</td>
<td>Form taken by the aid</td>
<td>Amount to be repaid (ECU million)</td>
<td>Current status</td>
<td>Remarks</td>
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</tr>
<tr>
<td>D</td>
<td>Deutsche Luxemburger Stahlwerke GmbH (decisions II and III)</td>
<td>18.10.1995</td>
<td>L 53 (2.3.1996)</td>
<td>Loans</td>
<td>25.64</td>
<td>x</td>
<td>31.12.1998; NMH insolvent. The amount to be recovered has been notified as part of the insolvency proceedings.</td>
</tr>
<tr>
<td></td>
<td></td>
<td>13.3.1996</td>
<td>L 198 (8.8.1996)</td>
<td>Loans</td>
<td>12.39</td>
<td>x</td>
<td>31.12.1998; NMH insolvent. The amount to be recovered has been notified as part of the insolvency proceedings.</td>
</tr>
<tr>
<td>D</td>
<td>Hamburger Stahlwerke GmbH</td>
<td>31.10.1995</td>
<td>L 78 (28.3.1996)</td>
<td>Soft loans</td>
<td>approx. 82</td>
<td>x</td>
<td>Pending before CFI (Case T-234/95) and Court of Justice (Case C-404/95). Appeal by Government to national courts. Aid has been partly repaid.</td>
</tr>
<tr>
<td>E</td>
<td>Tubacex</td>
<td>30.7.1996</td>
<td>L 8 (11.1.1997)</td>
<td>Soft loans; repayment holiday</td>
<td>Not specified</td>
<td>x</td>
<td>Aid to Fogasa partly repaid. remainder to be repaid in near future. Appeal by the company to the Spanish courts against reimbursement of aid linked to social security. Pending before Court of Justice (Case C-342/96).</td>
</tr>
<tr>
<td>D</td>
<td>West Berlin tax concessions</td>
<td>12.2.1997</td>
<td>L 228 (19.8.1997)</td>
<td>Tax breaks</td>
<td>Not specified</td>
<td>x</td>
<td>The German authorities have notified the Commission that the decision has been implemented. The notification is being examined. The need for repayment depends on any domestic proceedings.</td>
</tr>
<tr>
<td>MS</td>
<td>Name</td>
<td>Date of decision</td>
<td>Official Journal</td>
<td>Form taken by the aid</td>
<td>Amount to be repaid (ECU million)</td>
<td>Current status</td>
<td>Remarks</td>
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</tr>
<tr>
<td>D</td>
<td>Tax concessions former GDR (8%)</td>
<td>1.10.1997</td>
<td>L 73 (12.3.1998)</td>
<td>Tax premiums</td>
<td>Not specified</td>
<td>x</td>
<td>Repayment under way.</td>
</tr>
</tbody>
</table>
### 2. Commission decisions (DG IV) taken in 1998 ordering reimbursement

<table>
<thead>
<tr>
<th>MS</th>
<th>Name</th>
<th>Date of decision</th>
<th>Official Journal</th>
<th>Form taken by the aid</th>
<th>Amount to be repaid (ECU million)</th>
<th>Remarks</th>
</tr>
</thead>
<tbody>
<tr>
<td>NL</td>
<td>FMC</td>
<td>21.1.1998</td>
<td>L 171 (17.6.1998)</td>
<td>Grants, sale of land at a lower price</td>
<td>2.85</td>
<td>Decision implemented (phased payment of grants has ceased)</td>
</tr>
<tr>
<td>D</td>
<td>Teleworking</td>
<td>25.2.1998</td>
<td>Publication pending</td>
<td></td>
<td></td>
<td>German authorities confirmed on 22.12.1998 and 7.1.1999 that no aid had been granted under the prohibited part of the scheme</td>
</tr>
<tr>
<td>D</td>
<td>Development assistance to Indonesia</td>
<td>25.2.1998</td>
<td>Publication pending</td>
<td>Loan and grant</td>
<td>5.7</td>
<td>Proceedings partly terminated</td>
</tr>
<tr>
<td>D</td>
<td>Stahl- und Hartgußwerke Bösdorf (SHB)</td>
<td>22.4.1998</td>
<td>Publication pending</td>
<td>Participation of the Consolidation Fund of the Land of Saxony: grant and loan</td>
<td>DEM 5 million (ECU 2.5 million) DEM 4.5 million (ECU 2.25 million) DEM 1.5 million (ECU 0.75 million)</td>
<td>Company insolvent. Government has registered its claim. Talks with the Commission on repayment of interest under way (as planned).</td>
</tr>
<tr>
<td>D</td>
<td>Triptis Porzellan</td>
<td>22.4.1998</td>
<td>Publication pending</td>
<td>Waiving of claims; guarantees</td>
<td>DEM 34.75 million approx.ECU17million</td>
<td>Company insolvent. Government has registered its claim. Talks with the Commission on repayment of interest under way (as planned).</td>
</tr>
<tr>
<td>I</td>
<td>Tax reductions</td>
<td>13.5.1998</td>
<td>Publication pending</td>
<td>Tax reductions</td>
<td>Not specified</td>
<td>Italy has taken the necessary action to identify businesses which have benefited from the aid.</td>
</tr>
<tr>
<td>I</td>
<td>Employment in Sicily</td>
<td>3.6.1998</td>
<td>Publication pending</td>
<td>Loan</td>
<td>Not specified</td>
<td>Securing repayments will be difficult given the form taken by the aid, the small amounts involved and the application of percentages.</td>
</tr>
<tr>
<td>L</td>
<td>ProfilArbed</td>
<td>17.6.1998</td>
<td>Publication pending</td>
<td></td>
<td>LUF 91.95 million</td>
<td>Luxembourg has been requested by the Commission to undertake recovery.</td>
</tr>
<tr>
<td>MS</td>
<td>Name</td>
<td>Date of decision</td>
<td>Official Journal</td>
<td>Form taken by the aid</td>
<td>Amount to be repaid (ECU million)</td>
<td>Remarks</td>
</tr>
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<td>-------------------------------------------------------------------------</td>
</tr>
<tr>
<td>I</td>
<td>Keller &amp; Keller Meccanica</td>
<td>1.7.1998</td>
<td>Publication pending</td>
<td>Loans at preferential rates</td>
<td>2.62</td>
<td>The publicly owned banks have demanded repayment of the aid from the companies concerned. Their response is not known.</td>
</tr>
<tr>
<td>Ö</td>
<td>Actual Maschinenbau</td>
<td>1.7.1998</td>
<td>L 316 (25.11.1998)</td>
<td>Soft loan</td>
<td>1.1</td>
<td></td>
</tr>
<tr>
<td>E</td>
<td>Sniace</td>
<td>28.10.1998</td>
<td>Publication pending</td>
<td>Preferential interest rates</td>
<td>Not specified</td>
<td>Spanish authorities have not responded so far.</td>
</tr>
<tr>
<td>D</td>
<td>ESF Elbestahlwerk Feralpi</td>
<td>11.11.1998</td>
<td>Publication pending</td>
<td>Grants Guarantees</td>
<td>4.8 6.14</td>
<td>Company has brought an action for annulment before the CFI (Case T-6/99)</td>
</tr>
<tr>
<td>D</td>
<td>MTW</td>
<td>22.7.1998</td>
<td>Publication pending</td>
<td>Loan and grant</td>
<td>402</td>
<td>Company insolvent; no funds available for repayment, but claims registered as part of the insolvency proceedings.</td>
</tr>
<tr>
<td>F</td>
<td>SDBO</td>
<td>22.7.1998</td>
<td>Publication pending</td>
<td>Recapitalisation</td>
<td>36</td>
<td>Reimbursement notified by the French authorities. DG IV challenges reimbursement procedures applied.</td>
</tr>
<tr>
<td>D</td>
<td>Georgmarien-hütte</td>
<td>29.7.1998</td>
<td>Publication pending</td>
<td>Grant</td>
<td>31.15 or 18.77</td>
<td></td>
</tr>
<tr>
<td>MS</td>
<td>Name</td>
<td>Date of decision</td>
<td>Official Journal</td>
<td>Form taken by the aid</td>
<td>Amount to be repaid (ECU million)</td>
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</tr>
<tr>
<td>D</td>
<td>Samag</td>
<td>9.12.1998</td>
<td>Publication pending</td>
<td>Grants</td>
<td>1</td>
<td>German authorities have not responded so far.</td>
</tr>
<tr>
<td>D</td>
<td>Riedel-De Haën</td>
<td>22.12.1998</td>
<td>Publication pending</td>
<td>Grant</td>
<td>4</td>
<td>German authorities’ reply expected by 21.3.1999</td>
</tr>
</tbody>
</table>
1. Introduction

On 23.09.1991 the Commission concluded an Agreement with the Government of the United States of America regarding the application of their competition laws234 (“the 1991 Agreement”), the aim of which is to promote cooperation between the competition authorities. By the joint decision of the Council and the Commission of 10.04.1995235 the Agreement was approved and declared applicable.

On 8.10.1996 the Commission adopted the first report on the application of the Agreement for the period of 10.04.1995 to 30.06.1996236. The second report completes the 1996 calendar year, covering the period of 1.07.1996 to 31.12.1996237. The third report covers the whole calendar year 1997238, and the present report covers the calendar year from the 1.01.1998 to 31.12.1998. This report should be read in conjunction with the first report which sets out in detail the benefits, but also the limitations of this kind of cooperation.

2. EC/US cooperation: the record so far

In the period from April 1995 till December 1998 application of the 1991 Agreement gave rise to contacts on more than 200 competition cases.

In all cases of mutual interest it has become the norm to establish contacts at the outset in order to exchange views and, when appropriate, to coordinate enforcement activities. The two sides, where appropriate, seek to coordinate their respective approaches on the definition of relevant markets, on possible remedies in order to ensure that they do not conflict, as well as on points of foreign law relevant to the interpretation of an agreement or to the effectiveness of a remedy. Cooperation under this heading has involved the synchronisation of investigations and searches. This is designed to make fact-finding action more effective and helps prevent companies suspected of cartel activity from destroying evidence located in the territory of the agency investigating the same conduct after its counterpart on the other side of the Atlantic has acted.

Formal activation of the positive comity provision (Article V of the 1991 Agreement) was felt appropriate in the Sabre/Amadeus case. The US Department of Justice (‘DoJ’) requested the Commission to investigate specific allegations of discrimination advanced by the US Computerised Reservation System (CRS) SABRE regarding the operation of the CRS AMADEUS set up by a number of European airlines. The Commission is currently investigating the case in close co-operation

234 Agreement between the Government of the United States of America and the Commission of the European Communities regarding the application of their competition laws (OJ L 95, 27.4.95, pp.47 and 50)
235 See OJ L 95, 27.4.95, pp.45 and 46.
236 Com(96) 479 final, see XXVIth Report on Competition Policy, pp. 299-311.
237 Com(97) 346 final, see XXVIth Report on Competition Policy, pp. 312-318.
238 Com(98) 510 final, see XXVIIth Report on Competition Policy, pp. 317-327.

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with the DoJ. More details will be published in the first EC/US cooperation report following the closure of this case.

2.1. Mergers

Since the adoption of the Merger Regulation, there has been nearly every year a steep increase in the number of operations notified to the Commission. The number of cases increased annually by more than 30% in 1997 and 1998.

On top of the increase in the number of transactions, there are a number of indications that the current merger wave has a new, global dimension. Indeed, there is an increase in the co-operation between the US and the EC on merger cases.

International co-operation has proved effective in the context of individual cases. An example of best cooperation practices is set by the WorldCom/MCI case, where the two case-teams worked smoothly together. Indeed, joint negotiations were undertaken between the parties and the US DoJ and the European Commission, as a result of which the parties agreed to find a buyer and to divest MCI’s Internet activities prior to completing the merger. On the basis of these undertakings, the Commission cleared the transaction on 8 July 1998 and, following approval from the US DoJ and the FCC, MCI’s Internet business was sold to Cable & Wireless. The merger was cleared in September 1998. This kind of co-operation has been replicated in many other transactions.

In fact, the co-operation is very extensive: co-operation on timing, on market definition, (in the Boeing/McDonnell Douglas case, for example, both the Federal Trade Commission (‘FTC’) and the Commission reached the same product definition of “large commercial aircraft”), co-operation on remedies and co-operation on the assessment of anti-competitive effects. US antitrust authorities have moreover participated as observer in some Commission hearings (Guinness/Grand Metropolitan, Boeing/MDD and Worldcom/MCI), and the Commission is exploring the possibility for its officials to attend, under similar conditions and with the consent of the parties, certain key meetings between the US competition authorities and parties to proceedings under US antitrust rules.

The complexities involved in the handling of cases involving more than two competition agencies need also be taken into consideration. Co-operation between, for instance, four or even more agencies might be more difficult to manage than a single transatlantic communication. The risks of reaching diverging decisions, or simply of the agencies being unable to grasp the economic significance of all aspects of a given transaction, would then be higher. In a few instances, transactions needed clearance by several competition agencies (for example the Price Waterhouse/Coopers & Lybrand merger). In such cases, the various agencies involved have co-ordinated their investigations. None of the two potential pitfalls identified above has yet materialised. It is true that in some rare instances (cf the Boeing case), the final outcomes of procedures have been different. However, final decisions have never been in conflict.

2.2. Cartels

The US-DoJ has suggested in the past that cooperation in cartel cases would be facilitated if there was in DGIV one contact point responsible for major international cartel cases. It is expected that the new DGIV cartel structure, the Cartel Unit\textsuperscript{239}, will be in a position to provide this interface with officials of

the DoJ responsible for criminal investigations. This should facilitate cartel cooperation, even if it cannot solve all problems.

Until now, despite excellent cooperation with the US in merger cases, DGIV has experienced difficulties regarding cooperation in cartel cases, primarily because of confidentiality rules. DG IV receives no advance notice of settlements in ‘guilty plea’ cases, our leniency policies are not sufficiently co-ordinated and we have difficulties in planning joint investigations.

On the issue of advance information (in the absence of waivers, which are rare in such cases), it is clear that the DoJ is in some instances not able to provide advance notifications is normally contemplated in the EC-US Agreement because of the confidentiality constraints. The situation could be improved, if an EC/US Bilateral Agreement, pursuant to the 1998 OECD Recommendation concerning Effective Action against Hard Core Cartels, made it possible for the US authorities and the Commission to share confidential information. It is clear that EC and US actions against serious infringements (e.g. hard core cartels) would be more effective if we could share confidential information.

A comparison of the leniency scheme in the EC and the corporate immunity scheme in the US also reveals divergences that could create practical problems. Some common strategy in order to solve these problems appears desirable.

**2.3. Abuses of Dominance**

One of the best examples of co-operation with the US in a case of abuse of dominant position is the 1993 Microsoft case which led, in 1994, to an undertaking from Microsoft to modify its licensing practices. This followed a period of intense negotiations involving Microsoft and a team of senior officials drawn from the European Commission and the United States Department of Justice. These negotiations also resulted in Microsoft settling charges brought by the United States Department of Justice by signing a consent decree.

The negotiation of the undertaking remains a milestone in the co-operation between the EC Commission and the United States Department of Justice: during the investigations conducted by DG IV and by the DoJ respectively, Microsoft consented to the exchange of information between the two competition authorities by waiving its right to secrecy with respect to both authorities. A number of contacts between DG IV and the DoJ followed; a co-ordinated approach was elaborated, and it was agreed to negotiate jointly with Microsoft. To this end, trilateral talks were held, both in Brussels and in Washington DC. They resulted in an undertaking by Microsoft to both authorities.

Although this type of joint action was carried out independently of the Cooperation Agreement in competition matters concluded in 1991 (its legal validity was at that time still under scrutiny by the Court of Justice), it served as an important model for the future, as it showed how the two authorities can combine their efforts to deal effectively with giant multinational companies. The success of this joint approach also sent a strong signal to all multinational companies, including those in other sectors.

The 1996 investigation into the practices of Nielsen, a provider of retail tracking services, is also a good example of successful cooperation.
3. The 1998 EC/US Agreement on positive Comity

It is clear that the 1991 Agreement has provided a solid and quite satisfactory framework for cooperation. However, with the increasing integration of transatlantic (and global) markets there was a need to broaden, deepen and intensify EU-US cooperation in the area of competition. It was also beyond doubt that certain conflicts can be avoided by using the positive comity concept more extensively.

On the basis of a mandate by the Council, the Commission negotiated with the United States an agreement which strengthens the relevant provisions of the 1991 Agreement. The product of these negotiations, the **1998 EC/US Positive Comity Agreement** was signed in Washington and entered into force on 4.06.1998.

The 1998 EC/US Positive Comity Agreement, like the 1991 Agreement, does not alter existing law, nor does it require any change in existing law. However, it does create a presumption that when anticompetitive activities occur in the whole or in a substantial part of the territory of one of the parties and affect the interests of the other party, the latter “will normally defer or suspend its enforcement activities in favour of” the former. This is expected to happen particularly when these anticompetitive activities do not have a direct, substantial and reasonably foreseeable impact on consumers in the territory of the party deferring or suspending its activities.

The presumption of deferral will only occur if the party in the territory of which the restrictive activities are occurring has jurisdiction over these activities and is prepared to deal actively and expeditiously with the matter. When dealing with the case that party will keep its counterpart closely informed of any developments in the procedure, within the limits of its internal rules protecting confidentiality.

The new Agreement constitutes an important development, since it represents a commitment on the part of the European Union and the United States to cooperate with respect to antitrust enforcement in certain situations, rather than to seek to apply their antitrust laws extraterritorially.

3.1. Protection of confidential information

Following its 1st Statement in 1995, the Commission indicated in a new ‘Statement on Confidentiality of Information’ made during the adoption on 29.05.1998 of the Joint Council and Commission Decision concluding the 1998 Positive Comity Agreement that:

— ‘The Statement made by the Commission in April 1995 on the confidentiality of information and the exchange of interpretative letters dated May 31 and July 31, 1995 in relation to the 1991 Agreement apply in their entirety to this Agreement.


— Article VII of this Agreement states that existing laws remain unchanged and that the Agreement must be interpreted consistently with those existing laws. This Agreement therefore cannot permit either of the Parties’ competition authorities to do any act they do not already have the power to do. One consequence of this is that the Commission may only provide information to the US authorities where it is consistent with Community law to do so.

— While this Agreement envisages that it may be appropriate to provide information to the other party in order to keep it informed of enforcement activities, confidential information may only be provided with the consent of the source of that information. Community law provides a high level of protection to confidential information provided to the Commission, and it will be necessary that any consent obtained is sufficient to discharge the Commission from its obligation of confidentiality pursuant to general principles of Community law, the case-law of the Court of Justice of the European Communities and Article 20(2) of Council Regulation No 17.

3.2. Transparency vis-à-vis Member States concerned

Member States concerned are kept informed of cooperation activities under the 1991 EC/US Agreement in accordance to the 1st Statement by the Commission to the Council in 1995. The Commission indicated in a new ‘Statement on Transparency’ made during the adoption on 29.05.1998 of the Joint Council and Commission Decision concluding the 1998 Positive Comity Agreement that:

— The principles on transparency which govern the relationship between the Commission and the Member States in the application of the competition rules as enshrined, in particular, in Council Regulation No 17, the statement made by the Commission in April 1995 on transparency and the arrangements contained in the exchange of interpretative letters dated 31 May and 31 July 1995, in relation to the 1991 Agreement shall apply.

— The Member States whose interests are affected shall be informed as soon as is reasonably possible of all requests by the US authorities to investigate or remedy anticompetitive activities and of all proceedings opened by the Commission as a result of a request by the US authorities under Article III of this Agreement.

— The Member States whose interests are affected shall be informed as soon as is reasonably possible of requests to the US authorities under Article III of this Agreement to investigate anticompetitive activities.

— The Member States whose interests are affected shall be informed as soon as is reasonably possible of Commission and US deferrals or suspensions of enforcement activities pursuant to Article IV(2) of the Agreement, or of Commission and US initiations or re-institutions of such activities pursuant to Article IV(4) of the Agreement.

— When the Commission opens proceedings following a request by the US authorities under Article III of this Agreement, the undertakings concerned shall be informed of the existence of the request.

at the latest when the statement of objections is issued, or when a publication pursuant to Article 19(3) of Council Regulation No 17 is made.

— The annual report presented by the Commission to the European Parliament and the Council on the application of the 1991 Agreement shall also cover the application of this Agreement, including any cases where information has been exchanged under the Agreements’.

3.3. Application of the 1998 Agreement

In the period from its entry into force (4.6.1998) to 31.12.1998 no requests have been submitted by the EC or the US under the 1998 Positive Comity Agreement.

4. Case specific cooperation within 1998

The cases listed below are those which fall directly under the EC/US Agreement and are dealt in the US by either the US DoJ or the FTC. Some competition cases are dealt in the US by other agencies, for instance the US Department of Transportation (DoT), the Federal Maritime Commission (FMC) or the US Department of Commerce (DoC). These agencies do not formally cooperate with the Commission directly, but do so indirectly, mostly through the DoJ. There are therefore informal contacts between the Commission and these agencies. These cases are not discussed in this report.

4.1. Statistical information

a) Number of cases notified by the Commission and by the US

There were the total of fifty-two notifications made by the Commission during the period between 1 January 1998 and 31 December 1998. The cases are divided into merger and non-merger cases and are listed in the Annex 1.

The Commission received the total of forty-six notifications from the US authorities during the same period. Twenty-four were received from the DoJ and twenty-two from the FTC. A list of these cases is found in the Annex 2, again broken down in merger and non-merger cases.

Merger cases made up the majority of all notifications in both directions. There were forty-three merger notifications by the Commission and thirty-nine by the US authorities.

The figures given represent the number of cases in which one (or more) notifications took place and not the total number of individual notifications. Under Article II of the Agreement, notifications are made at certain stages of the procedure and so several notifications may be made concerning the same case.

Table 1 sets out in figures the number of cases notified under the 1991 EC/US Agreement during the period from 1 January 1998 to 31 December 1998. Table 2 sets out in figures the number of cases notified since 23 September 1991.
Table 1

<table>
<thead>
<tr>
<th>Year</th>
<th>No. of EC notifications</th>
<th>No. of US notifications FTC</th>
<th>No. of US notifications DoJ</th>
<th>No. of merger notifications</th>
</tr>
</thead>
<tbody>
<tr>
<td>1998</td>
<td>52</td>
<td>22</td>
<td>24</td>
<td>43 (EC) 39 (US)</td>
</tr>
</tbody>
</table>

Table 2

<table>
<thead>
<tr>
<th>Year</th>
<th>No. of EC notifications</th>
<th>No. of US notifications FTC</th>
<th>No. of US notifications DoJ</th>
<th>No. of merger notifications</th>
</tr>
</thead>
<tbody>
<tr>
<td>1991</td>
<td>5</td>
<td>10</td>
<td>2 (=12)</td>
<td>3 (EC) + 9 (US)</td>
</tr>
<tr>
<td>1992</td>
<td>26</td>
<td>20</td>
<td>20 (=40)</td>
<td>11 (EC) + 31 (US)</td>
</tr>
<tr>
<td>1993</td>
<td>44</td>
<td>22</td>
<td>18 (=40)</td>
<td>20 (EC) + 20 (US)</td>
</tr>
<tr>
<td>1994</td>
<td>29</td>
<td>16</td>
<td>19 (=35)</td>
<td>18 (EC) + 20 (US)</td>
</tr>
<tr>
<td>1995</td>
<td>42</td>
<td>14</td>
<td>21 (=35)</td>
<td>31 (EC) + 18 (US)</td>
</tr>
<tr>
<td>1996</td>
<td>48</td>
<td>20</td>
<td>18 (=38)</td>
<td>35 (EC) + 27 (US)</td>
</tr>
<tr>
<td>1997</td>
<td>42</td>
<td>12</td>
<td>24 (=36)</td>
<td>30 (EC) + 20 (US)</td>
</tr>
<tr>
<td>1998</td>
<td>52</td>
<td>22</td>
<td>24 (=46)</td>
<td>43 (EC) +39 (US)</td>
</tr>
</tbody>
</table>

b) Notifications by the Commission to Member States

The text of the interpretative letter sent by the European Communities to the US as well as the Statement on Transparency made by the Commission to the Council on 10 April 1995 (see point 3.2 above) provides that the Commission, after notice to the US Competition authorities, will inform the Member State or Member States, whose interests are affected, of the notifications sent to it by the US antitrust authorities. Thus, when notifications are received from the US Authorities, they are forwarded immediately to the relevant units of DG IV and at the same time copies are sent to the Member States, if any, whose interests are affected. Equally, at the same time that DG IV makes notifications to the US authorities, copies are sent to the Member State(s) whose interests are affected.

In most instances, the US authorities also notify the Member States directly, under the OECD Recommendation. During the period under review 35 cases were notified to the United Kingdom, 17 to Germany, 11 to the Netherlands, 8 to France, 3 to Spain and Sweden, 2 to Italy and 1 to Denmark, Finland and Ireland each.

244 Revised recommendation of the OECD Council concerning cooperation between Member countries on anti-competitive practices affecting international trade, adopted 27/28 July 1995.

COMPETITION REPORT 1998
4.2. Substantive aspects of case-specific cooperation

1998 was notable not only for the continuation of a substantial level of merger and acquisition activity but also for the increasing size of the deals being announced. Throughout the year there were a string of announcements of ever larger global-scale mergers.

At the start of the year the merger with largest claimed value was the WorldCom/MCI deal, with a figure in the order of US$37 billion. During the course of year this was surpassed by mergers with higher announced values, for example, the Travelers Group/Citicorp deal, the BP/Amoco and Exxon/Mobil mergers, as well as SBC/Ameritech, Daimler Benz/Chrysler, and American Home Products/Monsanto. Other headline cases announced in 1998 included Price Waterhouse/Coopers & Lybrand and KPMG/Ernst & Young, as well as numbers of smaller concentrations which had implications beyond their home territory.

Not all large mergers require filing in Europe — SBC/Ameritech is one example which did not fall under EC jurisdiction. But as most of those mentioned above were international, if not global in scale, the majority required multiple competition filings with different agencies, including normally the EC and the US anti-trust enforcement agencies.

It might be thought that large mergers would normally require more extensive co-operation simply because of their scale, but this is not necessarily true. While some relatively large cases fell technically within the EC jurisdiction, they had little or no competitive impact in Europe. This might be because the main focus of activity is outside Europe, such as in the Travelers Citicorp case, or because the merging parties were coming together from home positions in their respective territories and the competitive impact of the overlap was minimal. In the Daimler Benz/Chrysler and BP/Amoco cases each party was active principally in its respective home continent, but absent or not substantially present in the territory of the other, hence overlaps were marginal or non-existent.

In such cases co-operation will be limited, and typically involve case handlers in the EC and US respectively making contact with one another, keeping each other informed about their respective timetables, and perhaps discussing product and geographic market definitions.

In another category of case, the EC and US agencies may adopt differing views on product and geographic markets, but find co-operation helpful in establishing why those differences exist, and to satisfy themselves that they are comfortable with their own reasoning. American Home Products/Monsanto, and Hoffmann-La Roche/Boehringer Mannheim, were cases where the conditions of competition were different in Europe from those in the US. Even if the product or geographic markets and hence the competition analysis differ, there may still be cases where a certain co-ordination of treatment of remedies is desirable. Hoffmann-La Roche/Boehringer Mannheim and Halliburton/Dresser were examples where discussions took place about possible remedies.

