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

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

Luxembourg: Office for Official Publications of the European Communities, 2002

ISBN 92-894-3536-4

© European Communities, 2002
Reproduction is authorised provided the source is acknowledged.

Printed in Belgium

PRINTED ON WHITE CHLORINE-FREE PAPER
The year 2001 saw intense activity in all three areas of competition policy: antitrust, merger control and State aid. Several cases decided by the Commission aroused considerable public interest, either because of particularly high fines or aid amounts or because of the size of mergers that eventually were not authorised, or because of important settlements in antitrust cases linked to sports (footballer transfers, Formula One). In the merger field, activity continued to be very substantial, although the rate of notified concentrations resulting in a prohibition decision remained very modest. The Commission adopted a Green Paper on the review of the merger regulation with the aim of launching a debate on how to improve the current EU merger control system.

Substantial progress was also made in the area of State aid policy. The Stockholm European Council called on all Member States to demonstrate a downward trend in State aid and to redirect aid toward horizontal objectives of common interest. The increased transparency resulting from the new State aid register and State aid scoreboard will make it possible to monitor the progress achieved by Member States. Major areas where we broke new ground include our proposals to end State guarantees for public banks in Germany, the launching of a wide-ranging investigation into the effects of aid in the form of fiscal measures, and our decisions on stranded costs in the electricity sector.

In the light of these developments, it is particularly important for me as Member of the European Commission with special responsibility for competition to explain the benefits of competition policy and the relevant work of the Commission. This annual report is a good opportunity to look back critically at what we have achieved, to draw conclusions for future action and to verify whether our action is in line with our objective.

Our objective is to ensure that competition is undistorted, so as to permit wider consumer choice, technological innovation and price competition. This is achieved if companies compete rather than collude and if market power is not abused. When competitive conditions prevail, producers try to attract customers by offering them lower prices, higher quality or better service than their competitors. In other words: we undertake to work for the benefit of the European citizen. It can be seen from the examples given in this report whether this objective is being attained.

The report will give a broad overview of how the Commission has performed its task of monitoring the proper functioning of competition in the single market. Here, I should like to focus on two topics where crucial progress was made in 2001: the fight against cartels, and international and multilateral cooperation (including enlargement).

**Cartels**

**Record amount of fines**

One of the things for which 2001 will doubtless be remembered is the unprecedented activity that took place in the sphere of cartels. With 10 negative decisions against 65 enterprises, fines totaling over EUR 1 800 million, nearly half of which in the Vitamins case alone, and the largest individual fine ever imposed (in the Carbonless paper case), the year will go down as a milestone in the Commission’s struggle against cartels.

Since I took up my present duties in September 1999, I have stated on a number of occasions, clearly and publicly, that I consider cartels to be a veritable cancer in an open, modern market economy. Unlike other forms of anticompetitive behaviour, they serve one purpose and one purpose alone: that of reducing or eliminating competition. They bring no benefit to the economy and can therefore never be viewed favourably from an economic standpoint. Their impact is
entirely negative in that they lead to less choice for consumers, higher costs and reduced competitiveness for industry, delays in firms making essential adjustments and less innovation.

Such is the price to pay for a cartelised economy. And it is a high price as far as the European economy is concerned. As the decisions taken this year show, cartels are numerous, affecting as they do many sectors ranging from banking services to industrial products, and from air transport to consumer goods. They involve both small firms and world leaders, and concern local markets and world markets alike.

**Increased enforcement efforts**

When I assumed office as competition commissioner, I was determined to step up the Commission’s efforts in the area of enforcement. I am convinced that the effectiveness of an anti-cartel policy depends first and foremost on its capacity to dissuade managers from engaging in collusive behaviour. Such dissuasion is effective only if there is a real chance of being punished and if the amount of the penalties is sufficiently high compared with the profits to be earned from a cartel.

This priority has been translated over the past two years into radical action in the case-handling sphere. We have considerably strengthened the human and material resources of our unit specialising in the handling of cartel cases and we shall continue to do so in 2002. We have shifted the focus of the other antitrust operational units of the Directorate-General for Competition towards the fight against cartels, both as regards the detection and as regards the prosecution and punishment of cartels. We have intensified our contacts with our opposite numbers in the Member States’ competition authorities, and with those further afield, especially in the United States and Canada, in order better to combat practices that are becoming worldwide. And we have put in place management tools enabling more efficient and more speedy management of cartel cases.

The resounding successes in 2001 are the first fruits of this action. I am very pleased with them. But they are just a beginning.

The credibility of an anti-cartel policy, its power to dissuade and hence its effectiveness are built up over time. The managers and directors of companies engaging in such practices must be in no doubt that we shall leave them no respite, that they will be detected and that the penalties will be heavy. In a word, that it is more dangerous than profitable to participate in a cartel and that their only chance of lessening the financial consequences of their actions is to put a stop to them and come forward and talk to us under the leniency programme.

**Enlargement and competition**

The year 2001 was also an important year for the accession negotiations on competition. These were provisionally closed in early December with Estonia, Latvia, Lithuania and Slovenia. Negotiations are being pursued with Bulgaria, Cyprus, the Czech Republic, Hungary, Malta, Slovakia, Poland and Romania. Even with the four candidate countries for which the competition chapter was provisionally closed, continuous monitoring will apply. The provisional closure of the negotiations with four candidate countries in 2001 reflects the important progress they have made in the adoption and implementation of the Community’s competition acquis.

In the coming months, the Commission will continue to assist the candidate countries in their transformation process in the competition field. In this context, I would like to emphasise the problem of incompatible State aid measures in the candidate countries, in particular those aimed at attracting foreign direct investment. Indeed, a lack of proper State aid discipline seems to be the major stumbling block for those candidate countries for which the competition chapter has not yet been provisionally closed. As we need to preserve the integrity of the single market, the EU cannot accept any continuance of incompatible State aid measures in the candidate countries after accession. This is of crucial importance, not least for investors who seek legal security. In fact, the Commission is actively helping the candidate countries in converting incompatible State aid into permissible aid arrangements before accession.

For their successful integration into the Union, the candidate countries also need a competition culture where businesses have learnt to obey the rules and where consumers become increasingly aware of its benefits. This is particularly important inasmuch as awareness of the important role played by competition policy also leads to
enhanced enforcement of the rules. Companies and private individuals can do much to help to enforce the rules by bringing competition cases before the courts and complaints before the competition authorities. I hope this will also increasingly happen in the candidate countries, thus helping to ensure healthy competition on the markets and hence to complete those countries’ transition to well-functioning market economies.

The Commission’s modernisation proposals in the antitrust area are precisely tailored to promoting the growth of such a competition culture. Our reform is aimed at making antitrust enforcement even more effective through the direct applicability of all elements of our antitrust rules by national courts and authorities. Furthermore, particular emphasis is being put on the further deepening of the network connecting the Commission and national competition authorities in the enforcement exercise. This is, of course, also of great relevance from the point of view of the candidate countries. The potential target dates of accession of the new Member States and the application of the antitrust reform essentially coincide. As soon as the current candidate countries become Member States, their antitrust authorities will become an integral part of the more decentralised, more active antitrust enforcement network. From this perspective, the current pre-accession phase is particularly important. But in view of the progress already made, and the regular contacts that have been established between the Commission and the competition offices of the candidate countries, we should be confident about the future.

International and multilateral cooperation

In times of globalisation, international cooperation must not be limited to candidate countries. We have to find means of linking together on a global level competition authorities, but also competition policy concepts. In 2001, progress was made on two forms of multilateral cooperation where the Commission had been at the forefront of the initiative.

WTO: trade and competition policy

One relevant forum is the World Trade Organisation (WTO). Since 1996, we have pioneered the idea of putting in place a multilateral agreement on trade and competition. The fourth WTO ministerial meeting, which took place in Doha (Qatar) from 9 to 14 November, adopted a declaration addressing the ‘interaction between trade and competition policy’. The declaration is a significant development in our efforts towards multilateral competition rules in the WTO since it recognises for the first time that there is a valid case for the WTO to negotiate and conclude a multilateral agreement on trade and competition. Until recently, the very principle of having such an agreement at the WTO was somewhat controversial. The recognition of the importance of developing such a framework and its relevance to international trade and development will contribute towards the introduction and more effective application of domestic competition regimes and will be of considerable benefit to consumers worldwide. Moreover, even if proponents of multilateral competition rules need to wait until the fifth WTO ministerial meeting in order to enter the formal phase of negotiations on the multilateral agreement, there is now a clear commitment to launching such negotiations on a certain date and the issue will fall within the single undertaking. For all practical purposes, we have now entered a ‘preparatory phase’ during which we can do much useful work to clarify with our partners from developing and developed countries the elements needed in such an agreement. Furthermore, the EU proposals on the basic elements for such an agreement were widely accepted in Doha. The declaration focuses indeed on the elements that the EU has highlighted as items that need to be taken up first for clarification (core principles of competition policy, such as transparency, non-discrimination and procedural fairness, commitment to outlawing hardcore cartels, modalities for voluntary cooperation between antitrust authorities). Finally, the declaration paves the way for more focused technical assistance and capacity building that will help emerging and developing economies to better understand and appreciate the significance of these issues.

International competition network

On a more informal level, the international competition network (ICN) was launched in October, following intensive discussions initiated in the autumn of 2000. This is the first time competition authorities worldwide have taken an autonomous initiative designed to enable them to share experi-
ence and exchange views on competition issues deriving from an ever-increasing globalisation of the world economy. The ICN will be a project-oriented, consensus-based, informal network of antitrust agencies from developed and developing countries. It will address antitrust enforcement and policy issues of common interest and formulate proposals for procedural and substantive convergence through a results-oriented agenda and structure. It will also encourage the dissemination of antitrust experience and best practice, promote the advocacy role of antitrust agencies and seek to facilitate international cooperation. The ICN will concentrate on international antitrust issues that are difficult yet capable of resolution. Initially, the ICN will work on two important issues in antitrust: the merger control process in the multi-jurisdictional context and the competition advocacy role of antitrust agencies. This agenda will later be opened up to include issues of particular relevance to transition and developing economies.

At this point, I wish to express my gratitude towards the European Parliament and the Economic and Social Committee. Both consistently support the Commission’s competition policy. In 2001, they backed our proposals for the modernisation of antitrust procedures, which I hope will finally be approved by the Council in 2002. The feedback from the representatives of European citizens and of economic and social interests is an extremely important check on our policy. Their support and constructive criticism help guide our work.

The annual report usually affords a good opportunity for me to take part in both institutions in a broad debate on a whole range of current competition policy issues. These debates are useful because they are not confined to an assessment of past Commission activity but also touch upon the further development of our policy. I look forward to continuing this exchange of views on the basis of this report.
XXXIst Report on competition policy
2001

(Published in conjunction with the General Report on the Activities of the European Union — 2001)

SEC(2002) 462 final
# CONTENTS

<table>
<thead>
<tr>
<th>Section</th>
<th>Pages</th>
</tr>
</thead>
<tbody>
<tr>
<td>Introduction</td>
<td>11</td>
</tr>
<tr>
<td><strong>I — Antitrust</strong></td>
<td></td>
</tr>
<tr>
<td>A — Modernisation of the legislative and interpretative rules</td>
<td>15</td>
</tr>
<tr>
<td>1. Modernisation of the rules implementing Articles 81 and 82 of the EC Treaty</td>
<td>15</td>
</tr>
<tr>
<td>2. Revision of the leniency notice</td>
<td>16</td>
</tr>
<tr>
<td>3. Review of the block exemption regulation for technology transfer agreements</td>
<td>16</td>
</tr>
<tr>
<td><strong>Box 2: New de minimis notice</strong></td>
<td>17</td>
</tr>
<tr>
<td>B — Application of Articles 81, 82 and 86</td>
<td>19</td>
</tr>
<tr>
<td>1. Article 81</td>
<td>19</td>
</tr>
<tr>
<td>2. Articles 82 and 86</td>
<td>24</td>
</tr>
<tr>
<td><strong>Box 3: Competition policy in the packaging waste sector</strong></td>
<td>25</td>
</tr>
<tr>
<td>C — Sector-based competition developments</td>
<td>27</td>
</tr>
<tr>
<td>1. Energy: liberalisation in the electricity and gas sector</td>
<td>27</td>
</tr>
<tr>
<td>2. Postal services</td>
<td>30</td>
</tr>
<tr>
<td>3. Telecommunications</td>
<td>32</td>
</tr>
<tr>
<td>4. Transport</td>
<td>35</td>
</tr>
<tr>
<td>5. Media</td>
<td>39</td>
</tr>
<tr>
<td>6. Motor vehicle distribution</td>
<td>40</td>
</tr>
<tr>
<td><strong>Box 4: Green light for Covisint, the automotive B2B marketplace</strong></td>
<td>42</td>
</tr>
<tr>
<td>7. Financial services</td>
<td>43</td>
</tr>
<tr>
<td>8. Information society</td>
<td>47</td>
</tr>
<tr>
<td>9. Sport</td>
<td>48</td>
</tr>
<tr>
<td><strong>Box 5: Footballer transfers</strong></td>
<td>48</td>
</tr>
<tr>
<td>10. Pharmaceuticals</td>
<td>50</td>
</tr>
<tr>
<td>D — Statistics</td>
<td>53</td>
</tr>
<tr>
<td><strong>II — Merger control</strong></td>
<td>55</td>
</tr>
<tr>
<td>A — General policy and new developments</td>
<td>55</td>
</tr>
<tr>
<td>1. Introduction — general developments</td>
<td>55</td>
</tr>
<tr>
<td>2. National markets and potential competition</td>
<td>56</td>
</tr>
<tr>
<td><strong>Box 6: The paper cases and collective dominance</strong></td>
<td>60</td>
</tr>
<tr>
<td><strong>Box 7: Ancillary restraints — adaptation of the Commission’s policy.</strong></td>
<td>63</td>
</tr>
<tr>
<td>4. Developments in the application of the failing firm defence</td>
<td>64</td>
</tr>
<tr>
<td><strong>Box 8: Schneider/Legrand</strong></td>
<td>64</td>
</tr>
<tr>
<td>5. Remedies</td>
<td>65</td>
</tr>
<tr>
<td>6. Article 9 referrals to Member States — new developments</td>
<td>70</td>
</tr>
<tr>
<td>7. International cooperation</td>
<td>71</td>
</tr>
<tr>
<td><strong>Box 9: GE/Honeywell</strong></td>
<td>72</td>
</tr>
<tr>
<td>B — Statistics</td>
<td>74</td>
</tr>
<tr>
<td><strong>III — State aid</strong></td>
<td>75</td>
</tr>
<tr>
<td>A — General policy</td>
<td>75</td>
</tr>
<tr>
<td>1. Transparency</td>
<td>75</td>
</tr>
<tr>
<td>2. Modernising State aid control</td>
<td>76</td>
</tr>
<tr>
<td><strong>Box 10: Risk capital</strong></td>
<td>77</td>
</tr>
<tr>
<td>3. State aid and tax policy</td>
<td>78</td>
</tr>
<tr>
<td>4. Stranded costs</td>
<td>79</td>
</tr>
<tr>
<td>5. Public broadcasting</td>
<td>79</td>
</tr>
</tbody>
</table>
6. Cinema and audiovisual production support ........................................ 80
7. Enlargement ......................................................................................... 80

Box 11: German public banks (Anstaltslast and Gewährträgerhaftung). ........ 81

B — Concept of aid .................................................................................. 82
1. Origin of resources .............................................................................. 82
2. Advantage to a firm ............................................................................ 83
3. Selectivity .......................................................................................... 84
4. Effect on trade between Member States .............................................. 85

C — Assessing the compatibility of aid with the common market ............... 85
1. Horizontal aid .................................................................................. 85
2. Regional aid ...................................................................................... 88
3. Sectoral aid ......................................................................................... 90

D — Procedures ....................................................................................... 100
1. Initiation of formal investigation proceedings ...................................... 100
2. Existing aid ....................................................................................... 101
3. Recovery of aid .................................................................................. 102
4. Non-execution of decisions ................................................................ 102

E — Statistics .......................................................................................... 104

IV — Services of general interest. ............................................................. 107
1. General principles .............................................................................. 107
2. Recent developments ......................................................................... 107
3. Antitrust (including liberalisation) ....................................................... 109

V — International activities. .................................................................... 113
A — Enlargement ..................................................................................... 113
1. Accession preparations and negotiations ........................................... 113
2. Progress in the alignment of competition rules ................................... 113
3. Implementing rules under the Europe Agreements and the customs union decision . . ................................................................... 114
4. Extension of Article 87(3)(a) status under the Europe Agreements and the adoption of regional aid maps .................................. 115
5. Technical assistance to the candidate countries .................................. 115
6. Western Balkans ................................................................................ 116

B — Bilateral cooperation ......................................................................... 116
1. United States ...................................................................................... 116
2. Canada ............................................................................................. 117
3. Other OECD countries ...................................................................... 117
4. Mediterranean countries .................................................................... 117
5. Latin America .................................................................................... 118
6. Russian Federation and Ukraine ......................................................... 118

C — Multilateral cooperation .................................................................... 118
1. WTO: trade and competition policy .................................................... 118

Box 12: Trade and competition: from the Van Miert report to Doha .......... 120
2. OECD ............................................................................................... 120
3. UNCTAD ........................................................................................ 121
4. International Competition Network .................................................. 121

VI — Outlook for 2002 ........................................................................... 123
1. Antitrust ............................................................................................. 123
2. Mergers .............................................................................................. 124
3. State aid ............................................................................................ 124
4. International field ............................................................................... 125

Annex — Cases discussed in the report ................................................... 127
1. Enforcement of the competition rules is one of the Commission’s key tasks; it plays a central role in the economic functioning of the single market. With the final phase of the introduction of the euro starting on 1 January 2002 and enlargement of the European Union on an unprecedented scale, the prospect of a modernisation of the rules on antitrust, mergers and State aid is essential if the Commission is to be able to respond to the fast-changing economic environment. This will make it possible to focus on such behaviour by market participants as most endangers an ‘open market economy with free competition’, as stipulated in the Treaty.

2. In 2001, a series of cartel decisions highlighted the sustained effort by the Commission to tackle flagrantly anticompetitive behaviour by undertakings in a wide range of sectors. These decisions provide evidence of the direct impact of competition policy on consumer welfare, as do this year’s decisions concerning the car industry. In addition, opening up markets where a competitive environment is not yet fully established, while at the same time guaranteeing a level playing field and safeguarding the provision of services of general interest, remained high on the Commission’s agenda.

3. The Commission’s action in the merger field is being carried on against a background of globalisation and an increasing complexity of cases. Multi-jurisdictional aspects raised by global mergers increasingly require intensive international cooperation in different forums, such as the International Competition Network (ICN), and under bilateral agreements. In order to ensure that the European merger control system is properly equipped to deal with the challenges raised by these global mergers, as well as the challenges that the enlargement of the European Union will bring, the Commission is undertaking a thorough review of the EC merger regulation. A consultation document (Green Paper) covering jurisdictional, procedural and substantive issues was published in December.

4. In the State aid field, major improvements in transparency were brought about in 2001, with the adoption of the State aid scoreboard and the opening to the public of an online State aid register. The Commission’s policy of updating and modernising its State aid rules continued with the adoption of new rules on State aid for risk capital and the start of three major new policy reviews concerning aid for employment, for research and development and for large regional investment projects. As concerns monitoring and enforcement, particular attention was given to the definitive entry into force of the two block exemption regulations governing aid for small and medium-sized enterprises and training aid, and the regulation on de minimis aid.

5. With the adoption of common positions on the competition chapter on 12 December, the initial phase of the enlargement activities in the State aid field came to an end. The association council decided to provisionally close the competition chapter for four candidate countries.

6. The Commission has to pay close attention to the competition aspects of the forthcoming enlargement and work with the applicant countries in order to make sure that the same rules will apply with equal effectiveness throughout an enlarged Union.

7. In 2001, the total number of new cases was 1 036, comprising 284 antitrust cases (under Articles 81, 82 and 86), 335 merger cases, and 417 State aid cases (excluding complaints). Comparable figures for 2000 were a total of 1 211 new cases, comprising 297 antitrust cases, 345 merger cases, and 569 State aid cases (1). The decrease in the overall number of new cases therefore represents an overall trend due to a slight decrease in the field of antitrust, the first decrease in merger cases in several years and a significant drop in the number of State aid cases.

8. The slight reduction in the number of new antitrust cases is confirmation that the effects on notifications in the past two years (sharp downward trend since 1999) of the issuing of guidelines on horizontal and vertical agreements are being maintained. The number of complaints, which has fluctuated widely over previous years, remained fairly stable this year (116 in 2001 against 112 in 2000).

9. The total number of cases closed was 1 204, comprising 378 antitrust cases, 346 merger cases, and 480 State aid cases (excluding complaints). Comparable figures for 2000 were 1 230 cases closed, comprising 400 antitrust cases, 355 merger cases and 475 State aid cases (2). While the slight decline in closed antitrust cases relates to the

---

(1) The figure for State aid in 2000 was revised after the 2000 Competition Report was published.
(2) The figure for antitrust in 2000 was revised after the 2000 Competition Report was published.
increased focus on (resource-intensive) cartel cases, the number of cases closed (378) largely exceeds the number of new cases (284) and further reduces the backlog.

10. The slight slowdown in mergers and alliances coming under Commission scrutiny in 2001 appears to reflect the general worsening of economic conditions in the industrialised world and the business community’s changed perception of the success of recent M&A activity. For the first time since 1993, the number of mergers notified to the Commission fell, from 345 in 2000 to 335 in 2001, but the level is still much higher than in 1999. In all, 340 formal decisions were taken during the year (against 345 in 2000). Whilst there was a pause in 2001 in the upward trend in the overall number of merger notifications, merger cases are becoming increasingly complex and markets more concentrated. In particular, the number of opened cases requiring in-depth investigation has increased more rapidly than the overall number of cases (phase II decisions: 2001 up 17% on 2000 and 100% on 1999).

11. In the field of State aid, the number of notifications was down by approximately 30% and new cases of non-notified aid decreased by about 45% compared with 2000, while requests for the review of aid schemes increased nearly fivefold. The number of proceedings initiated, however, remained stable (66 in 2001 against 67 in 2000). Negative final decisions increased slightly (31 in 2001 against 26 in 2000). Overall, the number of cases pending has also increased (from 584 in 2000 to 621 in 2001) due to the number of complaints (1).

Box 1: Competition and the consumer — the main Commission decisions in 2001

Commissioner Monti has repeatedly underlined the great importance the Commission attaches to consumer aspects of competition law and policy. State aid policy, merger control and antitrust enforcement all have their part to play in securing for consumers the benefits deriving from the application of EU competition rules.

Looking back on 2001, several of the antitrust decisions taken in particular illustrate clearly how the preservation of full competition works to the benefit of consumer interests. Any extra profits generated by market operators by their limiting the forces of competition, e.g. through cartels, will ultimately have to be paid for by the consumer, who would enjoy lower prices, better service and a wider choice if competition worked properly.

British Midland/Lufthansa/SAS

On 1 March 2000, British Midland International, Lufthansa and SAS notified a joint venture agreement under which they agreed to coordinate their services to and from London Heathrow and Manchester International airports.

The Commission acknowledged that, in terms of efficiency gains and competition, the agreement’s overall effect was positive in that it led to a reorganisation and expansion of the parties’ existing networks. However, the agreement provided that Lufthansa was to be granted the exclusive right to operate flights on almost all routes between London and Frankfurt. The London-Frankfurt market is one of the busiest in Europe. The Commission concluded that British Midland’s withdrawal from the London-Frankfurt route represented an appreciable restriction of competition on this market. It was concerned that the agreement might even have the effect of eliminating competition altogether. Only Lufthansa and British Airways would have remained, and Lufthansa/British Midland would have been in a much better position with regard to access to slots at both ends of the market. In contrast, British Airways was hampered in its efforts to increase its frequencies by a shortage of slots at Frankfurt.

With a view to addressing the Commission’s competition concerns, the parties gave a commitment to make slots available at Frankfurt airport so as to allow a new entrant or an existing competitor, in particular British Airways, to increase its frequencies on this route and compete on an equal footing with Lufthansa. British Airways has since requested and obtained some of these slots.

(1) The figure for 2000 was revised after the 2000 Competition Report was published.
As a result, customers will benefit from a wider choice of air transport services to more destinations, better connections, convenient scheduling and seamless travel.

**SAS/Maersk**

On 18 July, the Commission decided to fine Scandinavian airlines SAS and Maersk Air EUR 39.375 million and EUR 13.125 million respectively for operating a secret market-sharing agreement.

The Commission had observed that Maersk Air had withdrawn from the Copenhagen-Stockholm route. This led to the monopolisation by SAS of the Copenhagen-Stockholm route to the detriment of over one million passengers who use that route every year. It also appeared that SAS had stopped flying on the Copenhagen-Venice route and Maersk Air had started operations on this route and, finally, that SAS had withdrawn from the Billund-Frankfurt route, leaving Maersk Air as the only carrier. In addition, the parties also negotiated an overall non-compete clause covering their future operations on international routes to and from Denmark and on Danish domestic routes.

As a result of the decision, competition between SAS and Maersk Air, the two largest airlines operating to and from Denmark, was restored. Actual new entry on routes previously covered by the market sharing was announced, for example, by SAS concerning five round trips per day between Billund and Copenhagen. Pressure on airline tariffs was restored given that the parties' pricing behaviour was again constrained by the actual possibility of new entry by the other party.

**Car sector**

In the car sector the Commission denounced practices by manufacturers which prevent consumers from purchasing cars in the country of their choice.

On 29 June, the Commission adopted a decision fining Volkswagen EUR 30.96 million for resale price maintenance in Germany in respect of the new VW Passat. Volkswagen had sent circular letters in 1996 and 1997 to its German dealers asking them not to sell this model for less than the recommended list price. This is the first ever decision on resale price maintenance in the car sector. Resale price maintenance is a very severe restriction of price competition and has a direct impact on consumer prices.

On 10 October, the Commission adopted a decision fining DaimlerChrysler EUR 71.825 million for several infringements of Article 81 of the EC Treaty. One of these infringements consisted of obstacles to parallel trade in Germany, preventing buyers from other Member States from buying cars from German dealers. Another involved a price-fixing agreement in Belgium aimed at reducing discounts to customers.

Important developments concerning the review of the car distribution block exemption — which will be finalised in 2002 — took place during 2001. For details please refer to Section I.C. 6.1 of this report.

**Bank charges for euro zone currency exchange**

Shortly after the creation of the euro, the Commission received complaints from consumers alleging that certain banks had collectively fixed their charges for exchanging euro zone banknotes. The Commission carried out several surprise inspections at various banks and sent requests for information to most euro zone banks. Subsequently it started proceedings against a large number of banks in seven Member States.

Several banks reacted by presenting unilateral proposals to the Commission to the effect that they would significantly reduce the charges applicable and eliminate them entirely by October 2001 at the latest, at least for buying transactions carried out by account holders — something which would be of clear benefit to consumers before the changeover to the euro.

Taking into account the exceptional circumstance of the disappearance of the market concerned and the immediate benefit to consumers stemming from these proposals, the Commission decided to end the cartel proceedings against most of the banks. On 12 December, it fined five German banks a total of EUR 100.8 million for concluding an agreement on a commission of about 3 % for the buying and selling of euro zone banknotes.
Mergers

Merger control decisions also have an impact on the daily life of consumers.

In the Nordea/Postgirot case, the Commission approved the acquisition by the Scandinavian banking group Nordea of sole control of Sweden’s Postgirot Bank AB, subject to conditions. Postgirot is a wholly-owned subsidiary of state-owned Posten AB, the Swedish Post Office. It owns and operates an in-house giro payment system, which it uses to supply distance payment services to retail and corporate customers. Postgirot also provides banking services to household and corporate customers, including deposits, lending, international payments, trade finance and card services. The deal initially raised competition concerns as Nordea would have controlled both Postgirot and Bankgirot, the two main bank payments systems used by Swedish households to pay electricity, telephone and other bills. Such a significant level of influence could have led to price increases directly affecting consumers’ daily banking needs. Nordea undertook, however, to reduce its stake in Bankgirot to 10%, a level which will no longer give it decisive influence over the company, and to withdraw from Privatgirot, a company which competes with Postgirot in giro-related technical services. By accepting these undertakings and making approval of the merger conditional on them, the Commission made sure that the newly-created entity will continue to face competition to the advantage of the final consumer.

The Unilever case, which concerns the divestment of well-known household food brands (see Section II.5.3, point 309), and two cases concerning the petrol/oil distribution sector (BP/E.ON and Shell/DEA, see Section II.6, points 317–8) may also be of particular interest to consumers.

State aid

Finally, State aid control plays an important role in ensuring that the taxpayer’s money is allocated efficiently and contributes to a sound economic environment in which viable economic entities can create sustainable employment opportunities for European citizens. In its State aid decisions the Commission takes into account aspects related to the proper functioning of services of general interest.
A — Modernisation of the legislative and interpretative rules

1. Modernisation of the rules implementing Articles 81 and 82 of the EC Treaty

12. On 27 September 2000, the Commission adopted its proposal for a regulation introducing a new system for implementing Articles 81 and 82 of the EC Treaty (1). Once in force, the new regulation will, among other things, replace Regulation No 17 of 1962. The key element of the reform is the proposed transition from a system whereby the Commission enjoys a monopoly to apply Article 81(3) (the exemption monopoly) to a directly applicable system of legal exception, whereby agreements which do not contravene Article 81(1), or which fulfil the conditions of Article 81(3), are automatically deemed lawful and agreements in breach of Article 81(1), but not fulfilling the conditions of Article 81(3), are automatically deemed unlawful. This reform implies the abolition of the notification and authorisation system as it is provided for in Regulation No 17, an enhanced responsibility for national competition authorities and national courts to apply Articles 81 and 82, and clear arrangements to safeguard the coherent application of Articles 81 and 82 throughout the European Union, including a network between all European competition authorities. The proposed regulation also aims at strengthening the Commission’s powers of investigation (e.g. the right of inspection at non-business premises). Via its proposal, the Commission’s goal is to increase efficiency in tackling breaches of Articles 81 and 82, thereby ensuring effective competition in Europe (2).

13. On 29 March 2001, the Economic and Social Committee adopted its opinion on the proposed regulation (3). In its opinion, the Committee ‘wholeheartedly supports the reform of the system for applying competition rules’ and it ‘appreciates the clear and bold wording used’ in the Commission’s proposal, which it qualifies as effective decentralisation while maintaining maximum legal certainty, the Committee also urged the Commission to issue, before or after the entry into force of the new regulation, ‘accompanying measures’ which would further clarify some of the central concepts of EC competition law, such as the effect on trade between Member States.

14. On 20 June, the European Parliament’s Committee on Economic and Monetary Affairs adopted its final report on the Commission’s proposals (4). In its report, the Committee ‘accepted that the current system of regulating European competition policy is too bureaucratic, cumbersome and ineffective’ and acknowledged that the enlargement of the European Union could only aggravate that situation. The Committee therefore welcomed the well-timed proposal from the Commission ‘to radically overhaul the competition rules now, in advance of an enlarged Community’. However, in order to pragmatically achieve the intended objectives of the reform, the Committee encouraged the Commission to modify its proposal on some points and it suggested some clarifications on essential elements of the proposed reform. Most of these suggestions were taken over by Parliament when it adopted, by 409 votes to 54, its opinion on the proposed regulation on 6 September (5). The amendments proposed by Parliament aim among other things at deleting the clause concerning a registration system for certain types of agreement (Article 4(2)), harmonising the regime of fines (Article 5), ensuring the proportionality of the remedies of a behavioural or structural nature (Article 7(1)) and clearly defining public interest in the context of Commission decisions based on Article 10.

15. On 14–15 May and 5 December, under the Swedish and Belgian Presidencies respectively, the Council (Industry) held a substantive debate

---

(3) OJ C 155, 29.5.2001.
(4) The report of the Committee on Economic and Monetary Affairs and the opinions of the Committee on Industry, External Trade, Research and Energy and the Committee on Legal Affairs and the Internal Market (A5-0229/2001) have not yet been published in the Official Journal, but can be found on http://www2.europarl.eu.int/omk/OM-Europarl?PROG=REPORT&L=EN&PUBREF=/ED/TEXT+REPORT+A5-2001-0229+0+N+NOT+S+SGML+VOR+EN.
(5) The European Parliament legislative resolution (R5-0444/2001) has not yet been published in the Official Journal, but can be found on http://www3.europarl.eu.int/omk/omnsapir.solv2?AP=P+FV2&PRG=CALEND&FILE=010906&TPV=DEF&LANG=EN&UI=EN.
on the Commission’s proposal. Although provisional agreement was reached on some of the aspects of the proposed regulation, it was concluded that discussions on the principles and modalities of the envisaged reform needed to be continued in the Council working group. As guidance for further progress in the working group, the Council debated in particular the general principles underlying the functioning of the network of competition authorities, inviting the Commission to lay these principles down in a common declaration. The Council also subscribed to the objective of Article 3 of the Commission’s proposal so as to ensure a level playing field for agreements affecting trade between Member States, but it urged the working group to discuss further the effect of such a provision on specific national rules.

2. Revision of the leniency notice
16. In line with the general thinking behind the modernisation exercise, namely the need to refocus its activities on the most serious infringements of Community law, the Commission adopted in 2001 new draft rules aimed at better detection and eradication of price-fixing and other cartels. The leniency notice was revised, after five years of implementation, with a view to further increasing its effectiveness and maximising the Commission’s ability to detect and successfully prosecute cartels. The draft new notice published on 21 July (\(^1\)) addressed these issues in more precise terms and prepared the ground for the adoption of a new notice on immunity from fines and reduction of fines in 2002.

3. Review of the block exemption regulation for technology transfer agreements
17. On 20 December, the Commission adopted a report (\(^2\)) evaluating the functioning of Regulation (EC) No 240/96 (\(^3\)), the technology transfer block exemption (hereinafter called the ‘TTBE’). The report provides a critical analysis of the application of and policy approach underpinning the TTBE. It stresses in particular the need to adapt the TTBE to ensure consistency with the new Commission block exemptions for distribution agreements (\(^4\)), specialisation agreements and R&D agreements (\(^5\)), which follow a more economics-based approach.

18. The report finds that the TTBE uses criteria relating more to the form of the agreement than to the actual effects on the market. The TTBE has in fact four main shortcomings:

— first, it is too prescriptive and seems to work as a straitjacket, which may discourage efficient transactions and hamper the dissemination of new technologies;

— second, it covers only certain patent and know-how licensing agreements. This narrow scope of the TTBE seems increasingly inadequate to deal with the complexity of modern licensing arrangements (e.g. pooling arrangements, software licences involving copyright, etc.);

— third, a number of restraints are currently presumed illegal or excluded from the block exemption without proper economic justification where the parties lack market power and are in a vertical relationship. This concerns in particular restrictions extending beyond the scope of the licensed intellectual property right (IPR) (e.g. non-compete obligations, tying, etc.);

— fourth, by concentrating on the form of the agreement, the TTBE extends the benefit of the block exemption to situations which cannot always be presumed to fulfil the conditions of Article 81(3), either because the contracting parties are competitors or because they hold a strong position on the market.

19. The report invites comments on a number of issues:

— should the scope of the TTBE, which applies only to patents and know-how, be widened to cover also copyright, design rights and trade-

\(^1\) Draft Commission notice on immunity from fines and reduction of fines in cartel cases (OJ C 205, 21.7.2001).

marks? This issue is of particular importance to a number of sectors including the software industry, which depends on a chain of copyright licences for manufacture and distribution;

— should the TTBE also cover licensing agreements between more than two companies, such as licensing pools? Such arrangements have become increasingly important to industry, given the growing complexity of new technologies. In this respect, it may be observed that multiparty licences can be efficiency enhancing and procompetitive, in particular where the pool covers only essential IPRs. However, multiparty licences may also have serious anticompetitive effects, especially where the agreement covers substitute technologies or where it requires members to grant licences to each other for current and future technology at minimal cost or on an exclusive basis;

— a more lenient approach to licensing agreements between non-competitors. It is generally acknowledged that, if the parties to an agreement are in a vertical relationship, i.e. are not competitors, exclusive licences are mostly efficiency enhancing and procompetitive. For instance, if the IPR holder does not have the assets for the production or distribution of the licensed products, it is more efficient to license to someone who does;

— a more prudent approach to licensing agreements between competitors. If the parties are in a horizontal relationship, i.e. if the licence prevents competition that could have taken place between the licensor and the licensee were it not for the licence, licence agreements may give rise to a number of competition concerns. On the one hand, exclusive licences will often lead to market sharing through the allocation of territories or customers, especially where the licence is reciprocal or the exclusivity also extends into non-licensed competing products. Production quotas agreed in licensing agreements between competitors may easily lead to a straightforward output restriction. On the other hand, under certain conditions — in particular in the case of licensing to a joint venture — and in the case of non-reciprocal licensing, the exclusivity may lead not only to a loss of inter-brand competition but also to efficiencies. To assess whether the negative effects on competition may be outweighed by the efficiencies, the market power of the parties and the structure of the markets affected by the agreement need to be taken into account.

### Box 2: New de minimis notice

On 20 December, the Commission adopted a new notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the EC Treaty (‘de minimis notice’) (1). The new notice replaces the previous notice of 1997 (2). By defining more clearly and comprehensively when agreements between companies are not prohibited by the Treaty, the notice will reduce the compliance burden for companies, especially smaller companies. At the same time, the Commission will be better able to avoid examining cases which have no interest from a competition policy point of view and will thus be able to concentrate on more important cases.

The new notice reflects an economics-based approach and has the following key features:

1. The de minimis thresholds are raised to 10% market share for agreements between competitors and to 15% for agreements between non-competitors.

The previous notice had fixed the de minimis thresholds at 5% and 10% market share respectively. Competition concerns are in general not to be expected where companies do not have a minimum degree of market power. The new thresholds take account of this while at the same time staying low

---

(1) OJ C 368, 22.12.2001. The new notice is also available on the Internet at the following address: http://europa.eu.int/comm/competition/antitrust/deminimis/

enough to be applicable whatever the overall market structure looks like (1). The difference between the two thresholds takes into account, as before, the fact that agreements between competitors in general lead more easily to anticompetitive effects than agreements between non-competitors.

(2) It specifies for the first time a market share threshold for networks of agreements producing a cumulative anticompetitive effect.

The previous de minimis notice excluded from its benefit agreements operated on a market where ‘competition is restricted by the cumulative effects of parallel networks of similar agreements established by several manufacturers or dealers’. This meant in practice that firms operating in areas such as the beer and petrol sectors could usually not benefit from the de minimis notice. The new notice introduces a special de minimis market share threshold of 5% for markets where such parallel networks of similar agreements exist.

(3) It contains the same list of hardcore restrictions as the horizontal and vertical block exemption regulations.

The new notice defines more clearly and consistently the hardcore restrictions (such as price fixing and market sharing) which are normally always prohibited and cannot benefit from the de minimis notice. For agreements between non-competitors, the new notice has taken over the hardcore restrictions set out in block exemption Regulation (EC) No 2790/1999 for vertical agreements (2). For agreements between competitors, the new notice has taken over the hardcore restrictions set out in block exemption Regulation (EC) No 2658/2000 for specialisation agreements (3).

(4) Agreements between small and medium-sized enterprises are in general de minimis.

The new notice states that agreements between small and medium-sized enterprises (SMEs) are rarely capable of appreciably affecting trade between Member States. Agreements between SMEs therefore generally fall outside the scope of Article 81(1).

---

4. Review of procedural rules: new mandate of the hearing officers

20. On 23 May, the Commission adopted a decision on the terms of reference of hearing officers in certain competition proceedings (1). This new ‘mandate of the hearing officers’, which replaces the previous terms of reference dating from 1994 (2), follows the Commission’s decision last year to enhance this function. It aims to reinforce the independence and authority of the hearing officer, to strengthen his role in EC merger and antitrust proceedings and to enhance the objectivity and quality of the Commission’s competition proceedings and the resulting decisions.

21. The right of the parties concerned and of third parties to be heard is an established principle of Community law. The principle has been restated in the EU Charter of Fundamental Rights, as part of the right of every person ‘to have his or her affairs handled impartially, fairly and within a reasonable time’. Safeguarding that right during the Commission’s competition proceedings is the special responsibility of the hearing officer.

22. The position of hearing officer was created in 1982. His initial responsibility was limited primarily to the organisation, chairing and conduct of the oral hearing in antitrust proceedings — i.e. cartels and abuses of dominant positions — and later on also in merger proceedings. The hearing

---

officer also ensured that in the preparation of
draft Commission decisions in competition cases
due account was taken of all the relevant facts
whether favourable or unfavourable to the parties
concerned. In carrying out this task, the hearing
officer contributed to the objectivity of the hear-
ing itself and of any subsequent decision. This
remit was updated and widened in 1994 to ensure
adequate protection for the rights of parties, in
particular with regard to confidentiality of docu-
ments and business secrets and adequate access
to the case files of the Commission.

23. The new mandate, adopted by the Commis-
sion on 23 May, maintains these core aspects of
the hearing officer’s functions. In addition, how-
ever, the role has been strengthened and the terms
of reference adapted and consolidated in the light
of developments in competition law.

24. In particular, the transparency of the appoint-
ment of hearing officers has been increased by
publishing these appointments in the Official
Journal, while any interruption or termination of
appointment or transfer requires a reasoned deci-
sion by the Commission, also published in the
Official Journal. Significantly, the independence
of the hearing officer from the Directorate-Gen-
eral for Competition has been reinforced in that
the hearing officer is now attached for administra-
tive purposes to the Member of the Commission
with special responsibility for competition (the
Competition Commissioner) and reports directly
to him rather than to the Director-General for
Competition, as was previously the case.

25. In addition, the hearing officer’s function is
also reinforced in the decision-making process
itself. Members of senior management within the
Directorate-General for Competition are required
to keep the hearing officer informed about how a
proceeding is developing up to the stage of the
draft decision to be submitted to the Competition
Commissioner. The hearing officer may present
observations to the Commissioner on any matter
arising out of any Commission competition pro-
cceeding. More specifically, the hearing officer’s
final report, produced on the basis of the draft
decision submitted to the Advisory Committee,
must now systematically be attached to the draft
decision submitted to the Commission so that the
latter is fully aware of all relevant information on
the course of the competition proceeding and on
enforcement of the right to be heard. The report
may be modified in the light of any amendments
made to the draft decision prior to its adoption. In

order to enhance the transparency of proceedings,
the final report must also be communicated to the
addressees of the decision together with the deci-
sion itself as well as to Member States and be
published in the Official Journal with the decision.

26. The new mandate also extends the role of the
hearing officer as regards commitments for reme-
dies proposed by the parties in relation to any pro-
ceeding initiated by the Commission under
merger or antitrust control. The hearing officer
can report on the objectivity of any enquiry which
may have been conducted in order to assess the
competition impact of the proposed commit-
ments.

27. The new mandate also addresses the hearing
officer’s powers with regard to granting or
denying confidentiality when information is dis-
closed by publication in the Official Journal. This
applies in particular to the published versions of
Commission decisions on merger and antitrust
cases.

28. The importance parties attach to procedural
matters was underlined most recently by actions
brought before the Court of First Instance which
resulted in the President issuing orders on
20 December (1).

29. On 30 and 16 October respectively, the
Commission appointed Mr S. Durande and
Mrs K. Williams to the post of hearing officer.

B — Application

of Articles 81, 82 and 86

1. Article 81

1.1. Cartels

1.1.1. A record year for cartel decisions

30. In 2001, the priority given to tackling cartel
cases resulted in a large increase in the number of
cases handled. The Commission adopted 10 neg-
ative formal decisions in the Graphite electrodes,
Sodium gluconate, SAS/Maersk, Vitamins, Ger-
man banks, Citric acid, Belgian breweries, Lux-

(1) Cases T-219/01 R Commerzbank AG, T-216/01 R Reisebank AG
and T-213/01 R Österreichische Postsparkasse AG.
embourg breweries, Zinc phosphate and Carbonless paper cases and closed by way of settlement five cases of cartels in the banking sector connected with the introduction of the euro (\(^1\)). It adopted statements of objections in several other cases, including Plasterboard and GFU (\(^2\)).

31. Secret cartels are among the most serious restrictions of competition. They lead to higher prices and less choice for consumers. And they have a negative impact on the whole of European industry by increasing the cost of services, goods and raw materials for European enterprises obtaining their supplies from cartel members. In the longer term, they reduce European industry’s overall competitiveness.

32. For all these reasons, the detection, prosecution and punishment of secret cartels has been one of the central features of the competition policy pursued by the European Commission ever since it was set up. The formation in 1998 of a specialised unit (the cartels unit) gave tangible expression to the priority which the Commission intended to give to the fight against cartels, although other units may also take part. Moreover, the entry into force of the future Council regulation replacing Regulation No 17 on antitrust procedures places the surveillance of markets and the campaign against the hidden anticompetitive practices which develop therein at the heart of the tasks performed by Community competition policy. It is with this in view that, for a number of years now, the emphasis has been on substantially strengthening the overall competitiveness.

33. Detecting, prosecuting and punishing secret cartels poses a constant challenge to competition authorities. The increasing globalisation of trade means having to deal with secret agreements extending beyond the frontiers of Europe and sometimes concluded outside the territory of the EEA. Generalisation of the new information and communication technologies is making it more difficult to gain access to evidence of such agreements. And the intensification of the struggle against cartels, both inside and outside Europe, is being matched by greater sophistication in the practices employed.

34. Reform of Regulation No 17, which is currently being discussed in the Council, is vital as it will enable the Commission to meet this challenge by becoming increasingly efficient at fighting hidden practices. In particular, the investigatory powers reform, involving as it does the possibility of carrying out inspections at private dwellings, is a key factor in adapting the struggle against cartels to practices that are becoming ever more sophisticated.

