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XXIIIrd COMPETITION REPORT FROM THE COMMISSION

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<T4>

Introduction

1. The Annual Competition Report gives the Commission an opportunity to explain the main developments and cases of competition policy to the different Community institutions - the Parliament, the Economic and Social Committee, the Member States - as well as industry at large, which is directly concerned by its application, and the general public, which indirectly is the main beneficiary of its application. By presenting this Report in as non-technical language as possible, transparency is enhanced, a factor fundamental in any democratic society for the successful application of policy.

2. This year's activities have been marked by several major events in the Community's development - the entry into force of the Treaty on European Union, completion of the ratification of the European Economic Area Agreement, and the White Paper on growth, competitiveness and employment. This has given the opportunity in this Report, in addition to describing developments and activities during the year, to explore both how these three major landmarks will influence competition policy and conversely how competition policy is necessary to achieve the objectives these landmarks set out for the Community. This link between Community objectives and competition policy is a two-way process. It is inconceivable that competition policy could be applied without reference to the priorities fixed by the Community. But it is also important to realize how an effective competition policy will help to attain these goals.

3. Whilst this principle is not in dispute, the application of policy in practice will require careful consideration. In fact all the policy implications of the abovementioned major events have not yet been worked out and it is hoped that this Report will contribute towards the rich debate on how to achieve the correct balance in the application of competition policy and priorities which usually follows its launch. In this respect, this year's Report is a little more forward-looking than usual, in that in a by no means exhaustive summary, it suggests some of the ways in which competition policy may be adapted to meet the new Community priorities. The full details of these implications and the adaptation of policy to a rapidly changing world is an on-going and continuous process. Of course there are underlying principles that remain, and these are enshrined in the Treaty, but they

cannot be applied mechanically without reference either to the context within which they have their impact or the main objectives and priorities of the Community.

4. This reference to the context within which competition policy is applied is not a new phenomenon, but stems from the fact that competition is an instrument of Community policy. Since the beginning of the Community, competition policy has helped pursue fundamental Community goals. It has helped create, for example, a common market, a harmonious development of economic conditions and an accelerated raising of the standards of living. This role received a further boost with the Single European Act establishing the programme for a real internal market, where increased competition was seen as the mechanism by which many gains of this programme would be realized once the fiscal, administrative and other barriers were eliminated. Its role was further enhanced with the Communication of 1990 on industrial policy in open and competitive markets that gave an important role to competition policy in improving productivity of European industry in a rapidly changing world with increasingly globalized markets.

5. The Maastricht Treaty has added new goals. Inter alia, it introduced and deepened industrial, cultural and environmental goals. It also made explicit the principle of subsidiarity. In fact these three objectives and the subsidiarity principle are discussed separately and in depth in this report. The White Paper clearly laid out the policies to achieve growth, competitiveness and, even more importantly, employment. The need for competition policy to achieve these objectives and how these objectives affect the application of competition policy are also discussed. These developments do not devalue competition policy, rather they enhance it and give it renewed vigour and importance. A competition policy that did not have an impact on these policies or was not influenced by them would be marginalized and of less relevance.

6. In any year it is difficult and even dangerous to pick out any single points or policies to highlight in addition to the general and important considerations outlined above. The following remarks do not therefore in any way imply that any points not mentioned are not important. Rather they are meant to focus attention on areas that are seen as of growing relative importance.

- The first of these is the introduction of competition to monopolized sectors, where a major advance has been made in the field of telecommunications, but where steady progress in liberalization was made in other monopolized sectors. This is mentioned because of the gains that can be made from introducing for the first time competition into these sectors and the positive impact on competitiveness and employment of trans-European networks highlighted so clearly in the White Paper.

- Second is the introduction of competition into other sectors, notably services, previously to a large degree sheltered. Whilst there has been no single event to compare with the liberalization in telecommunications, the advance in policy in this area has been maintained. Again the White Paper stressed the employment potential in the service sector.

- Finally, the third area of growing relative importance to highlight is the international dimension of the Community's competition policy. This is particularly important this year because of the conclusion on 15 December of the Uruguay round in the GATT framework and the completion of the ratification process of the Agreement on a European Economic Area and hence its entry into force at the beginning of January 1994. These developments, taken together with continuing negotiations with countries in East and Central Europe, constitute major steps to freeing international trade and therefore changing the competitive environment in which the Community's competition policy is applied.

On the other hand it should also be stressed that the elimination of governmental barriers to trade such as tariffs and non-tariff barriers has made considerable progress in the past and that this pace is therefore unlikely to be maintained in the future. Further liberalization of regional or international trade flows therefore has to come in particular from the elimination of private obstacles to trade and other distortions of competition.

<T4> Structure of the Report

7. The Report comprises six parts and a large number of annexes. This structure should enable readers to find readily the information they are looking for.

8. Part One concerns the main developments in competition policy and is more general in scope than the other parts. It highlights developments in competition law in the year under review and also endeavours to forecast future trends. It covers all the aspects of competition policy and points up the cohesion that exists between these various aspects and between competition policy and other Community policies.

9. Part Two examines the application of the competition rules to enterprises. These rules are Articles 85 and 86 of the EC Treaty, Articles 65 and 66 of the ECSC Treaty and the Merger Control Regulation. Whilst this part is more descriptive, it does not discuss all the cases dealt with by the Commission but only those of particular interest for one reason or another. Other cases are also summarized in the annexes. In addition, Part Two not only provides an analysis of Commission decisions but also examines the decisions of the Court of Justice and the Court of First Instance.

10. Part Three is an innovation. Previously, developments concerning public enterprises and state monopolies were presented in the part dealing with aid. It seemed more appropriate to separate the two subjects, first because of the growing importance of competition policy towards such enterprises and, second, because the matters dealt with in this part are very mixed, relating to both the behaviour of the State and the behaviour of enterprises.

11. Part Four deals with the monitoring of aid and also discusses the main decisions of the Court of Justice on this subject. A traditional part of the Report, its importance needs no emphasis.

12. Part Five is also new. It covers the international aspects of developments in competition policy, an area that is gaining in importance and must therefore be given greater prominence.

13. Lastly, Part Six gives an account of the Commission's contacts with other Community institutions and with other international bodies. A traditional part of the Report, it describes the important part played by the primary addressees of the Report, the European Parliament and the Economic and Social Committee, in formulating Community competition policy.

14. There are a number of annexes to the body of the text. The Commission's aim is that the Report provide as full a picture as possible of developments in competition law in the past year. The full text is therefore supplied of all legislation or documents of particular relevance such as the resolutions of the European Parliament and the Economic and Social Committee concerning the preceding report (Annexes I and II). Annex III, as stated above, contains a summary of the most interesting cases decided on the basis of Articles 85 and 86 of the EC Treaty. Point 2 of Annex III provides a list of press releases on competition issues. In the field of aid, the list of press releases is supplied together with the list of decisions. No references are given in the body of the text in order not to overload it. Readers seeking a text or a document should simply turn to the Annexes.

15. Lastly, Annex V contains an analysis of the main developments in competition law in the Member States.

16. To conclude, it should be noted that DG IV has decided to appoint an "information officer" to deal with public requests for information on competition policy.

<T5>

Part One

<T1>

Main developments in competition policy

<T4>

Chapter I

<T2>

Maintaining a competitive environment

<T3>

§1. The contribution of competition policy to growth, competitiveness and employment

17., The present context of slower growth, a loss of competitiveness in certain sectors of the European economy and, especially, the particularly high level of unemployment calls for combined action on all Community policy fronts to meet these economic and social challenges. Competition policy has a central role to play in the Community's strategy for achieving a lasting recovery in growth and employment. The priorities which the Commission has set itself as regards competition are, therefore, largely determined by the contribution which competition policy can make to the Community's objective of growth, competitiveness and employment, as set out in the White Paper adopted by the Commission and presented to the first Council of the European Union in December 1993.(1)

18. The White Paper sets out as a policy priority for the European Union the creation of 15 million new jobs. It recognizes that there is no miracle cure. It identifies the different areas where action is needed to tackle this problem. One of the main themes running through the White Paper is the need for fundamental restructuring of the European economy if it is to meet the objectives laid down. In this respect, the White Paper stresses the need for the resolute application of the rules of competition including those for state aid and highlights the role this policy plays in eliminating market rigidities and improving flexibility in an increasingly dynamic economic context. This vigorous application of competition policy was also stressed by the summit of Heads of State or Government in December.

(1) White Paper on "Growth, Competitiveness and Employment. The Challenges and Ways Forward into the 21st Century", COM(93)700 final, 5 December 1993.

19. The stimulation of growth, competitiveness and employment has in fact always been one of the raisons d'être of competition policy. Competition encourages the efficient allocation of resources and stimulates research and development, innovation and investment. It is the mechanism by which resources and jobs are redirected towards growing sectors and away from ones with less promising futures. The importance of this traditional role of competition policy has been reinforced in recent years in two ways. Firstly, its part in making a reality of the internal market which will create jobs and stimulate growth and competitiveness is widely recognized.(2) Secondly, it is central to the Community's industrial policy.(3) The completion of a genuine internal market and an effective industry policy have received first priority in the White Paper. This in itself implies the need for renewed vigour in competition policy in areas where it complements and enhances these objectives.

Even though this firm competition policy needs to be maintained, the White Paper throws down a new challenge. It is essential to examine how competition policy can be applied even more effectively in helping to create growth and employment and how it can enhance or complement the other Community policies set out in the White Paper. This chapter will examine the link between competition policy and the major structural changes that are necessary in the European economy if it is to meet the objectives of the White Paper. This Report does not present a definitive statement - this will have to await a full in-depth review - but instead some preliminary ideas of the future direction of thinking.

20. One of the Commission's priorities is, by pursuing a clearly defined policy and reaching rapid decisions, to facilitate mergers and cooperative arrangements between firms that do not jeopardize effective competition and the dynamics of the market. Mergers can contribute to the restructuring of the economy, while cooperative arrangements may, for example, allow considerable economies of scale. These facilitate improved product quality, technological research and implementation of its results, and the entry of firms onto new markets. The White Paper emphasizes the efficiency-enhancing qualities as well as the fillip to research, innovation and product development that can come from cooperation between companies and can add to the competitive pressures on the market. It notes in particular how the

(2) See points 149 to 154 of this Report.
(3) See points 155 to 161 of this Report.

structure of competition must be seen in many sectors in an increasingly global context. This balance between the efficiencies of cooperation and the real competitive context within which cooperation takes place are essential elements to be taken into account in the assessment of this cooperation under the rules of competition.(4)

21. If they are to become more competitive, European firms must also reduce costs and gain access to more efficient services in key sectors such as financial services and public services, particularly telecommunications, transport and energy. Only through liberalization will the full positive effects on productivity be achieved that stem both from the encouragement of private capital to participate in the construction of infrastructure and from the reduction of the price of goods and services offered via such infrastructures. These infrastructures, which need to be expanded into trans-European networks, will be able to contribute fully to the restructuring of the European economy and to bring about fundamental changes in investment and services only within a liberalized framework. In fact, trans-European networks are assigned a central role by the White Paper and the progressive introduction of competition in these fields remains a priority objective for the Commission.(5) However, it should be noted that, when competition is first introduced in previously monopolized sectors, the prices of some goods and services may increase as hidden or cross-subsidies are eliminated.

Policy in this area and the reasons for the emphasis placed on it are best illustrated by the review of telecommunications which was completed this year and highlighted the growth potential of this sector, its importance to the competitiveness of the rest of industry as a vital input, its importance in terms of current jobs and job-creating potential, its demand for huge investment and advanced technology (hardware and software inputs) and, lastly, its social role via the universal service provisions.

If successful, the bottlenecks relieved by investment in this and other trans-European networks will have a large and positive effect on growth, competitiveness and employment. This challenge can be met only if competition policy is coordinated with the other Community policies that must be implemented.

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(4) See points 74 to 89 of this Report.
(5) See points 36 to 42 of this Report.

22. Another area highlighted in the White Paper as central to the creation of employment and the encouragement of flexibility is SMEs. SMEs have long received favourable treatment from the application of competition policy.(6) Further enhancement of this policy may be necessary to exploit even further both their job-creating potential and their ability to take up readily new and innovative technologies and to be quick to seize new market opportunities. Already, and in line with the White Paper, the state aid policy towards SMEs, as expressed in the aid framework, puts emphasis on "soft" aid designed to improve both labour flexibility (e.g. aid for training) and their technical and marketing potential ("soft" aid to technical and other knowledge-based inputs(7)). SMEs are also accorded preferential treatment in regard to investment incentives and aid for R&D and the environment.

23. State aid policy in general has an important role to play in encouraging and facilitating the major structural changes identified in the White Paper.(8) In the first place, a firm policy must continue to be pursued in order to prevent individual Member States from using aid defensively and negatively to resist the necessary structural changes and from shifting the cost of adjustment in terms of output and jobs onto other Member States. On the other hand, aid can play a positive role in this restructuring. It can speed up change, encourage R&D and innovation, and alleviate the social consequences of large and sudden changes. Europe is often accused of having good basic research but a disappointing record of innovation, having a rigid labour market and poor job-creating potential despite long-term overall economic growth. State aid policy needs to be examined in the light of the White Paper to see whether it is working effectively and in particular whether there is a need to correct the bias in favour of capital investment and against investment in human, organizational and knowledge-based resources.

Particular attention will have to be paid to ensuring that aid, in whatever form or for whatever factor of production, does not artificially prop up untenable jobs with no long-term future, but rather that it helps to restructure the economy in the direction of investment-generating viable jobs. Aid must not be used to second-guess the market because state intervention in this area has not always been successful. Rather, policy

(6) Twenty-second Competition Report, points 78 to 79.
(7) See points 430 to 432 of this Report.
(8) See points 27 to 35 of this Report.

needs to concentrate on horizontal measures and on areas where there is a failure of the market either to invest enough or to invest quickly enough (notably R&D, the environment, innovation and training). Central to the White Paper is the role of research, development and technology, and investment in human and non-physical capital in changing the growth, competitive and employment pattern of the Community. Competition policy in all its aspects must continue to play its role.

24. Aid policy, along with policy towards enterprises, will have to be coherently developed and applied in areas where the competition rules are not yet applied in a fully effective manner. This is not only true for the regulated sectors mentioned above, but even more so for many service sectors, e.g. financial services and the audiovisual sector.(9)

The fact that these sectors have long been sheltered from competition means that the gains from introducing effective competition are all the greater not only in terms of reducing prices to consumers but in terms of underpinning the competitiveness of the rest of industry, which needs as an input reasonably priced and innovative services from these sectors. Neither should the job-creating potential of these service sectors be ignored. For a long time, their contribution as a percentage of gross domestic product and to employment growth has been greater than that of industry. An increasingly dynamic service sector, underpinned by the effective application of competition policy, will inevitably continue to be one of the major sources of employment generation. This is best illustrated by a example from the White Paper. The audiovisual sector is thought to employ at least 1.8 million people. Recent estimates point to a doubling in the medium term of the share of household expenditure given over to audiovisual software products. If this growth is translated into jobs in Europe, it could create 2 million new jobs by the year 2000. Application of the competition rules in this sector must, however, take account of other Community policy objectives, notably as regards pluralism in the media and the promotion of culture.(10)

25. Lastly, the White Paper underlines the international dimension of the problem of improving Europe's growth, competitiveness and employment. Europe is an integral part of an increasingly global economy. As trade is freed from governmental constraints and barriers, a movement given renewed impetus

(9) See points 117 to 122 and 143 to 146 of this Report.
(10) See points 90, 143 to 146 and 172 to 177 of this Report.

by the successful conclusion of the GATT Uruguay Round, the role of competition policy at international level becomes even more crucial.(11) This development of the Community itself illustrates the point that competition policy can facilitate economic integration.

Whereas in most countries competition policy has traditionally been seen as a purely national prerogative, the Community was the first to practise a policy which tried to deal with the impact that distortions of competition had on trade. Originally only applied within the Community, this approach has been gradually extended to trade with the Community's main trading partners in Europe as well. Thus, competition policy has played a major role in furthering international trade and in particular the scope for our companies to export to other markets, hitherto sealed off by anti-competitive practices, state aid or public monopolies.

Not all of the Community's main trading partners have followed a similar approach of applying their competition policies to open their markets to imports, however. Such policies are lacking in particular in a number of countries in East and South-East Asia, whose markets are closed not so much by tariffs and non-tariff barriers but mainly by anti-competitive practices. The "Keiretsu" in Japan and the closed distribution systems in several countries are but two important examples of this phenomenon.

It is a Community priority to seek to establish rules governing these competition problems. Ideally, such rules should be agreed multilaterally in order to give them the broadest coverage possible. The present GATT Round does not deal with the issue, even though certain codes (in particular the TRIPS and Services Codes) include provisions on restrictive business practices. The World Trade Organization, created as part of the Round's package, should cover competition policy issues as part of its immediate agenda, focusing especially on restrictive business practices and cartels. The aim should certainly be to agree on minimum substantive rules but, more importantly, to lay down procedures to ensure enforcement of these rules by each of the contracting parties. For it is only through their enforcement in individual cases that the positive market-opening effects can be achieved. The right of recourse to GATT panels should be strengthened, as should the effectiveness of their adjudications. Bringing in effective rules of this

(11) See points 96, 97 and 114 to 116 of this Report.

kind will be difficult and time-consuming but it is high time to begin the process.

26. In the short term, the first step is to agree on a system of consultation and cooperation with the competition authorities in non-Community countries so as to prevent any potential conflict. The Commission has concluded an agreement with the US competition authorities to limit any conflicts through a consultation, cooperation and coordination process.

If the agreement, currently being examined by the Court of Justice, is accepted, it can serve as a model in other negotiations. Discussions along these lines have already been held with the Canadian authorities, and other countries could follow suit. Since one of their main objectives is to limit any conflicts to which their implementation might give rise, such agreements can be concluded only with those authorities that actually implement competition rules.

<T3>

§2. State aid

27. The control of state aid is part of the essential regulatory framework which will underpin and facilitate achievement of the objectives of the White Paper on growth, competitiveness and employment. It is a measure of the acceptance state aid control at Community level has gained that in the White Paper it is taken for granted. The Heads of State or Government at the Brussels European Council on 10 and 11 December emphasized the importance of state aid policy in the context of the White Paper strategy. The year's developments in the state aid sphere bear this out.

28. The control of state aid at Community level is vital, first of all, for the success of the single market programme, one of the factors that will improve the Community's competitiveness. Opening markets and keeping them open has always been one of the main functions of state aid control, as of competition policy generally.(12) In a more integrated market, the distortive effect of certain types of aid is magnified and so control of aid is even more important. This is especially obvious in industries with chronic structural problems, the so-called "sensitive sectors", which are subject to stringent aid frameworks. The policing of the aid rules in the steel, shipbuilding, synthetic fibre and motor industries was a high priority in the recession year 1993.(13) Increased attention also has to be paid to potentially distortive aid in other sectors. The Commission was reminded by the Court of Justice that when in doubt it must check the market situation carefully before rejecting complaints from competitors.(14) The concern to keep markets open and indeed to foster integration is also seen in many other areas of state aid work. National regional aid is controlled in such a way as to counteract the pull towards the most prosperous regions and encourage inward investment in the underdeveloped areas or in areas faced with industrial decline, in order to integrate these regions into the mainstream. Clearly, state aid also needs to be controlled closely in markets only now being opened up to competition such as energy and telecommunications.

29. The White Paper sees resistance to structural adjustment from declining to expanding industries as part of the reason for Europe's poor recent record of growth and job creation. The sluggishness of European economies in

(12) See point 157 of this Report.
(13) See points 480 to 533 of this Report.
(14) See point 533 of this Report.

adapting supply to demand has many causes: closed markets, a bloated public sector, labour-market rigidities, subsidies, etc. Fortunately, on many of these points the situation has vastly improved in the last ten years and is still improving. Trade barriers have been dismantled in the Community and are now falling between the Community, the rest of Europe and the rest of the world. Governments have rolled back state involvement in industry or are now doing so. As for subsidies, the Commission has always campaigned against state aid that simply allows firms to put off restructuring. This approach has been vindicated. Aid may be legitimate to ease restructuring, particularly its social consequences. Access to aid for this purpose can facilitate restructuring. But aid must not delay restructuring indefinitely. The events of the past year - the steel industry restructuring and the struggle over automatic guarantees of public-sector companies' debt(15) - underlined this message but only confirmed how hard it is sometimes to apply in practice.(16)

30. Stopping the waste of public money on businesses in need of restructuring has beneficial macroeconomic effects. It helps reduce budget deficits. As the White Paper points out, achieving the macroeconomic criteria for EMU, especially reduction of deficits, is an important condition of the growth strategy. This and the diversion of income from private consumption to investment will release the huge resources needed for trans-European networks and investment in growth sectors.

31. The Commission has always emphasized its positive attitude towards certain kinds of aid as long as they remain within certain limits and contribute to Community objectives. Incentives for small and medium-sized enterprises are one such category. The White Paper places great hope in SMEs for Europe's development. In its state aid policy the Commission has long recognized this contribution. Its guidelines on aid to small and medium-sized enterprises of May 1992 are quite explicit about, for instance, the financing handicap of SMEs - a point emphasized at the 1992 Edinburgh and 1993 Copenhagen summits with the proposed launch of loan guarantee and soft loan facilities - and the value of "soft" aid for training and consultancy. The Commission discussed the subject of aid for training and dissemination of information to SMEs at a multilateral meeting with Member States in

(15) See point 374 of this Report.
(16) See point 23 of this Report.

December.(17) In its new aid guidelines for environmental protection, the Commission also adopted a more favourable attitude towards support for SMEs.

32. It is also the Commission's long-standing policy to look favourably on support for research and development (R&D) and protection of the environment, two more areas to which the White Paper attaches priority. The Commission allows national support to cover a relatively high proportion of the costs of projects, depending on the distance of the R&D from the market, which partly determines the risk, and on the form in which the support is provided.(18)

33. The policy towards aid for environmental protection was reviewed in 1993. In the new aid guidelines,(19) further progress is made towards a wider application of the "polluter pays" principle and the Commission builds on experience which has shown the importance of incentives for investment that goes beyond mandatory requirements. Such investment may in future be aided at a higher rate than that which merely helps firms to adapt plant to new standards. Subsidies for buying environmentally friendly products, relief from new environmental taxes, and aid for recovery and recycling of waste are also now covered. The guidelines should contribute to realizing the hope that the White Paper has placed in environmental progress by increasing transparency and providing a broad policy framework for environmental subsidies.

34. The Commission normally takes a positive attitude towards state aid for the audiovisual sector, another growth area identified by the White Paper. It has never objected to film industry support schemes, except those designed to remove discrimination. Discrimination against EC nationals cannot be allowed even for cultural reasons. New Article 92(3)(d), inserted by the Treaty on European Union, provides a specific exception for aids to cultural activities and the arts.

35. It can be seen, therefore, that the Commission's state aid control is already furthering the objectives of the White Paper and the Treaty on European Union. By holding firm against distortive and wasteful aid and by controlling other subsidies only to the extent necessary to avoid abuse, the Commission is helping to create the necessary conditions for this strategy to succeed.

(17) See points 383 and 430 to 432 of this Report.
(18) See points 160 and 414 to 464 of this Report.
(19) See point 384 of this Report.

<T3> §3. Liberalization and privatization

36. There are two aspects to the Community competition rules. On the one hand, they are intended to maintain a competitive environment undistorted by firms or by state involvement. This is the role of Articles 85 and 86 of the EC Treaty, Regulation (EC) No 4064/89 on merger control, Articles 65 and 66 of the ECSC Treaty, Articles 92 and 93 of the EC Treaty and, to some extent, Article 90 of the EC Treaty. On the other hand, they may also be used to introduce greater competition into certain sectors in which Member States have conferred monopolies on certain enterprises. Article 90 of the EC Treaty also allows the Commission to take action against such Member States where they grant exclusive or special rights to certain firms in breach of the rules laid down in the EC Treaty. Article 90(3) provides the Commission with two possible courses of action: either it can adopt directives, i.e. acts that are generally applicable, or it can address individual decisions to specific Member States. The provisions of the Treaty that may be infringed in this context are, for example, those governing the freedom to provide services, those relating to freedom of establishment and, once again, Articles 85 and 86.

However, the EC Treaty does not concern itself with the question of whether the enterprises enjoying such exclusive or special rights are publicly or privately owned. Article 222 of the EC Treaty stipulates clearly that the Treaty does not in any way prejudice the rules in Member States governing the system of property ownership.

Parallel to such action vis-à-vis Member States, Article 90(2) provides that public undertakings and undertakings on which the state has conferred exclusive or special rights are not entitled to any preferential treatment in the implementation of the competition rules. The only exception concerns restrictions of competition that may be authorized where they are necessary for the performance of the particular tasks assigned to the undertakings. This is because certain undertakings are required to perform specific tasks on behalf of all consumers. Such tasks in the general economic interest may justify the granting of exclusive or special rights. The nature of the particular task varies according to the type of activity

concerned and, in practice, poses difficult problems of definition.(20) The exception provided for in Article 90(2) of the EC Treaty reflects the Community's intention of not obstructing the performance of such particular tasks.

37. A look at the sectors in the Community in which such exclusive or special rights exist shows that the prices charged are often higher than those charged in countries in which such sectors are open to the forces of competition. This is particularly the case with transport, telecommunications and energy. Furthermore, the lack of competitive pressure means that there is sometimes no incentive to pursue technological innovations and, in particular, it deprives consumers of the ability to choose between different technologies. This sort of situation is prejudicial to the competitiveness of Community industry as a whole since firms in such sectors cannot take advantage of the benefits of a genuine internal market. As the Commission has pointed out in its White Paper on growth, competitiveness and employment, this has probably resulted in job losses in Community industry. Moreover, the effect is twofold: over and above the actual job losses borne by industry as a whole, the situation prevents more firms from operating in the relevant sectors, which are themselves sources of employment. The introduction of competition will have beneficial effects in the medium and long term. However, in the short term, the introduction of competition, often accompanied by privatization, and the ensuing rationalization may cause a reduction in employment as a result of the shake-out associated with the anticipation of increased competitive pressures.

Furthermore, consumers as a whole are certainly penalized by the lack of effective competition in such sectors. On the one hand, the costs of such services are higher for them and, on the other hand, they suffer the consequences of the loss of productivity for Community industry as a whole. It is for this reason that the Commission considers that the introduction of greater competition is essential if the productivity of Community industry as a whole is to be improved. A more detailed analysis of developments in these sectors is given in Part One, Chapter III of this Report.

(20) See points 123 to 135 of this Report.

38. In addition to the specific features mentioned, a number of other general points should be highlighted. Firstly, although the Commission has far-reaching powers under Article 90(3) of the EC Treaty, it prefers to adopt a consensual approach and pursue gradual liberalization, taking particular account of the time required to adapt the price structure and to ensure that the task of providing a universal service (i.e. one which is essential to all consumers) is fulfilled. The pace at which this is carried out will depend closely on the specific features of the relevant sector. The best example of this differentiated approach is telecommunications. Here, technological developments have made the de jure monopolies that exist in most Member States obsolete. Consequently, liberalization will take place more rapidly in this sector.

39. Secondly, the gradual introduction of greater competition does not mean that all rules will eventually be abolished. Account must also be taken of the major objectives that have to be pursued in these sectors, objectives for which rules and regulations must be adopted. Thus, in transport, competition must not be to the detriment of passenger safety, and rules must be laid down to cover this. Similarly, in telecommunications and the postal sector, a universal service must be provided, without neglecting the social aspects of telecommunications, such as the help they provide for the elderly or the handicapped. In the energy sector, security of supply must be maintained, as must the universal service in the case of electricity. In all these instances, the aim must not be to replace one kind of bureaucracy by another, operating at Community rather than national level. If Community industry is to become more competitive, it must not be constrained by an over-rigid environment. However, basic standards designed to safeguard these objectives must be worked out at Community level.

Lastly, in all these sectors, the major difficulty is to establish the dividing line between activities that can continue to be reserved for a given undertaking and those which must be freely accessible to other undertakings,

without undermining the objective of market integration. The Commission recognizes that objectives legitimately pursued by Member States mean that some activities must be shielded from all competition, at least temporarily. If this were not the case, there would be a risk that firms acting on the basis of strictly commercial criteria would carry out only the most profitable activities at the expense of the public-interest task which the Member States wished to see performed. This dividing line, and the duration of any protection granted, must be decided on a case-by-case basis in the light of the characteristics of each of the sectors concerned. However, the Commission considers that any areas thus reserved must be confined to what is strictly essential in order to perform such public-service tasks.

40. The competition rules laid down in the EC Treaty will still have an important role to play once these sectors are liberalized. Steps must be taken to ensure that enterprises operating on these markets do not, through restrictive practices, abuses of dominant positions or mergers, deprive consumers of the benefits resulting from de-monopolization. The Commission will be particularly alert to any risks of infringement of Article 86 of the EC Treaty, which prohibits abuse of a dominant position. Even where there is de jure liberalization of access to infrastructures, undertakings previously granted exclusive or special rights will undoubtedly remain in a de facto position of strength on such markets, at least for some time to come. It must therefore be ensured that they do not use this position to restrict competition either on the market in question or on others.

As regards the first of these two concerns, the Commission will, in cases where infrastructure access is liberalized, certainly have to see to it in particular that third-party access to existing infrastructures does not entail any unwarranted restrictions. If competition is to be established, other undertakings must be able to benefit from such infrastructures on non-discriminatory terms. The Commission is aware that it may, in some instances, be difficult to draw up fair prices for infrastructure access. There may be grounds for requiring other undertakings enjoying access to existing infrastructures to pay the owner of the infrastructure. The owner has incurred and continues to incur certain costs for maintaining it. Furthermore, the owner has to continue to perform its universal service task, which imposes additional costs on it not borne by other undertakings. However, the price charged must not be such as to prevent any scope for real

access by other undertakings. In addition, such other undertakings will be endeavouring to penetrate a market which had hitherto been closed. One of the sectors within which the Commission is at present looking into such questions is telecommunications.

Furthermore, there is certainly a risk that such undertakings may use their position of strength in the sector in which they had or still have a monopoly to subsidize their activities in other markets where they face fiercer competition. This danger of cross-subsidization is undoubtedly greater in the sectors to be deregulated, since transparency has rarely been a feature of the accounts of such undertakings. The reverse situation, in which profits earned in non-regulated sectors are used in part to comply with the universal service requirement, is not in principle objectionable.

Lastly, the rules laid down in the Merger Control Regulation should ensure that undertakings to which exclusive rights have been granted do not, through acquisitions, create situations in which competition from other firms is not in fact possible. However, the Commission does not intend to oppose such regroupings where their real purpose is to allow firms to cope with the new competitive environment, which may sometimes be worldwide.

41. As stated above, the EC Treaty does not in any way prejudice the ownership of such undertakings. Nevertheless, the fact remains that the entry of new competitors onto the market, combined with the limited margin for growth in public expenditure in the Member States, will probably result in some privatization of these sectors, particularly if private enterprises can hope to benefit from an open environment. This is indeed one of the reasons why the Commission intends to promote the creation of genuine trans-European networks in certain sectors. The amount of investment required to gain effective access to such sectors will very probably entail forms of partnership between private-sector firms or between the public sector and the private sector. Such forms of cooperation will undoubtedly have to be examined in the light of the Community competition rules, either on the basis of Article 85 of the EC Treaty or on the basis of the Merger Control Regulation, so as to ensure that they do not result in the creation of new monopolies. Subject to this reservation, the Commission will very

probably promote agreements of this kind if they help to meet its fundamental objective of introducing more competition into such sectors and allowing them to develop.

42. In the case of privatizations, it is essential to ensure that any aid is strictly controlled. Aid can give the business privatized an unfair competitive advantage which prevents real competition developing and defeats the purpose of liberalization. Privatizations by stock-exchange flotation or open unconditional tender with the business being sold to the highest bidder do not normally raise state aid concerns. In all other cases, the Commission requires notification of the proposed sale to enable it to check whether aid is being granted. The purchaser must not receive the assets at a price below their true value. Nor must a business be kept going artificially with aid when it is in need of restructuring or indeed should be closed down. The principles the Commission applies in vetting privatizations under the state aid rules are described in the state aid chapter.(21)

(21) See points 402 and 403 of this Report.

<T3>

§4. Merger control

<T5>

(a) Background to the review exercise

43. After arduous negotiations, the Merger Control Regulation was unanimously adopted by the Council on 21 December 1989 and entered into force nine months later. The Regulation was to be reviewed after four years, i.e. in 1993. However, the review has not taken place, for the reasons set out below. Within the framework of the single market, it was essential to have an adequate legal instrument available both for maintaining effective competition that might be removed through acquisitions having cross-border effect and for facilitating the economic integration process. This objective is certainly still relevant, since the achievement of the internal market, and thus the need for firms to operate on much larger markets, is a phenomenon that will continue in future because of the various measures taken by the Community to extend the internal market in all sectors of activity. Some of the relevant measures are described in this report.

44. Subject to certain exceptions reflecting the application of the subsidiarity principle and the justified need for Member States to be able to protect legitimate interests compatible with Community law, the essential feature of the Regulation is that it establishes an exclusive Community jurisdiction for the competition-based assessment of all concentrations where certain turnover thresholds are satisfied. On the one hand, the thresholds must not be so high that concentrations having a genuine Community dimension are excluded but, on the other, they must not be so low that operations of primarily national interest are caught. The subsidiarity principle does not mean that all mergers must be dealt with at national level but rather that each merger should be examined by the most appropriate authority, which may be a national authority in some instances but the Commission in others. In accordance with this application of the subsidiarity principle, there is a concomitant requirement to find the right level of thresholds for striking the best balance in the difficult exercise of allocating institutional jurisdiction. At the same time, having regard to the desirability of a relatively simple rule for establishing jurisdiction in the interests of transparency and legal certainty, it must be recognized that, even if the

ideal balance is struck, there will inevitably be some borderline cases falling outside Community jurisdiction that would be better handled under the Regulation and vice versa.

45. The technical difficulty of setting thresholds was compounded by the absence of experience as regards practical application of the Regulation. Consequently, the Council recognized this uncertainty by adopting a two-stage approach to the determination of thresholds and agreed to review the initial thresholds within four years of adoption of the Regulation, i.e. before the end of 1993.(22) Furthermore, the thresholds were to be reviewed on the basis of a Commission proposal requiring qualified-majority voting.

46. At the time of the adoption of the Regulation, the Commission itself declared that, at the end of this initial stage of implementation, the main (i.e. world) turnover threshold should be reduced from ECU 5 000 million to ECU 2 000 million and that the Community turnover threshold of ECU 250 million should also be revised in the light of experience and any change in the main threshold. If the same proportionate reduction is applied to the Community threshold as to the main threshold, this would imply a revised Community threshold of ECU 100 million instead of the existing threshold of ECU 250 million. This is not to say that there would be no significant operations below these thresholds. Rather, the assumption is that below this level concentrations would principally have a national impact and, in accordance with the subsidiarity principle, would therefore be better handled at that level.

47. As any change in the threshold would affect the jurisdictional allocation between the Member States and the Commission, it was also appropriate at the same time to review Article 9 of the Regulation, which governs the terms on which a Member State can ask that cases falling under the Regulation are nevertheless referred by the Commission to the competent national competition authorities.(23) Referral under Article 9 reflects the practical application of the subsidiarity principle although this finds its

(22) Article 1(3).
(23) Article 9(10).

principal expression in the level of the turnover thresholds, and in particular in the two-thirds exclusion rule for national turnover.(24)

48. In addition to turnover thresholds and referral procedures, both the Council and the Commission had declared that other aspects of the Regulation should be examined, including turnover allocation for joint undertakings, a more precise concept of banking income and the arrangements for the publication of the opinions of the Advisory Committee.

<T5> (b) Progress on implementation to date

<T6> Summary of decisions and economic profile of cases

49. In the three years and three months that the Regulation has been in force, 193 notifications have been received. Since the individual decisions arising from these notifications are commented on either in previous competition reports or in this year's report, only the essential features are summarized below.

	1990	1991	1992	1993	Total
Number of notifications	12	63	60	58	193
Article 6(1)(a) decisions	2	5	9	4	20
Article 6(1)(b) decisions	5	50	47	49	151
Article 6(1)(c) decisions	0	6	4	4	14
Article 8(2) decisions					
without conditions	0	1	1	1	3
with conditions	0	3	3	2	8
Article 8(3) decisions	0	1	0	0	1
Article 9 referral	0	0	1	1	2

(24) The Regulation provides that a merger does not have to be notified under it where each of the undertakings concerned achieves more than two thirds of its turnover in one and the same Member State.

50. A total of 6 requests have been received under Article 9(2) and in one case a Member State has requested the application of Article 22(3), which permits the assessment under the Regulation of a concentration having no Community dimension.

51. The majority of cases notified were in the manufacturing sector, e.g. food and drinks, chemicals and motor vehicles, although there was also a large number of operations in service activities such as retailing and wholesaling, computing, banking and insurance. By far the greatest number of notifications concerned undertakings from Germany, the United Kingdom and particularly France.

52. Reflecting the aims of the Merger Control Regulation, nearly three quarters of notifications concerned undertakings from different Member States or from a non-member country. A similar number of cases related to geographical reference markets that were either Community-wide or extended over more than one Member State.

<T6> Effectiveness and efficiency of application

53. Over the last three years, the Commission has applied the Regulation in conformity with its fundamental objectives: allowing concentrations which bring about necessary corporate reorganizations in the Community as a result of the opening of national markets to Community and world markets, while prohibiting or modifying concentrations which are likely to produce lasting damage to effective competition in the common market or in a substantial part of it.

54. Although the Commission has taken only one prohibition decision(25) and although, in one other case,(26) the notification was withdrawn as a result of Phase II proceedings being initiated, the scope of Commission intervention is much wider than suggested by these bald statistics.

55. The very existence of EC merger control legislation, supplemented by the considerable amount of informal guidance given to undertakings by the Commission's departments, has had a significant preventive effect on anti-competitive business strategies in the Community. Moreover, of the

(25) IV/M.052 - Aérospatiale/Alenia/De Havilland.
(26) IV/M.238 - Siemens/Philips.

Phase II cases, closed by means of a decision under Article 8, eight were cleared only after the Commission had attached conditions and obligations modifying the original concentration plan. Furthermore, in an additional seven Phase I cases, the Commission cleared the concentration only after the parties had entered into commitments to remedy identified competition problems.

56. In these cases, effective competition was preserved and developed mainly through three types of remedy, namely, the removal of entry barriers, the ending of capital, personal or structural links and the divestiture of assets or shares.

57. If parties had not been willing to modify the original concentration plan, then inevitably there would have been a greater number of cases where proceedings would have been initiated or a prohibition decision taken.

58. Current implementation of the Regulation has been widely regarded as successful. The speed, legal certainty and one-stop regulatory control provided by Commission decisions have been greatly valued by the business community and by legal practitioners. At the same time, the Regulation creates a level playing-field for major acquisitions in the Community since these operations are subject to the same rules applied on a Community-wide basis. This is a further example showing that the establishment of a genuine internal market requires uniform and effective competition rules.