More substantial co-operation in the assessment phase may arise where the geographic extent of the product or service markets is either world-wide, or covers both the United States and Europe. In these cases both agencies have an interest in ensuring consistency of product and service market definition, and in knowing whether the other believes there is a substantial competition issue. In Price Waterhouse/Coopers & Lybrand, WorldCom/MCI, Wolters Kluwer/Reed Elsevier, Exxon/Shel and

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245 This report concentrates on aspects of case handling related to the EC/US cooperation. For more information on a particular case see the XXVIIth Report on Competition Policy.

COMPETITION REPORT 1998
Marsh & McLennan/Sedgwick, discussions took place about product market definition and geographic extent, with a view to confirming each agency’s analytical approach.

It is becoming more common for case handlers to ask for waivers on a routine basis in order to enable the agencies to exchange confidential information between one another. Frequently the main benefit of this is not so much the information which might be exchanged, but the removal of constraints which prevented the agencies from having a free and unfettered dialogue. For example, such exchanges prevent misunderstandings which might otherwise arise owing to an imperfect understanding of the position or intentions of case handlers in the other jurisdiction. And where co-operation is carried into the investigation stage, a co-ordinated approach can reduce the burden on the notifying parties and third parties. Finally, co-operation in the devising of remedies can help the notifying parties avoid ‘double-jeopardy’ whereby they are required to negotiate remedies sequentially, and thus have to make further concessions to the second agency to secure the clearance of a deal which has already received the blessing of the first.

If such dialogue is to be of value, it is important to facilitate it as early as possible in the assessment process. A common feature of earlier attempts to secure waivers was lengthy negotiations with the parties about the terms of their waiver, to the point where the value of any subsequent co-operation might be lost. The Commission has begun to take the initiative in suggesting to notifying parties a ‘standard form’ waiver, which they are invited to sign, and hence to minimise the time spent on negotiating the terms.

In a few cases, co-operation has been taken a stage further, to include co-ordination of investigative activity. Although both agencies would continue to make their own enquiries of third parties, they might discuss who should be contacted, and co-ordinate the questions to be asked. In WorldCom/MCI, assessments were greatly facilitated by the readiness of many firms who responded to parallel enquiries from the EC and US agencies and allow information to be shared between them, or who supplied the same submission to both.

Co-operation can go further still. In WorldCom/MCI and Exxon/Shell case the co-operation which had begun during the assessment stage was continued when discussions of remedies began. In WorldCom/MCI trilateral remedy negotiations were conducted between the notifying parties and the two agencies. In addition, the US Department of Justice (“DoJ” — the US agency responsible for handling the case) and the Commission jointly conducted the market testing of a first set of remedies. This included the presence of one person from DG IV case team in the DoJ premises to take part to the DoJ market testing. In Exxon/Shell, the remedy was extensively discussed between the US and EC agencies before either agency came to a final view.

There are as yet few cases on record where co-operation has taken place regarding the implementation of undertakings offered, but this may be an area of growth in the future. In WorldCom/MCI there was an exchange of letters between the EC and the US DoJ where the Commission requested the DoJ’s co-operation regarding the undertakings which were mutually offered by the parties to both the Commission and the DoJ. The DoJ confirmed that it would take whatever steps are necessary and appropriate to evaluate, and if it found them to be sufficient, to seek the effective implementation of these undertakings. In a good example of such co-operation, the Halliburton/Dresser case was cleared within the first Phase in the EC, but in the US it took somehow longer because of several serious problems identified there. One of the problem areas found related to the market for drilling fluids. Although this was of concern to the European Commission as well as to the DoJ, the US Antitrust Division was considered to be better placed to deal with it, as it involved divestitures of assets located.
in the US. Therefore, the Commission kept in close contact with its US counterparts, and relied on their pursuing the required divestiture as an element in deciding to clear the case at Phase 1. Subsequently, the US Antitrust Division kept the Commission fully informed throughout the divestiture process.

5. Conclusions

The implementation of the bilateral EC/US 1991 Agreement has been very successful so far. Approaches by the respective antitrust authorities have been largely converging rather than diverging. The experience has shown that co-operation with the US is not merely an option but rather an absolute necessity if both competition authorities want to be able to deal effectively with the ever-increasing problem of cross-border restrictive business activities.

This co-operation is even more necessary because of the importance of the sectors principally concerned (transport, telecom, pharmaceuticals, computers,...), and because of the implications of competition decisions for these key industries.

It is clear that these Agreements do not eliminate the possibility of conflicting views, because the different authorities retain the right to make their own analysis and to reach decisions independently of each other. However, increased cooperation contributes to improving the effectiveness and efficiency of both the EC’s and the US’s competition laws and reduces the risks of divergent decisions.
ANNEX 1
NOTIFICATIONS BY THE EUROPEAN COMMISSION

Merger cases

01 Case n° IV/M.1094 — Caterpillar/Perkins Engines
02 Case n° IV/M.1042 — Eastman Kodak/Sun Chemical
03 Case n° IV/M.986 — Agfa-Gevaert/DuPont
04 Case n° IV/M.1081 — Dow Jones/NBC — CNBC Europe
05 Case n° IV/M.970 — TKS/ITW Signode/Titan
06 Case n° IV/1069 — WorldCom/MCI
07 Case n° IV/M.1040 — Wolters-Kluwer/Reed-Elsevier
08 Case n° IV/M.1120 — Compaq/Digital
09 Case n° IV/M.1112 — Advent International/EMI/WH Smith
10 Case n° IV/M.1109 — Owens-Illinois/BTR Packaging
11 Case n° IV/M.1020 — GE Capital/Sea Containers
12 Case n° IV/M.1155 — Cendant Corporation/NPC
13 Case n° IV/M.1139 — DLJ/FM Holdings
14 Case n° IV/M.1162 — GE/BAYER
15 Case n° IV/M.1168 — Deutsche Post/Lufthansa/DHL
16 Case n° IV/M.1192 — CHS Electronics/Metrologie International
17 Case n° IV/M.1196 — Johnson Controls/Becker
18 Case n° IV/M.1182 — Akzo Nobel/Courtaulds

Due to the confidentiality requirements, this list names only those investigations or cases which have been made public.

COMPETITION REPORT 1998
19 Case n° IV/M.1140 — Halliburton/Dresser
20 Case n° IV/M.1137 — Exxon/Shell
21 Case n° IV/M.1208 — Jefferson Smurfit/*Stone Container*
22 Case n° IV/JV.5 — Cegetel/Canal+/America Online/Bertelsmann
23 Case n° IV/M.1204 — Daimler Benz/Chrysler
24 Case n° IV/M.1229 — American Home Products/Monsanto
25 Case n° IV/M.1289 — Harbert Management/DB/Bankers Trust/SPP/Öhman
26 Case n° IV/M.1276 — NEC/PBN
27 Case n° IV/M.1306 — Berkshire Hathaway/General Re
28 Case n° IV/M.1292 — Continental/ITT
29 Case n° IV/M.1300 — Allied Signal/AMP
30 Case n° IV/M.1304 — Hercules/BetzDearborn
31 Case n° IV/M.1307 — Marsh & McLennan/Sedgwick
32 Case n° IV/M.1246 — LHZ/Carl Zeiss
33 Case n° IV/M.1293 — BP/Amoco
34 Case n° IV/M.1286 — Johnson & Johnson/Depuy
35 Case n° IV/M.1298 — Kodak/Imation
36 Case n° IV/M.1301 — Texaco/Chevron
37 Case n° IV/M.1327 — Canal+, CDPQ and Bank America/NC
38 Case n° IV/M.1252 — AT&T/TCI
39 Case n° IV/JV.15 — BT/AT&T
40 Case n° IV/M.1335 — Dana/Glacier Vandervell
41 Case n° IV/M.1368 — Ford/ZF
42 Case n° IV/JV.12 — Motorola/Ericsson/Nokia/Psion

43 Case n° IV/M.1355 — Newell/Rubbermaid

**Non-merger cases**:247

01 Case n° IV/36.638 — FIA/FOA

02 Case n° IV/36696 — Parallel Products of DuPont Paints and Pigments

03 Case n° IV/36890 — Monitoring of Digital’s Undertaking of 8 October 1997

04 Case n° IV/36702 — Investigation of Iomega Corporation agreements and market behaviour

05 Case n° IV/34237 — Anheuser Bush/Scottish and Newcastle

06 Case n° IV/37241 — Boeing/Airbus

07 Case n° IV/36967 — Beloit/Valmet

08 Case n° IV/36545 — Aminoacids

09 Case n° IV/37174 — Network Solutions Premier Partner Program

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247 Due to the confidentiality requirements, this list names only those investigations or cases which have been made public.

COMPETITION REPORT 1998
ANNEX 2

Merger cases

01 see footnote

02 DuPont/Degussa

03 T &N PLC/Federal-Mogul

04 Engine Alliance

05 Flir/Spectra

06 GNK/Armstrong

07 Sentrachem/Dow

08 Reed Elsevier/Wolters Kluwer

09 Siemens/FPG

10 Wolters Kluwer/Thomson

11 Nutone/Nortek

12 SC Investments/Andes

13 Sungard/Rolfe & Nolan

14 Wolters Kluwer/Waverly

15 ANRFS/ANRP/Transok/Shell

16 Harsco/Pandrol Jackson

17 Coloniale/Parmalat/Kinnett

18 Boeing-McDonnell Douglas helicopter business

19 PMSI/Cognizant

Due to the confidentiality requirements, this list names only those investigations or cases which have been made public.
20 Intel Corporation/Digital Equipment Corporation

21 Worldcom/MCI

22 Reed Elsevier/Matthew Bender

23 Crosfield ICI/Grace

24 see footnote

25 Chrysler Corporation/Daimler-Benz

26 Alcatel/DSC

27 American Home Products/Monsanto

28 Pearson/Viacom

29 Wandel & Goltermann/Wavetek

30 Metallgesellschaft/Cyprus Foote

31 Giant Food/Ahold

32 Jefferson Smurfit/Stone Container

33 Halliburton/Dresser

34 see footnote

35 BP/Amoco

36 see footnote

37 Elsag Bailey/Finmeccanica/ABB

38 Sulzer/Guidant

39 AT & T/BT

40 see footnote

COMPETITION REPORT 1998
41 Exxon/Shell

42 Marsh & McLennan/Sedgwick

**Non-merger cases**

01 ICI Explosives

02 see footnote

03 see footnote

04 see footnote

05 see footnote

06 see footnote

07 see footnote

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249 Due to the confidentiality requirements, this list names only those investigations or cases which have been made public.
A — Legislative developments

The process of alignment of national laws on Community law continued in 1998, even though the alignment is only partial in some cases. The new Danish and Dutch laws, brought into conformity with Community law, entered into force on 1 January. New competition acts which closely resemble the Community rules were adopted in Germany and the United Kingdom. Discussions are continuing in Austria, Luxembourg and Sweden. New merger legislation in Finland is based on the European model. Interesting procedural reforms are to be noted in Belgium, Spain and Sweden.

There was no amendment to competition law in 1998 in six Member States (Austria, France, Greece, Italy, Luxembourg and Portugal).

Austria

In 1998 debate began in Austria on a revision of domestic competition law. Various solutions are being considered with regard to institutional structure (greater powers for the Restrictive Practices Court, creation of an independent Restrictive Practices Office (Kartellamt)). Also being discussed is an alignment of the substance of Austrian law with Community competition law. No final decision has yet been taken, although there is unanimous agreement that the principle of initiating proceedings by an administrative procedure should be reinforced.

Belgium

The Belgian Competition Act of 5 August 1991 is largely based on European competition law. Belgian law in this field is therefore already aligned with European law.

Furthermore, where the Belgian competition authorities must rule under Article 84 of the EC Treaty on the legality of agreements or of an abuse of a dominant position in the common market, their decision must be taken in the light of Articles 81(1) and 82 of the Treaty, according to the procedure and applying the penalties laid down by Belgian competition law.

In 1998 two additional implementing decrees were published. The Royal Decree of 22 January 1998 (published in the official gazette - Moniteur belge - of 24 April 1998) on lodging the complaints and applications provided for in Article 23(1)(c) and (d) of the Act of 5 August 1991 on safeguarding economic competition sets out how complaints should be lodged. It provides that eight copies must be submitted, that there must be a clear, detailed description of the competition practices concerned and that sufficient documentary evidence must be furnished.

The second Royal Decree, of 22 January 1998 (Moniteur, 24 April 1998) amends the Royal Decrees of 15 March 1993 on procedures in connection with safeguarding economic competition, of 23 March 1993 on the applications and notifications provided for in Articles 6 and 7 of the Act of 5 August 1991 on safeguarding economic competition, and of 23 March 1993 on the notification of mergers provided for...
in Article 12 of the Act of 5 August 1991. The Royal Decree, which is intended to improve the interaction between the authorities responsible for implementing the Competition Act, lays down that, in merger proceedings, firms may appeal against a decision of the Competition Council to launch the second stage of an investigation only when an appeal is brought against the Council’s final decision on whether the merger is lawful or not.

**Denmark**

As indicated in the 1997 Competition Report, new competition legislation, Act No 384 of 10 June 1997, entered into force on 1 January. The Act lays down a general ban on agreements restricting competition and prohibits abuse of a dominant position, both prohibitions corresponding to those contained in Articles 81 and 82 of the EC Treaty. The Danish competition authorities may not directly apply the prohibitions under Articles 81(1) and 82 of the Treaty.

The move to the prohibition principle represents a systemic change in Danish competition law, which will be applied from now on in accordance with the practice of the Commission and the case-law of the Court of First Instance and the Court of Justice.

The new Competition Act has also introduced the principle of a one-stop-shop, which means that agreements which qualify for Community exemption are automatically excluded from the general ban on agreements restricting competition laid down by the Competition Act.

Also excluded from the general prohibition are agreements which do not exceed certain thresholds and which are therefore of minor importance.

As at European Union level, it is possible to obtain negative clearance or an individual exemption, provided the competition authorities are notified.

By 1 July, there had been 845 notifications of agreements which were in existence when the Act entered into force on 1 January.

When the new Act was adopted, the Minister for trade and industry announced eight exemptions by category corresponding to those applied in the European Union, together with a special block exemption for agreements involving retail chain stores.

The Competition Act, which covers both private and public enterprises, is applied by the Competition Council (Konkurrencerådet), made up of 19 members. The Competition Board (Konkurrencestyrelsen), which acts as the Council’s secretariat, ensures its day-to-day application and deals with cooperation with the European Commission on matters of common interest.

Decisions taken under the Competition Act may be contested before the Competition Appeals Board (Konkurrenceankenhævnet) and ultimately before the courts.

Infringements of the prohibitions laid down by the Competition Act, whether committed deliberately or as a result of serious negligence, are punishable by a fine, which constitutes a criminal penalty. However, a fine is imposed for infringing the prohibition on abuse of a dominant position only if an order has been issued in respect of a similar infringement within the last five years. Furthermore, as set out in the explanatory memorandum of the Act, it was not considered to be in line with the tradition of
Danish criminal law to propose penalties as heavy as the fines imposed for a breach of the Community competition rules.

The new Competition Act does not cover merger control, but it does require mergers to be notified to the Competition Board if the combined turnover of the firms involved exceeds DKK 50 million. However, the obligation to notify applies only if at least one of the firms has its registered office in Denmark.

**Finland**


The most important change consisted in the addition of rules on the acquisition of undertakings. These rules apply to acquisitions where the parties’ total turnover exceeds FIM 2 billion and at least two parties have a turnover of more than FIM 150 million. It is a further condition that the transaction involve business carried on in Finland. Acquisitions of undertakings will be monitored in all sectors.

If an acquisition of an undertaking creates or strengthens a dominant position which appreciably impedes competition on all or most of the Finnish market, the Office of Free Competition (Kilpailuvirasto) may propose to the Competition Council (Kilpailuneuvosto) that the acquisition be prohibited. If the adverse effects of the acquisition can be avoided by making it subject to conditions, the Office must negotiate those conditions with the parties.

An acquisition of an undertaking must be notified to the Office within one week. Within one month at the latest following such notification, the Office must inform the parties whether the acquisition will be the subject of a detailed investigation. A proposal to prohibit the acquisition must be sent to the Competition Council within three months of the Office’s decision to conduct an investigation. The Council must take a decision on the case within three months of receiving the proposal. The acquisition may not be put into effect until the procedure is completed, if its implementation has not been authorised separately. Where proceedings are brought before the Competition Council, the prohibition of the acquisition’s implementation will expire if the Council has not decided otherwise within one month of the Office’s making the proposal or of a complaint’s being lodged.

In addition, acquisitions of enterprises operating on the electricity market are subject to a special provision whereby the Competition Council may, on a proposal from the Office, prohibit an acquisition in the electricity sector which would lead to a market share of more than 25% of the national distribution networks. This provision applies to activities on networks with a voltage of 400, since this is where the adverse effects of vertical integration are most evident.

On 1 July the Ministry of Trade and Industry took decisions on the obligation to notify acquisitions of undertakings (No 499/1998) and on the calculation of the turnover of parties to an acquisition (No 498/1998). These decisions took effect on 1 October. On 15 September the Office of Free Competition published a notice on the monitoring of acquisitions of undertakings.

By amendment (No 303/1998), a provision on minor restrictions of competition was also added to the Act on competition restrictions: the Office of Free Competition may choose not to take action if the competition restraint has only a minor impact on economic competition. On 17 September the Office published a notice on minor competition restraints.

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A provision on negative clearance was also added to the Act in order to improve legal protection for firms. Firms may apply to the Office of Free Competition for negative clearance in respect of the prohibitions set out in the Act on competition restrictions, except in cases of an abuse of a dominant position on the market. On 30 September the Office published instructions on how to apply for exemption and negative clearance.

Under the new provision on compensation incorporated into the Act on competition restrictions, firms which, whether deliberately or through negligence, are in breach of the Act or of the legislation or decrees adopted under it must compensate other firms for any damage they cause them. The aim is to clarify the situation regarding compensation for damage caused by restrictions of competition, in particular in cases where there is no agreement between the firm responsible for the damage and the injured party. Applications for compensation are examined by the ordinary courts, which may request an opinion from the Office of Free Competition.

**Germany**

On 28 May, after three years’ work, the German Parliament adopted legislation amending for the sixth time the federal Act on competition restraints (Gesetz gegen Wettbewerbsbeschränkungen — hereinafter GWB). As part of this reform, the text of the Act, which had been in effect for more than 40 years, was completely revised, with its provisions tightened up and drafted in more comprehensible language. As regards substance, the reform has brought about a moderate alignment with Community antitrust law, together with an increase in the extent to which the law as a whole safeguards competition.

The amended law prohibits the actual conclusion of restrictive agreements and not just their implementation. The list of exemptions from the prohibition on restrictive practices has been shortened and the procedure by which such practices are exempted has been simplified. As regards a number of specific forms of cooperation, the law has added a further ground for exemption, in line with Article 81(3).

Under the new provisions, the abuse of a dominant position is expressly prohibited by law, as under Article 82 of the EC Treaty, so that injured firms may themselves assert their rights before the civil courts. The authorities responsible for monitoring restrictive practices now have greater powers to investigate infringements by firms in dominant positions. Access to networks and infrastructures is governed by a general clause in the GWB. The new legislation prohibits firms in dominant positions from selling goods at below cost price if there is no objective justification for doing so and if it is not an occasional sale.

As regards merger control, the reform applies the prevention principle, which means that mergers must be notified before being implemented, as under Community law. Other firms may contest decisions authorising mergers before the courts.

The number of areas excluded from the scope of the law on competition restraints (agriculture, banking/insurance and transport) has been considerably reduced. The exemption applicable to the energy sector (electricity and gas) had already been abolished in March when the energy law was amended. Sport has been added to the list of sectors not covered by the law, thereby allowing the centralised sale of television broadcasting rights by sports federations. Since they provide services of general interest (promotion of youth and amateur sports), an adequate financial base must be ensured for these federations.
The new version of the GWB is to enter into force on 1 January 1999.

**Ireland**

The Competition Authority published one decision: Category certificate/licence in respect of agreements between suppliers and resellers, Decision No 528 of 4 December 1998. This block exemption will apply from 1 January 1999 to 31 December 2003.

**Luxembourg**

In 1998 good progress was made with the research project which the Ministry of Economic Affairs is carrying out in cooperation with the Public Research Centre’s economic law think tank with a view to updating the Act of 17 June 1970 on restrictive trade practices. Consumers and the sectors of business and industry concerned were widely consulted. These very constructive consultations gave direction to the reform plans in the light of the real problems faced by businesses in their specific markets. The ambitious project will attempt to demonstrate that competition legislation should be placed in a wider context so that it is consistent with legislation on unfair competition and consumer protection.

The Luxembourg Minister for Economic Affairs attaches great importance to modernising competition policy, which, in the context of the decentralisation of Community cases, will need to be applied to a greater extent in the years to come. The reform plan should be ready to be discussed and decided on by the relevant authorities in the second half of 1999.

**Netherlands**

In January the Dutch Government set out principles for (general and specific) monitoring of the liberalised public utility services. The Government took a position on the basis of the general Competition Act, which came into force on 1 January, and in the context of the liberalisation of the market for these services. It was important to clarify the basic system so as to prevent fragmentary monitoring by various authorities and the development of inconsistencies in the way the competition rules are applied.

The basic principle is that the Netherlands is not in favour of introducing specific arrangements: sector-specific rules will be adopted in addition to the Competition Act applicable to all sectors of the economy only if the general arrangements do not achieve the desired result. Regular assessment, in principle every three years, must be carried out to determine whether specific arrangements are necessary.

If there is a need for specific rules, their implementation will not necessarily have to be monitored by a separate regulator. This task can be entrusted to the general supervisory authority, the Netherlands Competition Authority (*Nederlandse Mededingingsautoriteit* or NMa), or a division attached to it.

The administrative relationship between the Netherlands Competition Authority and any other supervisory bodies, if these are set up, should be carefully defined. For some decisions, the specific supervisory body will have to come to an agreement with the Competition Authority, in particular if there is a danger of divergent interpretations of certain competition law concepts.

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Since these basic principles were laid down by the Government, they have been formalised in laws, draft laws and declarations of intent.

A new Telecommunications Act has entered into force and a new Postal Services Act is being prepared. A specific regulator has been set up: the Independent Post and Telecommunications Authority (Onafhankelijke Post- en Telecommunicatie Autoriteit or OPTA). The Government plans to require the OPTA to take certain decisions in agreement with the NMa.

An office responsible for implementing and monitoring the Electricity Act (Dienst Uitvoering en Toezicht Elektriciteitswet or DTE) was set up on the basis of that Act, adopted in 1998. The office takes some decisions in agreement with the NMa. It constitutes a division of the NMa.

Under the draft Gas Act, this sector will be supervised, not by a separate authority, but by the NMa.

Public transport (local and regional) is another area where no separate authority will be set up; rather, the NMa will be assigned specific responsibility for the sector.

Spain

On 27 February Royal Decree No 295/1998 for the application in Spain of the Community competition rules was approved. This law, on which work began in 1997, amends Royal Decree No 1882/86 of 29 August 1986 for the application of Articles 81 and 82 of the Treaty by the national competition authorities; the latter decree required modernisation in the light of legislative changes which had taken place since its entry into force.

The new decree makes the following changes:

i. it specifies the procedure to be followed in investigating cases under the Community competition rules and in taking decisions on those cases;

ii. it corrects the inflexibility of Royal Decree No 1882/86, which assigned responsibilities for applying Community legislation to the national competition authorities by drawing up an exhaustive list of the Community rules in force in 1986; the new royal decree assigns responsibilities ratione materiae, i.e. by subject-matter;

iii. as regards mergers, the royal decree specifies that:

   the Competition Tribunal is responsible for taking decisions on merger cases referred by the Commission to Spain’s competition authorities under Article 9 of Council Regulation (EEC) No 4064/89 (as amended by Regulation (EC) No 1310/97) and on whether it is appropriate to apply Article 22(3) of Council Regulation (EEC) No 4064/89;

   the Competition Service (SDC) is responsible for the procedural application of Articles 9 and 22(3) of Regulation (EEC) No 4064/89;

   the Government (meeting in cabinet) is responsible for authorising, unconditionally or not, or prohibiting mergers with a Community dimension referred to it by the Commission under Article 9
of Council Regulation (EEC) No 4064/89; it is also competent to take appropriate measures under Article 21(3) of the same regulation;

iv. as regards proceedings in respect of practices which infringe Articles 81(1) and 82:

the Competition Tribunal is responsible for ensuring the application in Spain of Articles 81(1) and 82 together with secondary legislation;

the SDC is responsible for the procedural application of Articles 81(1) and 82 together with secondary legislation;

v. the Directorate-General for Economic Policy and Competition is considered responsible for cooperation between the Spanish authorities and the Commission for the purpose of applying the Community competition rules in Spain;

vi. the royal decree also sets out the powers of officials and other Spanish government staff who, under the Community rules, carry out monitoring visits or checks in companies located in Spain;

vii. lastly, the decree defines arrangements with regard to the duty of confidentiality and the procedure to be followed in confidential investigations in connection with proceedings under the royal decree itself.

Act No 66/97 of 30 December 1997 on tax, administrative and social measures (official gazette — Boletín Oficial del Estado — of 31 December 1997) amended Competition Act No 16/89. Specifically, it added a new article (Article 56), which lays down maximum time limits for proceedings initiated before the Competition Service and Tribunal. These time limits apply only to proceedings initiated on or after 1 January 1998 and are of 18 months and 12 months for the Service and Tribunal respectively, after which time the proceedings become null and void.

Sweden

A number of amendments to the Competition Act came into force on 1 July. The redress system was amended as regards certain decisions taken by the Competition Authority (Konkurrensverket). Appeals against non-intervention, exemption and injunction decisions, for example, should from now on be brought directly before the highest court, which is the Commercial Court (Marknadsdomstolen). Previously, such appeals had to be brought before the court of first instance, the Stockholm District Court (Stockholms tingsrätt). This amendment is designed to enable the firms concerned to obtain a final decision more rapidly.

At the same time, the Competition Authority was given greater scope to impose interim measures. As of 1 July, these decisions may be taken as soon as there is a ‘particular reason’ for doing so, whereas previously ‘exceptional circumstances’ were required, such as the possibility that a competitor might be eliminated.

The Competition Authority’s rules of procedure were also amended. Thus, for example, it must now take a decision on an exemption request within one year at the most, whereas previously no time limit was applied.
In the light of work in progress within the Commission, the Government has decided to extend the block exemption applicable to franchise agreements until 30 June 2000. The exemption rules applicable to specialisation and research and development agreements have been extended to 30 June 2001.

A working party set up by the Government is considering *inter alia* the arrangements under the Competition Act with regard to cooperation between small businesses. The block exemption granted to retail chain stores, specific to Sweden, is also being reviewed as part of that work.

In addition, a study carried out by Government departments suggested amendments to the rules on merger control. The Competition Authority supported most of the proposals, which bring domestic law more into line with Community law.

**United Kingdom**

On 9 November the Competition Act 1998 received Royal Assent. The purpose of the Act is to strengthen UK competition law by replacing much of the current system with two prohibitions, closely based on Articles 81 and 82 of the EC Treaty: one concerns agreements between undertakings, decisions by associations of undertakings or concerted practices which prevent, restrict or distort competition and may affect trade within the UK; the other concerns conduct amounting to the abuse of a dominant position which may likewise affect trade within the UK. The Act provides for exemptions for agreements whose benefits outweigh their anticompetitive effects.