35. In the same way and for the same reasons, the Commission is undertaking a review of its guidelines on immunity from and reduction of fines.

36. The Commission first adopted a leniency programme in 1996 (\(^3\)) in order to increase effectiveness both in the detection and in the handling of cartel cases. The leniency programme was conceived as a potent investigative weapon rewarding undertakings cooperating with the Commission. It recognises the difficulty of obtaining hard evidence of secret cartels in an increasingly sophisticated environment.

37. Five years after it was adopted, the leniency programme plays an important role in the enforcement of competition rules against cartels and it has been invoked by companies in many of the cases opened since July 1996. Up to now, the leniency notice has been applied in 16 final Commission decisions: Extra-alloy surcharge (\(^4\)), British Sugar (\(^5\)), Pre-insulated pipes (\(^6\)), Greek ferries (\(^7\)), Seamless steel tubes (\(^8\)), Lysine (\(^9\)), SAS Maersk Air (\(^10\)), Graphite electrodes (\(^11\)), Sodium gluconate (\(^12\)), Vitamins (\(^13\)), Belgian breweries (\(^14\)), Luxembourg breweries (\(^15\)), Citric acid (\(^16\)), German banks (\(^17\)), Zinc phosphate (\(^18\)) and Carbonless paper (\(^19\)).

38. However, experience gathered to date shows that the effectiveness of the notice would be improved by an increase in the transparency and...

---

\(^1\) See 1.1.2 below.
\(^3\) See 1.1.2 below.
certainty of the conditions on which any reduction of fines is to be granted. It would also benefit from a closer alignment between the level of reduction of fines and the value of a company’s contribution to establishing the infringement.

39. For these reasons, after five years of implementation, the Commission decided to revise its leniency notice with a view to further increasing its effectiveness and maximising the Commission’s ability to detect and successfully prosecute cartels. A draft new notice published on 21 July (1) addressed these issues in a number of ways and prepared the ground for the adoption of a new leniency notice in 2002.

1.1.2. Cartel decisions in 2001

**Graphite electrodes (2)**

40. On 18 July, the Commission fined Germany’s SGL Carbon AG, UCAR International of the United States and six other companies a total of EUR 218.8 million for fixing the prices and sharing the market for graphite electrodes. Following an extensive investigation which started in 1997, the Commission found that the companies had participated in a worldwide cartel during most of the 1990s. It characterised the companies’ behaviour as a ‘very serious’ infringement of the EC competition rules.

41. Graphite electrodes are ceramic-moulded columns of graphite used primarily in the production of steel in electric arc furnaces, also referred to as ‘mini-mills’.

42. With regard to the leniency notice, it is important to note that this is the first time the Commission has granted a substantial reduction in a fine (70 %). Showa Denko benefited from this reduction, having been the first company to cooperate and provide conclusive evidence of the cartel to the Commission.

**SAS/Maersk (3)**

43. Again on 18 July, the Commission decided to fine Scandinavian airlines SAS and Maersk Air EUR 39.375 million and EUR 13.125 million respectively for operating a secret market-sharing agreement (4). The agreement had led to the monopolisation by SAS of the Copenhagen-Stockholm route to the detriment of over one million passengers who use that route every year, and to the sharing of other routes to and from Denmark.

44. SAS and Maersk Air had notified a cooperation agreement, which related mainly to code sharing and frequent-flyer programmes. In the course of the preliminary enquiry it transpired that, coinciding with the entry into force of the cooperation agreement, Maersk Air had withdrawn from the Copenhagen-Stockholm route, where it had until then been competing with SAS. It also transpired that, at the same time, SAS had stopped flying on the Copenhagen-Venice route and Maersk Air had started operations on that route and, finally, that SAS had withdrawn from the Billund-Frankfurt route, leaving Maersk Air — its previous competitor on the route — as the only carrier.

45. These entries and withdrawals, which were not notified, formed part of a wider market-sharing agreement which included an overall non-compete clause covering the parties’ future operations on international routes to and from Denmark and on Danish domestic routes.

46. The market sharing was discovered as a result of on-site inspections. The inspections were carried out in June 2000, in close cooperation with the national competition authorities in Denmark and Sweden.

47. As a result of the decision, competition between SAS and Maersk Air, the two largest airlines operating to and from Denmark, was restored to the benefit of consumers.

**Sodium gluconate (5)**

48. On 2 October, the Commission fined Archer Daniels Midland Company Inc., Akzo Nobel NV, Avebe BA, Fujisawa Pharmaceutical Company Ltd, Jungbunzlauer AG and Roquette Frères SA a total of EUR 57.53 million for fixing the price and sharing the market for sodium gluconate. It characterised the companies’ behaviour as a ‘very serious’ infringement of the Community and EEA competition rules.

---

(2) Case COMP/M36.490; press release IP/01/1010, 18.7.2001.
(6) SAS lodged an appeal against the decision before the Court of First Instance on 3 October (Case T-241/01), contesting the amount of the fine.
49. Following an investigation which started in 1997, the Commission established that the companies had participated in a worldwide cartel between 1987 and 1995. The cartel agreements were implemented through detailed sales monitoring, the holding of regular multi- and bilateral meetings, and the enforcement of a compensation scheme. Throughout the period, the Commission gathered evidence of over 25 cartel meetings.

50. Sodium gluconate is a chemical used to clean metal and glass, with applications such as bottle washing, utensil cleaning and paint removal, and as a food additive, together with various other chemical applications.

51. The Commission granted for the first time a very substantial reduction in the fine pursuant to Section B of the leniency notice. Fujisawa benefited from a reduction of 80% on the ground that it was the first to adduce conclusive evidence of the cartel’s existence, before the Commission had undertaken any investigation ordered by decision. The Commission did not grant Fujisawa a 100% reduction in its fine, as it could have done under Section B of the notice, as the company did not approach the Commission until after it had received a request for information. This reluctance to come forward spontaneously and before any investigatory measure was taken into account.

Vitamins (1)

52. On 21 November, the Commission adopted a decision under Article 81 of the EC Treaty and Article 53 of the EEA Agreement finding that 13 manufacturers of vitamins A, E, B1, B2, B5, B6, C, D3, H, folic acid, beta carotene and carotenoids had participated in cartels for each of these products resulting in a total of 12 separate infringements.

53. The Commission fined eight companies a total of EUR 855.23 million for fixing the prices of eight different products and allocating sales quotas in respect thereof. The limitation period for fines in competition cases (2) was applicable to the infringements affecting vitamins B1, B6, H and folic acid; the Commission therefore did not fine companies for their involvement in these cartels. Each agreement was a very serious infringement of the Community competition rules and as such justified the overall high level of fines imposed.

54. A striking feature of this complex of infringements was the central role played by Hoffmann-La Roche and BASF, the two main vitamin producers, in virtually each and every cartel, whilst other players were involved in only a limited number of vitamin products.

55. The participants in each of the cartels fixed prices for the different vitamin products, allocated sales quotas, agreed on and implemented price increases and issued price announcements in accordance with their agreements. They also set up machinery to monitor and enforce their agreements and participated in regular meetings to implement their plans. The modus operandi of the different cartels was essentially the same. Given the continuity and similarity of method, the Commission considered it appropriate to treat in one and the same proceeding and decision the complex of agreements covering the different vitamins.

Citric acid (3)

56. On 5 December, the Commission decided to fine five citric acid producers a total of EUR 135.22 million.

57. The Commission’s investigation revealed that the five producers had participated, between 1991 and 1995, in a secret cartel of worldwide scope which had enabled them to fix the price and share the market for citric acid. The cartel was a very serious infringement of Article 81 of the EC Treaty and Article 53 of the EEA Agreement, which justified the size of the fines.

Belgian breweries (4)

58. On 5 December, the Commission fined five companies a total of EUR 91.655 million for participating in two separate secret cartels on the Belgian beer market.

59. The first cartel involved Interbrew on the one hand and Alken-Maes and Danone (Alken-Maes’s parent company at the time) on the other. Interbrew and Alken-Maes/Danone, Nos 1 and 2 on

(2) Council Regulation (EEC) No 2988/74 of 26 November 1974 concerning limitation periods in proceedings and the enforcement of sanctions under the rules of the European Economic Community relating to transport and competition.
the market, had agreed on a general non-aggression pact, the allocation of customers in the ‘horeca’ (hotels, cafés and restaurants) or ‘on-trade’ sector, price fixing in the retail or ‘off-trade’ sector, the limitation of investments and advertising in the horeca sector, a new tariff structure (horeca and retail) and a detailed monthly information exchange system concerning sales volumes (horeca and retail). The cartel lasted from 1993 until 1998. The CEOs and other senior management of the companies involved met regularly to initiate and monitor these agreements. The Commission considered the infringement to be ‘very serious’. In setting the amount of the fine, it also took into account the fact that Danone had committed similar infringements of Article 81 in the past (1).

60. The second cartel concerned private-label beer in Belgium. This is beer which supermarkets order from brewers but sell under their own label. Between October 1997 and July 1998, Interbrew, Alken-Maes, Haacht and Martens met four times to discuss the private-label beer market in Belgium in general and their prices and customers in particular. During these meetings, the four brewers also exchanged business information. This cartel was considered to be a ‘serious’ infringement.

Luxembourg breweries (2)

61. On 5 December, the Commission fined three Luxembourg brewers — Brasserie Bofferding, Brasserie Battin and Brasserie de Wiltz — a total of EUR 448 000 for their participation in a market-sharing agreement in the Luxembourg ‘horeca’ (hotels, restaurants and cafés) or ‘on-trade’ sector. A fourth brewer, Brasserie de Luxembourg, an Interbrew subsidiary, was not fined because it had revealed the cartel to the Commission and fulfilled all the other conditions of Section B of the leniency notice.

62. The brewers had agreed in writing to respect each other’s exclusive purchasing arrangements (‘beer ties’) with horeca customers, as well as measures to restrict the entry of foreign brewers into the Luxembourg horeca sector. The agreement remained in force from 1985 until 2000. It was held to be a ‘serious’ infringement.

Zinc phosphate (3)

63. On 11 December, the Commission fined six producers or former producers of zinc phosphate a total of EUR 11.95 million. The Commission’s investigation had revealed that the six producers had participated, between 1994 and 1998, in a cartel covering the whole of the European Economic Area which had enabled them to fix prices and divide up their 90 % share of the market in zinc phosphate, an anticorrosion mineral pigment used in the manufacture of industrial paints. The cartel was by its very nature a very serious infringement of Article 81 of the EC Treaty and Article 53 of the EEA Agreement.

Settlements concerning bank charges for the exchange of euro zone currencies and German banks (4)

64. Shortly after the creation of the euro on 1 January 1999, the Commission (Directorate-General for the Internal Market) received complaints that exchange commissions for euro zone currency notes and coins remained high. The Commission carried out several surprise inspections at various banks and sent requests for information to most euro zone banks. It gathered evidence which suggested that certain national groups of banks may have colluded to maintain exchange charges at certain levels in order to minimise losses caused by the introduction of the euro. On this basis, the Commission started proceedings in 2000 against a large number of banks and bureaux de change in seven Member States (Austria, Belgium, Finland, Germany, Ireland, the Netherlands and Portugal).

65. However, several banks took the initiative in presenting unilateral proposals to the Commission to the effect that they would (i) significantly reduce their charges for exchanging in-currency banknotes, and (ii) abolish all such charges by October 2001 at the latest, at least for buying transactions by account holders.

66. Taking into account the exceptional circumstance of the disappearance of the market concerned, and the immediate benefit to consumers as a result of these proposals which implied a deviation from the alleged collusive behaviour, the Commission decided to end the cartel pro-

(1) Commission decision of 23.7.1984 (Flat glass) and Commission decision of 15.5.1974 (Flat glass).
ceedings against more than 50 banks in Belgium, Finland, Ireland, the Netherlands and Portugal and against some of the banks in Germany (1).

67. On 12 December, the Commission fined five German banks a total of EUR 100.8 million for concluding an agreement on a commission of about 3 % for the buying and selling of euro zone banknotes during the three-year transitional period beginning on 1 January 1999.

68. The Austrian case will be further examined in the context of a wider-ranging cartel in the Austrian banking sector currently under investigation.

Carbonless paper (2)

69. On 20 December, the Commission decided to fine 10 carbonless paper producers a total of EUR 313.69 million.

70. In the course of its investigations, the Commission discovered that the producers had participated, between 1992 and 1995, in a secret, Europe-wide cartel aimed at improving the participants’ profitability through collective price increases. This conduct was by its very nature a very serious infringement of Article 81 of the EC Treaty and Article 53 of the EEA Agreement, which justified the size of the fines, notably that of EUR 184.27 million imposed on Arjo Wiggins Appleton, the market leader and instigator of the cartel. Sappi was granted total immunity in respect of its participation in the cartel because, as the first company to cooperate with the Commission, it supplied conclusive evidence of wrongdoing.

Court judgment in British Sugar

71. By decision of 14 October 1998, the Commission fined the sugar producers British Sugar and Tate&Lyle and the sugar merchants Napier Brown and James Budgett for an infringement of Article 81 of the EC Treaty and Article 53 of the EEA Agreement, which justified the size of the fines, notably that of EUR 184.27 million imposed on Arjo Wiggins Appleton, the market leader and instigator of the cartel. Sappi was granted total immunity in respect of its participation in the cartel because, as the first company to cooperate with the Commission, it supplied conclusive evidence of wrongdoing.

72. Following an appeal by three of the parties, the Court of First Instance in its judgment of 12 July 2001 (2) upheld the Commission’s decision in its entirety, except for a reduction in the fine imposed on Tate&Lyle. The Court did not accept any of the various arguments by which the parties sought to show that there had been no infringement and that their behaviour had not been capable of affecting trade between Member States.

73. With regard to the fines imposed, the Court supported the Commission’s findings about the classification of the infringement as serious, its duration, its intentional nature and the assessment of aggravating and attenuating circumstances. On the issue of leniency, it did not question the principles of the Commission’s current leniency notice (3). It did, however, consider that the Commission had erroneously characterised Tate&Lyle’s cooperation as not being continuous and complete within the meaning of point B(d) of the notice. It therefore exercised its power of unlimited jurisdiction (4) and reassessed the merits of Tate&Lyle’s cooperation and increased the reduction in the fine from 50 % to 60 %.

74. Meanwhile, British Sugar has appealed to the Court of Justice against the Court of First Instance’s judgment (5).

2. Articles 82 and 86

2.1. Article 82 — undertakings in a dominant position

75. Article 82 prohibits undertakings in a dominant position on a given market from abusing this situation to the prejudice of third parties. Such abuse may consist, for instance, in limiting production, charging excessive prices, discriminatory or predatory pricing, tying sales, or other commercial practices not based on the principle of economic efficiency. Such practices have a negative impact on competition; they are engaged in by undertakings whose market power enables them to isolate themselves from competitive pressure and eliminate their competitors without significant damage to themselves or to block market access by new entrants to a significant degree.

76. In 2001, the Commission imposed fines in four Article 82 cases. In the remaining cases which it examined, it was able to accept commitments from the undertakings concerned, or

---

(3) For a comprehensive description of the decision, see 1998 Competition Report, pp. 138-140.
(5) OJ C 207, 18.7.1996.
(6) See Article 229 of the EC Treaty and Article 17 of Regulation No 1762/62.
(7) Case C-359/01 P.
changes to the agreements, which put an end to the abusive practices. The cases examined were not confined to specific sectors and relate inter alia to the postal sector and the car industry.

**Deutsche Post AG I (*)**

77. On 20 March, the Commission issued its first Article 82 decision in the postal sector, finding that the German postal operator, Deutsche Post AG, had abused its dominant position in the market for business parcel services by granting fidelity rebates and engaging in predatory pricing. Deutsche Post was fined EUR 24 million. See Section I.C.2.2.

**Deutsche Post AG II (**)**

78. Another decision in the postal sector, again relating to Deutsche Post AG, was issued on 25 July. See Section I.C.2.2.

---

**Duales System Deutschland (DSD) (***)**

79. On 20 April, the Commission decided that DSD, the company which created the ‘Green Dot’ trademark, had abused its dominant position in the market for organising the collection and recycling of sales packaging in Germany. DSD is the only undertaking to operate a comprehensive packaging take-back and recycling service in Germany. The Commission objected to a provision in the trademark agreement between DSD and its customers obliging the latter to pay fees corresponding to the volume of packaging bearing the Green Dot trademark, rather than to the volume of packaging for which DSD was actually providing its take-back and recycling services. The provision infringed Article 82 as it forced consumers to pay for services not actually rendered and prevented market entry by competitors.

---

**(*) Case COMP/C1/35.141.  
(**) Case COMP/C1/36.915.  
activity in packaging recovery is possible, and thus to remove obstacles to self-management and other individual compliance solutions. The Commission therefore does not accept abusive market behaviour which would consolidate the dominant position of the incumbent operator.

(b) No unjustified exclusivity arrangements: When the Commission assesses restrictions of competition in the packaging waste recovery sector, it considers among other things the scope and duration of contracts. It is critical in general towards all kinds of exclusive arrangement lacking solid and convincing economic justification.

(c) Unrestricted access to the collections infrastructure: One of the characteristics of the market for the collection and sorting of packaging waste at households is that duplication of the existing collection infrastructure is in practice often very difficult. It would be inconvenient for households to use different bins for different collection systems for the same material and this would not be an economically viable solution. The Commission therefore considers the sharing of collection facilities by collectors to be a precondition for the occurrence of competition in practice.

(d) Free marketing of secondary material: Collected and sorted packaging material can be reused as a secondary raw material for various new products. The marketing of secondary material by collectors should also be as free as possible while making sure that materials will find an appropriate reprocessing channel.

The Commission will apply the principles outlined above also to currently pending and future cases. The consumer will benefit directly from the application of these policy principles, since competition in the relevant packaging waste recovery markets is expected to reduce the price that the consumer ultimately pays for the products disposed of in the recovery systems.

Michelin (1)

80. On 20 June, the Commission decided to fine French tyre maker Michelin EUR 19.76 million for abusing its dominant position in the French market for retread and replacement tyres for heavy vehicles. The Commission’s investigation established that, between 1990 and 1998, Michelin operated a complex system of rebates, bonuses and commercial agreements which had the effect of tying dealers to Michelin as their supplier and thus of artificially barring Michelin’s competitors from the market. The heavy penalty reflected the seriousness and duration of the infringement and a previous, similar infringement by Michelin.

IMS Health (2)

81. On 3 July, the Commission imposed interim measures on IMS Health (United States), the world leader in the collection of data on pharmaceutical sales and prescriptions, ordering it to license its ‘1860 brick structure’, which segments Germany into 1 860 sales zones or ‘bricks’. The Commission considered that IMS’s refusal to grant a licence for the use of the structure, which, in the Commission’s view, has become a de facto standard in the German pharmaceutical industry, constituted a prima facie abuse of a dominant position. The refusal prevented potential new entry to the pharmaceutical sales data market and was likely to cause serious and irreparable damage to IMS’s current competitors NDC Health (United States) and AzyX Geopharma Services (Belgium). The President of the Court of First Instance, seized by IMS with an application for interim relief, suspended the operation of the Commission decision on 26 October pending a final judgment in proceedings for annulment (3). NDC Health lodged an appeal against the order of the President of the Court of First Instance on 12 December.

De Post/La Poste (Belgium) (4)

82. On 5 December, the Commission decided that the Belgian postal operator De Post/La Poste

---

(2) Case COMP/98.044 IMS Health/NDC; decision of 3.7.2001 (OJ L 59, 28.2.2002).
(3) Case T-184/01 R. The President found that the abusive nature of IMS’s conduct could not be considered unambiguous under current competition rules, that there was a risk that IMS would suffer serious and irreparable damage if it were forced to grant a licence to its competitors, and that the balance of interests in this case favoured suspension of the decision.
had abused its dominant position by making a preferential tariff in the general letter mail service subject to the acceptance of a supplementary contract covering a new business-to-business (‘B2B’) mail service and imposed a fine of EUR 2.5 million. See Section I.C.2.2.

2.2. Article 86(1) in combination with Article 82 — public undertakings/ undertakings with special or exclusive rights and dominance

83. Pursuant to Article 86, the competition rules are also applicable to public undertakings and undertakings which have been granted special or exclusive rights by Member States; Member States are not allowed to enact or maintain in force any measure contrary to the competition rules in respect of any such undertaking.

La Poste (France) (1)

84. On 23 October, the Commission adopted a decision on the monitoring of relations between the French company La Poste and firms specialising in the making-up and preparation of mail. The Commission saw a conflict of interests in the relations between La Poste and private mail-preparation firms in that La Poste was both a competitor of those firms and, in view of its postal monopoly, their unavoidable partner. In the Commission’s view, this conflict of interests encouraged La Poste to abuse its dominant position. Since French legislation did not provide for sufficiently effective or independent monitoring to neutralise this conflict of interests, the Commission took the view that the French state had contravened Article 86(1), read in conjunction with Article 82, of the Treaty.

C — Sector-based competition developments

1. Energy: liberalisation in the electricity and gas sector

85. The year 2001 brought about important developments for the European energy sector (electricity and gas), which is currently undergoing a liberalisation process. The restructuring of the European energy industry continued. Energy consumers started to benefit from liberalisation on a larger scale and many made use of the new possibilities to switch suppliers. New legislation was proposed to accelerate the liberalisation process. And last but not least, a number of ancillary measures were taken to ensure that liberalisation becomes an economic reality.

86. The liberalisation process requires market participants to adapt to the new economic reality. In the Commission’s view, liberalisation obliges energy companies to become more efficient (rationalisation) and to improve services to consumers. At the same time, it creates new market opportunities for energy companies. These can extend the geographic scope of their activities and become multinationals. And they can enter new product markets and become multi-utilities. The year 2001 provided evidence that the restructuring process in the European energy sector is under way and is leading to increased merger activity, with economies of scale and scope being the main drivers. The most prominent examples in 2001 were EdF’s acquisition policy in Spain, Italy and the UK, and the acquisition of a majority stake in the German gas company Ruhrgas by the German electricity company EON. To the extent that the Commission is competent to deal with these mergers under its merger regulation (2), it ensures that they do not lead to the creation or strengthening of a dominant position in the energy markets.

87. The ultimate objective of the liberalisation policy — from a competition perspective — is to provide consumers with a wider choice between suppliers, which in turn compete against each other on the basis of price and services. Consumers — particularly in those countries which have opted for a market opening going beyond the minimum requirements of the European electricity and gas directives — are already benefiting from the liberalisation process today. Thus, on a Community-wide level, electricity prices (excluding VAT and energy taxes) to large industrial users have fallen since the initiation of the liberalisation policy, naturally with certain differences between Member States. There also seem to be some signs of convergence of prices between Member States (3). As regards the gas sector, the

(1) Case COMP/C1/37.133.

(2) The acquisition of a majority shareholding in Ruhrgas by EON is being dealt with by the German Federal Cartel Office.

situation is somewhat different given that gas is to a large extent imported under long-term contracts and that continental European prices in these contracts are generally linked to oil prices. The rise in oil prices has therefore also led to a price increase for gas in the past year. In the medium and long run it is expected, however, that gas trading hubs will develop also in continental Europe, resulting in more liquidity and short-term trading. This will provide market participants with a new reference price, which could replace the oil price link and thus facilitate price negotiations.

1.1. Commission proposal on the completion of the European electricity and gas markets

88. From a legislative point of view, the most important development in 2001 was the Commission’s proposal for a new directive calling for the completion of the European electricity and gas markets (1). The proposal, which was submitted to the Council and the European Parliament in March 2001 following a public hearing of market participants in autumn 2000, consists of quantitative and qualitative elements.

89. As regards the ‘quantitative elements’, the proposal envisages a market opening for all commercial electricity consumers by 2003, for all commercial gas consumers by 2004 and for all other users — including private households — by 2005. When making its proposal the Commission took into account the fact that the implementation of the existing directives by Member States has led to different levels of market opening. In addition, the Commission initiated infringement proceedings in 2001 against France and Germany for failure to transpose completely the gas directive, and against Belgium for failure to fully transpose the electricity directive.

90. Unfortunately, consumers in countries that opted for a slow market opening suffer from a competitive disadvantage vis-à-vis consumers in countries that opted for a faster market opening. Similarly, energy companies in the latter countries are subject to competition across their entire customer base, whilst energy companies in the former countries still benefit from a protected customer base leading to unwarranted competitive advantages. These distortions of competition can be reduced or abolished only if all Member States agree on the same level of market opening.

91. As regards the ‘qualitative elements’, the proposal envisages, in the first place, a reinforcement of the unbundling rules. Given that a large number of companies in the electricity and gas sectors are vertically integrated, i.e. active in transmission and supply (in addition to electricity generation or gas storage), there is a risk that the transmission branch of a company might grant favourable treatment to its related supply branch to the detriment of third parties requesting third party access. In order to address this issue, the Commission proposed in its directive that vertically integrated companies be required to carry out a legal unbundling of the respective business units. The proposal also provides for certain accompanying measures in order to ensure that there is no undue flow of information between the unbundled business units. Finally, it was proposed that the reinforced unbundling rules should also be extended to large distribution companies.

92. Second, the Commission proposes to make it obligatory for Member States to create independent regulators at national level and to adopt a regulated third-party access regime (as opposed to a negotiated third party access regime, which is another option under the existing directives). Regulated access means that access is granted on the basis of tariffs approved by a public authority. The advantage of a regulated access regime is that it generally results in lower transaction costs for third parties and that the tariffs are monitored — on an ex ante basis — by the national regulator.

93. The Commission’s proposal for the completion of the energy markets was warmly welcomed by the majority of Member States at the Stockholm European Council in March. However, some Member States, such as France, expressed concern about the final deadline for full market opening. Others, such as Germany, which had opted for a negotiated third party access regime and against a national regulator, expressed concern about the ‘qualitative elements’. Nonetheless, negotiations on the draft directive were initiated in the Council working groups and significant progress was made this year. It is therefore hoped that the negotiations can be concluded in 2002.

94. In June, the Commission reminded Member States of their responsibility to ensure that the uneven level of market opening is remedied as

quickly as possible (1) and drew their attention to the fact that companies must not unduly benefit from the different levels of market opening. Finally, it announced that, if Member States are unable or unwilling to adopt its proposal for the completion of the energy markets, it may make use of the instruments provided for in Article 86(3) of the EC Treaty. This article makes it possible to adopt — under certain conditions — Commission decisions and directives addressed to Member States, which do not require Member States’ approval.

95. In parallel with the legislative proposals, work has been carried out by and discussions have taken place with international groups of interested parties (national administrations, regulators, consumers, producers). These groups (Florence Forum for electricity and Madrid Forum for gas) met at the initiative and with the active participation of the Commission. Discussions took place on certain technical and regulatory questions in an attempt to achieve harmonisation which will favour cross-border trade and the creation of a level playing field in Europe with undistorted competitive conditions for both gas and electricity markets.

1.2. Interaction of competition policy with single market rules

96. Competition policy enforcement ensures in particular that state barriers removed by the electricity and gas directive are not replaced by anti-competitive behaviour by market operators having the same effect. Three basic conditions must be met if effective competition is to be brought about and maintained in both the gas and the electricity market: free supply side, free demand side and free network access. ‘Free’ does not, of course, mean ‘free of charge’ but ‘free from artificial restrictions’.

97. The following, in particular, create an unfavourable environment for the development of competition in the European gas and electricity markets. First of all, the networks are and will remain natural monopolies. The Commission tries to favour effective network access for third parties under non-discriminatory and non-abusive conditions. In the electricity sector, particular attention is being paid to access to congested interconnectors, essential infrastructures in cross-border trade, between different Member States. Access to these interconnectors is at the same time vital in a number of countries with a monopolistic supply structure, where effective competition can thus be introduced only by means of import competition. The Commission intervened in the design of a transmission capacity allocation system for the UK/France electricity interconnector, and is currently investigating and monitoring the situation on other borders, e.g. as regards the electricity interconnectors between Spain and France and the interconnectors into the Netherlands. It also dealt with the construction and use of a new interconnector linking Norway and Germany (2). Access to the network is also an important issue for the gas sector. In the year under review the Commission dealt with a case involving the joint refusal of continental European gas companies to grant a Norwegian gas producer access to their pipelines. It settled the case with one of the European companies concerned after the latter had offered commitments rendering the third-party access regime more effective (3).

98. Second, vertical demarcation is and will remain a general feature of the energy industry, particularly in the gas market, due to the existence of a well-established vertical supply chain where all companies have their well-defined position and function.

99. Third, producers have traditionally cooperated in commercialisation in these markets, and still do today, leading to less vigorous competition on the supply side. An example of such a practice was found in the Irish (Corrib) (4) and Norwegian gas sector (GFU) (5), or in the French electricity sector (EdF/CNR), but it would appear that similar arrangements also exist in other countries.

100. Some other features (horizontal demarcation, use restrictions) limiting competition characterise mainly the gas markets.


(2) Cf. notice pursuant to Article 19(3) of Council Regulation No 17 in Case COMP/E3/37.921 Viking Cable (OJ C 247, 5.9.2001); the notifying parties have since decided to discontinue the Viking Cable project.

(3) Press release IP/01/1641 — Commission settles Marathon case with Thysengaas.

(4) Press release IP/01/578 — Enterprise Oil, Statoil and Marathon to market Irish Corrib gas separately.

1.3. Commission’s State aid policy in the energy sector

101. In 2001, particular attention was paid to the following aspects:

— Analysis of stranded cost cases (methodology and decisions). See Section III.A.4.

— Assessment of an increasing number of renewable energy promotion schemes. See Section III.C.1.3.

— Among other things, the Commission analysed schemes based on operating aid grants, such as the prime d’encouragement écologique in Luxembourg, schemes based on green certificate markets, such as the new regional electricity laws in Belgium’s regions, and more complex schemes including a combination of various incentive methods, such as the British renewable obligations system.

— Assessment of State aid aimed at securing a level of security of electricity supply. Directive 96/92/EC (1) authorises Member States to give priority to indigenous fossil fuel energy sources, to an extent not exceeding a fixed threshold based on their annual energy consumption, in order that they might meet a certain level of security of supply.

1.4. Other developments in the energy sector: motor fuels

102. When the Commission and the national competition authorities met on 29 September 2000 to discuss competition policy in the motor fuel sector (2), one of the conclusions was that new entrants and independents are essential to maintain and/or improve the competitive pressure on the European motor fuel markets. During 2001, the Directorate-General for Competition carried out a detailed investigation into the competitive conditions of independent, non-integrated operators in the motor fuel sector.

103. The independent operators identified a number of factors that render their situation sometimes difficult. These factors are linked to the behaviour of vertically-integrated firms as well as certain administrative barriers. The independents claimed that certain of their difficulties are due to the behaviour of some vertically-integrated companies, such as discriminatory pricing, predatory pricing, refusals to supply, unwillingness to give access to logistic facilities and the long-term exclusive supply contracts between integrated motor fuel companies and service stations. Although this kind of behaviour would be liable to fall under the scope of Articles 81 and 82 of the EC Treaty if the criteria for applying these provisions were met, the investigation did not provide any conclusive evidence of an infringement of EC competition rules. Finally, the independents mentioned a number of administrative barriers that cause them considerable difficulties. The state barriers most commonly complained of include the national laws implementing Directive 98/93/EC on security stocks, certain tax legislation, environmental requirements, measures increasing price transparency and the methods for allocating retail outlets. The investigation showed that the situation of the independent operators varies considerably between the Member States involved in the investigation. The findings of the investigation were presented and discussed at a second meeting between the Commission and national competition authorities on 16 November.

2. Postal services

104. The postal sector is expanding, owing in particular to further market opening and the changes brought about by the e-economy. The Commission took several important decisions concerning this sector to avoid re-monopolisation of liberalised markets by incumbent operators.

2.1. Commission proposal for further market opening

105. On 15 October, the Council approved a common position of the Member States on a text aimed at amending the existing postal directive.

106. The main changes introduced by the text approved by the Council are:
— a further opening of the market, with a staged reduction in the reserved area as of 1 January 2003 and as of 1 January 2006 (1);
— the possibility, by means of a Commission proposal to be approved by the European Parliament and the Council, of the completion of the internal postal market in 2009 (2);
— the liberalisation of outgoing cross-border mail except for those Member States where it needs to be part of the reserved services in order to ensure the provision of the universal service;
— the prohibition of cross-subsidisation of universal services outside the reserved area out of revenues from services in the reserved area unless it is strictly necessary in order to fulfil specific universal service obligations imposed in the competitive area;
— the application of the principles of transparency and non-discrimination whenever universal service providers apply special tariffs.

107. The text approved by the Council does not contain any definition of ‘special services’ (3). The revised text, although resulting in an opening of the postal market to a lesser extent than originally envisaged by the Commission, can be considered to be an important step towards a single postal market. The text still needs to be approved by Parliament.

2.2. Cases

Deutsche Post AG I (4)

108. On 20 March, the Commission concluded its investigation into Deutsche Post AG (DPAG) and adopted a decision finding that DPAG had abused its dominant position by granting fidelity rebates and engaging in predatory pricing in the market for business parcel services. DPAG was fined EUR 24 million in respect of the foreclosure resulting from its long-standing scheme of fidelity rebates. No fine was imposed in relation to predatory pricing given that the economic cost concepts used to identify predation were not sufficiently developed at the time. This is the first formal Commission abuse decision in the postal sector.

109. Following a complaint by United Parcel Service in 1994 claiming that DPAG was using revenues from the letter mail monopoly to finance below-cost selling in the open market for business parcel services, the Commission decided that any service provided by the beneficiary of a monopoly in open competition has to cover at least the additional or incremental cost incurred in branching out into the competitive sector. Any cost coverage below this level is to be considered predatory pricing. The investigation revealed that DPAG, for a period of five years, did not cover the costs incremental to providing the mail-order delivery service.

110. DPAG has undertaken to create a separate company (‘Newco’) to supply business parcel services which will be free to procure the ‘inputs’ necessary for its services either from DPAG (at market prices) or from third parties or to produce these inputs itself. In addition, DPAG has undertaken that all inputs it supplies to Newco will be supplied to Newco’s competitors at the same price and under the same conditions.

Deutsche Post AG II (5)

111. On 25 July, the Commission, following up a complaint filed by the UK Post Office, decided that Deutsche Post AG (6) (‘DPAG’) had abused its dominant position in the German letter market by intercepting, surcharging and delaying incoming international mail which it erroneously classified as circumvented domestic mail (so-called A-B-A remail). The Commission also decided that DPAG’s abusive behaviour justified the imposition of a fine, which, owing to the legal uncertainty that prevailed at the time of the infringement, was set at the ‘symbolic’ amount of EUR 1 000.

(1) In particular, as of 2003 the non-reserved area will include letters weighing more than 100g; this weight limit will not apply if the price is equal to or more than three times the public tariff for an item of correspondence in the first weight step of the fastest category. As of 2006 the non-reserved area will include letters weighing more than 50g; this weight limit will not apply if the price is equal to or more than three times the public tariff for an item of correspondence in the first weight step of the fastest category.

(2) In 2006, the Commission will carry out a study evaluating, for each Member State, the impact on universal service of the completion of the internal postal market in 2009. On the basis of this study the Commission will submit a report to Parliament and the Council accompanied by a proposal confirming, if appropriate, the date of 2009 for the full completion of the internal postal market or determining any other step in the light of the study’s conclusions.

(3) A definition of special services was included in the Commission’s original proposal. Although most of the national delegations agreed on the need to define special services in the new directive, a compromise could not be reached in the Council on a specific definition.


(5) Case COMP/35.141 (OJ L 125, 5.5.2001).

112. The Commission found that DPAG had abused its dominant position in the German market for the delivery of international mail - thereby infringing Article 82 of the EC Treaty — in four ways: (i) discriminating between different customers, (ii) refusing to provide its delivery service, (iii) charging an excessive price for the service offered and (iv) limiting the development of the German market for the delivery of international mail and of the UK market for international mail bound for Germany. During the course of the proceedings, DPAG had given an undertaking to the effect that it would no longer intercept, surcharge or delay international mail of the type to which the case related.

De Post/La Poste (Belgium) (1)

113. On 5 December, the Commission decided that the Belgian postal operator De Post/La Poste had abused its dominant position by making a preferential tariff in the general letter mail service subject to acceptance of a supplementary contract covering a new business-to-business (‘B2B’) mail service. This new service competes with the ‘document exchange’ B2B service provided in Belgium by Hays plc, a private operator in postal services based in the United Kingdom. As La Poste exploited the financial resources of the monopoly it enjoys in general letter mail in order to leverage its dominant position there into the separate and distinct market for B2B services, the Commission imposed a fine of EUR 2.5 million.

114. In April 2000, Hays had lodged a complaint with the Commission alleging that La Poste was trying to eliminate the Hays document exchange network, which it had been operating in Belgium since 1982. Hays could not compete with the tariff reduction offered by La Poste in the monopoly area and as a result was losing most of its traditional clients in Belgium, namely the insurance companies.

3. Telecommunications

3.1. Guidelines on market analysis and the calculation of significant market power

115. Following a joint initiative by Commissioners Mario Monti and Erkki Liikanen, on 25 March the Commission adopted ‘draft guidelines on market analysis and the calculation of significant market power’ (2) with a view to formal adoption of the proposed directive on a new regulatory framework for electronic communications services and networks. The draft guidelines should help the Council and the European Parliament to approve the new definition of market power proposed in the framework directive (Article 13).

116. The draft guidelines are based on the case law of the Court of First Instance and the Court of Justice in the competition sphere and on the Commission’s own decision-making practice in defining the relevant market and in applying the concept of single and collective dominant position, in particular with regard to electronic communications markets.

117. The draft was first of all discussed with national regulatory and competition authorities on 29 March in Brussels. As part of a public consultation exercise launched by the Commission, the operators concerned were also given the opportunity to express their views and define their position at a public meeting in Brussels on 18 June. These two events showed that the authorities and the operators concerned share, in substance, the Commission’s approach.

118. The definitive version of the guidelines will be adopted by the Commission once the new framework directive has been adopted by Parliament and the Council.

3.2. Adoption of the seventh implementation report

119. On 28 November, the Commission adopted the seventh report examining the state of implementation by EU Member States of the current regulatory framework for telecommunications. The key conclusion of the report is that the telecom services sector is buoyant and that the national regulatory authorities are continuing to make progress with liberalisation. Competition between operators is bringing prices down overall. Incumbents’ long-distance calls are down 11 % in price since last year and down 45 % since 1998 for a three-minute call in Europe, and by 14 % since last year and 47 % since 1998 for a ten-minute call. The average level of Internet penetration in EU households was around 36 %

---

in June 2001. On the other hand, a number of regula-
tory bottlenecks remain and these will have to 
be removed rapidly if there is to be continued 
growth in the telecommunications markets. The 
key issues are local loop unbundling, lengthy 
delivery times and absence of cost orientation for 
leased lines, particularly at the speeds required 
for broadband and e-commerce rollout, persist-
ing tariff distortions and price squeezes in certain 
instances and, finally, the full functioning of car-
rrier selection and pre-selection.

3.3. Monitoring the implementation 
of directives

120. The Commission continued to monitor the 
effective implementation of the liberalisation 
directives in Member States and the introduc-
tion of the regulatory framework in Greece follow-
ing the complete liberalisation of the markets, which 
became effective on 1 January.

121. Despite the substantial progress made by 
Member States, 21 infringement proceedings 
were still under way against Member States 
which had not correctly transposed the liberalisa-
tion directives based on Article 86(3) of the 
Treaty or which had omitted to notify transposal 
measures. The Commission continued, for exam-
ple, proceedings against Luxembourg in connec-
tion with the granting of rights of way, culminat-
ing in a reference to the Court of Justice in 
February. It is argued that Luxembourg is at fault 
for not drawing up clear rules guaranteeing non-
discriminatory treatment of operators in relation 
to rights of way.

122. On 16 October, the Court of Justice found 
for the Commission in connection with proceed-
ings brought by the latter against Greece and Por-
tugal. In its judgment concerning Portugal, the 
Court confirmed that call-back services were not 
voice telephony within the meaning of Directive 
90/388/EEC and that the Portuguese Government 
had therefore wrongly reserved these services for 
the incumbent operator pending the liberalisation 
of telecommunications (1). In its judgment 
calling to the Court of Justice (2).

123. On 6 December, the Court of Justice 
handed down a judgment (3) in a dispute between 
the Commission and France over the mechanism 
for financing the universal service which had 
been in place in that Member State since 1997. The 
matter had been brought before the Court by 
the Commission in April 2000. The Court found 
time entirely in the Commission’s favour, holding that 
the French mechanism did not respect the princi-
plies of proportionality, objectivity and transpar-
ency required by the directives, and that France 
also failed to fulfil its obligations in respect of 
the rebalancing of tariffs.

124. On the question of the rebalancing of tele-
phone subscription charges, as prescribed by 
Directive 96/19/EC, the Commission continued 
its infringement proceedings against Spain by 
sending in July a supplementary reasoned opin-
ion. This reasoned opinion stresses in particular 
the inconsistency between the full unbundled 
access tariffs set in December 2000 and the price 
cap mechanism as amended in May 2001, which 
creates a price squeeze risk up until 2003 likely to 
compromise the results of the unbundling. On 
21 December, the Commission referred the mat-
ter to the Court of Justice (4).

3.4. Sector inquiry on local loop unbundling

125. In July 2000, the Commission proposed a 
new regulation requiring local loop unbundling, 
which was speedily approved (5) by the European 
Parliament and the Council and which entered 
into force on 2 January (6). At the same time, the 
Directorate-General for Competition launched 
the first phase of a sector enquiry on the local 
loop and sent out letters to incumbent operators 
in order to investigate local loop access and the

(1) Case C-429/99.
(2) Joined Cases C-396/99 and C-397/99.
(3) Case C-146/00.
(4) Case C-500/01.
(5) Regulation (EC) No 2887/2000 of the European Parliament and 
(6) ‘Unbundling’ the local loop (or the ‘last mile’, i.e. the physical 
circuit between the customer’s premises and the telecommunications 
operator’s local switch) amounts to mandatory access on 
the incumbent’s local network to alternative carriers in order to 
introduce competition in this segment of the telecom networks, 
which are mainly in the hands of former monopolies. Nationwide 
duplication of these networks is normally impossible.
development of broadband services over the incumbents’ local loops. Broadband telecommunications use the same end-user’s lines to channel higher amounts of information with new techniques and allow for the provision of high-speed Internet access services.

126. This inquiry was pursued in 2001 with questionnaires being sent to new entrants in July. The purpose of this second phase of the inquiry is to assess the competitive situation on the local loop six months after the entry into force of the new regulation, as well as potential abuses of a dominant position by incumbent operators in breach of Article 82 of the EC Treaty. This second phase should enable the Commission to have, by early 2002, a comprehensive assessment of the situation of local loop unbundling in the 15 Member States and of problems encountered by new entrants in obtaining access under fair and competitive conditions.

3.5. Leased lines sector inquiry

127. The first phase of the leased line inquiry consisted in collecting and analysing comparative market data for all the Member States. In September 2000, the Commission presented the inquiry’s initial findings at a public hearing in Brussels. A number of competition concerns had been identified and the Commission decided to tackle those with an apparent Community dimension or of a cross-border nature and to leave the remaining ones to national authorities.

128. In November 2000, the Commission opened five ex officio cases (1) with a view to further examining the competitive provision of international leased lines in five Member States: Belgium, Greece, Italy, Portugal and Spain. The investigation is being conducted in close cooperation with the national competition authorities and telecom regulators in those countries.

129. Given that the initial sector inquiry results were of a comparative nature and not up to date, in 2001 the Commission sent formal information requests to the national authorities in the five Member States and discussed the relevant country-specific factors at bilateral meetings with those authorities. The ongoing cooperation with the national authorities boils down to close examination of the national incumbents’ competitive behaviour regarding leased line provision. At present, the Commission is verifying claims that the leased line prices of the five incumbents involved have been reduced, and it is considering other relevant factors, namely the level, fairness and transparency of discounts, service level agreements and quality of service parameters.

3.6. Sector inquiry on roaming

130. The sector inquiry was launched in January 2000 to investigate the problem of roaming prices, which are intransparent to consumers, rigid and at levels unrelated to the cost of carriage, by collecting comparative information on prices and cost levels for all EU mobile operators (2). Both wholesale and retail markets were found to be still predominantly national. The inquiry established concentration ratios of over 90 % for the two incumbent operators in most national wholesale roaming markets, and a pervasive lack of competitive pressure throughout the EU, particularly at wholesale level.

131. On 11 July, as part of the follow-up to the sector inquiry, Commission inspectors and officials from national competition authorities commenced simultaneous unannounced inspections at the premises of nine European mobile telephony operators located in the UK and Germany (3). The data collected are now being analysed to determine whether there is sufficient evidence to support a formal finding of antitrust infringements. In addition, coordination is taking place with national competition and telecommunications authorities to promote procompetitive action at national level.

3.7. Individual cases dealt with under Articles 81 and 82

3.7.1. Identrus

132. On 31 July, the Commission cleared agreements between a number of major European and non-European banks creating a global network (‘Identrus’) for the authentication of electronic signatures and other aspects of e-commerce

(1) Cases COMP/38.001 Leased lines Spain, COMP/38.002 Leased lines Portugal, COMP/38.003 Leased lines Italy, COMP/38.004 Leased lines Greece and COMP/38.005 Leased lines Belgium.

(2) Roaming occurs when a mobile phone user makes or receives calls when visiting a network other than his home network.

transactions (1). The Commission has concluded that the Identrus system will not lead to any appreciable restriction of competition. In particular, it entails no foreclosure risk, it will face competitive checks from competing systems, and participants are free to join other such systems. The Commission’s clearance decision illustrates the importance it attaches to the development of competitive e-commerce-related markets.