<T6> Link between Community and national merger control policies

59. With the growing integration of EC markets, there are fewer and fewer markets of purely national dimension. This trend towards integration of national markets is in itself pro-competitive and is reflected partly in the high number of clearance decisions. Nearly all Member States have introduced national merger control for mergers below the threshold set by the Regulation. This development is welcomed by the Commission since it guarantees a complete system for maintaining effective competition both at the national and at the Community level.

60. However, the greater the degree of integration, the more desirable it is that business should be able to conduct its corporate acquisition strategy on a Community-wide basis subject to a common set of rules. It is therefore essential that the objectives, methodology and procedures of national and Community merger policies converge as far as possible. Even if the turnover thresholds of the Merger Control Regulation are reduced, there remains an enduring need for increasing harmonization in a single market. It is not feasible for all mergers to be made subject to a single control procedure. National laws will therefore at all events still have a role to play.

<T5> (c) Scope for revising the Regulation

<T6> Thresholds and Article 9 referrals

61. In accordance with the requirements laid down in the Regulation, the Commission has examined the case for revision of turnover thresholds and referral procedures. It considers that there are strong arguments in favour of threshold reduction.

62. One consequence of the advent of additional national systems of merger control is that the number of regulatory stops has increased for concentrations having a genuine Community dimension but falling below the existing thresholds. At the same time, the single market programme has triggered an unprecedented wave of cross-border merger activity within the Community, while the crisis situation confronting Community industry has led to restructuring operations between firms that may take the form of mergers. Although the level of merger activity since 1985 has fluctuated in line with the overall level of economic activity, analysis of the general data collected by DG IV shows there has been a doubling in the number of cross-border mergers in the Community. Indeed, in pre-notification meetings, the Commission has encountered many cases having a strong impact on competitive conditions in the Community but falling below the existing thresholds. Consequently, the advantages of the one-stop shop and the need for a level playing-field caused by increasing integration are even greater today than in 1989.

63. In order to investigate the practical impact of threshold reduction, the Commission conducted a special survey among nearly 300 of the Community's largest businesses as well as among associations representing the business

community. Although merger activity fluctuates a great deal, the survey results indicated that, if the world and Community thresholds were lowered to ECU 2 000 million and ECU 150 million respectively, the Commission would have to handle some 110 cases per year compared to about 60 per year so far. More significantly, the great majority of extra cases would also have genuine cross-border effects.

64. There is also institutional support for threshold reduction from Parliament(27) and the Economic and Social Committee.(28) Although industry is broadly in favour of lower thresholds, views in Member States differ signficantly, with the national industry associations in northern Europe generally in favour but those in southern Europe holding a more reserved opinion.

65. In particular, among national competition authorities there is considerable hesitancy not only as regards threshold reduction but also as regards any legislative change to the Regulation at the present time. They consider that insufficient experience has been acquired with the application of what is admittedly still a relatively new Regulation and that cases currently falling below existing thresholds could be adequately dealt with by the national authorities. Moreover, they point to the fact that in the period since adoption inflation has already reduced the real level of thresholds and to the impact of the future enlargement of the Community.

66. Bearing in mind these differing views, the Commission considers it premature to propose a reduction in thresholds at the present time. It is especially concerned that, without more broadly based support from national authorities and business, a proposal requiring substantive changes in the balance of jurisdiction between the Member States and the Community may jeopardize the existing consensus and commitment built up around the Regulation.

67. With regard to the referral procedure, since it is now the general position of the Commission either to refer a case to the national authorities or to open Phase II proceedings where a justified request has been lodged, it

(27) Point 26 of the Resolution on the Nineteenth Report on Competition Policy, 24.1.1991. See Annex I to the Twentieth Competition Report.

(28) Point 1.3.2 of the Opinion on the Twenty-first Report on Competition Policy, 25.11.1991. See Annex I to the Twenty-second Competition Report.

is generally considered that the current terms of Article 9 provide an adequate instrument if existing turnover thresholds are maintained, although these terms would have to be re-examined if thresholds were lowered.

68. Given that no change is proposed at this stage to the principal substantive issues of the review (i.e. threshold and referral procedures), the Commission considers that the examination of other possible improvements requiring an amendment of the Regulation, including the implementation of the concept of banking income for threshold calculation, should be deferred and re-examined in the context of any proposal for amendment that the Commission may make, in particular in relation to thresholds, between now and the end of 1996.

<T5> (d) Conclusion

69. Although the Commission holds the view that there are sound administrative, economic and legal arguments in favour of threshold reduction, it considers that a proposal to lower thresholds at the present time would be inappropriate and might prove counter-productive. Furthermore, some additional experience with the application of the Regulation would be useful and helpful.

70. Nevertheless, the Commission is of the opinion that the case for threshold reduction will become stronger. The advantages of the one-stop shop will be highlighted in future cross-border mergers and, with further integration in the single market, the need for and logic of lower thresholds can only strengthen and become increasingly visible.

71. Therefore, although no proposal has been submitted, the Commission has invited the Council to undertake the formal review provided for in Article 1(3) and Article 9(10) of the Merger Control Regulation by the end of 1996 at the latest.

72. The report on the implementation of the Merger Control Regulation prepared by the Commission has been submitted to the Council, Parliament and the Economic and Social Committee.

<T5> (e) Improvements in transparency and procedures under the existing Regulation

73. Within the scope of the review report and aided by the case-experience already acquired, the Commission has been able to identify some improvements that would promote greater transparency and procedural efficiency. These improvements, which will be implemented by the Commission without any change to the Merger Control Regulation, concern the following areas:

- Phase I commitments: In the past, the Commission has accepted commitments made by the notifying parties to remedy clear-cut competition problems within its initial one-month (Phase I) examination. While this remains an efficient course of administrative action, it tends to result in some loss of transparency. In particular, other competitors and undertakings do not enjoy an opportunity to comment on the adequacy of the commitments offered. Transparency can be improved by the prior publication of proposed commitments, although the commitments will be required to be offered early in the procedure if the original deadline is to be maintained;

- Phase II commitments: Similarly, subject to the protection of valid business secrets, commitments offered by parties in Phase II cases will also as a general rule be subject to prior publication;

- Commission guidance statements: To improve transparency, the Commission intends to issue guidance statements covering technical and legal aspects such as jurisdiction (including a new notice on cooperative and concentrative joint ventures), calculation of turnover and the concept of concentration;

- Less stringent notification requirements for minor joint ventures: Some minor joint ventures fall under the Regulation merely because of the size of the parents, while others have no direct or indirect effects on markets in the Community. The Commission proposes to accept substantially reduced notifications for such operations that are consistent with the need to demonstrate that there is no impact on competitive conditions in the Community. However, the information requirements waived will generally have to be first agreed with the

Commission, through the now normal practice of pre-notification information meetings;

- Advisory Committee: The Advisory Committee, which is composed of at least one representative of each competent national authority, is obliged to deliver an opinion on all draft Commission decisions closing cases where Phase II proceedings have been initiated. Unlike the regulations implementing Articles 85 and 86 of the EC Treaty, the Merger Control Regulation provides for the possibility of publishing such opinions at the Committee's request. While the Commission is not legally required to publish the opinion, current practice has been to follow the request made by the Committee and to publish it simultaneously with the formal decision in the Official Journal. Owing to the need for translation, such publication normally takes place several months after the date of the binding Commission decision, by which time the case may have lost some of its initial interest. Transparency can be promoted by making the opinion of the Advisory Committee public at the same time as the Commission's decision, and this would also place greater emphasis on the importance of the views of the Member States.

<T3> §5. Restrictive agreements and abuses of dominant positions

74. A large number of cases described in Part Two of the report were examined under Articles 85 and 86 of the EC Treaty. This reflects the fundamental role which the competition rules have to play as an instrument underpinning other Community policies. Thus, the achievement of a genuine internal market means ensuring that private-sector obstacles to trade do not replace the previous public-sector ones. Furthermore, anti-competitive practices must not be allowed to damage the productivity of Community industry and thus penalize European consumers, while at the same time preventing employment from growing normally. The role which competition policy is thus called upon to play is described in Part One, Chapter IV, of the report.

75. A number of trends can be highlighted. Some of them are a continuation of developments noted previously.

76. The first is the increasingly generalized application of the competition rules in all sectors of economic activity. The transport sector is particularly significant in this respect, with the Commission having for the first time applied the competition rules to rail transport and once again taking action in several instances against restrictive practices by sea transport operators. While the application of the competition rules in this sector can take some of its specific features into consideration, the fact remains that the advantages of a genuine system of competition must also be available, particularly since the sector is important to Community industry as a whole. The same applies to the energy sector, where several cases provided the Commission with an opportunity of clarifying its approach to this sector. Certain types of conduct in the professions were also the focus of the Commission's attention. Lastly, the competition rules played an important role in the audiovisual sector. The role of competition policy will probably increase here because of the importance of this sector for the Community and because of its rapid, steady development.

77. Decisions were taken this year on the first cases involving cooperative joint ventures covered by the new procedure adopted at the end of last year. The Commission has made clear its intention of dealing with such cases

within a period of two months following their notification and has endeavoured to honour this undertaking.(29) This change must be seen in a wider context. While cartels must clearly be strictly prohibited, many forms of cooperation between undertakings must be encouraged since they increase the efficiency of Community industry by promoting the dissemination of new technologies. For the Commission, however, the important point is the effect such cooperation may have on the market rather than the legal arrangement used by the parties. As long as certain types of operation were eligible for rapid processing under the Merger Control Regulation while others remained subject to the slower procedure under Article 85 of the EC Treaty, there was a risk that firms would organize their cooperation merely to suit their own interests but also in such a way as to benefit from certain procedural advantages. This was certainly something to be avoided since it could lead to situations that were in some ways artificial. It is for this reason that the Commission considers that, over and above the legal structures chosen by the parties, which must not be neglected, it is important above all to place such operations in their context and to look at their effects on competition in the relevant markets. If they have the object or effect of reducing competition, they must be prohibited. Conversely, the Commission intends to encourage all those which allow cooperation that is beneficial to all.

78. The third phenomenon is the number of cases in which the undertakings concerned decided to abandon practices deemed anti-competitive by the Commission without awaiting any formal Commission decision on the matter. This situation explains the relatively small number of decisions. The aim of an effective competition policy is to have a direct effect on the conduct of undertakings rather than to create a multiplicity of lengthy procedures. This does not mean that the rights of the defence are not fully observed, since the undertakings in question can always refuse to alter their conduct in the absence of any decision.

(29) See points 193 and 194 of this Report.

79. The fourth feature is that the globalization of markets and the existence of worldwide competition in many sectors are being taken into account. The Philips/Thompson/Sagem case is particularly illuminating in this respect. Although the parents of this joint venture were the main Community producers of the relevant product, their agreement was authorized because the product market was clearly worldwide and there were major competitors in non-Community countries. Each type of conduct should be seen in context, taking all the economic and factual aspects into consideration. Technological developments and the gradual opening-up of markets outside the Community, notably because of the liberalization resulting from the bilateral or regional agreements concluded by the Community or from the GATT negotiations, mean that many markets are expanding. The Commission is aware of this and is determined to take account of it in analysing the agreements or restrictive practices it has to deal with. By thus placing the conduct of Community firms in this wider context, the Commission is able to judge whether agreements can be accepted on the ground that they allow Community industry to improve its competitiveness.

80. Lastly, a feature shared by a number of cases dealt with this year was that they related to situations involving access to infrastructure. There are many instances in which a firm or a group of firms enjoys preferential access to an infrastructure that is essential to its competitors. As explained above, this question is particularly sensitive in sectors where exclusive or special rights were previously granted to certain undertakings, but it also arises in other circumstances. If genuine competition is to exist in such situations, infrastructure access must be open in an objective and non-discriminatory manner to all the competing firms. This question is obviously important in cases where the undertaking owning the infrastructure is in a dominant position, but it is also relevant in cases where Article 85 of the EC Treaty applies. The Disma case is an example of the second category. The Commission took action in this case in order to ensure that all oil companies could enjoy non-discriminatory access to the equipment for transferring fuel direct from the depot to aircraft, via underground pipelines, that had been installed by Milan/Malpensa airport in cooperation

with certain oil companies, through the Disma joint venture.

81. Quite apart from these trends in Community competition law, developments in national competition law should also be noted. As part of the policy on subsidiarity, the Commission encourages decentralized application of the competition rules. However, there is no obligation on Member States to adopt national competition legislation that is in line with the rules laid down in the EC Treaty. Even so, it is evident that the most recent legislative provisions are modelled to a great extent on the principles contained in Articles 85 and 86 of the EC Treaty. This is notably the case with the Belgian Law that entered into force this year. The Commission can only welcome such spontaneous harmonization of competition laws. Even though similar texts may be interpreted differently by the Community authorities and by the authorities in the Member States, the fact remains that closer alignment of laws makes for greater coherence for firms and thus for a more clearly defined environment in which they have to operate. This phenomenon does indeed extend beyond the frontiers of the Community, and similar trends are evident in countries which have concluded with the Community agreements in which competition rules feature prominently, such as the Agreement establishing the European Economic Area or the Europe Agreements, concluded with the countries of central and eastern Europe.

It is thus no longer unrealistic to believe that, in the not too distant future, a huge area will exist in which corporate conduct will be assessed on the basis of common principles. However, if we wish to ensure that Community industry continues to grow, we must go beyond this stage. The White Paper on growth, competitiveness and employment observes that, if the productivity of Community industry is to improve, Community firms must be able to operate on non-Community markets without being subject to any discrimination there. For its part, the Community is open to firms from outside the Community since, on the one hand, it complies with the rules laid down under GATT and, on the other, it applies its own competition rules effectively to conduct aimed at compartmentalizing markets. The architects of the EC Treaty were aware that the creation of a genuine internal market meant eliminating both public-sector and private-sector obstacles to trade. At international level,

leaving aside the above-mentioned agreements concluded by the Community, the only approach adopted has been that of eliminating government obstacles. The example of the Community shows that this is not enough and that there must also be rules governing corporate conduct whose object or effect, direct or indirect, is to ensure the protection of national industry. Furthermore, as explained in the following Chapter, such rules must be applied effectively. In other words, a genuinely level playing-field must also be created at international level so that Community industry can enjoy effective access to markets outside the Community without coming up against private-sector obstacles with which firms in such countries do not have to contend when they wish to penetrate the Community market.

<T4> - Crisis cartels

82. One of the consequences of the current crisis has been the renewed interest in crisis cartels (which were last seen in the early 1980s following the second oil shock) as a way of dealing with structural overcapacity. In some industries the problems of structural overcapacity with fundamental reductions in demand have been exacerbated both by the current recession and by increased global competition, which not only increases supplies on the EC market but often takes away traditional markets outside the Community. In many cases, the individual firms involved, when faced with substantial structural as opposed to cyclical reductions in demand, unilaterally reduce capacity. In a free-market economy this is, in fact, the most common way of dealing with such significant reductions in the rates of capacity utilization and with falls in output accompanied by substantial operating losses. In some industries, however, such mechanisms do not necessarily guarantee elimination of the least efficient capacity. Not only has competition often been distorted by state aid (e.g. regional aid) aimed at creating capacity but, when industries have high fixed costs and relatively low operating costs, old and inefficient, but fully depreciated, plant can continue operating as long as its operating costs are covered. This can cause very large reductions in price, which may be good for consumers in the short run, but it undermines the capacity of the industry in the long and medium term to invest and undertake R&D. The consumers may therefore suffer in the long term.

83. Some sectors therefore would like to conclude either bilateral or multilateral restructuring deals to reduce capacity and put the industry on a healthy long-term footing. Such agreements are usually caught by Article 85. The Commission's policy in such matters is clearly laid out in earlier competition reports(30) but the principles remain valid and are worth repeating in extenso.

84. The Commission may be able to condone agreements in restraint of competition which relate to a sector as a whole, provided they are aimed solely at achieving a coordinated reduction of overcapacity and do not otherwise restrict free decision-making by the firms involved. The necessary structural reorganization must not be achieved by unsuitable means such as price-fixing or quota agreements, nor should it be hampered by state aid which leads to artificial preservation of surplus capacity.

85. The Commission will be able, however, to authorize sectoral agreements where it is satisfied that the other conditions of Article 85(3) of the EC Treaty are met, notably in the following circumstances:

(i) production can be considered to be improved if the reductions in capacity are likely in the long run to increase profitability and restore competitiveness and if the coordination of closures helps to mitigate, spread and stagger their impact on employment. For this purpose, the agreement must contain a detailed and binding programme of closures for each production centre which ensures, on the one hand, that overcapacity is irreversibly dismantled and, on the other, that, while the plan is in operation, no new capacity is created, except for replacement capacities provided for in the reorganization programme;

(ii) consumers can be considered to enjoy a fair share of the benefits resulting from the agreement if, at the end of the agreement, they are able to rely on a competitive and economically healthy structure of supply in the Community, without having been deprived during its operation, despite the effects of the capacity cutbacks, of their freedom of choice or the benefit of continued competition between the participating firms;

(30) Thirteenth Competition Report, points 56 to 61;
Fourteenth Competition Report, points 80 to 85.

(iii) the restrictions of competition which the agreement involves can be considered to be indispensable to the objective of the planned restructuration if the agreement is concerned solely with reducing surplus capacity and is limited from the outset to the period necessary for the technical implementation of the planned programme of cutbacks. The creation of a system for exchanging information in order to check that promised reductions of capacity are being implemented is admissible provided it does not in any way help to coordinate policy on the utilization of remaining capacity or to align conditions of sale;

(iv) the parties to the agreement will not be afforded the possibility of ultimately eliminating competition for the following reasons: firstly, since the orderly reduction of excess capacity is only one element, albeit an important one, of the competitive strategy of the participating undertakings, they will not have surrendered all freedom of action in the marketplace with the result that a degree of internal competition will be maintained. Secondly, the presence in the market of firms not party to the agreement and the fact that the Community is open to imports from third countries will usually provide a source of external competition. Lastly, as the agreement is from the outset to run for a limited period only, the certainty of a return to completely unfettered competition in the near future will prompt the undertakings concerned to take account, in the decisions they make even during the course of the agreement, of the fact that in due course they will again become full competitors.

86. As an alternative to such sectoral agreements, the Commission can also envisage agreements between a small number of firms providing for reciprocal specialization which would enable them to close down excess capacity.

87. Whatever type of solution is chosen, the Commission will always have to satisfy itself that, after the reorganization programme is completed, there will still be a sufficient number of Community manufacturers left to maintain effective competition in the Community. This condition is necessary to ensure that the economy as a whole, and users and consumers in particular, will also benefit from the positive results of the arrangements.

88. Reorganization operations should also be such as to stabilize and secure the employment situation within the sector concerned.

89. This Commission has in fact maintained the policy in the two cases under consideration. The first case concerns steel.(31) In the second case, it has published a notice under Article 19(3) of Regulation No 17 announcing its intention of adopt a favourable opinion for a crisis cartel among brick producers in the Netherlands.

In the Netherlands there has been a structural reduction in the demand for bricks, in particular common bricks, which have been replaced by a wide range of alternative building and finishing materials, in particular concretes, aluminium, steel, plastics and wood. Although the cyclical situation in the construction industry had exacerbated the reduction in demand, several indicators clearly pointed to long-term, underlying structural overcapacity. The fall in price and resultant losses were accentuated by the cost structure of production with relatively high fixed costs. The original agreement notified to the Commission contained, in addition to the measures proposed to remedy the structural overcapacity, several restrictions of competition which went beyond what was necessary and beyond the conditions set out above. In particular, there were arrangements to fix production quotas backed by a system of fines and resulting in a quantitative share-out of virtually the entire output of bricks in the Netherlands.

In response to a statement of objections by the Commission, the parties agreed to drop these further restrictions. The Commission was therefore able to adopt a preliminary favourable opinion because the parties limited their agreement to what was strictly necessary to reduce capacity without agreeing on price or output. The new agreement was therefore in line with the principles laid out above.

(31) See points 481 and 482 of this Report.

<T3> §6. Consequences of the Maastricht Treaty

90. The Maastricht Treaty entered into force on 1 November 1993. It provides for only two changes to the competition rules laid down in the EC Treaty, both relating to the control of state aid. First, the Commission may now in principle declare compatible with the EC Treaty "aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Community to an extent that is contrary to the common interest". Second, the European Parliament will have to be consulted by the Commission if it intends to propose to the Council any appropriate regulations for the application of Articles 92 and 93 of the EC Treaty. These changes do not fundamentally alter the structure of the EC Treaty, so that the Commission's role as the institution responsible for applying the competition rules is not challenged by the new Treaty. Nor is this surprising since the establishment of a genuine European Union calls for a neutral arbiter to monitor the behaviour of business. This does not mean, however, that the Maastricht Treaty does not have any other implications for competition policy.

91. In the first place, the Treaty is more explicit on certain objectives than the EC Treaty was. The first of these is environmental policy. Although it was mentioned for the first time in Article 130r of the Single Act, the Maastricht Treaty extends its scope. This raises the question of the extent to which the application of the competition rules will be affected.

The new guidelines on aid for environmental purposes issued by the Commission in 1993 already reflect this increased emphasis on the environment. In the guidelines the Commission recognizes the place of subsidies in environmental policy, a fact brought home by its recent experience in dealing with aid schemes in Member States, which the old framework dating from 1974 did not cover. The new guidelines thus place aid control at the service of environmental policy while ensuring that such aid does not distort competition to an extent contrary to the common interest.

Furthermore, it must be emphasised that the Commission can exempt an agreement restricting competition but having a favourable impact on environmental policy only if the agreement meets the

four conditions laid down in Article 85(3) of the EC Treaty. Article 85(3) was not amended to include any specific environmental considerations. The fact remains, however, that the terms of Article 85(3) are sufficiently broad to include other policy objectives, and more specifically environmental protection objectives. This question is discussed in greater detail below.(32)

Cultural policy is one of the new provisions contained in the Maastricht Treaty. This actually involves a direct change to the competition rules since, as indicated above, express provision is made for a new exception to the ban on aid.

92. The Maastricht Treaty expressly refers to industrial policy for the first time. As explained below,(33) the concept of industrial policy was, however, already inherent in the approach adopted by the Community in general and by the Commission in particular.

93. However, the consequences of the Maastricht Treaty go beyond the changes in Community policies which have just been described. The Maastricht Treaty also marks a step towards greater involvement of Parliament in the decision-making process, with the co-decision procedure, and hence greater democratic control. Competition policy cannot ignore this development.

The Commission is aware that it is necessary to get Member States, businesses and other relevant parties to accept the need for an effective competition policy. In order to achieve this, the Commission must take certain measures. It must firstly define its priorities and be consistent and effective in applying them. Clearly, the principles set out in the Maastricht Treaty will have a major influence on the choice of such priorities. The Commission must then inform the public of its priorities. For this purpose, it has continued to organize annual meetings with the national competition authorities at which such objectives are explained and discussed. Furthermore, one of the objectives of this Report is to inform

(32) See points 162 to 171 of this Report.
(33) See points 155 to 161 of this Report.

Parliament and the Economic and Social Committee, and subsequently the public at large, of the Commission's priorities.

Secondly, the Commission's policy must be as transparent as possible so that economic agents are fully aware of the framework within which they are supposed to operate. The Report contains a more detailed analysis of the measures which the Commission has taken or intends to take in pursuit of this objective.(34)

Lastly, there must be optimum cooperation between the Commission, the national authorities and the courts in the Member States.

94. The concept of subsidiarity is often cited as one of the changes introduced by the Maastricht Treaty. It was in fact already applied in Community competition law, as explained below.(35) It must continue to guide the Commission's work, which must concentrate on cases involving a genuine Community interest, leaving it to the national authorities or law courts to decide the other cases.

95. In conclusion, the Maastricht Treaty will certainly have important repercussions for competition policy. However, this is not a one-way process: competition policy will also play a fundamental role in the implementation of other Community policies.(36)

(34) See points 182 to 188 of this Report.
(35) See points 189 to 191 of this Report.
(36) See points 149 to 181 of this Report.

<T4>

Chapter II

<T2>

The international dimension of competition policy

<T3>

§1. General

96. During the year under review the international dimension of the Community's competition policy was marked by three main events, all of which took place in December. The Community and its Member States completed the ratification process of the European Economic Area Agreement. Because the five participating EFTA States had already done so, this enabled the EEA to enter into force on 1 January 1994. On 15 December, after seven years of often complicated negotiations the contracting parties of the GATT managed to conclude the so-called Uruguay Round of Multilateral Trade Negotiations. Finally there was the presentation by the Commission of its White Paper on growth, competitiveness and employment. As described above, this White Paper contains an important statement on the international dimension of competition policy.

97. These three events can be seen as marking the end of an era where the Community's policy on international competition issues focused essentially on the inclusion in international trade agreements of rules against anti-competitive practices, structures and state aid. They also marked the beginning of a policy which is based much more on taking steps to ensure that such rules are actively enforced and that enforcement is carried out in a manner similar to the way in which the Community has used the competition rules as a tool to foster intra-Community trade.

Thus there has been a certain shift from an essentially rules-based approach to a policy-based approach. This has affected the Community's relations with all of its trading partners, regardless of the actual rules governing them. Thus the Commission has used the rules of the 1972 Free Trade Agreements with countries in Europe to ensure enforcement of the competition rules in trade with the Community. It has also worked towards the creation of enforcement practices by the EFTA Surveillance Authority (ESA) similar to those of the Commission. But even with countries such as Japan, with which at present no specific rules on competition policy have been concluded, it has put in efforts to promote effective competition policy enforcement in order to open up trade opportunities.

<T3> §2. Promoting competition policy enforcement throughout Europe

<T4> - EFTA

98. The Commission has strengthened its efforts to bring about changes in state aid granted by EFTA countries in violation of the competition rules included in the Free Trade Agreements concluded in 1972. After the successful resolution of the state aid case involving the Eurostar joint venture between Chrysler Motors Company and Steyr Nutzfahrzeuge,(1) the Commission's attention was brought to four further state aid cases involving Austria and one involving Finland.

99. On 22 July the Comission found that the aid which the Austrian federal and regional authorities proposed to grant to General Motors Austria and the aid granted to Steyr Nutzfahrzeuge AG, like the subsidy which the Vienna municipal council had paid in May 1991 and June 1992 to Grundig Austria GmbH, were incompatible with Article 23 of the Agreement. Article 23(1)(iii) of the Agreement provides that any public aid affecting trade between the Community and Austria which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods is incompatible with its proper functioning. In accordance with a statement made by the Community when the Agreement was signed, the assessment of such practices is based on the criteria applied in implementing Article 92 of the EC Treaty.

Tha Austrian authorities planned to grant General Motors Austria public aid amounting to 15% for investment intended to extend the production of gearboxes, camshafts and cylinder heads at its Asperne/Vienna plant. Gearboxes alone are exported to the Community for assembly by General Motors, while the engine components are exported to Hungary. In the case of Steyr Nutzfahrzeuge AG (a subsidiary of MAN), Steyr, public aid amounting to 15.1% is granted for the rationalization and extension of its heavy goods vehicle production at Steyr, most of which is intended for the Community market. As far as Grundig Austria GmbH is concerned, the public subsidy granted for the rationalization and extension of the production of television sets is 10%,

(1) Twenty-second Competition Report, point 344.

with a ceiling of ÖS 100 million for an ÖS 1 billion programme at its Vienna factory.

In each of these cases, the firms receiving the aid are in competition with Community firms. In the Commission's view, the aid would not be acceptable on the basis of the criteria applied in implementing Article 92(3)(a) and (c) of the EC Treaty, notably because the Vienna conurbation, within which Grundig and General Motors are situated, would not be deemed eligible for regional aid.

Since no mutually satisfactory solution could be found between the Community and Austrian authorities within the Joint Committee or after discussions between experts by a deadline which had been set, the Commission sent the Council, on 22 September, three proposals on the withdrawal of tariff concessions on the relevant General Motors, Steyr Nutzfahrzeuge and Grundig products, pursuant to Article 27(3) of the Agreement. In the case of General Motors and Grundig, the Commission proposed that duties at a level equal to that of the customs duties which would have been applicable if the Free Trade Agreement had not entered into force be reintroduced. Such duties would be maintained until such time as the Council concluded that the aid in question was no longer having any harmful effects on competition and trade, or at the very most for a period equivalent to the average tax depreciation period. A fourth case, relating to an investment project in the motor vehicle industry (BMW) in the Steyr region, is being examined.

As part of the close contacts entertained with the Austrian authorities, a solution was found for the Steyr Nutzfahrzeuge case in the context of the Austrian regional aid scheme being examined in preparation for enlargement.

In the Grundig case, the Council decided by a qualified majority, on 21 December, to adopt the Regulation proposed by the Commission. The next day, the Austrian authorities agreed to recover the ÖS 67 million as requested by the Commission, prompting the Community to waive introduction of the abovementioned duties.

In the General Motors case, the Council also decided by a qualified majority to adopt the Regulation proposed by the Commission. Accordingly, a 4.9%

duty will be charged on imports from Austria of F15 gearboxes produced by General Motors Austria.

100. All of the cases which have been dealt with so far under the competition provisions of the 1972 Free Trade Agreements have demonstrated the difficulties which are inherent in the procedural rules of those agreements. In the case of five of the EFTA countries these difficulties should be solved for future competition cases with the entry into force of the European Economic Area on 1 January 1994. However, with regard to other countries the Community has decided that an efficient competition policy requires more viable procedures.

<T4> - Countries in Central and Easten Europe

101. In the case of the Europe and Interim Agreements concluded with a number of countries in Central and Eastern Europe,(2) this new approach has not only led to adoption of more elaborate substantive competition rules. The most innovative aspect of the competition provisions of these Agreements is that they also provide for the establishment of implementing rules within three years of the entry into force of the Agreements. These implementing rules should bring effective and reasonably efficient enforcement procedures.

Thus, the Commission and the competent authorities in the relevant countries have begun drawing up such rules within joint committees set up under each of the Interim Agreements. It should be stressed that, as stated in the previous Report,(3) it is not considered necessary to adopt competition rules that would be superimposed on the parties' existing legislation.

102. As regards the competition rules applicable to enterprises, cases should be dealt with mainly on the basis of the rules existing in the Community and in the associated country by the authorities responsible for their application. Situations might therefore arise in which each of the two authorities would have jurisdiction in one and the same case. It is also probable that, in cases where only one authority is competent, the measures taken by it might affect major interests of the party whose national

(2) See points 563 and 564 of this Report.
(3) Twenty-second Competition Report, point 103.

authority is not competent. Equally, a case might fall outside the competence of the authorities of both parties. It is mainly to deal with such situations that the adoption of enforcement rules is necessary.

A draft has been drawn up jointly by the Polish authorities, and more particularly by the Polish Antimonopoly Office, and by the Commission in accordance with the above guidelines. The draft has been sent to the co-chairmen of the Community-Poland Joint Committee for examination and discussion. The Commission intends to adopt the same approach in working with the other countries concerned so as to draw up similar procedural rules with them.

103. As regards state aid, work has not yet progressed very far. The Commission considers that the procedural rules could be based on a classification of aid into three categories: aid subject to the requirement of financial transparency, aid which should be notified to the other contracting party and aid which is not subject to the notification requirement, but on which discussions could be held at the request of the other party. During the period under review, work began on drawing up aid inventories in some of the countries in question. The inventories should help the parties in formulating the implementing rules.

104. Since the Europe Agreements contain a provision on the approximation of laws, the six countries began bringing their competition law provisions into line with those in the Community. No deadline has been set for doing so, but it must be regarded as a matter of priority, notably in order to facilitate the establishment of the rules for enforcing the agreements, since their implementation is based principally on the national rules. For this purpose, technical assistance must be provided to the countries in question.

Technical assistance is also being considered for the drawing-up of a report on the situation regarding state aid, national monopolies, public enterprises and enterprises granted special or exclusive rights. The report will facilitate the implementation of the agreements and the provisions on the gradual adjustment of state monopolies of a commercial nature and implementation of the principles laid down in Articles 90 and 92 of the EC Treaty.

Frequent contacts have been held between the Commission and the authorities of the relevant countries on such technical assistance. Some of the countries have asked that the assistance be provided under the Phare programme and accordingly be financed out of its budget. However, faced with a growing number of requests for technical assistance which it does not have the necessary staff to deal with, the Commission has had to entrust the task in part to outside consultants. Technical assistance clearly offers a unique means of assisting the relevant countries in the implementation of an active competition policy.

<T3> §3. A more daunting task: encouraging competition policy enforcement in non-European countries

105. In Europe the Community's wish to promote competition policy enforcement has greatly benefited from the fact that new agreements have been negotiated or are currently being negotiated with almost all European non-member states. Most, if not all of those agreements have included provisions on trade aspects and have allowed the Community to follow through on its two-track approach to trade liberalization. This approach consists in eliminating not only state obstacles to trade, but also obstacles stemming from private business practices.

106. The same situation has not existed with regard to most of its non-European trading partners. Trade relations with those countries will be affected of course by the new GATT agreement. However, this agreement will still not endow the GATT with a two-track approach to trade liberalization. During the year under review there have therefore been renewed calls for the inclusion of competition rules in GATT as part of the post-Uruguay Round agenda. Such calls have come from private groups such as the "International Antitrust Code Working Group", consisting of competition policy experts from Europe, the US and Japan, which published a "Draft International Antitrust Code as a GATT-Multilateral Trade Organization Plurilateral Trade Agreement" in Munich in July. They can also increasingly be heard in governments. Thus the OECD Committees on Competition Law and Policy and on Trade have organized a series of joint meetings to discuss the convergence of trade and competition policies.

107. Although a multilateral competition policy instrument concluded in the GATT framework seems to offer the best chances for dealing with anti-competitive practices which restrict international trade, it seems obvious that such a solution will require complicated, and therefore possibly time-consuming discussions. In its White Paper the Commission has recommended that establishing such multilateral rules be a Community priority, but it does not plan to sit idly by while waiting for their results. This is why, in the meantime, it is concentrating on certain of the Community's major trading partners in order to find ways of addressing anti-competitive practices and structures which create obstacles to trade with those countries.

108. The agreement concluded in 1991 between the Commission and the US Government already contained a provision aimed at dealing with this type of problem. Article V of that agreement lays down a so-called positive comity rule. Under this rule a Party whose important interests are affected by anti-competitive practices within the other Party's territory may request the latter to examine those practices. The Party on whose territory the practices are allegedly taking place may investigate the matter and take any measure it deems appropriate.

This procedure can obviously be applied in particular when anti-competitive practices in one country create market access barriers for imports from another country. Such practices may otherwise not be dealt with because the country where the alleged problem exists is not aware of its existence, or if it is, has not ranked it high on its list of priorities.

109. The procedure is therefore intended not just to promote competition policy enforcement in general, but also try to focus such enforcement specifically on those cases in which other countries are particularly interested. This is especially important when a country has an elaborate set of competition rules as well as an active policy of enforcing them, but is concentrating on anti-competitive practices whose main impact is domestic, leaving unsolved problems which are being felt mainly in other countries. The reason for this is often that a country sees the objective of its competition policy in terms of maximizing its national rather than global welfare.

Although the Commission has not, for the time being, concluded agreements similar to the one with the US with other countries, it is not entirely deprived of the positive comity tool in relation to other major trading partners. Indeed, a positive comity type provision has been included in the Revised Recommendation of the Council of the OECD of 21 May 1986, concerning international trade. The Commission has therefore invited any person affected by anti-competitive practices in other OECD countries to inform the Commission thereof so that it can raise the issue under the positive comity provisions.

110. In other cases the Commission has used even less formal means to promote competition policy enforcement in its trading partners. Thus on 4 November the Commission organized a seminar on competition policy in Tokyo, together with the Japanese Fair Trade Commission, which is responsible for competition policy enforcement in Japan. Its purpose was to compare EC and Japanese

approaches to a number of competition issues which have a particular relevance to international trade. Thus discussions took place on distribution, mergers and acquisitions, deregulation and on the international dimension of competition policy. The Commission speakers underlined in particular the way in which competition policy had been used in the Community to eliminate private obstacles to intra-Community trade and to establish a level playing field within the EC. They argued that similar policies should be followed with regard to international trade. It has been decided to organize a follow-up conference in Europe in the course of 1994.

111. Finally one should mention that in a number of countries, and in particular in the US and Japan, there have been political developments during the period under review which have led to increased enforcement. Since the new US Administration took office at the beginning of the year, US antitrust policies have seen a return to more stringent enforcement, including in areas which for 12 years had all but disappeared from the agenda. Thus the US Assistant Attorney-General decided to once again start enforcing the antitrust laws against vertical restraints.

In Japan the new government which came into office halfway through the review period made deregulation one of the cornerstones of its economic policies. This deregulation will be accompanied by increased enforcement of the Anti-Monopoly Act, inter alia, through a reduction in the number of excluded sectors.

Similar developments are taking place in a number of other countries, including Turkey, the Republic of Korea, Taiwan and several countries in Central and South America. The Commission welcomes these developments and tries to encourage them where it can. It firmly believes that it is through active competition policies that markets can be successfully opened around the world and a level playing field created for Community and other firms alike.

<T3> §4. Cooperation on enforcement in specific cases

112. All of the policy initiatives mentioned above which were taken during the period under review should help bring about more enforcement of competition rules in the Community's main trading partners, especially against private practices which affect trade with the Community. In a number of cases such private practices or structural changes may also be caught by the Community's own competition rules. It would seem to be important, therefore, to try and cooperate with the competition authorities of the third countries concerned in order to ensure that a coherent approach is taken on both sides. Such cooperation is in the interest of the enforcing authorities, as it may avoid duplication of cost and effort. It is also in the interest of the companies which are the subject of the enforcement action as cooperation may avoid the imposition of two sets of remedies whose combined effect would be larger than strictly required to solve whichever competition problems arise.

Both the EC-US Agreement of 23 September 1991 and the 1986 OECD Recommendation on Cooperation on Restrictive Business Practices offer a framework for such cooperation. However, confidentiality requirements such as those contained in Article 20 of Regulation No 17 greatly reduce the possibilities for a useful exchange of information and thus for cooperation between the authorities concerned.

113. This is why the Commission and the US Department of Justice took the initiative in December of the year under review to ask an undertaking which was being investigated by both authorities whether it agreed to waive the benefit of the confidentiality requirements and thus to allow DG IV and the Antitrust Division of the Department of Justice to exchange information and to cooperate in this particular enforcement case.

In its request the Commission pointed out that information which it might receive from the Department of Justice would not be used directly in the proceedings based upon Regulation No 17. However, the Commission reserved the right to obtain such information by using its own means of investigation. The Commission also indicated that it would ask the Department of Justice to undertake that any information which the Commission might send to the Department would not be disclosed to third parties, except where such information could be disclosed had it been obtained by the Department itself.

The Commission intends to use this procedure for requesting specific waivers of confidentiality in other appropriate cases. It is convinced that, as long as the existing confidentiality requirements are not amended, such waivers form a very useful tool to enable cooperation with other competition authorities, in the interest both of the companies in question and the enforcing authorities themselves.

<T3> §5. The impact of the Uruguay Round on competition policy

114. As indicated above, the Uruguay Round did not really offer an overall solution for the problems in international trade which result from private practices and structures. This does not mean, however, that the Round was without significance for the application of competition rules. The Final Act which was agreed in principle in December in Geneva contained an important Agreement on Subsidies and Countervailing Measures, which brought the GATT rules in this area more closely into line with the Community's state aid provisions even though differences between the two regimes still remain. In addition, the General Agreement on Trade in Services contains a positive comity clause, which was included at the initiative of the Community.