The prohibitions in the Act come into force on 1 March 2000 and at that time will replace the Restrictive Trade Practices Act 1976, the Resale Prices Act 1976 and the greater part of the Competition Act 1980. The new Act will give the Director General of Fair Trading improved powers of sanction, investigation and enforcement, including the power to levy fines and impose interim measures. It will be applied and enforced by the Director General and, in relation to the regulated utility sectors, concurrently by the regulators for telecommunications, gas and electricity, water and sewage treatment, and railway services. A new body, the Competition Commission, will take over the current role of the Monopolies and Mergers Commission and will also consider appeals against decisions of the Director General of Fair Trading and of the regulators.

The current UK competition legislation will continue to apply until 1 March 2000. However, the Restrictive Trade Practices Act will apply in a modified form only, requiring formal notification of price-fixing agreements to the Director General, who retains his powers to call in other forms of agreement considered to be anticompetitive.

One of the aims of the new legislation is to align national rules as far as possible on Community rules. Section 60 of the Act provides that the UK authorities must resolve problems of competition, as far as possible and having regard to any existing differences, in compliance with Treaty principles and European case-law.

The new Act will have no direct effect on the UK rules on mergers, which will continue to be assessed under the relevant provisions of the Fair Trading Act 1973. Agreements giving rise to mergers within the meaning of the 1973 Act will generally be excluded from the provisions of the 1998 Act, as will restrictions considered ancillary to such agreements. The Government has announced its intention to review the effectiveness of the current UK merger rules, and a consultation paper may be published soon.
B — Application of the Community competition rules by national authorities

Currently, in seven Member States (Austria, Denmark, Finland, Ireland, Luxembourg, Sweden and the United Kingdom) the competition authorities do not have the power to apply Articles 81(1) and 82 directly. In Sweden, however, a government committee is considering this possibility for the country’s authority.

Articles 81(1) and 82 were applied in 1998 by the competition authorities in France, Germany, Italy and Spain. Article 84 was applied by the United Kingdom competition authority. Cases involving the application of Article 9 of the Merger Regulation have been mentioned by the French and Netherlands authorities. The latter authority, together with the Danish one, has mentioned the application of the notice on cooperation between the Commission and national competition authorities in respect of the application of Articles 81 and 82.

This chapter also contains a summary of decisions based on domestic law reported by the national competition authorities of Austria, Belgium, Finland, Portugal and Sweden, owing mainly to their significance from a Community point of view. Mention is also made of court judgments delivered on appeal from competition authority decisions.

Austria

In the Oscar Bronner v Mediaprint case, which had been pending in Austria since 1995 and, in the meantime, also partly before the Court of Justice of the European Communities through a reference for a preliminary ruling, the Restrictive Practices Court (Kartellgericht) handed down a final judgment, upheld by the Supreme Court (Oberster Gerichtshof — 1 Ok 5/98), on the count of predatory pricing. Having regard to the case-law of the Court of Justice, the Restrictive Practices Court held that the act of reducing spectacularly and for a short period the price charged for publishing job advertisements in the largest-circulation Austrian daily newspapers was not a measure in restraint of competition in the area of provision of services. The plaintiff had been unable to prove that the defendant was pursuing a deliberate strategy of squeezing competitors out of the market. Consequently, the publishing house (the defendant), whose advertising rates had been temporarily frozen by interim order, will be able to set them freely once more.

On the second matter complained of by the plaintiff, who argued that inclusion in the only daily newspaper home-delivery scheme in Austria, which was operated by the defendant, was an essential facility, the Court of Justice delivered its judgment on 26 November.250 The Court ruled that, although the national court’s decision was in fact based on Article 35 of the Austrian Restrictive Practices Act (Kartellgesetz) and not on Article 82 of the EC Treaty, a conflict was capable of arising between national law and Community law, with the result that the reference for a preliminary ruling was justified and that, in the present case, owing to the existence of other means of distributing daily newspapers, non-inclusion in a home-delivery scheme did not constitute an abuse of a dominant position within the meaning of Article 82. The Restrictive Practices Court’s judgment is still awaited.

In its judgment 16Ok7/98, the Supreme Court, in its capacity as Supreme Restrictive Practices Court (Kartellobergericht), annulled a suspension order of the Restrictive Practices Court concerning the

250 Case C-7/97.
notification of an Austria-wide waste-disposal system. The system had also been notified to the Commission in 1994 under Article 81(3). The annulment order necessitated a decision on the part of the Commission, which had not yet officially initiated proceedings. The Supreme Restrictive Practices Court justified its decision on the ground that national restrictive practices law had to be applied in parallel with the relevant Community law. In view of the fact that an authorisation by the European Commission cannot on its own serve as a basis for the national authority’s decision, proceedings instituted under Austrian restrictive practices law cannot be suspended.

Belgium

Hearing an appeal from a decision of the Competition Council, the Brussels Court of Appeal held that resale price maintenance was prohibited. The Competition Council had established in 1997 that a system of resale prices imposed on individual retailers constituted an agreement in restraint of competition and did not qualify for exemption. The Court of Appeal upheld the Council’s decision, finding that the system did not allow consumers a fair share of the resulting benefit and therefore could not be exempted.

The most noteworthy merger case handled by the Competition Council in 1998 was the operation notified in April whereby Cognizant acquired control at world level of Pharmaceutical Marketing Services (PMSI). Given that there were serious doubts about the lawfulness of the operation, its structure was modified. The new structure provides for the acquisition by IMS of some of PMSI’s businesses, including the European and Japanese subsidiaries, but excluding the Belgian ones, for which a stock option plan was drawn up. The operation was prohibited by the Council on 14 December on the ground that IMS’s dominant position on the Belgian market for market research into, and the monitoring of, sales of pharmaceutical products would have been strengthened as a result.

In view of the fact that the stock option in respect of one of the subsidiaries had already been exercised during the second phase, the Council required the parties to undertake to dissolve the merger and sell the shares acquired.

Denmark

By virtue of the Commission notice on cooperation with Member States’ competition authorities, the Competition Council investigated a complaint which had been referred to it by the Commission. It concerned a circular which the Danish Motor Dealers Association (Danmarks Automobilforhandler Forening — DAF) had sent to its members.

In the circular, DAF declared that the individual freedom of its members to set prices and discounts was to be interpreted as meaning that they were lawfully entitled to ask for a bigger deposit in the event of sales to nationals of other countries of the European Union.

DAF was thus encouraging Danish car dealers to practice on a regular basis price discrimination against non-Danish buyers.

Under Article 6 of the Competition Act such initiatives on the part of an industry association are prohibited because they can lead to uniform pricing and limit sales to certain categories of customer.
The Competition Council has ordered DAF to withdraw its circular and distribute a correction concerning the deposit required by dealers in case of sale to EU nationals.

**Finland**

As indicated in the 1997 Competition Report, by decision of 24 October 1997 the Competition Council (Kilpailuneuvosto) fined Valio Oy FIM 5 million for abusing its dominant position on the market in milk products in Finland. Valio granted traders rebates on the wholesale price of liquid milk products on the basis of the average value of all products supplied. To obtain the maximum rebate, traders had to obtain all of their dairy product supplies from Valio. This had the effect of tying them to Valio and excluding smaller competitors. Marketing support, which was granted on the basis of the trader’s overall volume of purchases and which discriminated to some extent between traders, had similar effects. The Supreme Administrative Court (Korkein hallinto-oikeus) dismissed, by its judgment of 11 November, the appeal which Valio had brought against the Competition Council’s decision.

In its judgment the Court held that Valio’s market position and activities should be viewed in the light of Finnish competition-law requirements and the provisions of European Community law concerning dominant positions and the decisions of a firm in such a position. The Court found, as had the Competition Council before it, that Valio was guilty of an abuse of a dominant position on the market, prohibited by points 2 and 4 of Article 7 of the Act on competition restrictions and by Article 82.

The Competition Council pointed out in its decision on Ajasto Oy, which was delivered on 17 December, that the fact of fulfilling the conditions for the application of Article 82 did not preclude the application in the same case of national law on restrictions of competition. The Competition Authority had expressed the view in its proposal to the Competition Council that Ajasto had been guilty of an abuse of a dominant position prohibited by Article 7 of the Finnish Act. Ajasto had argued that domestic law was not applicable in this case as the conduct in question could have an effect on trade between Member States. Referring to the judgments of the Court of Justice of the European Communities in Walt Wilhelm (Case 14/68) and Guerlain (Joined Cases 253/78 and 1-3/79), the Competition Council stated that the Community competition rules and national competition law were applicable in parallel. These provisions were also complementary as regards the monitoring and punishment of abuses of dominant positions. Express exceptions had been laid down by specific legislation, for example with respect to the monitoring of acquisitions of companies. Ajasto also opposed the Competition Authority’s proposal regarding the dominant position and the abuse. The scrutiny of this matter is currently under way.

By its decision of 30 March the Competition Council dismissed an application for exemption submitted by Turun Linja-autoilijain Osakeyhtio¨ (TLO). The Council, like the Competition Authority before it, considered that cooperation in respect of fares and market sharing between coach operators under a joint pricing agreement was contrary to the Act on competition restrictions and that exemption was out of the question. Under an agreement, the city of Turku purchased transport services direct from TLO members without any call for tenders.

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251 At p. 339.

252 ‘Markkinointirahalla’ in Finnish. It consists in an amount paid by the producer, in this case Valio, to traders who buy substantial quantities from it, with which the traders have to make the producer’s goods known amongst consumers.
In its decision the Competition Council attached importance to the fact that, in recent years, competition from other Member States in the Finnish coach transport market had increased. The maintenance of a cartel between operators and the lack of any open tendering had objectives and effects contrary to Articles 81 and 49 and to the public procurement directives. It was not possible to authorise this type of practice, which foreclosed the market and prevented competition from other Member States. The Competition Council observed that it followed from Article 10 of the Treaty that a judicial body could not take, under domestic law, a decision that would clearly conflict with the obligations stemming from accession which were binding on Finland.

By its decision of 4 December the Competition Authority refused to grant the exemption which K-kauppiailiitto and Kesko Oyj had applied for in connection with a cooperative venture involving the retail prices of products belonging to the basic range of the K-lähikauppa, K-market, K-supermarket, Citymarket and Anttila chains. Nor was an exemption granted for the harmonisation of the other conditions of sale and delivery and of purchase prices and other conditions of purchase. The Authority considered that the applicants had not set out sufficient grounds for obtaining an exemption as required by Article 19 of the Act on competition restrictions. The substantial share of the basic consumer goods market held by the K group (nearly 40%) was also a factor in the Authority’s reaching a negative decision.

France

In 1998 there was one case in which a decision was taken finding that anticompetitive practices by a firm infringed Article 82. The case involved practices by Decaux, a street-furniture manufacturer, which consisted, through an interplay of tacit renewal clauses and schedules to a contract concluded with a local authority, in artificially prolonging the contract’s duration. The practices were held to constitute an abuse of a dominant position within the meaning of Article 82 as they prevented competing firms from other Member States from gaining access to the market for the supply of advertising hoardings to French local authorities.

Two judgments of the Paris Court of Appeal, which has jurisdiction to hear appeals from decisions of the Competition Council (Conseil de la Concurrence), must also be mentioned.

In the first case the Court upheld under Article 81 the penalties imposed by the Competition Council on France Télécom and Transpac for a restrictive practice having the effect of promoting Transpac technology to the detriment of the VSAT solution proposed by British Télécom-France. The rebate offered by Transpac on the price charged for the service was also found to constitute an abuse on the part of France Télécom, the dominant operator, and of its subsidiary Transpac under Article 82.

In the second case the Court upheld a decision of the Competition Council declaring unlawful under Article 81 clauses of exclusive distribution agreements granting distributors absolute territorial protection.

Germany

During the period under review the Federal Cartel Office applied the Community competition rules in four cases.

In proceedings brought under Article 81(1) in respect of the charging of recommended rates for groupage freight transport by forwarding agents, the Office decided to tolerate the practice pending repeal of the exceptional provision in Article 99(2) of the Law prohibiting restraints of competition - Gesetz gegen Wettbewerbsbeschränkungen (GWB) - as from the entry into force on 1 January 1999 of the sixth Law amending the GWB. The Office had previously informed the Federal Transport and Storage Association (Bundesverband Spedition und Lagerei eV) of the impending ban on recommended rates.

The proceedings brought for infringement of Articles 81 and 82 by clauses in gas supply contracts providing for total coverage of requirements were terminated after the gas distribution companies concerned ceased applying the clauses.

In an action against the German federal railways operator Deutsche Bahn AG, the ferry company Deutsche Fahrgesellschaft Ostsee-mbH and Deutsche Bahn’s real-estate arm (Deutsche Bahn Immobilien-gesellschaft mbH), the Office initiated proceedings under Article 82 of the Treaty and Articles 22 and 26 of the GWB in respect of those firms’ refusal to share use of the port facilities at Puttgarden with competing ferry companies.

The Office considered that the refusal by Deutsche Telekom AG to communicate, to persons requesting it, all the data in its possession concerning off-line use constituted an abuse. It took the view that the incomplete provision of such data to third parties was a serious obstacle to potential competitors’ entering the product markets for enquiry services and subscriber directories. Moreover, the system of payment for supplying subscriber data was particularly exploitative and prevented effective competition on the markets for the relevant products. Proceedings were initiated under Article 82 of the EC Treaty, in conjunction with Articles 47 and 26 of the GWB.

During the period under review, the Federal Court of Justice (Bundesgerichtshof) confirmed a prohibitory injunction issued by the Office, and a set of proceedings before the Berlin Court of Appeal (Kammergericht) was brought to an end.

In the first case, the Federal Court of Justice upheld the ban under Article 1 of the GWB and Article 81(1) of the EC Treaty on implementation of the articles of association of Carpartner Autovermietung GmbH (Carpartner) and of the cooperation agreements concluded between its shareholders and motor vehicle liability insurers. In the Court’s view, the formation of Carpartner by six insurance companies with a view to concentrating demand for the conclusion with car-hire firms of bilateral contracts on the replacement of accident-damaged vehicles had the effect of limiting the opportunities for parties on the other side of the market to withdraw from the contracts.

In the second case, the termination of the demarcation agreement between Ruhrgas and Thyssengas signalled the end of the proceedings before the Berlin Court of Appeal. The latter thereupon withdrew the order it had made in 1996 for a reference to the European Court of Justice.

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Italy

As part of the decentralised application of Articles 81(1) and 82 of the Treaty, the Competition and Market Authority (Autorità Garante della Concorrenza e del Mercato) is authorised, under Article 54 of Law No 52 of 6 February 1996, to use the powers and procedures at its disposal to apply domestic antitrust law. During 1998 the Authority initiated two sets of investigation proceedings under the Community competition rules.

The first set of proceedings (Consorzio industrie fiammiferi), initiated on 5 November, concerned possible infringements of Article 81(1) and Article 82 in the market for the production and wholesale distribution of matches in Italy. The case involved the presumed coordination of the commercial policies of Italian match manufacturers and conduct likely to have the effect of limiting access to the market by competing producers, whether from Italy or from other Community countries. The proceedings are scheduled to terminate on 31 March 1999.

The second set of proceedings (Unapace/ENEL), initiated on 12 November, concerned a presumed infringement of Article 82 by ENEL due to conduct likely to limit access by competitors from Italy and from other Community countries to the electricity supply market. The proceedings are scheduled to terminate on 20 May 1999.

In 1998 the Authority took its first two decisions on merger operations referred by the Commission under Article 9 of Regulation No 4064/89.

The first operation concerned the acquisition by Promodès of joint control of Gruppo GS, a company active in Italy in the retailing of foodstuffs, personal hygiene products and household goods. As a result of the merger the parties would have occupied a dominant position with shares of as much as 40-85% of some local retailing and distribution markets. The Authority gave the merger the go-ahead on condition that the parties undertook to dispose of a number of sales outlets in areas where competition might be affected.

The second operation concerned the acquisition by Alleanza Salute Italia of joint control of Unifarma Distribuzione. Both companies operate in the sector of the wholesale distribution of pharmaceutical and parapharmaceutical products. In view of the presence of sufficiently active actual competitors and the lack of any major entry barriers, the Authority took the view that the operation would not give rise to the creation of a dominant position likely to eliminate or reduce competition in regional markets for the wholesale distribution of pharmaceutical and parapharmaceutical products.

Luxembourg

With a view to preparing the Restrictive Trade Practices Commission (CPCR) for the new functions it may be required to fulfil after the entry into force of the planned reform of the Competition Act, the Minister for Economic Affairs referred a number of cases to it. The two most interesting cases submitted to the CPCR concerned telecommunications and catering services.

The first case had to do with accounting rates, which are arrangements freely negotiated between telecommunications operators whereby they are paid for transferring international telephone calls to their destination. Accounting rates formed the subject-matter of a preliminary inquiry by the European Commission, which suspended the procedure in order that the national authorities might, as
part of the decentralisation process, handle the case with a view to taking a decision under their domestic law. The investigation is scheduled to end during the first half of 1999.

The second case started with a complaint about practices relating to means of payment in restaurants. Since the investigations are lengthy and complex, the file on the case will not be closed before May 1999.

_Netherlands_

A large number of cases which it fell to the NMa to consider formed the subject-matter of consultations with the Directorate-General for Competition. The notice on cooperation between the Commission and national competition authorities performed a useful role in this respect. Cooperation at staff level proved particularly effective and was much appreciated, not only when it came to ensuring proper coordination between the Commission and the NMa, but also as a means of preventing the practice of forum shopping.

The NMa submitted a number of practical proposals to the Directorate-General aimed at making the cooperation between the two even more effective. The Directorate-General responded positively to these moves.

Although the NMa has the power to apply Article 81(1) and Article 82 of the EC Treaty, it did not use it in 1998. When it applies Netherlands competition rules, it relies extensively on Community case-law.

_Merger control_

Following receipt from the Netherlands of a memorandum on the subject, the Commission referred, under Article 9 of Regulation No 4064/89, the Vendex-KBB case to the NMa with regard to that part which concerned the Dutch non-food retailing sector. As far as the other activities of Vendex and KBB were concerned, the Commission found that the proposed merger was compatible with the common market. The NMa carried out a survey to see whether large-surface stores constituted a separate market. It concluded that that was not the case as all the products offered for sale in large-surface stores were also to be found in specialised shops; large-surface stores therefore faced strong competition. They were, of course, distinct from specialised shops, but the difference was not so big as to prevent consumers from buying goods in specialised shops if large-surface stores charged more. The combined market shares of Vendex and KBB came to between 19% and 40% in the markets for products such as baby clothes, lingerie, jewellery and leather goods. In the NMa’s opinion, the parties were therefore not in a dominant position, there being still sufficient competition from other large stores. Moreover, the barriers to entry to the relevant product markets were low. The NMa also considered whether Vendex/KBB would be in a dominant position as seeker of sites for luxury shops. The investigation showed that the market for sites for A1-type shops was a supplier’s market. In view of the limited supply of such sites and the ever-increasing demand from chain stores in particular, suppliers were in a position of strength. Although Vendex and KBB were well represented in major shopping centres in the Netherlands, this did not place them at an advantage compared with other chain stores when acquiring new sites. Price was the decisive criterion when it came to letting out a shop. There was nothing to be gained, moreover, by being totally dependent on one big tenant. All these factors were instrumental in inducing the Director-General of the NMa to decide to agree to the planned merger and to grant an unconditional authorisation to that effect.
Portugal

The Competition Council (*Conselho da Concorrência*) did not apply Community law in 1998.

Acting under domestic law (Decree-law No 371/93 of 24 October 1993), the Council initiated two sets of infringement proceedings, one concerning the formation of a joint venture (*Farminduária*) between the National Pharmacies Association and Stada Arzneimittel AG for the production and sale of generic medicines, and the other a concerted practice by a group of four firms in the medical gases sector aimed at market sharing.

Neither of the proceedings led to any fines being imposed.

The Council granted three negative clearances in respect of agreements between enterprises in the sea transport, soft drinks and dietary products sectors.

In 1998 the Directorate-General for Trade and Competition initiated four sets of proceedings for infringement of Portugal’s competition rules. They concerned flat glass, the provision of information during stock exchange sessions, the audio-visual sector and dietary products.

In the merger control field, the Directorate-General received 29 notifications and authorised 19 of these operations in the following sectors: industry (8), commerce (5) and services (6). Two of them, concerning the industrial sector, were also notified in other Member States. Thus, one operation, concerning the industrial sector of plant and machinery, was notified in Belgium, Ireland and the United Kingdom, while another, in the chemical industry, was notified in Belgium, Germany, Greece and the United Kingdom.

Spain

The dispute between ARCO and Repsol was sparked off by agreements for the transfer of shares which ARCO Chemicals held in the Puertollano plant owned by a 50/50 joint venture between the two companies. It was in this plant that a technique for the joint production of propylene oxide and styrene monomer was developed in the 1960s. When it disposed of its interest in 1986, ARCO placed limits on the expansion of production capacity by Repsol. This gave rise to a lengthy conflict, waged on many fronts, between the two companies when Repsol, in view of the technique’s excellent results from a commercial and ecological point of view, sought to increase output by building a plant at Tarragone.

ARCO lodged a complaint against Repsol before the International Chamber of Commerce in Paris and notified the agreements to DG IV with a view to obtaining exemption under Article 81(3). Repsol, for its part, lodged a complaint against ARCO before the Competition Service (SDC) and DG IV, arguing that the agreements infringed the Competition Act and Article 81(1). The SDC and DG IV accordingly initiated restrictive practices proceedings (DG IV case IV/36.233 and SDC case 1454/96).

The SDC learnt from press reports that the two parties had reached an agreement putting an end to their long-running dispute and removing the main restrictions of competition. It thereupon opened a confidential inquiry (ref. 1742/97) into the compatibility of the new agreements notified to DG IV (case IV/36.838).
DG IV closed the file on both cases early in 1998 and the SDC, after having analysed the new agreements and having been informed that both parties were withdrawing their suits, likewise found on 26 February that there was no case to answer in case 1454/96 and on 5 January closed the confidential inquiry in case 1742/97.

By decision of 26 May 1997 the Competition Tribunal had decided to adopt the interim protective measure proposed by the SDC at the request of the plaintiff, McLane, consisting in ordering Tabacalera to supply McLane, on non-discriminatory terms, with tobacco products bearing its trade marks for a period of six months.

Tabacalera holds a monopoly on the relevant market, that for the manufacture and sale of tobacco products in Spain, and occupies a de facto dominant position in the wholesale distribution and importation of such products. According to the complaint, although McLane had in 1995 obtained authorisation to act as a distributor, it had been unable so to act because of (a) Tabacalera’s refusal to supply it with the products it manufactures and (b) the exclusive distribution agreements the latter had concluded with other tobacco manufacturers.

The decision was notified to Tabacalera on 29 May 1997. By order of 30 July 1997 the Competition Tribunal required Tabacalera to make within 10 days a proposal concerning supplies to McLane and decided to impose a penalty of PTA 150 000 a day on it in the event of non-compliance.

On 18 November 1997 Tabacalera claimed that it had made offers to negotiate supplies of products to McLane but that the latter had not responded. The Competition Tribunal asked the SDC to confirm the existence of these offers and, if appropriate, whether there was any proof that the Tribunal's decision had been complied with. The SDC informed the Tribunal that the offers and responses in question were the same as those of which it already had cognisance and that, in the absence of any fresh evidence, Tabacalera had to be deemed not to have complied.

The Competition Tribunal decided, on 4 February 1998, to fine Tabacalera PTA 15 450 000 for its failure to comply with its decision of 26 May 1997.

By decision of 15 July 1998 the Competition Tribunal dismissed the application for interim protective measures submitted by the SDC at the request of Federación Española de Hoteles, Agrupación Hotelera de las Zonas Turísticas de España, Sol Meliá SA, Ciga International Hotels Corporation SA, Cigahotels España SA and NH Hoteles SA. The measures were intended to ‘require EGEDA to refrain from applying, in whatsoever way, the rates published by that body in December 1997, as set out in point 1.A.3 of the ’Schedule of charges applicable to the right of authorisation of reproduction and to the right to remuneration enjoyed by producers of audio-visual recordings in respect of retransmissions (Article 20(2)(f) of the codified version of the Intellectual Property Act) and communications in a place accessible to the public (Article 20(2)(g) of the Act)’, and to refrain also from applying the rates published before December 1997 for the retransmission in hotels of audio-visual works and recordings contained in broadcasts and/or transmissions of broadcasting organisations’.

EGEDA is the body responsible for managing the rights of producers of audio-visual works. The applicants in this case did not recognise its right to make any charge for the piping of programmes picked up by hotel TV aerials to rooms, as they considered that, in such circumstances, there was no ‘communication to the public’ (Article 20(2)(g)) or ‘retransmission’ (Article 20(2)(f)) of the broadcast
work within the meaning of the Intellectual Property Act, and hence they challenged this interpretation in numerous actions before the ordinary courts.

The Competition Tribunal found that in this instance the requirements of the establishment of a prima facie case and urgency, which must be fulfilled before interim measures can be ordered, were not met.

The Tribunal adopted the interim protective measure proposed by the SDC consisting in suspending, for six months, the application of one of the general conditions of sale of Glaxo Wellcome SA and its subsidiaries. It considered it necessary, moreover, to require the applicants — the Association of Spanish Exporters of Pharmaceutical Products, the Association of Pharmaceutical Cooperative Businesses and Spain Pharma SA — to provide a joint guarantee of PTA 600 million in case the interim measure was not confirmed by the final decision in this matter.

On 6 March Glaxo's sales department sent wholesalers new general conditions of sale for the proprietary medicinal products marketed by the group, indicating that they would enter into force on 9 March. These general conditions, which set out the contractual terms on which products were sold to wholesalers, contained two price lists depending on the products' end use. Through these new conditions, Glaxo was trying to curb parallel exports by certain Spanish wholesalers to other EC countries where pharmaceutical prices were higher. The prices on the two lists differed by as much as 2 500%.

On 6 March Glaxo notified the new general conditions of sale to the European Commission with a request for negative clearance or, alternatively, exemption under Article 81(3). As from 13 March Glaxo stopped supplying its products to wholesalers who had not signed the general conditions of sale.

By order of 22 April the SDC decided to institute criminal proceedings in respect of practices prohibited by Articles 1 and 7 of the Competition Act and Article 81(1). DG IV sent Glaxo a warning letter about the agreement the latter had notified in which it expressed the view that, upon preliminary scrutiny, the agreement seemed to contain or give rise to competition restrictions incompatible with Article 81(1) and not covered by any of the exceptions in Article 81(3).

The Competition Tribunal, applying the Commission’s criteria as confirmed by the Court of Justice in its judgment in \textit{Sandoz},\footnote{Case C-277/87 \textit{Sandoz prodotti farmaceutici SpA} v \textit{Commission} [1990] ECR I-45.} \cite{256} held that, in so far as the purpose of the new conditions of sale was, as Glaxo had itself acknowledged, to limit exports of proprietary medicinal products from Spain, it had to be determined whether the existence of an infringement of Article 81(1), and hence of a prima facie case, had been sufficiently proven for interim measures to be granted, without prejudice to the final outcome of the main proceedings.

The Tribunal also stated that the new conditions of sale ‘appreciably modify the terms of competition on the wholesale market for proprietary medicinal products for traders marketing Glaxo products — a situation which both affects those who have signed them and is liable to affect those who have not signed them.’