3.7.2. Intelsat

133. On 1 June, the Commission issued a negative clearance comfort letter to Intelsat for its restructuring from an intergovernmental organisation into a commercial company. Intelsat was formed as a government cooperative to provide satellite communications around the world in a time before telecommunications liberalisation. As telecommunications markets developed and other satellite operators entered the market, Intelsat’s structure became less appropriate in both commercial and competition terms. The Commission’s investigation and analysis revealed that the restructuring did not give rise to an appreciable restriction of competition, noting that Intelsat would carry out an IPO within two years of privatisation. This finding was in line with the conclusions of previous cases involving other intergovernmental satellite organisations, namely the maritime satellite organisation Inmarsat (2) and the European satellite organisation Eutelsat (3).

3.7.3. Wanadoo

134. On 19 December, the Commission sent a statement of objections to Wanadoo Interactive, a subsidiary of France Télécom in charge of Internet access provision (4). At this stage, the Commission believes that the company has priced its high-speed Internet access services via the ADSL technology below their incremental costs (and below their variable costs as well), which may constitute an abuse of a dominant position. This possible abuse has taken place throughout 2001, at a critical time in the take-off of broadband access services for the residential market in France, to the detriment of Wanadoo’s competitors.

4. Transport

4.1. Air transport

135. The Commission examined a number of airline alliances during 2001. In general, it believes that airline alliances can bring benefits for passengers by extending networks and improving efficiency. However, alliances can also restrict competition on individual routes and remedies are often needed to counter this.

4.1.1. British Midland/Lufthansa/SAS (5)

136. On 1 March 2000, bmi British Midland International, Lufthansa and SAS notified a joint venture agreement under which they agreed to coordinate their services within the EEA to and from London Heathrow and Manchester International airports. The Commission investigated this agreement in close cooperation with the UK competition authorities. On 12 June 2001, after the parties had given a number of undertakings, the Commission informed them that they were being granted a six-year exemption for their joint venture agreement pursuant to Article 5(3) of Regulation (EEC) No 3975/87.

137. The JV A provides that Lufthansa is granted the exclusive right to operate flights on almost all routes between London and Manchester on the one hand and German airports on the other. Similarly, SAS is granted the exclusive right for the traffic between London/Manchester and Scandinavian countries. This restriction was found to be problematic for the London-Frankfurt market, which, with 2.1 million O&D (point of origin/point of destination) passengers in 1999, is one of the busiest in Europe. The Commission concluded that British Midland’s withdrawal from the London-Frankfurt route represented an appreciable restriction of competition on both the market for non-time-sensitive (leisure) passengers and the market for time-sensitive (business) customers.

138. In its analysis under Article 81(3), the Commission came to the conclusion that, in terms of efficiency gains and competition, the overall effect of the agreement is positive. It leads to a reorganisation and expansion of the parties’ existing networks, and allows Lufthansa and SAS to compete for domestic UK traffic as well as for

---

(3) Press release IP/00/1360, 27.11.2000.
traffic between the UK and Ireland and to carry passengers from any point in the STAR network to regional destinations in the UK. It leads furthermore to an increase in network competition. As a result of the agreement, British Midland was able to start providing new services between London and Barcelona, Lisbon, Madrid, Milan and Rome.

139. With a view to addressing the Commission’s competition concerns, the parties submitted a number of commitments, in particular to make slots available at Frankfurt airport, thereby allowing the entrant to operate four daily frequencies. The Commission carried out a market test to ascertain that the slots would actually be taken up by competitors.

140. The Commission also investigated the cooperation between Austrian Airlines and Lufthansa. On 14 December, it published a notice under Article 16 of Regulation (EEC) No 3975/87 (1), stating its intention of exempting the cooperation on the basis of remedies offered by the parties.

141. Furthermore, the Commission continued its investigations into the Lufthansa/United and KLM/Northwest transatlantic alliances. It also opened a new investigation into the proposed BA/AA transatlantic alliance, working in close cooperation with the UK Office of Fair Trading. Decisions on all these alliances are expected in 2002.

4.1.2. SAS/Maersk Air (2)

142. See Section I.B.1.1.

4.1.3. IATA cargo tariff consultations

143. The IATA cargo tariff conferences are a forum where air carriers meet to agree tariffs for the transport of freight.

144. Until June 1997, this system benefited from a block exemption under Commission Regulation (EEC) No 1617/93 (3), which effectively enabled European airlines to agree on tariffs for the carriage of freight within the EEA. This block exemption was withdrawn by Commission Regulation (EC) No 1523/96 of 24 July 1996. The Commission’s main reasons for withdrawing the block exemption were that the tariffs fixed by cargo tariff conferences appeared to be much higher than the market rates and that the system no longer seemed essential for doing interlining (4) work within the EEA.

145. Following the withdrawal of the block exemption, IATA notified the system and applied for an individual exemption (5). IATA’s main argument in favour of tariff conferences was that they facilitate cargo interlining. The cargo tariffs fixed by tariff conferences are used at the wholesale level to calculate each carrier’s remuneration for its participation in an interline move.

146. In a statement of objections sent to IATA in May, the Commission took the preliminary view that IATA cargo tariff conferences fell under Article 81(1) of the EC Treaty. In its analysis under Article 81(3), the Commission accepted that cargo tariff conferences facilitated the provision of a comprehensive system of interlining within the EEA. It considered, however, that IATA had not succeeded in demonstrating that this restrictive system was still indispensable to providing customers with efficient interlining services within the EEA.

147. Following the statement of objections, IATA agreed to end the joint setting of cargo rates within the EEA. Concretely, by the beginning of 2002, cargo rates fixed individually by each carrier should replace those jointly set by the tariff conferences.

148. As a result, the Commission decided to close the case. It also provided IATA with a comfort letter covering a number of other administrative and technical resolutions in the cargo sector, which facilitate interlining and are distinct from the setting of cargo rates.

4.1.4. IATA passenger tariff conferences

149. Airlines within the Community benefit from a block exemption allowing them to consult on scheduled passenger tariffs so long as these tariffs are for interlining (Commission Regulation (EEC) No 1617/93). Interlining occurs when a passenger is carried for part or all of his journey by an airline other than the one he booked with.

---

(4) Interlining occurs when cargo is carried for part or all of the journey by an airline other than the airline the customer has contracted with.
(5) Case COMP/36.563.
150. In practice, the exemption for passenger tariff consultations applies to the activities of just one organisation — the International Air Transport Association (IATA). IATA organises passenger tariff conferences which meet several times a year to set interlining tariffs for all regions of the world. All EEA flag carriers and a number of regional airlines participate in the tariff conference that covers Europe. Any airline which is a member of the passenger tariff conferences can interline with any other at the rates set in these conferences. Both business and full economy fares are agreed for all EEA city pairs for one year at a time. For some city pairs APEX and other discounted fares are also agreed. These fares are applied together with a weighting system known as the Multilateral Prorate Agreement to determine how much an airline will receive for carrying an interlining passenger on any given journey segment.

151. In February, the Directorate-General for Competition published a consultation paper seeking views on whether IATA passenger tariff conferences should continue to be exempted. In June, the Commission renewed the current block exemption for passenger tariff conferences for one year while considering what approach to take in future. Tariff conferences are a clear restriction of competition in that they involve price fixing, but they also secure a benefit for consumers by providing them with the possibility of buying a single through ticket for journeys involving different airlines. The consultation paper started from the premiss that interlining brings both economic and consumer benefits and asked whether the restrictions on competition inherent in passenger tariff conferences are necessary in order to secure these benefits.

4.2. Maritime transport

152. The year 2001 saw significant developments in liner shipping competition policy, both within the EU and internationally.

4.2.1. Revised TACA

153. On 29 November, the Commission published a notice stating its intention to exempt the maritime aspects of the revised Trans-Atlantic Conference Agreement (‘the revised TACA’) and giving third parties 30 days in which to comment. This followed the Commission’s decision in August 1999 not to oppose the inland aspects of the agreement, while raising serious doubts about the maritime aspects.

154. In the period since August 1999, the Commission’s investigation has focused mainly on verifying that the provisions for exchange of information between members of the conference are not such as to jeopardise the confidentiality of individual service contracts concluded between individual carriers and shippers. The free and widespread availability of such contracts is, in the Commission’s view, crucial to ensuring that the members of the revised TACA remain subject to effective competition. In considering whether this is indeed the case, the Commission has taken due account of the finding of the United States Federal Maritime Commission, in its report on the impact of the US Ocean Shipping Reform Act, that no more than approximately 10% of all cargo carried by members of the revised TACA is currently carried under the conference tariff. The remaining 90% is carried under service contracts.

155. In response to the Commission’s concerns, the TACA parties have made significant amendments to the conference arrangements concerning information exchange and given certain undertakings. The Commission has taken the preliminary view, pending comments from third parties, that these amendments and undertakings, in combination with the clear evidence of substantial internal and external competition, are sufficient to address the serious doubts raised in August 1999.

156. The revised TACA case has also served to highlight the issue of capacity management. The conference agreement contains a general provision modelled on Article 3(d) of Council Regulation (EEC) No 4056/86, which allows a conference to regulate the capacity offered by each of its members. The revised TACA availed itself of this option over the Christmas and New Year low season of 2000/2001. The capacity programme, which covered a period of five weeks and was notified to the Commission, gave the latter the opportunity to clarify its view of the scope of Article 3(d). The Commission thus considered inter alia that a conference capacity management programme could not be used as an instrument to create an artificial peak season and that capacity withdrawal could not be combined with an increase in the conference tariff. The revised TACA parties undertook to comply with these guidelines.
157. The scope of Article 3(d) was also at issue in a case involving the Far Eastern Freight Conference (the FEFC). In October, the FEFC parties decided to implement a six-month coordinated vessel withdrawal scheme. The scheme was intended to deal with the combined effects of a drastic fall in demand on the Europe–Far East trades and the introduction of significant amounts of new capacity. In a warning letter to the parties, the Commission indicated that it considered that the FEFC programme was not covered by Article 3(d), as interpreted by the Commission in its TAA (\(^1\)) and EATA (\(^2\)) decisions. In particular, the programme did not, in the Commission’s view, have the permissible objective of addressing a short-term fluctuation in demand. Nor would the programme qualify for individual exemption, as any possible benefit to transport users would be more than outweighed by the negative impact of the programme on the users’ costs. In response to the warning letter, the members of the FEFC immediately terminated their coordinated withdrawal scheme.

4.2.2. Consortia

158. Two consortia agreements were cleared by the Commission in 2001 (\(^3\)), confirming that operational agreements of this nature generally contribute to a more rational organisation of maritime transport services while bringing substantial benefits to transport users.

4.2.3. OECD report on liner shipping

159. Internationally, the most significant event of the year was undoubtedly the publication of a draft OECD report on liner shipping competition policy. The report, which was discussed at an OECD workshop in December, questions the justification for maintaining antitrust immunity or exemption for the collective price-fixing activities of shipping lines and recommends that member countries should undertake a review of their current legislation in this respect. The Commission welcomes the report as a substantial contribution to the debate and will reflect further on the implications for EU liner shipping legislation.

4.2.4. P&O/Stena

160. In the short-sea sector, the highlight of 2001 was the Commission’s decision to renew the exemption for the P&O and Stena Line cross-Channel ferry joint venture. The original three-year exemption was granted on 26 January 1999 and the parties applied for renewal on 22 December 2000. The Commission’s investigation found inter alia that the characteristics of the market were such that the main operators on the market could be expected to compete with each other and that the price increases that had taken place could be explained by circumstances other than the existence of the joint venture. The Commission therefore concluded that there were no grounds for opposing a further automatic exemption for six years, which is the standard period under the relevant maritime transport regulation. The joint venture is therefore deemed exempt until 7 March 2007.

4.3. Railways

161. In February, the Council and the European Parliament finally adopted the three directives comprising the railway package (\(^4\)). The package extends rights of access to all types of international rail freight operating over a specified trans-European rail freight network until 2008, and over the whole EU network thereafter. The package also includes Community licensing for train operators; detailed rules on infrastructure charging, train path allocation and safety certification; and the requirement to establish an independent regulatory body at national level to oversee the charging/allocation process and to hear complaints.

162. In June, the Commission opened formal proceedings against Ferrovie dello Stato (FS) in a case concerning market access (\(^5\)). In its statement of objections, the Commission considered that FS’s repeated and long-standing refusal to grant access to GVG, a small German railway

---


\(^3\) Case COMP/37.982 Grand Alliance/Americana Consortium and Case COMP/38.021 Europe to Caribbean Consortium.


operator, amounted to an abuse of a dominant position.

163. In October, the Commission warned Deutsche Bahn (DB) about discriminating against a private operator (1). In this other case involving GVG, the Commission found in its statement of objections that DB had abused its dominant position in three ways. First, it discriminated in its charges for traction. Second, it subsequently declined to provide traction altogether. And third, it imposed a requirement that GVG must hire DB staff.

164. The Commission has meanwhile announced in the White Paper European Transport Policy for 2010: Time to decide (2) its intention to put forward further legislative proposals to liberalise market access by opening up domestic and cabotage freight services, thereby completing the internal market in the rail freight sector.

5. Media

5.1. Sports broadcasting

5.1.1. UEFA broadcasting regulations

165. Access to broadcasting markets, particularly pay-television and pay-per-view markets, is heavily dependent on access to premium rights and technology. Over the past year, the potential for sports rights to foreclose broadcasting markets was examined in several cases. In the UEFA broadcasting regulations decision (3), for example, the changes limiting the hours when broadcasters would be prevented from broadcasting football of a particular origin prevented the regulations from having any appreciable effect on broadcasting markets. The UEFA regulations on the broadcasting of sporting fixtures originally submitted to the Commission were highly complex and very broad in scope. The broadcasting of matches was prohibited throughout the weekend. Following the Commission’s intervention, UEFA has simplified its rules and strictly limited the blocked number of hours. As from the 2000/2001 season, the new UEFA regulations will authorise national associations to prevent the broadcasting of fixtures within their territories for only two and a half hours either on Saturdays or on Sundays at a time when major national matches are taking place. Similarly, the separation of the FIA’s regulatory and commercial functions, and more particularly the reduced duration of the contracts for the broadcasting of Formula One, would prevent those broadcasting contracts from distorting the national free-to-air and pay-television broadcasting markets (4). The sector will be kept under scrutiny, in particular with regard to developments in downstream broadcasting markets.

5.1.2. UEFA Champions League

166. The Commission also began to examine how rights are sold, rather than the terms on which they are sold. It issued a statement of objections against UEFA in respect of the collective selling of the broadcasting rights to the later stages of the UEFA Champions League. The collective selling of these rights on an exclusive basis risks limiting the supply of such rights, thereby limiting the broadcasting of football on downstream broadcasting markets; the exclusive sale of those rights risks distorting competition on those markets.

5.2. Other issues

5.2.1. Collecting societies

167. The management of rights by collecting societies has traditionally been done by national collecting societies which have had monopoly positions on national markets. The development of the Internet challenges this situation, as a service made available over the Internet is theoretically available anywhere in the world. The collecting societies have therefore begun to examine how rights should be managed in this borderless environment. The Commission published an Article 19(3) notice in August in respect of an agreement between collecting societies for the management of rights to broadcast simultaneously via traditional broadcast media and over the Internet. This agreement would not alter the monopoly position of each collecting society in respect of its national repertoire, but would introduce competition between collecting societies for the downstream provision of a global licence to users.

5.2.2. CDs/DVDs

168. Vertical problems were examined in relation to the distribution and pricing of CDs, where the Commission found evidence of limited retail price maintenance — which was rapidly discontinued following the Commission’s investigation.

169. The Commission also began to look at a potentially important case for consumers which may combine both horizontal and vertical restraints: the regional coding system for DVDs. In this case, the Commission is examining the horizontal agreement on the DVD standard, which includes the region-coding system, together with vertical agreements for the licensing of the technology and know-how to use that standard.

6. Motor vehicle distribution

170. In the motor vehicle distribution sector, the Commission’s activities in 2001 centred on:

— continuing the process of evaluating Regulation (EC) No 1475/95 (1) following the evaluation report adopted by the Commission on 15 November 2000 (2);

— starting a reflection process on the possible adoption of a specific legislative framework for motor vehicle distribution after the expiry of Regulation (EC) No 1475/95 in September 2002;

— monitoring the application of Regulation (EC) No 1475/95, with the adoption of, among other things, two infringement decisions with fines.

6.1. Preparing the ground for a new legislative framework specific to motor vehicle distribution

171. Until 30 September 2002, the date of its expiry, Regulation (EC) No 1475/95 exempts from the prohibition in Article 81(1) selective and exclusive distribution agreements for motor vehicles having three or more wheels whereby manufacturers set up dealers in exclusive territories; these dealers may sell vehicles either to final consumers or their agents, or to other dealers approved by the manufacturer.

172. The evaluation report concluded that the aims of Regulation (EC) No 1475/95 had been only partially achieved and that the assumptions underlying the regulation were no longer entirely valid.

173. Before deciding on the legislative framework that would best resolve the motor vehicle distribution problems identified in the block exemption regulation evaluation report, the Commission launched a study to identify and measure the economic impact on all parties concerned of five possible legislative scenarios (3). The study is purely consultative in nature and contains no recommendations as to the future legislative framework.

174. The economic impact study analyses the effects on inter-brand and intra-brand competition, on the creation of obstacles to internal market integration, and on competition in the after-sales service market. These effects were analysed in order to identify the impact on manufacturers, their official distribution networks, approved after-sales service providers, independent repairers, consumers, and manufacturers of spare parts and diagnostic systems.

175. In addition to the five legislative scenarios, a number of specific issues, considered to be variables capable of being applied to each scenario, were analysed separately and in the context of each appropriate scenario (for example, multi-branding and the link between sales and after-sales servicing).

176. At the same time, a study of consumer expectations was commissioned with a view to determining consumers’ positions with regard to the current system of car distribution and possible alternatives for the future (4). These two studies complete the process of evaluation by the Commission of the block exemption regulation. They come on top of two other studies carried out in 2000 into the link between new vehicle sales and


(3) The study’s terms of reference may be consulted on the Competition Directorate-General’s Internet site: http://europa.eu.int/comm/competition/car_sector/distribution. The study was entrusted to the firm of consultants Andersen following a call for tenders. It may be consulted at the abovementioned Internet address.

after-sales servicing and price differentials in the Community (1). All these studies are useful sources of information when it comes to determining the future framework for motor vehicle distribution.

177. After analysing the findings of the studies it has had carried out, in early 2002 the Commission will present a proposal for the future framework applicable to motor vehicle distribution as from September of that year. It goes without saying that it will examine every other available source of information (2).

6.2. General assessment of the application of the block exemption regulation as regards new car prices

178. Every year the Commission compares the pre-tax prices of new cars in the Community (3). The comparison is carried out twice a year (in May and November) on the basis of the selling prices recommended by manufacturers for each Community Member State.

179. The situation on 1 May 2001 shows that, as in November 2000 and despite the continued depreciation of the pound sterling against the euro, prices in the United Kingdom — although they had decreased or remained stable — were still higher than in the euro zone. In the euro zone, Austria and Germany were still the most expensive countries. The Commission noted once more that the average price differential within the euro zone was well above 20 % in the cheapest segments (A to D), despite the fact that the large number of models in segments B to D should normally be a sign of strong competition. In general, Denmark, Finland, Greece, the Netherlands and Spain are the markets where the pre-tax prices of new cars are the lowest (4).

180. These price differentials are much higher than the limit laid down in the notice concerning Regulation (EEC) No 123/85 (5), i.e. 12 % (6). The notice is still in force, and deals with certain questions relating to Regulation (EC) No 1475/95, including price differentials. Above this limit, the Commission may withdraw the benefit of the exemption if the price differentials are due to obligations exempted by Regulation (EC) No 1475/95 (7).

181. These wide price differentials explain why many consumers continue to buy their cars in other Community countries, not without difficulty though, as can be seen from the steady stream of complaints reaching the Commission, most of the time for excessively long delivery periods.

6.3. Application of the block exemption regulation in 2001

182. The Commission adopted two infringement decisions with fines in 2001 against the two car manufacturers Volkswagen and DaimlerChrysler. It also approved Porsche’s new distribution system.

6.3.1. Volkswagen (8)

183. The Commission adopted a decision fining Volkswagen EUR 30.96 million for resale price maintenance in Germany for the new VW Passat. Volkswagen had sent circular letters in 1996 and 1997 to its German dealers telling them not to sell this model at prices below the recommended list price. Unlike the previous decision against Volkswagen, this second decision does not concern measures aimed at hindering cross-border sales. Resale price maintenance is, however, a hardcore restriction. This is the first decision on resale price maintenance in the car sector.

6.3.2. DaimlerChrysler (9)

184. Following the receipt of complaints from consumers, the Commission opened an own-initiative proceeding against DaimlerChrysler. On

---

(1) These two studies may be consulted on the Competition Directorate-General’s Internet site: http://europa.eu.int/comm/competition/car_sector/. The natural link between sales and service’ (Autopolis), ‘Car price differentials in the European Union: An economic analysis’ (Hans Degryse and Frank Verboven — KULeuven and CEPR). See also 2000 Competition Report, point 113.

(2) Of these sources, mention may be made of a study commissioned by the European Automobile Manufacturers’ Association (EAMA), also dealing with the economic effects of alternative distribution systems.

(3) The comparison is required by Article 11 of the exemption regulation.


(6) The differential may, however, exceed 12 % by six percentage points for a period of less than one year or in respect of an insignificant portion of the vehicles.

(7) See Article 8 and the 31st recital of the regulation.


10 October, it adopted a decision fining Daimler-Chrysler EUR 71.825 million for several infringements of Article 81 of the EC Treaty. The first infringement consisted of obstacles to parallel trade in Germany agreed between Daimler-Chrysler and the members of its German distribution network. The application of Article 81 to these restrictions between Daimler-Chrysler and its German agents resulted from the fact that these agents bear a considerable commercial risk linked to their activity (\(^1\)). The second infringement consisted of the restriction of sales to independent leasing companies in Germany and Spain. Lastly, DaimlerChrysler participated in a price-fixing agreement in Belgium aimed at reducing rebates granted to consumers.

### 6.3.3. Porsche’s distribution system

185. Following notification of Porsche’s new distribution agreements (\(^2\)), the Commission came to the conclusion that the agreements could be exempted under Regulation (EC) No 1475/95 after certain modifications had been made by Porsche. In particular, in establishing sales targets all sales are to be taken into account regardless of the buyer’s place of residence and Porsche dealers are to be allowed to carry out online sales if consumers wish to buy over the Internet. The file was accordingly closed by comfort letter.

---

\(^1\) According to the guidelines on vertical restraints (OJ C 291, 13.10.2000), the only relevant criterion for determining whether Article 81(1) applies to the activity of commercial agents is whether or not the agent has to bear a risk linked to the sale of goods or services he is involved in. In this case, rebates granted by agents were taken off their commission and agents bore responsibilities with regard to transport; they also bought demonstration vehicles — a significant proportion of the total number of cars sold — and financed spare part stocks. The contract obliged them to supply warranty services (without being fully reimbursed) and after-sales services at their own risk.

\(^2\) Case COMP/37.886 Porsche.
Exchange of information

This relates to the ability of users to exchange or discover market-sensitive information on, for example, prices and quantities. Their ability to do so will usually depend on how the system is designed, in particular as regards users’ ability to access each other’s data.

Joint purchasing/selling

As in the ‘bricks and mortar’ world, this concern arises if users get together in order to restrict competition vis-à-vis their counterparts. This phenomenon is discussed extensively in the guidelines on horizontal restraints.

Investigation and analysis

The Covisint project does not constitute a merger, since the companies that created the exchange will not exercise joint or sole control over the new company. Covisint therefore fell to be examined under Article 81 of the EC Treaty rather than under the merger regulation, and was the first major B2B exchange to be looked at in this way. Covisint’s novelty meant that it could potentially serve as a guide for the treatment of other similar projects.

After examining the notified agreements and the replies received to information requests, the Commission concluded that the notified project does not currently restrict competition within the meaning of Article 81(1) and sent the parties a comfort letter to that effect. In particular, the agreements contain adequate provisions to allay potential competition concerns of the types discussed above (1). This relates to joint purchasing (between car manufacturers or for automotive-specific products), but also to the exchange of confidential information, as the agreements provide for adequate data protection through the use of firewalls and security rules. The Commission also notes that Covisint is open to all firms in the industry on a non-discriminatory basis, is based on open standards and allows both shareholders and other users to participate in other B2B exchanges.


6.4. Order of the Court of Justice in the Asia Motor France SA case (1)

186. Asia Motor France, and other companies related to it, carried on the business of importing Japanese vehicles into France. In 1985 and 1988 they complained to the Commission about an alleged restrictive practice between five importers of Japanese cars (Toyota, Mazda, Honda, Mitsubishi and Nissan) which were said to have entered into an agreement with the French Government aimed at limiting Japanese car sales to 3% of total annual motor vehicle sales and to have agreed among themselves to divide up this 3% quota in such a way as to exclude any Japanese makes other than their own (2). The complaints were rejected by the Commission.

187. The Court’s order of 20 September, which was favourable to the Commission, brought the case to an end. The Commission had good cause to reject the complaints inasmuch as the problems complained of resulted directly from the policy of the public authorities and not from an agreement between undertakings.

7. Financial services

188. In applying competition policy to the financial services sector, the overall objective is to achieve more competitive and efficient European financial markets. Such achievements contribute to the welfare of consumers and the delivery of a dynamic, knowledge-based European economy with higher economic growth.

189. The EU financial system is integrating progressively under the influence of globalisation, technological advances, the introduction of the
euro and ongoing market liberalisation. The introduction of euro notes and coins on 1 January 2002 will further increase transparency and strengthen the forces of integration within the Union. Integration is resulting in increased levels of competition on certain markets. It also increases the need for greater vigilance in the application and enforcement of competition policy so as to ensure that financial markets remain open and competitive. There is a risk that companies might seek to protect themselves from increased levels of competition by entering into anticompetitive agreements or, where they are in a dominant position, by exercising their market power in a way which hinders the development of new and innovative business formats.

190. In 2001, major advances were made in the application and clarification of competition policy towards payment systems. This is of significant importance in view of the forthcoming introduction of a single payments area within the EU. In the area of financial infrastructure the policy objective is to facilitate competition, thereby unleashing market forces favourable to the establishment of a more efficient infrastructure. The Commission has started work on ensuring that competition policy is being fully respected in the so-called back office operations of securities transactions. The efficiency of these operations, referred to in the industry as clearing and settlement, have important implications for the overall efficiency of European capital markets.

7.1. Competition in the clearing and settlement sector

191. On 15 February, the Committee of Wise Men on the Regulation of European Securities Markets, chaired by Mr Lamfalussy, published its final report. Its terms of reference were defined by the European Union’s economics and finance ministers on 17 July 2000 with the aim of achieving a truly integrated European financial market.

192. In its report the Committee specifically refers to the clearing and settlement sector. It is convinced that further restructuring of this sector is necessary in the European Union. The process of consolidation should largely be in the hands of the private sector. The Committee states, however, that this does not mean that there are no public policy issues at stake. In particular, public policy should focus on competition issues and removing the kinds of obstacles and impediments that make consolidation difficult. The Committee clearly considers competition issues such as open and non-discriminatory access and exclusive agreements to be among the most important public policy issues.

193. The Committee suggests that the Commission should examine the situation in the field of clearing and settlement in order to ensure that the Community’s competition policy is being properly respected in this crucial sector. Against that background and given that the Commission was already examining this sector, it has extended its examination by launching a formal in-depth ex officio inquiry. It is the first time that such a large-scale antitrust examination of the clearing and settlement sector has been undertaken.

194. The Commission had already identified a number of possible competition concerns in the field of clearing and settlement:

— first, market participants indicated that some settlement systems may be engaging in discriminatory pricing and applying dissimilar conditions to equivalent transactions;
— second, there may be exclusive arrangements between exchanges and clearing and settlement systems which restrict competition in clearing and settlement services; and
— third, market participants have pointed out the possible risk of excessive prices being charged for clearing and settlement services where the clearing and/or settlement system is held by the trading platform and trades on such platform have to be cleared and/or settled in that system (so-called ‘vertical silos’).

195. The purpose of the ex officio inquiry is to determine whether the above-mentioned possible competition concerns are real competition concerns, and if so, whether they can be addressed by applying EU competition law. The addressees of this inquiry are market participants including banks, trading platforms, and clearing and settlement systems.

7.1.1. Eurex (1)

196. In December, the Commission closed by way of comfort letter the notification by Deutsche Börse AG and SWX Swiss Exchange (‘the par-

(1) Case COMP/D1/37.557.
I — ANTITRUST — ARTICLES 81 AND 82; STATE MONOPOLIES AND MONOPOLY RIGHTS — ARTICLES 31 AND 86

ent’s) of their joint venture Eurex, a cross-border exchange for electronic trading in financial derivatives, such as options and futures (1).

197. The Commission considered that Eurex is a jointly controlled full-function joint venture and hence a concentration, but that it does not have a Community dimension. Pursuant to Article 22(1) of Regulation (EEC) No 4064/89, Regulation No 17/62 does not apply to concentrations except in relation to joint ventures that do not have a Community dimension and which have as their object or effect the coordination of the competitive behaviour of undertakings that remain independent. Usually the national competition authorities examine whether any such risk of coordination is present in the context of their merger analysis. No such analysis was carried out in this case because the transaction did not need to be and was not notified to the relevant national competition authorities.

198. The Commission therefore examined under Article 81(1) whether there is any risk of coordination of the parents’ behaviour resulting from the concentration of part of their activities. The parents are active in a number of markets that are adjacent to the derivatives trading and clearing markets in which Eurex is present, such as those for the listing and trading services of securities (shares and bonds) and warrants, the provision of electronic exchange systems and the sale of market information.

199. The Commission published in August 2000 a notice seeking comments on its intention to adopt a favourable position in this case (2). The outcome of the Commission’s examination is that there is no appreciable risk of coordination of the behaviour of the parents in these neighbouring markets.

7.2. Payment systems

200. On 9 August, the Commission adopted its first formal decision under Article 81 of the EC Treaty with regard to international payment cards in the Visa International case (3). The decision clarifies the Commission’s policy with regard to a number of issues in this sector. It finds that certain provisions in the Visa International payment card scheme, which had been notified to the Commission for clearance, fall outside the scope of the prohibition of Article 81 and covers all types of international Visa cards (credit cards with revolving credit facility, deferred debit cards and direct debit cards). It relates exclusively to the five provisions in the Visa International rules described below:

(a) the no-discrimination rule (NDR), which prohibits merchants from charging cardholders extra for using their Visa card.

While considering that the NDR limits the freedom of merchants to set their own prices, the Commission came to the conclusion that this restriction cannot be said to have an appreciable negative effect on competition. Market studies in Sweden and the Netherlands — where the NDR has been abolished by national competition authorities — had shown that abolition did not have a significant effect on merchant fees;

(b) the modified rules on cross-border card issuing and merchant acquiring, which now allow Visa members to issue cards to consumers and contract with (all types of) merchants in other Member States, without prior establishment of a branch/subsidiary in the country concerned;

(c) the principle of territorial licensing, according to which banks normally need a licence to issue and acquire for each Member State. Given that banks can obtain additional trademark licences for all Member States in which they are authorised to carry on banking activities, this principle is considered not to constitute an appreciable restriction of competition;

(d) the ‘no acquiring without issuing’ rule, which requires banks to issue a reasonable number of cards to cardholders first before starting merchant acquiring activities. However, this rule is held to promote the development of the system by ensuring a large card base, thereby making the system more attractive for merchants;

(e) the honour all cards rule, according to which merchants must accept all valid cards with either the Visa (usually a credit or deferred debit card) or Electron (usually a direct debit card) brand, irrespective of the identity of the issuer, the nature of the transaction and the type of card being issued.

(1) Press release IP/02/4, 3.1.2002.
Given that the development of a payment system depends on issuers being able to rely on acceptance of their cards by merchants contracted to other acquirers, this rule is held to promote the development of the Visa payment scheme since it ensures the universal acceptance of Visa cards.

201. Visa cards are by their nature cross-border means of payment. The decision concludes that the provisions in the Visa International rules, which are applicable at least in the whole common market, have at least potentially an effect on trade between Member States.

202. Separately from the decision mentioned above, the Commission published in August a notice seeking comments on its intention to adopt a favourable position on Visa’s so-called interregional multilateral interchange fee (or MIF) (1). The Commission had originally sent Visa a statement of objections on this, but Visa has now proposed changes which involve a reduction of the level of the fees, the introduction of objective criteria to set the level of the fees, and transparency vis-à-vis merchants on the level and the relative percentage of the cost categories included in the MIF.

7.4. Convergence between banking and insurance

204. The term bancassurance (or Allfinanz in German) refers to the increasing convergence between banks and insurers. In retail finance, convergence is based on supposed distribution synergies: the ability to cross-sell insurance to bank customers and banking services to insurance policyholders. This is true in particular in Germany where recently enacted rules specifically favour private pension products, thus opening up a vast — and potentially very profitable — new area of business for banks and insurers. This has led to an increased number of bancassurance arrangements, be it in the form of cooperation agreements or of mergers.

205. From a competition analysis perspective, cooperation agreements or mergers between banks and insurers tend to pose little competitive concern because the companies involved will typically not have been present in each other’s markets before. As to bancassurance mergers, see Case M.2431 Allianz/Dresdner, discussed in Part II, under II, Merger Control.

206. As to bancassurance cooperation agreements, in November, the Commission, after publishing a Carlsberg notice, cleared by comfort letter the setting-up by Generali-controlled AMB, Germany’s number four insurer, and Commerzbank, Germany’s fourth biggest bank, of a joint venture with regard to the distribution of their respective retail banking and insurance products. The primary reasons for this clearance were that (a) the market overlaps were minimal, (b) the relevant interlocking directorships did not raise competition concerns, and (c) the parties will face strong competition from, among others, the Allianz/Dresdner and Münchener Rück/Ergo groups.

---

(2) Cases COMP/37.363 Svenska Atomförsäkringspoolen, COMP/34.985 Pool Italiano Rischi Atomici and COMP/34.558 Aseguradores Riesgos Nucleares.
8. Information society

8.1. Statement of objections sent to Microsoft

207. On 30 August, the Commission sent a statement of objections to the US software company Microsoft Corp. (‘Microsoft’) (1) concerning several infringements of Article 82. This statement of objections extended and supplemented a previous statement issued in August 2000 following a complaint from the US company Sun Microsystems Inc. (2).

208. According to the statement of objections of 2001, Microsoft violates EC competition rules by leveraging its dominant position in the markets for personal computer operating systems and low-end server operating systems. The Commission considers that Microsoft has been withholding ‘interface information’ from competing software vendors, i.e. information needed to allow the vendors’ server software to interoperate with Microsoft’s ‘Windows’ PC and server software. Microsoft has also applied a policy of discriminatory and selective disclosure of interface information.

209. In the Commission’s view, Microsoft thus engages in a leveraging strategy which is based on denying competitors’ server software the opportunity to compete on the merits with its Windows software. Indeed, on account of the widespread usage of Windows in information technology networks, interoperability with Windows has an important influence on customers’ purchasing decisions.

210. Furthermore, the Commission believes that Microsoft abuses its dominant position by means of its licensing policy for Windows 2000. As a result of Microsoft’s all-inclusive licence, customers have to pay for a full package of services even if they would prefer to obtain some services from competing server providers. Thus customers who are already using Windows and who want to buy competing services would have to pay double licensing fees. This policy will consequently drive consumers towards Microsoft server products, thereby reducing their choice for competing software and foreclosing competition.

211. Finally, with respect to Microsoft’s Media Player (a ‘streaming media’ software program allowing for fast transmission via the Internet and for playback on PCs of audio and video files), the Commission takes the view that the tying of the Media Player with the Windows PC operating system distorts competition on the merits. Given consumers’ tendency to use the pre-installed configuration on their desktop, this tying forecloses other vendors of ‘streaming media’ software.

212. The Commission takes note of the fact that the United States Court of Appeals ruled on 28 June that Microsoft violated section 2 of the Sherman Act by employing anticompetitive means to maintain a monopoly in the operating systems market. The Commission is closely following the outcome of this case and notes that the US Department of Justice and several states agreed on a proposed final judgment settling the case whereas other states continue the litigation. Though any outcome of the US case might affect some of the practices investigated by the Commission, the US and EC cases do not address the same facts and are thus complementary.

8.2. Information society and the Internet

213. The creation of conditions of an open and competitive environment for the development of the Internet and e-commerce remains the primary goal of the Commission. Clearly, the existing competition rules are able to deal with the peculiarities of the Internet due to their appropriate level of abstraction. The competition rules are remarkably adaptable to changing economic circumstances, including those resulting from the fundamental change in the way of doing business in the Internet economy.

214. Competition policy concerns arose in respect of telecommunications infrastructure used for Internet traffic. Such concerns related to a variety of markets, notably broadband (high capacity) and narrowband (low capacity) Internet access markets as well as markets relating to Internet connectivity.

215. The lack of competition in the local access markets in all Member States, in particular for broadband access, was again identified as a major impediment to the deployment of the Internet and Internet services in Europe. Earlier, the Commission had initiated important policy steps in this respect such as the regulation on ‘unbundled access to the local loop’ and the sector inquiry on

(2) Case COMP/37.245, which is now dealt with jointly with Case COMP/37.792 under case number COMP/37.792.
the local loop (1), and is now ready to look for even further initiatives. The Commission continued to consider any competitive pressure that might come from alternative broadband access platforms, including mobile wireless access. However, while mobile wireless access may put a competitive check on the currently dominating local loop technology, it is equally important to supervise market-dominating players in the mobile telephony sector.

216. Concerns have also become apparent in the area of Internet governance, in particular relating to Internet domain names. The cases the Commission is dealing with involve complaints against registries of top-level domain names under Article 82. European competition rules doubtless do apply to the domain name system. In general, the Commission believes that speculative, discriminatory and abusive registration of Internet domain names must be avoided, as this is crucial to securing an open and competitive environment for the Internet.

9. Sport

217. In its report to the Helsinki European Council on sport (2), the Commission stated its position on the manner of reconciling the different functions of sport. The Council of the European Union in its declaration annexed to the conclusions of the Nice European Council (3) stressed the need to take account, in all action by the Community, of ‘the social, educational and cultural functions inherent in sport and making it special, in order that the code of ethics and the solidarity essential to the preservation of its social role may be respected and nurtured’.

218. The declaration underlines the Council’s support for the independence of sports organisations and their right to organise themselves through appropriate associative structures. It is thus the task of sports organisations to organise and promote their particular sports, particularly as regards the specifically sporting rules applicable and the make-up of national teams. In performing this task, due regard must, of course, be had to national and Community legislation.

219. The Council noted especially that sports federations play a central role in ensuring the essential solidarity between recreational sport and top-level sport and stressed the principles which must guide them: access to sports for the public at large, support for amateur sports, non-discrimination, equality of opportunities, training, health protection and measures to combat doping.

220. In 2001, the Commission had the opportunity, in four competition cases, to put into practice the principles enunciated by the Council in its declaration.

---

(1) See Section I.C.3.4.
(2) Report from the Commission to the European Council with a view to safeguarding current sports structures and maintaining the social function of sport within the Community framework (COM(1999) 644 final, 10.12.1999).
(3) Declaration on the specific characteristics of sport and its social function in Europe, of which account should be taken in implementing common policies.

---

Box 5: Footballer transfers

On 5 March, Commissioners Monti, Reding and Diamantopoulou and the Presidents of FIFA and UEFA finalised the discussions on international footballer transfers. FIFA and UEFA undertook to adopt new transfer rules on the basis of a number of principles (1), including three main ones which seek to promote the training of young players and to ensure the stability of teams as well as the integrity, regularity and proper functioning of competitions, in the context of the specific features of football, so as to safeguard the interests of fans and spectators of the sport.

(a) The first topic of discussion was training compensation. The Commission has always supported the idea of training compensation linked to the cost of training, including at the end of a player’s contract. A young footballer, that is to say one below the age of 23, is considered to undergo training up to the age of 21. If he is transferred to another club, it is only right that the club which trained him should be

---

9.1. Formula One

221. The Formula One case is extremely important both in economic and financial terms and because it involves the organisation of a sport within an international association. In 1999, the Commission found that the Fédération Internationale de l’Automobile (FIA) was facing a conflict of interest between its role as the body regulating the sport and its activity as organiser of motor racing championships. This situation favoured the series organised by the FIA, and in particular the Formula One championship. The Commission also queried the terms of the contracts between the FOA, the company which administers the television rights to Formula One races, and broadcasters because they made it possible to block the organisation of motor sports events that would have competed with Formula One races.

222. The Commission finally reached an agreement with the FIA and FOA. Under the solution agreed on, which was published in the Official Journal in June, the FIA is to withdraw from business activities in order to safeguard its independence and impartiality as a regulatory body. Where a young footballer plays for several clubs in succession, the club which originally trained him will receive part of the training compensation he receives.

(b) The second point of concern was contracts, and in particular the question of the limitation of their duration, one of the aims being to prevent the Bosman judgment from being circumvented. Contracts are thus to have a minimum duration of one year and a maximum duration of five years to prevent competition-distorting transfers in mid-season. Where they do take place, such transfers must be limited to exceptional cases such as injury or a complete breakdown in relations between a player and his trainer. As to the termination of contracts, the Commission favours a balanced system of unilateral termination. FIFA used to require the agreement of both clubs before a footballer could be transferred while still under contract. Nowadays, a player may be transferred without this dual agreement, but compensation may either be provided for directly in the player’s contract or be justified by the club. Exorbitant amounts may be appealed for in front of the courts. Club and federation managers have stressed, moreover, that a team is built up over a number of years and that the departure of a player after only one or two years undermines this work. To limit such damaging terminations, a system of penalties, which may consist of up to four months’ suspension at the end of the first or second year, has therefore been introduced. On the other hand, such penalties may no longer be imposed at the end of the third year. This system therefore limits the termination of contracts during the first two years but allows it after the third year. A balance has thus been struck between the interests of the various parties. A degree of flexibility has also been introduced to take account of the ‘valid sporting reasons’ rule.

(c) Thirdly, joint arbitration bodies, composed of representatives of players and clubs, are being set up. A Football Arbitration Tribunal, an appeal body, one chamber of which will also have a joint composition, will determine disputes concerning international transfers. These new arbitration bodies will deal rapidly with the cases that come before them, although this will not prevent players from bringing actions before the courts if they so wish — something that was not allowed under the old FIFA rules.
ation will in future receive the same income from all series. The freedom to operate, improved transparency and the assurance of high safety standards go to make up an environment that will be favourable to the continued development of motor sport and a unique type of sports organisation.

9.2. UEFA

224. The UEFA regulations on the broadcasting of sporting fixtures originally submitted to the Commission were highly complex and very broad in scope. The broadcasting of football matches was prohibited throughout the weekend. The Commission has tried to strike a balance between the interest of the sport and compliance with the competition rules. As from the 2000/01 season, the new UEFA regulations will authorise national associations to prevent the broadcasting of fixtures within their territories for only two and a half hours either on Saturdays or on Sundays at a time when the major national matches are taking place.

9.3. Grants to French professional football clubs

225. This case is covered by Articles 87 et seq. of the EC Treaty, that is to say the provisions on State aid. The French authorities wanted the Commission to adopt a position on what was for it a new topic, namely State aid to sport for the financing of training centres for young players. The Commission authorised the award of the grants concerned in view of their educational and integrative objective and the little impact they had on competition between the leading clubs.

226. In 2002, the Commission will continue to apply the principles set forth in the Nice declaration in its scrutiny of two cases the investigation of which is coming to a close, namely the FIFA regulations governing the activities of players’ agents and the UEFA rule on the ownership or economic control by one financial operator of several sporting clubs taking part in the same competition. The Commission is also investigating a number of cases involving the joint sale of exclusive rights to sports broadcast events to only one broadcaster per country for a period of several years.

10. Pharmaceuticals

227. From a policy point of view, the Commission’s antitrust activity in the pharmaceutical sector saw two developments, in the course of 2001, which are worth mentioning. In both instances, the Commission was invited to take into account the key importance of research and development in this sector.

228. First, the Commission took further steps to preserve parallel trade in this sector. It did so, on the one hand, by appealing against the judgment handed down by the Court of First Instance (CFI) on 26 October 2000 in a case concerning Bayer’s cardiovascular product Adalat (\(^1\)) and, on the other hand, by adopting a prohibition decision against GlaxoWellcome’s dual pricing system for around 80 drugs sold in Spain.

229. Second, the Commission’s departments assessed and cleared two joint ventures set up by pharmaceutical companies for the purpose of developing, manufacturing and selling certain novel drugs in the light of the Commission’s recent guidelines on horizontal restrictions of competition (\(^2\)).

10.1. Parallel trade: Adalat, GlaxoWellcome

10.1.1. Adalat

230. Early in January, the Commission lodged an appeal (\(^3\)) against the judgment by which the CFI had annulled its decision prohibiting an agreement between Bayer and wholesalers located in Spain and France containing an export ban for the drug Adalat (\(^4\)). The issues which are now before the European Court of Justice (ECJ) are (i) under what conditions dealers can be said to agree with their supplier on a particular restriction of competition and (ii) in what circumstances this restriction can be said to amount to an export ban.