115. Particular mention should be made of the Uruguay Round negotiations relating to state aid.

The final version of the Agreement comprises new elements in this area, mainly as regards the "green list" of subsidies deemed to be "non-actionable". In the case of aid for research and development, the Agreement regards as non-actionable aid whose intensity is substantially higher than that allowed by the Community guidelines both for basic research and for applied research and development.

Aid for environmental protection is included in the green list only where it relates to investment for the adaptation of plant and equipment to new regulations, subject to certain conditions relating to the intensity of the aid (20% of the adaptation costs).

Aid for the development of the least prosperous regions is also included in the "green list".

116. The General Agreement on Trade in Services is the first multilaterally agreed legal instrument which contains a positive comity clause. Article IX of the Agreement first entails the recognition that certain business practices of service suppliers may restrain competition and thereby restrict trade in services. It then goes on to provide for a procedure under which each member shall, at the request of any other member, enter into

consultations with a view to eliminating restrictive business practices. Although the only further obligation is to "accord full and sympathetic consideration to such a request" and to "cooperate through the supply of publicly available non-confidential information", this procedure still seems to offer an interesting opportunity to help bring about more enforcement in the services area, in the markets of the Community's trading partners.

<T4>

Chapter III

<T2>

Developments in the application of the competition rules to particular industries

<T3>

§1. Financial services - Insurance

117. In the European Community, like almost everywhere else, markets for services, which should particularly benefit from being opened up to competition, have long remained sheltered from competition, due to lack of mobility of services across markets and firms within markets.

Market services play a considerable role in the economy. Today they represent the most important sector of economic activity, accounting for over 50% of Community GDP. A substantial proportion of market services is made up of financial services, which are thus a major contributor to general wealth.

The competition rules are consequently bound to play an increasingly important role. Legislation(1) has helped to change the position of the sector: a true internal market is gradually taking shape.

118. The low degree of competition in services appears to have two causes: the intrinsic nature of services and government regulation.

According to a recent Commission study,(2) prior to the launching of the 1992 programme competition was particularly weak in banking and insurance owing to the two factors described above. In addition, the high degree of imperfection in the transmission of information about quality and reliance on established reputation confer advantages on those already present.

This general assessment of the sector naturally masks differences between the types of transaction concerned: within the financial system, some markets (e.g. mortgage credit) are more competitive than others.

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(1) Twenty-second Competition Report, points 42 to 48.

(2) "Market Services in the Community Economy", European Economy, Supplement A, May 1993.

Since the mid-1980s, service markets in the Community have undergone important changes as a result not only of the internal market programme (freedom of establishment and liberalization of the movement of factors of production) but also of technological change. The impact of the changes is particularly strong in banking.

119. As regards the practical application of the competition rules to the financial sector, it should be borne in mind that this sector has special features and that:

- its economic importance is not limited to its direct economic weight. Firstly, through cross-effects, the performance of the financial sector is crucial to the competitiveness of the other productive sectors and to the well-being of consumers. Secondly, from a macroeconomic standpoint, the institutional role of the banking sector is that of a conduit for monetary policy;

- in the case of certain products, the operation of the market can bring financial operators into contact independently of their will: operators carry out the orders of their customers, and there is consequently no direct relationship between supply and demand; for instance, when an operator issues a cheque, the creditor's bank is obliged to have dealings with the debtor's bank;

- operators can participate in the market for a given product both on the demand and the supply side. To take any means of payment as an example, banks act in the market both as creditors and debtors. Thus each operator contributes at any moment to the determination of both supply and demand.

120. Correct assessment of these factors is crucial if a competition policy is to be developed that is effectively based on the realities of this particular market.

Several cases are currently being investigated to determine whether certain banking practices are compatible with the competition rules. The Commission is also looking into the question of bank payment cards and will be defining its position on this subject.

121. State aid cases frequently involve state banks either as lenders, investors(3) or as deposit-taking institutions in competition for savings with private banks.(4)

122. In the insurance sector, Commission Regulation (EEC) No 3932/92 of 21 December 1992 exempting(5) certain categories of agreements in the insurance sector from the ban in Article 85(1) was adopted at the end of 1992 and entered into force on 1 April 1993. The Commission wrote to the associations or enterprises which had notified a little over 200 agreements within these categories before the Regulation entered into force, and gave them six months to check that their agreements conformed. The parties were told that if the Commission did not receive any specific applications within that period, it would consider that the associations or enterprises did not wish their original notifications to be followed up individually. Several associations have already informed the Commission of their decision to discontinue their agreements.

Other agreements are being amended to satisfy the conditions for exemption laid down by the Regulation. As no replies were received, the files on a large number of notifications have been or will be closed.

(3) Twenty-first Competition Report, point 221.
(4) See points 540 and 541 of this Report.
(5) OJ L 398, 31.12.1992; points 274 to 288 of this Report.

<T3> §2. Telecommunications and postal services

<T4> Telecommunications

123. In October 1992 the Commission published the "1992 Review of the situation in the telecommunications service sector"(6) called for by Commission Directive 90/388/EEC.(7) The publication set in motion a period of intensive consultations. The aim of the consultations was to see whether the remaining exclusive rights for the provision of public voice telephony were still justified and how best to create the required competitive environment for telecommunications services.

During the consultations the Commission heard the views of more than 130 organizations and businesses at five different hearings and received more than 80 written comments on the "1992 Review". The participants in the consultation included Community telecommunications operators, users, service providers and potential market entrants, equipment manufacturers, trade unions and consumer organizations.

The "1992 Review" had proposed four options(8) and the Commission had expressed a preference for opening up to competition voice telephony between Member States (Option Four). However, as a result of the consultation, Option Three, opening-up to competition of all voice telephony services, was chosen as the preferred one. This new approach therefore goes much further than was originally anticipated, but requires more time for preparation and a larger framework of supporting measures.

This represents considerable progress along the path to a true internal market in a sector whose importance has already been underlined elsewhere in this Report. The first to benefit will be European consumers, all of whom are telecommunications users. In addition, Community industry will benefit from more efficient and cheaper means of communication. Finally, the sector is set to expand considerably and will thus generate employment, whilst requiring major technological development.

(6) SEC(92)1048 final.
(7) Twenty-second Competition Report, points 33 to 36.
(8) Twenty-second Competition Report, point 511.

124. Based on the conclusions flowing from the consultations the Commission adopted its "Communication to the Council and the European Parliament on the consultation on the review of the situation in the telecommunications service sector" (COM(93) 159 final) on 28 April 1993. In the week prior to this the European Parliament debated the matter and adopted a resolution which supported the position of the Commission on further liberalization.

In this Communication the Commission set out a timetable for the full liberalization of telecommunications services by 1 January 1998 in all Member States. An additional two-year transition period, where justifiable, would be available to those countries experiencing specific difficulties. A Green Paper on mobile/personal communications was scheduled for the end of 1993 and another on public network telecommunications infrastructure before 1995.

The Communication addressed all the issues raised in the consultation, in particular those related to universal service; the necessary adaptations required for a competitive market; and the situation in the peripheral regions and small or less-developed networks.

It proposed special measures in the context of Community support frameworks, complementing funding from own resources, to accelerate network development and universal service in peripheral regions. The Communication emphasized the need for the rapid adoption of pending proposals on the application of Open Network Provision to voice telephony; the mutual recognition of licences; and satellite communications which were previously excluded from competition.

The Communication proposed the use of alternative infrastructure and cable TV infrastructure for telecommunications services already liberalized. Such a development would strengthen the implementation of existing legislation, which itself was identified in the consultation as a major objective.

125. At its meeting on 16 June 1993 the Council adopted a resolution, which largely supported the proposals of the Commission's communication of 28 April 1993, on the main policy goals, principles and timetable for the necessary legislation. The most important point of the resolution adopted by

the twelve Member States was the agreement to liberalize public voice telephony by 1 January 1998 at the latest, as proposed by the Commission.

However, the Council considered that four countries - Spain, Portugal, Greece and Ireland - should be granted, if necessary, the possibility of an extension of the deadline to 2003. The Commission has undertaken to help these countries develop their networks and to implement the necessary adaptations. At the request of Luxembourg, the Council considered that very small networks should be granted an extension until the year 2000 where this is justified.

The Commission's proposal on the use of alternative infrastructure for telecommunications services already liberalized did not figure in the Council's resolution although four Member States - France, Germany, the Netherlands and the United Kingdom - supported the Commission's position. The Commission is studying the impact of its proposed liberalization of alternative infrastructure, including cable television networks.

The Council resolution recognized the importance of maintaining the financial stability of the sector, preserving jobs, developing training, channelling Community resources into the peripheral regions, promoting the creation of trans-European networks in the interests of strengthening economic and social cohesion, and formulating a coherent approach to infrastructure. It also addressed the issue of the financing of universal service with the option of charging for access. The Council also foresaw the necessity of progressively rebalancing tariffs, maintaining the balance between liberalization and harmonization, recognizing the importance of cooperation between telecommunications operators, demanding equivalent market access to third countries, and coordinating national and Community measures in accordance with the principle of subsidiarity.(9)

The overall approach adopted, which combines liberalization and harmonization, shows that the liberalization of an economic sector does not require the removal of all rules but, on the contrary, calls for a regulatory framework so as to avoid harmful distortions.

(9) Council Resolution of 22 July 1993, OJ C 213, 6.8.1993.

126. The Economic and Social Committee gave its support to the broad thrust of the positions of the Commission and the Council, whilst questioning whether the date of 2003 was not too late for full liberalization in certain Member States.(10)

127. At the request of the Belgian Presidency, the Commission prepared a communication on universal service which emphasized its fundamental importance whilst recognizing the positive contribution of competition to the fulfilment of universal service.(11) It paid particular attention to the need for tariff rebalancing.

The communication also addressed two further issues. Firstly, drawing on Open Network Provision legislation, it defined the scope of universal service. Secondly, it addressed the central issue of how to finance universal service where a service would not normally be provided to a particular customer on a commercial basis by the operation of market forces alone. Tariff and access charges paid by new operators were all seen as having a role to play. Lastly, it proposed funding under the Community support framework from the Structural Funds, subject to national priorities, for the particular problems of the peripheral regions with respect to universal service issues.

On 7 December the Council adopted a Resolution on the principles of universal service in telecommunications which is based essentially on the Commission Communication. The Resolution stresses that the development of universal service is a key factor for the future development of telecommunications in the Community and calls on the Member States to establish an appropriate regulatory framework and set appropriate targets in order to ensure universal service throughout their territory. It recognizes that, in numerous cases, market forces would be expected to lead to universal service being provided on a commercial basis. Where voice telephony can be provided only at a loss, it should be possible to finance it through internal transfers, access charges or other mechanisms compatible with the competition rules of the Treaty.

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(10) ESC Opinion No 1166/93 on documents COM(93)159 and SEC(92)1048 of 24 November 1993.
(11) COM(93) 543.

128. By 1998, the Commission will take the measures necessary to bring about the scheduling and structural adjustments in the peripheral regions required in order to achieve full liberalization, decide on the regulatory framework for public infrastructure and implement the measures necessary to ensure the full liberalization of public voice telephony.

129. The liberalization of the sector has prompted established firms or those seeking access to conclude agreements in order to adapt to the new situation. The agreements set up various forms of cooperation, from strategic alliances to cooperative joint subsidiaries and, sometimes, even mergers. The competition rules, especially Articles 85 and 86 of the EC Treaty, and the Merger Control Regulation, are essential instruments in distinguishing between transactions resulting in more competition in the sector and those aimed at maintaining the status quo and slowing down the process of liberalization.

<T4> Postal services

130. In the postal sector, the Commission has sought to maintain the momentum created by the adoption of the Green Paper on the development of the single market for postal services last year. The importance to the Community of achieving high quality services, through a combination of harmonization and liberalization measures, has been the motivating force. Here too the sector's vital role in achieving economic and social cohesion within the Community cannot be overlooked.

131. Following the publication of the Green Paper on the postal sector in 1992,(12) the Commission adopted a Communication to the Council and to the European Parliament(13) on 2 June 1993, entitled Guidelines for the development of postal policy.

The Communication takes account of the trends which emerged during the course of the public consultation following the publication of the Green Paper and sets out a series of guidelines for the further development of the Community's postal services.

(12) Twenty-second Competition Report, point 38.
(13) COM(93) 247 final.

By the end of the formal public consultation, over 200 written submissions had been received by the Commission departments and a summary of these contributions is annexed to the Communication.

In general terms, the Guidelines relate to the definition of the universal postal service at Community level; the maintenance of a reserved area; the establishing of quality of service standards; measures to encourage harmonization; the separation of regulatory powers and operational functions; terminal dues and the international aspects of the postal sector.

More specifically, the Guidelines reflect the consensus reached on the basic concept of the universal service and propose a definition which reflects the obligations of the Member States under the Universal Postal Union Convention. They record agreement on the need to maintain a reserved area for the benefit of the universal service but note the divergence of views on the effect that specific liberalization measures, such as inward cross-border and direct mail services, will have on the economic viability of the universal service as well as problems relating to control.

132. In this regard, the Commission, while maintaining its preference for liberalization, has undertaken to carry out a more detailed analysis of the implications of the latter measures for the provision of the universal service.

The Guidelines also reinforce the Green Paper position as regards, firstly, the need to broaden and deepen the separation of regulatory and operational functions in the postal sector and, secondly, the importance of introducing a cost-based system of terminal dues into the rational development of postal policy in the Community.

The Commission's harmonization proposals received support during the consultation, and the Guidelines pay particular attention to the need to introduce measures to improve quality of service through the fixing of standards at Community level, the monitoring of progress in this regard and the publication of results. They also propose that the harmonization of conditions of sale should be reinforced as well as technical standardization in the handling, transport and delivery of mail.

<T3>

§3. Energy

133. The establishment of a single energy market, in accordance with Article 7a of the Union Treaty, continues to be a Commission priority despite the difficulties of introducing the dynamics of competition into a sector that has long been shielded from competition and the application of the Treaty rules.

The proposals for Directives which the Commission put forward in 1992 under Articles 57(2), 66 and 100a concerning common rules for the internal market in electricity(14) and gas(15) continued to be the subject of wide-ranging discussions.

At its meeting on 30 November 1992, the Council concluded that it was essential to work towards "more open, transparent, efficient and competitive" electricity and gas markets. Whilst noting that obstacles to the single market had yet to be eliminated and further progress achieved, the Council invited the Commission "to consider modifications to its proposals in the light of the Council discussions and of the Opinion of the European Parliament".

The Council meeting on 25 June 1993 confirmed these conclusions. Parliament delivered its opinion at its plenary sitting on 17 November 1993. On 10 December 1993, on the basis of the Council discussions and the numerous amendments proposed by Parliament, the Commission presented the Council with amended proposals for Directives on electricity and gas. The main changes are as follows:

- first, gas and electricity generators will have the right to negotiate access to the network. This replaces the regulated access envisaged in the initial proposals. Provision is made for dispute resolution procedures in the event of difficulties in negotiating or performing contracts, although the procedures may not take the place of the redress available under Community law;

(14) Proposal for a Council Directive, OJ C 65, 14.3.1992, p. 4.
(15) Proposal for a Council Directive, OJ C 65, 14.3.1992, p. 5.

- second, the proposals now include a detailed work schedule which will enable the Commission to draw up the necessary harmonization proposals for the smooth operation of the market without prejudice to the application of Community law.

The amended proposals also introduce, in the electricity sector, tendering procedures for the award of new network transmission and generating capacities as an alternative to the licensing system originally envisaged. An open and non-discriminatory system for the grant of licences to own-generators and independent producers is also established. Lastly, the network operating rules have been simplified. In its White Paper on growth, competitiveness and employment, the Commission undertook to encourage, where appropriate by mobilizing Community funding (grants and loans), the construction of new interconnected gas and electricity networks in the European Union. It will, however, see to it that the conditions governing access to and use of these new networks, as well as existing ones, are consistent with the principles deriving from the EC Treaty and, where applicable, the abovementioned proposals for Directives.

133a. The Commission is pressing ahead with its policy of creating a more competitive and open intra-Community energy market through the application of the competition rules. Thus it authorized an agreement, notified on 26 January 1993, between Electricidade de Portugal, National Power Plc (UK), Empresa Nacional de Electricidad, SA (Spain) and Electricité de France concerning the acquisition and operation of a coal-fired power station at Pego (Portugal) made up of two units. The agreements, chiefly as a result of amendments incorporated at the Commission's request, is in line with the liberalization of electricity generation provided for in the abovementioned proposals for Directives.

134. The Commission is also pressing on with its policy of liberalizing the oil industry, in particular the transport, distribution and sale of motor and jet fuels. To that end, it checked the conformity with the relevant rules of service station agreements between Spanish refineries and service station operators from the recently abolished monopoly network,(16) and of a franchise system in the United Kingdom(17) for service stations incorporating retail outlets for consumer goods.

(16) See point 226 of this Report.
(17) See point 225 of this Report.

The Commission also authorized an agreement on the joint operation by British Petroleum and Repsol SA of logistical facilities for storing and handling oil products in the Canary Islands,(18) and another agreement on the setting-up of a joint venture to deal with fuel-distribution logistics at Milan's new airport. In assessing these cases, the Commission looked into whether interested third parties had access to the network under objective and non-discriminatory conditions, in so far as access was a prerequisite for participation in the market.

135. In December, after long negotiations in the Council and the Parliament which had led it to amend its initial proposal presented in December 1992,(19) the Commission adopted a Decision unanimously agreed by the Council laying down new rules for the authorization of aid to the Community coal industry in the period 1994-2002, when the ECSC is due to expire. The new aid code(20) is closer to the code it replaced than the original proposal as it no longer sets an upper limit on the production costs on which subsidies can be paid to bridge the gap vis-à-vis world market prices. Originally it was proposed that production aid should be limited to the gap between average Community production costs and world market prices. However, an innovation introduced by the code is the requirement for notification and approval of aid before it is granted. Apart from coal, the other state aid decisions by the Commission in the energy sector all concerned aid for renewable energy.(21) The promotion of energy from renewable sources received fresh impetus with the adoption of the ALTENER programme.(22)

(18) See point 226 of this Report.
(19) Twenty-second Competition Report, point 400.
(20) See Annex II to this Report.
(21) See points 532 and 533 of this Report.
(22) Council Decision 93/500/EEC of 13 September 1993, OJ L 235, 18.9.1993.

<T3> §4. Transport

<T4> Air transport

136. Since 1 January 1993, air transport in the Community has constituted a single market from the regulatory standpoint in a largely liberalized system.(23) Carriers now have access to virtually all intra-Community routes, and fares are no longer subject to prior control, thus considerably increasing the opportunities for dynamic commercial strategies and enhancing competition in this sector.

Although liberalization of the internal market encourages the development of competition, certain forms of cooperation between airlines have their place in the new structure. A favourable view is still taken of cooperation where it benefits users and improves the competitive position of the firms taking part, especially smaller carriers without a large network. The Commission also adopted new block exemptions(24) for the joint planning of schedules, the joint operation of air services on new or less busy routes, slot allocation at airports and tariff consultations on fares with a view to the granting of interline facilities.(25) It has, however, made it clear that it will be closely monitoring the development of the interlining system to see whether tariff consultations should continue to be exempted. Lastly, the block exemption concerning computer reservation systems was amended(26) following the adoption by the Council of new rules on the operation of such systems.(27)

137. The Commission also noted that increased competition in air transport revealed more clearly the existence of ground handling monopolies in most European airports. The associated restrictions of competition are liable to jeopardize some of the beneficial effects of transport liberalization. Having received a fair number of complaints, the Commission decided to initiate wide-ranging consultations, on the basis of a working paper it had adopted on 15 December 1993, with Parliament, national authorities, air carriers and the institutions and parties concerned. The consultations

(23) Twenty-second Competition Report, point 58.
(24) Commission Regulation (EEC) No 1617/93, OJ L 155, 26.6.1993 and OJ L 177, 29.6.1993.
(25) Twentieth Competition Report, points 73 and 74.
(26) Commission Regulations (EEC) Nos 1618/93 (OJ L 155, 26.6.1993) and 3652/93 (OJ L 333, 31.12.1993).
(27) Council Regulation (EC) No 3089/93, OJ L 278, 11.11.1993.

should enable the Commission to identify the measures required and the type of legal instrument to be used. The Commission is currently examining within the framework of the goals set out on this subject in the 22nd Report, the observations received during the process of consultations.

The measures could consist, on the one hand, in the abolition of the monopolies for the various services provided (and full liberalization of some of them) and, on the other hand, in measures guaranteeing effective competition, e.g. impartial approval and tendering procedures, or transparent and non-discriminatory conditions of access for new entrants.

This important sector provides an illustration of the principles underlying the action taken by the Commission in areas which are in the hands of monopolies.

138. Norway and Sweden concluded an agreement with the Community which makes them part of the Community single market in civil aviation and also entails application of the competition rules.(28) The agreement was updated in order to bring it into line with developments in Community legislation.(29)

139. With the airline industry in Europe and elsewhere in recession and often loss-making, the Commission had to deal with several major cases of state aid to national flag-carrying airlines. These cases, notably Air France and Aer Lingus, are reported below.(30)

<T4>

Sea transport

140. The Commission continued to apply Articles 85 and 86 of the EC Treaty in this sector, which enabled it in particular to clarify the scope of block exemption Regulation (EEC) No 4056/86. It may also prepare a document next year setting out the principles it regards as fundamental to the application of the competition rules in this sector.

(28) OJ L 200, 18.7.1992.
(29) OJ L 212, 23.8.1993.
(30) See points 536 to 539 of this Report.

141. The Commission approved a draft block exemption regulation which specifies the categories of consortium agreements in the liner trade likely to be authorized under Article 85(3). The draft will now be discussed with the parties concerned in accordance with the procedures laid down in the enabling Regulation.(31)

Consortia are agreements between liner shipping companies for the joint operation, to varying degrees, of maritime transport services involving various technical, operational and/or commercial arrangements.

For the reasons given in its communication of June 1990,(32) the Commission is in favour of this modern form of organizing liner services, a response to containerization.

The growth of container services and the scale of the investment needed (mostly in ships) to operate such services has increased the need for cooperation between shipowners. This cooperation usually takes the form of consortia agreements.

These agreements vary considerably as the degree of cooperation and extent of the joint activities they cover differ according to operators' needs and the situation prevailing on a particular route, and so the Commission was anxious to prepare a balanced and flexible framework for a block exemption instrument which took account of the special features of maritime transport. The Regulation should allow shipping lines to operate under the various agreements in full legal certainty and ensure that shippers receive a fair share of the resulting benefits.

Under the draft Regulation, the block exemption will apply for an initial period of five years and covers both consortia operating within a liner conference and non-conference consortia.

The conditions set out in the new Regulation are modelled on previously published guidelines,(33) adjusted to ensure that consortia operate under conditions of effective competition.

(31) OJ L 55, 29.2.1992.
(32) COM(90)260, 18.6.1990.
(33) Twenty-first Competition Report, Annex II.4.

To that end, the Regulation specifies the maximum share of the trade that makes consortia qualify automatically for block exemption.

The draft Regulation, examined for the first time in December by the Member States at Advisory Committee level, was published at the beginning of 1994 with a view to obtaining the comments of other interested parties.

<T4> Rail transport

142. This has traditionally been a highly regulated sector with each national railway holding a monopoly in its territory. On 1 January 1993 Council Directive No 91/440 of 29 July 1991(34) on the development of the Community's railways entered into force. It represents a very important stage in the liberalization of railways since it authorizes railway undertakings, under certain conditions, to use rail infrastructures in other Member States in order to operate international passenger and goods trains.

Thus it is no longer possible to reserve rail infrastructure, which is just as much an essential facility as a seaport or an airport, solely for the national operator.

These new market operation arrangements clearly facilitate competition between existing railways and should make it easier for new operators to enter the market.

Nevertheless, certain forms of cooperation between railway undertakings may still be necessary. The Commission Decision of 24 February 1993 granting an exemption in the field of the combined transport of goods fits into this context; it has allowed the Commission to clarify certain principles which it will reinforce in its decisions on other cases pending.

More generally speaking, the Commission intends to apply an active policy over the next few years in order to encourage this form of transport and make it more competitive, especially in relation to road transport.

(34) OJ L 237, 24.8.1991, p. 25.

<T3>

§5. Audiovisual industry

143. The audiovisual industry is undoubtedly a key area in the improvement of the productivity of Community industry. It is, however, necessary to distinguish between the situation in television and that in film production and distribution.

Television is in full expansion with an ever-growing number of channels; new channels may differ from the traditional channels in that they take the form of single-subject channels, subscription channels or "pay per view" channels, where only what is watched is paid for. These developments have been made possible by constant technological progress. The arrival of digital compression should greatly increase the number of satellite TV channels. A further consequence of technological progress is that competition is increasingly becoming worldwide.

In the case of films, most Community countries are experiencing a decline in the number of cinema-goers and very strong competition from non-Community producers and distributors. Here, the trend in television feeds through to developments in the film industry.

Worldwide competition clearly makes it more necessary than ever to establish a level playing field to ensure that the conditions applied to the Community industry in third countries are not worse than those enjoyed by those countries' industry in the Community.

144. Whilst the growth of television is itself a source of employment, it also has repercussions on the whole of Community industry. As the White Paper on growth, competitiveness and employment noted, the dissemination of information is essential in enabling enterprises to adjust rapidly to a competitive environment.

Yet television is also a special sector, inasmuch as its openness to competition is recent, the emergence of modern technology having allowed television programmes to be broadcast over far larger areas. Current technical progress could indeed mean that viewers will soon be able to select their own menu of programmes.

145. Finally, it is also necessary to consider the aspects relating to pluralism in the media. A Green Paper(35) adopted by the Commission formed the basis in 1993 for a vast consultation programme with all the parties concerned. The purpose of the Green Paper is to consider whether, taking account of the objectives of the single market, it is necessary to propose Community-level approximation of the rules on media ownership as laid down by the Member States to ensure pluralism. The Commission will decide on the need for Community action by the spring of 1994. It should be noted that the Merger Control Regulation is certainly an effective instrument for monitoring developments in this sector, even though none of the cases notified this year under the Regulation concerned the audiovisual industry. It should also be remembered that one of the exceptions to the "one-stop shop" principle concerns the media; although in theory mergers meeting the threshold criteria are examined only under the Merger Control Regulation, Article 21(3) of that Regulation allows Member States to take measures against concentrations that jeopardize the plurality of the media, even if they would not be creating a dominant position liable to restrict competition within the meaning of the Regulation.

146. The desire to give real impetus to competition in television in its new environment explains the attitude the Commission has adopted in the year under review and intends to take in the future. On several occasions it had to decide on agreements between television stations aimed in practice at giving the parties to the agreements exclusive rights whilst preventing others from re-transmitting or distributing their pictures. In each case, the Commission required the parties to amend their agreements to allow third parties non-discriminatory access to the markets concerned. The EBU-Eurovision System case is particularly interesting in this connection. It concerned the joint acquisition of the radio-broadcasting rights to certain events. Initially, the agreement granted such rights only to members of a body named Eurovision. However, only public or private stations with public

(35) "Pluralism and media concentration in the internal market - An assessment of the need for Community action" COM(92)480 final.

service obligations could join that body. The machinery thus completely prevented private channels from retransmitting the events in question. The Commission eventually exempted the agreement only after the parties had agreed partially to open their agreement to third parties.

This approach was similar to that taken in other areas where the question of access to essential infrastructures arises.

147. The situation in the cinema industry, on the other hand, is more difficult. In the past, the Commission had approved the setting-up by three US producers of a joint venture, United International Pictures (UIP), for the joint distribution of their films. An application for renewal of the exemption was received in 1993. But the Commission's concern in this industry too is to ensure that third parties have equal access to markets on equitable terms, and at the same time to maintain a level playing field.

<T4> State aid

148. As stated above, the Commission has always taken a sympathetic approach to state aid for the audiovisual industry (feature films and television productions) because of the difficulties facing it and because of its particular cultural importance. It intervened only in respect of infringements of other provisions of the Treaty such as discrimination against the nationals of other Member States.(36)

Following complaints from a number of private television channels, the Commission is investigating the financing of public channels in several Member States (Spain, France and Portugal). To enable it to assess the various rights and obligations that determine the financing of public and private broadcasters in the Member States, together with their transnational repercussions, if any, it has commissioned a study from outside consultants.

(36) Twenty-second Competition Report, points 441 to 444.

<T4>

Chapter IV

<T2>

Competition policy and other Community policies

149. Competition policy is an instrument which complements the Community's other policies. This chapter of the Report therefore looks at the role which competition policy can play in the implementation of such other policies. However, the links described below are not the only ones that exist, since competition policy is also relevant to the pursuit of policies not dealt with in this Report, such as regional policy and consumer protection. The policies highlighted in this Report have thus been selected to reflect significant developments during the year, but this does not mean that the links between competition policy and other policies not mentioned are of any lesser importance.

<T3>

§1. Completion of the internal market

150. The 1993 year marked the beginning of a new stage in the development of the internal market. In accordance with Article 7a of the EC Treaty (formerly Article 8a of the EC Treaty, as added by the Single European Act), virtually all the measures aimed at establishing the internal market by 1 January 1993 were adopted. This legislative work led to the removal of internal frontiers to the free movement of goods, services and capital. Nevertheless, the Commission is aware that it is not sufficient to adopt such a legislative framework for an area to emerge in which there is free competition across internal frontiers. Recognizing the need for ongoing monitoring of the way in which the basic rules function, the Commission adopted the Strategic Programme on the Internal Market.(1)

151. The strategic programme identifies the guidelines and measures that are necessary for the internal market to operate and to allow competition between operators at Community level.(2) Key importance is attached to developing

(1) COM(93) 632 final.

(2) The annual report on the internal market describes the main Community measures affecting the operation of the internal market. The first report was published in March 1994.

the interaction between competition policy and establishment of the internal market. Such interaction springs from the fact that these Community policies serve the same fundamental objective - reinforcing the wealth-creating capacity of the Community economy through improved allocation and more efficient use of productive resources. Strict application of the competition rules is an essential complement to the drive to remove legal and administrative obstacles to trade within the Union. It will help to ensure that any anti-competitive practices by companies or national authorities do not inhibit the dynamics of competition that must be the key to achieving the economic advantages which completion of a single market should bring. A strong competition policy will ensure that firms trying to tap the openings created by the internal market do not see their efforts frustrated by such practices.

152. First of all, Member States may be tempted to grant aid to firms that are facing greater competition as a result of the single market programme. This may provoke similar measures in other richer Member States that wish to protect their firms. This type of chain reaction inevitably leads to an escalation in aid that in the end benefits the richest Member States, i.e. those that were the most developed in the first place. It is therefore essential that the Commission continue to play its role of arbitrator and that it applies strictly the principles laid down in the Treaty so as to maintain aid discipline and ensure cohesion.

There may also be some resistance to the non-discriminatory liberalization of competition at national and Community level in sectors which were traditionally managed on the basis of exclusive or special rights. This is particularly true of those sectors that involve certain basic infrastructures such as transport, energy and telecommunications. This policy is, however, prejudicial in the long run to the interests of such Member States and thus to the Community as a whole. If there is no competitive pressure, enterprises will not necessarily be induced to improve their productivity. The result is inefficiencies that are harmful to such enterprises, and hence to society as a whole. Furthermore, other businesses in such Member States which often depend on access to such infrastructure will be penalized in

their competitive relationships with firms in other Community or non-Community countries. Here again, the Commission's intention, in ensuring gradual liberalization in such sectors, is to give everyone a greater chance of benefiting from the advantages of a genuine internal market.

153. Secondly, firms may be tempted to protect themselves against competition from firms in other regions. What is involved here is not government action but private practices. Firms may attempt to achieve these ends by entering into agreements or by abusing dominant positions. Such types of conduct must be banned, since they do not allow firms to capitalize fully on their competitive advantages. They act moreover as a brake on the development of certain regions by obstructing improved exploitation of regional comparative advantage. Once again, by penalizing severely such practices, competition policy can help in ensuring economic and social cohesion, without which the internal market cannot function properly in the long term. Merger control pursues the same objectives, since it seeks to prevent firms from acquiring, through mergers, positions such that they no longer have to fear competition from other firms.

154. Competition policy will therefore remain an essential means of ensuring that completion of the internal market brings Community industry as a whole and consumers all the benefits which a Community-wide market affords. Another example is provided by the various block exemption regulations adopted in respect of exclusive distribution and exclusive purchasing agreements. This is not a new idea, since one basic reason why the EC Treaty includes competition rules is the desire to ensure that private obstacles to trade do not replace the government obstacles which the EC Treaty set out to eliminate.

<T3>

§2. Industrial policy

155. Competition policy and industrial policy have sometimes been portrayed as opposites. However, to understand the real extent of this supposed conflict, it is important to define first what is meant by industrial policy. All Member States have an industrial policy, but the term covers a wide variety of situations. At one end of the spectrum are those Member States in which government intervenes in life all the time, while at the other are those in which the state's role is confined to basic functions, such as education and the maintenance of law and order. Clearly, competition policy is not possible in a completely interventionist state. Yet all the other types of organization of the economy provide a role for competition policy, some greater, some smaller, that links up with industrial policy.

156. The Commission first expressed its position on industrial policy in its communication entitled "Industrial policy in an open and competitive environment".(3) Similar ideas found their way into the Maastricht Treaty. It contains a new Title XIII entitled "Industry" (Article 130). From the Community's viewpoint, as defined in the Maastricht Treaty, industrial policy rather seeks to create the essential conditions for the rapid development of an efficient Community industry. The idea is not therefore for the Community to take the place of businesses themselves, but to act as a catalyst in encouraging innovation and creating an appropriate and stable environment. Seen in this way, the main achievement is certainly the completion of the internal market, which should allow Community industry to benefit from economies of scale, while at the same time exposing it to greater competitive pressures, which can only boost its productivity.

This general approach shows up in more specific measures. Thus, the Commission has adopted documents relating to various sectors that stress the role of competition. Furthermore, several measures are mentioned in the White Paper on growth, competitiveness and employment. Examples include

(3) COM(90)556.

measures to promote the development of infrastructure, such as the creation of trans-European networks, the speeding-up of technological advances, notably in biotechnology, and the opening-up of markets to non-Community countries.

157. Against this background, the Commission considers that, far from being the direct opposite of industrial policy, competition policy is an essential instrument, with clear complementarity between the two policies. The approach in the Maastricht Treaty is no different. On the one hand, competition policy continues to be a fundamental objective, as Article 3(g) makes clear. On the other, the newly added Article 130 states that Community action to promote the competitiveness of Community industry must be "in accordance with a system of open and competitive markets". Lastly, Article 3a confirms that Community economic policy must be conducted in accordance with the principle of an open market economy with free competition. The Treaty lists a number of measures that may be taken, notably by the Commission. Competition policy therefore has an important role to play with respect to each of them.

158. The Treaty calls firstly for a speeding-up of industry's adjustment to structural change. Such adjustment requires firms to take advantage of the existence of a large internal market by way of integration. Such integration may take place through mergers. The Merger Control Regulation is a valuable instrument which enables the Commission to control corporate mergers so as to ensure that they do not result in situations that are prejudicial to the market and, above all, to authorize all mergers that do not pose any such danger. The discussions on the lowering of thresholds have shown that firms would prefer to deal with a single competition authority rather than having to meet the requirements of several national authorities.

Other forms of cooperation between firms may prove beneficial without necessarily resulting in a full merger. Thus, firms may decide to set up a joint venture, or indeed simply to conclude a cooperation agreement. Such forms of cooperation may enable the partners to become more efficient and to

stand up to competition, which is increasingly worldwide. These types of agreements may be authorized under Article 85(3), despite the fact that they restrict competition. Use was made of this possibility on numerous occasions this year. However, the Commission must in all cases react speedily: if firms cannot implement their decisions rapidly, they risk being overtaken by events in a changing environment. It is because it is aware of this requirement that the Commission has undertaken to work to tight deadlines in cases involving structural changes.

159. The Maastricht Treaty also provides for the encouragement of small and medium-sized businesses. As noted elsewhere in this Report, the Commission gives preferential treatment to small and medium-sized businesses in its control of state aid.

In handling the competition rules applicable to firms, the Commission has for many years given preferential treatment to small and medium-sized businesses and has decided that it will not normally concern itself with the conduct of smaller businesses. More generally, the application of the competition rules has often resulted in the prohibition of agreements or practices that were harmful to small and medium-sized businesses.

160. Lastly, Community industrial policy also comprises all the measures to encourage research and development. A clear and supportive policy towards aid for R&D was laid down by the Commission in its 1986 guidelines.(4) Acting under Article 85 of the EC Treaty, the Commission is ready to authorize agreements involving a restriction of the parties' freedom of action if such restriction is necessary in order to achieve technological innovation that is beneficial to all. One case decided on this year, Becton-Cyclopore, is a good example of this approach. It should also be remembered that, in 1984, the Commission adopted a block exemption Regulation authorizing certain joint research and development agreements. The Regulation was followed up by another which entered into force this year and which, subject to certain conditions, exempts such agreements where the parties decide to exploit jointly the results of their research by setting up a joint subsidiary to market the products.

(4) OJ No C 83, 11.4.1986. See also points 454 to 464 of this Report.

161. An important part of the business environment are services, such as transport and telecommunications which are discussed elsewhere in this Report, and the availability of a trained labour force. This makes well-developed infrastructures and efficient constantly updated training systems major instruments of industrial policy. The public financing of infrastructure that is to be accessible to all service providers is generally not considered state aid.

<T3>

§3. Environment

162. This year has been an important one for the relationship between environment and competition policies. With the entry into force of the Maastricht Treaty the environment has been given greater prominence. Article 130r(2) provides that "environmental protection requirements shall be a component of the Community's other policies". This principle of integrating environmental considerations into other Community policies was also a basic element in the fifth Community action programme on the environment "Towards sustainability"(5) and was given substance in the Communication in June on "Integration of environmental objectives into other policies".(6) Competition must therefore, as much as any other Community policy, take account of environmental considerations.

163. However, this effect of environmental considerations on competition policy is not a one-way street. Competition policy when put into its proper framework has a very important role to play in achieving environmental objectives.(7)

164. In the first place, one of the fundamentals of Community environmental policy is the "polluter pays" principle. When applied, this allows the price mechanism, which ought to translate into costs the negative effects of a particular process or good on the environment, to perform its signalling function which forms the basis of a market economy. This pushes firms to convert environmental costs into financial terms. The pressure of competition will therefore be one of the mechanisms which will prompt businesses to reduce emissions in particular by using less polluting production and disposal techniques. In the longer term these price incentives stimulate research to develop environmentally friendly products or production technologies, thereby putting the economy on a structurally less polluting path.

165. This approach of relying on competition and the market mechanism is found in all environmental policy. In its Communication on "Industrial competitiveness and protection of the environment",(8) the Commission

(5) COM(92)23.
(6) SEC(93) 785/5 of 28.5.1993.
(7) Twenty-second Competition Report, points 75 to 77.
(8) SEC(92) 1986 final.

clearly calls for a vigilant competition policy. It states that "whenever possible [integration of competitiveness and the environment requires a strategy that] should be built around solutions based on the competitive functioning of markets. This implies in particular emphasis on market-related instruments of environmental policy". A similar philosophy underlies other recent policies in the environmental field. The Green Paper on civil liability for environmental damage(9) puts the responsibility for environmental damage on the polluter and consumer. The draft Directive on the prevention of pollution and integrated pollution control(10) leaves a role for competition in determining the Best Available Technology (B.A.T.) to meet established standards.