The interim protective measure did not enter into force, however, until December, when the applicants provided the guarantee.
On 14 December the Competition Tribunal held in *Ondas Ramblas v AGEDI* that no practice prohibited by Article 6 of the Competition Act or by Article 82 of the EC Treaty, such as that which the SDC claimed the Association for the Management of Intellectual Property Rights (AGEDI) had engaged in, had been proved to exist.

The SDC had taken the view that AGEDI was guilty of practices contrary to Article 6(2)(a) and (b) of the Competition Act and Article 82(a) and (b) in that it had imposed unfair prices and prescribed additional conditions not directly connected with the service provided. It considered, therefore, that AGEDI had abused its dominant position on the market for management services in respect of rights held by producers of sound recordings in the transmission of their musical works to the public by radio.

The file on the case was opened following the lodging of a complaint by a private radio station, Ondas Ramblas, about the imposition by AGEDI of a contract for the authorisation of retransmission and the collection of intellectual property dues. The contract had been negotiated between AGEDI and the Spanish Association for Commercial Broadcasting (AERC), which groups together most private stations. It provided for the payment of dues by stations according to their advertising revenue, and hence the dues reflected each station’s audience share. Onda Ramblas refused to sign the standard contract negotiated by AERC on the ground that it was discriminatory, the amount paid by each station being dependent, not on the quantity of music broadcast, but on operating income.

In its judgment the Tribunal held that the clauses of the contract proposed to Ondas Ramblas by AGEDI stemmed from the agreements concluded between AGEDI and AERC and that, as Ondas Ramblas was a member of AERC, the existence of an abuse consisting in the imposition of the contract did not have to be determined inasmuch as the law of intellectual property recognised the system of collective bargaining for fixing the remuneration of intellectual property rights. The Tribunal added that it likewise did not have to be determined whether some of the contract’s rates were unfair as they were similar to other rates charged by other associations of holders of intellectual property rights and to those in force in other Member States.

**Sweden**

The Swedish competition authority (*Konkurrenceverket*) is not empowered to apply Articles 81 and 82. The Government has, however, appointed a rapporteur to look into the question and present a report in 1999.

Among the cases of interest involving the application of domestic law, mention may be made of the *Posten Sverige AB* case.257 Posten Sverige had notified its intention to charge a different rate for the distribution of large commercial consignments according to whether they were sent between certain localities or between certain localities and the rest of Sweden. The Competition Authority considered that the measure could constitute an abuse of a dominant position and prohibited the new rating method. Posten Sverige appealed against the decision to the Market Tribunal (*Marknadsdomstolen*), which held that the system of charging different rates had to be considered a form of abuse. Although Posten Sverige had objectively justifiable reasons for charging a different rate as between certain localities and the rest of Sweden, it had not established the need for doing so on the basis of cost differences between certain localities. The Tribunal accordingly authorised the rating system proposed by Posten Sverige for deliveries between certain localities and the rest of Sweden, but held that the second measure envisaged constituted an abuse.


COMPETITION REPORT 1998
In 1997 the Competition Authority submitted to the Stockholm District Court (Stockholms tingsrätt) an application for the prohibition of the acquisition by the building materials producer Optiroc of a holding in its competitor Ståbruken. Both firms are active mainly in the building materials field. The Authority argued that the merger would place Optiroc in a dominant position, which would be harmful to competition as the firm had a share of around 80% of some markets and competition from imports was insignificant. The court disagreed and dismissed the application. The Authority appealed against the judgment to the Market Tribunal, which nevertheless upheld it. The Tribunal found that a merger investigation should not concentrate solely on the operation’s direct effects on competition, but should be based on an overall assessment embracing other particularly important interests. It thus took account in this case of the need for restructuring and the growing pressure from international competition. It also considered that the opportunities for gaining access to the market were satisfactory and that purchasers (building firms and building materials distributors) had considerable buying power vis-à-vis suppliers (Optiroc).

The Tribunal also decided that a major cooperative venture in southern Sweden between the leading forest products companies Stora, MoDo and Munksjö, operating through a common purchasing organisation, Sydved, was prohibited under the Competition Act and should be quickly dismantled within the period set by the Tribunal. The cooperation involved the joint purchasing of building timber and had the effect of eliminating price competition between the three companies and preventing suppliers from selling to, and customers from buying from, each company individually.

In 1996 the Competition Authority brought an action against Statens Järnvägar (SJ), the state railways operator, on the ground that, through its bid to secure the contract for the operation of the regional rail network, SJ had abused its dominant position. The abuse consisted essentially in quoting too low a price. SJ won the contract by submitting a lower bid than its smaller competitor BK Tåg. SJ’s bid came to SEK 23.5 million. The Stockholm District Court found, first, that the total operating cost to SJ was more than SEK 30 million, with variable costs of at least SEK 29 million, and secondly that SJ must have known that its bid was lower than those amounts. SJ having quoted a price lower than its variable costs, the Court held that there was a presumption that the operator had quoted too low a price with a view to squeezing one or more competitors out of the market, or at least seriously weakening their position. Moreover, SJ had not furnished any counter-evidence capable of rebutting that presumption. The Court concluded that SJ had unlawfully quoted too low a price and fined it SEK 8 million. SJ has appealed against the judgment.

The Competition Authority brought an action against Scandinavian Airlines System (SAS) and called for it to be fined SEK 10 million for refusing to sign an interlining agreement with Nordic European Airways (NEA), a much smaller competing airline. The Stockholm District Court found for the Authority, holding that SAS had knowingly refused to conclude an interlining agreement with NEA with the intention of restricting competition or, at least, that SAS knew that its refusal could have the effect of restricting competition. The Court nevertheless imposed a smaller fine than that called for by the Authority, giving as its reasons the brevity (about 8 months) and limited impact of the infringement. Both SAS and the Authority have appealed from the judgment to the Market Tribunal.

The Competition Authority brought an action against explosives manufacturer Nitro Nobel AB and called for it to be fined SEK 5 million. The Authority considered that the firm had abused its dominant position, first by granting to one reseller more favourable trade terms than it did to others, and

secondly by tying some of its customers by means of exclusive purchasing agreements. In a judgment
delivered in 1998, the Stockholm District Court found in favour of the Competition Authority only as
regards the exclusive purchasing agreements, and accordingly imposed a smaller fine than the
Authority had called for. Both parties have appealed from the judgment to the Market Tribunal.

**United Kingdom**

The Competition Act 1998 makes no provision for the direct application of Articles 81 and 82.

The United Kingdom continued to investigate, under Article 84 of the EC Treaty, the proposed
alliance between British Airways and American Airlines. The investigation proceeded in parallel with
investigations under the merger provisions of the Fair Trading Act and by the Commission under
Article 85.

The Director General of Fair Trading continued to advise the Secretary of State for Trade and Industry
on regulations made in 1997 by the United Kingdom implementing the European directive on
packaging and packaging waste (94/62/CE). During 1998 five compliance schemes for recycling
packaging met the requirements of competition scrutiny and were approved by the Secretary of State
following advice from the Director General. One proposed scheme, Glaspak Ltd, withdrew its
application following advice from the Director General that it failed to meet competition scrutiny
requirements.

**C — Application of the Community competition rules by courts in the Member States**

This section does not include judgments delivered by courts with jurisdiction over decisions of national
competition authorities. These judgments were mentioned in the previous section (Application of the
Community competition rules by national authorities).

The competition authorities of six Member States only (Austria, France, Germany, Italy, the
Netherlands and the United Kingdom) have reported decisions by a national court applying the
Community competition rules or referring a question to the European Court of Justice for a
preliminary ruling.

**Germany**

The judgments of the German civil courts applying Community competition law and notified to the
Federal Cartel Office are indicated below:

1 Frankfurt am Main Higher Regional Court (*Oberlandesgericht*), judgment of 13 January 1998, 11 U
   (Kart) 33/97 P-080/97
   AE TV Cooperation GmbH, Heidelberg
   Fédération internationale de l’automobile (FIA), Paris
   In view of the lack of urgency of the case, the defendant could not be prohibited by an injunction
   from claiming that it held certain television rights in motor racing competitions; as an application
   for negative clearance and/or exemption under Article 81(3) EC had been submitted, a suspension
   of proceedings was inappropriate.

COMPETITION REPORT 1998
2 Stuttgart Regional Court, judgment of 5 March 1998, 17 O 344/96 P-052/96
Interparfums GmbH, Stuttgart
Eurocos Cosmetic GmbH, Dreieich
The applicant is not entitled to supplies of cosmetic products as the defendant is not subject to the legal provision in question and the discrimination is justified (first and second sentences of Section 26(2) and Section 35 of the Law prohibiting restraints of competition - GWB, Article 81(1) EC, read in conjunction with Article 823(2) of the German Civil Code — BGB).

3 Berlin Regional Court, judgment of 17 March 1998, 16 O 642/97 P-072/98
Langnese-Iglo GmbH, Hamburg
Ingeborg Handl, Schönwalde
The applicant is prohibited by injunction from selling, at its stand, ice-cream made by manufacturers other than the defendant (Article 81(1) EC; Article 3(d) of Commission Regulation No 1984/83).

4 Düsseldorf Regional Court, judgment of 20 March 1998, 38 O 22/98 P-054/98
Procter & Gamble GmbH, Schwalbach am Taunus
AOK Rheinland, Düsseldorf
No injunction can be granted under Section 35 of the GWB and Articles 1004 and 823(2) of the German Civil Code, read in conjunction with Article 81 EC, against sickness insurance funds as the determination of fixed amounts under the German Social Security Code (SGB V) constitutes a sovereign act.

5 Düsseldorf Regional Court, judgment of 20 March 1998, 38 O (Kart) 126/97 P-179/097
Is Internet Services GmbH & Co. KG Hamburger, Hamburg
Deutsche Telekom AG, Düsseldorf
DTAG’s ‘T-InterConnect’ tariff does not infringe Section 26(2) of the GWB or Article 82 EC, as DTAG does not hold a dominant position on the market for Internet access services only (disregarding on-line services).

6 Leipzig Higher Regional Court, judgment of 8 April 1998, 7 U 2980/97 P-092/98
Fernwasserversorgung Elbaue-Osthwarz GmbH, Torgau
Magdeburger Wasser-und Abwassergesellschaft mbH i.L; Magdeburg
The regional water distribution body is not entitled to ask water distribution firms to reimburse payments made under the water supply contract (Section 22 of the GWB in conjunction with Article 138 of the Civil Code; Sections 22(4) and (5) and 103 of the GWB; Article 82 EC read in conjunction with Article 134 of the Civil Code).

7 Nuremberg-Fürth Regional Court, judgment of 22 April 1998, 3 O 11298/95 P-004/96
Michael Wolf Spedition, Straubing
Zweckverband Abfallwirtschaft Straubing Stadt und Land, Straubing
The services contract concluded in connection with the Duales System for the setting-up and operation of a system for collecting and sorting waste commercial packaging infringes Section 1 of the GWB and Article 81 EC.
No injunction can be granted against an insurer which, in respect of replacements for crashed vehicles, charges for its services on the basis of its own price lists, as the applicant is not subject to the legal provision in question.

Incitation to breach of contract by the defendant, who had caused kiosk operators to terminate their contract by wrongly stating that the contracts they had concluded with the defendant infringed competition law (Article 1 of the German law on unfair competition — UWG; Articles 81 and 82 EC; Commission Regulation No 83/1984).

The applicant has a right to be supplied with cosmetic products under the warehouse supply contract habitually concluded between the defendant and retailers (Article 81(1) EC read in conjunction with Article 823(2) and the first sentence of Article 249 of the Civil Code).

Neither Article 82 EC nor Section 26(2) of the GWB authorises the applicant to replace a provider of ‘into-plane’ services or to act as an additional provider of handling services at Munich airport.

The protection provided by Article 81(1) EC read in conjunction with Article 823 of the Civil Code does not guarantee a right of supply. The Federal Court of Justice delivered judgment on the relevance of precontractual conduct to a right to be supplied with cosmetic products (Section 26(2) read in conjunction with Section 35 of the GWB).

The protection provided by Article 81(1) EC read in conjunction with Article 823 of the Civil Code does not guarantee a right of supply; similarly, Section 26(2) read in conjunction with Section 35 of the GWB does not give the applicant the right to be supplied as he is not dependent on a particular range of products and/or leading manufacturers.
14 Federal Court of Justice, judgment of 12 May 1998, KZR 24/96 P-044/91
City-Parfümerie Jürgen Rathjen GmbH, Munich
Deutsche Lancôme GmbH, Bonn
The protection provided by Article 81(1) read in conjunction with Article 823 of the Civil Code does not guarantee a right of supply; the Federal Court of Justice delivered judgment on the relevance of precontractual conduct to the right to be supplied with cosmetic products (Section 26(2) read in conjunction with Section 35 of the GWB).

15 Düsseldorf Higher Regional Court, judgment of 16 June 1998, U (Kart) 15/97 P-178/96
1. Deutsche Telekom AG Bonn; 2. ATLAS Deutschland
The defendants, whose joint venture ‘Global One’ had started trading before the Commission exemption decisions entered into force, were ordered to pay compensation to the applicants (Article 81 EC).

16 Rostock Regional Court, judgment of 2 July 1998, 3 O 284/97 P-147/97
Stadtwerke Neustrelitz GmbH, Neustrelitz
EMO Energieversorgung Müritz-Oderhaff AG, Neubrandenburg
The applicant may not obtain a reduction in long-term electricity prices agreed with the defendant after the acquisition of the local electricity distributor by the latter (Sections 26(2) and 35 of the GWB, Articles 81, 82 and 86 EC).

17 Düsseldorf Higher Regional Court, judgment of 11 August 1998, U (Kart) 3/98 P-042/98
Hetzel GmbH & Co. KG, Rudersberg-Steinenberg
Duales System Deutschland GmbH, Cologne
Validity of a licensing agreement which provides that use of the ‘Green Dot’ must be subject to payment of a fee, also in the case of packaging not sold to individuals and small firms (Section 26(2) of the GWB, Article 81 EC).

18 Düsseldorf Regional Court, judgment of 28 August 1998, 38 O 84/97 (Kart) P-108/97
Intersan, Institut f. pharm. u klin. Forschung GmbH, Ettlingen
AOK Bundesverband, Bonn, and other central sickness insurance funds
No injunction can be granted for breach of Articles 81 and 82 EC in respect of the determining of fixed sums as the applicant is not concerned by trade between Member States and the defendant is not an undertaking (Articles 81 and 82 EC, Articles 1004 and 823 of the German Civil Code, Section 1 of the Law on unfair competition).

19 Düsseldorf Higher Regional Court, judgment of 28 August 1998, U (Kart) 19/98 P-054/98
Procter & Gamble GmbH, Schwalbach am Taunus
AOK Rheinland, Düsseldorf
The medical supplies manufacturer was successful in its action to prevent central sickness insurance funds from determining a fixed amount (Articles 823(2) and 1004 (by analogy) of the Civil Code, read in conjunction with Article 81(1) and (2) EC; injunction).
20 Du¨sseldorf Regional Court, judgment of 28 August 1998, 38 O 74/97 (Kart) P-097/97
Gödecke AG, Berlin
AOK Bundesverband, Bonn, and other central sickness insurance funds
The applicant may not compel central sickness insurance funds (defendant) not to adjust the fixed
amount, as the defendant is not an undertaking and the applicant is not statutorily affected
(Article 81 EC read in conjunction with Section 35 of the GWB and Articles 823 and 1004 of the
Civil Code); leave to appeal.

Austria

In 1998 the decisions of the courts were of decisive importance to the application of competition law. A
judgment by the Constitutional Court (Verfassungsgerichtshof) had the effect of abolishing a provision
of the law on pharmacies which regulates the number of new pharmacies according to the number of
inhabitants on the ground that the requirement was contrary to the freedom to pursue an occupational
activity. The judgment should lead to greater competition in the pharmacy sector.

The Korneuburg Regional Court (Landesgericht) handed down a criminal law decision in a case of
fraud in public works contracts and price fixing: it was able to prove that the fraud had caused direct
harm amounting to several million schillings. Through the decision, the penalties in force for cases of
fraud (up to ten years of imprisonment and payment of damages) were also applied to the price-fixing
cartels, thus effectively strengthening competition law. The Vienna and Korneuburg public prosecution
departments instituted proceedings against price-fixing cartels created for invitations to tender for
public works contracts: a building firm had been illegally obtaining or purchasing lists of tendering
firms, approaching potential competitors and then increasing the prices. The firms not selected
received payments amounting to 1% of the transaction, financed by bogus invoices. When the financial
police carried out on-the-spot investigations simultaneously in over 80 firms, documents were found
containing, before the end of the tender deadline, the names of tenderers and the amounts of their bids.
Other documents showed that the building firm in question, SBG, had calculated the amount of
building bids on behalf of competitors. In all, 22 persons were committed to trial. The director of SBG
was sentenced to seven years imprisonment for fraud and was fined ATS 30 million; non-payment of
the fine entails a possible extra year of imprisonment.

The persons who supplied lists of tenderers were given suspended prison sentences of between six and
eight months for breach of confidentiality. None of the sentences has as yet been enforced. The injured
municipalities demanded repayment of damages by the tenderers; substantial amounts have already
been paid. The lawyers for the entrepreneurs concerned claimed that fraud was not at issue in this case
but rather a failure to comply with the law on restrictive agreements, which at the most would incur a
penalty of 360 day-fines. The prosecutor’s office replied that, in cases of agreements between firms
concerning public contracts, tenderers would be misled into believing that competition existed; if such
cartels or agreements became public knowledge, the tendering procedure was cancelled and the firms
concerned were usually removed from the list of approved entrepreneurs. As a result, to the extent that
the existence of injury could be proved, fraud had been committed and the perpetrator was liable to a
period of imprisonment of up to 10 years.

Several cases before the national (commercial) courts concerned the direct application of Article 81
and/or Article 82 of the EC Treaty to motor vehicle distribution agreements. In its Decision 4Ob165/98
of 30 June 1998, the Supreme Court (Oberster Gerichtshof) held that a leasing company belonging to
an automotive group with a market share in excess of 20%, which concluded maintenance contracts
involving some 8 000 vehicles, did not have a dominant position as regards the repair of its vehicles, and
that the cancellation of orders given to a firm which was no longer a member of the vehicle distribution system did not constitute a boycott.

Other proceedings concerned the direct application of Articles 81 and 82 of the EC Treaty (e.g. OBH 2Ob237/98 of 24.9.1998, Lotto-Totto sales point), although the courts considered that there was no evidence of abuse of a dominant position. The case concerned a firm holding a monopoly which had refused to provide a newsagent with the on-line equipment needed to register lottery tickets.

In a case concerning the refusal of a film distribution company in a dominant position to supply a cinema, the reasoning concerned inter alia Article 82 of the EC Treaty, together with the accepted principle of morality within the meaning of the law on unfair competition (4Ob214/97). The court concluded that the refusal to supply was in itself an infringement of the law on unfair competition.

**France**

Two judgments delivered by the Court of Cassation, which uphold the case-law of the Court of Justice, are noteworthy.

In the first case, the Court applied the case-law of the Court of Justice of 17 February 1993 in *Camulrac and Cancava*, according to which Organic, a body managing the recovery of the social contribution to the solidarity fund (CSG), fulfils a purely social function and is therefore not an undertaking within the meaning of Articles 81 and 82.

In the second case, the Court of Cassation upheld the application by the Paris Court of Appeal of the *de minimis* rule in proceedings concerning a supplier of luxury products and its vertical distribution agreement. The supplier held a market share amounting to only 0.5%. The Court of Cassation found that the fact that the contract had not been notified to the Commission was not relevant to the lawfulness of the contract under Article 81.

In 1998, the Council of State did not annul any administrative decisions or contracts on the basis of the Community competition rules. In a judgment dismissing a case, however, the Council upheld its case-law on the inclusion of those rules in the body of law guaranteed by the administrative courts.

**Italy**

1) Decisions of national courts:

In its judgment No 791 of 11 July 1998 (relating to the tariffs of the national Bar Council (*Consiglio Nazionale Forense*), the Turin Court of Appeal (*Corte d’Appello di Torino*) annulled the tariff of legal fees which, in accordance with the law, had been drawn up by the Bar Council and approved by Ministerial decree, on the ground that it was contrary to Articles 10 and 81(1). The Court of Appeal had in particular considered, on the basis of the Court of Justice judgment in Case C-35/96 (*Commission v Italian Republic*) (customs agents), that the activity of lawyers falls within the concept of a service of general interest.

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260 Social Division of the Court of Cassation, 5 February 1998, *Organic*.
261 Commercial Division of the Court of Cassation, judgment of 13 January 1998 *Gift Shop v Boucheron*
262 Judgment of the Council of State of 1 April 1998 in *Union Hospitalière privée v Intersyndicale des Etablissements d’hospitalisation privée*. 
of undertaking for the purposes of the application of Article 81(1) of the Treaty and regarded the national Bar Council as an association of undertakings.

2) References for preliminary rulings:

In 1998, four orders for references to the Court of Justice for preliminary rulings under Article 234 of the EC Treaty were adopted. They concerned the compatibility of national rules or of the conduct of certain firms with Articles 81, 82 and 86 of the Treaty.\(^{263}\)

One of the cases concerned was a question by the Turin Court of Appeal concerning the applicability of Article 82 of the Treaty to motor vehicle manufacturers exercising industrial and intellectual property rights over their own spare parts.

**Netherlands**

The Dutch courts applied Community competition law in the following decisions. It should be noted that, even where the Dutch courts apply the new Competition Act, they interpret Articles 81 and 82 as the Dutch act is based on the Community competition rules.

— President of the Arnhem District Court (Rechtbank Arnhem), order of 1 April 1998, Schuurmans v Banken Champignons BV

Application for interim measures; non-compete clause in a contract for the acquisition of a mushroom and asparagus business; no incompatibility with Article 81(1); under Article 2 of Regulation No 26, Article 81(1) is not applicable to such agreements.

— President of the Rotterdam District Court (Rechtbank Rotterdam), order of 1 April 1998 in Onderlinge Waarborgmaatschappij Zorg en Zekerheid v Theo de Graaf Brillen en Contactlenzen BV

Application for interim measures; the healthcare insurer can in this case be regarded as an undertaking under Article 81(1) as, in addition to its statutory objects, it provides supplementary insurance; the fact that it operates on the basis of statutory terms of reference is irrelevant in this respect.

— President of the Leeuwarden District Court (Rechtbank Leeuwarden), order of 9 April 1998 in Beheer Miedema BV v Kapenga Beheer BV

Application for interim measures; notion that the agreement (protection of a sector) is incompatible with Article 81(1); the relevant market is at most a part of Leeuwarden; Article 81, which served as model for Article 6 of the Competition Act, concerns a geographic market of a certain size; it is clear from the case-law of the Court of Justice that Article 81(1) does not cover every geographic market, however small.


COMPUTATION REPORT 1998
— Arnhem Court of Appeal (Gerechtshof Arnhem), judgment of 14 April 1998 in Coenders v Louis Nagel

Application for interim measures; block exemption for exclusive distribution agreements (Regulation No 1983/83) makes it possible to require a reseller not to distribute competing products; Article 2(2)(a) is not applicable as it concerns competing products of other brands; Article 2(2)(b) is not applicable either because the contract goods are, in this case, only new products; the ban on importing recent, second-hand tractors under an exclusive resale agreement is consequently not covered by the block exemption.

— Groningen Magistrates Court (Kantongerecht Groningen), judgment of 20 May 1998 (interlocutory judgment of 4 February 1998), Hendrik van der Woude v Stichting Beatrixoord

Collective agreement for hospitals; the applicant considers that the provision which prohibits exceptions to the agreement in conjunction with the provision that employees are entitled to sickness benefits from the employer only if they are insured by the insurer specified in the agreement, is incompatible with Article 81(1). The Court referred the matter to the European Court of Justice for a preliminary ruling since, in order for it to deliver a judgment, it was necessary to know whether the insurer could be regarded as an undertaking within the meaning of Article 81(1).

— Utrecht District Court (Rechtbank Utrecht), judgment of 17 June 1998, WAC Centraal Bureau BV v Toonen

Application made under a scheme notified to the Commission for exemption. The Court considered it possible that the scheme could be exempted under Article 81(3) but would await the Commission’s decision.

— President of the ’s Hertogenbosh District Court (Rechtbank ’s-Hertogenbosch), order of 19 June 1998, MTV Europe v Combivisie Regio

Application for interim measures: dispute between a programme supplier and a cable operator; finding that the various cable operators in the Netherlands hold a collective dominant position under Article 82; in this case, the cable operator is not abusing its dominant position.

— Amsterdam Court of Appeal (Gerechtshof Amsterdam), judgment of 9 July 1998, Van der Neut (Neutrol) v Primagaz

Application for interim measures; exclusive purchasing clause; there is no agreement within the meaning of Article 81(1); the clause exists only in agreements with consumers, the end users, who are not undertakings within the meaning of Article 81(1).

— President of the Arnhem District Court (Rechtbank Arnhem), judgment of 17 September 1998, Heineken Nederland BV v Mega Company and others.

Application for interim measures; block exemption for exclusive purchasing agreements (Regulation No 1984/83) is not applicable as there are no particular economic or financial advantages for the reseller; the restriction of competition resulting from the ten-year exclusive beer tie is not justified.
— Amsterdam District Court (Rechtbank Amsterdam), judgment of 30 September 1998, Free Record Shop BV v Koninklijke Vereeniging ter Bevordering van de Belangen des Boekhandels (KVB)

Temporary validity of the KVB rules notified prior to 1 November 1962 with a view to exemption under Article 81(3); following amendments to the rules, questions were referred to the Court of Justice, for a preliminary ruling, which was given on 24 April 1997. The District Court then concluded that, for the rules no longer to retain their provisional validity, two criteria should be met: 1) the amendments should have the effect of limiting, reinforcing or extending the restrictions of competition; and if that were the case, 2) the amendments could not be regarded as introducing new restrictions severable from the agreement and not affecting its essential structure. As the last criterion was not met in the case in point, the rules remain in force provisionally.

— Trade and Industry Appeals Tribunal (College van Beroep voor het Bedrijfsleven), judgment of 7 October 1998, Stolp International BV v Productschap Tuinbouw

The decision of the Productschap\(^{264}\) to impose advertising taxes is not incompatible with Article 81(1) because decisions to conduct impersonal advertising campaigns for certain products must not be regarded as prohibited by Article 81(1). Accordingly, the judgment does not rule on whether a Productschap is an undertaking within the meaning of Article 81(1).

— Supreme Court (Hoge Raad), judgment of 20 November 1998, Johnson Wax GmbH v Novem Trading International BV

Exclusive distribution agreement; the agreement is not inherently incompatible with Article 81(1) as it qualifies for (block) exemption under Regulation No 1983/83 or under Article 81(3); a clause which prohibits the sale of the relevant products three months after termination of the agreement does not, in the case in point, constitute one of the restrictions exempted in Article 2(2) of Regulation No 1983/83.

**United Kingdom**

In 1998 the Court of Appeal heard two cases involving beer ties: Trent Taverns Ltd v Sykes and Gibbs Mew plc and Centric Pub Company Ltd v Graham Gemmell. In both cases the tenants of tied houses sought unsuccessfully to persuade the Court that the agreements in question were caught by Article 81(1) and thus rendered void.