231. These may appear to be narrow legal issues but they are vital for the safeguarding of the Commission’s policy concerning vertical territorial restraints in this sector as well as in other sectors. In the Commission’s view, the CFI has departed from earlier case law set by the ECJ by giving too strict a reading of the concepts of ‘agreement’

\(^1\) Case T-41/96 Bayer v Commission, not yet reported.
\(^3\) Cases C-2801 and 3001P. The Bundesverband Arzneimittel-Importeure has lodged a separate appeal against the CFI’s judgment. The Court of Justice has joined the two appeal cases.
and ‘export ban’ (1). This reading — if not overruled by the ECJ — would enable companies to design policies directed against parallel trade in such a way that their actions fall outside the scope of Article 81 of the EC Treaty. This could in turn mean the end of the Commission’s policy to preserve parallel trade in the pharmaceutical and other sectors while making a qualitative assessment of the alleged merits behind the industry’s actions.

10.1.2. GlaxoWellcome (2)

232. It is that sort of qualitative assessment that the Commission has undertaken in the decision addressed to GlaxoSmithKline (GSK) prohibiting a dual pricing system under which GlaxoWellcome (GW) intends to charge Spanish wholesalers a higher price for drugs which they export than for drugs which they resell for consumption in Spain.

233. In its decision, the Commission does not dwell on the issue of whether or not there is an ‘agreement’ within the meaning of Article 81(1), simply because there is evidence that most dealers have subscribed to GW’s pricing system which was contained in its new sales conditions. In the context of Article 81(1), the Commission does concede GW’s point that the pharmaceutical sector is heavily regulated in that national authorities often have their say in the setting of sales prices and that they all have reimbursement schemes which turn patients into customers who are not particularly price-sensitive. It is also evident that the lack of harmonisation between national laws leads to a certain discrepancy of price levels between Member States. Yet the Commission holds the view — in line with standard case law — that this lack of harmonisation does not give the pharmaceutical companies the right to consolidate this price discrepancy by charging higher prices in lower-price countries where drugs are exported to higher-price countries. In the Commission’s opinion, such dual pricing systems unduly perpetuate the segmentation of national markets.

234. The Commission nevertheless goes on to examine at length GW’s contention that this segmentation of national markets brings benefits to consumers and hence that its dual pricing system qualifies for exemption under Article 81(3). It is actually the first case in which a pharmaceutical company has invited the Commission to make such an assessment. GW advances, by and large, two arguments, both of which are rebutted by the Commission.

235. GW argues first that parallel trade causes losses of revenue, that this reduces its R&D budget (roughly 15 % of its costs) and hence that this weakens its capacity to develop new, innovative drugs. In this regard, the Commission observes that any losses of revenue could just as well be accounted for in GW’s marketing budget (the remaining 85 % of its costs). This does appear to be the more plausible alternative since the pharmaceutical sector is one in which R&D investments are among the highest in the economy and in which innovation — more than price — is the prime parameter of competition. GW also argues that parallel trade causes delays in the market entry of drugs in low-price countries. The Commission finds the evidence unconvincing.

236. GW has meanwhile sought to have the Commission’s decision annulled (3).

237. All the issues raised by Adalat and Glaxo are also present in many other pending notification cases. Several pharmaceutical companies, including Merck, have asked the Commission to grant them negative clearance, or at least exemption, for their supply quota systems. These systems, which are said to be unilaterally imposed on wholesalers, limit the quantities of drugs supplied to wholesalers by reference to their past domestic sales. The pharmaceutical companies invoke production and distribution planning as their main justification. Many wholesalers have long-standing complaints against these systems. Now that the Commission has adopted its Glaxo decision, its departments have started examining these supply quota systems in more detail.

10.2. Joint ventures

238. The Commission recognises how important research and development activities are in the pharmaceutical sector. In the course of 2001, its departments issued comfort letters in two cases in which pharmaceutical companies had notified a cooperative joint venture encompassing develop-

(1) For an executive summary of the Commission’s main grounds for appeal, see OJ C 79, 10.3.2001.
(2) Case COMP/36.957; Commission decision of 8.5.2001 (OJ L 302, 17.11.2001); press release IP/01/661, 8.5.2001.
(3) Case C-168/01 P.
ment, production and sales of new drugs. The two cases raised issues under the Commission’s guidelines concerning horizontal restrictions of competition.

10.2.1. Pfizer/EISAI (1)

239. In the first case, Pfizer (USA) had decided to cooperate with EISAI (Japan) to bring an anti-Alzheimer product to market. Pfizer would drop its own pipeline product in favour of that of EISAI, which would take care of the bulk of the R&D and production activity. Pfizer would use its worldwide distribution network to handle most of the marketing. By the time both parties notified their cooperation, their product (commonly known under the brand name Aricept) had already reached the market whereas virtually none of the competing R&D joint ventures had succeeded in bringing a rival product to market. Aricept’s high market share indicated that it held a dominant position in many Member States.

240. The Commission considered the fact that Pfizer had given up its R&D activity to be a loss of competition within the meaning of Article 81(1). Had EISAI chosen to team up with a strong marketing partner which did not have a pipeline product of its own, there would have been more competition in this market. However, in view of the obvious consumer benefits, the Commission departments saw sufficient grounds to issue an exemption. The high market shares were not held against the parties because they resulted from the so-called ‘first mover’ advantage. The duration of the exemption was, however, limited to seven years starting from market introduction of the drug because the parties had not demonstrated that they needed a longer period to recoup their relatively small investments (2).

10.2.2. Pfizer/Aventis (3)

241. In the second case, Pfizer (USA) was involved in cooperation with one other major player (Aventis) and a smaller USA-based research company called Inhale. The aim was to develop, manufacture and sell an inhalable insulin product in a market which so far comprises only injectable insulin. Pfizer was not present at all in the (injectable) insulin market and Aventis was only the number three player, lagging behind the two leading manufacturers (Novo Nordisk and Eli Lilly) in most Member States.

242. For this reason, the joint venture (in reality a series of separate joint ventures) was not considered to raise a competition issue under Article 81(1). However, a non-compete obligation (30 years plus 5 years post-termination to organise the practicalities of winding up the cooperation) was considered too long to qualify as an ancillary restraint. The parties gave a commitment to reduce this period to 20 years (plus 3 years post-termination). The Commission departments accepted the non-compete clause in view of the relatively weak market position of the parties involved and the lack of any appreciable foreclosure effect stemming from the exclusive dealing arrangements between these parties. Under the circumstances, the Commission departments saw no need to determine with absolute precision the exact length of the period which the parties would need to recoup their large investments.

243. It should be noted that the two cases involved cooperation at the marketing level in the form of co-promotion or co-marketing. In the case of co-promotion, two or more companies use their sales force to market the product under a single trademark, whereas co-marketing means that each company sells the product under its own trademark. Some countries prohibit co-promotion on the ground that the co-promotor does not hold a marketing authorisation for the relevant drug. In these countries, companies will choose the co-marketing technique.

---

(1) Case COMP/36.932.
(2) See guidelines on horizontal agreements, point 73 (OJ C 3, 6.1. 2001).
(3) Case COMP/37.590.
Figure 1
New cases

Figure 2
Cases closed
Figure 3
Changes in the number of cases pending at the year end

New cases
Cases closed
Cases pending up to 31 December of each year
II — MERGER CONTROL

A — General policy and new developments

1. Introduction — general developments

244. After seven years of rapid growth in merger activity, the number of merger notifications declined slightly in 2001, to 335 from 345 the previous year.

245. The Commission took 339 final decisions, 20 of which followed in-depth investigations (five prohibitions, five clearances without conditions and 10 conditional clearance decisions) and 13 of which were conditional clearances at the end of an initial investigation (‘phase I’). The Commission cleared 312 cases in phase I. In all, 140 decisions (45 %) of the first-phase clearance decisions were taken in accordance with the simplified procedures introduced in September 2000. In addition, the Commission took seven referral decisions pursuant to Article 9 of the merger regulation and opened in-depth investigations in 22 cases, three of which were outstanding at year’s end (1).

246. Merger activity in the telecoms and media sectors, which were particularly affected by the decline in stock prices, almost came to a standstill in 2001. While there were 65 notifications in these sectors in 2000, the number fell to four in 2001, with a marked drop from 13 cases to one between the fourth quarter of 2000 and the first quarter of 2001.

247. The most frequent type of merger and acquisition assessed by the Commission involved two (or more) EU companies. The number of transactions between EU and non-EU undertakings decreased from 2000 to 2001, while the number of domestic transactions between companies based in the same country increased.

248. Despite the slightly lower total number of notifications, there were five prohibition decisions (2), the highest number of prohibitions in a single year so far. In addition, five notifications were withdrawn by the notifying parties in phase II (partly as a result of the Commission’s competition concerns and partly for unrelated reasons). All five prohibition decisions were taken on the basis of the creation (four cases) or strengthening (one case) of a single-dominance position. Potential collective dominance was at the centre of five of this year’s phase II cases. In MAN/Auwärter (3) and in two cases analysed jointly, UPM Kymmene/Haindl (4) and Norske Skog/Parenco/Walsum (5), the in-depth investigations led to unconditional clearance of the transactions. In two other cases examined in parallel, BP/E.ON (6) and Shell/DEA (7), the Commission cleared the transactions subject to commitments that were offered by the parties to address the concerns of collective dominance on the market for ethylene on the pipeline network ARG+, which links Belgium, Germany and the Netherlands.

249. Despite the increase in prohibitions, the percentage of notified concentrations resulting in a prohibition decision remains modest at 1 %, or 2 % if phase II withdrawals are included. There is no systematic upward or downward trend in the risk incurred by a notifying party of a notified merger resulting in withdrawal in phase II or a prohibition decision, as the chart below indicates.

---


<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>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Notifications</td>
<td>63</td>
<td>60</td>
<td>58</td>
<td>95</td>
<td>110</td>
<td>131</td>
<td>172</td>
<td>235</td>
<td>292</td>
<td>345</td>
<td>296</td>
<td>1,857</td>
</tr>
<tr>
<td>Prohibitions</td>
<td>1</td>
<td>1</td>
<td>2</td>
<td>3</td>
<td>1</td>
<td>2</td>
<td>1</td>
<td>5</td>
<td>1</td>
<td>2</td>
<td>5</td>
<td>18</td>
</tr>
<tr>
<td>Phase II withdrawals</td>
<td>1</td>
<td></td>
<td></td>
<td>1</td>
<td></td>
<td>4</td>
<td>5</td>
<td>6</td>
<td>3</td>
<td></td>
<td></td>
<td>20</td>
</tr>
<tr>
<td>Regulatory risk (%)</td>
<td>1.6</td>
<td>0.0</td>
<td>1.7</td>
<td>1.1</td>
<td>1.8</td>
<td>3.1</td>
<td>0.6</td>
<td>2.6</td>
<td>2.1</td>
<td>2.3</td>
<td>2.7</td>
<td>2.0</td>
</tr>
</tbody>
</table>

---

(1) In accordance with Article 8(3) of the merger regulation.
(7) COMP/M.2495 — Haniel/Fels; COMP/M.2547 — Bayer/Aventis Crop Science; and COMP/M.2568 — Haniel/Ytong.
2. National markets and potential competition

250. About half of this year’s prohibitions and phase II withdrawals involved mergers of companies based in the same country. In most of these cases, competition concerns arose in several countries, and not only in the countries where the merging parties’ headquarters were located. Nevertheless, prohibitions of ‘domestic’ mergers tend to provoke the most vocal criticism and lobbying of national politicians by the companies involved, as seen after this year’s prohibition decisions in General Electric/Honeywell (¹) and Schneider/Legrand (²) as well as the phase II withdrawal of SEB/Föreningssparbanken (³).

Since 1990, 12 out of 18 prohibitions have related to such domestic mergers. Companies based in the following countries were affected by the 12 ‘domestic’ prohibitions: Germany (three), the Netherlands (two cases, both as a result of an Article 22 referral by the Netherlands), the United States (two) and Finland (Article 22 referral), France, South Africa (⁴), Sweden and the United Kingdom (one case each). The geographic spread of prohibited domestic mergers appears to reflect the respective countries’ relative size, with no discernible difference between any countries or groups of countries. In particular, the data do not support any ‘small-country bias’ in the Commission’s merger regime. Arguably, seven prohibitions of domestic mergers affected companies headquartered in large economies (D, F, UK and the United States), two concerned small countries (FIN, S), while the status of the Netherlands and South Africa would depend on the size measure applied (population, GDP, surface area, etc.). In addition to the companies’ respective home markets, most of the prohibited domestic mergers also created competition problems in other EEA countries.

251. Given the small number of prohibitions overall, there is limited scope for statistically significant conclusions to be drawn from the distribution of prohibitions across different countries and over time. With this note of caution in mind, the table below indicates the number of undertakings affected by a prohibition decision along with the number of parties involved (i.e., two or more per transaction) from each country where companies have been affected by a prohibition decision. Among the EEA countries, companies from Denmark, Finland, France, Germany, Norway and Sweden have faced an above-average proportion of prohibitions, whereas British and Italian firms had somewhat fewer prohibitions. US undertakings have also faced a below-average prohibition risk. However, overall, the cross-country distribution of the relative number of prohibitions is not statistically different from a normal (random) distribution.

<table>
<thead>
<tr>
<th>A</th>
<th>D</th>
<th>DK</th>
<th>F</th>
<th>I</th>
<th>NL</th>
<th>S</th>
<th>FIN</th>
<th>UK</th>
<th>NO</th>
<th>CA</th>
<th>Ch.Is</th>
<th>ZA</th>
<th>US</th>
</tr>
</thead>
<tbody>
<tr>
<td>Affected by prohibition (excl. Art. 22)</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td>7</td>
<td>1</td>
<td>2</td>
<td>4</td>
<td>1</td>
<td>3</td>
<td>1</td>
<td>1</td>
<td>4</td>
<td></td>
</tr>
<tr>
<td>No of parties</td>
<td>119</td>
<td>1 007</td>
<td>79</td>
<td>599</td>
<td>310</td>
<td>334</td>
<td>260</td>
<td>85</td>
<td>724</td>
<td>70</td>
<td>49</td>
<td>24</td>
<td>21</td>
</tr>
<tr>
<td>Undertakings affected (%)</td>
<td>0.8</td>
<td>1.1</td>
<td>1.3</td>
<td>1.2</td>
<td>0.3</td>
<td>0.6</td>
<td>1.5</td>
<td>1.2</td>
<td>0.4</td>
<td>1.4</td>
<td>2.0</td>
<td>4.2</td>
<td>4.8</td>
</tr>
</tbody>
</table>

²⁵². Horizontal mergers of companies in the same geographic and product markets may cause competition problems because they increase market shares and lead to the removal of a direct competitor. This analysis is independent of market size because merger control’s fundamental objective of protecting consumers against the effects of monopoly power (higher prices, lower quality, lower production, less innovation) applies universally, regardless of whether these consumers are based in a small or a large country. In 2001, the blocked transactions Schneider/Legrand (⁵), SCA/Metsä Tissue (⁶) and CVC/Lenzing (⁷) as well as the abandoned Swedish bank merger SEB/Föreningssparbanken (⁸) fell in this category. All three combinations would have given the merging parties exceptionally high market

¹³ COMP/M.2220, 3.7.2001.
² COMP/M.2282, 10.10.2001.
³ COMP/M.2380, case withdrawn.
⁴ Case COMP/M.619 Gencor/Lonrho: although Lonrho is a UK-registered company, its main activities are located in southern Africa.
⁵ COMP/M.2283, 10.10.2001.
⁸ COMP/M.2380, case withdrawn.
shares in the relevant geographic and product markets. While in Schneider/Leigrand, SCA/Metsä Tissue and SEB/Föreningssparbanken the relevant geographic markets were national, the CVC/Lenzing transaction would have led to dominant positions at a European level.

### 2.1. Definition of the relevant geographic market and potential competition

253. A central element in competition analysis is the definition of the relevant geographic market. The purpose of defining a relevant geographic (as well as product) market is to identify the competitors of the undertakings concerned by a particular case that are capable of constraining their behaviour. The approach is laid down in the merger regulation and represents established practice in most of the world’s competition authorities. Demand-side analysis and supply-side analysis are both used in defining geographic markets. In 2001, the Commission analysed market definitions adopted in its merger decisions over the past five years. Out of 1 295 decisions, in 184 (14.2 %) markets were defined as national. In 187 (14.4 %), markets were wider than national. In the remaining 924 cases (71.4 %), the scope of the geographic markets was left open because competition concerns would not have arisen under any alternative definition, whether EEA-wide, regional or national. Thus, only in a minority of cases was the geographic market defined as national.

254. However, market definition is only the beginning of merger analysis, not the end. Even in cases where, for industry-specific reasons, geographic markets are defined narrowly, e.g., as national, the existence of potential competitors has in the past led the Commission to accept relatively high national market shares.

255. A case in point is this year’s decision in SCA/Metsä Tissue (¹). The case concerned the proposed takeover by SCA Mölnlycke Holding BV, controlled by Sweden’s Svenska Cellulosa AB, of its Finnish competitor Metsä Tissue Corp. Both companies are active in the production of tissue paper products, such as toilet paper, kitchen towels, handkerchiefs and napkins, in a number of EEA countries. The Commission defined the relevant geographic markets as national because the market investigation found that suppliers could charge customers (supermarkets) different prices in different countries (price discrimination) and because of the presence of significant transport costs. However, in doing so, the Commission did not consider each national market in isolation, but took account of all actual and potential imports into each country in question. For example, the competition analysis for the Swedish market involved identification of all plants, in whatever country, that can supply Swedish supermarkets with tissue products at competitive cost, the number of such credible competitors left after the merger, their production capacity and brand ownership. By taking into account all existing and potential competitors for tissue products, the Commission concluded that market shares in certain national markets that would, in isolation, appear high created no competition problems in this specific case. Conversely, the investigation found that no potential competitors with sufficient production capacity existed to challenge the parties’ very high market shares (up to 90 %) in Denmark, Finland, Norway and Sweden, which eventually led the Commission to prohibit the transaction. In Finland, the competition concerns were due primarily to the removal of a potential competitor.

256. A market’s openness to entry by new competitors is of key importance in this analysis. High barriers to entry continue to be an important factor in determining whether an operation poses competition problems. In CVC/Lenzing (²), for instance, the Commission found such high entry barriers in EEA markets in spite of low trade barriers, due to the high capital investment necessary, barriers of perceived quality, cultural barriers and barriers concerning supply logistics. On the other hand, the absence of regulatory barriers or local distribution requirements and the existence of credible competitors in sufficient proximity all raise the market shares that may be acceptable at the national level. Small countries tend to be at a distinct ‘advantage’ in this respect and the Commission has regularly accepted higher market shares in small economies than in the larger markets. Further cases that were cleared by the Commission because of potential competition or because the removal of regulatory barriers had led to a widening of geographic markets include Philips/Agilent Health

(²) COMP/M.2187, 17.10.2001.
Care Solutions (1), Pirelli/BICC (2) and Gerling/NCM (3). These transactions led to national market shares of between 40% and over 60% in certain countries.

257. Conversely, the removal through merger or acquisition of a potential competitor that has prevented a company from becoming dominant can lead to competition problems, even if there is no direct overlap in the undertakings’ current activities. Several phase II investigations in 2001 focused on the removal of potential competitors.

258. In the EdF/EnBW case (4), the Commission authorised, subject to conditions, the acquisition of joint control of German electricity company Energie Baden-Württemberg AG (EnBW) by Electricité de France (EdF) and Zweckverband Oberschwäbische Elektrizitätswerke (OEW), an association of nine south-west German districts.

259. The investigation concluded that EdF enjoyed a dominant position on the French market for the supply of eligible customers, with a market share of approximately 90%. Besides EdF, there are three other electricity producers active in France, CNR, Société Nationale d’Electricité Thermique (SNET) and Harpen AG, which belongs to the RWE group. The three, however, account for only a small share of electricity generation and supply their production mainly to EdF. EnBW was considered one of the most likely potential competitors in the French market and would be one of the strategically best-placed companies to enter the market for the supply of eligible customers. EnBW’s supply area is in the south-west of Germany and has a long common border with France. Two of the four Franco-German interconnectors are in the EnBW supply area. By acquiring EnBW, EdF would also increase its potential for retaliation in Germany and would thus become less exposed to competition in France. The remedies accepted in this case are discussed at point 300 below.

260. The competition concerns raised by the Grupo Villar Mir/EnBW/Hidroeléctrica del Cantábrico transaction (5), which was also authorised subject to conditions, were of a very similar nature. The transaction involved the acquisition of joint control over the Spanish electricity company Hidroeléctrica del Cantábrico (Hidro-cantábrico) by Spanish Grupo Villar Mir and Energie Baden-Württemberg (EnBW), a German company jointly controlled by Electricité de France (EdF).

261. The Commission was concerned that the deal would strengthen the existing collective dominant position on the Spanish wholesale market for electricity held by Endesa and Iberdrola. EdF would after the transaction have had little incentive to increase commercial capacity on the French-Spanish interconnector, which was already scarce, creating a barrier for electricity imports into Spain and resulting in the market’s isolation from other continental electricity markets to the detriment of customers. To eliminate these concerns, EdF and the operator of the French electricity grid, RTE, undertook to substantially increase the commercial capacity from 1 100 MW to about 4 000 MW on the interconnector between France and Spain, thereby creating the conditions for greater electricity trade volumes to and from Spain to the benefit of Spanish customers.

262. The elimination of potential competition also led to competition concerns in Südzucker/Saint Louis (6), a transaction cleared subject to conditions following a phase II investigation. The Commission’s investigation revealed that the operation would have strengthened Südzucker’s already dominant position in the markets for industrial sugar and retail sugar in southern Germany and Belgium because Saint Louis would cease to exist as an independent and credible potential competitor to Südzucker in these geographical areas. The importance of preserving potential competition is all the greater in highly regulated markets such as sugar where there is little competition and customers are heavily dependent on a limited number of suppliers.

2.2. Definition of the relevant product market

263. The dynamic analysis of potential competition applies not only to geographic market definition but also to product markets as highlighted by this year’s decision in the Tetra Laval/Sidel case (7).
The Commission undertook a detailed investigation of this proposed concentration in the packaging sector between Tetra Laval (Tetra), the world leader in carton packaging and carton packaging equipment, and Sidel, the world leader in PET (plastic) packaging equipment. The concentration, which was a public bid in the Paris Bourse, was notified to the Commission on 18 May. In the light of the results of its investigation the Commission decided, on 30 October, to prohibit the proposed merger. The grounds for the Commission’s decision were, briefly, that the merger would create a market structure which would (a) enable Tetra to strengthen its dominant position in carton packaging by eliminating the biggest competitor in a neighbouring market, PET packaging equipment, and (b) enable Tetra to leverage its dominant position in carton packaging in order to acquire a dominant position in PET packaging equipment. As a result, the merger would have increased concentration in the packaging sector, raised barriers to entry and reduced competition to the detriment of consumers.

Tetra is the world’s uncontested leader in carton packaging. As found in earlier Commission decisions and as confirmed by the Court of Justice (Case C-333/94 TetraPak v Commission), Tetra holds dominant positions in the markets for aseptic carton packaging machines and aseptic cartons packaging with a market share in the EEA of 80 %. Sidel is the leading manufacturer of plastic PET packaging equipment and in particular stretch blow-moulding (SBM) machines, which are used to produce empty PET bottles, with a market share in the region of 60 %. Both sectors are highly concentrated with competitors having market shares of not more than 15 %.

Given the strong positions of the parties in their respective fields, the Commission’s investigation focused on the interplay between carton packaging and PET packaging. Carton packaging, in particular aseptic carton, has been traditionally used to package products which are sensitive to light or oxygen such as liquid dairy products, fruit juices, fruit-flavoured drinks, and ready-to-serve tea and coffee drinks (the ‘sensitive products’). Aseptic packaging is used for long-life products, which do not require chilled distribution. PET bottles are transparent plastic bottles made from resin. PET bottles have traditionally been used for the packaging of mineral water and carbonated soft drinks. In 2000, not more than 1 % of milk and juices were packaged in PET in the EEA.

In the light of the traditionally different focus of the two packaging materials, the parties claimed that the two markets should be viewed as distinct and unrelated markets for competition law purposes. The Commission’s detailed investigation showed that, following a market definition analysis using the SSNIP (1) test, the two markets constitute, today, distinct relevant product markets.

However, the Commission found that a static and narrow market definition did not reflect appropriately the dynamic market conditions and, in particular, the interplay between the two packaging materials. Following a detailed investigation, the Commission found that the two markets, which belong to the same industry sector, liquid food packaging, are closely related neighbouring markets and that interaction between them will grow rapidly in the coming years.

The Commission established that, in the coming years, PET packaging equipment companies, principally Sidel, in conjunction with independent packagers (converters), would compete in the marketplace in order to induce a shift from carton to PET packaging. Sidel’s strategy, in particular, was to contribute significantly to the rapid growth of PET in aseptic packaging for fruit juices and liquid dairy products. In the view of Sidel and other market participants, this was eroding the lead of the still-predominant carton packaging in this market segment.

The merger would have eliminated Sidel as a competitor in a closely neighbouring market exerting competitive pressure on Tetra’s dominant position in carton packaging. The Commission found that, by enabling Tetra to be active in both packaging markets, the merger would strengthen Tetra’s dominance, would increase prices in carton packaging and would reduce innovation. The forthcoming rapid future growth of PET meant that increasing potential competition would be lost.

In conclusion, both geographic and product market definitions by no means result in a static analysis of simple market share addition but form the starting point for a thorough analysis of the specific market dynamics prevailing in a specific industry. Regarding the so-called ‘small-country’ discussion, this means that, while it is true that

---

(1) Small significant non-transitory increase in prices.
mergers more easily lead to high market shares in small national markets, this does not necessarily equate to competition concerns. There is no discernible difference in the impact of the Commission’s merger regime on companies based in one geographic location or another. This is also corroborated by the statistics on prohibited mergers presented above.

Box 6: The paper cases and collective dominance

**UPM-Kymmene/Haindl (1) and Norske Skog/Parenco/Walsum (2)**

On 20 June 2000, the Commission received a notification of the Finnish pulp and paper company UPM-Kymmene’s proposed takeover of its German rival Haindl and of a second concentration which concerned the resale of two of the six Haindl paper mills to the Norwegian paper manufacturer Norske Skog. The markets analysed in this investigation were the markets for newsprint and wood-containing magazine paper (the ‘paper market’). The focus of the Commission’s investigation was the question whether these two transactions would result in the creation of a collective dominant position in the markets for newsprint and paper. These were among the first cases where the Commission investigated the potential creation of collective dominance by four firms.

The publication paper industry in general is characterised by long-run competition in (new) capacity and short-run competition on prices under capacity constraints. Both the markets investigated show similar market characteristics which can be summarised as follows: (i) relatively homogeneous products, although some variations within the different paper grades exist; (ii) fluctuations in the market shares of the top suppliers in both markets which have been more pronounced for newsprint; (iii) a high degree of transparency on capacities, deliveries and on average prices, but a lack of transparency in relation to investment decisions before they become irreversible; (iv) inelastic and cyclical demand; (v) some uncertainty about the degree of cost symmetry, especially in the newsprint market; (vi) a high level of multi-market contacts and links across the pulp and paper industry; (vii) limited buyer power; (viii) the ready availability of up-to-date technology; and (ix) the characteristics of a sunk cost industry (i.e., high entry barriers).

In the newsprint market, the Commission focused on the top four companies (UPM-Kymmene/Haindl, Stora Enso, Norske Skog/Haindl-2 and Holmen), which together would have held around 70 % in terms of sales and 80 % in terms of capacities. In the paper market, post-mergers, the top three suppliers (UPM-Kymmene/Haindl, Stora Enso, and M-Real/Myllykoski) would have accounted for around 70 % of the market in terms of both capacity and sales. The transactions eliminate from the market a significant competitor, Haindl, whose cost structure is somewhat different from the other top suppliers, especially in the newsprint market, since it uses recycled paper as raw material to a significantly larger extent. In the wood-containing magazine paper market, Haindl has been particularly active in the last five years as it accounts for a large part of the total increase in capacity.

The merger would have resulted in a relatively more transparent and less uncertain market, which is reflected in the reduction from five to four for the newsprint market, and from four to three for the wood-containing magazine paper market. However, a number of characteristics would not be conducive to the creation of a collective dominant position. These were the limited stability of market shares, the lack of transparency on capacity expansion projects prior to a committed announcement and the lack of symmetry in cost structures.

Initially, the Commission considered whether coordination could occur through the following two mechanisms: first, through the coordination of investment in new capacities in order to limit capacity in the marketplace, thus raising the level of average prices in the long run; second, through coordination of output downtimes to support short-run prices during a slowdown in demand (there is no need to coordinate in the short run during a period of high level of demand).

The Commission concluded that the mechanism identified above for the coordination of investments would not sustain the creation of tacit coordination in the markets for newsprint and wood-containing

---

(2) COMP/M. 2499, 21.11.2001.

However, such coordination, in this specific case, would likely be undermined by action by fringe players. Indeed, the Commission believes that the remaining fringe players such as SCA, Abitibi, Palm and Burgo can play an active role in their respective markets and make tacit coordination unsustainable. These players could break coordination by investing were the oligopolists to try to refrain from investment in order to reach higher prices and by increasing production were the oligopolists to try to shut down their machines temporarily – the definition of downtime. These firms, some of which are part of major groups with significant resources and expertise in other pulp and paper markets, would have the means to take advantage of the tacit coordination among top players to increase their market shares.

Conclusion

Despite finding a number of characteristics that increased the likelihood that the deals would create collective dominant positions by four and three firms respectively, a number of factors were found which the Commission concluded would, on balance, outweigh these risks. The two transactions were therefore both cleared.

(1) Similar reasoning was applied in another case which was cleared after an in-depth investigation, COMP/M.2201 — MAN/Auwärter, 26.6.2001, and which raised questions of collective dominance. The main impact of this case will be on the city-bus market in Germany. MAN/Auwärter and the other main player in the market for city buses in Germany, DaimlerChrysler’s EvoBus, will each supply just under half of that market. Following a close examination of the case, however, the Commission concluded that there was no risk that the two companies would be able to tacitly coordinate their activities. Firstly, the Commission found that any tacit division of the market between EvoBus and MAN/Auwärter was not likely as there would be no viable coordination mechanism. Secondly, significant disparities between EvoBus and MAN/Auwärter, such as different cost structures, made it likely that the companies would compete rather than collude. The Commission therefore concluded that the German bus market sector would remain competitive even after the acquisition.
more Member States were actually caught by these thresholds. The Commission therefore proposes to amend Article 1(3) and to introduce automatic Community competence over cases subject to multiple filing requirements in three or more Member States. The turnover thresholds currently in Article 1(3) would be removed. This solution is suggested in order to allow the Commission, as the generally best-placed authority, to deal with transactions with effects in three or more Member States, and to strengthen the level playing field in European merger control. This amendment should be operational before the enlargement of the Community in 2004.

275. Articles 9 and 22 are the referral mechanisms set out in the merger regulation in order to adjust a generally turnover-based merger control system by enabling the best-placed authority to deal with the case. The Commission proposes to simplify the requirements for referrals, thereby adding transparency and facilitating a proper work-sharing between the Commission and the Member States. The main amendment related to the referral instruments concerns Article 9(2). The proposal in the Green Paper is to remove the obligation to show that a transaction will lead to a threat that a dominant position in a distinct market in the Member State will be created or strengthened. Instead it will be sufficient for the Member State to show that the transaction would affect competition in such a distinct market. Moreover, it is envisaged that the Member State would no longer be required to establish whether such a distinct market constitutes a substantial part of the common market.

3.2. Substantive issues

276. As business practices have changed since the merger regulation entered into force, it has become appropriate to consider whether the concept of a concentration requires updating in order to take proper account of this development.

277. The concept of a concentration covers the acquisition by one or more companies of legal or de facto control over one or more companies, including the creation of joint ventures. Transactions that involve the acquisition of non-controlling minority shareholdings are therefore not covered by the regulation. Nor does it cover strategic alliances. These alliances are usually cooperative contractual arrangements but they often imply a significant structural element whereby the parties’ business conduct is linked together. There are several examples of these types of arrangement in the airline and telecom sectors. Strategic alliances are currently scrutinised under Articles 81 and 82 of the Treaty. The Green Paper describes the difficulties involved in drawing the borderlines with sufficient legal certainty and concludes that Articles 81 and 82 appear to remain the most suitable tool for assessing these transactions. It therefore does not propose any change in this regard.

278. The Green Paper proposes certain amendments to the current provisions on multiple transactions. Multiple transactions are separate legal transactions that for different reasons are linked but, when taken separately, may not meet the turnover thresholds in the merger regulation. The question arises whether such transactions should be regarded as constituting a single concentration which as a result would meet the turnover thresholds in the regulation and thereby come under the Commission’s jurisdiction. The Green Paper proposes to amend the current provisions targeting multiple transactions in order to ensure more consistent and effective application of the merger control system.

279. The main substantive test for assessing mergers under the merger regulation is the dominance test. The Green Paper opens a debate on the virtues of the dominance test as the substantive test set out in the merger regulation compared with the test of ‘substantial lessening of competition’ which is used in other jurisdictions, such as the USA, Canada and Australia. The Green Paper calls for a discussion of the advantages and drawbacks of both tests, as well as of the proper role of efficiencies in merger assessment. It should be pointed out, however, that definite conclusions on this issue are not to be expected within the time available for the current merger regulation review.

3.3. Procedural issues

280. One of the purposes of the Green Paper is to launch a debate on possible means of further procedural simplification for cases that do not raise competitive concerns. In addition to discussing such measures generally, a specific discussion is also developed on the scope for modifications in relation to certain venture capital transactions.
Finally, the most important procedural suggestion in the Green Paper concerns the realignment of the timetable for the submission and discussion of commitments in the first and second phases of the Commission’s investigation. It is proposed that provision be made for a ‘stop-the-clock’ provision, applicable at the parties’ request, in order to provide more time for all involved to consider remedies to the transaction suggested by the parties.

3.4. Joint working group with national competition authorities

In formulating the merger review Green Paper, which was adopted on 11 December, the Commission canvassed opinions from a wide range of parties affected by merger control (the business world, Member States, etc.). Discussions took place on Competition DG premises and covered, among other things, jurisdictional issues, remedies procedures and issues of substance (the competition test) and procedure. Member States also had the opportunity to comment on a draft of the Green Paper as a whole.

The Commission intends to pursue the discussions on the possible reform of the merger regulation in the same inclusive and open manner and invites all interested parties to make substantiated contributions in reply to the Green Paper.

Box 7: Ancillary restraints — adaptation of the Commission’s policy

The Commission adopted a notice on restrictions directly related and necessary to concentrations (so-called ‘ancillary restraints’) (1), which replaces a previous notice dating from 1990. Ancillary restraints are contractual agreements directly related to and necessary for the transaction which companies frequently enter into in the context of mergers. Common examples of such ancillary restraints are non-compete clauses, licence agreements, or purchase and supply agreements.

The new policy announces an important change of policy in the field of merger control. The Commission will no longer assess ancillary restraints entered into by parties in its merger decisions, thereby ending an 11-year-old practice. Under the previous policy such clauses would automatically benefit from the effect of the clearance decision if the Commission found them directly related to and necessary for the transaction. Instead, now companies and their lawyers will have to assess whether any such restraints can be covered by the merger decision or by a relevant block exemption, or whether they might fall under Article 81. The notice provides guidance to the legal and business communities, based on past Commission practice and experience in this field. It is in line, moreover, with the ongoing modernisation of the European Union’s competition policy.

The new policy is also in line with the simplified procedure that has been applied by the Commission to certain categories of merger since September 2000. Indeed, in simplified procedure cases, the Commission has already stopped assessing ancillary restraints.

It should be noted that the Commission has never been under a legal obligation to assess and formally address ancillary restraints in its decisions under the merger regulation. Any such statements in past merger decisions have been of a purely declaratory nature, without any legally binding effect on the parties or on national courts.

Clauses that cannot be considered ‘ancillary’ are not per se illegal. They are just not automatically covered by a Commission merger decision. Nevertheless, they can be justified under Article 81 of the Treaty or fall within the scope of a block exemption regulation.

4. Developments in the application of the failing firm defence

285. The Commission applied a failing firm defence in reaching its decision to clear BASF’s proposed acquisition of the two Belgian subsidiaries of Sisas SPA, (Pantochim and Eurodiol) (1), which under Belgian law were subject to bankruptcy proceedings.

286. Before 2000, the Commission had only once based a clearance decision on the concept of the failing firm defence (sometimes referred to as a rescue merger). That was in the Kali+Salz case (2), which established three criteria for the concept’s application. These criteria were that (a) the acquired undertaking would soon have been forced out of the market if it had not been taken over by another undertaking; (b) there was no other less anticompetitive alternative purchaser; and (c) the acquiring undertaking would have taken over the market share of the acquired undertaking if it had been forced out of the market. This approach was broadly confirmed by the Court of Justice in its subsequent judgment (3).

287. Only the third criterion would not have been met in the BASF case because, unlike in Kali+Salz, which was a duopoly merging to become a monopoly, there were other players in the markets affected by the transaction, for example Lyondell Chemical and ISP. Given the presence of these other suppliers, it would have been unreasonable to conclude that the demise of Eurodiol would have led to the transfer of all of Eurodiol’s market share to BASF.

288. The Commission, however, compared the market situation of BASF owning the assets with the inevitable alternative of the assets being withdrawn from the market, and concluded that the withdrawal of the assets from the market would have led directly to capacity shortages in a market already under very tight capacity constraints which would not be counteracted in the short term by competitors. Without the merger, market conditions would have been significantly worse for consumers. In any event, the economics of the case did not suggest that BASF would be likely to enforce major price increases after the merger. Given the particular and exceptional circumstances of the case, the Commission therefore took some cautious steps forward in developing the highly restrictive failing firm defence criteria established during the Kali+Salz proceedings.

Box 8: Schneider/Legrand (1)

Following a detailed investigation, the Commission in October prohibited the merger of Schneider Electric and Legrand, the two main French manufacturers of electrical equipment. The merger would have considerably weakened the operation of the market in a number of countries, particularly in France, where the rivalry between the two companies was the mainstay of competition.

The effects of the merger on competition related primarily to low-voltage electrical equipment, i.e., all the systems used for electricity distribution and the control of electrical circuits in homes, offices or factories. Such equipment covers many different types of product, ranging from electrical distribution boards and sockets and switches to cable trays.

There were substantial overlaps between the activities of Schneider and Legrand in the markets for electrical switchboards (distribution boards and final panelboards, together with their components, where the combined market share would have been between 40 % and 70 % depending on the country), wiring accessories (in particular, sockets and switches and fixing and connecting equipment, where combined market shares ranged from 40 % to 90 %), and certain products for industrial use (industrial pushbuttons and low-voltage transformers) or for more specific applications (for example, emergency lighting).

(1) COMP/M.2314 — BASF/Eurodiol/Pantochim, 11.7.2001.

(1) COMP/M.2283, 10.10.2001.
5. Remedies

289. This year has been a year of consolidation and development in regard to the Commission’s remedies policy and practice in merger cases. The Commission’s notice on remedies (1) (‘remedies notice’) was adopted in December 2000. The remedies notice provides guidance on commitments and on the types and form of remedial actions acceptable to resolve competition problems.

290. The Commission’s aim of developing consistency of treatment and best practices in the handling of remedies was significantly furthered by its decision to establish, in April, an enforcement unit within the Merger Task Force dedicated to advising on the acceptability and implementation of remedies in merger cases. This enforcement unit has several functions. On a day-to-day basis, its most important role is to provide an internal centre of expertise on the specific issues raised in merger cases requiring remedies. Members of the enforcement unit also join the case teams working on merger cases where remedies may be required or even just discussed, and do so at the earliest possible moment. In such cases, their role is to ensure that the general principles set out in the remedies notice are applied as consistently as possible while taking account of the specific requirements of each case.

291. The enforcement unit is also seeking to develop best practice guidelines, building on the experience obtained from previous merger cases so as to identify aspects that have worked well and those that have not.

292. One example of the improved clarity which the adoption of the remedies notice has introduced is that decisions now include clear statements as to which aspects of the commitments are conditions and which are obligations (2). Articles 2 and 3 of the operative part of the decision in the The Post Office/TPG/SPPL (3) case are good examples of such statements. There are different legal consequences attaching to breaches of conditions as opposed to breaches of obligations. In drawing a clear distinction between such conditions and obligations in the Commission’s clearance decisions subject to commitments, the intention is to ensure that there can be no doubt about the implications of failure to comply with the different parts of the commitments.

---


(2) See Section II, paragraph 12 of the notice.

293. A further example of the impact of the remedies notice is that trustees were employed in all but one (1) of the cases which involved conditional clearances in 2001. Furthermore, the mandates establishing the role and powers of the trustees were significantly developed during the course of the year. In the first half of 2002, the Commission intends to launch a consultation exercise with a view to producing a standard text for divestment commitments and a pro forma trustee mandate. The introduction of such precedents is intended to assist the parties to a notified operation and the Commission when drafting and negotiating remedies. The aim is to do so in a manner that ensures consistency of approach across different cases while retaining the flexibility to customise commitments to take account of the particular circumstances of individual cases.

5.1. Remedies — statistical developments

294. There were 13 decisions taken during this year subject to undertakings after a phase I investigation (2). In addition, 10 cases were cleared subject to commitments following phase II investigations (3). In two of these (Metso/Svedala (4) and Bombadier/Adtranz (5)), commitments had also been offered in phase I but these had been deemed not to remove the Commission’s serious doubts, therefore phase II investigations had been initiated. Five further cases were cleared unconditionally following phase II investigations (6). It should be noted that the parties in the MAN/Auwärter case had submitted commitments in phase I, but these became redundant after the Commission decided at the end of its in-depth investigation that there were no grounds for reaching an adverse finding about the effects of the deal.

295. Of the five deals that were prohibited in 2001, in two cases (SCA/Metsä Tissue (7) and CVC/Lenzing (8)) the same set of undertakings was submitted in phase II as had been rejected as insufficient in phase I; in two others (Schneider/Le Grand (9) and Tetra Laval/Sidel (10)) different remedies were submitted in the two phases, and in one (GE/Honeywell (11)) there were no remedies submitted in phase I. These latter three cases are discussed elsewhere in this chapter.

5.2. Nature of remedies accepted in 2001

296. A fundamental principle set out in the remedies notice is that, where competition concerns arise, ‘the most effective way to restore effective competition, apart from prohibition, is to create the conditions for the emergence of a new competitive entity or for the strengthening of existing competitors via divestiture’ (12). In accordance with this principle, the vast majority of the competition concerns that arose in merger cases in 2001 were addressed by means of divestments. For example, of the 13 cases that were cleared conditionally in phase I, seven involved a divestment of a business or businesses (13), and another one involved the divestment of landing slots (United Airlines/US Airways (14)). In phase II, the divestment of a business or businesses was also the most frequently accepted type of remedy. Indeed, in Metso/Svedala (15) and The Post Office/TPG/SPPL (16), the competition concerns were fully addressed by the divestments to which

(5) COMP/M.2139, 3.4.2001.
(9) COMP/M.2283, 10.10.2001.
(10) COMP/M.2416, 30.10.2001.
(12) Section III.1, paragraph 13.
(14) The merger agreement between these two companies was subsequently withdrawn as a result of antitrust objections to the deal in the United States.
the parties committed themselves. And in Bombadier/Adtranz (1), the parties committed themselves to divesting their Regioshuttle and Variotram businesses by means of exclusive, non-transferable licences.

297. In four cases in phase I and a further four cases in phase II, the parties gave a commitment to sell shareholdings that they held in other companies in order to remove control or influence over companies which would have led to competition concerns (2). For example, in Allianz/Dresdner, the Commission’s concerns about probable de facto control of Münchener Rück, a major competitor, were removed by the parties’ commitment to reduce their shareholding in that company to 20.5% by the end of 2003 and not to exercise more than that proportion of their voting rights at Münchener Rück’s annual general meetings. Likewise in Nordbanken/Postgirot, the Swedish banking group Nordea would have had full control over one of the two main payment systems, and undertook to reduce its stake in the other, Bankgirot, to 10% and to waive its shareholder rights accordingly.

298. Most of the divestment remedies that were adopted in 2001 involved a commitment to complete the divestment within a certain period from the date of the decision. Two cases involved an up-front solution (3). In the The Post Office/TPG/SPPL (4) case, the parties gave a commitment not to implement their operation until a buyer was found for the divested business and approved by the Commission because the Commission considered that the success of the remedy depended to a very large extent on the characteristics of the purchaser (5).

299. The Nestlé/Ralston Purina case (6) was the other example in 2001 of the Commission accepting an up-front buyer. For the first time, this provision was coupled with an alternative remedy which is informally referred to as a ‘crown jewels’ remedy (7). The possibility of accepting such crown jewels remedies was provided for in the remedies notice (8) and it is a form of commitment which the Commission expects to see more of in the future. In this case, the first alternative solution was the licensing of Nestlé’s Friskies brand in Spain. If this licensing alternative were not implemented by either a fixed date (9) or the date on which the notified operation was closed, then the option to license Nestlé’s brands would no longer be available to the parties and the crown jewel alternative would have to be implemented. This alternative involves the divestiture of the 50% shareholding in the Spanish joint venture with Agroímen (Gallina Blanca Purina JV), which represents a crown jewel because it consists of a larger and more easily salable package compared with the licensing of Nestlé’s Friskies brand.