166. The "polluter pays" principle is taken a step further in the new environmental aid guidelines which set out the principles by which the Commission will judge state aid for environmental protection.(11) Clearly subsidies towards the cost of dealing with pollution are not a straightforward application of the principle, which would require all such costs to be borne by the polluter. But they may be a second-best solution. The difficulty of applying the "polluter pays" principle fully and at once has been recognized ever since the first framework was issued in 1974, but over time the levels of subsidy have been progressively reduced. The new guidelines further cut back on aid for adapting existing plant, but, again in recognition of the "second-best" solution that subsidies may represent, allows a higher rate of aid (up to 30 %) for investment that goes significantly beyond current environmental requirements. By establishing clearer rules in these and other areas, the new guidelines will contribute to a more effective conduct of environment policy in the Member States.

167. Just as important as state aid policy is cooperation between companies that can have effects that need to be analysed with respect to the competition rules. For example, an increasing number of Member States are legislating in the field of packaging waste to take them out of the public waste disposal system for household waste. This objective is to ensure that

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(9) COM(93) 47.
(10) COM(93) 423 of 14.9.1993.
(11) See points 419 to 426 of this Report.

waste or other products at the end of their useful life need to be either recycled or reused.(12)

168. Cooperation between companies is often the only way for them to meet these norms and run collection and retrieval systems privately. Several important cases are currently under investigation. The DSD (Duales System Deutschland) allows participating companies who pay a fee to place a "Grüner Punkt" on their products, showing that the packaging will normally be sorted and can be recycled. This case has been the object of a number of complaints which raise several important issues. In particular the question must be asked whether it is necessary that there be only one system, which gives rise to risk of monopoly power, and whether participation in the system is a de facto necessity for producers, particularly from outside Germany, to enter the German market, in other words whether the system could be used as a barrier to entry to new competition.

Similar issues are raised in another case under investigation relating to re-usable plastic crates for the transport of fresh fruit and vegetables. In return for a fee, IFCO (International Fruit Container Organization - set up by food traders) undertakes to produce, supply, take back and clean these crates so as to permit their re-use. The food traders informed their fruit and vegetable suppliers they would "whenever possible, buy only goods delivered in IFCO crates". They also notified the system to the Commission. National and European association groupings, on the one hand, of producers of carton board packages and, on the other hand, of fruit and vegetable producers complained against the IFCO system. The Commission is still examining the case but in early June 1993 it issued a press release in order to clarify one specific question. The letter by which the traders had informed their suppliers of the existence of the IFCO system differed from the notification of that system in so far as it created the impression that the traders would only accept IFCO crates. According to the notification, the traders merely committed themselves to promoting the IFCO-crates by using the minimum number of such crates judged necessary for the safe start-up of the IFCO system. In its press release the Commission informed the public at

(12) The Court of Justice has confirmed that obstacles to free movement of goods within the meaning of Article 30 can be justified on environmental grounds in particular where no Community measures have yet been adopted (Case 240/83 [1985] ECR 531 and Case 302/86 [1988] ECR 4607).

large that, at its request, the traders had written a second letter to their suppliers clarifying this point.(13)

169. Another case that was decided this year is very interesting in showing the Commission's thinking in this complicated area. It concerns agreements between water bottlers to standardize bottles so as to enable them to comply with legislation requiring these bottles to be re-usable if a system for their recycling did not exist.(14) A standard bottle has efficiency advantages, notably at the retail level for sorting. With the introduction of the new German legislation, membership of this system of standard bottles, whilst not a de jure requirement for access to the German market, became a de facto necessity. Following a statement of objections in which the Commission highlighted the discriminatory conditions of access to the system for non-German mineral water producers, which seriously impeded their entry into the German market, the system was changed. This contrasts with the situation several years earlier when the Commission rejected a similar complaint because at that time other possibilities for distributing mineral waters existed and membership of the system was not necessary to have access to the market.

170. This case shows clearly that the Commission will examine carefully all agreements between companies to see if they are indispensable to attain the environmental objectives. It will be particularly vigilant to ensure that such agreements do not foreclose market entry to outsiders and that where membership of the system is necessary for market access because there is no viable alternative, then this membership will be given on non-discriminatory terms. In this respect membership is treated in a similar way to access to essential facilities in regulated sectors or transport (e.g. ports).(15) The Commission in its analysis of individual cases will have to weigh the restrictions of competition in the agreement against the environmental objectives that the agreement will help attain, in order to determine whether, under this proportionality analysis, it can approve the agreement.

(13) Press release IP(93)430, 3.6.1993.
(14) See point 240 of this Report.
(15) See point 234 of this Report.

171. Finally as regards the environment, the White Paper gives it a prominent place in the new development model for the Community. The underuse of labour-based resources is contrasted with the overuse of environmental resources and capital-intensive methods of production. The development path laid out builds on elements already being established in environmental policy but with renewed vigour and focus. The necessary role of competition policy in carrying out the policy of sustainable development and the impact of this latter on the application of competition policy will therefore be a further enhancement of the two-way influence between environment and competition described in this chapter.

<T3>

§4. Culture

172. The Maastricht Treaty introduced an innovation by devoting a specific title to culture. This new Community policy has direct consequences for the competition rules: Article 92(3) of the EC Treaty now provides that, where aid to promote culture and heritage conservation does not affect trading conditions and competition in the Community to an extent that is contrary to the common interest, it may be considered to be compatible with the common market and therefore authorized. This important new provision will enable the Commission to strike the necessary balance between the requirements of cultural and heritage promotion and the openness of trade and competition in the single market.

173. While the provision of an explicit legal basis in the Treaty for state aid policy in the cultural field is welcome, this should not be taken to imply that the Commission pursued a different policy in the past. The Commission's consistent practice has been to authorize state aid to promote culture and heritage conservation as long as competition is not unduly distorted and that the other single market rules are fully complied with. The Commission position with regard to cinema and television was set out in last year's Report.(16)

There are many local, regional and indeed national cultural subsidies which do not distort competition or affect trade between Member States to any significant extent. In such cases, Article 92 of the EC Treaty does not apply and the Commission has no cause to intervene. Where a subsidy does have distortive effects, those effects are analysed in the light of the national and Community policies being pursued and the impact on the beneficiaries' competitors. This analysis pays particular attention to the principle of proportionality. The Commission must ask whether the subsidy does no more than is necessary to meet the objectives of the policy being pursued and whether the harm to competitors outweighs the benefit of meeting the relevant policy objectives.

(16) Twenty-second Competition Report, points 64 to 66.

174. Culture, it is often said, is not a vulgar product like any other. This may be so, but artists, producers, distributors and indeed all the participants in the process of cultural creation and heritage conservation frequently find themselves in competition with each other for audiences, advertisers and outlets. Accordingly, it is as important in this field as in any other that the Commission should ensure that competition is not unduly distorted and that wasteful subsidy races are avoided.

In recent years, the Commission has taken a number of decisions which clarify its position on cultural aid. Maintaining cultural diversity has been accepted as a justification for support of the film industry, for subsidizing production of television programmes in regional languages, for promoting the plastic arts and for supporting the export of books to countries where the language of the book is not widely spoken. Ways of reconciling cultural preservation and non-discrimination have been found. Now that the EC Treaty has been amended in the way described above, further clarifications may be expected without, however, any fundamental shift in policy.

175. Protection of culture is also a concern that has always been borne in mind in applying the competition rules that affect businesses. Although culture is not mentioned by name in Articles 85 and 86 of the EC Treaty, the Commission takes account of the cultural dimension when investigating cases in the light of those provisions. Yet the aim is not to frame a policy on culture or to make value judgments in applying the provisions, but rather to assess business practices with due regard to the repercussions they could have on the Community's cultural policy.

176. One example of this concern has already been mentioned in the part of this Report devoted to the audiovisual industry. Here, as elsewhere, the Commission's action is of course aimed in the first place at ensuring that competition between firms is not distorted and that some firms do not try to oust others through anti-competitive practices. The Commission's action thus also has the effect of preserving some plurality in the media, and this is undoubtedly an effective means of promoting European culture. By stopping, for example, certain operators restricting others from transmitting certain pictures, the Commission wishes to see them disseminated as widely as

possible and is thus contributing indirectly to their distribution across the Community.

177. To take another, perhaps more striking example, the Commission is currently investigating several cases involving resale price maintenance systems for books. This is machinery set in place by publishers in several Member States to prevent active price competition between publishers and between booksellers. Without at all prejudging its final conclusions in these cases, the Commission has in the past repeatedly stated that it could regard such resale price maintenance arrangements for books as compatible with the competition rules provided that they are individual and purely vertical. In other words, while the Commission cannot agree to prices, pricing methods or conditions of sale being established collectively by all publishers, it can, on the other hand, countenance a system whereby an individual publisher lays down the conditions of sale and retail prices of his books in the bookshops. In taking such a stance, the Commission is of course conscious of the need to afford some form of protection to publishers of books produced in smaller print runs, a consideration which influences its analysis of the conditions of competition. A system of individual resale price maintenance protects booksellers offering ranges of books of more limited appeal, and therefore produced in smaller print runs. This is another important example of how the Commission reconciles the concerns of cultural policy with application of the competition rules.

<T3>

§5. Commercial policy

178. The links between competition policy and commercial policy, and more specifically anti-dumping measures, have long been the subject of discussions. It has even been proposed on occasion that the anti-dumping rules be replaced by the competition rules. This means, however, that the latter are viewed only in terms of their application to business practices within the Community.

The Commission does not share this view. In its White Paper on growth, competitiveness and employment, it stresses the need to protect Community industry against unfair practices in the Community by firms based in non-member countries, by tightening application of the anti-dumping rules. There are therefore no moves at present to replace the instruments of commercial policy with the competition rules.

179. This does not mean, however, that the competition rules will not have to play a key role in future in this area. Application of anti-dumping measures does not enable Community industry to gain access to markets in certain non-member countries where domestic manufacturers often organize themselves in such a way that foreign firms are to all intents and purposes excluded. Furthermore, anti-dumping measures in the form of undertakings secured from manufacturers or import quotas can even backfire by boosting the profits of non-Community firms, because the products are sold in the Community at higher prices. If a lasting solution is to be found to the difficulties facing Community industry in this area, other instruments must therefore be used.

180. In the Commission's view, the competition rules can constitute such an instrument. The example of the Community itself serves to show that competition rules form an essential complement to the removal of state barriers to trade. This is why the Community has always made it a special point to challenge business practices that hinder market integration. However, at the present time, the efforts to liberalize world trade concern only state barriers and not private barriers to trade. In the Commission's view, it is therefore essential that global competition rules be developed, and above all effectively applied, if Community firms are to be able to operate under similar conditions to their competitors.

181. There are many possible approaches, and they are not mutually exclusive in the Commission's view. The most ambitious solution would undoubtedly be the adoption of an international competition code, backed up by effective means of enforcement. The Commission is also anxious to see competition rules included in agreements it concludes with non-member countries. Lastly, it has concluded or is planning to conclude certain specific agreements in the competition field with the competition authorities of some non-member countries. These are essential preconditions if Community industry is to gain unhindered access to third country markets. The new situation would stop firms in those countries earning the large profits they currently make because their domestic market has been closed off. An end would thus be put in the long run to the economic conditions that allow them at present to engage in unfair competition within the Community: if they were to continue to sell at extremely low prices, either their products could be re-exported to their country of origin, or Community firms could sell more cheaply than them on their home markets. The economic conditions allowing dumping to take place would thus disappear.

<T4>

Chapter V

<T2>

Application of the competition rules

<T3>

§1. Transparency

182. The Commission has for a number of years been making special efforts to ensure that businesses and the public can gain easy and effective access to the information they need to understand the Community's competition policy and, in the case of businesses, comply with its requirements on a day-to-day basis. With respect to state aid in particular it is vital that the Member States' governments and local authorities have access to the information necessary to ensure that any plans they elaborate regarding the grant of aid comply with the Community's relevant procedural and substantive rules. This need for clear information is regarded as one of the Commission's priorities in the area of competition policy. The Community's competition policy will be fully supported by business, policymakers and the general public only if it is widely understood. To achieve this aim the Community's approach in this area must be fully transparent.

In 1993 the Commission continued to take a number of measures to ensure that this policy remains effective.

183. First, it appointed an information officer within the Directorate-General for Competition, to whom companies and Community citizens may address enquiries. The information office aims to present an accessible information point both for general enquiries on competition policy and for specific questions on points of law. The unit can be contacted by telephoning Brussels (32) 2-295 00 94 or by fax, Brussels (32) 2-295 54 37.

184. Second, the Commission has continued its efforts to increase the range of publications and other sources of information that can be made available.

In addition to the publication in the Official Journal of the full texts of formal decisions taken by the Commission pursuant to Articles 85 and 86, all major developments in individual cases and on questions of general policy are reported by press release. These press releases are generally available, and can be consulted through an on-line database, named RAPID, accessible by subscription with the Commission. Furthermore a summary of these press

releases appears monthly in the Bulletin of the European Communities, as well as annually in the Competition Report. The Commission published for the first time in 1993 a long press release outlining its activities in applying the competition rules over the first half of the year. Another press release, covering the second half of the year, was also published in early 1994.

A number of other projects are also nearing completion. A variety of brochures on the Community's competition policy are under preparation and will be available during the course of 1994. Furthermore, a quarterly newsletter is planned, which will update the business and legal community on recent developments in an easily readable format.

185. Third, the Commission has been taking a number of measures aimed at increasing the input from industry and consumers on cases under active consideration by the Commission. Thus, in merger cases and cases regarding structural joint ventures falling under Article 85(1), the Commission publishes a short notice in the C series of the Official Journal as soon as it receives the notification, outlining the operation in question, and inviting third parties to comment. In cases where the Commission is considering the adoption of a formal exemption or negative clearance decision, it continues to publish a fairly detailed notice under Article 19(3) of Regulation No 17 outlining the proposed transaction and its likely effect on the market in question and inviting third parties to comment before it adopts a final decision.

186. Fourth, the Commission has been furthering its policy of inviting companies and their representatives to contact the Directorate-General for Competition for consultations on individual cases prior to notification or the lodging of a complaint. Such contacts are now standard procedure for cases falling under the Merger Control Regulation, and the practice has been widely welcomed by those involved. The Commission has therefore been informing companies of this facility, in particular in cases involving structural joint ventures, where the new internal deadlines followed by the Commission make close collaboration between the Commission and the companies in question indispensable.

187. Lastly, special mention should be made of transparency in the field of state aid. A new set of policy guidelines was issued in 1993 laying down the principles that will guide the Commission when assessing the compatibility of state aid for environmental protection.(1) The Commission also adopted a notice which standardizes the formats of notifications and the reporting requirements on authorized aid schemes.(2) Commission staff met twice with experts from all twelve Member States in multilateral meetings.

188. The Commission also took practical steps, by issuing instructions to its departments, to make legislative work more transparent. If there is to be an active dialogue with the sectors and interests concerned and, more generally, with European citizens, all these groups must be more thoroughly informed of preparatory work prior to the adoption of legislative instruments.

The Commission is under a legal obligation to publish draft legislation it is preparing only in the case of block exemption regulations.(3) It has undertaken to publish in future all proposals for Council directives or regulations and all draft directives, regulations or interpretative or policy notices which it intends to adopt in the field of the competition rules applicable to enterprises.

These drafts will normally be published in the Official Journal; texts other than draft block exemption regulations will be published at the same time as they are sent to the Member States. This will enable the Commission already to take account of the reactions of interested parties when it holds consultations with the national authorities.

(1) See point 384 of this Report.
(2) See point 385 of this Report.
(3) See the Council enabling regulations: Articles 5 and 6 of Regulation No 19/65/EEC (OJ 36, 6.3.1965, p. 533) and Articles 5 and 6 of Regulation (EEC) No 2821/71 (OJ L 285, 29.12.1971, p. 46).

<T3> §2. Subsidiarity and decentralized application

189. The principle of subsidiarity, which is enshrined in the new Article 3b of the EC Treaty, has from the outset been at the heart of the rules designed to ensure that fair, effective and undistorted competition is maintained and developed both in the Member States and at Community level. In the field of restrictive agreements and dominant positions, Articles 85 and 86 of the EC Treaty have always existed alongside similar provisions of national law. The agreements and practices concerned are caught by the Community rules only where they are liable to affect trade between Member States. A similar approach has been taken by the Community legislator in allocating responsibilities for merger control between the Community and the Member States: Regulation (EEC) No 4064/89 provides for control by the Commission only where the operations have a Community dimension.(4)

While the principle of subsidiarity is well established in competition policy, the way it is put into practice is not always satisfactory, because the demarcation between matters that should be the responsibility of the Commission and those that should be dealt with by the Member States is not always ideal. This applies particularly to the dividing line drawn by the Merger Control Regulation between the respective fields of application of Community law and the domestic law of the Member States. Experience in applying the Regulation has shown that very many operations which fall below the current thresholds do have a genuine European dimension and therefore ought to be subject to control by the Community.(5)

The Commission will accordingly continue to press for a revision, in 1996, of the turnover thresholds laid down in Article 1 of the Merger Control Regulation, which determine whether a merger is deemed to have a Community dimension.

190. As far as action under Articles 85 and 86 is concerned, the actual wording of the provisions prevents the Commission investigating restrictive agreements or abuses of dominant positions whose foreseeable effects do not

(4) Twenty-second Competition Report, point 120.
(5) See the part of this Report on merger control.

extend beyond the confines of a single Member State: this is an area reserved for the national authorities, which apply their domestic laws. On the other hand, neither the Community nor the Commission is exclusively competent to deal with restrictive agreements and abuses of dominant positions that produce their effects in several Member States and consequently affect intra-Community trade. The national authorities can apply their domestic law in such cases; as long as the Commission has not initiated any proceedings, they can even apply the prohibitions laid down in Article 85(1) and Article 86. The power to grant individual exemptions under Article 85(3) is nevertheless reserved for the Commission (Article 9 of Regulation No 17).

This pattern of responsibilities requires constant close cooperation between the Commission and the national authorities to prevent overlapping investigations that might lead to inconsistent or even conflicting decisions. It also points to the need for a better division of labour between the Community and the national competition authorities. The Commission takes the view that restrictive agreements and abuses of dominant positions which, albeit appreciably affecting intra-Community trade, produce most of their effects on the market of a single country should be dealt with by the competition authorities of the Member State concerned under the subsidiary powers conferred on them by Article 9(3) of Regulation No 17. In accordance with that provision, the national authorities could apply the prohibitions laid down in Article 85(1) and Article 86, either on their own, or in conjunction with similar provisions of their domestic law. Conversely, cases with a significant impact on competition either throughout the Community or in a part of it that extends well beyond the confines of a single Member State would be dealt with by the Commission alone.

Such a division of labour would not impinge on the Commission's exclusive powers under Article 9(1) of Regulation No 17 to grant individual exemptions in pursuance of Article 85(3). National courts and authorities may be allowed to apply Article 85(3) only for types of agreement that do not greatly jeopardize effective competition and are covered by block exemption regulations. In other cases, which must be examined individually, the grant

of a derogation from the ban on restrictive agreements requires assessment of complex economic situations and the exercise of considerable discretionary power, particularly where different objectives of the EC Treaty are involved. This task can only be performed by the Commission.

191. The solution advocated above is fully in line with the policy of further decentralizing the application of Articles 85 and 86 which the Commission has been pursuing for several years. A first step in this direction was taken with the adoption of a notice on cooperation between national courts and the Commission.(6) The Commission will henceforth endeavour to step up cooperation with the competent national authorities in order to prepare the ground for their regular application of Community law. The annual conference of the Directors-General for Competition of the Member States, held in Brussels on 15 October, was devoted exclusively to this topic. Discussions are continuing within an ad hoc working party composed of representatives of the national authorities and of the Commission, which has the task of examining what steps should be taken in order to:

- make competition policy towards enterprises more effective throughout the Community;

- involve the competent national authorities more closely in implementing that policy;

- improve Community procedures; and

- share out the case load more satisfactorily between the Commission and the Member States.

The Commission is convinced that these aims can be achieved without amending Regulation No 17. The practical steps to be taken in this area will be set out in a notice published in the Official Journal.

(6) OJ C 39, 13.2.1993, p. 6; Twenty-second Competition Report, point 299.

<T3> §3. Improvement of procedures

192. The Commission is continuing to look for ways of streamlining and speeding up its procedures. This involves, firstly standardizing the requests, notifications and reports submitted by the parties and the letters dispatched by the Directorate-General for Competition and, secondly, improving the flow of information on which the Commission bases its decisions. During the year, considerable progress was made along these lines in connection with both the monitoring of state aid(7) and the application of Articles 85 and 86.

<T4> "Structural" cooperative joint ventures

<T5> (a) Aims

193. On 23 December 1992 the Commission adopted new internal procedures to speed up its handling of "structural" cooperative joint ventures.(8) These are cooperative joint ventures (JVs) whose creation entails major changes in the structure of the participating firms. The joint venture must therefore be more than a mere legal arrangement chosen in order to coordinate the parties' commercial policies: it must have an existence in its own right because it pools a significant number of assets transferred to it by the parent companies, particularly in the production field and in connection with the manufacture and marketing of certain goods.

It was necessary to speed up the Commission's procedures in these cases in order to give the firms concerned the degree of legal certainty they need when making major investments as part of a medium- or long-term industrial and commercial strategy. Under the Commission's new internal rules, DG IV will therefore, within two months of full notification of the agreement, inform the parties of the outcome of its initial analysis and the probable duration of any administrative procedure it intends to initiate.

(7) See point 385 of this Report.
(8) Twenty-second Competition Report, points 122 to 124.

194. This extremely short deadline can be met only if in-house measures taken by the Commission are backed up by other rules on dealings between the relevant Commission departments and businesses. The basic aim is to ensure that "structural" cooperative JVs notified to the Commission are handled efficiently. This is all the more necessary as the number of such notifications is on the increase. A sound economic and legal assessment can be made within two months only if the Commission has, right from the start of its investigation, full information on a number of factors to be taken into account, in particular the activities of the firms taking part and of the groups to which they belong, their size and market shares, the nature, role and importance of the joint venture and the structure of competition on the relevant markets.

<T5> (b) Planned measures

195. These aims cannot be achieved through normal administrative practice developed under the procedural rules currently in force (and followed up to the end of 1992 in the case of "structural" cooperative JVs too).

The present version of form A/B is drafted too imprecisely to guide notifying firms towards the essential questions on which a joint venture is assessed in the light of Article 85(1) and (3). The administrative procedure is all too often prolonged unnecessarily because DG IV has to draw up additional questionnaires for the firms concerned and await their replies.

In order to make a correct analysis of the structure of the relevant markets and the conditions of competition prevailing on them, DG IV often has to request information also from third-party firms, which causes further delays. Publication of the main points of the notification under Article 19(3) of Regulation No 17 does not provide a solution to the problem: it cannot take

place until the end of the investigation, since it presupposes that the Commission has already come to an (albeit provisional) view of the case. Publication of this notice, which is intended to elicit comments from competitors and business partners of the firms concerned and from consumers and consumer associations, therefore falls too late to help the case officer in his preliminary investigation.

196. The answer to the problem lies in changes both to administrative practice and to some of the underlying rules. The procedure for handling "structural" cooperative JVs should be modelled on the merger control procedure, which also requires a swift economic and legal analysis. Much depends here on the firms concerned showing an open and cooperative attitude.

In the interests of speeding up procedures, the Commission is prepared to allow contacts between its departments and firms even before a notification is made. Where appropriate, preparatory meetings can prove useful in enabling DG IV to plan its investigation more effectively. The Commission has also extended to "structural" cooperative JVs its practice of publishing in the Official Journal a summary of the notification shortly after receiving it. The publication of such summaries is modelled on that required by Article 4(3) of the Merger Control Regulation and is intended to prompt third parties to react: it is important for DG IV to have any comments from them at the beginning of its investigation. The legitimate interests of the firms concerned must of course be protected; the notice will therefore be confined to a short factual description of the agreement, without any comment on its merits, and will be published only with the consent of the parties.

Other measures need to be taken to ensure that notifications fully serve their purpose and to streamline the administrative procedure. To those ends, the current rules must be changed. The Commission intends to adopt a new regulation to replace Regulation No 27, which will be broadly similar to Regulation (EEC) No 2367/90 on merger notifications, and to draw up a new version of form A/B based on form CO.

197. In view of the importance of these measures both for the business community and for the competition authorities, the Commission is currently engaged in extensive consultations with the Member States and the interests concerned. It has also requested the EFTA Surveillance Authority (ESA) to give its opinion. An initial exchange of views with the Member States was held in early December at a meeting of the Conference of National Government Experts, which representatives of the ESA attended as observers. Parallel consultations are continuing with business and trade interests. The Commission hopes to be able to adopt the new regulation together with the revised form A/B during the first half of 1994, after second reading of the texts by the Conference of National Government Experts.

The Commission intends to streamline its procedures in areas other than cooperative joint ventures too. DG IV's experience in applying the planned rules will be decisive in determining to what extent the new system for handling "structural" link-ups can be extended to other individual cases.

<T4> The right to be heard

198. As part of an ongoing review of its procedures in applying the competition rules the Commission has given special consideration in 1993 to those that guarantee the right to be heard. The Commission has been examining how its existing procedures can be improved, and has had three principal objectives in mind. First, to ensure that undertakings that are the subject of proceedings under the competition rules have the fullest possible opportunity of expressing their views on any objections raised by the Commission; second, to ensure that the Commission is fair and objective in carrying out these procedures and is seen to be fair and objective by the undertakings concerned; and third, to reduce to the minimum the administrative burden placed both on the companies concerned and the Commission.

Although the existing procedures have worked well in the past, and problems have arisen in very few cases, areas have been identified where there is room for improvement. These areas concern the information given to parties on documentary evidence in the Commission's possession (access to information) and the role of the Hearing Officer.

<T4> Access to information

199. The disclosure to the parties of any relevant information is an essential part of the procedure that guarantees the right to be heard.(9) In a number of cases over the years the European Courts have emphasized the importance, when granting access to such information, of

- ensuring that all the documents on which the Commission relies in its Statement of Objections are disclosed to the interested parties;(10)

- ensuring that, as part of the effective exercise of the right to be heard, the Commission not only reveals the documents that are used as evidence against the undertaking, but also those in its favour;(11)

- the need to take particular care in handling confidential information.(12) Article 20 of Council Regulation No 17 requires that "without prejudice to the provisions of Articles 19 and 21, the Commission and the competent authorities of the Member States, their officials and other servants shall not disclose information acquired by them as a result of the application of this Regulation and of the kind covered by the obligation of professional secrecy".

  The Commission(13) has highlighted the difficulty in reconciling this requirement in certain cases with that of access to all relevant information. The Commission notes that confidential information includes not only documents containing business secrets but also other

(9) Case 85/76 Hoffmann-La Roche [1979] ECR 461, paragraphs 9 to 11.
(10) For example, Cases 43 and 63/82 VBVB and VBBB v Commission [1984] ECR 19; Case 62/86 AKZO [1991] ECR I-3359.
(11) Case T-7/89 Hercules v Commission [1991] ECR II-1711, paragraph 54; Case T-10/89 Hoechst v Commission [1992] ECR II-629, paragraph 54.
(12) Case 53/85 AKZO/professional secrecy [1986] ECR 1965 paragraphs 26 to 30; Sixteenth Competition Report, point 126; Joined Cases 142 and 156/84 BAT v Commission [1987] ECR 4487, paragraph 21.
(13) Eighteenth Competition Report, point 43.

proprietary documents belonging to an undertaking which may not wish to make them accessible to third parties or parties involved in the proceedings. It was emphasized that extensive protection for confidential information is necessary, but, exceptionally, that the confidential nature of documents does not preclude their disclosure where the Commission relies upon the information in question as necessary evidence of an alleged infringement of the Community rules.(14) In principle, therefore, given the need to ensure the confidentiality of the information supplied to it, the Commission considers that documents it receives pursuant to its powers under Regulation No 17 should be disclosed only where they are necessary to enable the undertakings in question effectively to exercise their right to be heard. Such documents include those containing information favourable to the party concerned.

200. In the Eleventh Competition Report(15) the Commission indicated its willingness to allow undertakings access to the file on the case, and in the Twelfth Report(16) clarified the rules applicable to such access:

"Undertakings are informed of the contents of the Commission's file by means of an annex to the statement of objections or to the letter rejecting a complaint, listing all the documents in the file and indicating documents or parts thereof to which they may have access.
They are invited to come and consult these documents on the Commission's premises. If an undertaking wishes to examine only a few of them the Commission may forward copies. However, the Commission regards the documents listed below as confidential and accordingly inaccessible to the undertaking concerned:

(i) documents or parts thereof containing other undertakings' business secrets;

(ii) internal Commission documents, such as notes, drafts or other working papers;

(14) Case 85/76 Hoffmann-La Roche [1979] ECR 461, paragraphs 13 to 14.
(15) Points 22 to 25.
(16) Points 34 to 35.

(iii) any other confidential information, such as documents enabling complainants to be identified where they wish to remain anonymous, and information disclosed to the Commission subject to an obligation of confidentiality.

Where an undertaking makes a justified request to consult a document which is not accessible, the Commission makes a non-confidential summary available."

In the Eighteenth Report the Commission further developed these rules with respect to multi-handed cartel cases, specifying that documents "can be made accessible to parties to proceedings, either by access to the file or by the sending of copies, according to the circumstances".

In CBR and others v Commission(17) the Court of First Instance stated that the "procedure for access to the file in competition cases is intended to allow the addressees of a Statement of Objections to examine evidence in the Commission's files so that they are in a position effectively to express their views on the conclusions reached by the Commission in its Statement of Objections on the basis of that evidence".

201. In the light of its experience in individual cases since the Eighteenth Report and recent Court judgments on this matter, the Commission has decided to consolidate and clarify its practice.

First, it has found that the practice of sending copies of all the documents or information that are to be made accessible to undertakings which are subject to Commission proceedings with the Statement of Objections offers advantages over the examination of the file at the Commission's premises. Undertakings in any event almost invariably take copies of all the documents available to them, and thus the procedure of sending a copy of the documents that are to be made available saves time and expense. This practice will therefore be the general rule in future.

Second, the practice of sending a list of all the documents in the Commission's file with an indication of documents or parts thereof to which the undertaking in question may have access, whilst not indispensable to ensure that companies receive all the documents necessary for them to make their views known on the Commission's objections, is useful. Thus, in all

(17) Joined Cases T-10, 11, 12 and 15/92 [1992] ECR II-2667, paragraph 38.

future cases the Statement of Objections will be accompanied by the documents available to the undertaking in question, together with a list of all documents on the Commission's file. This list will indicate the number of the document on the file, identify its nature and state whether access to the document is being given.

Third, the Commission has found that the description of the documents that can be disclosed to the undertakings contained in the Twelfth Competition Report is insufficiently precise, and has led to a degree of confusion, particularly in cases involving a number of different undertakings. This confusion has resulted partly from the imprecision of the term "the file". When access to files was introduced, in 1982, "the file" consisted of the documents passed from the Inspection Directorate within DG IV to the operational Directorate, responsible for further processing the case. The file therefore contained only the information considered necessary and relevant for further scrutiny of the case in question. Access to files therefore related to a limited number of documents; the documents irrelevant or unnecessary to the Commission's case had already been separated from "the file" by the Inspection Directorate. In 1984 this system changed, and the operational Directorates within DG IV became responsible for all aspects of preparing cases. The term "the file" thereafter applied to all the documents in the possession of the Commission that were collected during the investigation.

202. In almost all infringement cases the Commission collects a large amount of documentation during its investigation. Only a small fraction is normally used as evidence of an infringement, and much of it may be irrelevant to the case in question. Furthermore, much of the information in the file, having been gathered using the Commission's powers under Regulation No 17, is confidential in nature. Many of the documents will be confidential vis-à-vis some of the undertakings in question, but not others. Experience over the last few years has shown that since the nature of "the file" has fundamentally changed, as it now contains a number of irrelevant documents, it is no longer practicable to apply the categorization of documents that can be disclosed to undertakings during access to file set out in the Twelfth

Competition Report. This applies particularly to cases involving a significant number of undertakings.(18)

In such cases, therefore, the Commission has been following the guidelines set by the European Courts regarding access to files in the cases mentioned above. With the Statement of Objections the Commission sends a copy of all the documents on which it is relying to establish the existence of an infringement. It also sends any documents that, on the basis of a careful examination of the file, appear to go against or contradict the Commission's case (known as "exculpatory" documents). If an undertaking thereafter makes a reasoned request that the Commission re-examine its file to determine whether it has any further documents which concern a specified matter that the undertaking considers useful to its defence, the Commission will do so, and forward any such documents. In any case, before granting access to files, the Commission will have particular regard to the legitimate interest of undertakings in the protection of their business secrets. As to other confidential information, the Commission will ensure that the identity of informants who wish to remain anonymous vis-à-vis the parties is kept secret, and that sensitive commercial information is not disclosed if disclosure would have a significant adverse effect on the supply of such information.

Given this experience, and the need to apply a single procedure, the Commission will henceforth adopt the abovementioned practice in all cases. The Commission is convinced that this procedure, whilst being efficient and practical, will give undertakings all the necessary opportunities to exercise fully their right to be heard.

<T4> The role of the Hearing Officer

203. The post of Hearing Officer was created in 1982.(19) This has been widely welcomed, and is generally seen as an important addition to the mechanisms that ensure the fairness and objectivity of the handling of cases by the Commission and also reassure undertakings that they will be treated

(18) The Commission's right to exclude irrelevant documents was expressly recognized by Advocate-General Warner in Case 30/78 Distillers Company [1980] ECR 2229.

(19) Twelfth Competition Report, points 36 to 37. The mandate of the Hearing Officer was revised in 1990 to take account of the adoption of the Merger Control Regulation (Twentieth Competition Report, Annex).

objectively and fairly. This point was repeatedly emphasized by participants at the conference on procedures held by the Commission in September 1993.

In the light of the views expressed during the conference, and of the modification in the procedure for granting access to file explained above, the Commission has reconsidered the role of the Hearing Officer.

204. Although the rules ensuring that the firms concerned and third parties have the right to be heard have worked satisfactorily on the whole, the fact remains that there is still room for improvement. By transferring decision-making powers concerning the rights of the defence to the most appropriate level, namely the Member of the Commission with special responsibility for competition, who would in turn delegate them to the Hearing Officer, the Commission could lend greater efficiency to its procedures in the competition field and enhance legal certainty for businesses.

205. The role of the Hearing Officer should therefore be significantly extended, to cover the following areas:

- Deadline for reply to the Statement of Objections. An undertaking may consider that the deadline imposed upon it for reply to the Statement of Objections is too short. In such a case, the Hearing Officer should decide whether or not an extension to this deadline should be granted.

- Access to relevant information. It is important that undertakings should be confident that the Commission carries out its responsibilities regarding access to information carefully, fairly and objectively, and, subject to the obligations imposed upon it regarding confidentiality, discloses all documents that may be favourable to the undertakings concerned in preparing their defence. The Hearing Officer can play a useful role in this respect. Whilst it is neither possible nor appropriate that the Hearing Officer should carry out the initial examination of the file to determine which documents can and should be sent to the undertakings concerned,(20) he or she should exercise the functions of an arbiter once these documents have been sent, and access to the file has therefore taken place. If, on the basis of the list of

(20) See points 199 to 202 of this Report.

documents in the Commission's file sent together with the Statement of Objections and of its own knowledge of the case, the undertaking has reasonable grounds to believe that it should receive additional documents, the Hearing Officer should examine any such request and decide on its merits. Requests would, however, need to be reasoned and sufficiently specific to enable the Hearing Officer to carry out this function.

- Right of third parties to be heard. The Hearing Officer should also be given the right to decide whether third parties should be allowed to intervene in procedures concerning individuals, businesses or associations of businesses. Under the present rules, natural or legal persons proving sufficient interest have the right to be heard. The Hearing Officer is undoubtedly in the best position to decide on their requests.

- Hearings. The right to be heard is one of the fundamental principles of Community law. However, the different legislative instruments laying down the organizational arrangements(21) start from the principle that those concerned and third parties must submit their comments in writing within the period specified by the Commission; hearings are only an additional possibility. Except where the Commission intends to impose fines or periodic penalty payments, the persons, businesses or associations of businesses concerned by the procedure must supply proof of a specific interest in support of their request to be given an opportunity to put their case orally. This means, conversely, that cases can arise where there is no longer any point in granting the parties such a possibility, particularly where they have already had ample opportunity to explain their position in writing and there has since been no significant change in the facts of the case or the legal position. As regards the right of third parties to be heard, it is

(21) See Article 7 of Regulation No 99/63/EEC, Article 7 of Regulation (EEC) No 1630/69, Article 11 of Regulation (EEC) No 4260/88, Article 10 of Regulation (EEC) No 4261/88, and Articles 13(1) and 15 of Regulation (EEC) No 2367/90.

usually sufficient to give them an opportunity to submit written comments.(22) These may, however, exceptionally have a legitimate interest in developing their views orally; the Commission is furthermore fully entitled to grant of its own initiative interested or third parties an opportunity to make oral statements at a hearing. Since the Hearing Officer is responsible for organizing hearings, logic dictates that he should also have the task of deciding who is to be allowed to speak at hearings.

- Business secrets and other confidential information. In performing the abovementioned tasks, the Hearing Officer should also be able to decide which items of information supplied by a firm and contained in the Commission's file can be communicated to other firms or published. Access for interested and third parties to the information contained in files held by the Commission is limited by its obligation to protect firms' legitimate interest in their business secrets not being divulged. This is a general principle of Community law which has been given practical expression in all the competition regulations. Other information of a confidential nature provided by firms is made available by the Commission only in so far as it is essential to enable other persons or firms fully to exercise their right to be heard. The Commission endeavours above all to protect sensitive commercial information which, if divulged, would cause significant prejudice to its originator.

The Hearing Officer is seen as the most appropriate person to decide what may be divulged to third parties, while complying with the procedure laid down by the Court of Justice in AKZO.(23)

206. It is expected that the mandate of the Hearing Officer will be amended in early 1994 to reflect these changes.(24)

(22) Joined Cases 209 to 215 and 218/78 Fedetab [1980] ECR 3125, 3232.
(23) Case 53/85 [1986] ECR 1985.
(24) On ... 1994 the Commission did decide to amend the mandate of the Hearing Officer along these lines. The new mandate was published in OJ C..., ... 1994, p. ...

<T4> Standardization of deadlines for replies

207. In order to strike a reasonable balance between, on the one hand, sufficient protection of the rights of the defence and the Commission's obligation to have infringements ended swiftly and, on the other hand, the need to make allowance for the Commission's staffing shortage and also the availability of executives of the firms involved and their lawyers, DG IV has now decided to "standardize" the deadlines for replying to statements of objections.