**D — Application of the 1993 notice on cooperation between the Commission and national courts**

An account follows of replies given before 1998 but not reported in the 1996\(^{265}\) and 1997\(^{266}\) Competition Reports, in response to questions raised by national courts under the 1993 notice on

\(^{264}\) ‘Productschappen’ are producers’ trade organisations with certain economic powers in their sector. They are essentially to be found in agriculture.

\(^{265}\) see pp. 338-340.

\(^{266}\) see pp. 350-351.
cooperation between national courts and the Commission in applying Articles 81 and 82 of the EC Treaty.267, 268

The first case concerns a reply dated 1 August 1996 given by the deputy Director-General of the Directorate-General for Competition to questions put by the Vice-President of the Commercial Court of Brussels. The information was sought in connection with a dispute between a distributor of parapharmaceutical products and a manufacturer of parapharmaceutical and pharmaceutical products, together with a professional association of pharmacists. The reply was in response to a request referred by the Court on 26 June 1996 and forwarded to the Commission through the parties, a mode of transmission provided for in the Notice (point 42). The Commercial Court was primarily seeking information on procedure, namely whether the Commission intended to institute proceedings against the producer following a complaint by the distributor. It also sought the opinion of the Commission on the compatibility with Article 81 of an alleged agreement between the manufacturer and the association of pharmacists, under which the former expressed a wish for its products to be distributed exclusively in pharmacies. In its reply, the Commission stated that the parapharmaceutical products distributor had also complained to the Commission about the producer and the association of pharmacists. The complaint also concerned alleged collusion between manufacturers of parapharmaceutical products and a professional association of pharmacists, on the one hand, and between the manufacturers and pharmacies on the other, which was aimed at preventing or restricting the sale in Belgium of parapharmaceutical products except in pharmacies. The reply also stated that, to enable the Commission to obtain the full facts of the alleged collusion and its context, it had been necessary to undertake investigations on 26 and 27 June 1996 under Article 14(3) of Regulation No 17. The documents obtained during the investigations were being examined. It concluded that, should the existence of such agreements be proven, they and/or the practices could constitute an infringement of Article 81(1), in accordance with the judgment of the Court of First Instance in Vichy (judgment of 27 February 1992 in Case T-19/91).

In the second case, the Director-General for Competition replied on 8 April 1997 to a request dated 17 March 1997 made by the Spanish Chamber for Contentious Administrative Proceedings of the National High Court. In its request, the Court hoped that the Commission could provide it with copies of agreements examined in similar cases to that currently before it and also with information on the existence of files relating to the agreements. The requests were made in connection with an appeal by a sports federation, supported by a television channel, against a decision of the Competition Court which found that the Spanish law on competition (Law No 16/1989) had been breached by an agreement on the television broadcasting rights to certain sporting events organised by the federation concerned. In his reply, the Director-General noted that the agreements referred to by the National High Court were not directly linked to the case forming the subject of the ongoing appeal. There was therefore a problem of confidentiality. The Director-General as a result provided the court with a copy of the notices published in the Official Journal pursuant to Article 19(3) of Regulation No 17 in similar cases, and the press statement published when those cases ended. He pointed out that the cases had been dealt with by comfort letter under Article 81(3) and that they were exempted on the ground that the television channel enjoying exclusive retransmission rights in the country in question had just been launched on the market (a new market at that time) for direct broadcasting by satellite, which justified relatively long-term exclusive rights in order to facilitate its entry onto the market. As regards other cases concerning contracts involving the acquisition of sports retransmission rights, the Director-General stated that the notification of the agreement between the sporting federation of another

268 With the summary of the replies provided in the 1994 Competition Report (point 51) and this summary, all the replies given to date appear in the annual reports on competition policy.
Member State and a television channel had not resulted in any definite position being adopted by the Commission as, following the bankruptcy of that channel, the retransmission rights had been sold to other television companies operating in that Member State.

In 1998 the Directorate-General for Competition replied to four questions raised by national courts under the 1993 notice.

Firstly, on 4 August, the Director of Directorate A (competition policy, international affairs and relations with other institutions) replied to a letter dated 14 July 1997 from the Registrar of the ‘s Hertogenbosch Court of Appeal. The letter contained questions asked in connection with a dispute between a farmer and an agricultural cooperative. The farmer considered that his exclusion from the cooperative was contrary to Article 81(1) of the Treaty and Article 2(1) of Council Regulation No 26. The court first requested factual information concerning the structure of the livestock market (cattle and pigs) and the meat market. It was sent two reports on the situation in the European Union of the markets for beef and pigmeat. The long delay in answering the court was due to the delay in the anticipated date of adoption of the latter report, which was finally approved on 29 July 1998. The court also asked whether the Commission had initiated an investigation into the compatibility of the statutes of the cooperative in question with Article 81(1) of the Treaty or whether it intended to undertake an investigation. The reply given was in the negative; the Commission had formed a preliminary opinion of the compatibility of the disputed statutes with Article 81(1) and, on the basis of its assessment, was not planning an investigation. Lastly, the Dutch court sought the Commission’s opinion on the compatibility of the statutes with Article 2(1) of Regulation No 26. It also asked the Commission to provide it with criteria for the application of the provision to enable it to judge the dispute without any danger of infringing on the decision-making powers of the Commission. In reply, the Commission stated that, as it had not begun an investigation into the compatibility of the statutes in question with Article 81(1), it was not in a position to decide whether they complied with Article 2(1) of Regulation No 26. As regards the criteria for the application of that article, the Commission pointed out first that, if the nullity of a provision of the statutes of an agricultural cooperative for breach of Article 81(1) was sought in a case before a national court, and if the cooperative invoked Article 2(1) of Regulation No 26, the national court may rule that the disputed provision is null and void under Article 81(2) if it is clear that the provision is not compatible with Article 81(1) and does not satisfy the conditions to benefit from Article 2(1) of Regulation No 26 or for exemption under Article 81(3). It pointed out that, in the present case, the cooperative could not invoke the first category of exemption in Article 81(1), provided for in Article 2(1), namely that the provision in question formed part of a national market organisation, owing to the existence of a common organisation of the market in pigmeat. As regards the second exemption provided for in Article 2(1), namely that the provision was needed in order to achieve the aims of the common agricultural policy set out in Article 33 of the Treaty, the Commission replied that no answer was required if the statutes qualified for exemption under the second sentence of Article 2(1) of Regulation No 26. The Commission set out its reasoning, based on the case-law of the Court of Justice and on its own decision-making practice.

On 3 December, the competent Director provided the information requested on 30 September by the President of the Commercial Court of Paris and the President of Chamber, responsible for Community law, of that court. The request followed several legal actions instituted by wholesalers against the stock management system used by a major pharmaceuticals producer, a system which the wholesalers regarded as contrary to Article 81. Having learnt that the system had been notified to the Commission,
the Commercial Court wished to know, if not the outcome of the notification, then at least the probable time it would take to respond to the notification. If the response were not to be given before the end of 1998, the court requested clarification concerning established practice as regards the Community law in question. In reply, the Commission confirmed that it had been notified of the system, which was applicable to the leading pharmaceutical products of the manufacturer in question. It had also received complaints about the system from wholesalers in several Member States. The Commission explained that it was actively examining the notification in question and the relevant complaints, but that for the time being it was not possible to predict when it would be in a position to adopt a decision. It noted that, in this context, its Decision 96/478/EC (Adalat, OJ L 201, 9.8.1996) had dealt with several legal questions which could also arise in the case in point, and that the decision was pending before the Court of First Instance. As regards established policy regarding the relevant Community law, the competent Director drew attention to certain competition cases in the pharmaceuticals sector. These were the above-mentioned Adalat decision, Decision 80/1283/EEC (Johnson & Johnson, OJ L 377, 31.12.1980), Decision 87/409/EEC (Sandoz, OJ L 222, 10.8.1987), upheld by the Court of Justice in Case 277/87 ([1990] ECR I-45), and the Organon case, terminated without a formal decision as the firm concerned had ended its behaviour contrary to Article 81 following a statement of objections (1995 Competition Report, points 37-38). It also referred to certain cases concerning the application of Article 28 of the Treaty, in particular Joined Cases C-267/95 Merck & Co. Inc. and others v Primecrown Ltd and C-268/95 Beecham Group plc v Europharm of Worthing Ltd ([1996] ECR I-6285), and Case 16/74 Centrafarm BV and Adriaan de Peijper v Winthrop BV ([1974] ECR 1183).

On 22 December, the competent Director provided the Court of First Instance of Madrid with the information requested by the latter in a letter of 16 June. The court was dealing with a dispute between an oil company and the manager of a petrol service station. In order to deliver judgment, the court had asked the Commission whether it had examined the compatibility of the contract with Regulation No 1984/83. It had also requested a complete copy of the file compiled by the Commission concerning the notification of certain service-station contracts by the oil company. In his reply, the Director stated that, following changes to the contracts to bring them into line with Community rules, the proceedings instituted in 1993 in respect of the contracts had been terminated in June 1994. He specified that the manager of the service station in question had received a letter dated 1 March 1994, sent on 18 March, which modified the method of calculating the duration of the contract. The Director also stated that sending a complete copy of the notification file, consisting in this case of eight volumes, was not a customary form of cooperation with national legal authorities. But he said he was prepared to respond to further requests from the Spanish court to the extent allowed by administrative diligence and taking the necessary precautions to protect any confidential aspects contained in the information requested.

On the same day, the Director answered questions put by the Baeza Court of First Instance in connection with a dispute of a similar nature concerning the compatibility of a service-station contract with Regulation No 1984/83. The Director noted that the manager of the service station had not received a letter modifying his contract with the oil company following the modification of certain contracts of this type in June 1994. He noted, however, that the contract already appeared to correspond to modifications introduced by the standard letter notified to other service-station managers. He also considered that, as one of the aims of the block exemption regulations was to facilitate the application of Article 81 by national courts, the court was in possession of all necessary facts to rule on the compatibility of the contract with Regulation No 1984/83. Lastly, as regards the question of forwarding a complete copy of the file concerning the oil company, his reply was the same as that given to the Madrid Court of First Instance.
Annex

Application of Articles 81 and 82 by national competition authorities

Opening remarks:

1. The present summary relates only to the enforcement of Articles 81 and 82 of the EC Treaty by the administrative authorities of the Member States, not by the judiciary, as those articles are directly applicable and are therefore enforceable by the courts of each Member State without exception.

2. Their application by the administrative authorities is subject to the limitations provided for, in favour of the Commission, by Article 84 of the Treaty and Article 9(3) of Regulation No 17.

<table>
<thead>
<tr>
<th>Application</th>
<th>Source of Law / Additional Details</th>
</tr>
</thead>
<tbody>
<tr>
<td>AUSTRIA</td>
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</tr>
<tr>
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</tr>
<tr>
<td>DENMARK</td>
<td>NO</td>
</tr>
<tr>
<td>FINLAND</td>
<td>NO</td>
</tr>
<tr>
<td>FRANCE</td>
<td>YES</td>
</tr>
<tr>
<td>GERMANY</td>
<td>YES</td>
</tr>
<tr>
<td>GREECE</td>
<td>YES</td>
</tr>
<tr>
<td>IRELAND</td>
<td>NO</td>
</tr>
<tr>
<td>ITALY</td>
<td>YES</td>
</tr>
<tr>
<td>LUXEMBOURG</td>
<td>NO</td>
</tr>
<tr>
<td>THE NETHERLANDS</td>
<td>YES</td>
</tr>
</tbody>
</table>

Law of 5.8.1991, Art. 53, effective from 1.4.1993: when the Belgian authorities have to decide, under Art. 84 of the EC Treaty, on the admissibility of agreements and on abuse of a dominant position in the common market, the decision is taken by the authorities stipulated in that Law pursuant to Articles 81(1) and 82 of the Treaty, according to the procedure and the penalties provided for in that Law.

The working group established by the Ministry of Commerce and Industry opted out of this possibility (report of January 1997).

Order I.12 1986, Art. 56bis (inserted by the Act of 2.12.1992). Under the Order, the Minister for Economic Affairs and Ministry officials on the one hand and the ‘Conseil de la Concurrence’ (Competition Council) on the other, have the powers to apply Articles 81 and 82 that they normally have to apply French competition law.

GWB (Gesetz gegen Wettbewerbsbeschränkungen), Article 47. In order to exercise the powers conferred on the authorities of the Member States by Articles 84 and 85 of the EC Treaty, and by the regulations based on Article 83 of the Treaty, the ‘Bundeskartellamt’ is competent as regards the application of the GWB.

Nomos (Act) 703/1977 peri prostassias tou eleptherou antagonismou (on the protection of free competition), as amended by Article 13b(3) of Nomos (Act) 2296/1995: the Competition Commission and its Secretariat perform the tasks which have been assigned to the national authorities of the Member States by Articles 84 and 85 of the Treaty establishing of the European Economic Community, and by regulations adopted pursuant to Article 83 of the Treaty in conjunction with other enabling provisions thereof. To perform these tasks the Competition Commission and its Secretariat have the powers granted to them under the present Act.

Legge comunitaria 1994, Article 54(5) : The ‘Autorità garante della concorrenza’ applies Articles 81(1) and 82, using the powers conferred upon it by the national law on competition (Act No 287 of 10 October 1990).

Competition law (‘Mededingingswet’) of 22 May 1997, Article 88: the Director General of the Competition Authority (‘Mededingingsautoriteit’) is empowered under the regulations based on Article 83 of the EC Treaty to apply Articles 81(1) and 82 of the Treaty.
<table>
<thead>
<tr>
<th></th>
<th>YES</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>PORTUGAL</td>
<td>Decreto-lei 371/93, de 29 de Outubro, Article 12(2): the Directorate General for Competition and Prices is empowered to carry out the tasks for which the authorities of the Member States are responsible under the regulations based on Article 83 of the EC Treaty.</td>
<td></td>
</tr>
<tr>
<td>SPAIN</td>
<td>‘Real Decreto 295/1998, de 27 de febrero’ regarding the application in Spain of the European competition laws: Art. 1: ‘El Tribunal de Defensa de la Competencia’ is the competent authority for the application in Spain of Articles 81(1) and 82 of the EC Treaty. Art. 3: ‘El Servicio de Defensa de la Competencia’ is the body entrusted with carrying out the procedures for implementing Articles 81(1) and 82 of the EC Treaty.</td>
<td></td>
</tr>
<tr>
<td>SWEDEN</td>
<td>NO</td>
<td></td>
</tr>
<tr>
<td>UNITED KINGDOM</td>
<td>NO</td>
<td></td>
</tr>
</tbody>
</table>

Conclusions

1. Of the 15 Member States, eight administrative authorities of those Member States can directly apply Articles 81 and 82, whereas seven cannot.

2. The eight which can are Belgium, France, Germany, Greece, Italy, the Netherlands, Portugal and Spain. The seven which cannot are Austria, Denmark, Finland, Ireland, Luxembourg, Sweden and the United Kingdom.
VI — STATISTICS

A — Articles 81, 82 and 86 of the EC Treaty + Article 65 of the ECSC Treaty

1. Activities in 1998

1.1. New cases opened during 1998

<table>
<thead>
<tr>
<th>Type</th>
<th>Number</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>Notifications</td>
<td>216</td>
<td>42</td>
</tr>
<tr>
<td>Complaints</td>
<td>192</td>
<td>38</td>
</tr>
<tr>
<td>Ex officio</td>
<td>101</td>
<td>20</td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td><strong>509</strong></td>
<td><strong>100</strong></td>
</tr>
</tbody>
</table>

1.2. Cases closed during 1998

<table>
<thead>
<tr>
<th>By formal decisions</th>
<th>By informal procedure</th>
</tr>
</thead>
<tbody>
<tr>
<td>Infringement of Article 82 with fine</td>
<td>Comfort letter 81(1)</td>
</tr>
<tr>
<td>Exemption</td>
<td>Comfort letter 81(3)</td>
</tr>
<tr>
<td>Rejection of complaint</td>
<td>Rejection of complaint</td>
</tr>
<tr>
<td>Non-opposition</td>
<td>Administrative closure</td>
</tr>
<tr>
<td>Infringement of Article 65 ECSC</td>
<td>Discomfort letter</td>
</tr>
<tr>
<td>Article 86 decision</td>
<td>9</td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td><strong>42</strong></td>
</tr>
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</table>

2. Four-year overview

2.1. Evolution of stock of cases

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<thead>
<tr>
<th>Cases open at the end of the calendar year</th>
<th>95</th>
<th>96</th>
<th>97</th>
<th>98</th>
</tr>
</thead>
<tbody>
<tr>
<td>Notifications</td>
<td>625</td>
<td>726</td>
<td>589</td>
<td>538</td>
</tr>
<tr>
<td>Complaints</td>
<td>371</td>
<td>368</td>
<td>450</td>
<td>441</td>
</tr>
<tr>
<td>Ex officio</td>
<td>121</td>
<td>127</td>
<td>223</td>
<td>225</td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td><strong>1 117</strong></td>
<td><strong>1 221</strong></td>
<td><strong>1 262</strong></td>
<td><strong>1204</strong></td>
</tr>
</tbody>
</table>

An ex-officio case is one opened on the Commission’s own initiative.
2.2. Evolution of input

<table>
<thead>
<tr>
<th>New cases registered during the year</th>
<th>95</th>
<th>96</th>
<th>97</th>
<th>98</th>
</tr>
</thead>
<tbody>
<tr>
<td>Notifications</td>
<td>360</td>
<td>206</td>
<td>221</td>
<td>216</td>
</tr>
<tr>
<td>Complaints</td>
<td>114</td>
<td>159</td>
<td>177</td>
<td>192</td>
</tr>
<tr>
<td>Ex officio</td>
<td>47</td>
<td>82</td>
<td>101</td>
<td>101</td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td>521</td>
<td>447</td>
<td>499</td>
<td>509</td>
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</table>

2.3. Evolution of output

<table>
<thead>
<tr>
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<th>97</th>
<th>98</th>
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</thead>
<tbody>
<tr>
<td>Formal decisions</td>
<td>14</td>
<td>21</td>
<td>27</td>
<td>42</td>
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<tr>
<td>Informal procedures</td>
<td>403</td>
<td>367</td>
<td>490</td>
<td>539</td>
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<tr>
<td><strong>TOTAL</strong></td>
<td>417</td>
<td>388</td>
<td>517</td>
<td>581</td>
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B — Merger Regulation

1. Notifications received

<table>
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<tr>
<th>Cases notified</th>
<th>94</th>
<th>95</th>
<th>96</th>
<th>97</th>
<th>98</th>
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</thead>
<tbody>
<tr>
<td>Cases notified</td>
<td>95</td>
<td>110</td>
<td>131</td>
<td>172</td>
<td>235</td>
</tr>
<tr>
<td>Notifications withdrawn</td>
<td>6</td>
<td>4</td>
<td>6</td>
<td>9</td>
<td>9</td>
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<tr>
<td><strong>Total cases closed by final decision</strong></td>
<td>91</td>
<td>109</td>
<td>125</td>
<td>142</td>
<td>238</td>
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2. Article 6 decisions

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<th>95</th>
<th>96</th>
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<th>98</th>
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<tbody>
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<td>Article 6(1)(b)</td>
<td>80</td>
<td>88</td>
<td>93</td>
<td>85</td>
<td>109</td>
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<tr>
<td>Article 6(1)(c)</td>
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<td>7</td>
<td>7</td>
<td>6</td>
<td>5</td>
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<tr>
<td><strong>TOTAL</strong></td>
<td>91</td>
<td>109</td>
<td>109</td>
<td>100</td>
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3. Article 8 decisions

<table>
<thead>
<tr>
<th>Article 8(2) with conditions and obligations</th>
<th>94</th>
<th>95</th>
<th>96</th>
<th>97</th>
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<td>Article 8(2) without conditions and obligations</td>
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<td>40</td>
<td>2</td>
<td>14</td>
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COMPETITION REPORT 1998
<table>
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<th>Article 8(3) prohibition</th>
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<th>20</th>
<th>2</th>
<th>29</th>
<th>3</th>
<th>43</th>
<th>1</th>
<th>11</th>
<th>2</th>
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<tbody>
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<td>TOTAL</td>
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<td>7</td>
<td>100</td>
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<tr>
<td>Article 8(5) revocation of previously approved decisions</td>
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### 4. Referral decisions

<table>
<thead>
<tr>
<th>Article 9 (to a Member State)</th>
<th>94</th>
<th>95</th>
<th>96</th>
<th>97</th>
<th>98</th>
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<tr>
<td>Article 22(3) (to the Commission)</td>
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### 5. Procedural decisions

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<tr>
<th>Article 7(2) continuing suspense effect</th>
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<th>95</th>
<th>96</th>
<th>97</th>
<th>98</th>
</tr>
</thead>
<tbody>
<tr>
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<td>2</td>
<td>3</td>
<td>5</td>
<td>13</td>
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<tr>
<td>Article 4(2) Regulation 2367/90 notification declared incomplete</td>
<td>2</td>
<td>2</td>
<td>5</td>
<td>17</td>
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</table>

### C — State aid

#### 1. New cases registered in 1998

<table>
<thead>
<tr>
<th>Agriculture</th>
<th>Transport</th>
<th>Fisheries</th>
<th>Coal</th>
<th>Other</th>
<th>TOTAL</th>
<th>%</th>
</tr>
</thead>
<tbody>
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<tr>
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<td>0</td>
<td>0</td>
<td>5</td>
</tr>
<tr>
<td>Total</td>
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<td>308</td>
<td>44</td>
<td>52</td>
<td>6</td>
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</table>

#### 2. Cases being examined as at 31 December 1998

<table>
<thead>
<tr>
<th>Agriculture</th>
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<th>Fisheries</th>
<th>Coal</th>
<th>Other</th>
<th>TOTAL</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>Notified aid</td>
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<td>9</td>
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</table>
### Initiation procedures

<table>
<thead>
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<th>Agriculture</th>
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<th>Fisheries</th>
<th>Coal</th>
<th>Other</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>C</td>
<td>55</td>
<td>14</td>
<td>4</td>
<td>0</td>
<td>149</td>
</tr>
<tr>
<td>Total</td>
<td>306</td>
<td>42</td>
<td>38</td>
<td>3</td>
<td>682</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Initiation procedures</th>
<th>C</th>
<th>1998</th>
<th>2007</th>
<th>2008</th>
<th>2009</th>
<th>2010</th>
<th>2011</th>
<th>2012</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total</td>
<td>306</td>
<td>42</td>
<td>38</td>
<td>3</td>
<td>293</td>
<td>682</td>
<td>44.87</td>
<td>6.16</td>
<td>5.57</td>
</tr>
</tbody>
</table>

### 3. Cases dealt with in 1998 according to the register in which they were recorded

#### 3.1. Cases closed by Commission decision

<table>
<thead>
<tr>
<th>Agriculture</th>
<th>Transport</th>
<th>Fisheries</th>
<th>Coal</th>
<th>Other</th>
<th>TOTAL</th>
</tr>
</thead>
<tbody>
<tr>
<td>Notified aid N</td>
<td>207</td>
<td>22</td>
<td>38</td>
<td>3</td>
<td>317</td>
</tr>
<tr>
<td>Non-notified aid NN</td>
<td>17</td>
<td>9</td>
<td>0</td>
<td>0</td>
<td>86</td>
</tr>
<tr>
<td>Existing aid E</td>
<td>2</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>3</td>
</tr>
<tr>
<td>Procedures under way C</td>
<td>38</td>
<td>4</td>
<td>0</td>
<td>0</td>
<td>65</td>
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<tr>
<td>Total</td>
<td>264</td>
<td>35</td>
<td>38</td>
<td>3</td>
<td>471</td>
</tr>
</tbody>
</table>

#### 3.2. Cases removed from Commission registers

<table>
<thead>
<tr>
<th>Agriculture</th>
<th>Transport</th>
<th>Fisheries</th>
<th>Coal</th>
<th>Other</th>
<th>TOTAL</th>
</tr>
</thead>
<tbody>
<tr>
<td>At request of Member State</td>
<td>13</td>
<td>5</td>
<td>1</td>
<td>0</td>
<td>81</td>
</tr>
<tr>
<td>De minimis</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>7</td>
</tr>
<tr>
<td>Other</td>
<td>30</td>
<td>8</td>
<td>5</td>
<td>0</td>
<td>26</td>
</tr>
<tr>
<td>Total</td>
<td>43</td>
<td>13</td>
<td>6</td>
<td>0</td>
<td>114</td>
</tr>
</tbody>
</table>

The number of cases dealt with is larger than the number of Commission decisions because decisions often cover more than one case.
### 4. Decisions taken by the Commission in 1998

<table>
<thead>
<tr>
<th>No objection</th>
<th>Agriculture</th>
<th>Transport</th>
<th>Fisheries</th>
<th>Coal</th>
<th>Other</th>
<th>TOTAL</th>
<th>73.08 %</th>
</tr>
</thead>
<tbody>
<tr>
<td>Decisions as part of the formal scrutiny procedure</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Initiation</td>
<td>25</td>
<td>11</td>
<td>0</td>
<td>0</td>
<td>66</td>
<td><strong>102</strong></td>
<td>13 %</td>
</tr>
<tr>
<td>Positive</td>
<td>5</td>
<td>2</td>
<td>0</td>
<td>2</td>
<td>16</td>
<td><strong>25</strong></td>
<td>3.18 %</td>
</tr>
<tr>
<td>Negative</td>
<td>6</td>
<td>2</td>
<td>0</td>
<td>1</td>
<td>31</td>
<td><strong>40</strong></td>
<td>5.10 %</td>
</tr>
<tr>
<td>Conditional</td>
<td>2</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>8</td>
<td><strong>10</strong></td>
<td>1.27 %</td>
</tr>
<tr>
<td>Appropriate measures</td>
<td>2</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>3</td>
<td><strong>5</strong></td>
<td>0.68 %</td>
</tr>
<tr>
<td>Other decisions</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>28</td>
<td><strong>29</strong></td>
<td>3.69 %</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>244</strong></td>
<td><strong>35</strong></td>
<td><strong>380</strong></td>
<td><strong>7</strong></td>
<td><strong>460</strong></td>
<td><strong>784</strong></td>
<td><strong>100%</strong></td>
</tr>
</tbody>
</table>

### 5. Evolution over the period 1989-98

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>No objection</td>
<td>259</td>
<td>415</td>
<td>493</td>
<td>473</td>
<td>399</td>
<td>440</td>
<td>504</td>
<td>373</td>
<td>385</td>
<td>308</td>
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<tr>
<td>Decision as part of the formal scrutiny procedure</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Initiation</td>
<td>36</td>
<td>34</td>
<td>54</td>
<td>30</td>
<td>32</td>
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<td>68</td>
<td>66</td>
</tr>
<tr>
<td>Positive</td>
<td>21</td>
<td>20</td>
<td>28</td>
<td>25</td>
<td>19</td>
<td>15</td>
<td>22</td>
<td>14</td>
<td>18</td>
<td>16</td>
</tr>
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<td>2</td>
<td>5</td>
<td>3</td>
<td>5</td>
<td>8</td>
</tr>
<tr>
<td>Appropriate measures/other decisions</td>
<td>11</td>
<td>9</td>
<td>13</td>
<td>9</td>
<td>10</td>
<td>27</td>
<td>22</td>
<td>18</td>
<td>17</td>
<td>31</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>342</strong></td>
<td><strong>492</strong></td>
<td><strong>597</strong></td>
<td><strong>552</strong></td>
<td><strong>467</strong></td>
<td><strong>527</strong></td>
<td><strong>619</strong></td>
<td><strong>474</strong></td>
<td><strong>502</strong></td>
<td><strong>460</strong></td>
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</tbody>
</table>

COMPETITION REPORT 1998
6. Decisions broken down by Member State

<table>
<thead>
<tr>
<th>Decision Category</th>
<th>DE</th>
<th>AT</th>
<th>BE</th>
<th>DK</th>
<th>ES</th>
<th>FIN</th>
<th>F</th>
<th>EL</th>
<th>IRL</th>
<th>I</th>
<th>LU</th>
<th>NL</th>
<th>P</th>
<th>UK</th>
<th>SE</th>
<th>EU</th>
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</thead>
<tbody>
<tr>
<td>No objection</td>
<td>89</td>
<td>18</td>
<td>19</td>
<td>9</td>
<td>26</td>
<td>7</td>
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<td>31</td>
<td>1</td>
<td>17</td>
<td>1</td>
<td>286</td>
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<tr>
<td>Decisions as part of the formal scrutiny procedure</td>
<td></td>
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<td></td>
<td></td>
<td></td>
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<td></td>
<td></td>
<td></td>
<td></td>
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<td></td>
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<td>Initiation*</td>
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<td>0</td>
<td>4</td>
<td>1</td>
<td>7</td>
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<td>3</td>
<td>1</td>
<td>0</td>
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</tr>
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<td>0</td>
<td>0</td>
<td>8</td>
</tr>
<tr>
<td>Appropriate measures</td>
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<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
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<td>0</td>
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<td>1</td>
<td>1</td>
<td>3</td>
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<td>Other decisions***</td>
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<td>2</td>
<td>0</td>
<td>0</td>
<td>7</td>
<td>1</td>
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<td>1</td>
<td>28</td>
</tr>
<tr>
<td>**Total</td>
<td>154</td>
<td>28</td>
<td>22</td>
<td>9</td>
<td>36</td>
<td>8</td>
<td>27</td>
<td>9</td>
<td>2</td>
<td>77</td>
<td>3</td>
<td>38</td>
<td>3</td>
<td>18</td>
<td>4</td>
<td>438</td>
</tr>
</tbody>
</table>

* Initiation including extensions of proceedings already initiated.