300. Although the majority of remedies accepted by the Commission are in accordance with the principle that simple, structural remedies are the ideal solution, the Commission has accepted remedies which were somewhat more complicated than a straightforward divestment. For example, in the EdF/EnBW (10) case, cleared after an in-depth investigation, there were three elements to the package of remedies accepted. There were two relatively standard elements to the remedies package (11) and an innovative third element. This third element of the EdF remedy sought to address the competition concerns that had arisen in relation to so-called ‘eligible’ customers in France, i.e., those whose electricity supply is open to competition. To resolve these concerns, EdF undertook to provide competitors with access to generation capacity located in France in the form of virtual power plants (5,000 MW) and back-to-back agreements to existing co-generation power purchase agreements with a maximum of 1,000 MW. In this

---

(1) COMP/M.2139, 3.4.2001.
(3) See Section III.1, paragraph 20 of the notice.
(5) See also below (Section 5.3) for a discussion of the implementation of remedies.
(6) COMP/M.2337, 27.7.2001.
(7) This type of provision has been seen before in previous cases, for example IV/M.1453 — AXA/AGRE, 8.4.1999 and COMP/M.1813 — Industri Kapital/Nordkem/Vdyno, 12.7.2000.
(8) Paragraphs 22 and 23.
(9) The precise date is considered to be commercially confidential information.
(10) COMP/M.1853, 7.2.2001.
(11) Firstly, EdF undertook to renounce the exercise of its voting rights in CNR, an electricity producer active in France, and to withdraw its representative from the CNR board of directors; EdF will also no longer be involved in CNR’s commercial policy and market conduct. This commitment will ensure that CNR is in a position to become an active competitive force in the electricity sector in France. Secondly, EnBW will divest its 24% co-controlling shareholding in WATT, which will restore the status quo ante in Switzerland.
respect, it has to be borne in mind that a divestiture of power plants could not be envisaged as an appropriate solution, for economic reasons in general (it was very unlikely that newcomers would have taken the risk of acquiring such a plant) and for legal reasons in the particular case of nuclear plants. According to the terms of the commitments, the contracts for the virtual power plants will be awarded through an open, non-discriminatory public auction open to utilities and energy traders alike. It is envisaged that these arrangements for access to generation capacity will remain in place for a period of five years and that they may be terminated only on the basis of a reasoned request by EdF. It is anticipated that in that period the electricity market in France will have developed so as to allow sufficient alternative supply sources to be made available.

301. The lessons that can be drawn from this example are perhaps limited due to the highly specific circumstances of the EdF/EnBW case. Nevertheless this case does show that the Commission is prepared to accept non-standard remedies when circumstances demand them and when there is sufficient time for the efficacy of such proposals to be examined. This is usually within the context of phase II proceedings.

302. There is one notable difference in the types of remedy that the Commission accepted in phase I cases in 2001 compared with 2000. This difference is that in 2001 the Commission did not accept any remedies in phase I which involved commitments to provide competitors or customers access to delivery networks or potentially blocking patents. These types of commitment had been accepted in 2000 in six cases (1). In Vivendi/Canal+/Seagram the Commission accepted a package of commitments which included access for competitors to Universal’s films and online music — without discrimination in favour of Universal’s affiliated companies, namely Canal+ and Vizzavi. Other examples were BASF/Shell/Project Nicole (patent licensing), Vodafone Airtouch/Mannesmann (access to roaming tariffs and wholesale services) and BSkyB/Kirch Pay TV (access to Kirch’s conditional access system and pay-TV services).

303. Although the Commission did not accept remedies aimed at providing access to delivery networks or potentially blocking patents in phase I, in 2001 these types of remedy were accepted in five phase II cases (2). The fact that such remedies have continued to be accepted in phase II while not being accepted during phase I investigations may reflect a greater degree of caution from the Commission following the adoption of the remedies notice. This is also reflected in the fact that the number of cases involving remedies in the first phase of investigation has fallen this year compared with 2000 (13 as against 27 such decisions in 2000), while at the same time the Commission opened more phase II investigations in 2001 than in any previous year (22 in 2001 compared with 12 in 1998, 19 in 1999 and 20 in 2000).

5.3. Remedy implementation

304. The above discussion has focused on the new remedies that have been accepted by the Commission over the year. However, this is only part of the story. It is also important to examine the implementation of remedies previously accepted by the Commission, as a remedy will only fully address the competition concerns raised if it is fully and properly implemented.

305. Several of the companies involved in cases which were conditionally cleared during 2001 have already made considerable progress towards full implementation of their commitments. Such progress is particularly notable in relation to those cases where the remedies involved divestments.

306. One example where a buyer was found for a divestment extremely quickly was in *The Post Office/TPG/SPPL* (3), where the parties committed themselves to an up-front solution. The decision was taken on 13 March, and less than three months later a signed sale and purchase agreement with Swiss Post International was submitted to the Commission for its approval, which was granted on 14 June. The divestment was subsequently completed (4) and, in accordance with


(4) As with almost every case involving a divestment, the completion of the divestment did not mark the completion of the commitments as certain parts of the commitments related to the seller’s behaviour after the divestment.
the commitments in that case, The Post Office, TPG and SPPL were then able to implement their notified operation.

307. In *Metso/Svedala* (¹), the Commission issued a conditional clearance decision on 24 January and in September was able to approve the Swedish corporation Sandvik AB as a buyer for the divested assets. Although the solution was not proposed within a particularly short time, this was an interesting case in that it involved cooperation with the United States competition authority not just during the Commission’s investigative period, but also during the remedy procedure, after the Commission’s decision had been issued. The reason for the ongoing cooperation was that, owing to the differing timetable in the United States, the Federal Trade Commission’s (FTC’s) investigation continued until October when it was in a position to finalise its consent order. In the United States, the divestment of the various rock-crushing businesses to Sandvik AB was an up-front solution to most of the competition concerns identified.

308. Significant progress was also made during 2001 on many of the remedies that had been put in place in 2000. For example, the divestments of polypropylene plants and businesses to which the parties had committed themselves in *Shell/BASF/JV – Project Nicole* (²) were completed in the first half of 2001, as were those in the polyethylene markets where competition concerns had arisen in *Dow Chemical/Union Carbide* (³).

309. Another example was the successful sale of the portfolio of brands and businesses which Unilever had committed itself to selling in order to obtain clearance for its acquisition of Bestfoods in September 2000. The brands to be divested were Bachelors, McDonnell’s, Oxo and Vesta (soups) in the UK and Ireland, Royco, Heisse Tasse, Super Noodles, Aki Noodles, Liebig/Liebox, Oxo, Aardapel Anders, Rijke Sauzen, Raguletto and Lesieur (mainly soups, wet sauces and dry side dishes) in continental Europe, Casa de Mateus (jams) in Portugal and BlâBand, Touch of Taste and Isomitta (bouillon) in the Nordic countries. This sale was made in one tranche to Campbell Soup Company in a deal which itself reached the Community dimension thresholds so that it had to be notified for clearance to the Commission (⁴). The notified divestment was subsequently cleared in April.

310. However, progress has not been smooth in relation to all the commitments that have been offered to the Commission underpinning clearance decisions.

311. For example, in relation to the remedies that had been submitted by the parties in *Total-Fina/Elf Aquitaine* (⁵), in September 2000 the Commission had rejected TotalFina’s first proposed buyers because the package included buyers that did not have the incentives to bring competition effectively to the market for French motorway petrol sales. One of these proposed buyers, Le Mirabellier, subsequently lodged an appeal before the Court of First Instance (CFI) against this decision. The CFI has not yet reached a final decision on the appeal, but it did reject Le Mirabellier’s request for interim relief (⁶). After the rejection of this first proposal for purchasers for the petrol stations, TotalFina proposed a second group of buyers, which was accepted by the Commission in May.

312. A separate aspect of the remedies package accepted in *TotalFina/Elf Aquitaine* (⁷) was the sale of the liquid petroleum gas (LPG) business Elf Antargaz. This sale was finalised in 2001 (⁸) when the Commission authorised PAI, a subsidiary of BNP Paribas, and the US firm UGI to purchase the business. PAI and UGI had already been approved by the Commission as part of that commitment. However, the buyers had first had to convince the Commission that this solution, combining as it did a financial purchaser with a US company specialising in the distribution and sale of electricity, natural gas and LPG, represented a permanent, structural solution to the problems identified on the market for the sale of LPG in France. The conditions under which the Commission approved the *TotalFina/Elf Aquitaine* merger have now all been fulfilled.

313. The Commission has also seen examples of how the timetable to which parties commit themselves can be frustrated by the actions of third parties. For example, in *Carrefour/Promodès* (⁹)

---

(¹) COMP/M.2033, 24.1.2001.
(²) COMP/M.1751, 29.3.2000.
(³) COMP/M.1671, 3.5.2000.
(⁴) COMP/M.2350 — *Campbell/ECBB* (Unilever), 2.4.2001.
(⁵) COMP/M.1628, 9.2.2000.
Carrefour had committed itself to selling its shareholding in Cora within a fixed period. Despite Carrefour’s genuine efforts, the shareholding could not be sold within the time specified. However, rather than rescind the decision, the Commission was able to extend the deadline and the sale was subsequently completed with a financial investor. As the sale of the shareholding was not achieved in time, this emphasised the important role that the trustees can play in such situations in ensuring that no competitive harm comes to the company affected during the period between implementation of the original operation and sale of the shareholding. This experience has contributed significantly to the Commission’s work on preparing a standard mandate for the trustee.

314. Also, as the Carrefour/Promodès case eventually involved a sale to a financial investor, this obliged the Commission to consider carefully the conditions under which a financial investor could be considered acceptable as a purchaser. While the circumstances of each individual case have to be taken into account in deciding whether a financial investor would be a satisfactory buyer, certain factors could raise difficulties. For example, it is important that the buyer and seller are independent from each other, hence the seller should not have significant loans provided by the buyer, nor indeed should the buyer be in receipt of significant loans from or under obligations towards the selling party. Furthermore, the Commission has to assess whether the financial investor has the necessary business expertise to be able to develop or maintain the business as an active competitive force. This is especially important where the buyer is taking a majority stake in a divested business.

5.4. International cooperation on remedies

315. The significance of the Commission’s coordination with the relevant authorities in the United States and in other countries is discussed elsewhere in this report. However, it is important to stress that the discussions that take place between the Commission and other authorities relate not solely to the substantive issues at stake, but also to the remedial action required. There are several cases from 2001 where such coordination took place.

316. In Metso/Svedala (1), the United States’ ‘FTC’ was undertaking a parallel investigation which, owing to different time constraints in the two jurisdictions, continued after the Commission’s investigation had been concluded. In this case the commitments that had been given by the parties to the Commission also largely resolved the concerns that had been identified in the United States.

6. Article 9 referrals to Member States — new developments

317. In the context of the merger review, it has been suggested that the referral mechanism set out in Article 9 should be amended. However, the Commission’s policy with regard to the application of Article 9 also evolved this year as the Commission referred a part of two transactions, BP/E.ON (2) and Shell/DEA (3), concerning oil products to the German Federal Cartel Office. At the same time, the Commission opened an in-depth investigation into the petrochemical parts of both transactions based on concerns in the market for ethylene. The analysis of the petrochemical sector was thereby split from the analysis of the downstream oil products in Germany and the total analysis of the latter area was referred to the Federal Cartel Office.

318. For the first time, the analysis of a complete sector within a Member State was referred to a national authority even though that authority had not established that the transaction would lead to the threat of the creation or strengthening of a dominant position in all markets in this sector (for downstream oil products) in Germany. This decision was taken on the basis that the transaction would affect several other oil product markets which were not addressed by the request (e.g., base oils, additives, petroleum jelly and slack waxes), or in which the Federal Cartel Office did not see any prima facie competition problems arising from the transaction. These markets are intrinsically linked to the assessment of the oil products and lubricants markets specifically mentioned in the request, as they are all part of the chain of products resulting from the refining process, and therefore the issues of access to refineries and infrastructure are similarly relevant in these markets. A separation of these markets

---

(2) COMP/M.2533, 6.9.2001.
(3) COMP/M.2389, 23.8.2001.
would have inappropriately fragmented the assessment of the case as regards oil products. To avoid such fragmentation, the Commission decided to refer the part of the transaction dealing with oil products as a whole.

319. In Govia/Connex South Central (1), the Commission considered that the conditions laid down in Article 9(2)(b) of the merger regulation were fulfilled. For these conditions to be satisfied, the Commission had to decide that the affected market did not constitute a substantial part of the common market. The UK authorities made their request on the ground that the operation affected competition on specific railway routes, particularly in the London-Gatwick-Brighton area where it would create overlap between South Central and the parties’ existing train operating company Thameslink. This was the first ever instance of a case being referred to a Member State under Article 9(2)(b) of the merger regulation.

320. In two Article 9 cases, the Commission referred the cases to national authorities whose final decisions were subsequently appealed against before the national courts. According to the merger regulation, national authorities are required to take only the measures strictly necessary to restore competition in the markets concerned. However, Member States can be challenged under national and European law in relation to the action they have taken on referred cases. That is what happened this year in the abovementioned two cases.

321. The first of the cases was Interbrew/Bass (2), which had been referred to the United Kingdom authorities in 2000. After an in-depth investigation by the Competition Commission, the Secretary of State for Trade and Industry decided on 3 January to impose a remedy which involved the complete divestment of the Bass Brewers business, in effect prohibiting the transaction. On 2 February, Interbrew sought a judicial review of the remedy on the ground that it was unreasonable, disproportionate and based on unfair procedures. On 23 May, the High Court in London rejected Interbrew’s main challenge but held that the Competition Commission’s procedures had been unfair in that Interbrew had not been given a fair opportunity to deal with critical issues that were relevant to the assessment of an alternative, lesser remedy. After further consideration and consultation, the UK authorities decided that Interbrew should be required to dispose of either Bass Brewers or Carling Brewers to a buyer approved by the Director General of Fair Trading to remedy the adverse effects of the Interbrew/Bass Brewers merger.

322. The second case concerned the electricity supply aspects of Enel/FT/Wind/Infostrada (3), which were referred to the Italian competition authority. Following an in-depth investigation, the competition authority approved the proposed merger subject to a number of conditions imposed on Enel. This decision was subsequently appealed against by Enel (4) and by Codacons, the Italian consumer protection association. In a joint judgment on both appeals published on 14 November, the court which heard the appeal (the TAR) held that Enel was not dominant in the market for the supply of electricity and annulled the competition authority’s decision in relation to the remedies.

7. International cooperation

323. The Commission is developing its bilateral cooperation with non-EU countries in competition matters, in particular in relation to merger cases. It is also active in the multilateral arena and this year focused its efforts on the creation of an International Competition Network.

324. Practical and legal problems associated with the control of concentrations having a global scale have demanded effective cooperation between competition authorities in the enforcement of our respective rules.

7.1. Cooperation with the United States authorities

325. EU/United States cooperation is conducted on the basis of the two competition cooperation agreements that have been concluded over the past decade with the United States. Indeed, this cooperation in the area of competition law enforcement has become something of a model for transatlantic cooperation generally.

326. Experience of day-to-day cooperation has been that it works very effectively, particularly in merger cases, substantially reducing the risk of

---

(2) COMP/M.2044, 22.8.2000.
(4) The appeal was made to the Tribunale Amministrativo Regionale del Lazio (TAR).
divergent or inconsistent rulings. However, the Commission and the United States authorities occasionally disagree about the merits of a particular deal, even one involving global markets. This year witnessed a high-profile difference of view with the US authorities over the Commission’s decision to prohibit the GE/Honeywell merger (1). Both GE and Honeywell appealed against the prohibition decision before the Court of Justice in September.

327. While such differences of approach have been very rare indeed, there is much to be gained from ensuring a maximum of EU/US convergence in merger control. That is why the work of an existing transatlantic mergers working group has been refocused in order to identify areas where more convergence might be possible. Dialogue and cooperation between the Commission and the US antitrust authorities has already made a substantial contribution to the trend toward convergence, and by looking at cases where we may have adopted somewhat different approaches the Commission aims to reduce the risk of unnecessary disagreements in the future.

(1) See the box in this chapter for a discussion of this case, COMP/M.2220 — General Electric/Honeywell, 3.7.2001.

Box 9: GE/Honeywell

On 3 July, the Commission declared the proposed merger between the US companies General Electric (GE) and Honeywell incompatible with the common market.

The merger affected two categories of industrial sector, namely aerospace products (jet engines, avionics, non-avionics and engine starters) and industrial systems (small marine gas turbines).

The Commission considered the horizontal and exclusionary effects of the merger stemming from the complementary products and services that the merged entity would be able to offer to a common customer base. In particular, the Commission considered that the merger would enable the leveraging of market power with a view to foreclosing competition in those markets.

GE’s dominant position

An important factor in the Commission’s assessment was the transfer of GE’s dominance in jet engines for large commercial and large regional aircraft, its financial strength and its vertical integration into aircraft purchasing, financing and leasing to Honeywell’s leading market positions in corporate jet engines, avionics and non-avionics products.

GE can be characterised as a rather unique company. It is not only a leading industrial conglomerate, but also a major financial organisation through its subsidiary GE Capital, which provides GE’s industrial units with enormous financial means. Indeed, the Commission’s analysis of the transaction confirmed that an important financial surface and the ability to absorb product failures in an industry characterised by long term investments and imperfect financial markets is critical.

GE is further vertically integrated into aircraft purchasing, financing and leasing activities through GE Capital Aviation Services (GECAS), the largest purchaser of new aircraft and the owner of the largest fleet of aircraft in service and the largest share of aircraft on order and options. Unlike any other independent leasing company, GECAS’s policy is to select only GE engines when purchasing new aircraft. GE, through GECAS, has the incentive and the ability to enhance the market position of GE’s engines through various means. As a customer, whether it is a launch customer or not, GECAS can influence the selection of aircraft equipment by the airframe manufacturers and tilt the balance in favour of it being retained as the exclusive supplier. GECAS also contributed to strengthening GE’s position vis-à-vis airlines by persuading airlines that would not otherwise have chosen a GE-powered aircraft to select such an aircraft.

Thanks to the combination of its financial strength through GE Capital and its vertical integration into GECAS, GE has managed to achieve the highest and most sustainable positioning in the large commercial and regional aircraft engine markets, to increase the gap with its competitors and to secure exclusive positions as the engine supplier in a series of airframe platforms, to the detriment of its rivals.
Given the nature of the jet engines market, characterised by high barriers to entry and to expansion, GE’s incumbent position with many airlines, its incentive to use GE Capital’s financial power with customers, its ability to leverage its vertical integration through GECAS, the limited countervailing power of customers and the comparatively weak position of its rivals, GE was considered to be in a position to behave independently of its competitors, customers and ultimately consumers and thus to be a dominant firm on the markets for large commercial jet aircraft engines and for large regional jet aircraft engines.

The effects of the merger

The proposed merger would have led to the creation of dominant positions on several markets as a result of the combination of Honeywell’s leading positions on these markets with GE’s financial strength and vertical integration into aircraft purchasing, financing, leasing and aftermarket services as described above.

In addition, given the parties’ dominant and/or leading positions in their respective markets, and the wide combination of complementary products that it could have offered, these effects would have further been compounded by the merged entity’s financial and technical ability as well as economic incentive to carry out exclusionary practices such as packaged offers at strategically determined prices, including predatory pricing, in order to progressively foreclose their competitors on specific markets or market segments. This would have occurred as a result of, inter alia, the ability of the merged entity to cross-subsidise discounts across the products composing the package deal.

Rival avionics and non-avionics manufacturers would consequently have been deprived of future revenue streams generated by the sales of the original equipment and spare parts. Future internally generated financial means are key to this industry, as they are needed to fund development expenditures for future products, foster innovation and enable possible leapfrogging. By being progressively marginalised, as a result of the integration of Honeywell into GE, Honeywell’s competitors would have been deprived of a vital source of revenue and seen their ability to invest for the future and develop the next generation of aircraft systems substantially reduced/eliminated, to the detriment of innovation, competition and thus consumer welfare.
B — Statistics

Figure 4
Number of final decisions adopted each year since 1995 and number of notifications

Figure 5
Breakdown by type of operation (1993–2001)
A — General policy

328. The ninth survey on State aid in the European Union, published by the Commission in July (1), covers the period 1997–99. During that period, grants of aid amounting to an annual average of EUR 90 billion were paid by the 15 Member States to the manufacturing, agricultural, fisheries, coal mining, transport and financial services sectors. While this is a considerable amount, it nevertheless represents a reduction of nearly 12% in comparison with the previous period, 1995–97. Over the period 1997–99, State aid for regional objectives was 17% of the total and 10% was for horizontal objectives.

329. Particularly noteworthy has been the decline in aid to the manufacturing sector, which has now fallen below the level of aid granted to the transport sector. The ninth survey indicates that the average total amount of aid granted annually to manufacturing in the 15 Member States was EUR 27.6 billion, compared with EUR 35.8 billion over the period 1995–97.

330. The need to achieve further reductions in overall aid levels and to redirect aid towards horizontal objectives of Community interest was underlined by the Stockholm European Council in March, which committed the Member States to demonstrating a downward trend in State aid expressed as a percentage of GDP by 2003, taking into account the need to redirect aid towards horizontal objectives of common interest, including cohesion objectives. This was confirmed by a Council resolution of 6 December which invited the Member States to continue their efforts to reduce aid levels as a percentage of GDP; to focus efforts on reducing and eliminating aid which has the greatest distortive effects; to redirect aid towards horizontal objectives, including cohesion, and, where appropriate, towards small and medium-sized enterprises (SMEs); to further develop the use of *ex ante* and *ex post* evaluations of aid schemes; and to improve the transparency and the quality of reporting to the Commission, particularly by means of national control and follow-up procedures and, where possible, the provision of relevant statistics.

331. The resolution invited the Commission for its part to develop, together with the Member States, statistical tools and indicators of the effectiveness and efficiency of aid; to give greater emphasis to assessing the impact of aid on competition; to encourage exchanges of experience and concerted evaluation exercises; and to continue its efforts to simplify, modernise and clarify European rules on State aid. The Commission was also asked to submit an initial assessment of progress in 2002.

1. Transparency

332. On 22 March, the Commission unveiled the new public State aid register. The register provides details on State aid cases dealt with by the Commission. It will be updated at frequent intervals and will thus ensure that the public has timely access to the most recent State aid decisions. The register, which is available on the home page of the Competition Directorate-General’s Internet site [http://europa.eu.int/comm/competition/index_en.html](http://europa.eu.int/comm/competition/index_en.html), is in two parts. The first part presents aggregated information on all cases under preliminary examination that were registered after 1 January 2000. The second part allows users to carry out simple searches for information on all Commission State aid decisions pertaining to cases registered after 1 January 2000, allowing users to access information by: case number, aid instrument (e.g. interest subsidy, soft loan, guarantee, tax deferment), case type (individual application or aid scheme), decision type (e.g. opening of formal proceedings, final decisions), legal basis, Member State (and region/province), the objective of the aid and the sector concerned.

333. By providing links to press releases and Commission decisions that are either published in the Official Journal or sent directly to Member States, the register brings together under one roof the impressive amount of information on the Commission’s State aid decisions that is already available on the Internet.
334. In July this was followed up by the second major transparency initiative, with the publication of the first edition of the State aid scoreboard. The scoreboard is presented in five parts. The first part of the present scoreboard shows State aid expenditure in the European Union and in each Member State expressed as a percentage of GDP. The shares of aid are then given according to the main purposes pursued: fostering horizontal objectives like research and development, small and medium-sized enterprises or training; helping agriculture and fisheries; assisting the transport sector; aiding other specific sectors like coal mining, shipbuilding or steel production; supporting regions that lag behind. The idea is that it should act as a catalyst for discussion between Member States. The third part looks at Member States’ success in complying with State aid rules and identifies problems and areas where improvements might be necessary. It also includes information on the recovery of illegally granted State aid. With a view to identifying possible areas where future action by the Commission under State aid rules might be desirable, the fourth part of the scoreboard highlights the amounts of aid granted by the Member States for different objectives and specific sectors. The Member States are encouraged to discuss certain spending trends and patterns and ascertain their impact on the functioning of the internal market. The final part of the scoreboard attempts to generate a discussion on the relationship between State aid levels in the Member States as identified by the Commission, the functioning of the internal market and the success of the economic reform process. In so doing, the scoreboard goes beyond mere competition issues.

335. The scoreboard will in future be published twice a year and will develop gradually in response to the needs of its various future user groups. It will be based on a core set of indicators that will, over time, demonstrate long-term policy shifts and State aid spending patterns. These core indicators will be accompanied in each scoreboard by other indicators that will focus on certain topics for deeper analysis. The scoreboard will also add value to other Commission documents, in particular the proposals for broad economic policy guidelines, structural indicators and benchmarking enterprise policy.

2. Modernising State aid control

336. As already announced in last year’s report, the Commission has embarked on a long-term reform exercise aiming at simplifying State aid procedures for clear-cut cases and concentrating Commission resources on the most serious distortions of competition, with the objective of ensuring that the necessary changes are in place before enlargement.

337. The first three regulations adopted in principle in December 2000 on the basis of the enabling Regulation (EC) No 994/98 entered into force, representing an important step in the modernisation process. They consist of two regulations introducing block exemptions for aid to small and medium-sized enterprises and training aid and a regulation codifying the *de minimis* rule (1).

338. The regulation on *de minimis* aid codifies the application of that rule, which was previously set out in the form of a Commission notice published on 6 March 1996, and thereby increases legal certainty. Under the *de minimis* rule, aid to an enterprise that does not exceed the threshold of EUR 100 000 over any period of three years is not considered State aid within the meaning of Article 87(1) of the Treaty and is therefore not subject to the notification obligation.

339. The block exemptions allow Member States to grant aid immediately, without need for prior notification to and authorisation by the Commission, provided the conditions laid down in the block exemption regulation are met. The block exemption regulations benefit not only the Commission, but also the national, regional and local administrations in the Member States, since the procedure for granting aid can be much quicker and the administrative burden is reduced. However, this procedural simplification does not entail a lesser degree of control in or a relaxation of the rules on State aid. Several provisions in the regulations require Member States to provide the Commission with summary information sheets and annual reports, thereby allowing it to monitor the application of the block exemptions. Moreover, since the regulations are directly applicable in the Member States, complainants can also go to national courts if their competitors have received aid which does not comply with the

---

conditions laid down in the relevant block exemption regulation.

340. On the basis of the summary information forms sent in by Member States, it is possible to make an initial assessment of the use of the block exemption regulations by them. By the end of December, the Commission had received 106 forms on the basis of the regulation on aid to SMEs and 47 forms on the basis of the regulation on training aid. The great majority of these forms concerned aid schemes rather than individual aid. The substantial use made of the block exemption regulations has resulted in a decrease in the number of notified cases, with 286 notifications received between February and November, compared with 400 notifications received during the same period in 2000. Recourse to the block exemption regulations varies considerably from one Member State to another. By the beginning of December, Italy had sent in 56 forms, Germany 54 and Spain 20. These countries are by far the largest users of the block exemption regulations. At the other end of the spectrum, France, Portugal, Finland and Luxembourg had not yet sent any forms in.

341. The Commission is currently preparing a third block exemption regulation on employment aid. On 2 October, it adopted a draft proposal, on which it consulted the Member States in the Advisory Committee on State Aid on 7 December. The draft regulation proposes exempting from notification, subject to certain conditions, aid for the creation of employment, aid for the recruitment of disadvantaged categories of workers, and aid to meet the additional costs of employing disabled workers. The rules on aid for the creation of employment are aligned on those in the block exemption regulation on aid for SMEs concerning the creation of employment linked to investment.

342. On 13 November, the Commission decided to extend the validity of the multisectoral framework on regional aid for large investment projects, the code on aid to the synthetic fibres industry and the Community framework for State aid to the motor vehicle industry to 31 December 2002 (1). If the new multisectoral framework enters into force before 31 December 2002, it will replace the above three frameworks as of the date of its entry into force.

---

Box 10: Risk capital

An important development in State aid in 2001, showing how State aid rules may need to be adapted to new market situations, was the adoption by the Commission of a new communication on State aid and risk capital (1), together with the assessment by the Commission of several measures designed to promote the provision of risk capital in different Member States.

The communication was prepared as a response to a number of factors, in particular the concern to stimulate risk capital markets in the Community and the difficulty of assessing certain measures with this objective, proposed by Member States, under existing State aid rules, particularly when there is no direct link between the grant of aid and a specific set of eligible costs for investment or research and development. Depending on the design of risk capital measures, they may grant aid to economic operators at one or more different ‘levels’, by providing a benefit to investors (by enabling them to make risk capital investments on more favourable terms) and/or to the enterprises invested in. The communication sets out certain criteria against which the Commission will assess these measures, as well as giving a non-exhaustive list of forms of aid measures which could meet these criteria.

Applying the Commission communication on State aid and risk capital for the first time, the Commission approved the Regional Venture Capital Funds (2) in the United Kingdom even though there was no link to specific eligible costs and accepted State aid for a measure where the participation in a company may be in the nature of capital needed for daily business expenses (working capital). The aim of the UK scheme is to address a lack of funding at regional level available to SMEs for equity investments. The Commission acknowledged market failure for this segment because the thresholds as laid down in the risk capital

---

3. State aid and tax policy

343. The monitoring of State aid in the form of taxation remains one of the Commission’s priorities. In line with its notice on the application of the State aid rules to measures relating to direct business taxation (1), the Commission invited four Member States, pursuant to Article 88(1) of the EC Treaty, to amend or abolish existing aid schemes and initiated formal investigation proceedings in respect of eleven other measures in force in eight Member States.

344. Most of the relevant measures are tax schemes conferring advantages on certain types of activity (financial services, offshore activities) or certain types of undertakings that meet certain turnover, internationalisation or indeed nationality criteria. The proceedings initiated by the Commission will enable it to determine whether the selectivity of the measures is justified and whether the schemes confer an advantage within the meaning of Article 87(1) of the EC Treaty, in particular as a result of discretionary practices by the tax authorities.

345. As far as indirect taxation is concerned, the Commission decided to initiate proceedings under Article 88(3) of the Treaty in respect of excise duty reductions granted by three Member States on heavy fuel oil used as fuel for the production of alumina. These reductions in excise duties were authorised by the Council (Decision 2001/224/EC of 12 March 2001) (2), pursuant to:.

---

(4) Cf. paragraph II.3 of the communication: ‘Nothing in this document should be taken to call into question the compatibility of State aid measures which meet the criteria of any other guidelines, frameworks or regulations adopted by the Commission.’
(5) For the definition of initial investment, see, for example, point 4.4. of the guidelines on national regional aid (OJ C 74, 10.3.1998).
III — STATE AID

ant to the provisions of Council Directive 92/81/EEC of 19 October 1992 on the harmonisation of the structures of excise duties on mineral oils. However, as the fifth recital of Council Decision 2001/224/EC stipulates, ‘this Decision shall be without prejudice to the outcome of any procedures relating to distortions of the operation of the single market that may be undertaken, in particular under Articles 87 and 88 of the Treaty’. The Commission would point out that, as a general rule, decisions authorising reductions in excise duty that are taken on the basis of the Treaty provisions relating to taxes are without prejudice to the application of the competition rules laid down in the Treaty.

4. Stranded costs

346. Before the liberalisation of the European electricity market, recovery of investments by electricity undertakings was achieved through adequate tariff fixation by the State. In these circumstances, many of these undertakings invested in relatively costly electricity production plants or long-term take or pay contracts. The decrease in electricity prices following the liberalisation of the sector may compromise the recovery of many of these investments or long-term contract costs, and thus generate non-recoverable costs. Such costs are generally known as ‘stranded costs’.

347. Unlike other previous liberalisation processes, the liberalisation of the electricity sector does not take place coincidentally with a technological leap or a large increase in demand. On the contrary, the electricity market is more and more subject to various external constraints that have a tendency to increase production costs, such as environmental protection or security of supply.

348. In such circumstances, certain undertakings may be tempted to pass the whole burden of their stranded costs on to their captive customers, thus threatening the viability of other undertakings. It may therefore be necessary to devise some compensation mechanism for stranded costs.

349. This compensation mechanism must strike a delicate balance between, on the one hand, the need not to weaken electricity undertakings to a point where they would no longer be in a position to ensure proper delivery of electricity, which is vital to the economy of the European Union, and, on the other hand, the need to ensure that new entrants are not prevented from entering the market, which would hamper the liberalisation process and the benefit it brings to consumers.

350. It is the Commission’s view that where such balanced compensation mechanisms constitute State aid, they can be viewed as compatible with the EC Treaty under Article 87(3)(c), as they facilitate the transition of the electricity sector to a liberalised market and hence the economic development of the sector, while ensuring that the compensations are limited and proportionate, and therefore do not adversely affect trading conditions to an extent contrary to the common interest.

351. On 26 July, the Commission adopted a communication on the methodology for analysing State aid linked to stranded costs, which sets out the criteria it will use in examining whether a stranded costs compensation mechanism that constitutes State aid can be authorised under the EC Treaty (1).  

352. The basic principle of the methodology is that compensations should be limited in time and in extent. They should not exceed the costs actually borne by undertakings, directly caused by the liberalisation and resulting in losses. For example, no compensation should be paid for a plant that became less profitable following the opening-up of the market, but nonetheless remained profitable. Compensations must be bounded \textit{ex ante} and should also provide for an \textit{ex post} adaptation mechanism that takes into account the real evolution of the market as a result of liberalisation, and in particular the actual change in electricity market prices.

353. On 26 July, applying this methodology for the first time, the Commission authorised three individual stranded costs cases, in Austria, Spain and the Netherlands (2).

5. Public broadcasting

5.1. Communication from the Commission on the application of State aid rules to public service broadcasting (3)

354. On 17 October, the Commission adopted a communication which explains how it applies

---

(1) Available in all languages on the Competition DG pages of the Europa website.
(2) See Part Two of the XXXI Report on Competition Policy 2001, not yet published.
State aid rules to the funding of public service broadcasters. The communication acknowledges that Member States are in principle free to define the content and scope of the public service and the way it is financed and organised. However, the Commission calls for transparency on these aspects so that it can assess the proportionality of state funding and control possible abusive practices. Member States should establish a precise definition of the public service remit, formally entrust it to one or more operators through an official act and have an appropriate authority in place that monitors its fulfilment. The Commission will intervene in cases where the aid causes a distortion of competition that cannot be justified by the need to perform the public service obligation.

6. Cinema and audiovisual production support

6.1. Review of the national cinema and audiovisual production support schemes

355. Following its 1998 decision on the French scheme of automatic aid for film production, the Commission is reviewing the schemes in place in other Member States under the same assessment criteria. The Commission has already reviewed and approved the schemes operating in a number of Member States. The Commission is at present completing discussions with the remaining Member States to bring their schemes into line with EC law. The completion of the review will provide the sector with legal certainty.

6.2. Communication from the Commission on certain legal aspects relating to cinematographic and other audiovisual works

356. On 26 September, the Commission adopted a communication which explains and clarifies the criteria governing the application of the State aid rules to aid given by the Member States to support their national film production. The communication recognises that Member States are in principle free to support their national film production and that they can do so by whatever method they deem most appropriate. However, the Commission requires Member States to comply with certain specific conditions so as to ensure that the aid does not conflict with the functioning of the common market. The Commission does not intend to alter the existing compatibility criteria unless they prove incapable of preventing undue distortions of competition within the European Union. In the communication, the Commission notes that possible distortions of competition created by aid in this sector stem more from territorialisation requirements (e.g. conditions requiring producers to spend a certain proportion of the film budget in the national territory) than from the level of aid itself. In its 1998 decision on the French aid scheme, the Commission took the view that Member States should be encouraged to reduce national preferences as to the place of expenditure in respect of a substantial proportion of the costs. In this regard, the communication announces that the Commission intends to examine the maximum level of admissible territorialisation further, in the light of the results of the review of aid schemes it is currently undertaking.

7. Enlargement

357. The year 2001 was important in the preparatory work on enlargement as regards State aid. In February, the Directorate-General for Competition decided to set up an enlargement and State aid task force to assess the State aid control situation in the 12 applicant countries. For each applicant country, an assessment was made of the legal framework for State aid control, the administrative capacity established for this purpose and the actual enforcement record achieved. The result of the assessment exercise provided a basis for preparing the State aid part of the draft common position for each applicant country, including a position on the provisional closure of the competition chapter.

358. With the adoption by the Council of the EU common positions on the competition chapter, which were tabled in the accession conferences on 11 and 12 December, an initial phase of the task force’s activities came to an end. The respective conferences agreed to provisionally close the competition chapter for four applicant countries (Estonia, Latvia, Lithuania and Slovenia). With respect to the eight other applicant countries, the common positions conclude that, in spite of the progress made on State aid, it is not yet possible to provisionally close the chapter.

359. In a second phase, the enlargement and State aid task force will carry out a second round of assessment of the enforcement record of the
eight applicant countries for which the competition chapter could not yet be closed. In this regard it will in particular follow up specific State aid problems identified in the common positions (major issues such as the conversion of incompatible tax aid, the establishment of regional aid maps and steel restructuring programmes). The task force will also continue to monitor closely the State aid situation in the four countries for which the competition chapter has been closed. Finally, the follow-up of the State aid inventories and annual surveys of State aid prepared by the applicant countries will continue to be an important task.

**Box 11: German public banks (Anstaltslack and Gewährträgerhaftung)**

As announced in last year’s report, the Commission continued its examination of the compatibility with the State aid rules of the German system of state guarantees for public-law credit institutions (Anstaltslack and Gewährträgerhaftung).

**Legal and economic context**

Anstaltslack could be translated as ‘maintenance obligation’. It means that the public owners (e.g. federal government, Länder, municipalities, etc.) of the institution are responsible for securing its economic basis and its function for the entire duration of its existence. It was first recognised in 1897 as a general principle of law by a German high court. Gewährträgerhaftung could be translated as ‘guarantee obligation’. It stipulates that the guarantor will meet all liabilities of the bank which cannot be satisfied from its assets. It was explicitly introduced in several Länder laws in 1931/32 when the previous direct liability of the municipalities was replaced.

The guarantees allow the public banks, which are strong competitors on the European financial markets, significantly cheaper funding. The German public-law credit institutions which benefit from these guarantees comprise the 12 Landesbanken, around 550 savings banks of widely varying size and 11 special-purpose credit institutions engaging in public-policy-based financing, which taken together account for about one third of the German banking market and have some 320,000 employees.

Both guarantees are limited neither in time nor in amount. Also, the credit institutions do not have to pay any remuneration for them.

**Assessment under the State aid rules and recommendation**

On 8 May, following intensive contacts between the Commission and the German authorities, the Commission adopted a formal recommendation proposing to the German Government appropriate measures in order to abolish these state guarantees or render them compatible with the State aid rules laid down in the EC Treaty.

The recommendation explains that the guarantee system has to be considered to be State aid within the meaning of the Treaty: the measures are based on State resources and favour certain groups of undertakings, they distort competition and affect trade within the Community. However, since the system already existed when the EC Treaty entered into force in 1958, the aid qualifies as ‘existing’ aid, on which the Commission can only demand changes for the future, but cannot act retroactively.

According to the Commission recommendation, compatibility with the EC rules should be achieved by 31 March 2002. However, it is explicitly provided for in the recommendation that the Commission can decide to agree to a later date if it considers this objectively necessary and justified in order to allow appropriate transition for certain public banks to the new situation. The Commission is aware of the need to protect existing creditors who provided funds to the public-law credit institutions on the basis of the guarantee system.

**Solution**

On 18 July, the German government accepted the formal recommendation adopted by the Commission on 8 May. This acceptance was based on an understanding reached on 17 July between Commissioner for Competition Mario Monti and German State-Secretary for Finance Caio Koch-Weser, leading a delegation of three Länder finance ministers and the president of the German savings banks’ and giro association.
The German government confirms by its acceptance that the existing aid system of guarantees, which constitutes incompatible State aid within the meaning of the Treaty, needs to be changed. Its acceptance creates an obligation for the German government to bring the system of guarantees into line with the State aid rules laid down in the Treaty.

The understanding of 17 July provides for a four-year transitional period, which lasts from 19 July 2001 to 18 July 2005. During this period, the two existing guarantees may remain in place. After that, on the basis of the so-called ‘platform-model’, one guarantee (Anstaltslast) will be replaced by a normal commercial owner relationship governed by market economy principles, implying no obligation on the State to support the bank any more. The other guarantee (Gewährträgerhaftung) will be abolished.

However, Gewährträgerhaftung can be maintained (grandfathered) even after 18 July 2005 to protect creditors in the following cases:

— For liabilities existing at 18 July 2001, Gewährträgerhaftung can be maintained without any limits until they mature.

— For liabilities created between 19 July 2001 and 18 July 2005, Gewährträgerhaftung will be maintained only for those maturing before the end of 2015. Otherwise, for those maturing after 2015, Gewährträgerhaftung will not be maintained.

According to the Commission decision of 8 May, the German authorities had to submit to the Commission by 30 September the specific measures they intend to take in order to make the guarantee system compatible with the Treaty. The German authorities undertook to submit the necessary legal measures to the relevant federal or Länder legislative bodies by the end of 2001 and to adopt them by the end of 2002. In case of non-compliance with the deadline for adoption by the federal government or a Land, the State aid elements contained in the guarantees will be treated as new aid from the beginning of 2003 for banks falling under the legislation of the respective Land or the federal government. Consequently, the State aid element could be recovered from these banks with effect from 2003.

While the understanding of 17 July refers only to Landesbanken and savings banks, the acceptance of appropriate measures also covers the 11 independent special credit institutions engaging in public policy motivated financing. A separate understanding for special credit institutions was concluded at the beginning of 2002. This understanding stipulates the conditions for neutrality of competition under which special credit institutions can operate in the future while maintaining the state guarantees. In particular, they will have to use as a rule commercial banks for channelling through their special financing, from which only a few exceptions are allowed.

The contents of both understandings are to be integrated in a legally binding way into a new Commission decision amending the recommendation of 8 May 2001. That decision is to be taken before the end of March 2002.

Both understandings contribute to the creation of a future level playing field between private sector and public sector banks. The transitional arrangements taken together will allow the financial institutions concerned to restructure adequately their activities and organisation in view of the changed legal and economic environment.

B — Concept of aid

360. According to the definition set out in Article 87(1) of the EC Treaty, State aid is incompatible with the common market if it is granted by a Member State or through State resources, if it distorts or threatens to distort competition by conferring an advantage on certain undertakings or the production of certain goods and if it is liable to affect trade between Member States. The form in which the aid is granted (interest rebates, tax reductions, loan guarantees, supply of goods or services on preferential terms or capital injections on terms not acceptable to a private investor) is irrelevant.

1. Origin of resources

361. The first of the conditions to be fulfilled is that aid must be granted by a Member State or through State resources. The previous case law of
the Court has established that both the terms ‘state’ and the notion of ‘resources’ in this context are to be interpreted widely. However, the judgment of the Court of 13 March in the PreussenElektra case defined the limits of the concept of State resources. The case concerned an obligation imposed on electricity distributors in Germany to pay a higher feed-in price for electricity generated from renewable sources. Following litigation in Germany, the Court of Justice was asked to give a preliminary ruling on whether such a system would amount to State aid within the meaning of Article 87(1) of the Treaty.

362. In its judgment the Court ruled that the measure incontestably constituted an advantage for the producers of electricity from renewable sources as they received guaranteed higher prices than would otherwise be the case. However, for a measure to rank as State aid, it was not enough that the advantage was conferred by the State. The advantage had to be provided directly or indirectly through State resources. Having regard to the facts of the case, the Court found that the system of electricity pricing in Germany which required one private company to pay another a higher price than would otherwise have been the case did not involve the use of State resources and therefore could not be deemed to be aid.

363. Based on the reasoning of the Court of Justice in PreussenElektra, the Commission declared a Belgian measure, applicable in the Flemish region, not to be caught by Article 87(1) of the EC Treaty (1). The Commission found that a measure whereby the distributors have to buy annually a certain quantity of green certificates did not involve State resources (2). Equally, the Commission decided that the issuing of certificates by state authorities in order to prove that the green electricity corresponds to the definition given in the law did not involve State resources (3). Notwithstanding this assessment, the Commission also examined the measure as State aid and considered it to fulfil the criteria of the guidelines on State aid for environmental protection (see below).

2. Advantage to a firm

364. In order to constitute State aid, a measure must also confer a direct or indirect advantage on the beneficiary. The question of whether compensation for the costs of meeting public service obligations may be considered to be an advantage is addressed in the specific chapter of this report dealing with services of general economic interest. The Commission has also addressed the question of advantage in the field of waste management. On 31 January, in Case N 484/00, the Commission decided not to raise any objections to the Dutch waste disposal system for PVC facade elements, because the arrangements did not confer an advantage on the participating companies (producers and importers on the one hand, recycling companies on the other). They did not therefore constitute State aid within the meaning of Article 87(1) of the EC Treaty. The system ensures that the companies selling PVC facade elements assume responsibility for recycling these elements, in line with the ‘polluter pays’ principle. The system is based on a voluntary agreement between several organisations in the PVC production, consumption and recycling chain. The agreement stipulates a fixed payment for PVC frames and facade elements marketed in the Netherlands to be paid by the PVC facade element producers and importers. These resources are used for the cost of the collection and recycling of the facade elements, including the transport. The Commission took similar decisions with respect to Dutch systems for waste paper and cardboard and car wrecks (Cases NN 87/00 and C 11/01). The latter system was approved only after obtaining substantial evidence on the absence of overcompensation to car dismantling companies.

365. Sometimes the question of whether a particular state measure constitutes an advantage must be decided by considering whether a private investor acting in a free market would participate in the transaction (4). On 6 June, in Case C 36/2001, the Commission decided to initiate the formal procedure for the investigation of State aid measures in the case of a measure taken by the authorities in the Walloon region of Belgium involving the Beaulieu group, one of the leading manufacturers of carpets in Europe, which is

(3) See also Case NN 30/B/2000, Commission decision of 28.11.2001, not yet published.
(4) See the Commission paper on the application of Articles 92 and 93 to public authorities’ holdings, Bulletin EC 9-1984, also available on the Competition DG pages of the Europa website.
based in the Flemish region of the country. In the course of its enquiries in the Verlipack case, the Commission became aware of possible State aid to the Beaulieu group. This was a fresh measure taken by the Walloon region, and the Commission accordingly asked the Belgian central government for information to enable it to assess the measure in the light of the rules in force. From the information supplied, the Commission learnt that in December 1998 the Beaulieu group had settled a debt of BEF 113 712 000 owed to the Walloon region by transferring 9 704 shares in Holding Verlipack II, the nominal value of which was BEF 100 million but the real value of which must have been significantly lower, given the assets position of the company at the time. The Commission therefore doubted that a private investor would have accepted this transaction.