The first situation concerns the main procedure. In cases of average importance, a general period of two months will be granted, and for complicated cases, a period of three months. An extra two weeks will automatically be allowed when these general periods fall at Christmas or Easter, and an extra one month will be granted automatically where the periods include all or part of the month of August. At the most, then, a maximum period of four months will be set from the outset in complicated cases that fall within the holiday period. Nevertheless, unlike practice followed in the past, these fairly long periods will not normally be extended.

The second situation concerns expedited procedures, for example where interim measures are being considered. These cases must be handled extremely quickly in the interests of the parties concerned. Only the minimum period of two weeks provided for in Article 11 of Regulation No 99/63 will therefore be granted here, and without any extension.

<T3> §4. Commission activities (quantitative description)

208. On 31 December 1993 the Directorate-General for Competition had a staff of 411, of which 51% were A grade staff (including 24 national experts seconded to the Commission). Of the manpower available, 44% was allocated to work under Articles 85 and 86 of the EC Treaty, 12% to merger control cases, 3% to work under Article 90 of the EC Treaty, 21% to state aid cases, 9% to international relations and coordination and 11% to data processing, documentation and other support duties. The total number of staff employed had increased by 1% from its level on 31 December 1992, as a result of the allocation of new posts and a new procedure for converting appropriations into posts.

<T5> (a) Articles 85 and 86 of the EC Treaty

On 1 January 1994 there were 1 231 cases pending under Articles 85 and 86 of the EC Treaty: over 300 less than on 1 January 1993. The reduction is due to DG IV's continued efforts to clear the backlog. Of the "backlog" cases, all of which had been pending for several years, half had been overtaken by events (for example, because the agreement notified was no longer in force), and the other half were notifications of insurance agreements that proved compatible with the block exemption regulation adopted by the Commission in late December 1992. Now that the backlog-clearing exercise is more or less complete, the number of cases pending cannot be expected to fall in future; it may even rise. Speedier handling of notifications, particularly in the case of "structural" cooperative joint ventures, could, for example, encourage firms to notify their agreements more frequently.

The reduction in the number of cases pending chiefly concerned notifications; the proportion of complaints and own-initiative procedures grew slightly. The Commission's workload on 1 January 1994 consisted of a little over 60% notifications (749) and slightly more than 25% complaints (335), while the remainder (147) were the subject of an own-initiative procedure. The number of complaints has remained roughly at the 1992 level and has therefore not been affected by the judgment of 18 September 1992 in Automec II (Case T-24/90), in which the Court of First Instance stated that the Commission has considerable discretion to reject complaints. The Commission

uses this discretion with moderation; it admittedly refers complainants to national authorities or courts more often than before, particularly where it is sure that these channels will enable their problem to be solved, but it does continue to handle with all the necessary care complaints in which it sees an important Community dimension. Complaints, being necessarily controversial, also normally take longer to deal with than notifications: it is revealing to note that while the total number of cases concluded in 1993 (832) was twice as high as the number of new cases registered (404), the proportion is reversed as far as complaints are concerned, since 37 cases of this kind were terminated (of which five by formal decision) and 107 new complaints were received.

A total of 12 cases were closed in 1993 by formal decision. Apart from the definitive rejections of complaints already mentioned (five in all), these comprised three prohibitions (Zera/Montedison-Hinkens/Stähler, AICAI/CNSD and Auditel), three exemptions (Eurovision, charging structures for combined transport and Grundig) and one negative clearance (Institute of London Underwriters). A request for interim measures was rejected in the Sealink case.

Since the beginning of 1993, some 25 notifications of "structural" cooperative joint ventures have been handled by means of an expedited procedure. Under this procedure, DG IV informs the parties concerned of its (provisional or definitive) assessment within two months of receiving the notification. (The two-month period does not start to run until the notification is complete.) The new version of notification form A/B, a draft of which is currently being discussed with the national authorities and business circles, is intended to enable firms to submit all the necessary information to DG IV immediately on notification. Along the lines of the standard practice followed in cases falling within the scope of the Merger Control Regulation, notifications of "structural" cooperative joint ventures will systematically be summarized in a notice published in the Official Journal, inviting comments from third parties.

Some of the 25 cases notified since the beginning of 1993 are still pending because DG IV requested the notifying parties to supplement the information they had already supplied. Most of the other cases were settled within the two-month period. In six cases, however, DG IV made only a provisional assessment within the period: in three of these, it had to send a warning letter to the parties (Potacan, Pasteur-Mérieux and Coca Cola/Nestlé); in two other cases, it published a notice in the Official Journal under Article 19(3) of Regulation No 17, announcing that it intended to take a favourable view of the notified agreements (Eurosport Mark III and International Private Satellite Partners); in a sixth case, it informed the parties of its intention to publish such a notice (Fujitsu + AMD).

<T5> (b) Mergers

As far as work under the Merger Control Regulation is concerned, a total of 58 cases were closed during the year (60 in 1992). The vast majority of mergers (50) were cleared at the end of the first phase (46 in 1992). Three mergers were given the go-ahead at the end of the second phase (5 in 1992): while authorization of the Pilkington/SIV merger was not subject to conditions or obligations, the Commission attached conditions to its decision to allow the KNP/Bührmann/URG and Kali+Salz/MDK/Treuhand operations. The four remaining cases were found not to constitute concentrations within the meaning of the Regulation (9 in 1992), but three of these were subsequently examined in the light of Article 85 under the expedited procedure (Philips-Thomson-Sagem, Pasteur-Mérieux/Merck and BT/MCI). One case was referred to the national authorities (McCormick).

Of the 50 cases closed at the end of the first phase, 24 were found to be concentrative joint ventures, a number comparable to that of the structural joint ventures examined under Article 85 of the EC Treaty.

Lastly, the Commission authorized nine mergers under Article 66 of the ECSC Treaty.

<T5> (c) State aid

In the state aid field, some 435 cases were concluded by a decision (502 in 1992). These can be broken down into 399 decisions to raise no objection (455 in 1992) and, of those cases in which the Article 93(2) procedure had been initiated, 19 positive final decisions (31 in 1992) and seven negative final decisions, including two partly negative or conditional decisions (6 in 1992). The remaining ten measures (the same number as in 1992) include decisions to refer matters to the Council under Article 95 of the ECSC Treaty, one injunction under Article 88 of the ECSC Treaty (Ilva) and one appropriate measure under Article 93(1).

The Commission initiated the Article 93(2) procedure in some 30 cases (as in 1992).

The Commission registered 561 new cases during the year (558 in 1992), of which 475 concerned notified aid (452 in 1992), 85 non-notified aid (102 in 1992) and one an existing aid scheme (8 in 1992). The reduction in the number of unnotified aid cases is heartening because it shows that the Member States are fulfilling more scrupulously their obligation under Article 93(3) of the EC Treaty to notify all planned aid to the Commission.

The above figures of course relate only to aid cases handled by DG IV.(25)

(25) For a table giving overall statistics on the work of DG IV and the other departments handling aid cases (DGs VI, VII and XIV), see Annex III.C to this Report.

<T5>

Part Two

<T1>

Competition rules applicable to enterprises

<T4>

Chapter I

<T2>

Main decisions and measures taken by the Commission

<T9>

A. General

<T3>

§1. Horizontal agreements

209. Horizontal agreements, i.e. those concluded between firms at the same production and marketing stage, may take many forms. They may range from price-fixing or market-sharing agreements between manufacturers to agreements designed to promote joint research and development of new products. The Commission is determined to take vigorous action against genuine cartels, the effect of which is to deprive consumers of the benefits of undistorted competition. This attitude has been reflected once again this year in the investigations being carried out in a number of economic sectors against firms that have been involved mostly in market sharing. It should be noted, however, that the identification and combating of such practices requires a major effort on the part of the Commission, notably in terms of manpower. It is for this reason that such procedures are sometimes very lengthy. None the less, since cartels must be eliminated completely, the Commission is resolved to deploy all the resources necessary to take effective action against them.

210. The Commission takes a different attitude to agreements designed to establish forms of cooperation between firms that allow them to improve their productivity, while at the same time benefiting society as a whole. The clearest example of such cooperation is agreements under which the parties set up a joint venture. While it is aware that, in certain instances, this type of operation may be a means of concealing a cartel, the Commission is in favour of such agreements because of their advantages. It has moreover

introduced an accelerated procedure for dealing with such cases.(1) As explained earlier, the aim was also to ensure that parties did not opt for a particular legal structure because of the procedural advantages they could derive from it in their dealings with the Commission, rather than basing their decision solely on the operation in question. The key element in assessing the compatibility of such forms of cooperation with the Community competition rules must be their effects on the relevant market rather than the nature of the agreement.

(1) See point 77 of this Report.

<T3>

§2. Vertical agreements

211. Article 85(1) of the EC Treaty does not make any distinction between horizontal and vertical agreements. Vertical agreements are agreements between firms at different stages in the production and marketing process. From the very outset of the implementation of Regulation No 17, the Court of Justice has made it clear that vertical agreements could infringe Article 85 of the EC Treaty. Since then, numerous Commission decisions have been taken against such types of agreements. However, a number of block exemption regulations have also been adopted for agreements of this type. There is no disputing that vertical agreements are an appropriate instrument for enabling certain firms to enter new markets. Distribution agreements may help to increase competition between different brands, without requiring massive investments by the new entrant. The benefits which vertical agreements can provide explains the support given to them in the block exemption regulations. However, they can also be used to restrict market access for other firms. The Commission has accordingly always adopted a cautious attitude to such agreements. The Grundig case dealt with this year illustrates this approach. In this case, the Commission agreed to renew an individual exemption for the selective distribution network set up by Grundig for the sale of certain electronic equipment. In its analysis, the Commission took account of the impact which the agreement could have on consumers, but also of the fact that there was competition on this market between the various brands.

212. To get a clear understanding of this attitude, which has been endorsed by the Court of Justice, it is important to see the competition rules laid down in the EC Treaty in their overall context. They are aimed not only at protecting an economic system, but they are also an instrument for promoting the establishment of a genuine internal market. Their purpose is to ensure that private obstacles to trade do not replace the government obstacles that have gradually been removed. As far as vertical agreements are concerned, the Commission's approach has accordingly always been based on a two-stage analysis under Article 85 of the EC Treaty. Firstly, the exclusive nature of a contractual relationship between a producer and a distributor is viewed as restricting competition, since it limits the parties' freedom of action on

the territory covered. Secondly, the agreement may normally be exempted under Article 85(3) of the EC Treaty if it does not contain any provisions that create absolute territorial protection for the distributor or, at any rate, does not objectively have such an effect. This reflects the fundamental concern of the Treaty to ensure genuine freedom of movement for goods in the single market. The analysis carried out by the Commission thus goes beyond discussion of the merits of vertical agreements in terms of competition. One of the cases dealt with this year is particularly revealing in this respect. In the Zera-Montedison case, an exclusive dealing agreement together with national approval procedures resulted in the prevention of all parallel imports into Germany. The Commission took action in the case because the situation created ran counter to the achievement of a genuine internal market, since, through their agreement, the parties wanted to use the differences between national legislative provisions to prevent any scope for consumers to take advantage of cheaper prices in other Member States.

<T3> §3. Abuse of a dominant position

213. A review of the decisions taken by the Commission and of the judgments delivered by the Court of First Instance confirms a trend noted earlier. There is increasing evidence that conduct which is in principle accepted when it relates to firms having limited market shares may become objectionable where the relevant firms are in a dominant position. Such firms must therefore be particularly careful if they are to avoid infringing the rules laid down in Article 86 of the EC Treaty.

The point might even be made that, in certain situations, a firm in a dominant position is actually under an obligation to cooperate with its competitors. As explained earlier,(2) the owner of essential infrastructure must, in certain cases, allow other firms non-discriminatory access to the infrastructure so that effective competition can take place. Any other arrangement would mean that the dominant firm would maintain its privileged position, making it virtually impossible for other firms to obtain market access. Consequently, while it is true that Article 86 of the EC Treaty does not challenge the existence of dominant positions, it is also true that the concept of abuse is defined broadly, which restricts appreciably the types of action in which a dominant firm can engage.

Though it draws a distinction between firms in a dominant position and those which are not, this approach cannot be described as discriminatory. If one looks at the effects which such behaviour can have on competition, it is clear that the behaviour of a dominant firm, because of its market power, can have a much greater impact than that of a smaller firm. There are therefore grounds for requiring dominant firms to be more cautious in their conduct.

(2) See point 40 of this Report.

<T9> B. Analysis of individual decisions and measures

<T3> §1. Setting-up of joint ventures and other forms of cooperation

214. The first cases covered by the new accelerated procedure for assessing cooperative joint ventures were dealt with this year. It will be recalled that, in addition to the amendments made to a number of block exemption regulations last year, the Commission stated that it would endeavour to give firms an indication of whether or not their agreement was compatible with Article 85 of the EC Treaty within two months of notification. A number of the cases mentioned below benefited from such accelerated processing. As indicated earlier, 25 cases were handled this way.(1) Only some of them are discussed in this chapter, but others are summarized in Annex III.A.1.

<T6> Philips-Thomson-Sagem

215. The Commission cleared the creation of a joint venture company called Flat Panel Display BV (FPD) under Article 85 of the EC Treaty. The parents of the joint venture are Philips Electronics N.V., Thomson Consumer Electronics S.A. and Sagem.

FPD will be active in the development, design, manufacture and sale of active matrix liquid crystal displays (AM-LCD). AM-LCDs are used inter alia for direct view TV modules, consumer and professional projection displays and datagraphic modules.

AM-LCDs belong to a family of technologies currently referred to as Liquid Crystal Displays (LCD), which, in turn, are one of the alternative technologies, under various degrees of development, generally known as flat screen technologies.

FPD will be the first European company capable of producing very large series of screens. It was expected FPD would start mass-production in 1993. It will have its own process and product development departments, facilities and personnel. Its production will be made available to third parties worldwide.

(1) See point 208 of this Report.

The share capital of FPD will be held by Philips (80 %), Thomson (10 %) and Sagem (10 %). However, in spite of its majority, Philips alone will not be in a position to adopt a number of strategic decisions without the support of at least one of the other shareholders. In addition, the parties envisage other companies joining as new shareholders in FPD.

The agreement establishing FPD was originally notified under the provisions of the Merger Control Regulation on 8 December 1992. However, by formal decision issued on 18 January 1993, the Commission decided that FPD did not constitute a concentration within the meaning of Article 3 of the Merger Control Regulation. Subsequently, and at the request of the parties, the notification was converted into a notification within the meaning of Article 4 of Council Regulation No 17.

The Commission, therefore, assessed the proposed joint venture from the point of view of the application of Article 85 of the EC Treaty and came to the conclusion that the notified cooperative joint venture fell under the scope of Article 85(1).

This conclusion was mainly supported by the fact that the parent companies, given their remaining activities within the AM-LCD field, in the LCD field in general and in respect of other types of flat screens, as well as in respect of cathode ray tubes (where Thomson and Philips are very important players on a worldwide basis), have to be considered as being potential and even actual competitors either among themselves or in respect of the joint venture.

However, the Commission considered that the conditions for the granting of an individual exemption to FPD were fulfilled in the present case.

In particular, the Commission ascertained that the joint venture is going to be a means for the parent companies to develop and sustain mass-production in Europe of new high technology products in a field where competition from foreign suppliers (mainly Japan) is strong, where production and marketing within a tight time schedule on an economically viable scale is essential and where the technical and industrial framework is uncertain.

In addition, screens manufactured by FPD will be sold to sophisticated buyers (i.e. consumer electronics manufacturers, car manufacturers and telecommunications equipment manufacturers) to be integrated either in existing families of products or in completely new ones that will enlarge the range of products offered to consumers.

This aspect is also important because such purchasers can represent an effective counterweight to the joint venture.

Finally, the Commission was convinced that the joint venture is not a means for the parent companies to eliminate competition either in respect of displays in general or AM-LCDs in particular. In respect of the latter, it can be said that a new technology will be put into production in the EC. More importantly, this is a sector in which the market is worldwide. Consequently, the important position acquired by the joint venture in the Community must be seen in a global context. In this instance, it is apparent that the new entity will not have a dominant position on the market.

For the reasons mentioned above and given the urgency of the case, which is part of a wider programme supported by the Commission under the ESPRIT III programme, the case was closed by means of a comfort letter sent to the parties.

This important case was one of the first in which the new internal rules for the assessment of cooperative joint ventures of a structural nature were applied.

<T6> Alenia-Honeywell

216. Under the new internal procedure for the accelerated assessment of cooperative joint ventures of a structural nature, the Commission also cleared the setting-up of a cooperative joint venture company created in Italy between Alenia Spa, an Italian company specialized in aeronautics, and Honeywell Inc., a US enterprise manufacturing computers, under Article 85 of the Treaty of Rome. The new company, Space Controls Alenia-Honeywell (SCAH) will design, develop, manufacture, sell and support four space control products based on Honeywell's technology. Those products will be sold to subcontractors who will integrate them into subassemblies. These will then be further integrated by prime contractors to form a complete satellite.

The share capital of SCAH will be held 60 % by Alenia and 40 % by Honeywell. The management board of SCAH will consist of 5 members, 3 appointed by Alenia and 2 by Honeywell. Although decisions on the ordinary course of business will be adopted by simple majority, unanimity will be required in respect of the business plan and the operational and R & D budgets.

The Commission considered that although the joint venture had all the characteristics of a normal firm, it was mainly an instrument in the hands of the parent companies to serve a number of strategic purposes. Alenia will become a more vertically integrated prime contractor in the field of satellites, and Honeywell will break into the European space market.

The Commission, therefore, assessed the joint venture under Article 85 of the EC Treaty and came to the conclusion that the creation of SCAH qualified for negative clearance because the parent companies were not actual or potential competitors either in the satellites field in general or in the components market in particular. In fact, they operate at different levels in the market place.

However, the Commission raised objections against a number of very stringent non-compete post-termination obligations and asked the parties to modify and/or delete them. Indeed, these obligations were not ancillary to their agreement since they were not necessary to the realization of the operation. Once they did so, a comfort letter was sent to them.

<T6> International Private Satellite Partners (IPSP)

217. The Commission sent a letter of intent to the parent companies of IPSP, a joint venture company that was set up in the form of a limited partnership organized under US Law. The parent companies of ISP are, on the one hand, subsidiaries of companies specializing in the manufacture or launching of satellites and, on the other, subsidiaries of telecommunications companies. IPSP's aims are twofold. Firstly, it provides international business telecommunications services to businesses in Europe and North America using its own satellite system on a "one-stop shop" basis. Secondly, it offers bulk transmission capacity to third parties, to the extent that the capacity of the satellites is not fully utilized by IPSP or its partners.

The first of these markets has developed because of the need of multinational firms to have rapid telecommunications between their various subsidiaries. IPSP will operate on the second market only if demand for services on the first is lower than anticipated.

In its letter of intent, sent in the framework of the new accelerated procedure for the assessment of cooperative joint ventures of a structural nature, the Commission informed the parties of its preliminary conclusion that the notified agreements might qualify for negative clearance under Article 85 of the EC Treaty. Subsequently, it published a notice pursuant to Article 19(3) of Regulation No 17.

<T6> INTRAX

218. The Commission cleared the arrangements whereby PTT Telecom B.V., the public telecommunications operator (TO) in the Netherlands, and Nederlands Omroepproduktie Bedrijf N.V. (NOB), the main television facilities house in the Netherlands, have set up a joint venture company, Intrax B.V., to provide "Satellite News Gathering" services both within and outside the Netherlands: satellite news gathering involves the use of transportable equipment allowing for the rapid audio-visual registration and transmission of television signals via satellite from remote locations not served by the terrestrial network. This case was notified before the new procedure for accelerated decisions was set up by the Commission.

This case illustrates an increasingly common phenomenon whereby TOs join together with companies not operating in the telecommunications area in order to venture into new, not strictly telecom-related business activities. In each case of this type, on top of the traditional analysis of cooperative joint ventures under the competition rules, the Commission must examine whether the still existing special and/or exclusive rights of the TO in question cause its participation in the joint venture company to place the latter in an unjustifiably favourable position vis-à-vis competitors.

In the case at hand, the Commission found that satellite news gathering service providers who wish to compete with Intrax on the Dutch market are not faced by any major barriers to entry.

- The uplinking of signals to satellites, traditionally an activity reserved exclusively for the TOs, was liberalized in the Netherlands in 1991 as far as satellite news gathering is concerned.

- Furthermore, as far as capacity on satellites is concerned, PTT Telecom has assured the Commission that as Signatory to international TO-run satellite-operating consortia such as Eutelsat, it will deal with Intrax on the same footing as competing companies.

- Even when uplinking in the Netherlands these companies are free to acquire capacity on Eutelsat satellites via the Signatories in at least

France, Germany and the United Kingdom. As a third possibility, capacity is available on independent satellites not belonging to the TO-run consortia.

- In countries other than the Netherlands, Intrax will be subject to the same operational constraints relating to uplinking and satellite capacity as its competitors.

In view of these circumstances, the Commission published its favourable attitude to the operation in the Official Journal which did not give rise to any comments. The Commission has now closed the file by means of an administrative "comfort" letter (negative clearance type), after consultation of the national competition authorities.

<T3> §2. Service sector

<T6> CNSD

219. On 30 June the Commission took for the first time a decision finding that the adoption by a trade association of a tariff that had to be applied by its members when they provided services, even if their activity is considered to be a profession, constitutes an infringement of the Community competition rules.

The Commission received several complaints from Community firms in respect of difficulties encountered in Italy in carrying out customs clearance operations. One of the complaints related to the decision by the "Consiglio Nazionale degli Spedizionieri Doganali" (CNSD-National Council of Customs Agents) of 21 March 1988 setting the tariff to be applied by customs agents when providing services linked to customs clearance operations.

The occupation of customs agent is regulated in Italy by Law No 1612 of 22 December 1960 and by various implementing measures.

In order to operate as a self-employed customs agent, authorization is necessary and registration in the national register is compulsory. Administration of the national register is entrusted to the CNSD, which draws up the agents' tariff. It thus established, on the basis of suggestions from the departmental Councils, the tariff of 21 March 1988, which replaced the tariff approved on 16 April 1970, and all the increases made to that tariff between 1970 and 1988 through a coefficient of increase.

The restrictions of competition resulting from the CNSD decision of 21 March 1988 on the market for the services provided by customs agents to firms importing or exporting in Italy are as follows:

- the setting of a tariff of fixed minimum and maximum rates, from which individual operators may not derogate, for each transaction carried out by customs agents;

- the imposing of mandatory invoicing arrangements, such as separate invoices.

Although the tariffs set by the CNSD are subsequently approved by ministerial decree, such approval does not in any way alter the fact that the CNSD's decisions are decisions by an association of undertakings. Decisions derogating from the tariff, for example, do not require the Minister's approval, which shows that the tariff is set autonomously.

An appeal against this decision has been lodged before the Court of First Instance.

The Commission is now examining the conformity of Italian Law No 1612 of 22 December 1960 with Community law and, in particular, with Articles 3(f) and 5 read in conjunction with Article 85 of the EC Treaty and has decided to send a letter of formal notice to Italy on the matter. The aim is to verify the extent to which the Law might have infringed the provisions of the EC Treaty by obliging the CNSD to conclude anti-competitive agreements.

<T3> §3. Audiovisual sector

<T6> EBU

220. The Commission granted an exemption under Article 85(3) of the EC Treaty to the Eurovision system operated by the European Broadcasting Union (EBU).

The EBU is the association of European broadcasters entrusted with providing a service in the public interest. Its members are mostly public-sector television or radio broadcasting organizations. Although some private broadcasters belong to it, they are subject to a number of obligations reflecting the public interest task assigned to them. Purely commmercial broadcasters are not admitted as members.

The Eurovision system operated by the EBU and its members consists of exchanges of television programmes, especially sports programmes, and the joint purchasing of the relevant broadcasting rights. The joint purchasing of broadcasting rights for international sporting events restricts competition, because of the combined purchasing power enjoyed by EBU members in joint negotiations. However, the system makes for a number of improvements, notably rationalization and cost savings, which benefit members from small countries in particular, allowing them to show more sports programmes and programmes of better quality than would otherwise be the case. In addition, cooperation between members facilitates cross-border broadcasting, which contributes to the development of a genuine European broadcasting market.

The EBU members also agreed to grant non-member channels contractual access to the sports programmes in question under a new scheme of rules submitted to the Commission on 26 February 1993. The new scheme allows non-member channels access not only for deferred transmissions and the broadcasting of extracts, but also for live transmissions of sporting events which the EBU members do not themselves broadcast live. More restrictive clauses in a previous scheme which had given rise to criticism from non-members were removed at the request of the Commission. As a result, access is now easier for third parties.

<T6>

Auditel

221. On 24 November the Commission adopted a decision finding that the agreement between Auditel's shareholders to use only the Italian television audience ratings measured by the company infringed the Community competition rules.

The decision was adopted in response to a notification by Auditel of the system it had established in Italy for measuring and disseminating television audience ratings. Auditel's shareholders are divided into three groups:

- the public television channel,
- the private television channels,
- the associations of the following operators: advertisers, advertising agencies and organizations dealing in advertising techniques.

The cost of the operation is borne by the first two groups.

Article 11 of the agreement setting up Auditel provided that shareholders must, in their activities, with regard to overall audience ratings (audience share figure for a specific time period), use exclusively Auditel's measurements, the sole aim being to avoid disagreements on audience shares and distortions in the information provided to the public by the press, radio or television. In practice, Article 11 seemed to be intended to prevent a ratings war between the main Italian television channels.

This requirement constituted a restriction of competition in that it deprived shareholders of any freedom to use other figures. The ratings are the basis on which advertisers and operators decide on the size of their advertising budgets, how to allocate them between the different media and for which media of the same type to opt.

The exemption requested was refused because the restriction contained in Article 11 was not indispensable and led to the total elimination of competition. Auditel deleted Article 11 of the agreement shortly before the decision was adopted.

<T3> §4. Energy

<T6> Electricidade de Portugal/Pego project

222. On 26 January Electricidade de Portugal S.A. (EDP) notified to the Commission a number of agreements concluded in 1992 between EDP, National Power PLC, Electricité de France and Empresa Nacional de Electricidad S.A. and their respective subsidiaries, concerning the purchase and operation of a coal-fuelled station at Pego.

The notification concerned a project for the purchase and operation - on a build, own, operate and transfer basis - of a coal-fuelled power station (consisting of two units) at Pego, Portugal, whereby the Generator, to be jointly owned by National Power PLC (United Kingdom), Electricité de France, Empresa Nacional de Electricidad S.A. (Spain) and Electricidade de Portugal S.A., agreed to purchase the project from EDP and to supply power from units 1 and 2 to EDP.

The power station is expected to have an installed capacity of 614 megawatts and each of units 1 and 2 to have a capacity of 307 megawatts. The selection of the Generator has been the result of a call for tenders at an international level.

After having examined the notified agreements, the Commission informed the parties in March that it was unable to accept the clause providing for an exclusivity of supply for 28 years on the ground that for the full duration of the contracts the Generator would be prevented from delivering electricity to consumers other than EDP either in Portugal or in other Member States. The exchange of views that followed that letter resulted in EDP proposing significant modifications which it subsequently agreed to implement.

The principal changes were:

- the capacity and output of the power station will be provided exclusively to EDP for the first 15 years;

- there will be a "first option" system for the remaining 13 years of the contract, allowing the Generator to sell to third parties outside the franchise system if there is surplus capacity which is not required by the Grid. Under this "first option" system the Generator will compete with the Grid in seeking to find an outside market (either in the Portuguese free system or in another Member State) for its capacity.

On 30 September 1993 the Commission published a notice pursuant to Article 19(3) of Council Regulation No 17 announcing that as a result of these modifications and having regard to the expected development of electricity supply conditions in Portugal stemming from Decree Laws 99/91 and 7/91, the Commission intended to take a favourable position in respect of the agreements. No observations from third parties were received.

The result of the examination by the Commission's Directorate-General for Competition was that the parties had provided sufficient justification for an exemption to be granted by the Commission in accordance with Article 85(3) of the EC Treaty taking into account the significant modifications introduced into the agreements originally notified and the legal possibilities for the introduction of competition in the energy sector offered by the new regulation in force in Portugal for the electricity sector (Decree Laws 99/91 and 7/91).

The arrangements reflect Portugal's policy of introducing competition in electricity generation through a competitive bidding process.

The new legal framework distinguishes between two types of electricity systems, one serving a franchise market and one serving a free market. Franchise customers (who may buy electricity from only one source) will be differentiated from free market customers (who may purchase from any available source) by an electricity consumption threshold.

At present in the franchise system EDP (which has a public supply obligation) carries out the functions of generation, transmission, distribution and supply. The Generator under the Pego agreements will be fully integrated in the franchise system.

The free market system envisages free access to the transmission and distribution systems. A free market system is developing. Since the adoption of Decree Law 99/91 establishing the broad lines of the future organization of the electricity sector in Portugal, a number of small producers and auto-producers have managed to gain a total market share of around 5%. In the very long term, the free market system is expected to cover 20-25% of the market. The possibility of establishing the free market system would result essentially from the fact that other producers could be in a position to supply energy under better conditions than EDP.

It should be noted that customers will be free to leave one system in favour of the other. Initially only the largest consumers will be allowed to move from the existing system to the free one. The distribution companies will be entitled to buy a percentage of their needs (initially 10-15%) on the free system. It will also be possible for generators to build their own transmission lines. This system offers competition in both the generation and the supply of electricity. Free market customers are entitled to contract freely for their electricity supplies with different generators or other suppliers who can compete for their custom. Moreover, free market customers will have the possibility of open and transparent access to the existing transmission and distribution grids.

Under the "first option" system introduced into the agreement the Generator would not be prevented from delivering electricity to consumers other than EDP either in Portugal or in other Member States after the first 15 years and for the remaining 13 years of the contract.

It was considered that the notification under consideration could be dealt with by means of an administrative letter based upon the conditions of Article 85(3) of the EC Treaty.

<T6> Logistical collaboration agreement between REPSOL and BPMED in the Canary Islands

On 14 April, by standard comfort letter, the Commission authorized an agreement notified on 2 March by REPSOL S.A. and BPMED S.A. on the joint operation by them of logistical plant for the storage and handling of petroleum products. Through the intermediary of a new company, Terminales Canarios S.A., in which REPSOL S.A. and BPMED S.A. each have a 50% stake, new facilities for the storage and transport of petroleum products are available in the Canary Islands, not only for these two companies, but also for any other companies that might be interested.

In view of the particular characteristics of this market, which is supplied almost exclusively by the Canary Islands' only refinery, the Commission took the view that the agreement made it easier for new operators to set up there, by increasing the logistical facilities available and, in particular, imports of petroleum products from the Spanish mainland and/or other Member States.

<T6> Disma

223. Under an agreement between certain oil companies and the managing company of Milan's Malpensa Airport, a joint venture was created under the name Disma for the installation and operation of equipment for storing jet fuel and transferring it to supply points on the site of the new airport. The Commission demanded, and obtained, certain changes needed to guarantee non-discriminatory access for the companies operating on this market.

The agreement envisages the creation on the site of the airport of a new fixed aircraft-refuelling installation essentially comprising a fuel and lubricant depot directly linked via underground pipelines to supply points. This will enable fuel to be transferred direct from the depot's pipelines and pumping equipment without the use of the traditional tankers. Once it has been completed, this equipment will be the only means of refuelling aircraft at the new airport.

224. At the outset, the Commission acknowledged that the technological characteristics of the Disma installations would enable jet fuel to be stored and transported advantageously in terms of Community environmental legislation, particularly with regard to traffic and air pollution. Moreover, the advantages benefit not only the oil companies but also the customer airlines and their users.

However, the initial version of the agreements notified to the Commission contained clauses preventing non-Disma companies from having access on non-discriminatory terms to the joint venture's services. For one thing, the almost insurmountable obstacles making impossible in practice the transfer of holdings in Disma to third parties prevented the latter from gaining access to the market. The founding members had also agreed to impose significantly higher charges on non-members. Some users of Disma's installations and services were thus forced to accept unequal conditions for equivalent services, and this placed them at a competitive disadvantage.

In view of the foregoing considerations, and given the more important role that Milan Malpensa Airport is likely to play as regards air transport in the Community, a sector which is gradually being liberalized, the Commission initiated proceedings with a view to eliminating these unjustified barriers to access and ensuring neutrality and equality of treatment for all users of Disma's installations, it being borne in mind that all oil companies, whether or not members of the joint venture, have to use these installations to supply their customers. The members of Disma have therefore proposed a uniform tariff although actual charges are on a sliding scale according to the quantities of jet fuel supplied. The principle of a sliding scale can be justified by the existence of fixed costs associated with the services supplied to each customer.

The parties to the agreement finally agreed that access by firms not participating in the capital of Disma should be made easier once Malpensa's static refuelling system is operational.

The Commission took the view that the agreements concerning the Disma joint venture were then compatible with the common market. Accordingly, it adopted a favourable position in their regard and terminated the proceedings by standard comfort letter.

<T6> Texaco Ltd

225. In November 1992 Texaco Ltd notified an agreement establishing a service station franchising system. It requested that agreements concluded with managers for the operation of service stations and integrated on-site shops be cleared under Regulation (EEC) No 4087/88 granting block exemption for franchising agreements.

Texaco wanted not only to sell fuels and petroleum products marketed under its name, to which Regulation (EEC) No 1984/83 on the application of Article 85(3) of the Treaty to categories of exclusive distribution agreements could have applied, but also to organize a network of service stations and shops that would distribute foodstuffs, tobacco, newspapers and car-related articles using a common name and presenting the contract premises in a uniform manner, would possess know-how and would receive commercial and technical assistance.

The Commission took the view that the contracts complied with all the conditions laid down in Article 1 of Regulation No 4087/88. The contract provides in particular for obligations relating to the use of a common name or shop sign, a uniform presentation of contract premises and the communication by the franchisor to the franchisee of substantial know-how, including training and substantial information relating to management, administration and finances and to the promotion, storage and presentation of products to consumers. The requirement laid down in the contracts that only Texaco fuel be sold is also in line with the exemption criteria provided for in the Regulation.

With regard to the on-site shops, the Commission took the view that the requirement that the franchisees must always have available certain brand products specified by Texaco was lawful. For each category of product sold, the franchisee is required to sell Texaco's specified brand product, while remaining free to sell competing products of his choice, provided that such products comply with minimum quality criteria. The franchisor may require part of the shop's shelf-space to be reserved for the display of such brand products.

Texaco has also set up a centralized purchasing system for the designated products. Under the system, Texaco negotiates purchasing terms with manufacturers and wholesalers and identifies those with the lowest prices. It can obtain much cheaper purchasing terms than those which could be offered individually to franchisees. If franchisees decide to participate in this system, they are then required to purchase all the products selected from Texaco's designated suppliers. However, they are free to purchase other products from suppliers of their choice.

Following discussions with the Commission, Texaco made it clear that the purchasing system was optional and that it was not automatically linked to the franchising contract. The system has advantages in terms of discounts and rebates, but the franchisee is free to participate in it or not as he wishes and can withdraw from it at any time.

On the basis of these clarifications the Commission took the view that the agreement notified by Texaco, including its motor vehicle fuel distribution aspect, complied with the provisions of Regulation (EEC) No 4087/88/CEE.

<T6> Service station agreements in Spain

226. With regard to the application of Regulation No 1984/83 (concerning exclusive purchasing agreements) to service stations, the Commission was able, on several occasions, to clarify and define more closely certain aspects of the scope of the exemption and, in particular, the restrictions of competition that ruled out its application.

In the particular context of the recent abolition of the Spanish oil monopoly,(2) the Commission examined the contracts negotiated by the Spanish refineries with service station operators under the former monopolized network when it was still legally reserved to Spanish refiners' products. The contracts were exclusive supply contracts entered into for a period of ten years as from the date of abolition of the monopoly.

The Commission took the view that the contracts were not compatible with Regulation (EEC) No 1984/83: as the service station operators were legally and economically dependent, the entry into force of the contracts at a different time from that at which they were signed meant de facto that they were concluded for an indefinite duration or for a period of more than the ten years provided for in the Regulation. The Commission also challenged the arrangement whereby the exclusive supply requirement covered not only motor vehicle fuels, but also lubricants sold in the service stations concerned.

Since the Spanish refineries demonstrated their willingness to amend their agreements so as make them compatible with the Regulation and since, for this purpose, the ten-year period for the exclusivity arrangements will commence on the date the agreement was signed and will apply only to motor vehicle fuels, except in cases where the supplier has made a lubrication bay or other lubrication equipment available to the service station operator, the Commission decided that it would probably close the case, by means of a standard comfort letter.

(2) See point 362 of this Report.

<T6> Service station agreements in the Canary Islands

226(a). In response to a complaint lodged by the Association of Petroleum Product Distributors in the Canary Islands against Texaco Petrolífera S.A., challenging the compatibility with the relevant Community rules(3) of the exclusivity agreements signed by that company in the Canary Islands, the Commission sent Texaco Petrolífera S.A. a statement of objections on 23 December 1991. In the Commission's view, the exclusive purchasing agreements negotiated by the company with service station owners in the Canary Islands constituted an infringement of Article 85(1) of the EC Treaty, since some of the clauses (notably those concerning the duration and scope of the exclusivity arrangements relating to the sale of motor vehicle fuels and the arrangements for setting the pump prices of the products) went beyond the limits set by Regulation (EEC) No 1984/83.

On 28 January 1992 Texaco Petrolífera S.A. replied to the Commission's statement of objections.

At the same time, the Commission sent requests for information pursuant to Article 11 of Council Regulation No 17 of 6 February 1962(4) to all the established oil companies that had negotiated exclusive purchasing agreements with service station operators in the Canary Islands similar to those negotiated by Texaco Petrolífera S.A. These included Shell España S.A., Distribuidora Industrial S.A. (DISA) and Mobil Oil España S.A.

As a result of the Commission's representations, both Texaco Petrolífera S.A. and the other companies that had signed exclusive purchasing agreements indicated that they were prepared to bring their agreements into line with the Community rules applicable. For this purpose, the companies proposed (and the service station operators agreed) that addenda be signed to adjust the clauses in the agreements that the Commission had objected to.

Since most of the service station operators concerned signed such addenda and since, consequently, they had once again demonstrated their willingness to

(3) Commission Regulation (EEC) No 1984/83 of 22 June 1983 on the application of Article 85(3) of the Treaty to categories of exclusive purchasing agreements.

(4) First Regulation implementing Articles 85 and 86 of the Treaty, amended and supplemented by Regulation No 59, by Regulation No 188/63/EEC and by Regulation (EEC) No 2822/71.

continue their business relationships with the company of their choice for a period not exceeding ten years in accordance with the conditions provided for in Regulation No 1984/83, it was decided on 8 February 1993 to close the case. In the situation described there was less need to continue examining the case at Community level, and so the competent national authority took up the complaint.

It is thus the Spanish competition authority that will deal with the case of the small number of station operators who have refused to renew the agreements put forward by the companies. Furthermore, since Article 85(1) has direct effect, there is nothing to prevent the complainant from raising before the national judicial authorities the problems of compatibility with Community law of exclusive purchasing contracts that are not exemptable under Regulation (EEC) No 1984/83. This case provides a good illustration of the subsidiarity and decentralization policy pursued by the Commission.