** Negative decision including partly negative decisions.

*** Other decisions including orders, referrals to the Court of Justice or Council, withdrawals of notifications, linguistic revision, and corrections to previous decisions.
VII — STUDIES

DG IV commissioned 13 studies in 1998. Eight of them will be completed in 1999. Of the five studies completed this year, four must remain strictly confidential and will not be covered in this report. One other confidential study was completed; only its title is given below:

*Energy contracts in the framework of state aid case No C 83/97 Dow/Buna SOW Leuna Olefinverbund GmbH (BSL), Germany (Saxony-Anhalt)*

Seven studies commissioned the previous year were also completed in 1998. One of them concerns an individual case and must remain strictly confidential; it is therefore not covered here. Three other confidential studies were completed; only their titles are given below:

*Study on the policies of Member States’ competition authorities towards horizontal cooperation agreements between companies*

*Study on the retail market for motor fuel and associated products*

*Assessment of and developments in the exemption, provided for in Regulation (EEC) No 1617/93, of consultations on tariffs for the carriage of passengers by air within the Community*

The other three studies completed in 1998 are summarised below:

*Study of the balance between the respective rights and obligations and financial resources of public and private television in Austria, Finland, Sweden, Norway, Liechtenstein and Iceland*

The study analyses legislation, television markets and their development, the various television stations and the costs and income linked both to the obligations laid on public and private stations and to the privileges they are granted. However, it confines itself to examining stations which had a significant economic impact on television markets during the period 1994-97.

First, the study identifies the obligations and privileges of the television stations and their financial impact on domestic and international markets. The information collected shows that obligations incumbent on broadcasters are either set out in current legislation or laid on them in an informal manner by higher authorities. It should be pointed out that public and private television broadcasters differ not only in terms of their shareholders but also in the number of obligations laid on them, although in no case is there any precise definition of the concept of public service obligation.

The study also shows that public broadcasters are financed partly or in full by the licence fees paid by all households which possess a television. Legislation explicitly provides that, since all sections of the audience have to pay the licence fee, public television stations must broadcast to all households and, ideally, ensure that their programmes take account of the preferences of all viewers. Consequently, public service obligations extend to the provision not only of cultural and educational programmes of all kinds and directed at all minorities but also of programmes which attract mass audiences. Public and private broadcasters therefore compete fiercely to reach all these audiences and to offer them the widest possible choice of programmes.

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A number of problems follow from these findings:

— there is no definition of public service obligations such as would allow a quantitative analysis or an assessment of costs to be carried out;

— there is broad scope for interpreting the concept of public service obligation;

— lastly, the accounts of certain broadcasters are not transparent and do not allow detailed analysis.

A more in-depth study of the costs/income structure of public and private television broadcasters cannot therefore be carried out in future unless clear and precise obligations are first defined.

There are no plans to publish this study.

Study on how national courts apply the state aid rules

Exhaustive study and analysis by Member State of how national courts apply the state aid rules when actions are brought by competitors, aid recipients or national authorities (recovery, etc.).

In 1995 the Commission adopted a notice on cooperation between national courts and the Commission in the state aid field. In it, the Commission drew attention to the scope for action at national level as regards state aid. In some cases, national courts may be better placed to deal with presumed infringements of the state aid rules. The study’s purpose was to examine, on the basis of the case-law established by national courts, the extent to which the various parties involved in the aid field take advantage of these possibilities for action and in which respects there are problems.

First, the study reviews the various types of case which might be brought before a national court, such as:

— cases concerning the direct effect of Article 88(3);

— various types of action brought in the context of the implementation or non-implementation of a negative decision requiring that aid be recovered (Member State, recipient, competitors, etc.);

— various redress procedures by means of which competitors may contest the validity of Commission decisions (in particular where aid schemes have been approved).

The bulk of the study consists of 15 chapters (one per Member State) which review the means of redress available under the relevant Member State’s law and list the various cases in which Articles 87 and 88 of the EC Treaty have been applied, with a summary of each case.

The last part contains a critical and comparative analysis of national case-law, data and conclusions.

The study draws several conclusions of importance with regard to state aid policy:

In all Member States, means of redress exist to protect third parties.
None the less, the number of state aid cases brought before national courts is very small.

Instruments are already in place, but insufficient use is made of them. Consequently, it is a question of how to publicise and make use of means of redress at national level.

As regards the type of case most frequently brought, i.e. a competitor bringing an action against unlawful aid, there have been only two such cases in which the proceedings resulted in the economic outcome envisaged by the competitor.

Actions for damages brought by competitors against the Member State, while possible in all Member States, remain only a theoretical possibility owing to the difficulty of proving the causal link between the infringement and the damage suffered.

This study will be published.

*Remedies in EU competition law: the policy and practice of the European Commission*

This study of undertakings in competition cases under the Merger Regulation and under Articles 81 and 82 is organised under three headings:

— a theoretical and taxonomic section that provides a summary of economic aspects of competition concerns, a classification of the different remedies available and their rationale and general legal appraisal;

— a comparative economic and legal analysis of relevant international practice among other competition authorities within the EU and outside it;

— qualitative and quantitative in-depth analysis of a number of previous cases.

Its principal conclusions are:

— remedies should address barriers to entry and seek to reduce or eliminate them so as to create competition through entry of new firms;

— the focus should be on creating genuine competition and not just a new competitor;

— structural remedies are to be advocated because they are more effective;

— a matrix of competition problems and appropriate remedies is set out;

— the effective role of fines in specific situations is outlined;

— Commission policy is in line with current antitrust economic reasoning.

There are no plans to publish this study.
VIII — REACTIONS TO THE TWENTY-SEVENTH REPORT

A — European Parliament

1. Resolution on the XXVII report by the Commission on Competition Policy — 1997
(SEC(98)0636 — C4-0379/98)

The European Parliament,

— having regard to the XXVII report by the Commission on Competition Policy — 1997
(SEC(98)0636 — C4-0379/98),

— having regard to the Communication from the Commission to the Member States on the links
between regional and competition policy (C(98)0673 — C4-0247/98), 271

— having regard to the report from the Commission on the Sixth Survey on State Aid in the European
Union in the manufacturing and certain other sectors (COM(98)0417),

— having regard to its resolutions of 13 November 1996 272 on the XXVth report on Competition
Policy and of 18 July 1997 273 on the Commission’s Green Paper on vertical restraints,

— having regard to the report of the Committee on Economic and Monetary Affairs and Industrial
Policy and the opinion of the Committee on Legal Affairs and Citizens’ Rights (A4-0421/98),

A. Whereas the EU’s competition policy ‘must adapt to the economic realities of the contemporary
world’ while current ‘legislation and practice are still rooted in the early years of the common market’,

B. Whereas there is a need for competition legislation in order to achieve certain priority
objectives of the European Union, namely economic and social cohesion, an adequate level of research
and development, environmental protection, the growth of SMEs and structural adjustment,

C. Whereas the proper development of competition and the quest for equal opportunities for all
businesses constitute essential preconditions for the smooth functioning of the internal market,
especially following the introduction of the single currency,

D. Whereas in its judgment of 18 June 1998 in Case C-35/96 the Court of Justice ruled that
members of liberal professions were entrepreneurs and, as such, were subject to the competition rules
laid down in Articles 85 and 86 of the Treaty in the same way as any other form of undertaking, thus
endorsing the interpretation already used in the past by the Commission,

E. Whereas limits to free-market competition result from State intervention, the interdependence
of national economies and the need to preserve regional and social cohesion,

271 OJ C 152, 18.5.1998, p. 3.

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F. Whereas Monetary Union demands a higher degree of control of competition distortion to safeguard the internal market, in particular of the State Aids given by Member States sharing the same currency,

G. Whereas the existing structure and resources of the Commission to control practices prejudicial to fair competition continue to be inadequate,

H. Whereas safeguarding competition inside the Monetary Union needs further coordination of the Commission services with the different Member States’ Competition Authorities,

I. Whereas the allocation of State Aid in breach of the EC Treaty is counter productive, and favours the inefficient over the efficient, distorts competition between regions and companies and imposes an excessive burden on public budgets,

J. Whereas negotiations have begun on the accession of new Member States from Eastern Europe, which need to take into account the transitional nature of these economies and the effects of competition legislation on their development,

1. Welcomes the XXVIIth report on Competition Policy and considers it a useful document upon which the accountability of the Commission in pursuing its Treaty duties and responsibilities could be exercised, bring thus Community competition policy closer to the public; in this context, supports the Commission’s DG IV in its endeavour to be equipped with adequate human resources and with the proper legal instruments;

2. Further encourages the Commission and the Member States to better coordinate and integrate their resources in order to establish an efficient EU system and structure to safeguard fair competition;

3. Believes that further exchanges of staff between the Commission and national authorities would increase the knowledge base and skills available to Member States and the Commission when dealing with complex competition cases; is appreciative of the work undertaken by the Commission and its staff, especially in the field of mergers, which is a politically sensitive field;

As Regards Democratic Accountability

4. Calls for the Commission to undertake formally to send the European Parliament all draft Commission implementing proposals in the field of Community competition policy, such as draft block exemptions pursuant to Article 85(3) of the Treaty and Commission initiatives taken pursuant to Article 90(3) of the Treaty affecting public undertakings;

5. While appreciative of the current excellent dialogue with the Commission, and especially with the Commissioner, calls for a further strengthening of the democratic control of competition policy in the European Union and for the regular information meetings already organised between the Commissioner for Competition Policy and the European Parliament’s relevant committee to become a matter of standard practice for the future at a rhythm of at least once every 3 months in common agreement between the Committee concerned and the Commissioner;
6. Calls again for greater efforts to be made, within the framework of the Annual Report, to assess
the impact of competition policy on other policy areas, in particular, social, regional and environmental
policy;

7. Calls on the Commission to launch a debate on the application of the competition rules to the
regulated professions, taking account of the special role which some professions play in society in the
public interest;

As regards the application of Articles 85 and 86

8. Reiterates its position as stated in its resolution of 18 July 1997 on the Commission’s Green
Paper on vertical restraints;

9. Welcomes the introduction of the new de minimis notice of 15 October 1997; wishes to be
assured that this notice will provide legal certainty, especially for SMEs, over the criteria for vertical
and horizontal agreements;

10. Asks the Commission to publish an analysis of the de minimis threshold for agreements of
minor importance to demonstrate its assertion that ‘such agreements have no significant effect either
on competition or on intra-Community trade’ while minimising bureaucracy and legal costs for SMEs;
further asks that future Competition Policy reports demonstrate how the Commission uses the de
minimis notice in certain cases;

11. Believes that the Commission is correct to assert that SMEs are rarely capable of significantly
affecting competition in cross-border trade;

12. Is firmly of the belief, however, that the new de minimis notice should not lead to any
‘renationalisation’ of competition policy; there is a need to ensure, with the introduction of the single
currency, that competition policy remains at a supra-national level, and a partnership between the
Commission and the Parliament, in order to guarantee a level playing field for companies from all
Member States and a transparency of policy;

13. Recalls its resolution on the Green Paper on vertical restraints, especially in relation to:

— the examination of including other parameters other than market share as threshold value;

— block exemption regulations for selective distribution agreements;

— a system in which the lowest market segment is exempted from the prohibition laid down in Article
85 (1) on the basis of the de minimis notice;

— the ceiling for the rules on de minimis to become the threshold value for the field of application of
the block exemption.

COMPETITION REPORT 1998
As regards the abuse of a dominant position

14. Recalls its position as stated in its resolution of 13 November 1996 and, in particular, paragraphs 2, 3 and 4, and requests the Commission to examine, on the basis of the ownership criterion, predatory pricing and other unfair practices, regulatory and non-regulatory barriers in the fields of telecommunications in both mobile and satellite communications as well as on-line services, of media, of air transport and of the banking and financial sectors;

15. Believes that the Commission should publish suitable guidelines and criteria, aimed especially at SMEs, on the definition of the relevant market in Competition Policy regulation so as to allow SMEs to evaluate their position with regards to their relevant product and geographic markets and to see if further legal investigation is recommended;

As regards State monopolies and the Amsterdam Treaty

16. Welcomes the examination by the Commission, as requested, of the implications for competition policy of the Treaty of Amsterdam, and in particular, Article 7d on services of general economic interest and believes that this will provide the best framework for employment creation; this confirms the Community's role in contributing to the promotion of services of general interest while not calling into question the allocation of powers between the Commission and the Member States;

17. Believes that the future development of a liberalised Competition Policy under the Treaty of Amsterdam should be coupled with the development of an enhanced consumer policy, so that consumers are able to benefit from the transparent prices across the single currency area; believes that consumers in those countries not participating in the single currency should also benefit from European-wide price reductions as a result of increased price transparency;

18. Considers that consumer protection must lie at the heart of all measures taken in the field of European Union competition policy, which must keep a watchful eye not only on the increasing number of products and services offered to consumers but also on the quality thereof;

19. Draws attention to the need for competition policy to help boost employment by means of an improved system of allocating resources.

As regards State Aid

20. Recalls the main findings of the VIth Survey on State Aid over the period 1994-1996:

a) the overall level of aid amounted on average over the period 1994-96 to almost ECU 84,000 million, which is an underestimate due to missing data from Member States on expenditure in the agricultural sector; on the basis on the data available, State Aids account for at least 1.4% of EUR15 GDP, ECU 573 per person employed and 2.6% of government expenditure;

b) overall State Aids given by some Member States are extremely high;

c) about 46% of overall aid (i.e. 38 318 million ECU on average over the period 1994-96) went to the manufacturing sector; the disparities in the level of aid between Member States is huge, in percent of value added the highest aid level is nine times the lowest aid level; allowing this level of aid for manufacturing, when it is concentrated in certain Member States, is creating a potential distortion of competition;

d) State Aid to the manufacturing sector was distributed as follows: 30% for horizontal objectives (i.e. R&D, environment, SMEs, trade, energy saving etc.), 13% for shipbuilding, steel and other sectors, and 56% for regional objectives; aid for horizontal objectives has fallen from 40% of overall aid in 1988-90 (for the EUR12) to around 30% in 1994-96 (for the EUR 15) while sector specific interventions have risen slightly; this trend should be reversed as sectorial objectives have the potential to create even greater distortive effects than horizontal objectives;

21. Reaffirms its support for State Aid deemed to be in the common interest, such as R&D, SMEs, training, energy saving and environmental aid; yet it notes that such aid has been decreasing while aid granted to individual enterprises has been rising;

22. Notes the links between State Aids and competition policy, as set out in the Communication from the Commission to the Member States of 17 March 1998; agrees with the need for increased consistency between national aid schemes, Union aid schemes and competition policy;

23. Believes, nevertheless, that the volume of overall aid in the Community is massive, and indicates a stable tendency which distorts fair competition, is incompatible with the internal market and undermines the EU’s commitment to a free world market;

24. Calls for the introduction of a published and regularly updated register of all State Aids, including State Aids agreed under block exemptions; this would provide information to third parties about the level of State Aids and allow the Commission to produce accurate and up-to-date figures on State Aids; believes that the Commission should also publish on its web-site all State Aid agreements, including those individual agreements covered by block exemptions, as soon as they have been agreed, giving the name of the companies involved, the purpose of the aid, the amount of aid given and the locations where these aids will be disbursed; this information should be available in all official European languages; believes that there should also be a simple facility, via this site, for third parties to have complaints about individual State Aids independently investigated;

25. Welcomes the adoption of the ‘enabling regulation’ which forms part of the Commission’s contribution to improving the administrative management of certain sectors of competition policy, and believes that the Commission should make the principles laid down in the 1997 Notice concerning ‘de minimis agreements’ binding;

26. Welcomes the forthcoming adoption of a ‘procedural regulation’ on state aids and the fact that this regulation includes fresh guarantees on the protection of third parties, and highlights the need to maintain a certain degree of consistency and homogeneity with regard to the judicial protection reserved for undertakings and private persons under Community competition law, without prejudice to the principle of the useful effect of that law;

27. Considers that, with regard to the supervision of state aid for regional development purposes, account must be taken of the need to ensure economic and social cohesion and the method of determining resources must take account of the legal concept of ultraperipherality;
28. Believes that the introduction of a ‘scoreboard’ similar to the internal market scoreboard would be a useful publication in highlighting which Member States provide the highest and the lowest levels of State Aids;

29. Proposes that stability and convergence programmes including State budget objectives should also be subject to competition considerations, as to limit excessive overall State Aid given by any Member State;

30. Stresses that more account must be taken, in studies on state aids and competition, of tax exemptions or tax relief which have an equivalent effect to aids and distort competition, and that such fiscal arrangements must be prohibited;

**As regards international cooperation**

31. Believes that the determining factors of globalisation: technology progress, deregulation of markets, liberalisation of key sectors and intensification of trade in goods and of capital markets influence the effectiveness of the traditional forms of European policy, one of them being competition policy;

32. Is of the opinion that the resulting interdependence due to globalisation of production, of distribution and of exchange and pronounced international dimension of competition problems necessitate a new approach to EU competition policy;

33. Favours an increasing role for the World Trade Organisation (WTO) in international competition policy; asks therefore the Council to mandate the Commission — while taking account of the Agreement between the EU and the Government of the USA regarding the application of their competition laws and of the successful outcome of the dispute over the merger of McDonnell Douglas and Boeing — to pursue negotiations with the aim of reaching a multilateral agreement on international competition law in the form of a supplement to the Agreement Establishing the WTO, containing the following rules:

a) the establishment of uniform minimum standards to prevent anti-competitive behaviour such as the formation of cartels, the abuse of a dominant market position or vertical and horizontal restrictions on competition;

b) the requirement for all signatory States to set up an independent regulatory authority to ensure compliance with minimum competitive standards, and the provision of a mechanism for cooperation between the national competition authorities with a view to achieving approximation of standards;

c) the requirement for all signatory States to apply their national competition law to states of affairs outside their own territory only when this is clearly in the public interest;

d) the incorporation at WTO level of the principle of ‘positive comity’ as set out in Articles III to V of the Agreement between the European Communities and the Government of the United States of America regarding the application of positive comity principles in the enforcement of their competition rules;
c) the extension of the Dispute settlement mechanism contained in the Agreement Establishing the WTO to cover disputes in connection with the enforcement of international minimum competitive standards;

34. Considers that the Trade Policy Review Mechanism set out in Article III(4) in conjunction with Annex 3 of the Agreement Establishing the World Trade Organisation should be supplemented by the requirement for any signatory state which has been subject to such review to draw up at the request of a contracting State a report on the operation of the national competition system in another State;

35. Believes that enlargement to the countries of central and eastern Europe could create tensions over the adoption of competition policy legislation; therefore welcomes the assistance given by the Commission for the application of antitrust cases in these countries;

36. Instructs its President to forward this resolution to the Commission and to the Council.

2. Reply by the Commission to Parliament’s Resolution on the XXVIIth Report on Competition Policy

Rapporteur: Mrs Karin RIIS-JØRGENSEN

EP No: A4-0421/98

Date of adoption of the report: 9 February 1999

Subject

Report by the Commission on Competition Policy

Parliamentary Committee responsible

Committee on Economic and Monetary Affairs and Industrial Policy

Background


At the sitting on 1 July 1998 the President of Parliament announced that he had referred the report to the Committee on Economic and Monetary Affairs and Industrial Policy as the committee responsible and to the Committee on Legal Affairs and Citizens’ Rights for its opinion.

At its meeting on 21 January 1998 the Committee on Economic and Monetary Affairs and Industrial Policy had appointed Mrs Riis-Jørgensen rapporteur.

It considered the draft report at its meetings on 26 May, 24 September and 10 November 1998.

At the last of these meetings it adopted the motion for a resolution unanimously.

COMPETITION REPORT 1998
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<tr>
<th>European Parliament</th>
<th>Commission</th>
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<tr>
<td>— having regard to the XXVIIth report by the Commission on Competition Policy — 1997 (SEC(98)0636 — C4-0379/98),</td>
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<td>— having regard to the Communication from the Commission to the Member States of 17 March 1998 on the links between regional and competition policy (C(98)0673 — C4-0247/98),</td>
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<td>— having regard to the report from the Commission on the Sixth Survey on State Aid in the European Union in the manufacturing and certain other sectors (COM(98)0417),</td>
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<td>— having regard to its resolutions of 13 November 1996 on the XXVth report on Competition Policy and of 18 July 1997 on the Commission’s Green Paper on vertical restraints and EU competition policy,</td>
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<td>— having regard to the report of the Committee on Economic and Monetary Affairs and Industrial Policy and the opinion of the Committee on Legal Affairs and Citizens’ Rights (A4-00421/98),</td>
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<td>A. whereas the EU’s competition policy ‘must adapt to the economic realities of the contemporary world’ while current ‘legislation and practice are still rooted in the early years of the common market’,</td>
<td>The Commission agrees with Parliament that legislation and decision-making practice in the field of Community competition law need to be updated. The Commission launched a modernisation process two years ago.</td>
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<td>B. whereas there is a need for competition legislation in order to achieve certain priority objectives of the European Union, namely economic and social cohesion, an adequate level of research and development, environmental protection, the growth of SMEs and structural adjustment,</td>
<td>The Commission shares Parliament’s view as regards the importance of effective competition rules in relation to the achievement of those European Union objectives referred to by Parliament.</td>
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<td>C. whereas the proper development of competition and the quest for equal opportunities for all businesses constitute essential preconditions for the smooth functioning of the internal market, especially following the introduction of the single currency,</td>
<td>Like Parliament, the Commission considers that the development of a competitive environment is an essential precondition for the success of the single market, especially after the introduction of the single currency.</td>
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<td>D. whereas in its judgment of 18 June 1998 in Case C-35/96 the Court of Justice ruled that members of liberal professions were entrepreneurs and, as such, were subject to the competition rules laid down in Articles 85 and 86 of the Treaty in the same way as any other form of undertaking, thus endorsing the interpretation already used in the past by the Commission,</td>
<td>The Commission endorses Parliament’s view as regards the importance of the Court’s judgment in Case C-35/96.</td>
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<td>E. whereas limits to free-market competition result from State intervention, the interdependence of national economies and the need to preserve regional and social cohesion,</td>
<td>The Commission agrees with Parliament that the principle of regional and social cohesion should be taken into account.</td>
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<td>F. whereas Economic and Monetary Union demands a higher degree of control of competition distortion to safeguard the internal market, in particular of the State Aids given by Member States sharing the same currency,</td>
<td>The Commission agrees that the control of state aid needs to be enforced, regardless of the currency in which the aid is granted. This would not influence its effect on the common market. Indeed, a common currency makes distortions of competition more visible.</td>
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<td>G.</td>
<td>whereas the existing structure and resources of the Commission to control practices prejudicial to fair competition continue to be inadequate,</td>
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<td>H.</td>
<td>whereas safeguarding competition inside the Monetary Union requires further coordination of the Commission services with the different Member States’ Competition Authorities,</td>
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<td>I.</td>
<td>whereas the allocation of State aid in breach of the EC Treaty is counter-productive, and favours the inefficient over the efficient, distorts competition between regions and companies and imposes an excessive burden on public budgets,</td>
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<td>J.</td>
<td>whereas the negotiations which have begun on the accession of new Member States from Eastern Europe need to take into account the transitional nature of these economies and the effects of competition legislation on their development,</td>
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<td>1.</td>
<td>Welcomes the XXVIth report on Competition Policy and considers it a useful document upon which the accountability of the Commission in pursuing its Treaty duties and responsibilities can be assessed, thus bringing Community competition policy closer to the public; in this context, supports the Commission’s DG IV in its endeavour to be equipped with adequate human resources and with the proper legal instruments;</td>
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<td>2.</td>
<td>Further encourages the Commission and the Member States to better coordinate and integrate their resources in order to establish an efficient EU system and structure to safeguard fair competition;</td>
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<td>3.</td>
<td>Believes that further exchanges of staff between the Commission and national authorities would increase the knowledge base and skills available to Member States and the Commission when dealing with complex competition cases; is appreciative of the work undertaken by the Commission and its staff, especially in the field of mergers, which is a politically sensitive field;</td>
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<td>4.</td>
<td>Calls on the Commission to undertake formally to send the European Parliament all draft Commission implementing proposals in the field of Community competition policy, such as draft block exemptions pursuant to Article 85(3) of the Treaty and Commission initiatives taken pursuant to Article 90(3) of the Treaty affecting public undertakings;</td>
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5. While appreciative of the current excellent dialogue with the Commission, and especially with the relevant Commissioner, calls for a further strengthening of the democratic control of competition policy in the European Union and for the regular information meetings already organised between the Commissioner for Competition Policy and the European Parliament’s relevant committee to become a matter of standard practice for the future at a rhythm of at least once every 3 months in common agreement between the Committee concerned and the Commissioner;  

The practice of organising regular information meetings between the relevant Parliamentary committee and the Commissioner with special responsibility for competition has proved to be very useful and beneficial for both institutions; it also increases transparency in the implementation of competition policy. For these reasons, the Commission considers that the practice should continue in the future.

6. Calls again for greater efforts to be made, within the framework of the Annual Report, to assess the impact of competition policy on other policy areas, in particular, social, regional and environmental policy;  

The Commission takes note of Parliament’s request for a better assessment to be made in the report of the impact of competition policy on other Community policy areas, and in particular on social, regional and environmental policy. It undertakes to meet Parliament’s concerns as far as possible in the next report but would stress that the XXVIIth report already contains comments on these areas.