3. Selectivity

366. To be caught by Article 87(1) of the EC Treaty, a measure must not only be a State measure, but it must also be selective, affecting the balance between the recipient firm and its competitors. This selective character distinguishes State aid measures from general economic support measures which apply across the board to all firms in all sectors of activity in a Member State. As long as they do not favour a particular area of economic activity, such general measures fall within the scope of Member States’ power to determine their economic policy. Consequently, measures that have a cross-sectoral impact, being applicable throughout the territory of a Member State and to the whole economy, do not constitute State aid for the purposes of Article 87(1).

367. In the Adria-Wien pipeline case, the Austrian Constitutional Court (Verfassungsgerichtshof) asked the Court of Justice for a preliminary ruling concerning the interpretation of Article 87, the question being whether legislative measures adopted by a Member State which provide for a rebate of energy taxes on natural gas and electricity, but grant that rebate only to undertakings whose activity is shown to consist primarily in the manufacture of goods, are to be regarded as State aid within the meaning of Article 87(1). The Court of Justice concluded that, although objective, the criterion applied by the national legislation was not justified by the nature or general scheme of that legislation and could not therefore save the measure from being State aid.

368. By contrast, the Commission decided that the Italian legislative measure designed to promote the regularisation of firms and workers in the underground economy was a general measure for the purposes of Article 87(1) of the Treaty (1). The measure, which provides for tax concessions and reductions in social security contributions, applies throughout Italy to all firms in all sectors that have not properly declared their employees and do not fully comply with statutory requirements regarding taxes and social security contributions. The Commission found that the measure did not introduce any systematic discrimination in terms of either the rules themselves (by identifying specific beneficiaries) or the way they are applied (by conferring discretionary powers on the public authorities).

369. The Belgian measures providing for reductions in employers’ social security contributions for firms which introduce shorter working hours were also deemed to be a general measure (2). The rules apply automatically to all firms in Belgium and to all private-sector workers and autonomous public enterprises, and the public authorities do not have any discretionary power in applying the rules, which do not contain any type of sectoral, regional or other specificity.

370. In the decision on the UK climate change levy (3) (see ‘Environment’ below), the Commission decided that a tax exemption for combined heat and power plants was not selective and therefore did not constitute State aid for the purposes of Article 87(1) of the EC Treaty.

371. The German system under which companies are obliged to accumulate financial reserves for the financing of future statutory obligations gave rise to a complaint on the application of this system to nuclear power stations and their reserves for waste management and decommissioning (4). The Commission found that the German commercial code requires all undertakings to constitute reserves for contingent liabilities. These rules are applied to all companies in the same way and cannot be restricted by the discretionary power of the State. They therefore fall

into the category of general measures and are not caught by the State aid rules of the EC Treaty. The Commission accordingly declared the provisions justified by the nature or general scheme of the German corporate tax system.

372. In its decision initiating formal investigation proceedings on Åland Island captive insurance companies (C 55/2001), the Commission took the view that the selectivity criteria were met because the beneficiaries of a corporate tax reduction were limited to companies active in captive insurance operations, which represent only a segment of the insurance business.

373. In its preliminary assessment of the Dutch international financing activities scheme (C 51/2001), which provides for tax benefits linked to an international activity, the Commission also found that the measure was selective because the benefit was limited to groups of companies operating in at least four foreign countries or on two continents. Groups of companies which were internationally active but did not fulfil the aforementioned criteria were not eligible for the measure.

374. Selectivity can also derive from the nationality of the company, as in ‘Co-ordination centres of foreign companies in Germany’ (C 47/2001) and ‘Gibraltar exempt and qualifying companies’ (C 52/2001 and C 53/2001).

4. Effect on trade between Member States

375. In a case concerning aid to road haulage companies in the Friuli-Venezia Giulia region (1), the Court of First Instance confirmed its case law with regard to two conditions for the application of Article 87(1), namely that trade between Member States must be affected and competition distorted. The Court pointed out that these two conditions are as a general rule inextricably linked. In particular, where aid strengthens the position of an undertaking as compared with other undertakings competing in intra-Community trade, the latter must be regarded as affected by that aid.

376. In the case concerned, the Court recalled first that it is settled case law that even aid of a relatively small amount is liable to affect trade between Member States in sectors with strong competition such as the transport sector. Secondly, for the application of Article 87(1) it is sufficient that the aid threatens to distort competition and is capable of affecting trade between Member States. The onus was therefore not on the Commission to establish that the aid had affected the competitive position of certain haulage undertakings in this case. The Court also pointed out that the essentially local activity of most recipients of the aid was not such as to prevent the aid from having an effect on trade between Member States and on competition, as from the partial opening-up of the cabotage market to competition. The aid strengthened the financial position of the road haulage sector and hence the scope of commercial road haulage companies in the Friuli-Venezia Giulia region vis-à-vis their competitors.

C — Assessing the compatibility of aid with the common market

1. Horizontal aid

1.1. Research and development

377. The Commission declared an Italian aid project providing support for research and development carried out in the field of non-volatile flash memories compatible with the common market, applying the Community framework for State aid for research and development (2). On the basis of an expert scientific report, the Commission found that the aid beneficiary, ST Microelectronics, undertook industrial research. As for the design of the new production processes, the Commission deemed this part of the project to be precompetitive development.

378. The Commission has consistently held that an advance from the State, even if reimbursable in the event of the project proving successful, is State aid. The UK notification of an advance for an R&D project being carried out by Rolls-Royce was accordingly examined in the light of the R&D framework. The Commission held that the R&D project could partly be considered as not closer to the market than precompetitive develop-

---

(1) Judgment of 4.4.2001 in Case T-288/97, not yet reported.
ment. Based on an expert report, the Commission decided that the level of technological risk required state support and therefore accepted that the aid had an incentive effect. As all other criteria of the R&D framework were met, the Commission considered the aid to be compatible with the EC Treaty.

379. In the area of lithography, which plays a key role in defining the precise structure of integrated circuits, the Commission approved several R&D projects (1).

1.2. Employment, training and working conditions

380. Denmark notified, as a measure introduced as part of its active labour market policy, a job rotation scheme (2) under which an employer or an employee may receive a grant covering part of the salary costs if the employee participates in education or training as part of the scheme. Job rotation means that an unemployed person receiving unemployment benefits takes over the job of the employee who is temporarily absent on training. When the training is over, the trained person comes back to another job with the same employer and the newly hired person may stay on. The Commission took the view that the scheme did not favour certain undertakings or the production of certain goods. Thus, Article 87(1) of the EC Treaty did not apply. The scheme needs to be seen in conjunction with a previous Commission decision concerning an employment grant covering part of the salary for the newly hired person (3). Both schemes together are an example of how to combine training and employment as a national policy measure for the labour market.

381. In order to encourage employers to improve working conditions and the working environment beyond the requirements of the legislation, Denmark notified a scheme under which a company active on land, including road transport firms (as opposed to offshore operations and shipping and air transport companies), may receive a grant to compensate for the working environmental tax and to cover the costs linked to the certification procedure (4). The Commission accepted the argument that the differentiation between land-based firms and others can be justified by the nature or general scheme of the system. Furthermore, the certification body has no scope for favouring certain undertakings or the production of certain goods. The measure was therefore deemed not to be covered by Article 87(1) of the EC Treaty. With regard to the exemption from the chargeable inspections in companies with particular environmental problems, the Commission decided that it did not lead to a loss of revenue or higher costs for the State. Accordingly, this measure was deemed not to fall under Article 87(1) of the EC Treaty either.

1.3. Environment

382. The Commission had various opportunities to apply the new guidelines on State aid for environmental protection, which were adopted in principle in December 2000 and published in the Official Journal on 3 February 2001 (5). Pursuant to the Kyoto Protocol to the UN Framework Convention on Climate Change adopted in December 1997, several Member States seek to reduce greenhouse gases by taxing environmentally unfriendly energy. The United Kingdom, for example, introduced a climate change levy on the non-domestic use of energy. Various beneficiaries are charged reduced rates or granted total exemption from the levy for a period of ten years.

383. The UK notification on tax exemption/reduction from the climate change levy (6) raised an array of different State aid questions, one of which (exemption for dual-use fuels) led to the initiation of formal investigation proceedings.

384. In the Dutch 'green electricity' case (7), concerning electricity suppliers who contracted with a generator of energy sources such as wind

---

(1) Case N 430/2001, Commission decision of 30.10.2001, not yet published, Case N 433/2001, Commission decision of 30.10.2001, not yet published, Case N 801/2000, Commission decision of 18.7.2001 (OJ C 333, 28.11.2001). In the first two decisions, the Commission expressly stated that the aided projects could also have been allowed on the basis of Article 87(3)(b) of the EC Treaty, since they could be considered important projects of common European interest within the meaning of that provision.
(5) OJ C 37, 3.2.2001.
energy, hydro power up to 10 MW, tidal power or wave energy, the Commission accepted the argument that the exemption was justified by the nature or general scheme of the tax system. As the production of green electricity does not contribute to long-cycle CO₂ emissions, it is logical that the CO₂ tax does not apply. Therefore, this tax exemption falls outside the scope of application of Article 87(1) of the EC Treaty. Nevertheless, the Commission continued to examine the UK and the Dutch measures applying the guidelines on environmental aid.

385. For the UK levy, compatibility was assessed, for the first time, on the basis of ‘operating aid in the form of tax reductions or exemptions and based on the conclusion of agreements between the Member State and the aid recipients’ (1). In the Dutch green electricity case, compatibility was assessed on the basis of the rules applicable to existing taxes. As all conditions set out in the environmental guidelines were fully met, the Commission did not raise any objections to these types of exemptions.

386. The second UK notification of particular interest in this area was a total tax exemption from the climate change levy for five years for natural gas in Northern Ireland (2). The Commission recognised the specific situation of the natural gas market in Northern Ireland, i.e. infant industry (since 1996), 40–70 % higher gas prices than in the rest of the United Kingdom, lack of a gas infrastructure, marginal share of gas in energy consumption (2.4 %), and acknowledged that a climate change levy for gas would add further obstacles to this already precarious but environmentally preferable market and that, if businesses were indeed encouraged to substitute gas for coal, oil or electricity, this had the potential to lead to a significant reduction in CO₂ emissions due to the relatively small share of gas in total energy consumption. The Commission also accepted the United Kingdom’s argument that infrastructure development for gas may proceed only if there is a business market for gas. In approving favourable conditions in order to develop such demand, the Commission’s decision indirectly also supports the development of a gas infrastructure in Northern Ireland.

387. A Belgian measure, restricted to the Flemish region, introduces green certificates for green energy producers. Although the Commission found that the issuing of green certificates by the Flemish authorities did not involve State resources (see ‘Origin of resources’ above), it continued assessing the notified measure on the basis of the environmental guidelines and declared it compatible with the common market (3). The same approach was taken for measures adopted by the United Kingdom requiring electricity suppliers in Scotland, England and Wales to ensure that a proportion of electricity supplied to customers in Great Britain is from renewable sources of energy (4). The measures also require suppliers who do not have a sufficient amount of green electricity certificates to make payments to a fund set up and run by the State. The revenues of this fund will be distributed to the suppliers. The Commission considered that the redistribution mechanism was State aid. As the rules governing the redistribution mechanism were in line with the environmental guidelines, the Commission declared them compatible with the Treaty.

388. The UK notification on an emission trading scheme to reduce greenhouse gas emissions was considered to be compatible with the guidelines on State aid for environmental protection (5). The trading system allows target holders from different mechanisms to trade emission allowances among themselves and with other participants. Emission allowances are allocated to participants free of charge. The notification was also interesting as, besides the trading scheme, the United Kingdom provides grants to companies in return for absolute emission reductions for which they bid in an auction. The United Kingdom argued that such grants were necessary as an incentive, and the Commission declared them compatible with the environmental guidelines because and so long as no EU-wide compulsory scheme existed on this subject.

1.4. Rescue and restructuring

389. In 1999, the Commission proposed appropriate measures to all Member States in connec-

---

tion with the Community guidelines on State aid for rescuing and restructuring firms in difficulty. All Member States accepted them. One of the measures proposed was to bring existing rescue and restructuring aid schemes in operation in some Member States into conformity with the new guidelines. In 2000, the Commission had to enter into a bilateral dialogue with several Member States on changes to their existing aid schemes. In relation to Germany (1), the Member State with the most such schemes, the Commission took note in 2001 that the aid schemes in question had been brought into conformity with the new guidelines.

390. On 28 March, in Case C 41/99, the Commission closed investigations into one of the biggest and most difficult cases of State aid in eastern Germany. In March 1996, the Commission allowed aid to be given to the Lintra holding company and its eight subsidiaries. A plan to privatise the group subsequently collapsed. The Commission concluded that DEM 623 million in aid was nevertheless granted in accordance with the restructuring plan for the group and complied with the Commission decision authorising assistance. However, a sum of DEM 35 million was misused and must be recovered from the recipients, the Lintra holding companies and its subsidiaries. State aid to several of the Lintra subsidiaries is being looked at in separate proceedings.

391. On 8 May, in Case C 1/2000, the Commission authorised a subordinated loan from the state-run Kreditanstalt für Wiederaufbau (‘KfW’) of EUR 76.7 million (DEM 150 million) and an 80% federal guarantee for a loan of EUR 63.9 million (DEM 125 million) for the German construction company Philipp Holzmann AG. The Commission came to the conclusion that the restructuring measures were appropriate to restore the company’s long-term viability and to deal with past mistakes. In that context, the Commission took into account modifications to the original plan and authorised a one-year credit line of DEM 125 million (EUR 63.9 million) provided by the Kreditanstalt für Wiederaufbau at the end of 2000.

392. On 3 July, in Case C 33/98, the Commission took a partly negative decision regarding aid granted to Babcock Wilcox España (‘BWE’). In April 1998 the Commission had initiated a formal investigation under the State aid rules of the EC Treaty into two capital increases, both of EUR 60.1 million (ESP 10 000 million), that the Sociedad Estatal de Participaciones Industriales (SEPI) had contributed in 1994 and 1997 to its wholly owned subsidiary BWE. In July 1999, the Commission decided to extend the procedure to include under the investigation a new capital increase of EUR 246.4 million (ESP 41 000 million) notified by the Spanish authorities. Finally, in July 2000 the Commission extended the procedure again to cover aid of EUR 463.5 million in total (ESP 77 110 million) proposed under the privatisation arrangements between SEPI and Babcock Borsig AG. The Commission decided to prohibit the aid of EUR 21.44 million that the Spanish authorities intended to grant to the ongoing business for future investments in the equity of joint ventures through which it will contract future orders. The Commission judged that, unlike other assisted investments included in the industrial plan, this disbursement was very close to the market, formed part of the commercial policy of the company and, consequently, its assistance by the State could seriously distort competition to an extent contrary to the common interest.

393. On 30 October, in Case C 36/2000, after a thorough investigation which started in June 2000, the Commission took a negative final decision on aid to the German porcelain manufacturer Graf von Henneberg GmbH located in Thuringia. The Commission ordered recovery of some EUR 71.3 million (DEM 139.4 million), which was found to constitute incompatible and illegal aid. In line with its practice, the Commission decided that the Graf von Henneberg company in its present form was jointly liable with its predecessor for the recovery of all the incompatible aid.

2. Regional aid

394. The Commission closed the formal investigation proceedings on the investment allowance law (Investitionszulagegesetz) 1999 for the new
German Länder, including Berlin (1). This law is the most important regional aid scheme for east German companies. A positive decision was made possible due to several amendments of the German law, introduced in the course of the investigation proceedings. In particular, Germany accepted the distinction between initial investment, for which investment aid can be given, and replacement investment, which ranks as operating aid. Specific conditions for operating aid were added (aid intensity of a maximum of 5 %, no more operating aid after 31 December 2004). The German law was also amended to bring it into line with the geographical coverage of aid and the maximum amount of aid intensities set out in the Commission decisions on the German regional aid map (maximum aid intensities varying between 10 % and 27.5 %, depending on whether the aid beneficiary is an SME and/or is located in an Interreg III region bordering the Czech Republic or Poland). In this respect, the labour market region of Berlin needs to be looked at separately. The labour market region consists of Berlin city and its periphery (which is part of the Land of Brandenburg) and is a region covered by Article 87(3)(c) of the EC Treaty, unlike the east German Länder, which are Article 87(3)(a) regions. Aid intensity for the labour market region of Berlin is therefore only up to 20 % net for investment aid, and there is no possibility of granting operating aid.

395. The main regional aid scheme for Flanders (2) was approved by the Commission without the need to initiate formal investigation proceedings. The primary aim of the ‘Aid scheme for large and medium-sized firms in regional aid areas covered by Article 87(3)(c) of the EC Treaty (Economic Expansion Law of 30.12.1970)’ is to encourage business investment. Under the scheme, the Commission approved the leasing of a building as an eligible investment cost, i.e. as a fixed capital cost rather than current expenditure of a company, but only if each of the following conditions are satisfied: the leasing contracts must be included as fixed assets in the balance sheet of the aid beneficiary; the lessee must apply depreciation on the leased assets; the length of the leasing contract must be at least five years; the leasing contract must not cover current expenditure (e.g. maintenance costs or insurance costs).

396. Under the UK regional selective assistance scheme (3), the Commission again accepted leasing of a building as a fixed capital cost. The conditions to be met are: the lease must be for a minimum period of eight years and relate to the building only, excluding all ancillary operating costs such as rates, common services, insurance, repairs and utilities. In order to calculate the value of the lease, the rental payments over at least eight years will be discounted to give a figure of the net present value of the rental commitment.

397. An Italian notification (4) gave rise to an interesting debate on the definition of initial investment. The relevant fiscal scheme does not make explicit reference to initial investment as defined in points 4.4 and 4.6 of the guidelines on national regional aid. It does, however, put forward a technical definition of eligible investment as being the net investment calculated as the difference between: a firm’s gross investment in new assets during a given reference period (representing the increase in the firm’s production capacity) and the total amounts of sales, write-offs and depreciation of all the firm’s assets during the same reference period (representing the decrease in the firm’s production capacity). In order to determine investment, the scheme thus deducts from total gross investment the replacement investment carried out to restore the firm’s production capacity, minus the sales, write-offs and depreciation of all the assets during a given period. On the basis of this definition, the Commission accepted that the investment eligible for the aid was equivalent to initial investment within the meaning of the guidelines on national regional aid.

398. By contrast, the Commission decided that the definition (investment in new material fixed assets) applied in a number of Spanish laws (5) could not be deemed equivalent to initial investment within the meaning of the guidelines, because the expenditure could cover replacement investment, which ranks as operating aid.

399. In seven cases, the Commission had to initiate formal investigation proceedings against

unnotified Spanish tax aid schemes (2). The argument that the exemptions could be justified by the nature and general scheme of the tax system was rejected by the Commission. In three cases (2), the Commission refuted the argument that the tax scheme under examination should be considered to be existing aid. The Commission found that there was new aid because the schemes under scrutiny either contained substantial modifications or were not connected at all to tax schemes existing before the accession of Spain to the EU. In three cases (concerning reductions of the amount of tax payable of up to 45 % of an investment made (2)), the Commission took the view that the aid was partly investment aid and partly operating aid, and in four cases (concerning ‘fiscal holidays’, i.e. sliding-scale reductions of the basic taxable amount over four consecutive tax periods (3)), it found that the aid was operating aid. In none of the cases did it consider the aid compatible under any derogation provided for in the Treaty, and it asked Spain to recover the illegal aid.

400. In 1998, the Commission proposed appropriate measures to all Member States in connection with the guidelines on national regional aid. In 1999 and 2000, the Commission had to enter into a bilateral dialogue with several Member States in order to bring their existing regional aid schemes into line with the exact wording and meaning of the provisions in the regional aid guidelines. In relation to Italy (4) and Germany (5), a fair number of such administrative co-operative measures ended this year with a letter from the Commission taking note of the fact that the regional aid scheme in question had been brought into line with the regional aid guidelines.

401. In addition, the Commission took a number of decisions under the multisectoral framework on regional aid for large investment projects (6). On 8 May, in Case N 783/2000, the Commission decided not to raise any objections to proposed aid amounting to EUR 119 080 000 for Wacker Chemie GmbH Nünchritz, for the extension and modernisation of the former Hüls AG silicone plant. The Commission concluded that the proposed 26.77 % GGE intensity was below the maximum aid intensity allowable under the multisectoral framework for this particular project. In assessing the compatibility of the aid, the Commission took into account the market situation, the number of jobs directly created by the project and the beneficial effects of the investment on the economies of the assisted regions (7). On 18 July, in Case N 184/2000, the Commission approved EUR 27.6 million in investment aid for Kartogroup in Leuna, Saxony-Anhalt. The investment concerned the setting-up of a tissue plant to produce toilet paper and kitchen towels. The total investment costs amounted to EUR 85 million (DEM 166 million) and the aid approved represented 35 % of the eligible investment costs. The investment project creates 154 permanent jobs in an area suffering from high unemployment. The Commission approved the aid, since it found it to be compatible with the multisectoral framework on regional aid for large investment projects.

3. Sectoral aid

3.1. Sectors subject to specific rules

3.1.1. Shipbuilding

402. In accordance with Article 3(1) of Council Regulation (EC) No 1540/98 establishing new rules on aid to shipbuilding (6), no new operating aid to shipbuilding has been authorised since the start of 2001.

403. In line with its position of 29 November, the Commission implemented its two-pronged strategy to defend the Community shipbuilding industry from alleged subsidies granted by Korea to its shipbuilding industry. On the one hand, it carried out investigations under the trade barriers regulation (9) (TBR) and prepared its action against Korea in the WTO. On the other hand, it

(5) Cases N 711/95 and N 618/96.
(7) The ceiling for regional aid in the assisted area concerned is 35 % gross for large companies.
proposed a regulation for a temporary defensive mechanism (1).

404. The proposed temporary defensive mechanism (TDM) is an exceptional measure, designed to support the Commission’s action against Korea under the WTO agreement on subsidies and countervailing measures. It will not become effective until the Commission starts the WTO action against Korea and would cease to be effective if the Community and Korea reach an agreement on this matter. It would, in any case, expire on 31 December 2002.

405. The Industry Council of 5 December was unable to adopt the TDM. Accordingly, the Commission has not yet started the WTO action against Korea. However, it will update its TBR investigations during the first half of 2002.

406. On 25 July, the Commission decided to declare unnotified State aid for the investors in the ship ‘Le Levant’ incompatible with the common market (2). The ship had been financed by private investors whose property it still was. The ship was operated by the firm CIL, which was also to become the eventual owner. The investors had been entitled to deduct their investment costs from their taxable income in accordance with a tax scheme (‘Loi Pons’). For this kind of project, the Commission must verify the development content of the project. In this case, the Commission took the view that the vessel would not contribute in any significant way to the development of Saint-Pierre-et-Miquelon. As the unlawful aid had already been granted, it had to be recovered. The Commission considered that the investors, as the direct beneficiaries and current owners of the ship, should repay the aid.

407. The Commission decided to extend a formal investigation on the restructuring of Spanish shipbuilding to include all transactions that led to the creation of the shipbuilding group IZAR (3). The Commission doubts whether the prices paid by the state-owned military shipbuilding group Bazan (which then changed its name to IZAR) for a number of shipyards bought from the state-owned civil shipbuilding group Astilleros Españoles (AESA) and from the state holding company Sociedad Estatal de Participaciones Industriales (SEPI) were genuine market transactions and therefore might constitute aid to the new IZAR group. The Commission doubts whether such aid would be compatible with the shipbuilding aid rules. It therefore decided to extend the investigation procedure already initiated concerning a transaction whereby AESA sold two shipyards and a motor factory to SEPI.

3.1.2. Steel

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

409. The Commission approved aid for environmental protection for the following ECSC steel companies: Voest Alpine Linz (EUR 1.6 million), Voest Alpine Donawitz (EUR 2.6 million), Böhler Edelstahl (EUR 348 830) and several Spanish companies. It adopted a negative decision against aid for BRE.M.A Warmwalzwerk (EUR 622 564), since no deduction had been made as to the savings generated by the investment, as required by the annex to the steel aid code.

410. The Commission approved R&D aid for Corus Technology BV (EUR 166 661), Sidmar NV (EUR 505 620), Stahlwerke Bremen (EUR 290 828) and Cogne Acciai Speciale (EUR 2.58 million). It adopted a negative decision against aid for Eko Stahl (EUR 399 004), since it considered that this company would merely function as a ‘testing ground’ for the other participants in an R&D project.

411. The Commission also took two final decisions concerning Georgsmarienhütte Holding GmbH and Gröditzer Stahlwerke GmbH and found that no aid was involved in the management contract and the sale of assets.

3.1.3. Coal

412. Four Member States currently produce coal in the EU. Because of unfavourable geological conditions, most EU mines are not competitive against imported coal. Nevertheless, the Member States concerned choose to support their coal mining industry mainly on social and regional policy grounds. State aid to the coal industry is governed by Decision 3632/93/ECSC (4), which

(2) Case C 74/99.
(3) Case C 40/00, decision of 28.11.2001.
sets forth the terms and conditions under which such aid may be granted. Member States notify State aid on an annual basis. The Commission carefully screens the applications before authorising them. This arrangement will apply until the expiration of the ECSC treaty.

413. On 25 July, the Commission adopted a proposal for a Council regulation on State aid to the coal industry (1) to deal with State aid to be granted beyond 23 July 2002.

414. The Commission authorised State aid schemes allowing Germany (2), France (3), Spain (4) and the United Kingdom (5) to grant the necessary public funding of the coal industry for the year 2001. The aid covers the difference between production costs and the price of internationally traded coal and also compensation for the payment of social security costs.

3.1.4. Motor vehicle industry

415. On 13 November, the Commission decided to extend the period of validity of the Community framework for State aid to the motor vehicle industry (OJ C 279, 15.9.1997). All Member States agreed to the extension. The extension is valid for one year, i.e. until 31 December 2002, unless the new multisectoral framework on regional aid for large investment projects, replacing the specific sectoral framework for the motor vehicle industry, enters into force before that date.

416. On 17 January, the Commission authorised regional investment aid of GBP 40 million for Nissan Motor Manufacturing Ltd. (6). The aid is regional investment aid for the conversion of the car plant in Sunderland (United Kingdom) for production of the new ‘Micra’ model. The Commission’s initial doubts, which had led to the initiation of formal investigation proceedings in September 2000, had not been borne out.

417. On 6 June, the Commission took a negative final decision regarding research and development aid that the Italian authorities were proposing to grant to IVECO SpA, a subsidiary of the Fiat group. The planned aid amounted to EUR 16 million in nominal terms towards an EUR 111 million investment project for the renewal and expansion of IVECO’s range of light vehicles.

418. The Commission concluded that the planned aid was not necessary for IVECO to develop the new light van range. While the project led to an improved product compared with the previous model, the innovative character of the investment was limited to what is common in the motor vehicle industry in the context of the development and launch of new models.

419. Under the rules governing R&D aid, aid can be granted if it serves as an incentive for firms to undertake R&D activities in addition to their normal day-to-day operations. If the development of a new model or range of models were to be considered research activities deserving aid, every car manufacturer could claim R&D aid for every new model it brings to the market. The public subsidy would then simply amount to operating aid and would not achieve its goal of inducing firms to pursue research which they would not otherwise have pursued.

420. On 23 October, the Commission authorised a capital injection for the Spanish motor vehicle manufacturer Santana Motor carried out in 1999, since the measure did not constitute State aid. The Commission also partially approved investment aid for Santana in relation to its 1998–2006 strategic plan.

421. Where capital injections for companies involve public resources, the Commission has to ensure that the measure does not contain any State aid element. To do so, the Commission carries out an in-depth investigation to establish whether the profitability and growth prospects of the company justify the capital injection from the point of view of a market economy investor. In this instance, the Commission concluded that Santana’s profitability prospects were good enough to justify the capital injection. The Commission therefore decided that the capital injection did not constitute aid.

422. Regarding regional investment aid granted to Santana Motor, the Commission concluded that the aid was compatible with the common market insofar as it complied with the limits above which a more detailed assessment under

---

the specific rules governing aid to the motor vehicle industry becomes necessary. The maximum amount of aid that could be granted was fixed at EUR 8.68 million.

423. On 28 February, after conducting the formal investigation procedure, the Commission authorised regional investment aid of ITL 78 billion (EUR 40 million) for the production of the new ‘Punto’ model at the Fiat plant in Melfi (southern Italy). The Commission studied the geographical mobility of the project and concluded that the Fiat group’s plant at Tychy in Poland would have been a viable alternative. To assess the proportionality of the aid, a ‘cost-benefit analysis’ was carried out. The cost–benefit analysis compared the costs of the project at Melfi with those of the alternative location. As the proposed aid intensity was both below the regional aid ceiling and the regional handicap intensity, i.e. the extra cost for locating the production in Melfi rather than in Poland, the Commission concluded that the rules laid down in the Community framework for State aid to the motor vehicle industry had been complied with and that the aid was compatible with the Treaty.

424. On 20 December, following formal investigation proceedings, the Commission decided that Germany must reduce regional investment aid to be granted to DaimlerChrysler for the construction of a new engine plant in Kölleda (Thuringia), an assisted area pursuant to Article 87(3)(a).

425. As regards the necessity of the aid, Germany stated that the investment could be carried out at an alternative site in Hungary (in Nyergesújfalu). On the basis of the documents received, the Commission concluded that the site in Hungary was a credible commercial alternative. As regards the proportionality of the aid, the assessment of the cost–benefit analysis showed that Kölleda had a regional handicap ratio of 31.93 %, which was lower than initially indicated by Germany. Due to the significant increase in production capacity, the allowable aid ratio was further reduced by one percentage point to 30.93 %. Consequently, the Commission could only authorise an aid amount of 30.93 % of the eligible investment of EUR 185 million (net present value), which corresponded to EUR 57.22 million (net present value). The remaining EUR 6.58 million in notified aid was considered incompatible with the common market.

426. On 18 July, following formal investigation proceedings, the Commission decided to reduce planned regional investment aid to be granted to Volkswagen for a new car plant in Dresden. The assembly of the new model and the intermediate storage centre were planned to be located in Dresden and the new bodyshop and paintshop in nearby Mosel, both assisted areas pursuant to Article 87(3)(a).

427. As regards the necessity of the aid, the Commission concluded, on the basis of the documents received during the proceedings, that production in the Czech Republic (in Prague and Kvasiny) had been considered by the company as a credible commercial alternative. The Commission based its assessment of the proportionality of the aid on two separate cost–benefit analyses: for the Dresden and Prague sites on the one hand, and for Mosel and Kvasiny on the other. As regards the investment in Mosel, the planned aid intensity was lower than both the regional handicap and the regional aid ceiling. The Commission therefore authorised an aid amount of DEM 65 million for Mosel. As regards the investment in Dresden, the aid intensity proposed by Germany exceeded the regional handicap. Consequently, the Commission authorised an aid amount of DEM 80 million, whereas an excess amount of DEM 25.7 million was considered incompatible with the common market.

3.1.5. Transport

Rail

428. The Commission has for some years pursued a policy of shifting the balance between modes of transport and promoting modes that are less damaging to the environment in order to achieve a sustainable transport system. In its recent White Paper on a common transport policy, the Commission recalled that rail transport was the strategic sector on which the success of the efforts to shift the balance will depend. The Commission will therefore continue to take a favourable approach to aid in the rail sector, both with regard to rail services and, in particular, to investments in rail infrastructure which, due to heavy investments costs, are not viable without public co-financing.

429. In line with its common transport policy, the Commission decided, on 13 February, to raise no objections to the United Kingdom’s decision
to award public grants to a number of projects. The purpose of the projects is to demonstrate to a wider public that rail can be an efficient and viable mode of transport and an alternative to, in particular, road (N 687/2000, "Innovative solutions in rail logistics") (1). Furthermore, on 19 September, it authorised a substantial amount of aid to the infrastructure manager in the United Kingdom to help it finance a renewals investment programme on the principal railway network infrastructure (N 500/2001 UK Network Grants) (2).

Maritime transport

430. The Commission authorised a number of aid schemes for the employment of Community seamen during the year. The purpose of the measures, which help to reduce wage costs, is to enable shipping companies to stand up to international competition without having to resort in large numbers to flying the flags of countries where taxation and social security contributions impose less of a burden on shipowners. The measures also help to safeguard the employment of Community seamen so as to maintain seagoing know-how and a high level of safety in the sector.

431. On 8 February, the Commission authorised France to extend beyond 2001 the scheme for the reimbursement of employers’ social security contributions paid by shipping companies, authorised by the Commission in 1999 for a period of three years. Under the scheme, companies which employ ship crews and whose ships face international competition are reimbursed the social security contributions for old age, sickness and accident risks paid, the previous year, to the bodies responsible for collecting such contributions.

432. On 30 April, the Commission authorised France to introduce a further aid measure in support of the employment of Community seafarers by allowing family allowance contributions and unemployment insurance contributions to be refunded to shipping companies.

433. On 6 March, the Commission authorised Finland to repay to shipowners the employers’ contributions paid toward the seafarers’ pension fund, unemployment insurance, accident insurance, life assurance and leisure time insurance. The aid measures apply to all ships registered as being used in international trade, including, subject to certain conditions, tugs and pusher craft. In both cases, the measures apply only to ocean-going ships.

434. On 28 February, the Commission decided to initiate Article 88(2) proceedings in order to assess aid measures to compensate for the public service obligations performed by SNCM (3). The decision was taken in the light of new information provided to the Commission under the investigation proceedings initiated in 1998 in respect of aid which Corsica Marittima, a subsidiary of SNCM, was believed to be receiving from the French State for the transport of passengers between France and Italy on the Genoa–Bastia and Livorno–Bastia routes (4).

435. On 30 October, the Commission decided to terminate the two proceedings jointly. It concluded that, since the subsidies granted to SNCM had not exceeded the costs borne by it in providing public maritime services to Corsica, as laid down by the public authorities, it could be concluded that there were no cross-subsidies to SNCM’s subsidiary Corsica Marittima. The Commission’s investigation also showed that the rents paid by Corsica Marittima were determined on market terms. The Commission also asked France to inform it, before the entry into force of the new contract on public maritime services to Corsica, of the measures taken for the structural adaptation of SNCM to the new market conditions resulting from the application of Article 4 of Regulation (EEC) No 3577/92.

436. On 20 June, the Commission terminated the proceedings initiated in August 1999 in respect of aid granted by Italy to Tirrenia di Navigazione from 1990 to the end of 2000, having concluded that the aid was eligible for the derogation provided for in Article 86(2) of the Treaty for undertakings entrusted with the operation of services of general economic interest. The Commission noted that the aid granted by Italy was compensation which was necessary and proportionate to the task entrusted to Tirrenia di Navigazione of guaranteeing a sufficient level of regular services to and from certain ports in Sicily and Sardinia throughout the year.

---

(2) Case C 78/98, OJ C 62, 4.3.1999.
In order to take account of the changes in the market due to the liberalisation of coastal shipping since 1 January 1999 and the recent arrival of new operators, the Commission decided that the compensation paid to Tirrenia di Navigazione as from 1 January 2001 would be limited to cover of the deficit incurred during the provision of the services which represent commitments entered into by Italy for the period 2000-04. These provide for a reduction in the number of services operated by Tirrenia di Navigazione in order to allow more room for other operators on commercially viable routes.

On 25 July, the Commission authorised the aid granted by Spain to the Trasmediterranea shipping company under the public service contract agreed with the State in 1978. The Commission also authorised aid compensating the company for public service obligations between the Canary Islands which it took on in 1998.

The Commission took the view that the aid resulting from the liquidation of the public service contract concluded in 1978 between Trasmediterranea and the Spanish State was existing aid. The aid was linked to the rights and obligations arising during the period covered by the contract and represented the balance of compensation due to Trasmediterranea for providing maritime cabotage services from 1978 until the end of 1997 under the contract.

On 18 July, the Commission decided to terminate the proceedings pursuant to Article 88(2) of the Treaty which it had initiated and extended, respectively, on 3 September 1993, 23 June 1996 and 21 January 1999 in respect of aid granted to the port sector in Italy between 1992 and 1998 (1). In 1991, the Italian government began a far-reaching structural reform of the sector. As part of the reform, substantial aid was granted for the purpose of dismantling the existing system and allowing the sector to be opened up to competition. In its final decision, the Commission concluded that aid amounting to EUR 120 million paid by Italy to port undertakings, companies and groups, in the form of subsidies intended to wipe out the debts and cover the deficits of such undertakings, companies and groups, was incompatible with the common market and must be recovered by Italy. However, the Commission concluded that the aid granted by Italy for the payment of severance pay and early retirement contributions for the departure of dock workers belonging to dock-work companies did not constitute aid within the meaning of Article 87 of the Treaty. Similarly, the measures adopted by Italy in respect of the Cassa integrazione guadagni straordinaria (special earnings supplement fund), invalidity severance pay and the Cassa di soggiorno di Dovadola (holiday fund) to preserve dock workers’ social security rights did not constitute aid within the meaning of Article 87 of the Treaty.

On 20 December, the Commission approved the extension of the UK scheme Freight Facilities Grants to coastal and short-sea-shipping, as well as the Port of Rosyth project (2), which became the first application of the State aid rules to port infrastructure. The Commission normally considers that state financing of infrastructure open to all potential users in a non-discriminatory way and managed by the state does normally not fall under Article 87(1) of the EC Treaty. From the Court of First Instance’s judgment in Aéroports de Paris v Commission of the European Communities (3), one may draw the conclusion that the management and provision of infrastructure facilities may constitute an economic activity for the purposes of Article 87(1) of the Treaty. However, state support for an infrastructure manager chosen by an open and non-discriminatory procedure for construction and maintenance of transport infrastructure represents a market price and does not normally trigger the application of Article 87(1) of the EC Treaty. The FFG scheme and the Port of Rosyth project were authorised under Article 87(3)(c) of the EC Treaty.

Inland waterway transport

The White Paper on European transport policy for 2010 (4) sets out the broad lines and priorities of Community transport policy. It calls for priority to be given to shifting the balance between modes of transport. This is to be done by promoting modes of transport that are less harmful to the environment and have unused capacity available, such as inland waterway transport. Inland waterway transport is safe, clean and efficient in terms of energy consumption and has large unused capacity available. Switching the

(2) Case T-123/98 ECR II-3929.
transport of goods from road to inland waterways is therefore in the common interest within the meaning of Article 87(3)(c) of the EC Treaty. Council Regulation (EC) No 718/1999 also seeks to encourage Member States to take a number of measures to promote inland waterway transport (1).

443. Aid granted to the inland waterway sector during the year came from aid schemes intended to encourage the adaptation of the inland waterway fleet to market requirements, as in France (2), or to promote the establishment, extension and bringing into operation of links between industrial plants and inland waterways so as to bring about a modal shift to inland waterway transport, as in the Netherlands (3). In the latter case, the Commission took the view that what was involved was public co-financing of infrastructures for which there was no competitive market. State intervention was thus justified, since it met the needs of coordination of transport, in line with Article 73 of the EC Treaty.

444. In addition, the Commission authorised State aid for the building of loading and unloading facilities (transhipment terminals) along the Flemish inland waterways, the purpose of which was to make inland waterways more accessible and to increase the use of this mode of transport (4). In its decision, the Commission noted, in particular, that inland waterway transport required heavy investment in infrastructure in order to perform efficiently and that such investments would not be economically viable without public co-financing.

Air transport

445. The year was divided into two parts, ‘before 11 September’ and ‘after 11 September’, with the terrorist attacks in the United States having a major impact on air transport. As far as aid for civil aviation and airports is concerned, the Commission pursued a policy based on the December 1994 guidelines (5).

446. The Commission quickly clarified its policy in response to the terrorist attacks (6). The Commission acknowledged that some aid could be justified as a reaction to the extraordinary events. It made mention of aid for cases where there was no appropriate offer of insurance cover, and aid to offset the losses suffered by airlines following the closure of air space for four days and the high costs involved in increased security measures. All these aid measures taken by Member States had to be notified by them for examination under Article 87(2)(b) of the Treaty. A number of State aid measures relating to insurance were authorised by the Commission before the end of the year.

447. So as to allow planes to take off and airports to function, Member States notified the Commission of aid to be granted under public guarantee schemes to private companies providing insurance against terrorist risks. The Commission gave the go-ahead, provided a number of criteria were complied with (7), to aid for airlines and for private providers of insurance against terrorist risks in the case of the following Member States:

— United Kingdom: decision of 23 October 2001 (8)
— Portugal and Luxembourg: decisions of 28 November (9)
— Belgium and Sweden: decisions of 11 December (10)
— Austria, Denmark, France, Germany and Spain: decisions of 20 December (11).

448. For the rest, the Commission pursued its established policy on aid to the air transport industry. It also began looking into airport financing.

449. On 18 July, the Commission decided that training aid granted by the Belgian authorities to Sabena (12) was compatible with the EC Treaty in line with the framework on training aid (13).

(7) Commission communication of 10 October 2001 on the repercussions of the terrorist attacks in the United States on the air transport industry, as adapted by the Council’s ad hoc group.
(11) Cases NN 153/2001 (Austria), NN 157/2001 (France), NN 146 and 161/2001 (Denmark), NN 143/2001 (Spain) and NN 162/2001 (Germany).
450. On 18 July, following the judgment of the Court of First Instance of 12 December 2000 annulling Decision 97/789/EC on aid granted to Alitalia, the Commission adopted a new decision correcting the errors of assessment and the failure to state reasons identified by the Court and declared the aid granted to Alitalia (1) in the form of a capital injection of ITL 2 750 billion, payable in three instalments, compatible with the common market.

451. The Commission also authorised two grants of rescue aid to airlines, both belonging in part to the bankrupt group Swissair. On 17 October, the Commission decided to raise no objections to rescue aid of EUR 125 million granted to Sabena (2). On 20 December, the Commission raised no objections to rescue aid of EUR 120 million granted in the form of a loan guarantee by the Land of North-Rhine Westphalia to the German airline LTU.

452. With regard to airports, one decision related to an exemption from the obligation to pay corporation tax, which was deemed to be State aid; in two other cases, the measures in question were deemed not to be State aid.

453. On 3 July, the Commission decided that the exemption from Dutch corporation tax granted to the Dutch Schiphol Group, i.e. the company which owns and operates Amsterdam Schiphol airport as well as other airports in the Netherlands, constituted State aid and that it should therefore be discontinued by 1 January 2002 (3).

454. On 13 March, the Commission decided that the public financing by the region of Piedmont (Italy) of improvements to and further development of the infrastructure of the airports of Turin, Cuneo and Biella could not be considered to be State aid. It was considered that the location of the airports in question and their predominantly local importance as far as their economic and competition impact was concerned amply justified this conclusion (4).

455. On 5 October, the Commission adopted a decision concerning a complaint against Aer Rianta, the Irish state-owned company which owns and runs the airports of Dublin, Cork and Shannon. It was decided that as the special tax status of Aer Rianta had changed as from 1 January 1999, the previously existing tax exemption was no longer an issue. Furthermore, the transfer of airport infrastructure from the State to Aer Rianta at a value deemed below the market price was not considered to be State aid, nor was the fact that Aer Rianta is the concessionaire for duty-free shops and multi-storey car parks (5).

3.1.6. Agriculture

456. On 6 June, the Commission adopted new guidelines on the use of State aid to advertise agricultural products (6). The new text clarifies the Commission’s policy in relation to the advertising of quality products, products of regional origin and traceability systems.

457. As far as the regional origin of products is concerned, such origin can now be promoted on condition that the rules on the free movement of goods are complied with. The new guidelines will allow subsidies for advertising where the origin of a product is the primary message, if it takes place outside the Member State or the region of production. The objective should be to introduce consumers to products with which they are not familiar. Where advertising is aimed at consumers in the Member State or region of production, information about the origin of the product can also be given. However, in such cases the reference to origin has to remain secondary to information about the quality of the product.

458. Aid for advertising quality products may also be granted where these products clearly meet higher standards, or have a protected designation of origin. Claims that products are of high quality when in fact they simply meet the legislative requirements applicable to all similar products may mislead the consumer. State support for advertising will only be possible where no internal market rules are infringed.

459. In the case of products bearing a protected designation of origin (Protected Designation of Origin — PDO, Protected Geographical Indication — PGI, Traditional Speciality Guaranteed — TSG) registered by the EU, the Commission in

(2) C (2001) 3137 final, not yet published.
(3) This decision has not yet been published in the Official Journal, but can be found on the Competition DG’s website under the number E 45/2000. See also IP/01/934.
(4) This decision has not yet been published in the Official Journal, but can be found on the Competition DG’s website under the number N 58/2000.
(5) This decision is not yet on the Competition DG’s website.
general does not oppose aid for advertising which includes a reference to the origin of the product concerned, provided that it corresponds exactly to the designations which have been registered.

460. Following the introduction of compulsory beef labelling, the new rules also set out how the advertising of traceability systems may be subsidised. State aid for advertising of individual firms remains prohibited, and the maximum aid intensity allowed is 50 %, or 75 % for certain products from SMEs from disadvantaged regions.

461. The new guidelines supersede the two existing texts dating from 1986 and 1987. This consolidation and clarification should help to further simplify the Community State aid rules and make them more transparent. The new guidelines will apply to new State aid, including pending notifications, from 1 January 2002.