<T3> §5. Motor vehicles

<T6> Cooperation agreements between Peugeot and Fiat involving the Sevel joint venture

227. The Commission continued its scrutiny of the agreements concluded by Fiat and Peugeot for the joint production of vehicles intended for specific segments of the automobile market. The agreements concern the manufacture at two plants of three types of vehicle. Sevel Val di Sangro produces medium commercial vehicles, while Sevel Nord produces light commercial and multi-purpose vehicles.

The medium commercial vehicles are the fruit of an initial collaborative venture agreed on 29 June 1978, to build the Peugeot J5, Citroën C25 and Fiat Ducato, with the vehicles still to be marketed separately through the parties' own distribution networks. The Commission approved this agreement by administrative letter on the ground that it was aimed at promoting research into and the development of a new product. A subsequent agreement was concluded to enable the firms to replace the abovementioned vehicles with new products better suited to a changing market. The Commission proposes to approve the extension of the collaborative venture to include the new products by a formal decision, to which it intends, however, to attach conditions designed to ensure the maintenance of genuine competition between Fiat and Peugeot in the distribution of such vehicles throughout the common market. It has already published a notice in the Official Journal seeking the views of interested parties.

The joint production of multi-purpose vehicles and of light commercial vehicles is a new venture covered by a more recent agreement. It concerns not only the chassis, which is common to all models, but also the engines and bodies. Following a detailed examination of the notification which was made by the two parent companies as a precautionary measure, the Commission found

that the agreement was covered by Regulation (EEC) No 418/85, which exempts under Article 85(3) of the EC Treaty certain agreements concerning joint research and development: the two firms can therefore continue the research undertaken jointly, and subsequently entrust to Sevel Nord the manufacture of the vehicles in question.

<T6> Rover Group

228. Between 1986 and 1990 Rover Group operated a system in the United Kingdom by which it set a ceiling on the amount of discount that a customer should receive on some of its models. Rover Group's authorized Rover dealers were allowed the normal dealer margin of 15%, but a further 2% margin (payable for compliance with dealership standards) was not paid over in the event of the dealer exceeding fixed discount levels. This practice was a clear breach of EC competition rules because it restricted price competition between dealers.

Rover's senior management terminated the practice, following which they voluntarily notified the changes they introduced to the United Kingdom's Office of Fair Trading and subsequently to the Commission. In order to remedy the situation Rover informed its dealers that the discounting policy previously pursued had been abandoned. Furthermore, the Rover Group undertook to reimburse dealers any margin which had been withheld from them. Finally, after discussions with the Commission, Rover agreed to contribute the sum of UKL 1 million to the funding of two projects designed to benefit consumers who purchased motor vehicles in the United Kingdom. However, this does not affect the rights of individual consumers to claim compensation against Rover or any Rover dealer, or prevent the UK authorities from taking action under national law.

Under the circumstances the Commission does not propose to initiate official proceedings in this case.

<T6> The Commission sees to reorganization of the distribution of Fiat spare parts in Italy

229. Acting on a complaint from Cicra, the Italian association of manufacturers of spare parts and accessories, the Commission contacted Fiat Auto to lead it to modify its system of distributing spare parts for its cars in Italy.

Under Italian law a motor manufacturer may obtain a legal monopoly over body parts for which it seeks registration as industrial designs. Fiat Auto availed itself of this opportunity and was therefore entitled by law to the exclusive supply of certain parts. Moreover, the discounts granted to distributors of spare parts for all Fiat products were closely bound up with the discounts offered on spare parts covered by the monopoly. These discounts also depended on a purchasing threshold accepted by each distributor.

Alongside its motor vehicle distribution network, organized in conformity with Commission block exemption Regulation (EEC) No 123/85, Fiat had set up a system of exclusive distribution through a network of 315 dealers specializing in the distribution of spare parts. The Regulation covers the distribution of parts only in so far as it is linked to the distribution of motor vehicles. Fiat had ceased to have such a homogeneous system of exclusive and selective distribution and therefore lost the benefit of the block exemption, at least as regards the spare parts sector.

Following the Commission's intervention, Fiat decided to modify its system of discounts as from 1 January 1994 to bring it into line with the competition rules. In particular, it proposed to abandon the discount intended to deter distributors from selling to customers from outside their area, scrap the LIT 99 million purchasing threshold that distributors had to reach before they qualified for discounts, and abolish any link between the discounts granted on parts covered by an industrial design right and the discounts granted on other spare parts. The effect of these discounts was to limit access by third parties to the market in spare parts for Fiat vehicles.

Fiat also decided to abolish the network of distributors specializing in the sale of spare parts. There are some 750 such distributors in Italy, 315 of whom have been appointed "authorized Fiat distributors" in return for their agreeing to tie themselves to Fiat through an exclusive dealing agreement known as the "CSR". Because of their number the Commission granted Fiat a five-year grace period in which to terminate these exclusivity agreements as and when they come up for renewal. This new policy of Fiat's will mean more competition in the market for spare parts because independent spare parts manufacturers will be able to sell to a group of customers to which they were hitherto denied access.

<T3> §6. Transport

<T5> (a) Sea transport

<T6> East African Conference

230. In September the Commission terminated the proceedings it had initiated in 1991 against the liner conference operating in trade between Europe and East Africa (the EAC) and member shipping companies in respect of the length of notice companies wishing to leave the conference had to give.

The Commission had acted originally in response to a complaint lodged in June 1989 by Compagnie Maritime Belge (CMB) against the EAC in respect of the obstacles the conference had placed in the way of CMB's introduction of a non-conference service. The dispute between the parties dates back to the time when CMB decided it was not going to serve the trade in question any longer as a member of the conference, and offered a new liner service competing directly with that provided by the EAC.

The EAC thereupon went to court and also referred the matter to arbitration in an attempt to prevent the service from being introduced before 31 December 1990, the date on which it considered that the notice given by CMB could have the effect of releasing that company from the various obligations and geographical restrictions contained in the conference agreement.

CMB argued that the clause in the agreement relating to the length of notice to be given in order to leave the conference was not covered by the block exemption granted to liner conferences.(5) The clause provided for a minimum period of notice of 12 months, such notice to expire only at the end of a calendar year.

The Commission found that the current arrangements for giving notice could restrict, for a period of up to two years less one day, the freedom of a

(5) Article 3 of Council Regulation No 4056/86, OJ L 378, 31.12.1986.

member shipping company wishing to leave the conference in order to offer a non-conference service as an outsider.

It acknowledged that the requirement of the giving of notice to leave a conference was a normal contractual provision: conferences involved a certain amount of coordination of schedules and capacity, and the withdrawal of one of the members could cause disruption. It found, however, that in the present case the period of notice provided for in the conference agreement was unreasonably long and constituted a restriction of competition. As the provision in question did not satisfy the conditions necessary for it to benefit from the block exemption granted to liner conferences or from an individual exemption, it was therefore automatically void under Article 85(2) of the EC Treaty.

231. In the Commission's view, the notice-giving clauses in conference agreements are closely linked to effective non-conference competition from outsider companies, which constitutes the main counterweight to the block exemption granted to liner conferences. The Commission must ensure not only that existing outsiders are not hampered by restrictive practices on the part of conferences benefiting from exemption, but also that a company belonging to a conference can become, within a reasonable period, an outsider offering a service competing directly with that offered by the conference.

The Commission considers that the maximum period of notice required of a member before it can leave a conference without incurring any penalty should not as a rule exceed six months and in some cases might even be shorter, and that it should be possible for such notice to be given at any time.

The EAC having amended its conference agreement as requested by the Commission, the Commission decided to terminate the proceedings without adopting a formal decision.

<T6> Trans-Atlantic Agreement

232. Almost all shipping lines in the Europe/US trade are parties to this agreement, which has the objective of freezing capacity on that trade.

According to these lines, the trade has suffered during the last two years from overcapacity and heavy losses for most members.

The agreement entered into force on 31 August 1992. It allows the members of the TAA to fix prices in common in relation not only to the sea transport segment but also to the land-based segment. In addition, the TAA established a management programme for the capacity offered by members which enables them to reduce by up to 25% the amount of capacity previously offered to shippers by the non-utilization of some of the space available on their vessels. The programme extends only to westbound traffic and therefore mainly covers Community exports to the United States.

The Commission has received numerous complaints from shippers (transport users) regarding this agreement. Following the announcement by the members of the TAA of substantial rate increases for 1993 (between 30% and 100%), the British and French shippers' councils lodged applications for interim measures asking the Commission to suspend implementation of the agreement.

On 14 April the Commission sent a statement of objections to the TAA's members with a view to adopting interim measures such as suspension of the agreement. Following the written reply and the hearing it became apparent that the elements of serious and irreparable harm to the complainants were insufficient to justify such a decision.

On 10 December the Commission sent to the TAA's members a statement of objections on the substance of the case. This statement of objections is based on presumed infringements of Articles 85 and 86 of the EC Treaty and envisages a prohibition of the agreement.

<T6> Irish Club Rules

233. The Commission received a request for individual exemption under Article 12 of Regulation (EEC) No 4056/86 for an agreement known as the Irish Club Rules concluded by six small and medium-sized shipping companies providing liner services for the carriage of cargo between the Continent, on the one hand, and Ireland and Northern Ireland, on the other. According to the parties, the agreement was neither a conference nor a consortium agreement.

As part of the scrutiny procedure, the Commission published in June 1991, pursuant to Article 12(2) of Regulations (EEC) Nos 4056/86 and 1017/68, a notice summarizing the essential content of the agreement and of the request for exemption.

Following publication of the notice and the receipt of numerous comments from interested third parties voicing their opposition to the granting of an individual exemption to the agreement as it stood, in September 1991 the Commission sent, in accordance with Article 12(3), a letter to the shipping companies concerned expressing serious doubts as to the applicability of Article 85(3) of the EC Treaty to the Rules. Its main objection was that the Rules' scope included the land-based segment of the transport service.

During subsequent talks between it and the parties, the Commission pointed out that the Rules could not be exempted on the strength of any stabilizing effect they might have, as this was acknowledged by Regulation 4056/86 as being a sufficient ground only in the case of liner conferences (eighth recital of the Regulation); such an effect was produced primarily by cooperation between shipping companies on freight rates leading to the adoption of a common tariff, a feature lacking here.

In May 1993 the parties again notified their agreement, as amended to take account of the serious doubts and other points raised by the Commission.

Subsequently, the Commission, in accordance with Article 23(3) of Regulation 4056/86, published a notice(6) announcing its intention of adopting a favourable decision on the Rules. The notice contained a summary of the serious doubts raised, of the amendments made to the agreement and of the main reasons why the Commission considered it could grant the Rules an individual exemption.

Since no new factor capable of modifying the Commission's assessment was brought to its attention following publication of the second notice, the Commission closed the file on the case.

An Article 85(3) comfort letter was accordingly sent to the parties.

(6) OJ C 263, 29.9.1993, p. 6.

<T5> (b) Port services

<T6> Sea Containers/Sealink

234. The Commission rejected an application by Sea Containers (a company which, amongst other activities, operates high-speed ferries between Great Britain and France and Ireland) for interim measures against Stena Sealink (a British ferry operator which is also the port authority at Holyhead, Wales), after the companies had come to an arrangement following Commission intervention.

Sea Containers complained to the Commission in April that Stena Sealink was refusing to grant it access to the port of Holyhead for the purpose of commencing a high-speed ferry service, thereby protecting its own ferry service from competition. Sea Containers asked the Commission to adopt interim measures against Stena Sealink obliging it to grant access to the port. In July the Commission issued a statement of objections to Stena Sealink in which it said that it considered that Sealink's behaviour constituted an abuse of its dominant position as owner and operator of the port, contrary to Community competition rules, in particular Article 86 of the EC Treaty. The Commission indicated that it intended to order interim measures against Stena Sealink obliging it to grant access to Holyhead to Sea Containers.

In October Stena Sealink offered Sea Containers access to the port on terms which the Commission considered to be reasonable and non-discriminatory. Sea Containers later accepted the offer, after the Commission had indicated that it considered that the necessary conditions for ordering interim measures were no longer fulfilled (i.e. urgency, arising from the likelihood of serious and irreparable harm to the applicant).

The Commission decided to adopt a formal decision in the case in order to clarify the legal position for the benefit of the companies and other interested parties. In its decision the Commission said that Sea Containers was not entitled, by way of interim measures, to more than Sealink had offered. However, it made clear that it considered that Sealink had prima facie abused its dominant position at the port of Holyhead. In its

view, a company which both owns and uses an essential facility such as a port, and which refuses its competitors access to that facility, or grants access only on terms less favourable than those it gives its own services, infringes Article 86 of the EC Treaty if there is an effect on trade between Member States.

The Commission believes that, when a company is in a position such as that of Sealink in this case, it cannot normally expect to fulfil satisfactorily its duty to provide non-discriminatory access and to resolve its conflicts of interest unless it takes steps to separate its management of the essential facility from its use of it. This could involve, for example, having different employees responsible for the management of the port than for the management of the ferry service, the establishment of a non-discriminatory code of practice, a consultation procedure involving other port users, and arrangements for independent arbitration in the event of disputes.

<T5> (c) Rail transport

<T6> Decision on tariff structures in the combined transport of goods

235. The Commission adopted a decision authorizing an agreement establishing a common tariff structure to be applied by the main railway companies in the Community. Railway companies only exceptionally sell combined transport services (i.e. services involving more than one means of transport such as, for instance, rail and sea transport) direct to consignors. In the vast majority of cases, such transport services are sold through specialized operators, which may be either subsidiaries of railway companies or independent firms.

The agreement establishes a tariff price structure for the sale of rail haulage to these operators. It defines a grid of coefficients to be used in calculating prices, but it does not lay down the prices themselves.

236. The Commission took the view that the agreement would restrict competition, because without it each railway company could adopt its own tariff to attract traffic operating on competing combined transport routes. In addition, the agreement was not a technical agreement within the meaning of Article 3 of Council Regulation (EEC) No 1017/68, which authorizes agreements the sole object and effect of which is to apply technical improvements or to achieve technical cooperation.

The Commission nevertheless came to the conclusion that the negative effects of the agreement would be offset by the fact that it would be easier to set international prices and by the fact that operators purchasing haulage from the railways could compare different international routes more readily and thus take advantage of competition between them. A common tariff structure that would be in force for several years also gave operators the stability they needed to invest.

The Commission accordingly decided to authorize the agreement for five years but attached conditions to its authorization to protect combined transport operators from abuse of the agreement by the railways.

<T5> (d) Air transport

<T6> IATA - Currency Rules

237. The rules governing the terms and conditions for the issue of airline tickets are contained in a number of resolutions by IATA Tariff Coordination Conferences. One of these resolutions restricted the freedom of passengers to purchase tickets outside the country of travel origin.

IATA was informed that, in the Commission's view, the rule amounted to a form of market segmentation and appeared to prevent the consumer from obtaining the best terms for his or her transport arrangements. The adoption of the resolution by IATA airlines therefore appeared to restrict competition in the Community, and would thus fall within the scope of Article 85(1) of the EC Treaty.

Following discussions with IATA, the resolution was modified by an IATA conference so that the provisions were no longer applicable to travel within the EC, Norway and Sweden.

<T6> IATA - Cargo Surcharge

238. The annual round of talks on cargo tariffs between airlines within IATA Tariff Coordinating Conferences is permitted under Commission Regulation (EEC) No 1617/93 on the ground that the discussion of, but not the agreement on, tariffs may contribute to general acceptance of interlining to the benefit of carriers and air transport users alike.

On two separate occasions during the course of the year IATA adopted resolutions providing for the imposition of a worldwide fixed surcharge of 15 US cents per kilo on all air freight movements. The increase in the intra-EC revenues of carriers applying the surcharge was estimated at ECU 100 million. IATA considered that the adoption of the surcharge fell within the scope of the block exemption because the surcharge formed part of an interlinable tariff.

The Commission did not accept that a global surcharge, the main purpose of which was to raise revenue and not to facilitate interlining and which failed to take account of the different impact of cost trends of individual

carriers, could benefit from block exemption. Even if it could, it appeared to have effects that were contrary to Article 85(3) of the Treaty.

IATA abandoned its first attempt to impose a surcharge following the Commission's expression of concern that the IATA resolution did not meet the conditions for exemption or for an individual exemption.

At a subsequent conference IATA again adopted a surcharge resolution, but this time it was slightly different. The new resolution allowed individual carriers more discretion in applying the surcharge. However, evidence in the market-place indicated that most carriers were treating the surcharge as binding, and the main purpose was to increase revenue rather than interlining. In these circumstances, the Commission's view remained unchanged, and IATA was informed accordingly. In the light of the Commission's reaction, IATA withdrew the surcharge.

<T6> Sabre/Air France and Iberia

239. The Commission received a complaint from the Sabre computerized reservation system (CRS) concerning the refusal of the subsidiaries of two major airlines (Air France and Iberia) in the Community to participate to an adequate extent in its distribution facilities. It considered that a CRS could not provide effective competition in the national markets in which it operated, if it was not able to distribute the services of the domestic airlines. CRSs provide information on schedules, availability and fares for air transport. The two national carriers are shareholders of a rival CRS.

The airlines considered that their own CRS, which held over 80% of their respective national markets, provided all the distribution facilities they required. Furthermore, they considered that Sabre, which is a "hosted" system (the internal reservation system of the owner, American Airlines, is integrated in the CRS itself), discriminated against them in that it provided a better quality of service for American Airlines than for non-hosted carriers.

Eventually, a settlement was reached between the various parties which led to the domestic subsidiaries of Air France and Iberia participating in Sabre.

As a result of the above complaints, in both the amendment to the Code of Conduct for CRSs[7] and the revised block exemption for CRSs,[8] the requirements for parent carriers to participate in rival CRSs and the non-discriminatory operation of hosted CRSs have been strengthened.

(7) Council Regulation (EEC) No 3089/93, OJ L 278, 11.11.1993, p. 1.
(8) Commission Regulation (EC) No 3652/93, OJ L 333, 31.12.1993, p. 37.

<T3> §7. Protection of the environment

<T6> Spa Monopole/GDB

240. Following the unanimous decision of the general assembly of the Genossenschaft Deutscher Brunnen (GDB) on 29 April to afford access to its pool of multi-way glass bottles to mineral water producers from other Member States, the Commission decided to terminate the proceedings initiated under Articles 85 and 86 of the EC Treaty in 1989 against the GDB in response to a complaint by a Belgian water producer which wanted to use GDB bottles to sell its products in Germany. The complaint has now been withdrawn.

The Belgian mineral water producer Spa submitted a formal complaint in 1989 against the GDB's refusal to grant access to a pool of standardized refillable glass bottles and crates which operates in Germany. A similar complaint by Belgian and French mineral water producers was rejected by the Commission in December 1987. According to the Commission at that time the GDB agreement and the ensuing exclusion of foreign water producers did not have an appreciable negative effect on the position of third parties or on inter-state trade in particular because alternative packaging, such as PVC or one-way glass, had free access to the German market. In fact, up to 1988 mineral water exports to Germany particularly from France and Belgium were increasing rapidly.
Nevertheless, the Commission at that time stated its intention of reconsidering the situation if compulsory legislation were to be adopted with regard to the use of disposable bottles for mineral water. Plastic PVC/PET bottles were in fact the most popular packaging used for exports of mineral water to Germany until the end of 1989.

By means of a statement of objections in December 1992, the Commission asked the GDB to open its pool to mineral water producers from the rest of the Community. It was argued essentially that conditions in the German market for mineral water had been changed to such an extent that the only way for non-German producers to remain competitive in that market was for them to be able to bottle their products in GDB bottles. Access to the pool was therefore essential to them. What had happened was that German waste management legislation which entered into force in 1989 had resulted in the removal of plastic one-way bottles from the market. Alternative packaging

such as recyclable plastic or one-way glass bottles had not shown itself to be a viable substitute for one-way plastic bottles. Moreover, following the entry into force of the new "packaging" regulation (VerpackVO) at the beginning of 1993, disposable glass bottles (one-way glass) and other one-way packaging are no longer permitted either if a system for their recycling does not exist. The use of any non-refillable container is subject to the obligation on the part of the producer/distributor to take a deposit. On the other hand, refillable glass bottles compete directly with the GDB. Starting a new pool of such bottles is not, however, a realistic proposition for those outside the GDB, since most water wholesalers and supermarkets do not wish to introduce a second pool besides the GDB. This would result in considerable additional handling and stocking costs for them.

It must be noted that in this case the Commission did not question the German anti-pollution legislation. It stated however that, in view of the evolution of the German mineral water market since 1990 - particularly the adoption of compulsory legislation concerning the use of disposable bottles for mineral water and the reaction of the retail trade to this legislation and its effects on EC exports to Germany - the GDB agreement and its operation in practice was capable of acting as a barrier to entry. Thus, the agreement hindered access by foreign water producers to the German market, restricting competition and appreciably affecting inter-state trade within the meaning of Articles 85 and 86 of the EC Treaty. Furthermore, in view of the dominant position of the GDB in the market for mineral water containers, its refusal to grant foreign EC water producers access to its pool, despite the fact that such access was essential in order to be able to compete effectively in the mineral water market, constituted an abuse of a dominant position within the meaning of Article 86 of the EC Treaty.

Under the amended system, water producers from other Member States who wish to enter the GDB pool must sign a contract ("Beitrittsvertrag") with the GDB. The contract stipulates among other things that the new member accepts the existing rules and regulations of the GDB and will use the bottles for exports to Germany only. Foreign water producers should use labels which make clear to the German consumer the origin of the mineral water and the place where it was bottled. The Commission believes that this is enough to avoid any confusion which might otherwise result from the utilization of GDB bottles by producers in other Member States.

<T3> §8. Case concerning intellectual property

<T6> Becton Dickinson/Cyclopore

241. The Commission issued an Article 85(3) comfort letter for a licensing agreement with exclusive supply and purchasing obligations between Cyclopore, an independent Belgium-based firm which has close links with the Université Catholique de Louvain (UCL), and the US medical supply company Becton Dickinson and Company Inc.

Cyclopore produces membranes based on a patent licence granted by UCL. The membrane is a very thin transparent film with over 100 000 pores per square centimetre. Becton Dickinson has developed a technique to weld these membranes into tissue culture products. These products are used specifically for culturing mammalian and insect cells in vitro.

Under the agreement Cyclopore grants Becton Dickinson the exclusive worldwide right to manufacture and sell its membranes for use in tissue culture products for as long as Becton Dickinson purchases a minimum quantity, and Becton Dickinson undertakes to purchase exclusively from Cyclopore all its microporous track-tech membranes for use in tissue culture. Furthermore, the agreement contains an exclusive supply obligation on Cyclopore. This obligation has been limited, following intervention by the Commission, in order to permit Cyclopore to sell its membranes for use in tissue culture also to other parties after five years.

The agreement is interesting since it ensures the commercialization of university spin-off technology, whilst enabling, after a transitional period, access by competitors to this innovative product.

<T3> §9. Other sectors

<T6> Zera Montedison/Hinkens Stähler

242. By a decision under Article 85 of the EC Treaty, the Commission ruled that it is an infringement of competition law for a manufacturer to grant a distributor absolute territorial protection by seeking, under the agreement between them, to have products which often differ only slightly from one another approved in the various Member States. Such differentiation between products requiring national approval makes parallel imports impossible if the imported products do not meet the approval requirements of the Member State of importation.

In the present case, two firms, Farmoplant and Montedison Deutschland, used the method described above to grant absolute territorial protection for the herbicide Digermin to their German exclusive distributor (Stähler) between 1983 and 1988. In this way, they prevented German parallel imports of Digermin, which is sold at much lower prices in other Member States (but not approved in the same composition by the German authorities).

Under German law on product approval, a product can be imported only if the importer provides the authorities with proof that it is identical to the product approved in Germany. Any changes, however slight, in the composition of the product thus mean that it cannot be imported, despite the fact that it was obtained lawfully in another Member State.

In the Commission's view, the parties had infringed Article 85 of the Treaty by agreeing to grant absolute territorial protection in Germany for Digermin through product differentiation in order to protect themselves against parallel imports from other Member States.

The case will serve as a landmark since product differentiation is also practised in other sectors where official product approval is required.

Until such time as there is mutual recognition of national approval or a uniform approval system at European level, national provisions can be used by firms to impede and indeed prevent trade in a product between Member States through a slight change in the product's composition or brand name. As a result, price differences between Member States cannot be exploited to the benefit of the consumer.

<T6> Grundig's selective distribution system

243. On 21 December the Commission adopted a decision extending, under Article 85(3) of the EC Treaty, an exemption for Grundig's selective distribution system.

Grundig, which is incorporated in Germany, is one of Europe's largest manufacturers of consumer electronics equipment. Since 1984 Grundig's manufacturing operations have been managed by the Dutch company Philips Electronics, which recently took full control of Grundig by buying out the other shareholders.

Grundig operates a system of selective distribution, that is to say it distributes its products through specialist wholesalers and retailers whom it selects on the basis of certain criteria (availability of trained sales personnel, ability to advise customers and to display and demonstrate products, provision of an after-sales service, etc.). In the present case, the agreement contained two clauses already considered restrictive of competition in the original exemption decision of 10 July 1985. One concerned the obligation on wholesalers and retailers to stock the entire range of Grundig products, and the other, the obligation on retailers to display a representative selection of those products.

As established by past Commission decisions and the case law of the Court of Justice, such systems are nevertheless compatible with Community competition law where they are justified by the specific nature of the products concerned. The original exemption granted on this basis expired on 28 March 1989. At Grundig's request, it has now been extended until 1999.

However, in the interests of better consumer protection, the Commission asked Grundig to amend its warranty terms so that, even where a defective item was purchased in another Member State, a consumer could have it repaired under

warranty in the Member State in which he lived. To that end, Grundig intends to introduce a uniform, Europe-wide, contractual comprehensive warranty and has begun building up an appropriate network of repair shops. It has undertaken, pending completion of the network, to honour all cross-border warranty claims on an ex gratia basis.

<T6> Papeteries de Golbey

244. The Commission examined a number of agreements notified by Norske Skogindustrier AS, E. Holtzmann & Co AG, SA Papeteries Matussière et Forest and Papeteries de Golbey SA, relating to the setting-up of a joint venture (Golbey) for the construction and operation of a greenfield paper-mill in Golbey, France, the distribution of the paper (i.e. newsprint) produced by the joint venture, and the purchase of raw materials (i.e. waste paper and wood) by the joint venture.

In the form in which they were originally notified, the agreements conferred on the joint venture all the functions of an undertaking, placed at its disposal all the existing resources of the parents for the marketing and distribution of its products, and provided for a long-term territorial division of the market for Golbey's products between Norske Skogindustrier and Holtzmann (through exclusivity clauses).

The Commission found that the agreements could allow the parties to coordinate their competitive behaviour and could lead to market sharing liable to restrict competition and affect trade between EC countries. It made its misgivings known to the parties and requested them to change the arrangements for the marketing and distribution of Golbey's products. In view of the Commission's opposition, the parties finally undertook to change the distribution model and Papeteries de Golbey will function in future as a mere production joint venture.

If anything, the joint venture is likely to offer more effective competition to existing European groupings; the additional capacity will increase supply relative to demand and will help keep prices down.

As far as production is concerned, the operation will be of benefit both to the parties and to the consumer. Through the exchange of technical know-how between the parties, the new mill at Golbey uses highly sophisticated waste paper de-inking technology and the manufacturing processes have been rendered "environmentally friendly".

After taking into account the notified amendments to the original agreements, which limit the risk of market sharing and minimize the restrictive effects on competition, the Commission was able to inform the parties by comfort letter that the operation qualified for exemption under Article 85(3).

<T9> C. Merger control

245. This chapter begins by looking at the operations which were declared to be caught by Regulation (EEC) No 4064/89 on the control of concentrations (the Merger Control Regulation). It then goes on to examine how the criteria for assessing the compatibility of such operations with the Regulation have been applied.(1)

<T3> §1. Scope of application

246. For an acquisition to be caught by the Merger Control Regulation, the parties must first meet certain conditions as to their turnover, particularly their turnover within the Community.(2) Second, the transaction must amount to a concentration.

<T5> a. Community dimension (Article 1)

247. One of the fundamental aims of the turnover thresholds in Article 1 of the Regulation is to act as a screen to identify transactions with a Community interest. For example, in Fletcher Challenge/Methanex where a New Zealand and an EC company moved to a position of joint control over a Canadian one, the turnover obtained by the parties in the EC was none the less sufficient to trigger the Article 1 thresholds. This case illustrated the need for the Commission to examine such operations because in fact the joint venture had significant effects in the EC.

248. The rules set out in Article 1 are also intended to draw a clear dividing line between cases that should be dealt with by the Commission on the one hand and by Member States on the other, in order to safeguard the one-stop shop principle. A refinement of this principle is contained in Article 22(3) of the Regulation which provides that a Member State may ask the Commission to examine the effects in its territory of a concentration

(1) A complete list of the decisions taken under the Merger Control Regulation is given in the Annex.

(2) Under the current figures, the combined aggregate worldwide turnover of all the undertakings concerned must be more than ECU 5 billion, while the Community-wide turnover of at least two of the undertakings concerned must be more than ECU 250 million.

without a Community dimension, insofar as the concentration also affects trade between Member States. Thus the Commission may, on request, act for the competent authority of a Member State and apply the Merger Regulation in assessing the impact of a non-notifiable transaction within that Member State's territory.

249. For the first time since the entry into force of the Regulation a request pursuant to Article 22(3) was received in the case of British Airways/Dan Air. Since British Airways acquired only the non-charter operations of Dan Air, the turnover attributable to the latter did not attain the EC threshold and this was therefore a case to be dealt with by the national authorities concerned. Following, however, the request from the Belgian Government, the Commission examined the effects of the transaction in the territory of Belgium.

<T5> b. Calculation of turnover thresholds (Article 5)

250. Article 5(4) sets out the method for determining the economic grouping to which an undertaking concerned belongs for the purposes of calculating turnover. In respect of state-owned enterprises, Article 5's provisions should be read in conjunction with Recital 12 of the Regulation. This states that, in order to avoid discrimination between the public and private sector, account should be taken "of undertakings making up an economic unit with an independent power of decision ..." in calculating the turnover of the state-owned undertakings. In the case of Alcan/Inespal/Palco, Inespal is a wholly-owned subsidiary of INI, a Spanish state holding company, and it planned to sell a 50 % stake in its subsidiary, Palco, to Alcan. In accordance with Recital 12, the turnover to be taken into account in respect of Inespal was deemed to include that of INI alone(3)not that of all the entreprises held by the state. The same rule was applied in the concentration Kali+Salz/MdK/Treuhand where Kali & Salz, a subsidiary of BASF, and the Treuhand acquired joint control of the potash company MdK. The Treuhand is a public-law institution intended to restructure the former GDR's state-owned companies. The Commission considered that in the case in question, the Treuhand was itself an undertaking with a direct interest in the operation but at the same time it did not exclude the possibility of regarding the different organizational units within the Treuhand (up to the level of directorate) as economic units with independent power of decision within the meaning of the 12th Recital. Even assuming that hypothesis, the turnover attributable to the directorate responsible for extractive industries exceeded the EC turnover threshold.

251. Furthermore, in determining whether the thresholds of the Regulation are met, it is necessary to allocate turnover geographically both between the EC and the rest of the world and between individual Member States. In the case of the purchase by Alcatel Cable S.A. of the submarine telecommunications systems (i.e. undersea cable-laying) business of STC Limited, however, there was no immediately obvious way in which to do so.

252. The Commission rejected the approach of the parties which was to take the turnover generated from all contracts where the cable laid had at least

(3) This same idea of economic independence also underlies the Commission's attitude to concentrations between public entities.

one landfall in the EC, and thus where at least one EC telecom operator (TO) would earn revenue from traffic using the system, as EC turnover. This approach was not followed since the parties' business was the laying of undersea cables and not the service subsequently provided through them by TOs.

253. Cables are laid primarily in international waters and sold to international purchasing consortia mostly comprised of TOs. The circuits contained in these cables are apportioned to the TOs according to their participation in the purchasing consortium. The Commission concluded that in allocating the turnover geographically, it was important to establish where competition for the contracts occurred and the place of establishment of the purchasers of the cable was taken as a sufficient surrogate in this particular case. Furthermore, since there was more than one purchaser per cable, the turnover generated by a contract was allocated to the operators according to their participation in the consortium.

<T5> c. Definition of concentration (Article 3)

254. For there to be a concentration within the meaning of the Regulation, there must be acquisition of sole or joint control of a firm by one or more other companies. The difference between sole and joint control also has implications for the method of calculating turnover. In the case of joint control, the turnover of all the companies concerned must be taken into account, while in the case of sole control only the firm holding such control is taken into account.

<T6> Sole control

255. Sole control frequently results from the acquisition by one undertaking of more than 50% of the capital of another undertaking. If there are no other elements of fact or of law, it does not matter very much, for control to be found to exist, whether the holding acquired is 50% + one share, as in Crédit Lyonnais/BFG Bank, or 100%, as in Sara Lee/BP Food Division. Sole control may also be obtained through the purchase of assets, notably, as in Zürich/MMI, when it relates to a part of an undertaking not constituted as a legal entity.

256. In accordance with well-established practice,(4) the Commission took the view, in VW AG/VAG UK and West LB/Thomas Cook, that the acquisition by one of the parties of sole control over an undertaking previously held jointly was a concentration within the meaning of the Regulation.

257. In Société Générale de Belgique/Générale de Banque the Commission took the view that the increase from 20.94% to 25.96% in the stake which the Société Générale de Belgique held in the Général de Banque gave the former sole control over the latter. In reaching this conclusion, the Commission carried out a projection of attendance at the future general shareholders' meeting of the Générale de Banque based on participation of all shareholders holding more than 0.06% of the capital. It deduced from this that the holding of the Société Générale de Belgique in the Générale de Banque will in all probability give it a majority of votes at the shareholders' general meeting amongst those present and represented and that, in view of the wide dispersion of shareholdings, this de facto majority would persist. The

(4) Twentieth Competition Report, point 149; Twenty-second Competition Report, point 228.

Commission also examined whether the provisions of Belgian law intended to ensure the autonomy of banking and laid down in a Protocol, called into question the de facto control normally resulting from a majority at the shareholders' general meeting. It concluded that this was not the case, applying competition policy analysis, given the powers conferred on the Board of Directors. A majority of the Board may consist of representatives of the shareholders that were signatories to the act separate from the Protocol on banking. The Société Générale de Belgique is one such signatory.

<T6> Joint control

258. Joint control may arise where each of the parties has an identical stake in the joint venture. In such cases, it is not necessary for there to be any particular statutory rules or a specific shareholders' agreement. If such is the case, however, such rules or agreement must, as in Matra/Cap Gemini Sogeti, Alcan/Inespal/Palco and Rhône-Poulenc/Snai(II), confirm that each partner cannot act independently from the other partner(s) within the joint venture because, for example, all have the same number of representatives on the representative and/or management bodies and that none of the representatives has a casting vote.

259. The key to determining whether there is joint control is to establish whether the different partners have necessarily to be in agreement on the strategic decisions taken by the joint venture. There is consequently no need for each of the partners to have the same holding in the share capital or the same powers: in Ericsson/Hewlett Packard, Ericsson held 60% of the capital and was entitled to appoint four directors, whereas Hewlett Packard held 40% of the capital and was entitled to appoint three directors; however, all major decisions had to be taken unanimously. Similarly, in Aegon/Scottish Equitable, Aegon had initially 100% of the capital and 40% of the voting rights, whereas the other partner, Trustco, had 60% of the voting rights: however, the stategic and business decisions and the appointment of directors were carried out by common agreement.(5)

(5) See also JCSAT/SAJAC and Costa Crociere/Chargeurs/Accor.

260. The rights of each of the partners must, however, be sufficient and must go beyond those normally conferred on the minority shareholders of an undertaking. In Sita-RP/Scori, the Commission took the view that the rights conferred on some of the parties were insufficient to give them joint control, since they had no right of veto in matters of business policy, strategy, budgets and corporate planning. Similarly, in Dasa/Fokker, the Dutch state's holding was deemed not to give it joint control, since it could not on its own block any decision and had of its own accord limited its right of objection, and had done so even though there were few instances in which Dasa was able to act alone (i.e. without the support of an independent member or of the Dutch state).

261. Joint control does not necessarily mean that the parties sharing it must hold all of the capital of the joint venture: a shareholders' agreement, as in Costa Crociere/Chargeurs/Accor or BHF/CCF/Charterhouse, may do instead.

262. In accordance with established practice,(6) which is in line with paragraph 41 of the Commission notice regarding the concentrative and cooperative operations under Council Regulation (EEC) No 4064/89,(7) the simultaneous creation, as part of one and the same operation, of several joint ventures between the same parties is to be deemed a single concentration. This principle was applied in Harrisons & Crosfield/Akzo.

263. In Fortis/CGER-ASKL, analysis of all the factual and legal circumstances prompted the Commission to conclude that the operation resulted in sole control as regards the "insurance" aspect and in joint control as regards the "banking" aspect. Through this operation, Fortis, which is controlled by the Belgian group AG and the Dutch Amev, acquired 49.9% of ASLK-CGER Banque and ASLK-CGER Assurance. This holding was sold to it by ASLK Holding NV/CGER Holding SA ("Holding"), the public-interest banking holding of the Belgian state. Holding also retains 49.9%. The rest is held by the company itself or through an ASLK/CGER Assurance cross-holding in ASLK/CGER Banque.

(6) Twenty-second Competition Report, point 229.
(7) OJ C 203, 14.8.1990; Twentieth Competition Report, point 25.

264. Account was taken from the outset of the equal shareholdings and representation of the two parties within the new entities, and of the spirit of partnership that guides them, notably with the setting up of a "Consultation Committee". However, in insurance (Fortis's main activity), the simple majority rule applying in voting on the Board, combined with a casting vote given to Fortis in the event of persistent deadlock within the "Consultation Committee", led the Commission to recognize here that Fortis had sole control (the "power of the final say"). Conversely, in banking (ASLK/CGER's main activity), in addition to the nine votes held by Fortis (one double vote) and the eight votes held by Holding, account had to be taken of the fact that Fortis must, in proposing strategic decisions, obtain the agreement of the six members of the Management Committee (whose composition is subject to approval by the Banking Commission) in order to obtain the required qualified majority of 15 out of the 23 votes. Since the possibility cannot be ruled out that just one of the members of the Management Committee might vote with Holding in order to block a Fortis proposal and that Fortis must therefore take this eventuality into account in drawing up its proposals to the Board of Directors, it was concluded that Fortis and Holding had joint control.

265. In Philips/Grundig, the Commission took the view that, prior to the transaction, Grundig was jointly controlled by Philips and by three banks. In concluding that the three banks held joint control, even though there was no shareholders' agreement between them, the Commission based itself mainly on the fact that the three banks had to approve the appointment of one of the two managing directors of the company managing Grundig - the other being appointed by Philips -, that they would normally follow the advice of that director in view of their lack of relevant experience and that, being financial institutions and given their objectives, they would tend to act in the same way.