7. Calls on the Commission to launch a debate on the application of the competition rules to the regulated professions, taking account of the special role which some professions play in society in the public interest;  

The Commission notes Parliament’s proposal with interest but does not see any urgent need to launch a debate on this subject since the number of cases involving the regulated professions remains small.

As regards the application of Articles 85 and 86

8. Reiterates its position as stated in its aforementioned resolution of 18 July 1997 on the Commission’s Green Paper on vertical restraints;  

See point 13.

9. Welcomes the introduction of the new de minimis notice of 15 October 1997; wishes to be assured that this notice will provide legal certainty, especially for SMEs, over the criteria for vertical and horizontal agreements;  

The Commission assures Parliament that the de minimis notice will increase legal certainty, in particular for SMEs, as regards the criteria for vertical and horizontal agreements since it clarifies these criteria and increases the de minimis threshold from 5% to 10% for vertical agreements.

10. Asks the Commission to publish an analysis of the de minimis threshold for agreements of minor importance to demonstrate its assertion that ‘such agreements have no significant effect either on competition or on intra-Community trade’ while minimising bureaucracy and legal costs for SMEs; further asks that future Competition Policy reports demonstrate how the Commission uses the de minimis notice in certain cases;  

The Commission considers that the criteria set out in the notice, which are expressed in figures and based on its experience, already allow corroboration of its assertion that the agreements covered by the notice have no significant effect on competition or on intra-Community trade; at the same time, they minimise red tape and costs for SMEs. It is able to assure Parliament that future reports on competition policy will illustrate how the Commission uses the de minimis notice, starting with the 1998 report (XXVIIIth report).

11. Believes that the Commission is correct to assert that SMEs are rarely capable of significantly affecting competition in cross-border trade;  

The Commission notes that Parliament approves its assertion that SMEs only rarely affect intra-Community trade.
12. Is firmly of the belief, however, that the new de minimis notice should not lead to any ‘renationalisation’ of competition policy; there is a need to ensure, with the introduction of the single currency, that competition policy remains at a supra-national level, and a partnership between the Commission and the Parliament, in order to guarantee a level playing field for companies from all Member States and a transparency of policy; The Commission shares Parliament’s desire to guarantee equal conditions of competition for firms from all Member States and to ensure that policies are transparent. It believes that the introduction of the euro will make some distortions of competition more visible and undertakes to take energetic action to prevent such distortions. It would stress that the adoption of the de minimis notice was based on a broad consensus between Member States. It therefore considers it highly unlikely that the domestic policies of these same Member States would restrict agreements covered by the Community notice. As regards agreements which are threatening enough not to fall within its scope, the notice provides for a division of labour between the Commission and the authorities and courts in the Member States. The Commission ‘will only intervene in such cases when it considers that the interest of the Community so demands, and in particular if the agreements impair the proper functioning of the internal market’. In other cases, it ‘considers that in the first instance it is for the authorities and courts of the Member States to take action’, preferably applying Community law, which the courts of all Member States and the authorities of most of them are entitled to do.

13. Recalls its resolution of 18 July 1997 on the Green Paper on vertical restraints, in particular as regards the following: — considering whether to include parameters other than market share as threshold value; The Commission took account, where possible, of the opinion expressed by Parliament in the Thyssen report when drafting the follow-up to the Green Paper.

| — block exemption regulations for selective distribution agreements; |
| — a system in which the lowest market segment is exempted from the prohibition laid down in Article 85(1) on the basis of the de minimis notice; |
| - the ceiling for the rules on de minimis to become the threshold value for the field of application of the block exemption; |

Parliament is asked to give its opinion on this follow-up (a Communication from the Commission (COM(1998) 544 final) and a proposal for two Council Regulations (COM(1998) 546 final)).

As regards the abuse of a dominant position

14. Recalls its position as stated in its aforementioned resolution of 13 November 1996, in particular paragraphs 2, 3 and 4, and requests the Commission to examine, on the basis of the ownership criterion, predatory pricing and other unfair practices, regulatory and non-regulatory barriers in the fields of telecommunications in both mobile and satellite communications as well as on-line services, of media, of air transport and of the banking and financial sectors; The Commission takes note of the fact that Parliament has requested once again that the Commission ensure that in certain industries an ‘ownership criterion’ is applied in examinations of predatory pricing and unfair competition practices. Bearing in mind that the industries mentioned were mostly former state monopolies, it would appear that Parliament is referring here to public undertakings and to the State as shareholder.

Generally speaking, examinations of predatory pricing or unfair practices are conducted in cases involving the practices covered by Article 86 of the Treaty (abuse of a dominant position — renumbered as Article 82). If the body responsible for such practices is a public undertaking, the Commission has no problem applying the provisions of that Article. Furthermore, if the State as a public authority is involved in one way or another, the Commission can also apply Article 90 (renumbered as Article 86). It does not therefore consider that the shareholder’s ‘ownership’ is a relevant criterion for making assessments in application of Community competition law.
15. Believes that the Commission should publish suitable guidelines and criteria, aimed especially at SMEs, on the definition of the relevant market in Competition Policy regulation so as to allow SMEs to evaluate their position with regards to their relevant product and geographic markets and to see if further legal investigation is recommended;

The Commission would draw Parliament’s attention to the fact that the existing notice on the definition of relevant markets for the purpose of making assessments under the competition rules applies in any case to SMEs, as it does to all businesses, whatever their size. It therefore does not intend to publish a specific notice for SMEs.

16. Calls on the Commission to present to the relevant committee of the European Parliament a comprehensive overview of the implications of the liberalisation and privatisation process in the telecommunications and energy sectors in the different Member States for competition policy, with particular regard to ownership structures and the overweening influence of certain large players in decisions regarding future development of the two sectors; calls for an examination of possible abuses of dominant positions and of the links between these two sectors, given the technological overlap between them; calls too for an examination of links between these two sectors and the banking sector;

Liberalisation is closely monitored by Commission departments in a highly transparent manner. Generally speaking, the annual report on competition policy regularly gives an update on the liberalisation process in the various sectors which it covers.

As regards telecommunications, the Commission has been conducting investigations for several years and more particularly since 1 January 1998 into the opening-up of this sector to competition. In 1998 it produced two reports on progress in implementing the liberalisation directives, both of which have been published (COM(1998)80 and COM(1998)594). Following these investigations, the Commission has initiated infringement proceedings against several Member States. Furthermore, it makes sure that the former monopolies are not abusing dominant positions that they may still hold or hindering competition by means of agreements. Proceedings have been initiated in several cases and decisions adopted. The same applies to mergers and acquisitions. These decisions are published in the Official Journal, reported on in the Competition Policy Newsletter and summarised in the annual competition report.

As for the energy sector, it has only just been liberalised. The next competition report (1998) devotes considerable attention to the subject.

The Commission therefore considers that the strict monitoring of the implementation of liberalisation and the transparency of its own action in this area are assured. If possible links between telecommunications operators, energy producers, banks or other economic operators were to lead to agreements which restricted competition or to abuses of a dominant position, the Commission would obviously deal with such cases under the provisions in force without needing to conduct preliminary studies. For example, in one case the Commission investigated the conditions in which an agreement between a telecommunications operator (Cégetel) and the SNCF was implemented.

Lastly, the Commission regularly carries out or commissions studies on network industries in Europe in order to assess the impact of the deregulation process. Examples include the study entitled ‘Europe’s Network Industries: Conflicting Priorities (telecommunications)’, which was published in September 1998, and the joint study currently being conducted by DG II and the University of Toulouse on network industries.
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<td><strong>The Commission welcomes Parliament’s satisfaction with its follow-up to the latter’s request to spell out the implications for competition policy of the Treaty of Amsterdam. It agrees with Parliament’s reading of the new Article 7d, (renumbered as Article 16) which highlights the balance struck between the powers of the Commission and those of the Member States.</strong></td>
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<td>17.</td>
<td>Welcomes the examination by the Commission, as requested, of the implications for competition policy of the Treaty of Amsterdam, in particular <strong>Article 7d on services of general economic interest</strong>, and believes that this will provide the best framework for employment creation; this confirms the Community’s role in contributing to the promotion of services of general interest while not calling into question the allocation of powers between the Commission and the Member States;</td>
<td><strong>The Commission welcomes Parliament’s satisfaction with its follow-up to the latter’s request to spell out the implications for competition policy of the Treaty of Amsterdam. It agrees with Parliament’s reading of the new Article 7d, (renumbered as Article 16) which highlights the balance struck between the powers of the Commission and those of the Member States.</strong></td>
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<td>18.</td>
<td>Believes that the future development of a liberalised Competition Policy should be coupled with the development of an enhanced consumer policy, so that consumers are able to benefit from the transparent prices across the single currency area; believes that consumers in those countries not participating in the single currency should also benefit from European-wide price reductions as a result of increased price transparency;</td>
<td><strong>The Commission shares Parliament’s view of the need to develop a consumer information policy in order to ensure the success of the single currency. Consumers in the Union must be able to benefit from the price transparency which the euro is certain to create and stimulate.</strong></td>
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<td>19.</td>
<td>Considers that consumer protection must lie at the heart of all measures taken in the field of European Union competition policy, which must keep a watchful eye not only on the increasing number of products and services offered to consumers but also on the quality thereof;</td>
<td><strong>The Commission agrees with Parliament that the consumer should ultimately benefit from the competitive process and that safeguarding competition and defending consumer interests therefore go hand in hand. It would point out, for example, that the opening-up of telecommunications markets to competition has had a positive impact by expanding supply, fostering innovation and improving the quality of goods and services.</strong></td>
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<td>20.</td>
<td>Draws attention to the need for competition policy to help boost employment by means of an improved system of allocating resources;</td>
<td><strong>The Commission agrees that competition policy should contribute to the promotion of employment. Indeed, a competitive industry in an environment of undistorted competition is the best guarantee for the sustainable development of employment.</strong></td>
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<td><strong>As regards State aid</strong></td>
<td><strong>The Commission welcomes Parliament’s interest in the Sixth Survey on state aid in the Union.</strong></td>
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| 21. | **Recalls the main findings of the Vth Survey on State Aid over the period 1994-1996:**  
   a) the overall level of aid amounted on average over the period 1994-96 to almost ECU 84 000 million, which is an underestimate due to missing data from Member States on expenditure in the agricultural sector; on the basis of the data available, State aids account for at least 1 4% of EUR15 GDP, ECU 573 per person employed and 2 6% of government expenditure;  
   b) overall State aids given by some Member States are extremely high;  
   c) about 46% of overall aid (i.e. ECU 38 318 million on average over the period 1994-96) went to the manufacturing sector; the disparities in the level of aid between Member States are huge: in percent of value added the highest aid level is nine times the lowest aid level; allowing this level of aid for manufacturing, when it is concentrated in certain Member States, is creating a potential distortion of competition; | **The Commission welcomes Parliament’s interest in the Sixth Survey on state aid in the Union.** |
d) State aid to the manufacturing sector was distributed as follows: 30% for horizontal objectives (i.e. R&D, environment, SMEs, trade, energy saving etc.), 13% for shipbuilding, steel and other sectors, and 56% for regional objectives; aid for horizontal objectives has fallen from 40% of overall aid in 1988-90 (for the EUR12) to around 30% in 1994-96 (for the EUR 15) while sector-specific interventions have risen slightly; this trend should be reversed as sectoral objectives have the potential to create even greater distortive effects than horizontal objectives;

The Commission shares Parliament’s opinion, provided that such aid does not give rise to abuses (R&D, training) or threaten by its amount the liberalisation of certain markets such as that for electricity (environmental protection); in this connection, the Commission would highlight the adoption in July 1998 of the framework on training aid. The Commission has also observed the same trend as Parliament as regards the amounts granted in horizontal aid and those granted to individual companies.

| 22 | Reaffirms its support for State aid deemed to be in the common interest, such as R&D, SMEs, training, energy saving and environmental aid; notes however that such aid has been decreasing while aid granted to individual enterprises has been rising; |
| 23 | Notes the links between State aids and competition policy, as set out in the Communication from the Commission to the Member States of 17 March 1998; agrees with the need for increased consistency between national aid schemes, Union aid schemes and competition policy; |
| 24 | Believes nevertheless that the volume of overall aid in the Community is massive, and indicates a stable tendency which distorts fair competition, is incompatible with the internal market and undermines the EU’s commitment to a free world market; |
| 25 | Calls for the introduction of a published and regularly updated register of all State aids, including State aids agreed under block exemptions; this would provide information to third parties about the level of State aids and allow the Commission to produce accurate and up-to-date figures on such aids; believes that the Commission should also publish on its web-site all State aid agreements, including those individual agreements covered by block exemptions, as soon as they have been agreed, giving the name of the companies involved, the purpose of the aid, the amount of aid given and the locations where these aids will be disbursed; this information should be available in all official European languages; believes that there should also be a simple facility, via this site, for third parties to have complaints about individual State aids independently investigated; |

The Commission has no comment to make on this subject. The Commission has observed the same trend as Parliament as regards the amounts granted in horizontal aid and those granted to individual companies.

The Commission has no comment to make on this subject.

The Commission has no comment to make on this subject.

The Commission’s survey of state aid, based on the annual reporting from the Member States, provides extensive information on the level and structure of state aid granted in the Member States. From 1998 the survey, which is available in all official language versions on the Internet, will be published annually. Furthermore, all decisions are published in the Official Journal, which is also available on the Internet. The publication contains the information desired by Parliament.

In so far as block exemptions are concerned, the Commission has laid down detailed rules that will apply to Member States to ensure transparency and satisfactory monitoring of aid. For example, as regards implementation of aid schemes or individual aid measures not forming part of any scheme which have been exempted pursuant to such rules, Member States are required to forward to the Commission, with a view to publication in the Official Journal, summaries of the relevant information.
In order to improve access to information, the Annual Competition Policy Report, which lists all individual state aid decisions adopted and gives a detailed overview of the important cases, is also available to the general public by way of the Internet. In the meantime the Commission is continually seeking to improve access to state aid information.

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<td>Like Parliament, the Commission believes that the effectiveness of regional aid as an instrument of regional development must be ensured. Eligibility for regional aid gives the regions concerned a relative advantage over other regions which are not eligible for aid. Too broad a coverage would diminish this relative advantage, rendering the aid ineffective and leading to a misallocation of state resources. That is why the Commission has decided to reduce current regional aid coverage by 4 percentage points and to set the overall ceiling at 42.7% of the Community’s population. In this connection, the provisions of the new guidelines on national regional aid, especially the reduction in admissible aid intensities for large firms, are of particular importance. This reduction meets the concern that distortions of competition caused by such aid should be mitigated, while retaining cohesion as an overriding objective. In addition to the general reduction in intensities, the Commission also laid down specific rules for the differentiation of maximum aid intensities according to the seriousness and extent of regional problems.</td>
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<tr>
<th>27. Welcomes the forthcoming adoption of a ‘procedural regulation’ on State aids and the fact that this regulation includes fresh guarantees on the protection of third parties, and highlights the need to maintain a certain degree of consistency and homogeneity with regard to the judicial protection reserved for undertakings and private persons under Community competition law, without prejudice to the principle of the useful effect of that law;</th>
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<td>The Commission also recognises that the most remote regions suffer from a number of permanent disadvantages as a result of their location. That is why, under the guidelines on national regional aid, aid intended to compensate in part for additional transport costs may be authorised in all the most remote regions which qualify for one of the regional derogations. Furthermore, higher aid intensities may be granted in these regions: up to 65% net in Article 92(3)(a) regions and up to 30% in Article 92(3)(c) regions (renumbered as Articles 87(3)(a) and 87(3)(c) respectively).</td>
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<tr>
<th>28. Considers that, with regard to the supervision of State aid for regional development purposes, account must be taken of the need to ensure economic and social cohesion and the method of determining resources must take account of the legal concept of ultraperipherality;</th>
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<td>a) the establishment of uniform minimum standards to prevent anti-competitive behaviour such as the formation of cartels, the abuse of a dominant market position or vertical and horizontal restrictions on competition;</td>
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<td>b) the requirement for all signatory States to set up an independent regulatory authority to ensure compliance with minimum competitive standards, and the provision of a mechanism for cooperation between the national competition authorities with a view to achieving approximation of standards;</td>
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<td>c) the requirement for all signatory States to apply their national competition law to states of affairs outside their own territory only when this is clearly in the public interest;</td>
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<td>d) the incorporation at WTO level of the principle of 'positive comity' as set out in Articles III to V of the Agreement between the European Communities and the Government of the United States of America regarding the application of positive comity principles in the enforcement of their competition rules;</td>
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<td>e) the extension of the dispute settlement mechanism contained in the Agreement establishing the WTO to cover disputes in connection with the enforcement of international minimum competitive standards;</td>
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|   |   |
|   |   |
|   | An international framework for competition rules established under the aegis of the WTO should include an undertaking by each member country to set in place competition rules and structures. In this context, the competition authorities should publish an annual report, which would be one way of allowing them to establish that they have fulfilled that undertaking. The publication of an annual report could thus be imposed without it being necessary to amend Annex 3. |

|   | This interdependence implies not only closer bilateral cooperation in the competition field but also the establishment of a multilateral framework for competition rules. |
|   | The Commission fully endorses Parliament’s desire to see trade negotiations launched which extend to the competition field. |

|   | However, establishing minimum standards is not always possible. The Commission therefore prefers to take a more flexible approach aimed at adopting common ways of combating anti-competitive behaviour which has an effect on trade and investment. Such an approach would include, among other things, the following: |
|   | — prohibition of the behaviour usually banned by those countries which have competition rules (price cartels; agreements on public procurement, market-sharing, etc.); |
|   | — definition of criteria to assess practices where there is a lesser degree of convergence (vertical restrictions, abuses of dominant positions, etc.). |
38. Believes that enlargement to the countries of central and eastern Europe could create tensions over the adoption of competition policy legislation; therefore welcomes the assistance given by the Commission for the application of anti-trust legislation in these countries;

39. Instructs its President to forward this resolution to the Commission and to the Council.

The Commission welcomes Parliament’s satisfaction with the assistance granted to the CEECs with a view to applying the competition rules.

B — Economic and Social Committee


The Section for the Single Market, Production and Consumption, which was responsible for preparing the Committee’s work on the subject, adopted its opinion on 19 January 1999. The rapporteur was Mr Sepi.

At its 360th plenary session (meeting of 27 January 1999), the Economic and Social Committee adopted the following opinion by 37 votes to three, with four abstentions.

1. Introduction

1.1 The Economic and Social Committee first and foremost welcomes the inclusion in the XXVIIth Competition Report of a foreword by Commissioner Van Miert outlining the prospects, role and general objectives of this policy sector.

1.2 The Committee has, in fact, always been in favour of viewing the Commission’s work on competition policy as an instrument for pursuing the general objectives of EU economic policy and not as an end in itself.

1.3 In numerous opinions on past reports, it has been stressed that excessively juridical and formalistic interpretations of competition policy should be avoided. Instead more emphasis should be placed on economic and societal factors.

1.4 It is important, therefore, to highlight this new approach (which, in the Committee’s view, is not merely formal) whereby this report is not just an account of the work carried out by the bodies responsible, but is also an outline of the future prospects which constitute the framework for Commission action.

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275 Reports on Competition Policy
1995, rapporteur Mr Bagliano, OJ C 75 of 10.3.1997, and
1994, rapporteur Mr Sepi, OJ C 39 of 12.2.1995
1.5 The Committee believes that this is an important message for the business world and, more generally, for the EU public, who can bear it in mind before making decisions.

1.6 This kind of approach is essential at a time when economic integration is about to make a quantum leap with EMU, which will complete the single market, and when EU enlargement is on the horizon.

1.7 In this context, it is equally important that the Commission continue its streamlining of legislation, so as to ensure that the Treaty is applied more effectively and consistently.

1.8 Lastly, the Committee wishes to highlight the growing importance of market globalization for several products and services. Greater weight must be given to this when assessing the effective implementation of the Treaty articles, as when the latter were drawn up globalization had only just begun.

1.9 The Commission must therefore take account of European companies which operate on the international market, and must keep this broader context in mind when it applies the rules.

1.10 The Committee draws attention to the excessive time lag between its opinion and the events illustrated in the Commission report. It therefore calls for a more streamlined presentation/communication schedule between the Commission and the ESC, to enable opinions to impact more quickly and effectively on the other institutions.

2. The report

2.1 As previously stated, the report contains a political foreword by the Commissioner for competition policy, Mr Van Miert, which highlights the relationship between competition policy and the general economic objectives of the EU.

2.2 The report acknowledges the new situation brought into being by the Treaty of Amsterdam, notably the new Article 7d which deals with services of general interest and their role in furthering economic and social cohesion.

2.3 The Commission underlines the need to modernize competition policy, which is ‘still rooted in the early years of the common market’.

2.4 With regard to the antitrust aspects, the report highlights the efforts made to modernize both the vertical restraint policy, which should culminate in concrete legislative measures in 1998, and the policy on horizontal agreements, the updating of which has only just begun. There are three objectives: to adapt the legislation and to make it more effective, to ensure transparency and to apply the principle of subsidiarity.

2.5 As for mergers, the report mentions the amendment of EEC Regulation No. 4064/89, which makes it simpler and more effective, particularly because of the new definition of ‘joint venture’, but also because it confirms the single-authority principle for cross-border mergers.

2.6 The Committee stresses the importance of the notice on the new definition of agreements of ‘minor importance’ which are not normally covered by Article 85(1) of the EC Treaty.
2.7 Another innovation is the establishment of criteria and procedures for cooperation between the Commission and national competition authorities, confirming the single-authority principle.

2.8 The Commission has taken significant action on state aid, submitting a proposal for regulation on horizontal state aid and, subsequently, one on procedures applying to state aid, published in 1998. In this connection the Commission has issued a notice with the objective of ‘clarifying and reinforcing the application of the state aid rules in order to reduce distortions of competition in the single market’276.

2.9 The Commission states that EU enlargement will inevitably lead to considerable difficulties in monitoring state aid.

2.10 In 1997, supervisory activity was particularly intense. The Commission dealt with 1338 cases — a significant increase of 92 cases over 1996. However, while the total number of state aid cases remained more or less stable, merger cases grew by 31%. 1,165 of all cases have been closed.

2.11 The Commission frequently highlights the successes of the liberalization of public services, ‘in accordance with the principle of access for all Union citizens’. Particular progress has been made in the transport and telecommunications sectors. The main problem for the future lies in the liberalization of the energy sector.

2.12 The Commission report also underlines the two main problems in the field of international relations: the adoption of the competition rules by applicant countries and cooperation with competition authorities outside Europe, notably with the US Antitrust Commission.

3. General comments

3.1 In emphasizing DG IV’s commitment to pursuing, amongst other things, the EU’s general social objectives via competition policy, the foreword on strategy reveals how this aspect may have been sometimes neglected in the past. While reiterating the considerable merits of DG IV’s drive to modernize EU economies and businesses — not least because of the benefits to consumers — the Committee notes that DG IV displays an excess of formalism. Moreover, it calls on the Commission to redouble its efforts to raise public awareness of the results of its work.

3.2 The foreword states that EMU and, might we add, the single market, will lead to a huge restructuring of the economy. This will inevitably increase the number of mergers, although this is not necessarily detrimental for European competitiveness in certain globalized markets — hence the need for closer supervision to ensure that consumers and other economic operators are not put at a disadvantage.

3.3 The Committee wishes to emphasize that the internal (EMU, single market etc.) and external (enlargement, international cooperation) changes that are to take place over the next few years will demand careful consideration of the relationship between the new tasks and the resources needed to accomplish them. These new tasks and the increasing complexity of existing tasks will require an enhanced intervention capability.

3.4 The Committee believes that reforms are needed on four fronts: more efficient working patterns; judicious selection of cases to be handled at EU level; decentralization to the national authorities; and the adoption of clearer and more consistent legislation.

3.5 More effective monitoring is a necessary (albeit insufficient) condition for ‘downward price convergence’ — one of the advantages that European consumers are expecting from monetary union.

3.6 The Committee also draws the Commission’s attention to the fact that the anticipated increase in mergers and acquisitions will bring a need for new rules, together with new instruments to cushion the social impact of restructuring. The single currency could also facilitate the formation of cartels (explicit or otherwise), and anti-trust controls will be needed.

3.7 For an effective employment policy, the Luxembourg summit suggested that ‘it is important to focus on aid arrangements which favour economic efficiency and employment without causing distortions of competition’. To determine suitable guidelines on the matter, the Commission should urgently put forward its ideas on competition and other aspects and establish which instruments to use in order to pursue them.

3.8 The foreword acknowledges this need but does not indicate how it is to be addressed. In particular, it is not clear whether the Commission intends to treat this objective as a side-effect of improved competitiveness, or whether — as the Luxembourg summit seems to suggest — new, employment-oriented criteria for the Commission’s action are being drawn up.

3.9 It is also essential to modernize the instruments and procedures involved in the liberalization of public services. The balance between the market and citizens’ access to such services needs to be further redressed in pursuance of Article 7d of the Amsterdam Treaty.

3.10 An issue that has in the past been exclusively a matter for the Member States, but is now of considerable interest due to the advent of the single currency and the growth in competition, is that of taxation and social security contributions. Several countries are calling for coordination in this field. The Committee believes that failure to coordinate could lead to serious distortions of competition and a shift in the tax burden towards taxation of labour rather than of financial returns.

3.11 In any event, these new areas of Community policy will increasingly require an extension of the three-way dialogue between all the parties concerned, in view of the impact of competition on EU social and industrial policies.

3.12 EU competition policy must be a living instrument that keeps in step with the market and with market trends. When considering or taking decisions on this policy, careful thought must therefore be given to the best way of tackling new circumstances (as the Commission itself acknowledges in point 2.3). Here the Committee would highlight the concentration in the
consumer product distribution sector and the resultant economic dependence vis-à-vis industry, the situation of the defence industry, or certain agreements on minimum fees; although these areas are somewhat delicate, they could affect general competitiveness.

3.13 Since the McDonnell Douglas/Boeing case, the problem of international controls for certain raw materials and advanced technology sectors has raised its head in many other sectors. A global competition policy requires international control instruments, and the Committee urges the Commission to pursue its negotiations with this aim in mind.

3.14 In several technological sectors in economic areas outside Europe, public support is far more widespread and multi-faceted than in the EU. The Committee asks the Commission to consider the case for introducing similar industrial policy instruments, so that European industry will not be at a disadvantage in these sectors (space, defence, aeronautics), which are of strategic importance to the economy and are global market players.

4. Specific comments

4.1 Numerous Committee opinions277 (e.g. those on state aid and vertical restraints) have already set out the Committee’s position on individual Commission regulations and communications. The present opinion therefore makes no comment on the latter, but merely confirms the validity of previous opinions. It should, however, be stressed that, as recommended in previous Committee opinions278, the Commission’s ‘legislative’ initiatives (i.e. regulations and directives) and ‘quasi-legislative’ initiatives (communications) are becoming more important than case law.

4.2 There is a certain tendency to off-load part of competition policy to national authorities. The Committee agrees that this would help to avoid an overload of cases in Brussels, but believes that the rules should be harmonized and that competition authorities should be set up in all Member States with the same basic powers as those conferred upon the Commission by the Treaties. The Member States must ensure that decentralization does not lead to confused or inconsistent enforcement of the rules.

4.3 Here the Committee notes that the Commission communication mentioned in point 12 of the report is not binding on the Member States. Close vigilance will therefore be necessary, particularly in cases where the national authorities do not have appropriate machinery for enforcing EU rules.