462. The main issue of the year, as far as State aid in the agricultural sector was concerned, was without any doubt linked to the consequences of the ‘BSE crisis’. State aid rules normally prevent Member States from paying income aid to farmers because this could distort competition and interfere with the functioning of the Community market organisations. Only in exceptional circumstances may such aid be granted to offset the damage caused by such situations.

463. The ongoing crisis in the beef market, which had been caused by a BSE scare at the end of the previous year, was recognised by the Commission as an exceptional occurrence within the meaning of Article 87(2)(b) of the EC Treaty. It was not the drop in sales or turnover that was considered exceptional. The drop in sales was seen by the Commission as a consequence of an exceptional and rare combination of circumstances which caused farmers’ income losses: the closure of export markets to Community beef and the extent of the negative reaction of European consumers, both preceded and accompanied by a series of incidents including the first cases of BSE detected in countries such as Germany, Italy and Spain, the ban at Community level of the marketing of any type of meat and bonemeal as animal feed, and the sometimes controversial management of the crisis at national level.

464. The Commission accordingly authorised Member States to pay income aid totalling EUR 460 million to beef farmers who had suffered losses between November 2000 and June 2001 because of the BSE crisis and other BSE-related State aid (i.e. towards the costs of BSE tests, compensating slaughterhouses, the value of slaughtered animals, the restocking of herds on farms where BSE had been found, storage transport and the disposal of processed animal proteins and animal feed).

465. Overall the Commission received 379 notifications of State aid draft measures to be granted in the agricultural and agro-industrial sector. The Commission also started the examination of 39 aid measures which had not been notified before under Article 88(3) of the EC Treaty. The Commission raised no objections to 212 measures. Several of these measures were approved after the Member States concerned either amended them or undertook to amend them in order to bring them in line with Community State aid rules. The procedure provided for in Article 88(2) of the EC Treaty was launched in respect of 15 cases in which there were serious doubts as to the compatibility of the measures with the common market. The Commission terminated the Article 88(2) proceedings in five cases, taking a negative final decision in two of them. In all the cases where a negative decision was taken and State aid had already been granted by the Member State concerned, the Commission requested recovery of the aid disbursed.

3.1.7. Fisheries

466. On account of its social and economic features, the fisheries sector is still receiving large amounts of public assistance, both from the Community and from national sources.

467. The Commission examined the compatibility of national aid schemes in the light of the guidelines for the examination of State aid to fisheries and aquaculture (1).

468. The new guidelines, applicable from 1 January, spell out the rules more clearly in certain areas. They thus provide that the guidelines on national regional aid do not apply in the fisheries sector and that aspects of regional aid schemes which concern fisheries will be examined in the light of the fisheries guidelines. They also provide further details for assessing training aid, aid for consultancy services and aid to experimental fishing and set out more precisely the conditions for granting aid for rescuing and restructuring

firms in difficulty (reference to the Commission’s submission of a plan aimed at reducing fleet capacity). More detailed rules and conditions are likewise set out for aid intended to improve the management and control of fishing activities and aid in connection with the purchase of used vessels. As far as special cases are concerned, more detailed rules are set out for income aid (measures linked to exceptional circumstances are to be examined on a case-by-case basis, and for temporary cessations of activity reference is made to the relevant point of the guidelines), the point dealing with operating loans has been deleted and specific points have been added to cover aid to compensate for damage caused by natural disasters or other exceptional occurrences, insurance premiums, the outermost regions and employment aid. The new guidelines contain two annexes which will make for closer monitoring of approved schemes: one setting out the information to be supplied when aid schemes are notified, the other specifying the information which must appear in the annual report to be submitted to the Commission on all existing aid schemes or all individual aid measures granted outside an approved scheme that are not made subject to a specific reporting obligation by a conditional decision.

469. A large number of schemes were notified to the Commission, especially during the second half of the year, owing to notification of all national joint financing measures adopted under the Financial Instrument for Fisheries Guidance and as part of the preparatory work on measures implementing the new Community support framework.

3.2. Specific sectors not subject to special rules

3.2.1. Financial sector

470. On 25 July, in Case NN 53/2001 (Bankgesellschaft Berlin (BGB)), the Commission approved rescue aid of some EUR 2 billion to bring the bank’s own funds ratio back to its pre-crisis level of 9.7%. The bank had incurred substantial losses in 2000 mainly through bad operations in the real-estate sector. The approval of rescue aid was based on the undertaking given by the German authorities that they would present a restructuring plan within six months and limited to this period or the time-span the Commission needed to take a decision on the restructuring plan. Under this second examination, the Commission was to have a close look at the necessary volume of the aid and ask for compensatory measures to offset the competition-distorting effect of the aid, if this was found appropriate.

471. On 11 December, the Commission decided that the tax measures for banks introduced by Italian Law No 461/98 of 23 December 1998 and the related Legislative Decree No 153/99 of 17 May 1999 were incompatible with the State aid rules laid down in the EC Treaty. The measures in question provide a discriminatory competitive advantage to the banks that participate in the operations being assisted. Italy must now recover the amounts that the banks benefiting from tax exemptions avoided having to pay. The Commission’s investigation into State aid to banking foundations (as distinct from banks themselves) continues. The status of these measures still needs to be defined. The Commission also examined whether the special tax treatment could be considered to be restructuring aid. However, the conditions for applying the Community guidelines on State aid for rescuing and restructuring firms in difficulty were not met. The aid was not notified individually to the Commission. The banks that benefited from the aid were not in difficulties nor was the aid intended to restore the firms’ long-term viability. Finally, the guidelines require that measures must be taken to mitigate as far as possible any adverse effects of the aid on competitors (usually this takes the form of a reduced market presence of the company after its restructuring). No such situation is envisaged in the present case.

3.2.2. Services

472. On 13 November, in accordance with the procedure provided for in Article 88(1) of the EC Treaty and Article 18 of Regulation (EC) No 659/1999, the Commission proposed appropriate measures to France in Case E 46/2001, namely the ending of the exemption from the tax on health insurance contracts enjoyed by mutual and provident societies. Alternatively, the French authorities may also grant the exemption in return for the performance of a service of general economic interest, ensuring that the aid resulting from the exemption does not exceed the costs imposed by the constraints assumed for this purpose.

473. On 13 November, the Commission initiated formal investigation proceedings on a number of ad hoc measures granted to the Portuguese public
broadcaster RTP, since it had doubts whether or not the Portuguese State had overcompensated the reimbursable public service costs of RTP in 1992–98 to the tune of EUR 83.6 million. The initiation of proceedings followed three complaints that the Commission received in 1993, 1996 and 1997 from the private Portuguese broadcaster SIC. On 7 November 1996, the Commission already took a decision on the first and part of the second complaint, which was annulled by the Court of First Instance (1).

3.2.3. Exceptional occurrences

474. The Commission authorised proposed aid in the region of Valle d’Aosta to offset the damage caused by the floods and landslides resulting from the torrential rain that hit the region in October 2000 (2). The scheme aims to provide compensation for the fixed costs borne by firms which had to stop business because of the rain, provided that the firm has since resumed business. The aid consists of a subsidy covering up to 95 % of the fixed costs borne by firms during the period between the disruption of business and its resumption, which must not exceed six months. Any amounts received by way of insurance indemnities must be deducted from the aid. The project has a duration of one year, and the budget set aside by the Italian authorities is EUR 516 456. The scheme was deemed compatible with the EC Treaty pursuant to Article 87(2)(b), since it was intended to make good the damage caused by natural disasters. The Commission took the view that the events covered by the scheme were natural disasters within the meaning of that provision. The Commission also noted that the aid would not give rise to any overcompensation and that, in view of the budget set aside and the number of recipients envisaged, the sums to be paid to each firm would probably be modest.

D — Procedures

475. Following the adoption and entry into force of Council Regulation (EC) No 659/1999, many of the detailed procedural rules governing the examination of State aid have been codified and consolidated into a single legislative text. Although some of the cases decided by the Court continue to concern decisions adopted by the Commission before the entry into force of the regulation, others may provide useful guidance on the interpretation and application of the provisions of the regulation.

1. Initiation of formal investigation proceedings

476. In two judgments, the Court emphasised that the Commission does not have any discretion in deciding whether or not to initiate the formal investigation procedure provided for in Article 88(2). In particular, the Court emphasised that reasons of administrative convenience, either for the Commission or for the Member State, could not justify the failure to initiate proceedings in cases where the Commission had, or should have had, serious doubts about the compatibility of a measure with the common market.

477. In its Prayon–Rupel judgment of 15 March (3), the Court provided further clarification on the circumstances in which the Commission is required to initiate the formal investigation procedure. The procedure serves a dual purpose: it is intended both to protect the rights of potentially interested third parties and to enable the Commission to be fully informed of all of the facts of the case before adopting its decision. Thus, the formal investigation procedure is obligatory if the Commission encounters serious difficulties in establishing whether or not aid is compatible with the common market. The notion of serious difficulties is an objective one. It follows that judicial review by the Court of First Instance of the existence of serious difficulties goes beyond simple consideration of whether or not there has been a manifest error of assessment. The Court examines whether the information in the Commission’s possession or available to it at the time when it adopted the contested decision should have led to serious doubts. In this regard, the Court points out that the evidence of serious difficulty may also be inferred from the length of time taken by, and the particular circumstances of, the preliminary pro-

procedure. In the particular case, the Court concluded that the eight-month period which elapsed between the time of notification and the decision, as a result of the repeated requests for information and the reluctance of the Member State to provide information, constituted an indication of serious difficulties. Taking account of all these elements, the Court found that the Commission had insufficient knowledge of the facts when it adopted its decision to raise no objection to the aid and should thus have initiated the formal investigation procedure in order to gather more ample information and overcome the serious difficulties of assessment.

478. The Court followed the same line of reasoning in annulling the Commission’s decision not to raise any objections to aid granted by the French Republic to producers of liqueur wines and eaux de vie (1). Since the complaints received by the Commission contained strong evidence of a link between the draft aid plan and a system of taxation that might infringe other Treaty provisions, there was a serious difficulty for the Commission to determine whether the aid plan was compatible with the common market. In those circumstances, the Article 88(2) procedure should have been initiated.

479. In an action for annulment brought by Austria against a Commission decision to initiate formal investigation proceedings regarding aid granted to Siemens Bauelemente OHG, Austria argued that in the case concerned the period of two months laid down in the Lorenz judgment in which the Commission must conclude its preliminary examination had already expired and that the aid had become existing aid when the Commission initiated the proceedings. The Commission was therefore no longer entitled to initiate the formal investigation proceedings. The Court confirmed the Lorenz case law, pointing out that notified aid becomes existing aid when two necessary but sufficient conditions are met: the two-month period following complete notification must have expired and the Member State must give the Commission prior notice of the implementation of the planned aid. The Court rejected the Commission’s argument that, having received such prior notice, it would still have a right of objection. The Court made it clear, however, that, at the relevant time, no rules of procedure had yet been adopted on the basis of Article 89 of the EC Treaty. Meanwhile, the provisions of Article 4(5) and (6) of Regulation (EC) No 659/1999 make the ruling of the judgment no longer applicable, since they give the Commission an explicit right of objection within a period of 15 working days following the receipt of the prior notice of the Member State. Although the judgment does not, therefore, directly affect the current procedural rules, it confirms the strict attitude of the Court with regard to compliance with imposed time limits by the Commission. It also fits into the general line taken by the Court that, whenever the Commission has doubts about the compatibility of aid, the procedure should be initiated quickly.

2. Existing aid

480. The Court addressed the issue of distinguishing new aid from existing aid (2). The case concerned a Commission decision which had already been partially annulled by the earlier judgment of 15 June 2000 in Alzetta Mauro (3). The Court confirmed that a system of aid established in a market that was initially closed to competition must, when that market is liberalised, be regarded as an existing aid system, in so far as at the time of its establishment it did not come within the scope of Article 87(1) of the Treaty, which applies only to sectors open to competition. The Court of First Instance rejected the argument that only aid granted after full liberalisation can be classified as new aid. It confirmed that in State aid matters it is sufficient that the market concerned be open, even partly, to competition, for aid to be capable of affecting trade between Member States. It is important to point out that whilst the Court of First Instance confirmed that aid granted before liberalisation constituted existing aid, it stressed that it had reached this conclusion in the absence of detailed provisions implementing Article 88 of the Treaty ruling out the classification of such aid after the date fixed for liberalisation. In the meantime, however, Council Regulation (EC) No 659/1999 contained an explicit provision in Article 1(b)(v) according to which ‘where certain measures

(1) Judgment of the Court of First Instance of 3 May 2001 in Case C-204/97 Portugal v Commission, not yet reported.
become aid following the liberalisation of an activity by Community law, such measures shall not be considered as existing aid after the date fixed for liberalisation’. A situation such as that in Case T-288/97, but arising after the entry into force of the regulation, cannot therefore be treated as existing aid any more.

481. Under Article 88(2) of the Treaty, the Commission is entitled to initiate the procedure only in respect of new aid. Where aid is classified as existing aid, the Commission is obliged to first make a proposal for appropriate measures to the Member State concerned. This classification is of more than procedural importance. In cases where new aid has been put into effect unlawfully and is subsequently found to be incompatible with the common market, the Commission is normally required to order recovery pursuant to Article 14 of Council Regulation (EC) No 659/1999. However, recovery cannot be ordered in the case of existing aid.

482. The Court examined the procedural situation where the Commission had classified an aid measure as new aid and initiated the procedure under Article 88(2), whereas the Member State concerned had maintained that the measure was existing aid (1). The Court considered that the choice of procedure made by the Commission, in connection with its invitation to the Italian authorities to suspend payment, implied a classification of the aid, even if provisional, as new and it itself entailed legal effects. The initiation of the formal examination procedure implied that the Commission did not intend to examine the aid in the context of the procedure for existing aid pursuant to Article 88(1) of the EC Treaty and that from its point of view the aid had been unlawfully implemented. Such a decision altered the legal position of the measure concerned and of the beneficiaries, since it created at the very least a significant element of doubt as to the legality of the measure, which must lead the Member State to suspend payment. It might also be invoked before a national court called upon to draw all the consequences arising from the infringement of the last sentence of Article 88(3) of the EC Treaty. For these reasons, the Court declared the action admissible.

3. Recovery of aid

483. Following the principle laid down in Article 14 of the procedural regulation, the Commission orders recovery of all aid that has been granted in violation of the notification obligation and is incompatible with the common market. Article 14 further requires that Member States carry out recovery without delay and in accordance with the procedure under their national laws provided that they allow the immediate and effective execution of the Commission’s decision.

484. During the year, the Commission ordered recovery in 20 cases. At the end of the year, there were 67 recovery cases still pending. These cases are closely monitored by the Commission, which ensures that the principles laid down in Article 14 are fully complied with by the Member States. During the year, failure by the German authorities to do so in the Lautex GmbH case (2) led the Commission to bring a complaint to the Court of Justice on 25 July for non-compliance with the recovery order, on the basis of Article 88(2) of the EC Treaty.

4. Non-execution of decisions

485. When Member States refuse to comply with a recovery decision, it has become standard Commission practice to bring an action before the Court of Justice. In 2001, the Court of Justice decided on two actions for non-implementation of a Commission decision. The first case concerned the recovery of the aid granted to the ‘Nouvelle Filiature Lainière de Roubaix’. In November 1998 (3), the Commission had adopted a decision according to which the aid granted to this company was incompatible with the common market and had to be recovered by the French authorities. This decision gave rise to two appeals to the Court of Justice. In January 1999, the French government lodged an action for annulment (4) of the decision. Since actions for annulment do not have suspensive effect, they do not affect the Member State’s obligation to comply with the recovery decision. In July 1999, since no recovery was taking place, the Commission brought an action for the non-implementation of the recovery order in the period

(1) Judgment of the Court of 9 October 2001 in Case C-400/99 Italy v Commission, not yet reported.


(4) C-17999.
imposed (1). On 22 March, the Court rejected the action for annulment (2) and decided on the same day on the action for non-implementation of the recovery order (3). The Court stressed that according to established case law, only the absolute impossibility of implementing the decision could be a valid defence for the Member State’s non-compliance. If a Member State encountered unforeseen and unforeseeable difficulties in the implementation of a decision, it had to submit such problems to the Commission together with proposals for suitable amendments to the decision in question. In such circumstances, the Commission and the Member State concerned were both bound by the principle of Article 10 of the EC Treaty, which imposes a duty of genuine cooperation in order to overcome the difficulties, whilst fully observing the State aid rules. Since the French government failed to inform the Commission of any such difficulties, the Court concluded that France had failed to fulfil its obligations under the Treaty. On 3 July, the Court reiterated these principles in a judgment declaring that the Belgian authorities had failed to adopt the measures necessary to recover the aid provided for under the Maribel bis/ter schemes (4).

486. If a Member State fails to comply with the Court’s judgment, the Commission may, in accordance with Article 228, institute further proceedings against the Member State concerned which may ultimately lead to the imposition of a penalty payment. On 18 July, for the first time in a State aid recovery case, the Commission decided to send a reasoned opinion to Italy specifying the points on which Italy had not complied with the Court’s judgment in Commission v Italy (5).

(1) C-261/99.
(2) Judgment of the Court of 22 March 2001 in Case C-17/99 France v Commission, not yet reported.
(3) Judgment of the Court of 22 March 2001 in Case C-261/99 Commission v France, not yet reported.
(4) Judgment of the Court of 3 July 2001 in Case C-378/98 Commission v Belgium, not yet reported.
(5) Case C-280/95, Commission v Italy [1998] ECR I-259. In that judgment, Italy had already been condemned for failure to comply with the recovery order in the Commission decision of 9 June 1993 (tax credit for professional road hauliers) (OJ L 233, 16.9.1993).
Figure 6
Trend in the number of aid cases registered (other than in agriculture, fisheries, transport and coal) between 1996 and 2001

<table>
<thead>
<tr>
<th>Year</th>
<th>Notified aid</th>
<th>Unnotified aid</th>
<th>Existing aid</th>
<th>Complaints</th>
</tr>
</thead>
<tbody>
<tr>
<td>1996</td>
<td>644</td>
<td>3</td>
<td>91</td>
<td></td>
</tr>
<tr>
<td>1997</td>
<td>656</td>
<td>1</td>
<td>140</td>
<td></td>
</tr>
<tr>
<td>1998</td>
<td>550</td>
<td>515</td>
<td>342</td>
<td></td>
</tr>
<tr>
<td>1999</td>
<td>569</td>
<td>569</td>
<td>98</td>
<td></td>
</tr>
<tr>
<td>2000</td>
<td>663</td>
<td>663</td>
<td>473</td>
<td></td>
</tr>
<tr>
<td>2001</td>
<td>569</td>
<td>569</td>
<td>322</td>
<td></td>
</tr>
</tbody>
</table>

Figure 7
Trend in the number of decisions taken by the Commission (other than in agriculture, fisheries, transport and coal) between 1996 and 2001

<table>
<thead>
<tr>
<th>Year</th>
<th>Notified aid</th>
<th>Unnotified aid</th>
<th>Existing aid</th>
<th>Complaints</th>
</tr>
</thead>
<tbody>
<tr>
<td>1996</td>
<td>474</td>
<td>503</td>
<td>460</td>
<td></td>
</tr>
<tr>
<td>1997</td>
<td>460</td>
<td>460</td>
<td>460</td>
<td></td>
</tr>
<tr>
<td>1998</td>
<td>475</td>
<td>475</td>
<td>451</td>
<td></td>
</tr>
<tr>
<td>1999</td>
<td>474</td>
<td>503</td>
<td>460</td>
<td></td>
</tr>
<tr>
<td>2000</td>
<td>460</td>
<td>460</td>
<td>451</td>
<td></td>
</tr>
<tr>
<td>2001</td>
<td>451</td>
<td>451</td>
<td>451</td>
<td></td>
</tr>
</tbody>
</table>
Figure 8
Number of decisions by Member State (other than in agriculture, fisheries, transport, and coal)

- European Union: 451
- Belgium: 24
- Denmark: 11
- Germany: 130
- Greece: 12
- Spain: 73
- France: 39
- Ireland: 7
- Italy: 39
- Luxembourg: 3
- Netherlands: 38
- Austria: 20
- Portugal: 15
- Finland: 7
- Sweden: 2
- United Kingdom: 31
1. General principles

487. EC competition rules are in principle fully applicable to undertakings which the State has entrusted with the performance of services of general economic interest (SGEIs). However, according to Article 86(2) of the EC Treaty, the application of the EC Treaty rules, and in particular the competition rules, may not obstruct the performance, in law or in fact, of the particular tasks assigned to these undertakings. On the other hand, the development of trade must not be affected to an extent that is contrary to the interests of the Community. Therefore, under the principle of proportionality enshrined in Article 86(2), the application of the EC Treaty rules has to be limited to the extent necessary to allow the undertaking concerned to fulfil the specific mission with which the State has entrusted it.

488. The importance of services of general economic interest was highlighted in particular by the Treaty of Amsterdam’s introducing Article 16 into the EC Treaty. This article provides that: ‘Without prejudice to Articles 73, 86 and 87, and given the place occupied by services of general economic interest in the shared values of the Union as well as their role in promoting social and territorial cohesion, the Community and the Member States, each within their respective powers and within the scope of application of this Treaty, shall take care that such services operate on the basis of principles and conditions which enable them to fulfil their missions’.

489. The Commission has set out its position on the subject in detail in its two communications on services of general interest in Europe of 1996 (1) and 2000 (2). In them, the Commission explains the criteria for applying the Treaty rules on competition and the single market, and demonstrates with the help of specific examples that the correct application of these criteria does not endanger the proper operation of SGEIs.

2. Recent developments

2.1. Request by the Nice European Council

490. The Nice European Council, meeting on 7, 8 and 9 December 2000, took note of the Commission communication of 2000, but requested the Commission to report on the implementation of services of general interest for the Laeken European Council on 14 and 15 December 2001. In particular, the European Council requested the Commission to consider ways of ensuring greater predictability and increased legal certainty in the application of competition rules to services of general interest. The European Council also approved a statement made by the Council of the European Union (meeting on internal market issues) on 28 September 2000, expressing two specific concerns:

— first, there is a need for clarification of the relationship between methods of funding services of general economic interest and application of the rules on State aid;

— second, services of general economic interest should be assessed regularly, particularly in terms of quality of service, accessibility, safety and pricing.

2.2. Commission report to the Laeken European Council

491. The Commission adopted its report on 17 October (3). In it, the Commission stresses the importance it attaches to services of general interest as essential building blocks of the European model of society, and points out that Community law in no way hinders the introduction and operation of efficient services of general interest.

492. The Community rules on State aid thus allow Member States to grant firms entrusted with operating services of general economic interest the financial assistance necessary to offset the additional costs generated by the specific tasks entrusted to them, and to enable the firms concerned to perform those tasks in conditions of economic equilibrium. On the other hand, Community law does not allow the amount of aid granted by the State to exceed what is necessary for the performance of the public service obligation or to be used by a firm entrusted with operating a service of general interest for the purposes of cross-subsidising activities that are subject to competition.
493. In order to increase predictability and legal certainty in the State aid field, the Commission adopted a two-phased approach:

— as a first step, it intends during 2002, in close consultation with the Member States, to lay down Community guidelines for State aid granted to undertakings entrusted with the provision of services of general economic interest. Such guidelines will provide Member States and firms with information on the terms on which the Commission may authorise State aid for undertakings entrusted with services of general economic interest;

— as a second step, it will evaluate the experience gained from the application of these guidelines and, if and to the extent that experience justifies it, will adopt a regulation exempting certain aid for services of general economic interest from the prior notification requirement.

494. The Commission also took two steps to increase transparency as regards services of general economic interest:

— first, it will in future devote a specific section of its annual competition report to services of general interest, setting out how it has applied the competition rules to such services;

— second, it will in future identify cases relating to services of general interest in its State aid register so as to facilitate access to the available information.

495. Lastly, it is worth noting that on 22 November the Court of Justice delivered its ruling in Ferring (1). In this specific case, the Court found that compensation granted to certain firms entrusted with the operation of a service of general economic interest was not State aid within the meaning of Article 87(1) of the Treaty. If this case law is confirmed by the Court, the Commission will naturally draw the necessary conclusions.

496. In its report to the Laeken European Council, the Commission also set out its position on how firms entrusted with services of general economic interest should be selected. Where Member States decide to entrust the provision of such services to a third party, they must follow the applicable Community rules. A contract by which a public authority entrusts the management of a service of general interest to a third party, and which meets the conditions set out in the Community directives on public procurement (2), constitutes a public contract within the meaning of those directives and must be awarded in accordance with them.

497. Moreover, according to the case law of the Court of Justice (3), contracts not covered by the directives on public procurement must none the less be awarded in accordance with the rules and principles of the Treaty, namely the rules on the freedom to provide services and the freedom of establishment, and with the principles of transparency, equal treatment, proportionality and mutual recognition.

498. The Commission takes the view that the application of these principles cannot but be of benefit to users and firms. It will consider whether other measures are needed to clarify these rules.

499. The Commission report was welcomed by the Council meeting on internal market, consumer affairs and tourism on 26 November. The Council particularly encouraged the Commission to establish in the near future guidelines clarifying in particular the conditions under which compensation for public services are not covered by the rules on State aid. It also invited the Commission, in the light and on the basis of experience gained in applying these guidelines, to draw up as soon as possible, in close cooperation with the Member States, a proposal for a regulation exempting certain aid for services of general interest from the prior notification requirement, taking account of sectoral specificities. Lastly, the Council asked the Commission to report to it on the drawing up of such a regulation in preparation for the Copenhagen European Council.

500. The European Council meeting on 14 and 15 December concluded that it ‘welcomes the Council’s conclusions and the joint Council and Commission report concerning services of general interest, which will be the subject of an assessment, at Community level, as to their performance and their effects on competition. The

---

(1) Case C-53/00.
(2) Directives 92/50, 93/77, 93/36 and 93/38.
European Council encourages the Commission to set up a policy framework for State aid to undertakings entrusted with the provision of services of general interest.’

501. During 2002, the Commission will endeavour to achieve the objectives set out in its report to the European Council, in the light of developments in the case law of the Court of Justice.

3. Antitrust (including liberalisation)

502. In the antitrust field, the Commission dealt in the course of 2001 with various cases and legislative issues involving services of general interest, following the principles of law and policy as set out in the Commission communication on services of general interest in Europe of 20 September 2000. The growing body of case law and legislation thus contributed to increasing predictability and legal certainty in this area.

503. EC competition rules do not apply where the activity in question is of a non-economic nature and/or where any effect on trade between Member States can be ruled out. On these grounds, the Commission closed various cases in 2001 (1).

504. In other cases, the EC competition rules could be fully applied because terminating the anticompetitive conduct of the undertaking entrusted with a service of general economic interest would obviously not obstruct the performance of the particular tasks assigned to that undertaking within the meaning of Article 86(2) (2). In the postal sector, several Commission decisions (3) showed that abuses of a dominant position held by an undertaking entrusted by the State with a service of general economic interest can normally not be justified under Article 86(2). Of particular importance was the decision in Deutsche Post AG I (DPAG), where the Commission considered that a derogation under Article 86(2) was not applicable because termination of the fidelity rebates agreed by DPAG with its cooperation partners and an increase in DPAG’s price to cover at least the incremental cost of providing mail-order parcel services would not prevent DPAG from complying with its statutory obligation to perform a service of general economic interest (‘carrier of last resort’).

3.1. Court developments

505. In its judgment of 17 May (4), the Court of Justice had to assess whether an Italian law which granted an undertaking the exclusive right to operate a universal postal service was compatible with Article 86(1) in conjunction with Article 82 inasmuch as it made the right of any other economic operator to provide an express mail service not forming part of the universal service subject to payment of postal dues equivalent to the postage charge normally payable to the undertaking responsible for the universal service. The Court stated that, in so far as trade between Member States may be affected, such legislation was contrary to Article 86(1) in conjunction with Article 82 since it created a situation in which the incumbent undertaking enjoying the exclusive right could not avoid abusing its dominant position by receiving payment for services which it had not supplied. However, the Court also held that this restriction of competition, which consisted in the fact that undertakings operating outside the universal service were obliged to contribute to the viability of the universal service provider, could be justified under Article 86(2) (5) if the financial contribution was limited to the amount strictly necessary to offset any losses which may be incurred by the incumbent undertaking in the operation of the universal postal service (6).

506. In the field of health care, the Court of Justice issued a preliminary ruling on 25 October (7) assessing the compatibility with Article 86 in

---

(1) Such as Case COMP/D-3/38213 Ryanair/ENAV and Italy, on the basis that ENAV (the entity in charge of air traffic control in Italy) did not exercise an economic activity.

(2) Similarly, in the Commission decision of 23.10.2001 in La Poste (France)/SNELPD (COMP/C/1/37133), Articles 86(1), 3(1)(g), 10(2), 81 and 82 could be fully applied against a Member State because terminating the anticompetitive situation created by that Member State in the context of an undertaking entrusted with services of general economic interest would not obstruct the performance of the particular tasks assigned to that undertaking.

(3) For cases Deutsche Post AG I, Deutsche Post AG II and De Post/La Poste (Belgium), see Section I.C.2.2.

(4) Case C-340/99 TNT Traco, paras 51-63.

(5) The facts to which the judgment relates occurred prior to the deadline for implementation of Directive 97/67/EC (i.e. February 1999), Article 9(4) of that directive makes it clear that only undertakings operating inside the universal service may be obliged to contribute to the universal service fund.

(6) In addition, the Court held that in these circumstances the incumbent, when supplying a service not forming part of the universal service, had also to be required to make a financial contribution to the universal service. Lastly, it ruled that the incumbent also had to ensure that its express mail activity outside the universal service was not subsidised by the universal service, thereby improperly increasing the potential losses of that service.

(7) Case C-475/99 Ambulanz, Glückner.
conjunction with Article 82 of a German legislative provision under which undertakings are to be refused authorisation to provide patient transport services where the grant of such an authorisation is likely to have adverse effects on the operation and profitability of the emergency transport service, which is entrusted for given geographical areas to medical aid organisations (MADs) that offer patient transport services at the same time. The Court first held that MADs are undertakings within the meaning of EC competition law, because emergency transport and patient transport services constitute activities of an economic nature. It then stated that it was for the national court to establish, first, whether the MADs held a dominant position on the market in emergency transport and whether this market represented a substantial part of the common market; and second, whether the German legislation had an effect on trade between Member States, i.e., whether there was a sufficient degree of probability that it would actually prevent operators established in Member States other than Germany either from providing ambulance transport services in Germany or from establishing themselves there. Assuming these conditions were met, the Court held that the German legislation would result in extending the MADs’ dominant position to the neighbouring but separate market of patient transport, thus constituting an infringement of Article 86(1) in conjunction with Article 82 if there was no objective justification for the legislation. However, it finally concluded that the German legislation concerned a service of general economic interest and could be justified under Article 86(2) provided that all requirements under this provision were met and that the possibility were not ruled out of independent undertakings’ obtaining authorisation for providing patient transport services if the entrusted undertakings were manifestly unable to satisfy demand for these services.

3.2. Liberalisation through legislative measures

507. The conclusions of the Lisbon European Council in March 2000 called upon the Commission, the Council of the European Union and the Member States, each in accordance with their respective powers, to set out by the end of 2000 a strategy for the removal of barriers to services and to speed up liberalisation in areas such as gas, electricity, postal services and transport. Accordingly, throughout 2001, the Commission continued to promote market opening and competition by making legislative proposals and by monitoring the implementation of existing EU legislation. This activity included areas in which services of general economic interest are performed, taking account of the proportionality principle and the particularities of each sector dealt with.

508. In the energy sector, the Commission proposed a new directive (1) stipulating full market opening in electricity and gas supplies in three steps between 2003 and 2005. The proposed directive also aims to safeguard a high level of services of general economic interest by obliging Member States to ensure the right for household consumers to be supplied with electricity on reasonable terms as well as the attainment of various essential objectives, such as the protection of vulnerable customers, basic guarantees for final customers (a minimum set of conditions for contracts, transparency of information, and the availability of low-cost and transparent dispute settlement mechanisms) and security of supply.

509. In the postal sector, the Commission continued its efforts to pave the way for further market opening. The Commission proposal of 21 March stresses inter alia that each Member State sets its own detailed universal service standards. In the common position adopted by the Council on 15 October, several amendments were made to the text. Of relevance for services of general economic interest are, first, the objective of liberalising outgoing cross-border mail except for those Member States where its inclusion in the reserved services is necessary to ensure the provision of the universal service, and second, the prohibition of cross-subsidisation of universal services outside the reserved area out of revenues from services in the reserved area unless this is strictly necessary to fulfil specific universal service obligations imposed in the competitive area.

510. In the telecommunications sector, the Council reached political agreement on 6 December on a set of directives (‘the telecom package’), which will replace the current Community regulatory framework for telecommunications. The main improvement on the current framework is that it is technology-neutral and dissociates the carrier services from the content provision. It ends the

(1) COM(2001) 125 final, 13.3.2001. For details see point 88.
distinction between the regulation of telecommunications networks and broadcasting networks. In addition, it introduces competition-law definitions of the markets and dominant operators with the aim of applying sector-specific legislation. In order to ensure coherent application of these principles, the Commission was granted the right to vet national interpretation not compatible with Community law.

511. The Commission’s activity concentrated on reviewing implementation of the existing liberalisation directives and on pursuing inquiries into local loop unbundling, into the leased lines sector and into roaming. By its judgment of 6 December in Case C-146/00 Commission v France, the Court of Justice clarified certain issues concerning the financing of the universal service and the calculation of the net cost of this service under the telecom directives. The Court ruled entirely in the Commission’s favour, finding that the French legislation on the financing of the universal service did not comply with the principles of proportionality, objectivity and transparency required by the directives, and that France had failed to meet its obligations as regards re-balancing tariffs.
1. Accession preparations and negotiations

512. In 2001, the European Union proceeded with the accession negotiations in the competition field. In March, competition negotiations were formally opened with Bulgaria. Accession negotiations with Turkey have not started yet, but preparations for the analytical examination of the compatibility of Turkish competition rules with Community law are well under way.

513. In assessing whether the candidate countries had prepared the ground sufficiently for it to propose to the Member States that the competition negotiations be provisionally closed, the Commission examined in particular whether the candidate countries had achieved a satisfactory level in relation to (i) their legislative framework for antitrust and State aid; (ii) their administrative capacity in the competition field; and (iii) their competition enforcement record. The methodology for assessing these criteria was explained in detail in the Commission’s progress report on the accession negotiations on the competition chapter, presented to the Council’s enlargement group in January. The progress report also covered the state of play in the negotiations with Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, and the Slovak Republic. The enlargement group welcomed both reports.

514. As regards the timing of the enlargement negotiations, the Göteborg European Council meeting on 15 and 16 June reaffirmed the ‘road map’ presented in the Commission’s enlargement strategy paper of 8 November 2000. According to that paper, the EU was to prioritise in the second half of 2001 the definition of common positions, including positions on requests for transitional measures for a number of chapters, including the one on competition policy. In line with the road map, the Commission presented revised draft common positions on the competition chapter to the Council at the end of October. The draft common positions concerned all 12 candidate countries with which the competition chapter was being negotiated. The aim was to enable the Council to assess whether conditions were right for the provisional closure of the competition chapter.

515. In November, on the Commission’s recommendation, the Council decided to provisionally close the competition negotiations with Estonia, Latvia, Lithuania and Slovenia. For all other candidate countries, the Council approved the Commission’s proposal that the competition negotiations be continued. In December, the Laeken European Council reaffirmed the European Union’s determination to bring the accession negotiations with those candidate countries that are ready to a successful conclusion by the end of 2002, so that the countries concerned can take part in the European Parliament elections in 2004 as members. In addition, the Laeken European Council agreed ‘with the report of the Commission, which considered that, if the present rate of progress of the negotiations and reforms in the candidate States is maintained, Cyprus, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, the Slovak Republic, the Czech Republic and Slovenia could be ready’.

2. Progress in the alignment of competition rules

516. The Commission reports regularly on the progress made by each of the candidate countries towards accession. The fourth set of regular reports for the 10 central and eastern European countries (CEECs), Cyprus, Malta and Turkey adopted by the Commission in November assessed progress since the previous reports were delivered by the Commission in 2000.

517. The achievements in the antitrust and merger areas were generally considered satisfactory, both on the legislative side and with regard to the creation of the necessary administrative capacity. The main challenge facing antitrust authorities in the candidate countries remained the need to give priority to antitrust enforcement regarding the anticompetitive conduct that most seriously obstructs the proper working of markets, such as cartels, monopolistic acquisitions, and exclusionary practices by dominant firms. The further strengthening of the antitrust enforcement record of the candidate countries should, in general, also include a more effective policy regarding penalties.

518. In comparison with the antitrust field, the introduction of State aid monitoring in the candi-
date countries has generally proved much more controversial, slower and politically sensitive. However, the accession negotiations have helped to speed up the creation of legal and procedural frameworks for State aid discipline.

519. By 2001, all candidate countries with which negotiations were ongoing had created national State aid monitoring authorities. Turkey agreed to do so by 1 January 2003. The Commission has emphasised that these authorities should effectively monitor new and existing State aid granted by all aid-granting authorities. Monitoring authorities should receive prior notification of all new aid measures. They should have the power to collect all the information they need in order to examine State aid from all aid-granting authorities. They should also have the power to give an independent opinion on the compatibility of all new aid measures with the Europe Agreements prior to the granting of any such aid. However, not all monitoring authorities seemed to receive, systematically, information on all new aid granted such as would enable them to perform their duties comprehensively.

520. To ensure the necessary transparency, most candidate countries have created comprehensive inventories of existing aid that are kept permanently up to date. In addition, the Commission has continued to work with the monitoring authorities of the candidate countries to ensure that their annual State aid reports conform to the methodology of the Commission’s State aid survey.

521. The Commission has continued to draw the attention of several candidate countries to the need to bring their tax aid regimes, often used in attracting foreign investment, and their State aid measures in special economic zones into line with Community law well before accession. It has also underlined the need for transparency and rigorous application of Community rules in restructuring cases.

3. Implementing rules under the Europe Agreements and the customs union decision

522. With a view to further completing the legal framework of the Europe Agreements for competition relations between the Community and the 10 associated CEECs, two sets of implementing rules have been prepared. The first concerns the implementation of the competition provisions of the Europe Agreements applicable to undertakings (antitrust). The second relates to the rules on State aid.

523. Implementing rules for the competition provisions applicable to undertakings had already been adopted in previous years for the Czech Republic (1), Poland (2), the Slovak Republic (3), Hungary (4), Bulgaria (5), Romania (6), Estonia (7), Lithuania (8) and Slovenia (9). In 2001, the Association Council also adopted the implementing rules for the competition provisions applicable to undertakings with respect to Latvia (10). The wording of the implementing rules is basically the same for all the associated countries. They contain mainly procedural-type rules, i.e. rules regarding competence to deal with cases, procedures for notification of cases to the other party, consultation, comity and the exchange of information. With respect to certain constitutional problems regarding the application of the implementing rules in Hungary, progress has been made towards trying to resolve the remaining difficulties. The Commission has submitted a proposal to the Council for amended implementing rules for Hungary. After agreeing on a text, the EC-Turkey Association Council can likewise adopt the implementing rules as requested under the customs union decision of 1995, covering both rules for undertakings and State aid monitoring.

524. Major progress was achieved in 2001 with respect to the adoption of implementing rules for State aid. The implementing rules have been in force for the Czech Republic since 1998 (11). In 2001, the Association Council also adopted

---

implementing rules with regard to Lithuania (1), Latvia (2), Romania (3), Slovenia (4), Poland (5), Bulgaria (6) and Slovakia (7). Implementing rules constitute a two-pillar system of State aid monitoring. 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 associated country, a national authority is to monitor and control existing and new public aid, on the basis of the criteria arising from the application of the Community State aid rules. The implementing rules include procedures for consultation and problem solving, rules on transparency (i.e. the associated countries are to draw up and thereafter update an inventory of their aid programmes and individual aid awards), and rules on the mutual exchange of information. After preparatory work in the Council, draft State aid implementing rules were ready for approval by the Association Council with Estonia in early 2002.

4. Extension of Article 87(3)(a) status under the Europe Agreements and the adoption of regional aid maps

525. The Europe Agreements lay down that public aid granted by the associated countries is to be assessed taking into account that for a five-year period they are to be regarded as areas identical to those areas of the Community described in Article 87(3)(a) of the Treaty establishing the European Community. In 2000, the Association Councils had decided to extend this status for another five years with respect to Bulgaria (8), Romania (9), Lithuania (10), and Estonia (11). In 2001, similar decisions were adopted by the respective Association Councils with the Czech Republic (12), Latvia (13), Poland (14), Slovakia (15) and Slovenia (16).

526. The Association Council decision extending Article 87(3)(a) status generally adds that the associated country has to submit GDP per capita figures at the appropriate statistical level. These figures are to be used by the State aid monitoring authority of the associated country and the Commission to jointly draw up the regional aid map for the associated country, on the basis of the Community guidelines on national regional aid. The regional aid map identifies the eligibility of regions for regional aid as well as the maximum aid intensities allowed in each of these regions.

5. Technical assistance to the candidate countries

527. In view of the remaining shortcomings, technical assistance in the field of competition continues to be an essential tool to prepare the candidate countries for accession. Specific actions are being taken under the PHARE programmes. Under the institution-building (‘twinning’) arrangement, EU Member State experts are now also providing advice on a long-term basis to the competition and State aid authorities in the CEECs. In addition, joint training sessions were organised in March for officials from the competition offices of the candidate countries. These joint training sessions focus on explaining new competition legislation to the candidate countries and on implementation and enforcement of the competition rules.

528. The Commission has pursued a proactive policy of further intensifying its contacts with the competition authorities of the candidate coun-

---

\(^{1}\) Decision 2/2001 of the EU-Lithuania Association Council of 22 February 2001 (OJ 98, 7.4.2001).
\(^{7}\) Decision 6/2001 of the EU-Slovakia Association Council of 22 November 2001 (not yet published).


\(^{13}\) Decision 3/2001 of the EU-Czech Association Council of 25 July 2001 (not yet published).

\(^{14}\) Decision 2/2001 of the EU-Latvia Association Council of 21 November 2001 (not yet published).


tries. On 17–19 June, the seventh annual competition conference between the competition offices of the candidate countries and the Commission took place in Ljubljana, Slovenia. The delegations included high-level officials from the respective competition and State aid authorities, including Commissioner Monti. The annual conference serves as a forum for the exchange of views and experience. It also serves to establish and strengthen professional contacts between officials responsible for competition. This year’s conference concentrated on the assessment of enforcement practice in the candidate countries and on the need for effective implementation of the rules in the fields of both antitrust and State aid.

6. Western Balkans

529. At Santa Maria da Feira, in June 2000, the European Council recognised that the countries of the Western Balkans were potential candidates for EU membership. The Union committed itself to supporting the stabilisation and association process for this region, notably through technical assistance. In 2001, the Commission began a process of discussion with the recently established competition authorities in the Western Balkan countries. This is with a view to the work that will be required under the competition provisions of the Stabilisation and Association Agreements that are currently being concluded with these countries (1). The Commission has also been an active participant in the OECD’s Regional Flagship Initiative on competition policy for the countries of the Western Balkans that was launched at Ljubljana in July.

B — Bilateral cooperation

1. United States

530. Every year, the Commission reports in detail to the Council and the European Parliament on its cooperation activities with the US under the 1991 Cooperation Agreement (2) and the 1998 Positive Comity Agreement (3). The latest report covered the period from 1 January 2000 to 31 December 2000 (4). The report for 2001 will be published during the course of 2002.

531. During 2001, the Commission continued its close cooperation with the Antitrust Division of the US Department of Justice (DoJ) and the US Federal Trade Commission (FTC) in an ever greater number of cases. The trend towards the globalisation of markets continued apace during the year, as most vividly illustrated by the record number and scale of transnational mergers: the year 2001 saw a notable increase in the number of transactions notified to both the Commission and the US antitrust agencies. A large number of operations in all areas of antitrust were scrutinised simultaneously by the Commission and the US agencies. Inter-agency discussions tend to focus on issues such as the definition of markets, the likely competitive impact of a transaction on those markets, and the viability of any remedies suggested.

532. Merger investigations involving close transatlantic cooperation included GE/Honeywell, Metso/Svedala and CVC/Lenzing (5). The Commission also cooperated closely with its US counterparts in a number of non-merger investigations, for example in the Commission’s and FTC’s respective enquiries into the creation of the Covisint business-to-business joint venture between the manufacturers of automobile spare parts. Case-related EU/US cooperation is discussed in further detail in this report’s chapter on merger control, and in the seventh report to the Council and the European Parliament for the year 2001, which will be published during the course of 2002.

533. There were numerous bilateral contacts between the Commission and the relevant US authorities during the course of 2001. Commissioner Monti paid a visit to Washington in March,

(1) In 2001, two Stabilisation and Association Agreements were signed. The Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the former Yugoslav Republic of Macedonia, of the other part, was signed on 9 April in Luxembourg. The Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Croatia, of the other part, was signed on 29 October in Luxembourg.

(2) 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).

(3) 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).


(5) For GE/Honeywell, see point 326 and Box 9; for Metso/Svedala, see points 307 and 316; for CVC/Lenzing, see point 256.
and used the occasion to meet, among other persons, key members of the administration. On 24 September, he met in Washington the newly appointed heads of the US antitrust agencies, Assistant Attorney General Charles James of the [DoJ] and Chairman Timothy Muris of the FTC, for the annual bilateral EU/US meeting. The meeting coincided with the 10th anniversary of the EU/US bilateral agreement on competition policy. Meetings also took place during the course of the year between the Commission and other US agencies, such as the US Department of Transportation (which have some responsibility for the management of competition policy issues in their respective sectors).