<T6> Concentration between public undertakings governed by one and the same public agency

266. In line with its practice, notably in ECSC cases, and in accordance with the twelfth recital of the Regulation, the Commission confirmed that concentrations between public undertakings governed by one and the same public agency (central government, regional or local authorities) must be

examined under the Regulation, provided that such undertakings each make up an economic unit with an independent power of decision. This principle was applied in CEA-Industrie/France Telecom/Finmeccanica/SGS-Thomson. In Fortis/ASLK-CGER, in concluding that there was no risk of coordination of competitive conduct, the Commission took the view that the "Office Central de Crédit Hypothécaire", although owned by the state, was pending its sale managed by the "Crédit Communal", a banking institution which was dependent on the municipalities and provinces.

<T6> Concentrative joint venture

267. Article 3(2) of Regulation (EEC) No 4064/89 sets out the two conditions which must be fulfilled for the setting up of a joint venture (JV) to be regarded as constituting a concentration. Under the terms of the first condition, referred to as the positive condition in the abovementioned Commission notice, the JV must perform on a lasting basis all the functions of an autonomous economic entity. Under the terms of the second condition, referred to as the negative condition in the notice, the JV must not give rise to coordination of the competitive behaviour of the parent companies amongst themselves or between them and the JV. If one of these conditions is not met, the agreement between the parties may be examined under Article 85 of the EC Treaty. It will then normally be covered by the accelerated procedure introduced for this type of operation.(8)

<T8> First condition: Autonomous economic entity established on a lasting basis

268. In Philips/Thomson/Sagem, the parties had set up a joint venture for the manufacture of liquid crystal displays, mainly to meet their own supply requirements. Although the Commission made no express comment on the question of autonomy, it follows from the decision that, although the parties are to acquire only some 30% of the JV's production, it cannot be ruled out that this percentage might increase in future. The JV's autonomy could then be placed in jeopardy. This reasoning, which is in line with the terms of paragraph 16 of the abovementioned notice, and with the Commission's previous decisions on the subject (see in particular Flachglas/Vegla) was also applied in British Telecom/MCI.

(8) See points 193 and 194 of this Report.

269. In Pasteur-Mérieux/Merck, the two parent companies, which are respectively the third and second largest world producers of human vaccines, pooled their activities in this sector in Western Europe. Pasteur-Mérieux (PM) transferred to the JV all its distribution infrastructure in Western Europe, thus enabling the JV to carry out the distribution of all the products previously distributed separately by the parties. However, since the geographical scope of activity of the JV was restricted to Western Europe, the parties did not transfer to it their research and development (R&D) activities, their production activities or all of their intellectual property rights. All these aspects taken together prompted the Commission to conclude that the JV was not autonomous, and it was consequently assessed under Article 85 of the EC Treaty.

The parent companies were to retain all of their R&D activities, with the JV having access to them only through the intermediary of a development committee. Consequently, the JV could only make "recommendations" as to the research to be carried out for the improvement of products already marketed. In the case of new products, the JV had an independent power of decision only at the stage when a business decision relating to its territory was to be taken and not at the upstream stages of research. While recognizing that the specific features of the sector could make it difficult to transfer R&D activities, the Commission found that, for the reasons set out above, the JV would not have a decisive influence at each stage of the R&D process. In view of the importance of R&D in the vaccine industry, the Commission concluded that this lack of any decisive influence would not allow the JV to behave as an independent player on the market.

The Commission reached the same conclusion as regards the non-transfer of production activities to the JV, while the scope of the JV to turn to independent suppliers appeared extremely limited, both legally and economically.

Lastly, neither PM nor Merck was transferring patents for existing products, while patents for future products were transferred only if the parent companies could manufacture and sell outside the JV's territory. The Commission concluded that these provisions would enable the parent companies to re-enter the market rapidly if the JV were dissolved.

<T8> Second condition: Absence of coordination of competitive behaviour

270. First in 1991 (in Thomson/Pilkington), then in 1992 (in Del Monte/Royal Food/Anglo American), the Commission made it clear that a very limited residual presence of the parent companies on the same market as the JV was not generally sufficient to give rise to coordination of competitive behaviour and was not therefore a bar to the application of the Merger Regulation. The Commission reaffirmed this position on several occasions in 1993. In Aegon/Scottish Equitable and Toyota Motor Corp./Walter Frey/Toyota France, Allied Signal/Knorr-Bremse and Fortis/ASLK-CGER, one of the parent companies was marginally active on the same market as the JV without that preventing the link from being regarded as concentrative.
Coordination of competitive behaviour may also result from the activity of the parent companies on neighbouring product markets that are linked to the market on which the JV is active. The Commission reaches its decisions in each individual case on the basis of a specific assessment. Thus, in Philips/Thomson/Sagem, the Commission considered that the degree of interdependence between the markets for the different types of screen (plasma, liquid crystals, cathode ray tubes, etc.) was such that coordination of competitive behaviour was extremely likely, both between the parent companies and between them and the JV. Conversely, in Harrisons & Crossfield/Akzo, the Commission took the view that, although there was some product overlap between the JV and the parent companies, there was no foreseeable risk of coordination since the JV's products and those of the parents were intended for very different applications one from another.

271. In Sita/RPC/Scori, the parent companies acquired joint control of an existing enterprise (Scori) engaged in the treatment of special industrial wastes, while they were already operating on the same product and geographic market through another joint subsidiary (Teris). The Commission noted on this occasion that, since it was established that Scori and Teris would permanently come under a single economic management, regardless of the legal structure of the group, there was no possible coordination between the two joint ventures. In the same decision, the Commission made the point that if Scori was, in respect of part of its activity, acting on behalf of one of the parent companies under an agency contract, this was not likely to give rise to any coordination of competitive behaviour since Scori did not in fact have any real autonomy in this context.

<T3> §2. Appraisal of concentrations

272. The substantive appraisal of concentrations generally includes three steps of analysis: the determination of the relevant product market, the determination of the relevant geographic market and the assessment of the compatibility of the merger with the common market. The relevant product and geographic markets determine the scope within which the market power of the new entity must be assessed. The Commission may, in its Article 6 decisions, leave open the question of the precise relevant product or geographic market if it can find that even on the basis of the narrowest possible market definition, no dominant position is created or reinforced.

<T5> a. Determination of the relevant product market

273. The decisions illustrate that the Commission's methodology is heavily orientated towards demand-side substitutability, whereby a product market comprises "all those products which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use". This implies an economic factual assessment. Sometimes the Commission finds it appropriate to distinguish separate product markets, for the same product group, which correspond to different categories of customers having distinct demand characteristics. The Commission may also investigate whether it is appropriate that supply-side substitutability (the facility of other manufacturers to switch production to the merging parties' products) should be integrated into the product market definition. Finally, the Commission may examine price evidence (levels, elasticity and correlations) to determine to what extent such evidence may complement findings based on the other criteria.

274. Demand-side substitutability has been used to define product markets in several decisions. In Procordia/Erbamont, different medicines are considered to belong to different product markets not only because of their intrinsic properties, but also because they serve to treat different illnesses.(9)

(9) See also Costa Crociere/Chargeurs/Accor, Thomson/Short, Rhône-Poulenc/SNIA II, Fletcher Challenge/Methanex, KNP/BT/VRG and Zurich/MMI.

275. The existence of separate customer categories or market segments is mentioned too in some decisions. In Costa Crociere/Chargeurs/Accor, the Commission focused on the cruise market as a distinct segment within the package holiday market because it found that a significant proportion of customers (around half) were "captive" to cruises and insensitive to significant price increases (although the Commission did not go as far as investigating the possibility of price discrimination by the cruise operators against these captive customers). In Nestlé/Italgel, the ice-cream market was found to be divided into three separate markets namely 'impulse', 'take-home', and 'catering' categories of customers. In Ericsson/Hewlett Packard, telecom network management systems were found to be evolving, in response to telecoms deregulation, to cater for an increasingly wider range of customers, beyond the traditional public-sector clients.

276. Supply-side substitutability is normally considered by the Commission under its assessment of possible dominance (that is, as potential competition). However, it is sometimes mentioned under product market definition, but is not generally a sufficient condition for extending the definition of the relevant market. Thus, in KNP/BT/VRG, graphic board was found to constitute a separate market because of its end-use characteristics and higher price, despite the existence of multi-purpose equipment allowing manufacturers to produce both graphic board and board used for packaging purposes.

277. Price factors are also considered in some decisions. An attempt to investigate price elasticities was made in the Costa Crociere/Chargeurs/Accor case, where a widespread enquiry among customers, tour operators and travel agencies revealed that a 10% increase in the price of cruises would depress demand from about half of consumers, but would not affect the other half. In Thomson/Shorts, very short-range missiles, short-range missiles and medium-range missiles were each held to constitute separate product markets because, inter alia, for each range of rocket prices were significantly higher than those of the range below.

<T5> b. Determination of the relevant geographic market

278. The Commission has found local, national, regional, Community and world markets in the various product markets considered. The determination of the relevant geographic market within which suppliers compete is an economic and factual assessment (see Article 2(1)(a)).

279. The Regulation has defined the relevant geographic market as 'the area where the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because conditions of competition are appreciably different in those areas'.(10)

In the decisions, emphasis is laid on supply and demand characteristics. Factors considered in the analysis of conditions of competition in geographic markets include both these general indicators, as well as factors exerting a possible determining influence on market delineation. General indicators include the geographical distribution of market shares and relative prices, and the location of major suppliers. On the demand-side, which is not likely to be directly influenced by single-market legislation, the Commission examines factors influencing consumer preferences, such as language and cultural differences as well as brand loyalty, and consumers' final purchasing patterns. On the supply-side, where single-market legislation may be of considerable importance, the Commission examines barriers to entry (quotas, tariffs, technical standards and public procurement preferences), transport costs, distribution systems and general evidence on trade flows.

280. The use of general indicators is illustrated by several decisions. In Rhône-Poulenc/SNIA II, the absence of price differences for an intermediate product (nylon textile fibres) was held to indicate a market as wide as Western Europe. Conversely, in Nestlé/Italgel, price differences between countries were considered as indicating a predominantly national market for a consumer product (ice-cream). In Harrisons & Grosfield/AKZO, the geographical market for three industrial product groups was held to be Community-wide in view of, inter alia, the presence of major suppliers in several

(10) See Article 9 (7).

Member States, with significant market shares. In Thomson/Shorts, the presence of a national supplier for defence equipment was held to be sufficient for the establishment of a national market, absence of a national supplies indicating international or even worldwide competition.(11)

281. As far as specific demand factors are concerned, the relevance of inherent customer preferences and the effect of advertising was noted in cases involving final consumer products. In Nestlé/Italgel, ice-cream markets were held to be predominantly national in view of national consumer profiles and consumption habits, and national brand loyalty. In Costa Crociere/Chargeurs/Accor, markets for cruises and package holidays were held to be national because of, inter alia, national differences in consumption patterns (cruises being much more popular in France and Germany than in Spain, for example), the need for brochures to be published in several different languages, and the existence of advertising campaigns targeting national audiences. Again, consumers' final purchasing patterns were found to be an important factor for the delimitation of geographical markets. For intermediate goods, this is illustrated by the KNP/BT/VRG case, where the market for the distribution and servicing of printing presses was found to be national, principally because customers (printers) insist that distributors have a well developed local service network for maintenance and repairs; again, in the Pilkington-Techint/SIV case, rapid response times and the quality of local service for the supply of certain kinds of glass used in the building trade seemed to suggest national or even regional markets. Conversely, a European-wide purchasing policy was taken to indicate the emergence of EC-wide markets for car components in Continental/Kalicko/DG-Bank/Benecke. For consumer goods, local catchment areas constituted the relevant geographic markets in the two retail cases Kingfisher/Darty and Ahold/Jeronimo Martins/Inovação.

282. As far as specific supply factors are concerned, the presence of significant trade flows was considered to indicate at least Community-wide markets for industrial goods in Harrisons & Grosfield/AKZO, Fletcher Challenge/Methanex and Rhône Poulenc/SNIA II. Conversely, in the Kali und Salz/MdK/Treuhand case, an insignificant level of imports of potash into Germany was held to indicate a distinct market. A low level of transnational

(11) See also Fletcher Challenge/Methanex, KNP/BT/VRG and Costa Crociere/Chargeurs/Accor.

trade (under 10% of total consumption) was taken to indicate national markets for a consumer product (ice-cream) in Nestlé/Italgel.

283. Concerning barriers to entry (another supply-side factor), the existence of an EC external tariff was taken to indicate Community-wide markets for industrial goods in Harrisons & Grosfield/AKZO and Fletcher Challenge/Methanex, whereas the absence of barriers was taken to indicate worldwide aircraft markets in DASA/Fokker. Other barriers to entry are technical standards and public regulation, the presence of which was taken to indicate national markets in the pharmaceutical sector in Gehe AG/OCP SA and in the insurance sector in Zurich/MMI and Fortis/CGER. On the other hand, harmonization of technical standards was taken to indicate EC-wide markets for electronics products in Philips/Grundig. The problem of estimating the time-frame over which regulatory barriers may be eroded by single-market legislation was alluded to in American Cyanamid/Shell; national regulatory schemes, which encourage national marketing of crop protection products, were replaced in July 1993 by EC directives establishing mutual recognition of national authorizations, but it was held that the ease of Community-wide trade in such products was not likely to occur in the short term.(12)

284. Significant transport costs were considered as a factor likely to constrain the scope of geographic markets for liquid petrochemicals in Fletcher Challence/Methanex, for packaging board in KNP/BT/VRG, and for industrial rubber products in Synthomer/Yule Catto. Conversely, in the Pilkington-Techint/SIV case, markets for some kinds of flat glass were held to be EC-wide since transport costs were found to be relatively low in relation to the high-value-added products transported. National differences in distribution channels for car exhaust components were held to suggest national markets in Arvin/Sogefi and Knorr-Bremse/Allied Signal.

(12) See also Hoechst/Schering.

<T5> c. Assessment of compatibility

285. In 1993 the Commission authorized 49 notified mergers in the first phase of proceedings, because it had no serious doubts as to their compatibility with the common market (Article 6(1)(b) decisions). In one Phase I case, British Airways/Dan Air, the Commission examined for the first time the effects of a concentration of non-Community dimension on competition within the territory of a Member State, following Belgium's request pursuant to Article 22(3) of the Merger Regulation. In 4 cases, the Commission went into the second phase of proceedings in order to carry out an in-depth investigation of mergers that raised serious doubts (Article 6(1)(c) decisions). Out of these 4 cases, the Commission authorized one merger (Pilkinson-Techint/SIV) without attaching conditions and obligations to its decision, because it concluded that no dominance was created or strengthened (Article 8(2) subparagraph 1 decision). In two other cases (Kali+Salz/MdK/Treuhand and KNP/BT/VRG), the Commission considered that the merger would lead to dominance. However, following undertakings given by the parties, a decision of compatibility subject to conditions and obligations was finally adopted (Article 8(2) subparagraph 2 decision). In one of these two cases (Kali+Salz/MdK/Treuhand), the Commission set the criteria on the basis of which a merger should exceptionally not be considered as the cause of dominance if the dominant position would have been created or strengthened even in the absence of the merger. The last of the four Phase II cases (Mannesmann/Vallourec/Ilva) was still pending at the end of 1993.

286. In the Nestlé/Perrier decision adopted in 1992, the Commission interpreted Article 2(3) of the Merger Regulation as covering collective or oligopolistic dominance. During the course of 1993, the possible creation or strengthening of collective dominance was examined in a number of cases, four of which are summarized below (Rhône-Poulenc/SNIA, Allied Signal/Knorr Bremse, Kali+Salz/MdK/Treuhand and Pilkington-Techint/SIV). In its assessment, the Commission analysed the market structures and conditions in order to establish: (i) the likelihood of anti-competitive parallel behaviour by the members of the oligopoly group which may require the assessment of a variety of factors including in particular, market transparency, respective market positions or possible structural links; and (ii) the possible constraints on such behaviour exerted by competitive elements outside the oligopoly group.

<T6> Rhône-Poulenc/SNIA (Phase I case)

287. Rhône-Poulenc and SNIA created a joint venture, Europa, to which they contributed all their activities in the field of nylon filament for textile applications. The two companies had already pooled their activities in related sectors (fibres used for carpets, textile and industrial applications) in a joint venture authorized by the Commission on 10 August 1992.(13)

288. Although Europa will have a significant share of the market for nylon filament for textile applications in the EC (around 42%), the Commission considered that the operation would not lead to the creation of single dominance, because of the presence of strong competitors, in particular Du Pont, the world leader in the field, with a market share of 23% in the EC, the existence of overcapacities and the lack of long-term links between suppliers and customers.

289. In view of a significant increase of the degree of concentration in the EC market for nylon textile filament as a result of the operation leading to a combined market share of around 66% for Du Pont and Europa, the Commission also examined whether the concentration would create or reinforce a position of oligopolistic dominance. It concluded that the following structural characteristics of the market made parallel behaviour resulting from a situation of oligopolistic interdependence unlikely:

- the product is not homogeneous;

- the competitive environment is not stable due to the high degree and speed of innovation leading to the development of new products that are generally not patented;

- there is a general lack of transparency in prices due to the existence of individual negotiations between suppliers and customers;

- the existence of structural overcapacity in the market and competitive pressures from outside the EC constrain the two players' ability to raise prices; and

(13) Twenty-second Competition Report, point 258.

- there are no durable links between suppliers and customers.

290. The past behaviour of the players in the market for nylon textile filament was highly competitive leading to price reductions in recent years. This history of the market also led the Commission to conclude that no oligopolistic dominance existed before the operation. In view of the structural factors described above it was not expected that the competitive situation would change as a result of the concentration.

<T6> Allied Signal/Knorr Bremse (Phase I case)

291. Knorr Bremse, a German company, and the US conglomerate Allied Signal created a worldwide joint venture in which they pooled their interests in air brake systems for medium and heavy trucks, buses and trailers. Air brake systems are divided into actuation systems that create and control the braking power and foundation brakes that apply the braking power to the wheel. The product range of the concentration included both kinds of air braking systems as well as related products.

292. The Commission examined the effects of the concentration in the following product markets: components for air actuation systems, including ABS, for commercial vehicles over six tons; air foundation braking systems for commercial vehicles over six tons; levelling control components; operating cylinders; clutch servos; independent aftermarket of replacement parts for air braking system components.

293. With regard to air actuation system components, in all markets, except for ABS, the joint venture would strengthen the parties' market position vis-à-vis the current market leader, Wabco, belonging to the Westinghouse group, and in respect of air compressors and air dryers, the joint venture would become the market leader with a share of around 50%. In view of the presence of Wabco and other significant competitors with expertise and high reputation for innovation in all areas of air actuation system components, the buying power of truck manufacturers and potential competition from players in neighbouring markets where technology and manufacturing processes were similar, the Commission concluded that the concentration would not create or strengthen a single dominant position for the joint venture.

294. At the same time, however, the operation would increase the level of concentration in the component markets creating a combined market share of more than two thirds for the joint venture and Wabco with the two players being more equal than was previously the case. As a result, the Commission examined whether the operation would create or reinforce a position of oligopolistic dominance on those markets. Despite the high degree of concentration, the Commission concluded that this would not be the case for the following reasons:

- the lack of transparency in prices resulting from the fact that suppliers negotiate individually with vehicle manufacturers, the importance of non-price criteria and the lack of stability of the competitive environment due to rapid technological progress would make coordinated behaviour extremely difficult; and

- the buying power of truck manufacturers and potential competition from players in neighbouring markets would effectively constrain the market power of the joint venture and Wabco.

295. With regard to the independent aftermarket for replacement parts for air braking system components, although the degree of concentration would be significantly increased, the Commission concluded that no single or oligopolistic dominance would be created or reinforced, because the ability of components manufacturers to raise prices in the independent aftermarket would be limited by the prices at which replacement parts are sold through the truck manufacturers' own concessionnaires. In the other markets affected by the operation, the concentration did not give rise to serious doubts as to its compatibility with the common market, in view of the low combined market share of the parties and the presence of significant competitors.

296. Notwithstanding the Commission's decision to authorize the merger in view of the specific features of this case, the Commission will be closely following competitive developments in the vehicle component markets in the light of the increasing degree of concentration in this sector.

<T6> Kali+Salz/MdK/Treuhand (Phase II case)

297. This case concerned the concentration of the salt and potash activities of Kali+Salz (K+S), a BASF subsidiary, and MdK, a former GDR state-owned company. The concentration took the form of a joint venture between K+S and MdK's sole current shareholder, the Treuhandanstalt, a public institution charged with MdK's privatization.

298. The centre of gravity of the concentration lay in the area of potash products used in agriculture. The Commission examined the effects of the operation on two distinct geographical markets for agricultural potash, namely the German market and the EC market outside Germany.

299. With regard to the German market for agricultural potash, the Commission considered that following the concentration, K+S's dominant position would be strengthened. Competition outside the K+S/MdK group would be insignificant and new entry was not likely due to high entry barriers.

300. Nevertheless, the Commission concluded that the reinforcement of K+S's dominant position on the German market would take place even in the absence of the merger. The concentration could not therefore be considered as the cause of this deterioration in the market structure. According to this line of argument, in exceptional cases, a merger, which should normally lead to the creation or reinforcement of a dominant position, cannot be regarded as causing that result, if:

- the acquired undertaking would, in the foreseeable future, disappear from the market if not taken over by another undertaking;
- its market share would go to the acquirer; and
- acquisition by another undertaking that would be less anti-competitive in its effect can be ruled out.

In this case, there was sufficient evidence to consider that these three requirements were met. This particular outcome would also be in line with the fundamental objective of strengthening the Community's economic and social cohesion referred to in Recital 13 of the Merger Control Regulation. The Commission, therefore, considered that the operation should, in this respect, be declared compatible with the common market.

301. With regard to the EC market outside Germany, following the concentration, K+S/MdK and SCPA, the French potash supplier, would control about 60% of potash sales. The Commission concluded that supply outside this leading group was fragmented and that the remaining producers did not appear to be able to constrain its market power.

302. Moreover, structural features of the market, namely homogeneous product, transparent market conditions and lack of technological innovation, combined with the record of past behaviour of K+S and SCPA also indicated that the concentration would lead to a situation of collective dominance by K+S/MdK and SCPA. However, the particular feature of this case and the main reason for assuming an absence of real competition between the members of the leading group was the existence of exceptionally close links between K+S and SCPA. In particular, the two undertakings had a joint venture in Canada, Potacan, with an output equivalent to a large part of SCPA's total production. This joint venture would be particularly important for SCPA in the future, because its potash reserves would soon be depleted. K+S's and SCPA's cooperation within the export cartel Kali Export GmbH in Vienna also appeared to restrict effective competition between them in the Community. Finally, K+S had a long-established supply relationship with SCPA as a result of which K+S did not act as an independent competitor on the French market to any significant extent.

303. In order to sever the links between K+S and EMC/SCPA and thus remedy the negative effects of the concentration on the Community market outside Germany, the parties offered the following commitments:

- K+S and the joint venture between K+S and the Treuhandstalt would withdraw from Kali Export GmbH;
- K+S would establish its own distribution network for its potash products in the EC, and in France in particular; and
- with regard to Potacan, K+S has undertaken to adapt the structure of Potacan in such a way as to enable each partner to market the potash obtained from Potacan independently of the other in the Community.

304. The Commission considered that the first two commitments met the concerns arising from K+S's and SCPA's links in the export cartel and with regard to supplies to the French market. It therefore attached obligations to

its decision to ensure compliance with these commitments. As to the third commitment, the Commission decided not to impose it as a formal obligation, because any appropriate arrangement regarding Potacan could be reached only in agreement with EMC. The Potacan joint venture is already the object of proceedings under Article 85 to which, unlike the merger proceedings, EMC is also party. In the event that K+S is not able to reach agreement with EMC despite K+S's best efforts, an appropriate solution is to be found in the course of the Article 85 procedure.

<T6> KNP/BT/VRG (Phase II case)

305. This case concerned the merger between two Dutch paper, board and packaging groups, KNP and BT, and a Dutch distributor of paper and printing systems, VRG. The merger raised a problem of dominance in the markets for distribution and servicing of printing presses in Belgium and the Netherlands.

306. With regard to the manufacture of waste paper based board and the distribution of graphic paper, the Commission concluded that the merger would not lead to dominance. Although the parties would attain market shares above 25% in some segments of these markets, no dominance would be created or reinforced given inter alia the presence of other strong competitors, the existence of spare capacity and the views of customers contacted by the Commission that alternative sources of supply will be readily available.

307. With regard to printing presses, prior to the merger BT and VRG distributed and serviced on an exclusive basis printing presses manufactured by the two main European suppliers, Heidelberg and MAN-Roland respectively and competed against each other in Belgium and the Netherlands. As a result of the merger, the new entity would have a market share of more than two thirds in each of these countries.

308. The Commission considered the following elements in order to decide whether the merger would lead to dominance with regard to printing presses:

- distributors of other printing presses such as the Japanese company Komori who currently compete with the parties in Belgium or the Netherlands have a very small share of the market. They lack an extensive service network and the printing presses they distribute do

not have the long established reputation of Heidelberg and MAN-Roland in Europe;

- with regard to maintenance and after-sales service, the few existing independent providers in Belgium and the Netherlands could not significantly constrain the market power of the merged entity in view of their small size and lack of technological expertise;

- successful new entry into the Belgian and Dutch markets for distribution of the printing presses would depend on the quality and reputation of printing presses to be distributed. Given the very small number of well established makes, potential entry into the distribution market is therefore extremely limited;

- customers are small and dispersed and could not be expected to be able to constrain the parties' market power. Moreover, they would have difficulties in switching to another make of printing presses, if they were not satisfied with the service offered by the parties.

309. In view of these elements the Commission concluded that the merger would lead to dominance in the markets for distribution and servicing of printing presses in Belgium and the Netherlands. Given the structure of the markets concerned this dominant position was not likely to be quickly eroded. It was therefore not merely temporary and would significantly impede effective competition.

310. However, the parties entered into a commitment vis-à-vis the Commission to terminate their distribution relationship with either Heidelberg or MAN-Roland for Belgium and the Netherlands. In addition, they undertook to divest themselves of all assets related to the distribution and servicing of printing presses for which the relationship will be terminated, including the transfer of staff and existing servicing contracts, in order to ensure that a third party is able to establish itself as an independent distributor in the Belgian and Dutch markets.

311. On the basis of these undertakings the combination of the distribution and servicing activities that would have resulted from the merger will not

actually take place. Therefore, the Commission declared the operation compatible with the common market subject to fulfilment of the obligations accepted by the parties.

<T6> Pilkington-Techint/SIV (Phase II case)

312. This case concerned the acquisition of joint control by Pilkington and Techint in SIV, a flat and automotive safety glass producer previously owned by the Italian state.

313. The Commission analysed the effects of the concentration on the float glass market at two levels: (i) level 1, which corresponds to the production and sale of primary raw flat glass; (ii) level 2, where raw flat glass is subject to further processing before sale to the final user (automotive trade or general trade).

314. Following the concentration, over 90% of the float glass market in the Community would be supplied by five producers: St-Gobain, the market leader, followed by Pilkington/SIV, the US-owned companies PPG and Guardian and the Japanese-owned company Glaverbel. In view of the market shares and strength of the other producers, in particular St-Gobain, the Commission concluded that the concentration would not lead to the creation or strengthening of single dominance for Pilkington/SIV. However, the acquisition of SIV by Pilkington/Techint would further increase the degree of concentration in a sector that was already highly concentrated and subject to high entry barriers. Consequently, the Commission also examined whether the notified operation would create or strengthen a position of collective dominance by an oligopoly group of five producers.

315. With regard to the possible creation or strengthening of collective dominance, the Commission considered that competition outside the group of the five Community producers would not be significant and that potential entry was not likely in the medium term. Nevertheless, it concluded that the following market characteristics undermined the likelihood of parallel anti-competitive behaviour by the members of the oligopoly group:

- increasing excess capacity coupled with low price elasticity;

- product innovation and differentiation;
- asymmetries in the market position and the degree of vertical integration of the five producers;
- insufficient price and sales volume transparency;
- strong incentive to renege on parallel behaviour due to the economies of float glass production, i.e. relatively low variable costs resulting in high marginal profits from additional sales;
- considerable purchasing power of vehicle manufacturers.

316. In assessing the possible creation or strengthening of collective dominance, the Commission also examined the operation of joint ventures between the five Community float glass producers. The most important of these was considered to be the Flovetro joint venture, which following the concentration would be jointly operated by Pilkington/SIV and St-Gobain. The Commission concluded that the continued operation of Flovetro would not significantly impede effective competition because it was a pure production joint venture whose output represented a very small percentage of Community sales. Moreover, Flovetro did not involve the other 3 float glass producers and no other production links existed in the sector.

317. In view of the above, the acquisition of SIV by Pilkington/Techint was declared compatible with the common market.

<T3> §3. Application of Articles 9, 21 and 22

<T5> a. Application of Article 9

318. A request for referral was received from the German authorities in the McCormick/CPC/Rabobank/Ostmann case. As a general rule, when the substantive conditions under Article 9 are met, the Commission may either deal with the case itself or refer it to the competent authorities of the Member State concerned, taking into account the public interest of ensuring that competition in the common market is not distorted.

The Commission had the intention of dealing with this case itself, taking into account both the threat to the distinct market in Germany and any foreseeable effects of the concentration on other markets within the Community. This option was however foreclosed as a result of an error in the calculation of the legal deadlines provided for in Article 10(1), second sentence. Nevertheless, the possibility of referral under Article 9 was still open pursuant to Article 10(6) read in conjunction with Article 9(4)(a). The Commission therefore concluded that it was appropriate to refer the case to the competent authorities of the Federal Republic of Germany for the purposes of carrying out a proper competition assessment.

319. From the point of view of substance, several factors indicated that the herb and spice market remained national, in particular in Germany. The stability of demand and saturation of the market in Germany, together with the specificity of distribution and merchandising and the relatively high costs of entering the market created an important barrier to entry to the German market.

320. In the Commission's practice, a referral of a case affecting a whole national market would only take place in exceptional circumstances, when this market constitutes a substantial part of the common market. In this particular case, the fact that herbs and spices require a specific and very wide distribution and service system, which has resulted in more than 85 000 sales points in Germany, showed that local conditions were a crucial factor. From this perspective, the German authorities were probably in a good position to carry out a detailed examination.

<T5> b. Application of Article 21(3)

321. Article 21(3), which allows Member States to take appropriate measures to protect legitimate interests in respect of mergers covered by the Regulation, was applied for the first time in IBM France/CGI, which was authorized by the Commission on 19 May. The transaction involved a public exchange offer as a result of which IBM France obtained control of the French public limited company Compagnie Générale de l'Informatique (CGI). The French authorities informed the Commission that they had taken certain appropriate measures relating to two CGI subsidiaries forming part of the merger that worked in particular with the French Ministry of Defence. The measures were taken in order to protect French legitimate interests linked to public security, pursuant to the second subparagraph of Article 21(3).

<T5> c. Application of Article 22(3)

322. The first request pursuant to Article 22(3) of the Regulation, which entitles a Member State to request the Commission to examine a merger without Community dimension, was made in the British Airways/Dan Air case and raised a number of new issues. These mostly stemmed from the fact that although the procedural rules are essentially the same as for a notified transaction, no notification had been lodged. In this case, the Commission considered that the Belgian request did not provide sufficient information to allow it to proceed with an investigation and thus the time period started to run only when additional information was received from the Belgian Government.

323. On a point of substance, it is important to stress that, under Article 22(3), the Commission is entitled to intervene only "in so far as the concentration affects trade between Member States" and that its scope of action in terms of the measures to be taken is restricted to the territory of the Member State concerned. In this respect, the acquisition of the non-charter services of Dan Air clearly affected air transport between Belgium and the United Kingdom. However, the only route concerned was Brussels/London, where the Commission concluded that the operation would not lead to the creation or strengthening of a dominant position.

<T3> §4. Application of Article 223 of the Treaty

324. On 17 March the French authorities informed the Commission that, on the basis of Article 223 of the Treaty, they had requested the parties involved not to notify a merger having a Community dimension. The sector concerned was the manufacture of engines for missiles.

325. The Commission pointed out that Article 223 could be invoked for this purpose by a Member State in respect of mergers that were limited to military activities not having any civilian application. However, in such a case, the Member State concerned had to enable it to check that the conditions for the application of Article 223(1)(b) were met and that the merger would not have any adverse effects for the suppliers of the undertakings concerned, any intermediate consumers and final consumers (defence ministries) in other Member States. It also reserved the right to apply the first paragraph of Article 225 of the Treaty.

326. The French authorities provided the necessary information on 20 October, namely the reasons for which non-notification was necessary for the protection of the essential interests of the security of the country, the precise nature of the activity showing that it was covered by Article 223(2), the lack of any spill-over effects on non-military products and the impact of the merger on suppliers, intermediate consumers and defence ministries in the other Member States. The Commission informed the French authorities on 29 October that it had no comments.

<T9> D. Main decisions in the steel industry

<T3> §1. Main developments

327. The crisis affecting the Community steel industry continued in 1993. A total of 55 coal and steel cases were dealt with during the year. The number of specialization agreements and joint ventures increased, while the number of mergers fell appreciably. As a result, six decisions were taken under Article 66 of the ECSC Treaty, while nine cases were settled by means of an exemption letter under Decision No 25/67. By contrast, 14 cases were dealt with by means of a comfort letter pursuant to Article 65 of the ECSC Treaty.

<T3> §2. Mergers

<T5> (a) Mannesmann - Hoesch

328. The Commission authorized Mannesmannröhren Werke AG and Hoesch AG to set up a joint venture, Mannesmann Hoesch Präzisrohr GmbH, and authorized Mannesmannröhren Werke to acquire 50 % of Gebr. Fuchs GmbH, a subsidiary of Hoesch.
The decision covered only ECSC products. A parallel decision was adopted under Regulation (EEC) NO 4064/89 to cover those aspects of the merger involving EEC products.

<T5> (b) Sollac - Bamesa

329. The Commission authorized Usinor Sacilor, through its subsidiary Sollac, to acquire a 30 % stake in the capital of the ECSC products distributor Barcelonesa de Metales (Bamesa).

<T5> (c) Profilarbed - Unimetal

330. The Commission authorized the merger of the heavy section and machine wire production and distribution activities of Arbed and Usinor Sacilor, in the long products sector. The merger completes the process of rationalizing and integrating production that was begun when Europrofil was authorized.

<T5> (d) Ensidesa - Velasco

331. The Commission authorized Ensidesa to acquire a stake in the capital of the holding company Cosimet, which, together with the Riberas family, controls the Spanish ECSC products distribution group Velasco.

<T5> (e) Thyssen Kohletechnik RAG - Fechner

332. The Commission authorized Thyssen Schachtbau Kohletechnik GmbH (Thyssen Schachtbau GmbH group, Mülheim/Ruhr) and Bruno Fechner GmbH & Co. KG (Ruhrkohle AG group), to set up a joint venture, Micro Carbon

Brennstofftechnik GmbH and authorized the latter to acquire Techno Carbon GmbH. The new undertaking will produce and sell pulverized coal for cement and lime-burning kilns.

<T5> (f) Laubag - Espag

333. The Commission authorized Lausitzer Braunkohle AG (LAUBAG) to acquire all the capital of Energiewerke Schwarze Pumpe AG (ESPAG), a major distributor of lignite briquettes. Following the transaction, the Treuhand, which holds the capital of the two undertakings, will divide LAUBAG into two companies, one of which will group together the profitable divisions under the name "Braunkohlenwerke Brandenburg-Sachsen AG" with a view to future privatization.

<T3>

§3. Financial arrangements

334. In response to the crisis in the steel industry, the Commission put forward measures under Article 53 of the ECSC Treaty.
Three groups of undertakings, comprising numerous firms, producing hot-rolled wide coils and strip, heavy plate and heavy sections notified agreements establishing common financial arrangements pursurant to Article 53(a) of the ECSC Treaty,(1) the main arrangements being as follows:

- the parties to the financial arrangements that neither reduce nor close down capacity will contribute to the financing of the capacity reductions of the parties that opt for closure; the aim is to reduce heavy section capacity by 2.5 million tonnes, hot-rolled wide coils and strip capacity by 6 million tonnes, and reversing-mill plate capacity by 2 million tonnes,

- plant closures will be deemed permanent when they are carried out in accordance with Article 8 of Commission Decision No 3010/91/ECSC.(2) Any export of plant for reassembly at a location where exports to the Community market would be improbable could be deemed a permanent closure,

- parties opting for closure will undertake, for five years, not to increase their residual capacity for the products in question that are covered by the financial arrangements on pain of a fine, payable to the other parties, of ECU 100 per tonne of increased capacity. For a period of five years, capacity increases stemming from maintenance work or current productivity investment are limited to 2 % per year. Investment in new technologies is not excluded where it replaces existing capacity without leading to a net increase in capacity,

- individual capacity closure programmes will be notified to the Commission with details of the plant to be closed. In principle, closures should take place before 31 December 1994.

(1) Commission Decision of 21.12.1993 (OJ L 6, 8.1.1994).
(2) OJ L 286, 16.10.1991.

The Commission made its authorization subject to one condition designed to ensure that competition was maintained within the common market. This was that the companies must not, under the financial arrangements, establish any agreement or concerted practice or make unilateral declarations concerning prices, rates of capacity utilization or the level of production remaining under the control of each of the parties following the closures, and that the parties will not, for the duration of the arrangements, participate in any concerted practice or agreement for exchanging information that could restrict competition without first informing the Commission. In addition, each company must present its plant closure programme within three months of notification of the Decision of 27 October 1993, and all the companies must submit to any checks deemed necessary by the Commission.

<T9> E. Substantive and procedural rules

<T3> Application of the block exemption Regulations

<T5> (a) Motor vehicle distribution

<T6> Regulation (EEC) No 123/85

335. The year under review has seen the first bi-annual submissions of price data to the Commission by the 23 leading European and Japanese car manufacturers. This has come about in response to action taken by the Commission in 1992 to improve price transparency for cars in the EC.(1)

The car manufacturers furnished information relating to the prices (on 1 May 1993 and 1 November 1993) of 55 European and 17 Japanese top-selling car models, based on recommended retail prices, adjusted for equipment differences, and given in local currencies before and after tax.

The main conclusion to be drawn is that there were notable exchange rate movements in 1993 which must be taken into consideration. This is especially relevant with regard to Spain, Portugal and Italy where devaluation occurred, and which were the lowest price markets during this period with Germany, having a strong DM, being the highest. Nevertheless the following comments can be made :

- In November 1993, overall price differences were slightly greater than in May. Approximately 80% of the prices for cars produced by European manufacturers and 90% of Japanese models showed price differentials of less than 20%.

- However, by excluding monetary fluctuations (by using the May ecu rate for the November analysis), it became clear that car manufacturers had tended to reduce price differentials for most of their models.

- By market segment there were, between May and November 1993, virtually no alterations in the ranking with respect to the cars constituting the highest percentage share of the overall car market (i.e. segments B, C, D). Medium and large cars (segments C and D) showed small price

(1) Twenty-second Competition Report, point 290.

disparities (85% of models had less than 20% differentials), while small and mini cars (segments B and A) had the greatest differences (only 67% and 58% respectively of all models with price differences of less than 20%).

- The Commission notes that between May and November 1993 a general downward trend for car prices in the EC has occurred (taking the recommended retail prices at the appropriate ecu exchange rates).