4.3.1 The Committee feels that the proposed new regulations and policy on vertical restraints should place more emphasis on market data, rather than on abstract legal definitions.

4.4 The Committee emphasizes the need to fully revise the rules, to give legislative substance to Commission procedures and Court rulings, thus providing European citizens with a practical,

277 State Aid OJ C 129 of 27.4.1998
Aid to shipbuilding OJ C 129 of 27.4.1998
Defence-related industries OJ C 284 of 14.9.1998

278 State aid OJ C 129 of 27.4.1998
transparent system and enabling applicant countries to adapt their systems rapidly. In this context, the Commission’s proposals are positive, particularly the one on control procedures and sanctions on illegitimate state aid, as it demonstrates the Commission’s aim to overcome the differences in the commercial law of Member States.

4.5 Given the above, and the Commission’s position, an in-depth study should be made of taxation and social security contributions, with a view to competition regulations being included in the ‘code of conduct’ that the Commission has recently proposed. The Committee would be happy to contribute to this debate, which it hopes can be brought to a swift, fruitful conclusion.

4.6 Decisions sometimes take too long. The Committee stresses the need to set firm deadlines for the adoption of decisions in all fields of competition policy.

4.7 The Committee observes that merger notifications have increased, but there have been fewer infringements than in 1996, while the reverse is true for state aid. This clearly depends on the acceleration of certain economic processes. However, it might be expedient to re-examine state aid issues, particularly in the light of the above-mentioned restructuring.

4.8 With regard to regional state aid provided under Article 92(3) of the Treaty, the Committee notes the Commission proposal that areas eligible for Structural Funds support under Objectives 1 and 2 of the Funds should be the same as those areas assisted by Member States. Whilst the Committee accepts that this should be the case generally, it also recognizes that increased national support may be a corollary to intensifying the degree of concentration in the application of EU structural funding, and therefore would stress that regional state aid under Article 92(3) is a separate instrument of national economic policy which a Member State should be able to use at its discretion where the relevant case for so doing can be established.

4.9 In this regard, it has to be said that under the current system, and despite the Commission’s valiant efforts, there are still great imbalances in state aid, which favour the larger countries.

4.10 As announced in the annual report, in November 1998 the Commission published a ‘framework’ for vocational training aid which establishes new rules and procedures, on the grounds that some training aid can be considered as state aid. The Commission document introduces the rather vague concept of ‘training that is in the interests of the company’.

4.11 Life-long training is essential in today’s information society. Reducing or obstructing workers’ training in this field, notwithstanding the employment and training objectives announced by the European Council at various summits, could make it even more difficult to respect commitments between now and the end of 1999 — the last year of the current programming period for the Structural Funds.

4.12 A qualitative shift of public aid towards horizontal objectives such as research, SMEs and vocational training should be encouraged, while at the same time reducing public aid for operating costs.

279 Point 293

COMPETITION REPORT 1998
4.13 The Committee welcomes the recent agreement with the US antitrust authorities. However, the OECD and WTO must work for truly international regulations and make sure that these are enforced.

4.14 In order to fulfil its growing range of duties in this field, the Commission should set up in-house research facilities and promote external studies on specific issues.

4.15 The annual report is becoming increasingly user-friendly. The flow of information throughout the year should also be stepped up, in order to explain particularly significant initiatives and to give details of studies which have been conducted with a view to defining the most important cases.

4.16 In the Committee’s view, the task of introducing the Member States’ competition policies in the candidate countries remains extremely difficult, despite the Commission’s efforts. Applying these policies too rigorously would have dramatic social consequences, but not applying them would seriously distort competition. A transitional stage is thus needed, to take account of the social as well as economic aspects of enlargement in this sector.

4.17 The WTO negotiations and bilateral agreements must always take account of ILO conventions on working conditions, which should dovetail with international trade rules.

Brussels, 27 January 1999

The President of the Economic and Social Committee
Beatrice Rangoni Machiavelli

The Secretary-General of the Economic and Social Committee
Patrick Venturini

2. Reply by the Commission to the opinion on the XXVIIth Report on Competition Policy

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<td>Rapporteur: Mr. Sepi</td>
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<td>1. Introduction</td>
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<td>1.2 The Committee has, in fact, always been in favour of viewing the Commission’s work on competition policy as an instrument for pursuing the general objectives of EU economic policy and not as an end in itself.</td>
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<td>The Commission shares the view of the ESC that competition policy helps to achieve the general objectives of EU economic policy.</td>
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1.3 In numerous opinions on past reports, it has been stressed that excessively juridical and formalistic interpretations of competition policy should be avoided. Instead more emphasis should be placed on economic and societal factors.

The Commission has taken account of that request and, in 1995, remodelled the Report so that it now includes a more ‘political’ and less formal part. However, it should be borne in mind that competition policy essentially consists in implementing statutory rules to protect competition. The Report therefore has to reconcile the twofold need for transparency and exactitude which may sometimes give a formal tone.

1.4 It is important, therefore, to highlight this new approach (which, in the Committee’s view, is not merely formal) whereby this report is not just an account of the work carried out by the bodies responsible, but is also an outline of the future prospects which constitute the framework for Commission action.

The Commission welcomes the fact that the foreword by Mr Van Miert is viewed so positively by the ESC. The Committee clearly identified the reason for the innovation, i.e. to incorporate competition policy into the context of the major objectives of the Community.

The Committee notes in particular that the Commission should pay particular attention to the globalisation of markets. The Commission certainly concurs with that analysis, which is why the foreword to the next Competition Report will be dealing with the Commission’s international activities relating to competition.

1.5 The Committee believes that this is an important message for the business world and, more generally, for the EU public, who can bear it in mind before making decisions.

see 1.4

1.6 This kind of approach is essential at a time when economic integration is about to make a quantum leap with EMU, which will complete the single market, and when EU enlargement is on the horizon.

see 1.4

1.7 In this context, it is equally important that the Commission continue its streamlining of legislation, so as to ensure that the Treaty is applied more effectively and consistently.

1.8 Lastly, the Committee wishes to highlight the growing importance of market globalisation for several products and services. Greater weight must be given to this when assessing the effective implementation of the Treaty articles, as when the latter were drawn up globalisation had only just begun.

see 1.4

1.9 The Commission must therefore take account of European companies which operate on the international market, and must keep this broader context in mind when it applies the rules.

see 1.4

1.10 The Committee draws attention to the excessive time lag between its opinion and the events illustrated in the Commission report. It therefore calls for a more streamlined presentation/communication schedule between the Commission and the ESC, to enable opinions to impact more quickly and effectively on the other institutions.

The Commission points out that the report on the preceding year is usually adopted at the end of March/beginning of April of the following year, and that the institutions receive a copy of the adopted report immediately. It feels it would be difficult to produce the report earlier, in particular in view of the rules on interdepartmental consultation and translation constraints.

2. The report

2.1 As previously stated, the report contains a political foreword by the Commissioner responsible for competition policy, Mr Van Miert, which highlights the relationship between competition policy and the general economic objectives of the EU.

Identical reply to that given to points 1.4 to 1.9.
2.2 The report acknowledges the new situation brought into being by the Treaty of Amsterdam, notably the new Article 7d which deals with services of general interest and their role in furthering economic and social cohesion.

The Commission has noted this consideration.

2.3 The Commission underlines the need to modernise competition policy, which is 'still rooted in the early years of the common market'.

2.4 With regard to the antitrust aspects, the report highlights the efforts made to modernise both the vertical restraint policy, which should culminate in concrete legislative measures in 1998, and the policy on horizontal agreements, the updating of which has only just begun. There are three objectives: to adapt the legislation and to make it more effective, to ensure transparency and to apply the principle of subsidiarity.

2.5 As for mergers, the report mentions the amendment of EEC Regulation No 4064/89, which makes it simpler and more effective, particularly because of the new definition of 'joint venture', but also because it confirms the single-authority principle for cross-border mergers.

2.6 The Committee stresses the importance of the notice on the new definition of agreements of 'minor importance' which are not normally covered by Article 85(1) of the EC Treaty.

2.7 Another innovation is the establishment of criteria and procedures for cooperation between the Commission and national competition authorities, confirming the single-authority principle.

2.8 The Commission has taken significant action on state aid, including a proposal for a regulation on horizontal state aid and, subsequently, one on procedures applying to state aid, published in 1998. In this connection the Commission has issued a notice with the objective of 'clarifying and reinforcing the application of the state aid rules in order to reduce distortions of competition in the single market.'

The Commission points out that the notice referred to specifically states that the state aid rules are applicable to measures relating to the direct taxation of companies.

2.9 The Commission states that EU enlargement will inevitably lead to considerable difficulties in monitoring state aid.

2.10 In 1997, supervisory activity was particularly intense. The Commission dealt with 1 338 new cases, a significant increase of 92 cases over 1996. However, while the total number of state aid cases remained more or less stable, merger cases grew by 31%. 1 165 of all cases have been closed.

The sharp increase in the number of mergers monitored at Community level rose again in 1998 to reach a record level (an increase of 65% over the preceding year), showing once again the need to amend the rules applied by the Commission and to adjust the resources allocated for that purpose to the rapid evolution of the economic environment.

2.11 The Commission frequently highlights the successes of the liberalisation of public services, 'in accordance with the principle of access for all Union citizens'. Particular progress has been made in the transport and telecommunications sectors. The main problem for the future lies in the liberalisation of the energy sectors.

On this matter the ESC fully reflects the views of the Commission.
2.12 The Commission report also underlines the two main problems in the field of international relations: the adoption of the competition rules by applicant countries and cooperation with competition authorities outside Europe, notably with the US Antitrust Commission.

The Commission indeed considers that relations with Central and East European countries and with the antitrust authorities of the US (i.e. the Department of Justice and the Federal Trade Commission) are an important issue. Relations with the US in this area have been close and productive and contributed to resolving a number of difficult cases. The good results of this ongoing cooperation were reported by the Commission at regular intervals in the following reports to the Council and the Parliament: first report covering the period from 10.4.95 (when the 1991 Agreement entered into force) to 30.6.96, second report covering the period from 1.7.96 to 31.12.96, and third report covering the period from 1.1.97 to 31.12.97.

3. General comments

3.1 In emphasising DG IV's commitment to pursuing, amongst other things, the EU's general social objectives via competition policy, the foreword on strategy reveals how this aspect may have been sometimes neglected in the past. While reiterating the considerable merits of DG IV's drive to modernise EU economies and businesses — not least because of the benefits to consumers — the Committee notes that DG IV displays an excess of formalism. Moreover, it calls on the Commission to redouble its efforts to raise public awareness of the results of its work.

The Commission believes that a misunderstanding with the Committee has arisen. Through its competition policy, the Commission has always pursued the general social objectives of the Community. Its first aim is to ensure that the European consumer enjoys the benefits of a dynamic competitive process, whether in the form of the lowest prices, technological innovation or the availability of a wide range of products and services. Furthermore, in helping to strengthen the competitiveness of the European economy, Community competition policy helps to create or maintain stable and lasting employment.

The Committee refers to excessive formalism in the drive to modernisation. The Commission can only deny such an assessment of the efforts it has made in the last few years to make its laws and regulations closer to economic reality, e.g. the 'de minimis' notice or its review of the vertical restraints policy. It is true that there is still a 'formal' framework inasmuch as the Commission's activities are governed by the Treaty, the regulations and an abundant case-law.

Lastly, the Committee asks the Commission to improve communication and information. In addition to the Competition Report, the Commission publishes a specialised review four times a year (Competition Policy Newsletter), regularly produces press statements, in particular via an Internet site, and publishes its decisions in the Official Journal. The Commission representatives, starting with the Commissioner responsible for competition, respond to a number of invitations to comment on competition policy. Consequently, the Commission would like to know what new efforts the Committee would recommend?

3.2 The foreword states that EMU and, might we add, the single market, will lead to a huge restructuring of the economy. This will inevitably increase the number of mergers, although this is not necessarily detrimental for European competitiveness in certain globalised markets, hence the need for closer supervision to ensure that consumers and other economic operators are not put at a disadvantage.

The Committee's observation provides an accurate reflection of events in 1998, as regards both the increase in the total number of transactions monitored and the number of mergers posing competition problems and leading either to the initiation of an in-depth investigation or to the imposition of remedies in the first stage of the examination.
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<td>3.3</td>
<td>The Committee wishes to emphasise that the internal (EMU, single market, etc.) and external (enlargement, international cooperation) changes that are to take place over the next few years will demand careful consideration of the relationship between the new tasks and the resources needed to accomplish them. These new tasks and the increasing complexity of existing tasks will require an enhanced intervention capability. The Commission is very much aware of the new challenges with which its departments will have to cope in spite of increasingly rare allocations of new resources.</td>
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<td>3.4</td>
<td>The Committee believes that reforms are needed on four fronts: more efficient working patterns; judicious selection of cases to be handled at EU level; decentralisation to the national authorities; and the adoption of clearer and more consistent legislation. The Commission agrees with the Committee’s proposed reforms, especially since they are already being studied or implemented by the Commission. As regards working patterns, the Commission is constantly adapting its structures to the requirements of monitoring, for example by setting up recently a second directorate for state aid and a new ‘cartels’ unit. As regards the judicious selection of cases, the Commission redirected its monitoring activities towards cases with a clear Community interest, through its new ‘de minimis’ notice and a review of its policy on vertical restraints. As regards decentralisation, it invited the national competition authorities to take a more active part in the process by adopting a notice on cooperation between the Commission and the national authorities. Lastly, as regards improved transparency and consistency of Community legislation, the Commission has in recent years simplified its legal instruments and clarified its decision-making policy through the medium of notices (e.g. the notices accompanying the review of the merger control regulation, and the notices on the liberalisation of telecommunications). It is however aware that improvements are still needed and will present proposals in the course of 1999.</td>
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<td>3.5</td>
<td>More effective monitoring is a necessary (albeit insufficient) condition for ‘downward price convergence’ — one of the advantages that European consumers are expecting from monetary union. The Commission shares the Committee’s opinion.</td>
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<td>3.6</td>
<td>The Committee also draws the Commission’s attention to the fact that the anticipated increase in mergers and acquisitions will bring a need for new rules, together with new instruments to cushion the social impact of restructuring. The single currency could also facilitate the formation of cartels (explicit or otherwise), and anti-trust controls will be needed.</td>
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<td>As regards antitrust controls which could hamper the construction of EMU, the Commission has in recent months displayed greater severity by imposing fines on several price-fixing cartels or other commercial agreements. It has also created a new unit responsible for cartels. The Commission considers that increasing merger control urgently requires more staff or a reorganisation of departments rather than new rules, as proposed by the Committee. The Merger Control Regulation is the most effective instrument for a priori control of mergers and acquisitions, especially with the greater flexibility introduced by the review in 1997 in the area of commitments and remedies in the first stage of the examination. It can still be improved if necessary, in particular by rationalising and simplifying procedures. That will be the aim of the next review, consultations on this topic between the Commission and the national competition authorities already being under way. Lastly, the Committee calls for the development of social instruments in connection with merger control. The Commission shares the Committee’s concern to ensure that mergers benefit all economic actors. That is the intention of the thirteenth recital of the Regulation which states that the Commission must place its appraisal within the general framework of the achievement of the fundamental objectives of the Treaty, including that of strengthening the Community’s economic and social cohesion. However, the Commission believes in a consistent Merger Control Regulation, i.e. one which favours a competitive analysis. That policy was not called into question during the review of the Regulation.</td>
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<td>3.7</td>
<td>For an effective employment policy, the Luxembourg summit suggested that ‘it is important to focus on aid arrangements which favour economic efficiency and employment without causing distortions of competition’. To determine suitable guidelines on the matter, the Commission should urgently put forward its ideas on competition and other aspects and establish which instruments to use in order to pursue them.</td>
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<td>The Commission agrees with the view that competition policy should contribute to the promotion of employment. Indeed, a competitive industry in an environment of undistorted competition is the best guarantee of sustainable development of employment.</td>
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<td>3.8</td>
<td>The foreword acknowledges this need but does not indicate how it is to be addressed. In particular, it is not clear whether the Commission intends to treat this objective as a side-effect of improved competitiveness, or whether — as the Luxembourg summit seems to suggest — new, employment-oriented criteria for the Commission’s action are being drawn up.</td>
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<td>The Commission agrees with the Committee that liberalisation policy should take account of the need to maintain good quality services of general interest for all Union citizens. It has consistently worked to that end. However, it does not believe it is necessary to adopt new legal or procedural instruments. The existing texts are sufficient to ensure a balance is maintained between a universal service and competition, as evidenced in its work in the telecommunications sector, for example.</td>
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<td>3.9</td>
<td>It is also essential to modernise the instruments and procedures involved in the liberalisation of public services. The balance between the market and citizens’ access to such services needs to be further redressed in pursuance of Article 7d of the Amsterdam Treaty.</td>
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3.10 An issue that has in the past been exclusively a matter for the Member States, but is now of considerable interest due to the advent of the single currency and the growth in competition, is that of taxation and social security contributions. Several countries are calling for coordination in this field. The Committee believes that failure to coordinate could lead to serious distortions of competition and a shift in the tax burden towards taxation of labour rather than of financial returns.

3.11 In any event, these new areas of Community policy will increasingly require an extension of the three-way dialogue between all the parties concerned, in view of the impact of competition on EU social and industrial policies.

3.12 EU competition policy must be a living instrument that keeps in step with the market and with market trends. When considering or taking decisions on this policy, careful thought must therefore be given to the best way of tackling new circumstances (as the Commission itself acknowledges in point 2.3). Here the Committee would highlight the concentration in the consumer product distribution sector and the resultant economic dependence vis-à-vis industry, the situation of the defence industry, or certain agreements on minimum fees; although these areas are somewhat delicate, they could affect general competitiveness.

3.13 Since the McDonnell Douglas/Boeing case, the problem of international controls for certain raw materials and advanced technology sectors has raised its head in many other sectors. A global competition policy requires international control instruments, and the Committee urges the Commission to pursue its negotiations with this aim in mind.

3.14 In several technological sectors in economic areas outside Europe, public support is far more widespread and multi-faceted than in the EU. The Committee asks the Commission to consider the case for introducing similar industrial policy instruments, so that European industry will not be at a disadvantage in these sectors (space, defence, aeronautics), which are of strategic importance to the economy and are global market players.

4. Specific comments

4.1 Numerous Committee opinions (e.g. those on state aid and vertical restraints) have already set out the Committee’s position on individual Commission regulations and communications. The present opinion therefore makes no comment on the latter, but merely confirms the validity of previous opinions. It should, however, be stressed that, as recommended in previous Committee opinions, the Commission’s ‘legislative’ initiatives (i.e. regulations and directives) and ‘quasi-legislative’ initiatives (communications) are becoming more important than case-law.
<p>| 4.2 | There is a certain tendency to off-load part of competition policy to national authorities. The Committee agrees that this would help to avoid an overload of cases in Brussels, but believes that the rules should be harmonised and that competition authorities should be set up in all Member States with the same basic powers as those conferred upon the Commission by the Treaties. The Member States must ensure that decentralisation does not lead to confused or inconsistent enforcement of the rules. | The Commission agrees that decentralisation must be accompanied by certain precautions. It notes with satisfaction that in 1998, harmonisation of the laws of the Member States with Community law continued. The new Danish and Dutch laws, harmonised with Community law, entered into force on 1 January 1998. New laws, similar to the Community rules, were adopted in Germany and the United Kingdom. The new Finnish law on mergers is also based on the European model. These statutory amendments go hand in hand with a strengthening of the powers and the resources of the competition authorities concerned. |
| 4.3 | Here the Committee notes that the Commission communication mentioned in point 12 of the report is not binding on the Member States. Close vigilance will therefore be necessary, particularly in cases where the national authorities do not have appropriate machinery for enforcing EU rules. | The Commission points out that the communication on cooperation with the national competition authorities in handling cases falling within the scope of Articles 85 or 86 itself provides for mechanisms aimed at avoiding discrepancies and inconsistencies in the application of the law on restrictive practices and dominant positions. It assures the Committee that it keeps a close watch on the actual application of the notice, especially as regards national authorities without the necessary legislation to apply Articles 85 and 86 themselves. |
| 4.3.1 | The Committee feels that the proposed new regulations and policy on vertical restraints should place more emphasis on market data, rather than on abstract legal definitions. | One of the main aims of the Commission’s new policy on vertical restraints and of the draft implementing regulations is precisely to give greater importance to market data. |
| 4.4 | The Committee emphasises the need to fully revise the rules, to give legislative substance to Commission procedures and Court rulings, thus providing European citizens with a practical, transparent system and enabling applicant countries to adapt their systems rapidly. In this context, the Commission’s proposals are positive, particularly the one on control procedures and sanctions on illegitimate state aid, as it demonstrates the Commission’s aim to overcome the differences in the commercial law of Member States. | The Commission has responded to this point by continuing its work in 1998 in the field of restrictive practices and dominant positions, in particular as regards vertical and horizontal restraints, the greatest progress having been achieved in the former. As regards procedure in this area, it adopted Regulation No 2842/98 on hearings, whilst considering the possibility of amending Council Regulation No 17. The regulations and notices on merger control adopted in 1998 and ongoing proposals also form part of an extensive modernisation plan aimed at giving statutory or quasi-statutory value to Court case-law and Commission procedures. The fruit of such activities included, in 1998, Council Regulation No 1310/97, which entered into force on 1 March 1998, Commission Regulation No 447/98 on notifications, time limits and hearings, to which was attached the new Form CO and several explanatory notes, a number of interpretative notices aimed at increasing the legal certainty of the economic operators concerned with regard to the notion of mergers, relevant firms, ‘full function’ joint ventures, calculation of turnover, definition of the relevant market and approximation of merger control procedures under the ECSC and EC Treaties. A notice on ancillary restraints is being drafted which will replace the 1990 notice, and a notice on practice with regard to remedies. The Commission believes that each of these measures, based on experience, is and will continue to provide clarification for all concerned as well as applicant countries. |
| 4.5 | Given the above, and the Commission’s position, an in-depth study should be made of taxation and social security contributions, with a view to competition regulations being included in the ‘code of conduct’ that the Commission has recently proposed. The Committee would be happy to contribute to this debate, which it hopes can be brought to a swift, fruitful conclusion. | It is inevitable that in the years to come cooperation in fiscal policy will be the subject of discussion. An in-depth study in the field of direct taxation or social security contributions could certainly improve the transparency of such a debate. |</p>
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<td>4.6</td>
<td>Decisions sometimes take too long. The Committee stresses the need to set firm deadlines for the adoption of decisions in all fields of competition policy. The Commission is aware that some procedures are too lengthy and is considering ways of shortening them. That is why, for example, it recently modified certain procedural rules. It also set itself deadlines for responding in cases of structural joint ventures. It considers, however, that cases should be dealt with still more quickly and is studying this matter in the context of its modernisation project.</td>
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<td>4.7</td>
<td>The Committee observes that merger notifications have increased, but there have been fewer infringements than in 1996, while the reverse is true for state aid. This clearly depends on the acceleration of certain economic processes. However, it might be expedient to re-examine state aid issues, particularly in the light of the above-mentioned restructuring. The Commission would point out in reply to the Committee’s comment on the merger statistics that Community control takes place <em>a priori</em>. Thus, technically, infringements cannot exist. The Commission prohibits or authorises on certain conditions merger plans which, if they went ahead, would create or strengthen a dominant position. Nonetheless, the Commission refers to its reply in point 3.2 in which it underlined the increase in mergers liable to harm competition in 1998.</td>
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<td>4.8</td>
<td>With regard to regional state aid provided for under Article 92(3) of the Treaty, the Committee notes the Commission proposal that areas eligible for Structural Funds support under Objectives 1 and 2 of the Funds should be the same as those areas assisted by Member States. Whilst the Committee accepts that this should be the case generally, it also recognises that increased national support may be a corollary to intensifying the degree of concentration in the application of EU structural funds, and therefore would stress that regional state aid under Article 92(3) is a separate instrument of national economic policy which a Member State should be able to use at its discretion where the relevant case for so doing can be established. Like the Committee, the Commission believes that regional aid must be an effective regional development tool as eligibility for regional aid gives the regions concerned an edge over other, ineligible regions. Too broad a cover would dull that edge, making the aid ineffective and resulting in a poor allocation of public resources. The Commission therefore plans to control regional aid more effectively, in accordance with the Treaty which in principle bans state aid although providing for exceptions subject to restrictive interpretation.</td>
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<td>4.9</td>
<td>In this regard, it has to be said that under the current system, and despite the Commission’s valiant efforts, there are still great imbalances in state aid, which favour the larger countries. The Commission shares this concern; however, it notes that since 1994 there has been a gradual and continuing reduction in the imbalances.</td>
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<td>4.10</td>
<td>As announced in the annual report, in November 1998 the Commission published a ‘framework’ for vocational training aid which establishes new rules and procedures, on the grounds that some training aid can be considered state aid. The Commission document introduces the rather vague concept of ‘training that is in the interests of the company’. The framework for training aid distinguishes between two types of training, from the standpoint of their external aspects: general training which provides workers with additional skills that are directly transferable to other firms and specific training which meets the specific needs of the employer with regard to the employee and the job. The framework therefore takes the view that the level of aid needed to encourage firms to implement training projects is greater in the former case than in the latter.</td>
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<td>4.11</td>
<td>Life-long training is essential in today’s information society. Reducing or obstructing workers’ training in this field, notwithstanding the employment and training objectives announced by the European Council at various summits, could make it even more difficult to respect commitments between now and the end of 1999 — the last year of the current programming period for the Structural Funds. The Commission considers that the compatibility rules contained in the framework make it possible to encourage training of workers through large amounts of state aid compared with its usual practice but having an effect on competition and trade between Member States that is in proportion to its objectives. As stated in point 36 of the framework, the Commission does not plan to question Structural Fund commitments until the end of 1999.</td>
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<td>4.12</td>
<td>A qualitative shift of public aid towards horizontal objectives, such as research, SMEs and vocational training should be encouraged, while at the same time reducing public aid for operating costs. The Commission shares the Committee’s opinion, although it is necessary to ensure that the shift in question does not lead to misuse. The Commission has improved the practical aspects of its monitoring of research aid and recently adopted and published a framework on training aid.</td>
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4.13 The Committee welcomes the recent agreement with the US antitrust authorities. However, the OECD and WTO must work for truly international regulations and make sure that these are enforced.

4.14 In order to fulfil its growing range of duties in this field, the Commission should set up in-house research facilities and promote external studies on specific issues.

4.15 The annual report is becoming increasingly user-friendly. The flow of information throughout the year should also be stepped up, in order to explain particularly significant initiatives and to give details of studies which have been conducted with a view to defining the most important cases.

4.16 In the Committee’s view, the task of introducing the Member States’ competition policies in the candidate countries remains extremely difficult, despite the Commission’s efforts. Applying these policies too rigorously would have dramatic social consequences, but not applying them would seriously distort competition. A transitional stage is thus needed, to take account of the social as well as economic aspects of enlargement in this sector.

4.17 The WTO negotiations and bilateral agreements must always take account of ILO conventions on working conditions, which should dovetail with international trade rules.
The Report on Competition Policy is published annually by the European Commission in response to the request of the European Parliament made by a Resolution of 7 June 1971. This Report, which is published in conjunction with the General Report on the Activities of the European Union, is designed to give a general view of the competition policy followed during the past year.