3. Other OECD countries

537. During 2001 the Commission engaged in cooperation with the competition authorities of a number of other OECD countries, most notably Australia, New Zealand and Korea. These contacts concerned both case-related and more general competition policy issues. The Commission also continued its efforts to conclude a bilateral cooperation agreement with Japan.

538. During the course of the year the Commission continued its close cooperation with the ESA (EFTA Surveillance Authority) in enforcing the Agreement on the European Economic Area.

4. Mediterranean countries

539. The Euro-Mediterranean Agreements establishing an association between the EU and Morocco (6), Tunisia (7), and Israel (8) are in force. Morocco, Tunisia and Israel have competition legislation, which facilitates negotiations on a mechanism for cooperating with the Commission in connection with the commitments laid down in Article 36 of each of the three agreements. As regards the other Euro-Mediterranean Agreements, the one with Jordan (6) is not yet in force, the Jordanian Parliament having rejected the draft law on competition presented by the Government. The agreement with Egypt (7) was signed in 2000 and the Egyptian authorities are currently considering a draft law on competition. The interim agreement with the Palestinian Authority (6) has not yet undergone final renegotiation. The Commission has been monitoring the situation with a view to bringing the EU’s Mediterranean partners closer to cooperation on competition policy.

540. With a view to giving a boost to Mediterranean policy, negotiation meetings were held with Algeria, Lebanon and Syria. The competition chapter of the future agreements will make it possible to align the existing or future competition policies of these countries with Community policy. The Commission offers new partners the possibility of stepping up technical and institutional cooperation. Algeria already has a law on competition and an authority responsible for enforcing

2. Canada

535. Bilateral cooperation with Canada is based on the Competition Cooperation Agreement which entered into force in June 1999 (1). Every year, the Commission reports in detail to the Council and the European Parliament on its cooperation activities with Canada. The latest report covered the period from 1 January 2000 to 31 December 2000 (2). The report for 2001 will be published during the course of 2002.

536. An increasing number of cases are being examined by the competition authorities on both sides. Contacts between the Commission and its Canadian counterpart, the Canadian Competition Bureau, have been frequent and fruitful. Discussions have concerned both case-related issues and more general policy issues. Two bilateral meetings, as foreseen in the Cooperation Agreement, took place, one in February in Brussels and one in September in Ottawa, in which the heads of the respective competition authorities participated.

3. Other OECD countries

537. During 2001 the Commission engaged in cooperation with the competition authorities of a number of other OECD countries, most notably Australia, New Zealand and Korea. These contacts concerned both case-related and more general competition policy issues. The Commission also continued its efforts to conclude a bilateral cooperation agreement with Japan.

538. During the course of the year the Commission continued its close cooperation with the ESA (EFTA Surveillance Authority) in enforcing the Agreement on the European Economic Area.

4. Mediterranean countries

539. The Euro-Mediterranean Agreements establishing an association between the EU and Morocco (5), Tunisia (6), and Israel (7) are in force. Morocco, Tunisia and Israel have competition legislation, which facilitates negotiations on a mechanism for cooperating with the Commission in connection with the commitments laid down in Article 36 of each of the three agreements. As regards the other Euro-Mediterranean Agreements, the one with Jordan (8) is not yet in force, the Jordanian Parliament having rejected the draft law on competition presented by the Government. The agreement with Egypt (7) was signed in 2000 and the Egyptian authorities are currently considering a draft law on competition. The interim agreement with the Palestinian Authority (7) has not yet undergone final renegotiation. The Commission has been monitoring the situation with a view to bringing the EU’s Mediterranean partners closer to cooperation on competition policy.

540. With a view to giving a boost to Mediterranean policy, negotiation meetings were held with Algeria, Lebanon and Syria. The competition chapter of the future agreements will make it possible to align the existing or future competition policies of these countries with Community policy. The Commission offers new partners the possibility of stepping up technical and institutional cooperation. Algeria already has a law on competition and an authority responsible for enforcing

---

(1) Agreement between the European Communities and the Government of Canada regarding the application of their competition laws (OJ L 175, 10.7.1999).
it. Lebanon and Syria, on the other hand, have not yet reached this point.

5. Latin America

541. The mechanism for cooperation (1) between their competition authorities laid down in the agreement between the EU and Mexico (2), which is in force, gave rise to exchanges of information, consultations on certain activities and a provision on technical cooperation.

542. Four negotiation meetings on trade liberalisation were held between the EU, Mercosur and Chile. The goal is to establish mechanisms for cooperation between the competition authorities of the parties, with the application of competition rules ensuring legal certainty and transparency of treatment for firms on the respective markets. The regulatory framework for competition in the Mercosur countries has progressed; Argentina has enhanced its institutional and regulatory system by creating a Secretariat and must now set up a competition court. Uruguay set up a competition department responsible for drawing up regulations implementing the competition provisions of the law. Paraguay now has a very comprehensive draft law on competition. Brazil is considering a new proposal for a law integrating its competition departments. With these developments, the Commission received regular updates on Mercosur’s competition policy.

543. As regards the Andean Community, the financial protocol to the proposal on technical cooperation in competition was signed between the Commission and the General Secretariat of the Andean Community. EuropeAid is to be responsible for the procedure to select the consultant that will manage the programme.

544. During the year, direct information campaigns on Community rules and practice continued, as did the provision of information via the Boletín Latinoamericano de Competencia.

6. Russian Federation and Ukraine

545. Cooperation with the Russian Federation in the field of competition made important progress over the year through a series of high-level meetings. During these meetings the whole range of competition matters of common interest was covered, from case-related cooperation in specific antitrust investigations, through an exchange of experience in the field of liberalisation policy, to discussing the prospects for State aid monitoring policy within the Russian Federation.

546. Moreover, a considerable number of working meetings were held to advance the work required by the Partnership and Cooperation Agreement. A workshop for increasing understanding of European State aid policy in the steel sector was organised.

547. With Ukraine, the Commission organised a short study tour to enhance understanding of EC competition law and practice for members of the Ukrainian Competition Committee.

C — Multilateral cooperation

548. The year 2001 saw two major developments in relation to Commission initiatives within the framework of the World Trade Organization (WTO) and as regards the new International Competition Network (ICN).

1. WTO: trade and competition policy

1.1. Competition in the Doha Development Agenda

549. Following a long preparatory process, the fourth WTO Ministerial Conference took place in Doha (Qatar) from 9–14 November. The declaration adopted by WTO members in Doha (3) addresses among other issues the ‘interaction between trade and competition policy’. The relevant passages of the declaration (4) (paras 23–25) bear testimony to the recognition — for the first time — by all WTO members, with no exceptions, that a multilateral framework is needed today to enhance the contribution of competition policy to international trade and development. There was agreement in Doha that the WTO members will negotiate and conclude a multilateral agreement on trade and competition. It was also agreed that

---

(3) Also known as the ‘Doha Development Agenda’, because of the central position that the development dimension will occupy in future WTO work.
(4) Available online at the WTO website: www.wto.org.
the formal phase of negotiations will open immediately after the fifth WTO Ministerial Conference, due to take place in Mexico in 2003, and that the negotiated result on competition will form an integral part of the overall result of the negotiations (para. 47). The negotiating arrangements will be decided at the fifth Ministerial Conference.

550. In keeping with its ‘developmental’ aspirations, the declaration also highlights the need to step up efforts to provide technical assistance to build and enhance the capacity of developing and least developed countries in this area. It is obvious that these countries urgently need all the assistance that developed countries can provide in order to develop their capacity to evaluate the implications of closer multilateral cooperation in this area for their development policies and objectives, as well as for their human and institutional development. The Commission will work together with all relevant intergovernmental organisations, including UNCTAD, and through the appropriate regional and bilateral channels, to provide coordinated, strengthened and adequately resourced assistance to respond to these needs.

551. Finally, the declaration mentions that the pre-negotiation period leading up to the fifth Ministerial Conference should be used to clarify with partners in the Geneva process the various elements constituting this future multilateral framework and most likely to figure in a negotiating mandate. The declaration contains an indicative list of such key issues with the elements that the EU has repeatedly earmarked as the pillars of the planned multilateral framework on competition, namely certain core trade and competition principles, including transparency, non-discrimination and procedural fairness; a commitment to combat hardcore cartels; the arrangements for voluntary cooperation between antitrust agencies; and support for progressive reinforcement of competition institutions in developing countries through capacity building.

1.2. An initial assessment of the declaration adopted in Doha

552. The result of discussions on trade and competition in Doha and the formulation of the relevant passages in the ministerial declaration are most satisfactory for the Commission for the following reasons:

— first, the WTO members which have signed up to the package agreed in Doha (including some of those which were sceptical about the role of the WTO in the area of competition, such as certain developing countries, most notably India, as well as Hong Kong) recognise for the first time that it may be to their benefit and to the benefit of the multilateral trading system to negotiate and conclude a multilateral agreement on trade and competition in the WTO. Up until quite recently, even the principle of having such an agreement was controversial. The recognition of the importance of establishing such a framework and its relevance for international trade and development will contribute to the introduction and more effective application of domestic competition regimes and will be of considerable benefit to consumers worldwide;

— second, even if another decision will have to be taken at the fifth WTO Ministerial Conference in 2003 on the arrangements for the formal and final phase of negotiations on this multilateral agreement, there now exists a unanimous and clear commitment to launching such negotiations on a fixed date so that the new trade and competition rules will be an integral part of the so-called ‘single undertaking’ resulting from the negotiation process set in motion at Doha, which is to be concluded no later than 1 January 2005. As far as the EU and the other proponents for negotiating such rules in the WTO are concerned, we have now entered a crucial phase within which we have the firm intention to clarify with our partners from developing and developed countries the elements that WTO members need to include in this multilateral agreement and to draft with them a precise and inclusive negotiation agenda to be adopted by the fifth WTO Ministerial Conference in 2003;

— third, our proposals regarding the key components of the future multilateral agreement on trade and competition have been widely accepted. The EU was the first to put concrete substantive proposals on the table, so it takes particular note of the fact that that the Doha declaration focuses on precisely those elements that we have highlighted in our proposals and identifies them as the items that the WTO members will have to take up first for clarification;

— lastly, as the working group in Geneva will now shift its attention to concrete pre-negotiation work on these elements, the declaration opens up the scope for more focused techni-
cal assistance and capacity building that will help emerging and developing economies to better understand and appreciate the significance of these issues, including for the development of their own economies. In this process UNCTAD and other international institutions, as well as regional and bilateral arrangements, will certainly contribute and have an important role to play in order that everybody may be ready to open formal negotiations following the next Ministerial Conference.

Box 12: Trade and competition: from the Van Miert report to Doha

Efforts to include competition in the WTO work programme started in 1996 when, on the basis of the Van Miert report (1), the Commission proposed to the Council (2) that the World Trade Organization should set up a working group responsible for initial work on the development of an international framework of competition rules. This initiative was approved by the Council and supported by several other WTO members and a decision was adopted by the Singapore WTO Ministerial Conference on 11 December 1996 ‘[to] establish a working group to study issues ... relating to the interaction between trade and competition policy, including anti-competitive practices, in order to identify any areas that may merit consideration in the WTO framework’.

At that time, the Commission argued that the discussions should focus on an undertaking by all WTO members to develop active domestic competition structures, the identification and adoption of common competition principles at international level (most harmful practices), the creation of the means of cooperation between competition authorities and the adapting of the WTO rules for the settlement of disputes to the competition area (3).

Ever since the second WTO Ministerial Conference in Singapore and the subsequent establishment of the WTO working group on trade and competition in Geneva, the Commission has been at the forefront of efforts to persuade its WTO trading partners of the merits of a multilateral agreement on competition. Discussions in Geneva were particularly useful in clarifying the Commission’s position and promoting the interest of developing countries in such an agreement.

(1) Report by a group of independent experts chaired by Karel Van Miert and entitled ‘Competition policy in the new trade order: Strengthening international cooperation and rules’.
(3) 1996 Competition Report, points 235–6.

2. OECD

553. The main events of the May session were the round tables on the training programmes of competition authorities for their officials and on price transparency. On price transparency, the EC addressed the advantages of governmentally mandated price transparency measures (e.g. in certain utility markets, in the motor vehicle market) in order to achieve market integration and enhance competition and entry, as well as the anticompetitive effects of private voluntary price transparency agreements or similar practices between suppliers. Other delegations addressed different issues focusing on the pros and cons of price transparency for the consumer. Discussions boiled down to the conclusion that price transparency may in certain cases benefit the consumer but it can also have serious anticompetitive effects, depending on the structure of the market and the type of price transparency arrangements (level of aggregation of the information exchanged, time-frame of the data exchanged, frequency of the exchanges, etc.).

554. In June the Commission took part in and contributed to the first OECD conference on competition policy in the countries of south-east Europe, which was held in Ljubljana, the day after the seventh annual conference with the applicant countries.

555. During the Competition Law and Policy Committee (CLP) meeting in October, the OECD organised the first Global Forum on Competition, which brought together representatives of more than 50 countries. Commissioner Monti took part in the event. In his opening speech he called on competition authorities throughout the world to step up their cooperation and to establish mecha-
nisms for governance in the field of international competition policy. Topics covered during the Forum included the role of competition policy in economic reform, cooperation instruments, unjustifiable agreements and cooperation on cross-border mergers. The Commission also participated during the CLP session in the round tables on regulating prices for access to network infrastructures, especially in the telecommunications field, but also as regards gas and electricity, and on means of investigation other than leniency programmes (in particular surprise inspections).

3. UNCTAD

556. The Commission took part in the UNCTAD meeting on 2–4 July on international cooperation between competition authorities, at which Commissioner Monti announced specific plans for technical assistance to developing countries: a technical assistance project in the competition field for COMESA (Common Market for Eastern and Southern Africa), a planned seminar for competition officials from developing countries and a joint study with UNCTAD on the importance of a competition policy for poor countries. Commissioner Monti advocated competition for developing countries and called for efforts to develop international cooperation.

4. International Competition Network

557. On 2–4 February, the International Bar Association organised a meeting in Ditchley Park in the United Kingdom, bringing together a large number of competition authorities and practitioners for an informal discussion of the recommendation by the US Committee ICPAC (1) to establish an international competition network (ICN). Following the Ditchley meeting, a steering group was set up to supervise the launch of the project. The group, in which the Commission took an active part, met for the first time in Berlin in May and then on the fringes of the OECD CLP meeting in Paris in October.

558. As a result of the above discussions and practical efforts, the creation of an international competition network (ICN) was announced publicly on Thursday 25 October in New York. This is the first time so many competition authorities have taken an autonomous initiative designed to enable them to share experience and exchange views on competition issues deriving from the ever-increasing globalisation of the world economy. The ICN will be a project-oriented, consensus-based, informal network of antitrust agencies from developed and developing countries that will address antitrust enforcement and policy issues of common interest and formulate proposals for procedural and substantive convergence through a results-oriented agenda and structure. It will encourage the dissemination of antitrust experience and best practices, promote the advocacy role of antitrust agencies and seek to facilitate international cooperation. The ICN will concentrate its efforts on international antitrust issues that are difficult but capable of being resolved. Initially, the ICN will work on two important antitrust issues: the merger control process in the multi-jurisdictional context and the competition advocacy role of antitrust agencies. This agenda will be later opened up to include issues of particular relevance to transition and developing economies.

559. Any national or regional competition agency responsible for the enforcement of antitrust laws may become a member of the ICN. The network will also actively seek advice and contributions from the private sector and various non-governmental organisations, and will cooperate closely with the following types of entity: international organisations, such as the OECD, WTO and UNCTAD, industry and consumer associations, practitioners of antitrust law and/or economics and members of the academic community. In particular, the ICN will seek input from these non-governmental advisers, who are not members of the network but who will provide support in terms of identifying projects. The ICN may also request that certain non-governmental advisers participate in working groups for designated projects and contribute papers or participate in hearings related to ICN projects.

560. As regards its organisation, the ICN is intended as a virtual structure without any permanent secretariat, flexibly organised around its projects, and guided by a steering group which will identify projects and devise work plans for approval by the ICN as a whole. The authority hosting the annual conference will cover for a year logistic and secretarial costs related to its organisation. There will be one ICN conference per year. The conference will bring together

---

(1) International Competition Policy Advisory Committee.
heads of antitrust agencies to commission new projects and review the progress and recommendations of current projects. The conferences will provide a structured dialogue by focusing on a limited number of projects selected sufficiently in advance by the ICN to permit meaningful participation by all members. The first official ICN conference will be hosted by the Italian antitrust authority and is scheduled for October 2002. Thereafter, annual conferences will be held in the following countries: Mexico (2003); Korea (2004); Germany (2005); and South Africa (2006).
1. Antitrust

1.1. Legislative and regulatory activities

Proposal for a new regulation implementing Articles 81 and 82 EC

561. Following the discussion held by the Council on 5 December, the Belgian presidency concluded that the new regulation implementing Articles 81 and 82 EC had to be adopted in 2002 in order to ensure that it was fully applicable before the forthcoming enlargement of the European Union. Work on the Commission’s proposal for a new regulation will therefore continue in the Council under the Spanish and, if necessary, the Danish presidency. In parallel to discussions on the proposed regulation in the Council working group and in response to requests by the European Parliament, the Council and the Economic and Social Committee, the Commission will in 2002 present drafts of several notices clarifying some of the main concepts in the new regulation.

Proposal for the motor vehicle distribution regime

565. The block exemption regulation for car distribution (Regulation (EC) No 1475/95) expires on 30 September 2002. The Commission will in early 2002 adopt its proposal for the motor vehicle distribution regime, based on the November 2000 evaluation report and the hearing held on 14-15 February 2001 with all interested parties, the four studies carried out for the Commission (¹) and all other relevant information and studies at its disposal.

566. The adopted proposal will be published in the Official Journal in order to give all interested parties an opportunity to comment. After receiving written and oral comments from interested parties and from the Advisory Committee and after informing the other institutions, the proposal will then be finalised and submitted to the Commission for adoption. The Commission should adopt the future regime during the summer of 2002, i.e. before expiry of the current block exemption at the end of September 2002.

Review of the block exemption regulation for technology transfer agreements

562. After discussing the report (see points 17ff.) with industry, consumer associations and other interested parties in the first half of 2002 the Commission will propose new competition rules for the application of Article 81 to licensing agreements.

Commission guidelines on market analysis and recommendation on relevant markets for electronic communications services and networks; adoption of a consolidated Commission directive for competition in electronic communications markets

563. Following adoption of the proposed directives making up the new regulatory framework for electronic communications services and networks in early 2002, the Commission will, in accordance with Article 15 of the framework directive, publish guidelines on market analysis and the calculation of significant market power as well as a recommendation on relevant markets. Both texts should provide national regulatory authorities with necessary guidance for applying the new competition law-based concepts of the new regulatory framework.

564. The Commission will also adopt a consolidated directive on competition in the electronic communications markets to replace Directive 90/388 and all subsequent amending directives.

1.2. Enforcement activities

567. Following the publication for consultation in July of a draft leniency notice with a view to replacing the existing notice on the non-imposition or reduction of fines in cartel cases, adopted in 1996, the Commission carefully reviewed the comments received and intends to adopt an updated and revised notice in the course of 2002.

568. Access to the file is one of the main procedural guarantees intended to protect the rights of the defence. In order to take account of experience gained so far under the Commission’s notice on the internal rules of procedure for processing requests for access to the file, as well as to bring the notice into line with the recent case law of the Court of First Instance, a revision exercise was

(¹) Two in 2000 (Price differentials between Member States, and Link between sales and after-sales service) and two in 2001 (Impact of possible future legislative scenarios for motor vehicle distribution on all parties concerned, and Customer preferences for existing and potential sales and servicing alternatives in automotive distribution).
initiated in 2001. The revised notice is expected to be adopted by the Commission during the second half of 2002.

2. Mergers

569. In order to ensure that the European merger control system is ready to meet the challenges it will face in the future, most notably the forthcoming enlargement of the European Union, on 11 December the Commission adopted a Green Paper on the review of the merger regulation. This initiated a period of consultation that gives anyone interested the opportunity to submit comments on the jurisdictional, substantive and procedural issues raised. The consultation period will close at the end of March 2002, after which the Commission plans to propose an amended merger regulation. The proposal is expected to be adopted in the second half of 2002.

570. The Commission’s jurisdictional scope will also be affected by expiry of the European Coal and Steel (ECSC) Treaty on 23 July 2002. Once the ECSC Treaty has expired, mergers will be considered either under the EC Treaty, and in particular the merger regulation, or, if they do not meet the latter’s thresholds, under the appropriate national legislation. This will mark the end of the Commission’s exclusive jurisdiction over mergers in the coal and steel industries. After the expiry of the ECSC Treaty, it will no longer be possible for a merger to be covered by two different Treaties as happened in four (1) of the eleven cases that were handled under the ECSC Treaty in 2001. Together with the changes being considered under the merger review, this should help to ensure that the European merger control system operates as effectively and efficiently as possible and that coal and steel mergers are dealt with at the appropriate level.

571. Last but not least, cooperation with US merger control agencies will be stepped up with a view to achieving closer convergence in procedures and substantive analysis when applying merger control law to the growing number of cases which affect both EU and US jurisdiction.

For this purpose, the EU/US working group on mergers and its five specialised subgroups recently set up by the agencies involved (the European Commission, the US Federal Trade Commission and the US Department of Justice) will continue to figure among the priorities for 2002.

3. State aid

572. In the field of State aid, the Commission will continue and intensify its efforts to review State aid rules and procedures in order to ensure that simple cases are dealt with quickly and simply so that resources can be concentrated on those cases which present the greatest potential risks from the standpoint of competition policy. Nevertheless, even for these cases, the aim will be to ensure that they are handled in accordance with transparent and predictable procedures and rules. These efforts do not, however, imply any relaxation of the Commission’s traditional position, which is also recognised by all Member States, that overall aid levels in terms of GNP remain too high and that the most distortive forms of individual aid must be eliminated and aid measures reoriented towards horizontal measures in support of the Community’s broader economic aims, including cohesion objectives. Continuing efforts will thus be made to ensure prompt and effective repayment of incompatible aid and effectively monitor the implementation of decisions by Member States. Further improvements in transparency will also be sought through the progressive development of the register and scoreboard.

573. As regards horizontal and cohesion policy development, the Commission should normally complete the review of the guidelines for aid for research and development, a new legal framework for employment aid and the review of the multisectoral framework for large regional investment projects. In line with the commitments given in its report to the Laeken European Council, the Commission will also give high priority to clarifying, in the light of developments in the case law of the Court of Justice, application of the State aid rules to services of general economic interest (2).
4. International field

574. In the international sphere, the Commission will continue to pursue its dual policy of enhancing bilateral cooperation with its foreign counterparts while at the same time exploring possibilities for expanding multilateral cooperation. Regarding the former, the Commission will continue to cooperate with the United States and Canada within the framework of the existing bilateral agreements. A similar agreement is expected to be concluded with Japan. Cooperation in the competition field will also be developed with all the Mediterranean countries, the Commission having assigned priority to that region. The growing importance of Asian countries for global competition policy will necessitate an increased level of cooperation and technical assistance in that region too (with special reference to China, Korea, and India). Moreover, the Commission will have to develop appropriate cooperation with major countries with which association agreements are already in force or are in the process of being finalised, such as Russia, Ukraine, Mexico, Mercosur and Chile.

575. As regards multilateral initiatives, the Commission will continue to participate actively in all international forums where competition policy is on the agenda, in particular under the OECD, WTO and UNCTAD. Furthermore, the Commission is currently contributing to a new concept of governance by participating in the International Competition Network, which is striving to improve cooperation among competition authorities around the world in order to enhance the convergence of competition policies.

576. Under the timetable towards accession agreed by the Göteborg European Council in June, accession negotiations will be in the process of finalisation with some candidate countries but will continue with others. A reinforced monitoring process will apply to those candidate countries with which accession negotiations have been completed in the area of competition. Building on progress already achieved, relations will continue to be developed in the competition field with Turkey.

577. Particular attention will be devoted to the development of technical assistance to the candidate countries, as well as to developing countries.
## ANNEX — CASES DISCUSSED IN THE REPORT

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

<table>
<thead>
<tr>
<th>Case</th>
<th>Publication</th>
<th>Point</th>
</tr>
</thead>
<tbody>
<tr>
<td>Belgian breweries</td>
<td>IP/01/1739, 5.12.2001</td>
<td>58ff</td>
</tr>
<tr>
<td>British Midland/Lufthansa/SAS</td>
<td>OJ C 83, 14.3.2001</td>
<td>Box 1, 136ff</td>
</tr>
<tr>
<td>Carbonless paper</td>
<td>IP/01/1892, 20.12.2001</td>
<td>69ff</td>
</tr>
<tr>
<td>Citric acid</td>
<td>IP/01/1743, 5.12.2001</td>
<td>56ff</td>
</tr>
<tr>
<td>Covisint</td>
<td>IP/01/1155, 31.7.2001, OJ C 49, 15.2.2001</td>
<td>Box 4</td>
</tr>
<tr>
<td>DaimlerChrysler</td>
<td>IP/01/1394, 10.10.2001</td>
<td>184</td>
</tr>
<tr>
<td>De Post/La Poste (Belgium)</td>
<td>OJ L 61, 2.3.2002</td>
<td>82, 113ff</td>
</tr>
<tr>
<td>Deutsche Post AG I</td>
<td>OJ L 125, 5.5.2001</td>
<td>77, 108ff</td>
</tr>
<tr>
<td>Deutsche Post AG II</td>
<td>OJ L 331, 15.12.2001</td>
<td>78, 111ff</td>
</tr>
<tr>
<td>Duales System Deutschland (DSD)</td>
<td>OJ L 166, 21.6.2001</td>
<td>79, Box 3</td>
</tr>
<tr>
<td>Eurex</td>
<td>IP/02/4, 3.1.2002</td>
<td>196ff</td>
</tr>
<tr>
<td>Formula One (FIA &amp; FOA)</td>
<td>OJ C 169, 13.06.2001</td>
<td>221ff</td>
</tr>
<tr>
<td></td>
<td>IP/01/1523, 30.10.01</td>
<td></td>
</tr>
<tr>
<td>German banks</td>
<td>IP/01/1796, 11.12.2001</td>
<td>64ff</td>
</tr>
<tr>
<td>GlaxoWellcome</td>
<td>OJ L 302, 17.11.2001</td>
<td>232ff</td>
</tr>
<tr>
<td>Graphite electrodes</td>
<td>IP/01/1010, 18.7.2001</td>
<td>40ff</td>
</tr>
<tr>
<td>IATA Cargo Tariff Consultations</td>
<td>IP/01/694, 15.5.2001</td>
<td>143ff</td>
</tr>
<tr>
<td></td>
<td>IP/01/1433, 19.10.2001</td>
<td></td>
</tr>
<tr>
<td>IATA Passenger Tariff Conferences</td>
<td>OJ L 177, 30.6.2001</td>
<td>149ff</td>
</tr>
<tr>
<td>Identrus</td>
<td>OJ L 249, 19.9.2001</td>
<td>132</td>
</tr>
<tr>
<td>IMS Health</td>
<td>OJ L 59, 28.2.2002</td>
<td>81</td>
</tr>
<tr>
<td>Intelsat</td>
<td>OJ C 9, 12/01/2001</td>
<td>133</td>
</tr>
<tr>
<td>La Poste (France)</td>
<td>IP/01/1476, 23.10.2001</td>
<td>84</td>
</tr>
<tr>
<td>Luxembourg breweries</td>
<td>IP/01/1740, 5.12.2001</td>
<td>61ff</td>
</tr>
<tr>
<td>Michelin</td>
<td>IP/01/873, 20.6.2001</td>
<td>80</td>
</tr>
<tr>
<td>Microsoft</td>
<td>IP/01/1232, 30.8.2001</td>
<td>207ff</td>
</tr>
<tr>
<td>P&amp;O/Stena</td>
<td>IP/01/806, 7.6.2001</td>
<td>160</td>
</tr>
<tr>
<td>Pfizer/Aventis</td>
<td></td>
<td>241</td>
</tr>
<tr>
<td>Pfizer/EISAI</td>
<td></td>
<td>239, 240</td>
</tr>
<tr>
<td>Porsche’s distribution system</td>
<td></td>
<td>185</td>
</tr>
<tr>
<td>SAS/Maersk</td>
<td>OJ L 265, 5.10.2001</td>
<td>Box 1, 43ff</td>
</tr>
<tr>
<td>Sodium gluconate</td>
<td>IP/01/1355, 20.10.2001</td>
<td>48ff</td>
</tr>
<tr>
<td>TACA — Trans-Atlantic Conference Agreement</td>
<td>IP/01/1713, 3.12.2001</td>
<td>153ff</td>
</tr>
<tr>
<td>UEFA broadcasting regulations</td>
<td>OJ L 171, 26.6.2001</td>
<td>165, 224</td>
</tr>
<tr>
<td>UEFA Champions League</td>
<td>IP/01/1043, 20.7.2001</td>
<td>166</td>
</tr>
<tr>
<td>Visa International</td>
<td>OJ L 293, 10.11.2001</td>
<td>200ff</td>
</tr>
<tr>
<td>Vitamins</td>
<td>IP/01/1625, 21.11.2001</td>
<td>52ff</td>
</tr>
<tr>
<td>Volkswagen</td>
<td>OJ L 262, 2.10.2001</td>
<td>183</td>
</tr>
<tr>
<td>Wanadoo</td>
<td>IP/01/1899, 21.12.2001</td>
<td>134</td>
</tr>
<tr>
<td>Zinc phosphate</td>
<td>IP/01/1797, 11.12.2001</td>
<td>63</td>
</tr>
</tbody>
</table>
## 2. Merger control

<table>
<thead>
<tr>
<th>Case</th>
<th>Publication</th>
<th>Point</th>
</tr>
</thead>
<tbody>
<tr>
<td>BASF/Eurodiol/Pantochim</td>
<td>IP/01/1284, 11.7.2001</td>
<td>285</td>
</tr>
<tr>
<td>BP/E.ON</td>
<td>IP/01/1247, 6.9.2001</td>
<td>317</td>
</tr>
<tr>
<td>Carrefour/Promodès</td>
<td>OJ C164, 14.6.2000</td>
<td>313</td>
</tr>
<tr>
<td>CVC/Lenzing</td>
<td>IP/01/1436, 17.10.2001</td>
<td>256</td>
</tr>
<tr>
<td>EdF/EnBW</td>
<td>OJ L 59, 28.2.2002</td>
<td>258, 300</td>
</tr>
<tr>
<td>Enel/FT/Wind/Infostrada</td>
<td>IP/01/79, 19.1.2001</td>
<td>322</td>
</tr>
<tr>
<td>GE/Honeywell</td>
<td>IP/01/298, 1.3.2001</td>
<td>307</td>
</tr>
<tr>
<td>GE/Honeywell</td>
<td>IP/01/842, 14.6.2001</td>
<td>307</td>
</tr>
<tr>
<td>GE/Honeywell</td>
<td>IP/01/855, 18.6.2001</td>
<td>307</td>
</tr>
<tr>
<td>GE/Honeywell</td>
<td>IP/01/859, 3.7.2001</td>
<td>326, Box 9</td>
</tr>
<tr>
<td>Govia/Connex South Central</td>
<td>IP/01/1048, 20.7.2001</td>
<td>319</td>
</tr>
<tr>
<td>Grupo Villar Mir/EnBW/ Hidroeléctrica del Cantábrico</td>
<td>IP/01/1320, 26.9.2001</td>
<td>260</td>
</tr>
<tr>
<td>Interbrew/Bass</td>
<td>OJ C 293, 14.10.2000</td>
<td>321</td>
</tr>
<tr>
<td>Metso/Svedala</td>
<td>IP/01/103, 24.1.2001</td>
<td>307, 316</td>
</tr>
<tr>
<td>Nestlé/Ralston Purina</td>
<td>OJ C 239, 25.8.2001</td>
<td>299</td>
</tr>
<tr>
<td>Nordbanken/Postgirot</td>
<td>IP/01/1552, 8.11.2001</td>
<td>297, Box 1</td>
</tr>
<tr>
<td>Norske Skog/Parenco/Walsum</td>
<td>IP/01/1053, 23.7.2001</td>
<td>263ff</td>
</tr>
<tr>
<td>SCA/Metsa Tissue</td>
<td>IP/00/1065, 26.9.2000</td>
<td>255</td>
</tr>
<tr>
<td>Schneider/Le Grand</td>
<td>IP/01/147, 31.1.2001</td>
<td>255</td>
</tr>
<tr>
<td>Schneider/Le Grand</td>
<td>OJ L 57, 27.2.2002</td>
<td>255</td>
</tr>
<tr>
<td>Shell/DEA</td>
<td>IP/01/1222, 23.8.2001</td>
<td>317</td>
</tr>
<tr>
<td>Sudzucker/Saint Louis</td>
<td>IP/01/1223, 23.8.2001</td>
<td>262</td>
</tr>
<tr>
<td>The Post Office/TPG/SPPL</td>
<td>OJ L 143, 29.5.2001</td>
<td>311</td>
</tr>
<tr>
<td>TotalFina/Eif Aquitaine</td>
<td>OJ C 342, 5.12.2001</td>
<td>443</td>
</tr>
<tr>
<td>Unilever/Bestfoods</td>
<td>IP/01/1076, 29.9.2000</td>
<td>443</td>
</tr>
<tr>
<td>UPM-Kymmene/Haindl</td>
<td>IP/01/1053, 23.7.2001</td>
<td>443</td>
</tr>
<tr>
<td>Åland Island captive insurance companies</td>
<td>not yet published</td>
<td>372</td>
</tr>
</tbody>
</table>

## 3. State aid

<table>
<thead>
<tr>
<th>Case</th>
<th>Publication</th>
<th>Point</th>
</tr>
</thead>
<tbody>
<tr>
<td>Aer Rianta</td>
<td>not yet published</td>
<td>455</td>
</tr>
<tr>
<td>Aid to businesses affected by rain in October 2000</td>
<td>OJ C 5, 8.1.2002</td>
<td>474</td>
</tr>
<tr>
<td>Aid to the agricultural sector following the floods in October 2000 (Valle d’Aosta)</td>
<td>not yet published</td>
<td>474</td>
</tr>
<tr>
<td>Aid to the French inland waterway sector</td>
<td>OJ C 342, 5.12.2001</td>
<td>443</td>
</tr>
<tr>
<td>Aid to the inland waterway sector — Netherlands</td>
<td>OJ C 102, 31.3.2001</td>
<td>443</td>
</tr>
<tr>
<td>Åland Island captive insurance companies</td>
<td>not yet published</td>
<td>372</td>
</tr>
<tr>
<td>Case Study</td>
<td>Status</td>
<td>Page</td>
</tr>
<tr>
<td>---------------------------------------------------------------------------</td>
<td>------------------------</td>
<td>------</td>
</tr>
<tr>
<td>Babcock Wilcox España</td>
<td>not yet published</td>
<td>392</td>
</tr>
<tr>
<td>Banking Society Berlin BGB</td>
<td>not yet published</td>
<td>470</td>
</tr>
<tr>
<td>Böhler Edelstahl</td>
<td>OJ C 226, 11.8.2001</td>
<td>409</td>
</tr>
<tr>
<td>Capital grants — renewable technologies</td>
<td>OJ C 30, 2.2.2002</td>
<td>363, 387</td>
</tr>
<tr>
<td>Capital injection — Verlipack</td>
<td>not yet published</td>
<td>365</td>
</tr>
<tr>
<td>Capitalisation aid for technology based firms</td>
<td>OJ C 32, 5.2.2002</td>
<td>Box 10</td>
</tr>
<tr>
<td>Coalfields enterprise fund</td>
<td>not yet published</td>
<td>Box 10</td>
</tr>
<tr>
<td>Cogne Acciai Speciali R&amp;D</td>
<td>not yet published</td>
<td>410</td>
</tr>
<tr>
<td>Collection and processing of PVC facade elements</td>
<td>OJ C 358, 15.12.2001</td>
<td>364</td>
</tr>
<tr>
<td>Competition for innovative solutions in rail based logistics</td>
<td>not yet published</td>
<td>429</td>
</tr>
<tr>
<td>Control/coordination centres of foreign companies</td>
<td>not yet published</td>
<td>374</td>
</tr>
<tr>
<td>Corus Technology, ECSC steel</td>
<td>OJ C 347, 8.12.2001</td>
<td>410</td>
</tr>
<tr>
<td>DaimlerChrysler Kölleda (DE)</td>
<td>not yet published</td>
<td>424</td>
</tr>
<tr>
<td>Eko Stahl</td>
<td>not yet published</td>
<td>410</td>
</tr>
<tr>
<td>Emission trading scheme</td>
<td>not yet published</td>
<td>388</td>
</tr>
<tr>
<td>Entrepreneur loans</td>
<td>OJ C 328, 23.11.2001</td>
<td>Box 10</td>
</tr>
<tr>
<td>Environmental protection</td>
<td>OJ C 30, 2.2.2002</td>
<td>363</td>
</tr>
<tr>
<td>EUV-Lithography</td>
<td>OJ C 333, 28.11.2001</td>
<td>379</td>
</tr>
<tr>
<td>Extatic lithography</td>
<td>OJ C 5, 8.1.2002</td>
<td>379</td>
</tr>
<tr>
<td>Fiat Melfi (IT)</td>
<td>OJ L 177, 30.6.2001</td>
<td>423</td>
</tr>
<tr>
<td>Fluor lithography</td>
<td>OJ C 5, 8.1.2002</td>
<td>379</td>
</tr>
<tr>
<td>France: Aid to coal industry</td>
<td>OJ L 239, 7.9.2001</td>
<td>414</td>
</tr>
<tr>
<td>Freight facilities grant</td>
<td>OJ C 45, 19.2.2002</td>
<td>441</td>
</tr>
<tr>
<td>Futour 2000</td>
<td>OJ C 219, 4.8.2001</td>
<td>Box 10</td>
</tr>
<tr>
<td>Germany: Aid to coal industry</td>
<td>OJ C 127, 9.5.2001</td>
<td>414</td>
</tr>
<tr>
<td>Gibraltar exempt offshore companies</td>
<td>not yet published</td>
<td>374</td>
</tr>
<tr>
<td>Gibraltar qualifying offshore companies</td>
<td>not yet published</td>
<td>374</td>
</tr>
<tr>
<td>Graf von Henneberg GmbH</td>
<td>not yet published</td>
<td>393</td>
</tr>
<tr>
<td>Grants to companies with working environment certificates</td>
<td>OJ C 5, 9.1.2001</td>
<td>381</td>
</tr>
<tr>
<td>Grants to large energy consumers</td>
<td>OJ C 358, 15.12.2001</td>
<td>385</td>
</tr>
<tr>
<td>Green electricity certificates</td>
<td>OJ C 330, 24.11.2001</td>
<td>363, 387</td>
</tr>
<tr>
<td>International financial activities</td>
<td>not yet published</td>
<td>373</td>
</tr>
<tr>
<td>Investment allowance</td>
<td>not yet published</td>
<td>394</td>
</tr>
<tr>
<td>Investment capital funds</td>
<td>OJ C 318, 13.11.2001</td>
<td>Box 10</td>
</tr>
<tr>
<td>IVECO (IT)</td>
<td>OJ L 292, 9.11.2001</td>
<td>417</td>
</tr>
<tr>
<td>Job rotation</td>
<td>OJ C 268, 22.9.2001</td>
<td>380</td>
</tr>
<tr>
<td>Kartogroup</td>
<td>OJ C 5, 9.1.2001</td>
<td>401</td>
</tr>
<tr>
<td>Landesbanken (Germany)</td>
<td>not yet published</td>
<td>Box 11</td>
</tr>
<tr>
<td>Lautex GmbH</td>
<td>OJ L 42, 15.2.2000</td>
<td>484</td>
</tr>
<tr>
<td>Lintra Beteiligungsholding</td>
<td>not yet published</td>
<td>390</td>
</tr>
<tr>
<td>Loading and unloading facilities for inland waterway vessels</td>
<td>OJ C 24, 26.1.2002</td>
<td>444</td>
</tr>
<tr>
<td>Modification of aid to Philipp Holzmann AG</td>
<td>not yet published</td>
<td>391</td>
</tr>
<tr>
<td>Network grants for licensed heavy rail infrastructure managers</td>
<td>OJ C 333, 28.11.2001</td>
<td>429</td>
</tr>
<tr>
<td>Nissan Micra</td>
<td>OJ L 140, 24.5.2001</td>
<td>416</td>
</tr>
<tr>
<td>Non-volatile flash memories</td>
<td>OJ C 199, 14.7.2001</td>
<td>377</td>
</tr>
<tr>
<td>Nuclear power plants</td>
<td>not yet published</td>
<td>371</td>
</tr>
<tr>
<td>Planning for natural disasters</td>
<td>OJ C 71, 3.3.2001</td>
<td>474</td>
</tr>
<tr>
<td>Promotion of Piedmont airport system</td>
<td>not yet published</td>
<td>454</td>
</tr>
<tr>
<td>Topic</td>
<td>Document Reference</td>
<td>Pages</td>
</tr>
<tr>
<td>----------------------------------------------------------------------</td>
<td>-----------------------------</td>
<td>-------</td>
</tr>
<tr>
<td>Reductions in employers’ social security contributions for firms which introduce a 38-hour working week and a shorter working time</td>
<td>OJ C 268, 22.9.2001</td>
<td>369</td>
</tr>
<tr>
<td>Regional aid Flanders (expansion law)</td>
<td>OJ C 244, 11.9.2001</td>
<td>395</td>
</tr>
<tr>
<td>Regional selective assistance</td>
<td>OJ C 211, 28.7.2001</td>
<td>396</td>
</tr>
<tr>
<td>Regional Venture Capital Funds</td>
<td>OJ L 263, 3.10.2001</td>
<td>Box 10</td>
</tr>
<tr>
<td>Regularisation of the underground economy</td>
<td>OJ C 30, 2.2.2002</td>
<td>368</td>
</tr>
<tr>
<td>Santana Motor</td>
<td>not yet published</td>
<td>420</td>
</tr>
<tr>
<td>Schiphol Group AVI tax exemption</td>
<td>not yet published</td>
<td>453</td>
</tr>
<tr>
<td>Sidmar</td>
<td>not yet published</td>
<td>410</td>
</tr>
<tr>
<td>Société national maritime Corse-Méditerranée</td>
<td>OJ C 117, 21.4.2001</td>
<td>434</td>
</tr>
<tr>
<td>Spain: Aid to coal industry</td>
<td>not yet published</td>
<td>414</td>
</tr>
<tr>
<td>Stahlwerke Bremen</td>
<td>OJ C 244, 1.9.2001</td>
<td>410</td>
</tr>
<tr>
<td>Tax aid in the form of a 45% tax credit in the province of Alava</td>
<td>not yet published</td>
<td>398, 399</td>
</tr>
<tr>
<td>Tax aid in the form of a 45% tax credit in the province of Guipúzcoa</td>
<td>not yet published</td>
<td>398, 399</td>
</tr>
<tr>
<td>Tax aid in the form of a 45% tax credit in the province of Vizcaya</td>
<td>not yet published</td>
<td>398, 399</td>
</tr>
<tr>
<td>Tax aid in the form of a 50% reduction in the amount of corporation tax payable by business start-ups in the autonomous community of Navarre</td>
<td>not yet published</td>
<td>399</td>
</tr>
<tr>
<td>Tax aid in the form of a reduction in the amount of tax payable by certain new businesses in the province of Alava</td>
<td>not yet published</td>
<td>399</td>
</tr>
<tr>
<td>Tax aid in the form of a reduction in the amount of tax payable by certain new businesses in the province of Guipúzcoa</td>
<td>not yet published</td>
<td>399</td>
</tr>
<tr>
<td>Tax aid in the form of a reduction in the amount of tax payable by certain new businesses in the provinces of Alava, Guipúzcoa and Vizcaya</td>
<td>not yet published</td>
<td>399</td>
</tr>
<tr>
<td>Tax credits Mezzogiorno</td>
<td>OJ C 149, 19.5.2001</td>
<td>397</td>
</tr>
<tr>
<td>Tax measures applicable to mutual and provident societies in France</td>
<td>not yet published</td>
<td>472</td>
</tr>
<tr>
<td>UK — Climate change levy — N. Ireland</td>
<td>OJ C 263, 19.9.2001</td>
<td>386</td>
</tr>
<tr>
<td>UK climate change levy</td>
<td>OJ C 185, 30.6.2001</td>
<td>370, 383</td>
</tr>
<tr>
<td>Venture capital for small technology enterprises</td>
<td>OJ C 117, 21.4.2001</td>
<td>Box 10</td>
</tr>
<tr>
<td>Voest Alpine Donawitz</td>
<td>OJ C 318, 13.11.2001</td>
<td>409</td>
</tr>
<tr>
<td>Voest Alpine Linz, ECSC</td>
<td>OJ C 333, 28.11.2001</td>
<td>409</td>
</tr>
<tr>
<td>Wacker Chemie GmbH</td>
<td>OJ C 211, 28.7.2001</td>
<td>401</td>
</tr>
<tr>
<td>Waste disposal systems for car wrecks</td>
<td>not yet published</td>
<td>364</td>
</tr>
<tr>
<td>Waste disposal systems for paper and cardboard</td>
<td>not yet published</td>
<td>364</td>
</tr>
<tr>
<td>Zero tariff for green electricity</td>
<td>OJ C 30, 2.2.2002</td>
<td>363, 384</td>
</tr>
</tbody>
</table>
European Commission

European Union competition policy — 2001

Luxembourg: Office for Official Publications of the European Communities

2002 — 130 pp. — 21 x 29.7 cm

ISBN 92-894-3536-4