Surveys of car prices in the Community will be carried out in this manner every six months and will allow the Commission to go beyond the present exercise of improving price transparency. They will enable it to assess the trend in price differentials, which it expects to see diminish following the initiative which it launched in May 1992, and to take these trends into consideration in its reflections on the future of Regulation (EEC) No 123/85, which is due to expire in June 1995.

In 1992, as a further part of its action to deal with car price differentials between Member States, the Commission asked car manufacturers to make it clear to their dealers that the manufacturers would fill orders which the dealers receive from customers and approved dealers in other Member States. The car manufacturers have cooperated by sending circulars to their dealers, and judging by the significantly reduced number of complaints received from individual consumers in 1993, this action has been useful.

However, the Commission has again received, in 1993, complaints from consumers regarding the failure of dealers to carry out guarantee work on cars purchased in other Member States. These difficulties have been resolved by the intervention of the Commission and subsequent action on the part of the manufacturers to remind their dealers that such guarantee work is required by the provisions of Regulation (EEC) No 123/85.

In the year under review the Commission confirmed to manufacturers that Regulation (EEC) No 123/85 refers only to vehicles of three wheels or more and therefore is not applicable to the distribution of motorcycles within the Community.(2) The manufacturers can adapted their distribution contracts to

(2) Twenty-first Competition Report, point 123.

the provisions of Regulation (EEC) No 1983/83 concerning exclusive distribution in order to benefit from the exemption by category or may introduce a request for individual exemption if they consider that this regulation does not correspond to the requirements of motorcycle distribution.

336. During the year under review, the Commission also continued to ensure that intermediaries operating within the common market are not excluded from the supply of vehicles provided that they show clearly that they are acting as suppliers of services on behalf of a third party.

In addition, the Commission defined its position on the applicability of Regulation (EEC) No 123/85 to contractual clauses that restrict dealers' freedom to supply leasing companies. The problem arises in two references for preliminary rulings within the meaning of Article 177 of the EC Treaty that are currently before the Court of Justice. Taking the view that Article 13(12) - which ranks leasing as a form of distribution - concerns only relations between producers and dealers, the Commission concluded that Regulation (EEC) No 123/85, as it currently stands, is not applicable to relations between dealers and leasing companies.

<T5> (b) Application of the other block exemption Regulations

<T6> Exclusive purchasing

337. With regard to the application of Regulation (EEC) No 1984/83 to service stations, the Commission was able, on several occasions, to clarify and spell out certain aspects of the scope of the exemption and, in particular, the restrictions of competition that prevented its application.

The Commission examined in particular the contracts negotiated by the Spanish refineries with service station operators under the former monopolized network when it was still legally reserved to Spanish refiners' products.(3)

<T6> Specialization and research and development agreements

338. The Commission received only one notification in 1993 under the opposition procedure provided for in Article 4 of Regulation (EEC) No 417/85 on specialization agreements.(4) The six-month period has not yet expired, and the case is at present still under examination.

As far as Regulation (EEC) No 418/85 on research and development agreements is concerned, the opposition procedure provided for in Article 7 continues to be little used. No notifications under Article 7 were received in 1993.

<T6> Patent licensing and know-how licensing agreements

339. During the year, the Commission received only one notification in which the parties requested application of the opposition procedure provided for in Article 4 of Regulation (EEC) No 556/89 on know-how licensing agreements.(5) The six-month period has not yet expired, and the case is still under examination. The Commission did not receive any notifications in 1993 under Article 4 of Regulation (EEC) No 2349/84 on patent licensing agreements.(6)

(3) See point 226 of this Report.
(4) OJ L 53, 22.2.1985.
(5) OJ L 61, 4.3.1989.
(6) OJ L 219, 16.8.1984.

The Commission was able to terminate proceedings by sending a comfort letter in two cases notified respectively in 1990 and 1991 under the two Regulations, after the parties had amended their agreements in such a way as to make them compatible with Article 85.

<T6> Franchising agreements

340. During the period covered by the Report, the Commission received three notifications in which the parties requested application of the opposition procedure provided for in Article 6 of Regulation (EEC) No 4087/88.(7)

In one of the three cases, the Commission found that the agreement did not appreciably affect competition in the common market or trade between Member States. The opposition procedure was not therefore applicable, since the agreement was not caught by Article 85(1) of the EC Treaty. The two other notifications are still under examination.

The Commission was able to terminate examination of the two notifications(8) received in 1992 under Article 6 of Regulation (EEC) No 4087/88. In one case, the Commission found that the agreement did not appreciably affect competition within the common market. In the other, it found that the agreement now met the conditions required to be eligible for the block exemption, the parties having in particular removed the restriction preventing the franchisee from determining the selling prices of the franchised products and having expressly given the franchisee freedom to purchase the products from other franchisees. Mention should also be made of the Texaco case described earlier.(9)

(7) OJ L 359, 28.12.1988.
(8) Twenty-second Competition Report, point 273.
(9) See point 225 of this Report.

<T4> Chapter II

<T2> Main cases decided by the Community lawcourts

341. This Report covers a total of 12 judgments and 5 orders.

<T3> §1. Interpretation of Article 3(f), the second paragraph of Article 5 and Article 85(1) of the EC Treaty

342. In its important judgments of 17 November in Meng, Ohra and Reiff, the Court of Justice, in response to a reference for a preliminary ruling, defined the limits of its case-law on the interpretation of Article 3(f) 3(g) since the entry into force of the Treaty on European Union) and Articles 5 and 85 of the EC Treaty.

The Meng and Ohra cases concerned German (Meng) and Dutch (Ohra) regulations which prohibit insurance companies (Ohra) and/or insurance intermediaries (Ohra and Meng) from granting certain financial benefits, in particular in the form of the rebating of commissions in full or in part to clients.

The Reiff case concerned German regulations on the fixing of tariffs for the long-distance transport of goods by road.

343. In all three cases the Court applied the formula summing up its earlier case-law set out in its judgment in Van Eycke (Case 267/86 [1988] ECR 4769, at paragraph 16). Hence it rejected the interpretation that national legislation having the same anticompetitive effect as a concerted practice prohibited by Article 85 is contrary to the provisions referred to above, where there are no agreements between enterprises.

The Court first observed that Article 85 of the Treaty per se is concerned only with the conduct of enterprises and not with national legislation. For that reason, the Court made the preliminary observation in Meng that the measures at issue did indeed have an official character by reason of the

administrative status and the controlling and rule-making powers of their author, the German insurance supervisory office.

The Court went on, however, to qualify that statement by pointing out that Article 85, read in conjunction with Article 5 of the EC Treaty, requires Member States not to introduce or maintain in force measures, even of a legislative nature, which may render ineffective the competition rules applicable to enterprises. Such would be the case, either if a Member State were to require or favour the adoption of agreements, decisions or concerted practices contrary to Article 85 or to reinforce their effects, or if it were to deprive its own legislation of its official character by delegating to private traders responsibility for taking decisions affecting the economic sphere.

344. In response to the question put by the court making the reference, the Court first considered, in Reiff, whether the German rules in question pointed to the existence of an agreement within the meaning of Article 85 of the EC Treaty. Under those rules, tariffs are fixed by tariff boards made up of persons from the relevant branches of the road transport sector. The Court had previously held that an agreement existed where it was negotiated and concluded by persons who, although appointed by the public authorities, were proposed for appointment by the trade organizations and who consequently must be regarded as representing those organizations.(1) It pointed out, however, that in the present case the members of the tariff boards were acting as experts independently of the enterprises or associations which had proposed them to the Federal Minister for Transport and were required to take account of the interests of other sectors when fixing the tariffs. The Court therefore replied in the negative to this question.

As regards reinforcing the effects of an agreement, the Court rejected the argument put forward in Meng that the rules at issue had increased the scope of an agreement prohibiting the rebating of commissions in the life insurance sector by applying it to other classes of insurance. The Court considered that rules applicable to a particular sector consolidated the effects of a previous agreement only if they did no more than reproduce theterms of an agreement between operators in the sector.

(1) Case 123/83 BNIC v Clair [1985] ECR 391.

Lastly, in Reiff, the Court was asked to state whether the public authorities had delegated their powers to private economic operators. Here, too, it replied in the negative. It found that the German rules on the fixing of road transport tariffs required the Federal Government to approximate the conditions of competition between means of transport in order to avoid unfair competition between road, rail and inland waterway transport. To that end, the Federal Minister for Transport could himself attend, or be represented at, meetings of the tariff boards, and could also fix tariffs himself if he considered that those adopted by a board were not in the general interest.

<T3> §2. Definition of an undertaking

345. In two actions (Joined Cases C-159 and 160/91) between Christian Poucet and the Caisse Mutuelle régionale du Languedoc-Roussillon (Calmurac) and the AGF on the one hand and Daniel Pistre and the Caisse autonome nationale de compensation de l'assurance vieillesse des artisans (Cancava) on the other, the Court of Justice delivered a judgment on 17 February on the question whether a body entrusted with the management of a special social security scheme is an undertaking within the meaning of Articles 85 and 86 of the EC Treaty.

To answer this question, the Court referred to its judgment of 23 April 1991(2) in which it defined the concept of an undertaking: "in the context of competition law, the concept of an undertaking encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed".

The Court also pointed out that the social security schemes in question performed a social function and operated on the basis of the principle of solidarity; in view of the compulsory nature of membership, maintaining solidarity and financial equilibrium were essential factors.

On the basis of these considerations, the Court ruled that sickness insurance schemes or bodies entrusted with the management of a social security scheme as a public service fulfil an exclusively social function. That activity is based on the principle of national solidarity and is not profit-making. The benefits which are paid are statutory benefits and are independent of the amount of the contributions. It followed that the activity was not an economic activity and consequently the bodies entrusted with it did not constitute undertakings within the meaning of Articles 85 and 86 of the EC Treaty.

(2) Case C-41/90 Höfner and Elser v Macrotron [1991] ECR I-1979.

<T3> §3. Application of Article 85 to a horizontal agreement on prices

346. On 31 March the Court of Justice delivered a judgment in response to an application contesting a Commission decision(3) that 40 wood pulp producers and three of their trade associations had infringed Article 85(1) of the EC Treaty by concerting on prices (announced price and/or transaction price) (the "Wood Pulp" cases - Ahlström and Others v Commission). In the course of the proceedings, the Court had already delivered a judgment concerning the Community's jurisdiction to apply its competition rules to undertakings outside its territory.(4)

The Court annulled a number of provisions of the contested decision. It did this for two main reasons: infringement of the rights of the defence, and the fact that the Commission had failed clearly to establish general concertation on announced prices.

According to the Court, the system of quarterly price announcements for wood pulp did not in itself constitute an infringement of Article 85(1) of the Treaty.

Furthermore, as the Commission had also been unable to prove satisfactorily that prior concerted action had taken place, the Court endeavoured to determine whether the system of quarterly price announcements; the simultaneity or near-simultaneity of the announcements; and the fact that announced prices were identical in the period 1975-1983 constituted serious, detailed and consistent evidence of prior concertation. The two expert reports commissioned by the Court revealed, however, that:

. those factors could be explained otherwise than by concerted action;

. a more plausible explanation for the uniform prices was that they resulted from the normal operation of the market rather than from concerted action.

Since the Commission had not established concerted action on announced prices, the Court annulled Article 1(1) of the decision.

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(3) Decision 85/202/EEC of 19 December 1984.
(4) [1988] ECR 5193.

Consequently, it also annulled the provisions of the undertaking annexed to the decision in so far as they imposed obligations other than those resulting from the findings of infringements made by the Commission which had not been declared void by the Court.

The Court found, however, that all the other provisions of the decision were valid, namely those which establish:

- concertation on the fixing of "KEA recommended prices" by the members of that association (no fine had been imposed);

- participation by the Finnish association Fincell in the concerted action (fine upheld);

- the existence of contractual clauses banning exports and reselling (fine reduced to ECU 20 000 in view, in particular, of the termination of the infringement).

<T3> §4. Interpretation of Commission Regulation No 1984/83 on the application of Article 85(3) to categories of exclusive purchasing agreements

347. In its judgment of 10 November in Petrogal (Case C-39/92), delivered in response to a reference for a preliminary ruling from the Lisbon civil court (Tribunal Civel da Comarca), the Court of Justice gave a ruling on the interpretation of a specific point in Commission Regulation (EEC) No 1984/83 of 22 June 1983 on the application of Article 85(3) of the Treaty to categories of exclusive purchasing agreements.

The main action was between the Portuguese company Petrogal and the owner of a service station who had unilaterally terminated a contract in 1990 which had been concluded in 1982 for 15 years and under which he had undertaken to purchase fuel and oil from Petrogal. The court making the reference considered that the legal assessment of such conduct depended on how the provisions of Regulation 1984/83 concerning service station agreements were interpreted.

Article 10 of the Regulation states that Article 85(1) of the Treaty does not apply to the service station agreements which it defines. To qualify for block exemption, such agreements must satisfy the conditions of Articles 11 to 13 of the Regulation. Article 12(1)(c) provides that agreements do not qualify for exemption where they are concluded for an indefinite duration or for a period of more than 10 years. As the contract in question had been signed for 15 years, it would normally be caught by that provision.

However, the Regulation makes special provision for Spain and Portugal, specifying that, of the conditions set out in Articles 10 to 13, the condition relating to the maximum duration of the agreements referred to in Article 10 is not applicable to agreements in force in Spain and Portugal on the date of their accession to the Community.

Consequently, such agreements qualify for exemption under Regulation 1984/83 in so far as their terms meet the requirements of Articles 10 to 13 of the Regulation, with the exception of that relating to duration.

<T3> §5. Interpretation of Commission Regulation (EEC) No 123/85 of 12 December 1984 (motor vehicles) and the Commission notice of the same date concerning that Regulation

Concept of authorized intermediary

348. In its judgment of 22 April in Peugeot (Case T-9/92), the Court of First Instance defined the meaning of the term "authorized intermediary".

The origin of this case is a complaint made in 1989 by Eco System against Peugeot and three of its authorized dealers in Belgium which were preventing parallel imports of motor vehicles by Eco System acting as intermediary on behalf of French consumers. The Commission initially adopted interim measures at the request of Eco System, followed by a decision.(5) It is this decision that was being contested in the present case.

The decision found that a circular letter dated 9 May 1989 from Peugeot to its dealers in France, Belgium and Luxembourg, together with the implementation of the circular by those dealers, had the effect of suspending deliveries of Peugeot vehicles to Eco System and was therefore contrary to Article 85(1) and not exempted by Regulation (EEC) No 123/85 on the application of Article 85(3) of the Treaty to certain categories of motor vehicle distribution and servicing agreements.

In support of its application, Peugeot essentially relied on paragraph 11 of Article 3 of the Regulation, which allows exemption where the dealer is obliged not to sell vehicles to final consumers using the services of an intermediary unless the latter has "prior written authority" to purchase a vehicle and take delivery.

Peugeot also referred to the Commission Notice of 12 December 1984 concerning the Regulation, which states that undertakings within the distribution system can be obliged not to supply new motor vehicles within the contract programme to or through a third party who represents himself as an authorized reseller

(5) Decision of 4 December 1991, OJ L 66, 11.3.1992, p. 3.

of new vehicles or carries on an activity equivalent to that of a reseller (paragraph 3).

In dismissing the application, the Court clarified the concept of intermediary with written authority, pointing out that the only condition imposed on intermediaries by the Regulation was that they should have prior written authority from the final consumer. It followed that, provided an intermediary was duly authorized, he could not be denied this status under the Regulation on the sole ground that he was pursuing an occupational activity. Such exclusion would have the effect of impeding parallel imports and would run counter to the objective of achieving a single market.

The Court also ruled that the applicants could not rely on the above-mentioned Notice as it simply interpreted the Regulation and hence could not modify the latter's meaning as far as the concept of intermediary was concerned.

<T3> §6. Abuse of a dominant position

349. The "plasterboard" case (Case T-65/89 BPB and British Gypsum) afforded the Court of First Instance an opportunity to decide, by judgment of 1 April, that several practices constituted abuses of dominant positions.

The case concerned two enterprises in a dominant position: BPB, the British holding company of a group that controls about half of plasterboard production capacity in the Community, and its subsidiary, British Gypsum.

On 5 December 1988 the Commission decided that British Gypsum had abused its dominant position in the supply of plasterboard in Great Britain and that BPB, through its subsidiary British Gypsum, had also abused its dominant position in the supply of plasterboard in Ireland and Northern Ireland.

BPB and British Gypsum then brought an action for annulment of the decision and for a reduction in the fines imposed.

The Court rejected the contentions of the applicants relating first to infringement of the right to a fair hearing (see paragraph 8(c)) and secondly to various abuses of a dominant position.

It acknowledged that the practice of making promotional payments, even when linked to an undertaking by the recipient to purchase exclusively from the supplier, is common in vertical distribution systems and that, in a market subject to effective competition, such arrangements may be in the interests of both parties and may not, in principle, be prohibited. Such considerations are not, however, unreservedly applicable in a market where competition is already restricted owing to the dominant position of one of the parties.

An enterprise in a dominant position is under a special duty not to jeopardize nor distort effective competition in the common market. The Court held that British Gypsum had abused that position by tying purchasers - albeit at their

request - by a commitment or promise on their part to purchase all or a large part of their requirements exclusively from it, this being an unacceptable barrier to market entry. Referring to the Court of Justice judgment in Hoffmann-La Roche,(6) the Court said that an abuse may occur independently of any fault in view of the objective nature of that concept, and that therefore the applicants' contention that British Gypsum had never intended to weaken competition was invalid.

Furthermore, the fact that it was possible at any time to break the contract with an enterprise in a dominant position did not alter the abusive nature of the conduct, since a dominant undertaking has the power to oblige its customers not only to conclude but also to maintain such contracts.

The Court also found that the criteria for according priority in meeting orders in times of shortage constituted an abuse, although no fines had been imposed.

Lastly, it observed that enterprises in a dominant position are free to act in defence of their own interests provided such action is not aimed at strengthening and abusing their dominant position.

It considered, however, that British Gypsum's conduct in Ireland and Northern Ireland, as a supplier in a dominant position on which its customers depended to a fairly marked degree, clearly had the object of penalizing merchants intending to import plasterboard and of dissuading them from doing so, thus further strengthening its position.

(6) Case 85/76 [1979] ECR 461.

<T3> §7. References for preliminary rulings - Particular need for precision in the competition field

350. On two occasions the Court of Justice held that it was not necessary for it to give a preliminary ruling on questions referred to it concerning the interpretation of the Treaty competition rules.

a) It gave its first ruling to that effect in its judgment of 26 January in Telemarsicabruzzo, delivered in response to a reference from the Magistrate's Court, Frascati (Vice Pretore di Frascati), Italy.

The Italian court's questions concerned the interpretation of the Treaty's provisions on competition, in particular Articles 85(3) and 86, with a view to determining the compatibility with Community law of Italian rules which reserve the use of certain television channels for the Government, thus preventing the private sector from using them.

The questions arose in connection with a dispute between certain television broadcasting companies on the one hand and the Italian Ministries for Posts and Telecommunications and the Defence on the other. The court making the reference failed to specify the factual and legal framework which would have allowed the purpose of the questions to be identified and simply stated that Article 86 prohibits all monopolies.

The Court therefore reminded national courts of their obligation to set out the factual and legal context of their questions and at the very least to explain the factual assumptions on which those questions were based. It added that these requirements applied particularly to competition where complex legal and factual issues often arose.

Although the file sent by the national court and the Court proceedings had produced some information, it was too fragmentary to allow the Court to interpret the Community competition rules with regard to the subject of the proceedings.

b) The second case(7) was dismissed on 26 April, without oral hearing, by an Order declaring the application manifestly inadmissible.

The Order answers the questions put by the court supervising the liquidation of Monin Automobiles, an importer of Japanese motor vehicles into France whose business had been restricted by the French government's policy of regulating imports of vehicles from the Far East and the resulting quota-sharing cartel between the five main Japanese manufacturers. Monin had lodged a complaint with the Commission for infringement of Articles 30 and 85 of the EC Treaty, which the Commission had rejected.(8)

In the meantime, Monin went bankrupt. The court responsible for the liquidation asked the Court of Justice for a preliminary ruling on several questions, essentially whether the French policy described above and the position taken by the Commission in that respect were compatible with Community law.

The court making the reference had failed, however, to define the factual and legal background to its questions. The Court of Justice repeated that such a definition was an essential requirement, especially in the field of competition where complex legal and factual considerations often are at issue. Observing that it was therefore unable to establish a relationship between the questions and the substance of the case, the Court ruled that the questions were inadmissible.

(7) Case C-386/92 Monin Automobiles.
(8) Judgment of 18 September 1992, Case T-28/90 Asia Motor France and Others v Commission; not yet reported.

<T3> §8. Procedure

<T5> (a) Orkem case-law restricted to Commission procedure

351. The Court of Justice judgment of 10 November delivered in response to a reference for a preliminary ruling from the Amsterdam District Court (Arrondissementsrechtbank Amsterdam) concerns the question whether the Orkem case-law extends to proceedings before a national civil court.(9) In Orkem, the Court had held that observance of the rights of the defence, as a fundamental principle of Community law, prevented the Commission, in the course of a request for information under Article 11(5) of Regulation No 17, from compelling an undertaking to provide it with answers which might involve an admission on its part of the existence of an infringement which it is incumbent upon the Commission to prove.

In Otto v Postbank, the Court held, firstly, that the application of Articles 85 and 86 by national courts was in principle governed by national law and that therefore, provided that the fundamental principles of Community law were observed, the rights of the defence may differ from those applicable in Community proceedings.

Secondly, on the basis of the differences between an administrative procedure, as in the Orkem case, and a procedure exclusively concerning the private relationships between individuals which cannot lead directly or indirectly to the imposition of a penalty by a public authority, it ruled that Community law did not require that a party should have the option of refusing to give answers which might admit the existence of an infringement of the rules of competition.

In response to the argument that such an answer would allow the Commission to obtain, through national proceedings, information which it could not have obtained directly, the Court pointed out that the Commission and, indeed, a national authority, could not use such information (which it may legitimately receive from any interested party) as a means of proof of an infringement

(9) Case 374/87 Orkem v Commission [1989] ECR 3283.

of the competition rules in the context of proceedings capable of leading to penalties, or as evidence justifying the initiation of an enquiry prior to such proceedings.

The judgment contains two interesting points. First, it reflects the legitimate concern of the Court to ensure that the Commission cannot obtain by roundabout means information it is unable to obtain directly. Secondly, it reaffirms the Court's desire to draw a clear line between national and Community procedures, as evidenced by its ruling in the Spanish banks case.(10) The Postbank judgment places even more restrictions on the Commission than the Spanish banks judgment places on national authorities, as the latter allowed, under certain conditions, information in the possession and which the Commission sends to national authorities to be used by the latter as evidence justifying the initiation of national proceedings.

<T5> (b) Lack of clarity in statements of objections - infringement established on the basis of documents obtained subsequently

352. In its abovementioned judgment (see paragraph 3, supra) in the Wood Pulp cases (Ahlström and Others), the Court of Justice found that the rights of the defence had been infringed in several respects.

First, the Commission's statement of objections was not worded sufficiently clearly to enable the applicants to know exactly what conduct was being objected to (in respect of transaction prices) and hence to defend themselves effectively during the administrative procedure.

The Court also annulled Article 1(3) of the contested decision in so far as it concerned the infringement relating to transaction prices committed by members of one of the associations involved. The Commission had relied

(10) Case C-67/91 [1992] ECR-I 4785.

essentially on documents obtained after the statement of objections was drawn up, thus preventing the members of the association from expressing their views on the documents.

Lastly, the Court annulled Article 1(4) of the decision in so far as it related to the producer St Anne, which had not been able to learn of the objection concerning its participation in the meetings at which the concertation was arranged.

<T5> (c) Right to a fair hearing

353. In its Plasterboard judgment (Case T-65/89 BPB and British Gypsum) referred to above (see paragraph 6 supra), the Court of First Instance specified the documents which the Commission could refuse to communicate to parties under the rules on access to the file.

Under these rules, firms usually receive, in an annex to the statement of objections, a list of all the documents in the Commission's possession with an indication of the documents or parts of documents to which they may have access. This is to enable them to respond appropriately to the conclusions reached by the Commission. Among the documents regarded as confidential, and therefore inaccessible, are internal Commission documents such as memoranda, drafts and other working papers. Information which identifies complainants who wish to remain anonymous is also confidential, as is information given to the Commission on condition that it remains confidential.

In the Plasterboard case, the Court held that the applicants had failed to demonstrate that these rules had not been complied with. In particular, the Commission could not divulge the contents of correspondence with third parties to the applicants. A firm in a dominant position to which a statement of objections had been sent could take retaliatory action against competitors, suppliers or customers who had cooperated in the Commission's investigation.

<T5> (d) Rejection of complaint - inadmissibility of an action against the communication of preliminary comments

354. In Rendo II (Case T-2/92), the Court of First Instance was afforded the opportunity to answer this point by Order of 29 March. It originated in a complaint by the applicants against certain measures taken by SEP, (a Dutch company serving as a vehicle for cooperation between electricity companies in the Netherlands), and by those electricity companies. A Commission decision of 16 January 1991 concerning some of the points raised in the complaint had been unsuccessfully contested by the applicants before the Court.(11) In their new action, they were contesting a letter of 20 November 1991 from a Director in the Directorate-General for Competition stating that it was not possible as yet to act on their complaint in view of the decision already taken and the ongoing proceedings.

The Commission contended that the action was inadmissible as the letter did not constitute an act which could be reviewed under Article 173 of the EC Treaty.

The Court examined each paragraph of the letter and concluded that it was not a communication within the meaning of Article 6 of Commission Regulation No 99/63/EEC as it did not inform the applicants of the reasons for rejecting their complaint and did not fix a time-limit for them to submit their comments.

Nor was the letter a fresh Commission decision having legal effects and hence capable of being the subject of an application for annulment. Its content was confined to repeating certain information and making certain assessments which did not at any point take the shape of a new Commission decision. Nor did it in any way indicate that the full Commission had discussed the complaint a second time and adopted a decision thereon.

(11) Judgment of 18 November 1992 in Case T-16/91 Rendo and Others v Commission, not yet reported.

The Court thus appears to establish a new formal criterion of admissibility: a measure may be non-contestable because it is not in the form of a Commission decision.

The Court quickly dismissed the Commission's second argument to the effect that the applicants should instead, before instituting proceedings, have asked the Commission for a communication under Article 6 of Regulation 99/63 and then for a decision definitively rejecting the complaint. In its view, the admissibility of the action was not dependent on the availability of other recourses of appeal.

<T5> (e) Rejection of complaint - legality of grounds for rejection - manifest error of assessment

355. In order to understand the implications of the judgment of the Court of First Instance of 26 June in Asia Motor (Case T-7/92), it should be noted that in 1988 several French importers of Japanese cars had complained to the Commission that the official importers of the five leading Japanese makes had acceded to the French authorities' request that they limit their sales to 3% of the French market and had arranged to share this quota among themselves.

The Directorate-General for Competition had sent letters pursuant to Article 11 of Regulation No 17 to the importers in question. No replies were received as the French Ministry for Industry had instructed them not to answer. The Commission departments then requested information from the French authorities, which replied that the questions related to regulations made by the public authorities and that the importers had no say in managing the quota.

The Commission accordingly rejected the parallel importers' complaint by decision of 5 December 1991 on the ground that the contested behaviour was a direct result of the policy of the French authorities and hence the official importers had no freedom of manoeuvre. Furthermore, the complainants' position would not be remedied by applying Article 85 as the

French regulations did not allow any importers other than those forming the subject of the complaint to be included in the quota allocation.

The Court took the view that some of the documents submitted in evidence by the complainants to the Commission prima facie constituted strong evidence of real freedom of action by the five importers in question as regards market sharing. In the light of that evidence, which essentially related to dealers in Martinique, the Court concluded that the decision was vitiated by a manifest error in the assessment of the facts.

The second ground for rejecting the complaint was also invalid as the parallel importers could import vehicles into France and could thus be included in the 3% quota. A ban on the concertation aimed at sharing the quota would therefore have given them access to the French market.

Following this judgment, the first to have annulled a decision rejecting a complaint, the Commission again requested information under Article 11 of Regulation No 17 from the French authorities and from the importers of Japanese cars allowed into France.

<T5> (f) Involvement of a parent company in an infringement committed by a subsidiary

356. In its judgment of 1 April in BPB and British Gypsum (plasterboard), already referred to in another context (see paragraph 6 and 8(c)), the Court of First Instance referred to earlier judgments in which it had held that the conduct of a subsidiary may be attributed to the parent company where the subsidiary does not decide independently upon its own conduct in the market but carries out, in all material respects, the instructions given to it by the parent company.

More specifically as regards Northern Ireland, neither the dominant position nor the abuse thereof could be attributed specifically to any particular BPB subsidiary. British Gypsum sold plasterboard in that market which had been produced by the Irish subsidiary of BPB, so that the subsidiary increased its

deliveries to British Gypsum in direct relation to the effectiveness of the abuses committed by British Gypsum in Northern Ireland. Thus the BPB group as a whole benefited from the practices of British Gypsum in the province. It was therefore justifiable to attribute the practices of British Gypsum in Northern Ireland to BPB and to impose the contested fine.

<T3> §9. Case-law relating to the Merger Control Regulation

<T4> Applications by bodies representing the employees of the firms concerned

On 22 July 1992 the Commission decided that the acquisition of Perrier by the Nestlé group was compatible with the common market, provided that Nestlé sold a number of spring water companies formerly owned by Perrier to a competitor approved by the Commission. The employees of those companies were anxious about their position, with the result that on 3 February their representatives brought an action for annulment of the Commission decision. By separate application, they also sought suspension of the decision under Articles 185 and 186 of the EC Treaty in so far as it required the springs in question to be transferred (Case T-12/93 R Comité Central d'Entreprise de Vittel).

In an Order of 2 April, the second decision handed down by a Community court in a merger case governed by Regulation No 4064/89, the President of the Court of First Instance held that the application lodged by the employees' representatives was not manifestly inadmissible, notably in the light of Article 18(4) of Regulation No 4064/89 which gives employees of the undertakings concerned the right to be heard. He considered however that it was too early to give a ruling on the application for suspension as the transfer of the springs had not yet been finalized: the approval of several French authorities had yet to be obtained. He therefore ordered the interim suspension of the decision until such time as the Commission notified him of such approval.

In June the Commission informed the Court that the obstacles to the sale of the springs had been removed and that the transfer could go ahead. The President was thus able to decide on the application for interim measures.

In an Order of 6 July the President observed that the damage the employees claimed to have suffered was not serious and irreparable. They had not shown why the transfer of their company would result in damage to the maintenance of their jobs. By virtue of Directive 77/187 on the safeguarding of

employees' rights in the event of transfers of undertakings, the rights and obligations by which a transferor is bound under an employment contract or an employment relationship existing at the date of the transfer were transferred to the transferee. In addition, under the French Employment Code, the collective agreement in force could be terminated at any time - not necessarily as a result of a transfer. It followed that the decision could not directly result in the alleged damage, namely the loss of the advantages acquired under the collective agreement.

The President of the Court accordingly dismissed the application for interim measures.

<T4> Inadmissibility of an application by minority shareholders for the reopening of proceedings

On 28 October the Court of First Instance delivered its first judgment in a merger case under Regulation No 4064/89. The case concerned a question of procedure. The Court ruled as inadmissible an application lodged by minority shareholders in Generali, an Italian insurance company, against a refusal to reopen the proceedings that had resulted in a Commission decision under Article 6(1)(a) of the Regulation. The decision had concluded that the increase in Mediobanca's stake in Generali from 5.98% to 12.84% was not covered by the Regulation as Mediobanca would not be in a position, as a result of the transaction, to exercise a decisive influence over Generali.

On 26 June 1992 the minority shareholders had requested the reopening of proceedings following the publication, on 19 March of that year, in an Italian daily newspaper of the text of a hitherto secret agreement signed in 1985 by Generali, Mediobanca and Lazard, whose Eurolux subsidiary was the second main shareholder in Generali.

By letter dated 31 July 1992, the Director-General for Competition had rejected the applicants' request on the ground, inter alia, that the Commission had known of the 1985 agreement and had taken it into account when making its decision.

The Court observed, first, that there was no specific provision in Regulation No 4064/89 for requests to the Commission to reopen proceedings. Article 8(5)(a) does, however, enable the Commission to revoke a decision

declaring a concentration compatible with the common market where, in particular, it is based on information that is incorrect or has been obtained by deception.

The application was declared inadmissible, essentially because the applicants were third parties in relation to the decision whose annulment they were seeking - their request that proceedings be reopened would have led to the revocation of that decision - and because actions by third parties were admissible only if those third parties were individually and directly concerned by the decision.

The Court held that only in specific circumstances could a shareholder be regarded as directly and individually concerned by a measure capable of affecting relations between the shareholders of a company.

No such circumstances existed in the present case. In the first place, the Commission finding that the increase in Mediobanca's holding in Generali did not fall within the scope of the Regulation did not alter the substance or extent of the rights of shareholders. Secondly, the finding affects the applicants in the same way as any other of the 140 000 or so shareholders of that company. Finally, the court did not accept the applicants' contention, in support of their contention that they were individually concerned by the decision, that, if they had sought to intervene in the proceedings which resulted in the adoption of the decision (which they would have done if they had been aware of the matters subsequently disclosed) they would have had a right of action. The Court considered that the legal certainty of traders and the shortness of the time-limits which was a feature of Regulation No 4064/89 would require that a request for the reopening of proceedings on the ground of the discovery of an allegedly new fact should be submitted within a reasonable period.

It held that the application of 26 June 1992 was late, given that the applicants had themselves stated that they had learned of the alleged new fact at the end of March or early April of that year.

<T5>

Part Three

<T1>

Public enterprises and state monopolies

<T4>

Chapter 1

<T2>

Main developments

357. The principles underlying the Commission's approach to liberalization in certain sectors were dealt with in Part One of this Report.(1) This chapter reviews the measures adopted in the various sectors.

<T3>

§1. Telecommunications and postal services

<T4>

Community legislation

358. The main achievement this year was undoubtedly the Resolution of 22 July 1993 in which the Council of Ministers accepted the liberalization of public telephone services by 1 January 1999 at the latest.(2) The Council thus took the view that the enforcement of existing Community legislation on telecommunications services is one of the main Community policy objectives in the telecommunications sector.

359. In furtherance of this objective, the Commission pursued bilateral discussions during the year with a number of Member States on the application of Directive 90/388/EEC of 28 June 1990 on competition in the markets for telecommunications services. The main subject covered by the discussions was the extent of the reserved telephone service, which the Directive defines very strictly, which means that telephone services offered to closed user groups cannot be subject to monopoly arrangements.

360. Following such bilateral discussions, Germany liberalized its voice telephony services provided for "Corporate Networks" on 15 January, while Ireland undertook by letter of 22 July to stick strictly to the terms of the

(1) See points 36 to 42 of this Report.
(2) See points 123 to 129 of this Report.

Commission's definition. The Belgian Government confirmed, by letter dated 15 June, that, in Belgium, telephone traffic between third parties is authorized via fixed links provided that it does not consist of voice switching between two public switched network termination points or is not available to the public. However, the relationship between the third parties must be one that involves more than merely the need to make telephone calls to one another; an example of an acceptable relationship would be that between a parent company and its subsidiary. Denmark undertook by letter dated 16 September to liberalize fully telephone traffic via fixed links in 1994, rather than defining reserved and liberalized telephone services. The Commission continues to monitor the application of this aspect of the Directive and will continue to take action in the event of complaints.

The Commission was also called upon to define the application of the competition rules to the mobile telecommunications sector, which is excluded from the scope of application of the Directive. Such exclusion does not mean that the Member States could extend the monopoly enjoyed by their public operator to mobile radio telephony, for example. Following the intiation of proceedings against Italy, that country undertook on 1 October to grant a second licence for the operation of GSM radio telephony on its territory. Similar proceedings were initiated against Belgium, while discussions are taking place with Ireland.

The Commission also asked those Member States which were planning to begin procedures for the granting of additional licences to mobile operators to submit the proposed conditions to it so as to avoid any future disputes should such procedures fail to be objective and without discriminatory effects. By letter dated 31 March the Commission accordingly presented a number of comments on the preliminary draft which the Dutch Government had submitted to it.

361. On 1 December the Commission adopted, on first reading, a draft Directive[3] amending Directives 88/301/EEC and 90/388/EEC. The draft Directive is intended to extend to the satellite communications sector the

(3) SEC(93)1891 final.

the liberalization already introduced with regard to telecommunications terminals and services. The Commission decided to await any comments from the Council, Parliament and the Economic and Social Committee before formally adopting the draft Decision.

238<T3>

§2. Energy

<T4>

Spanish oil monopoly

362. With the entry into force on 14 January of Law No 34 of 22 December 1992 on the oil industry, the Spanish oil monopoly established in 1927 ceased legally to exist. This removed the last remaining statutory obstacle, namely the exclusive retail marketing rights enjoyed by the company formerly operating the monopoly (Campsa) and, by extension, by the Spanish refineries in the monopolized service-station network. In view of the scope of the new Law, the Commission decided to terminate the infringement proceedings it had initiated.

Nevertheless, the Commission will be careful to ensure that the full effect of the rules adopted is not neutralized and that the previous statutory restrictions of competition are not replaced by contractual ones(4) or restrictions that prevent the effective opening-up of the market.

<T4> - Exclusive rights for the importation and exportation of electricity and gas

363. The Commission received the national authorities' replies to the six reasoned opinions sent in November 1992. The Commission had initiated infringement proceedings under Article 169 of the EC Treaty against French, Italian, Spanish, Dutch, Danish and Irish statutory provisions granting exclusive rights for the importation and exportation of electricity and gas.

Some of the Member States involved reported that they were planning to embark on a period of reflection and discussion with a view to adopting legislative changes that would bring about some opening-up of the sector; however, none of these Member States came up with any specific plans for the abolition of the monopolies which had been challenged.

On the basis of these replies, and in the light of likely developments within the Member States, the Commission finally decided at the beginning of 1994 to refer the matter to the Court of Justice.

(4) See point 226 of this Report.

<T3> §3. Transport(5)

<T4> Sea transport

<T7> Spain

364. As regards the further discrimination on grounds of nationality by Transmediterranea, the public-sector sea transport company, referred to in last year's Report,(6) the Spanish Government finally informed the Commission, in response to the letter of formal notice sent on 24 November 1992 pursuant to Article 90 of the EC Treaty in conjunction with Article 7, that it had, as from June 1992, put an end to the discrimination objected to. In future, according to the information provided by the Spanish Government, the discount for which only certain categories of Spanish nationals were previously eligible will be granted both to Spanish nationals and to nationals of other Member States.

<T4> Air transport: ground-handling services

365. The opening-up of air transport to greater competition as a result of the third package of liberalization measures is obliging transport undertakings to improve the quality of their services and to pay more attention than ever to their cost levels. Ground-handling services provided to airlines at airports, such as baggage handling, passenger check-in, passenger transportation from terminals to aircraft, in-flight catering, fuelling and aircraft maintenance, represent a substantial part of the airlines' costs and are a key factor in their image.

However, unlike air transport, ground-handling services are in most Member States still controlled by firms that are shielded from competition and that are accordingly able to charge more than the quality of the services provided would justify. This is the case where national laws allow airports to be the sole providers of such services or where they grant such exclusive

(5) See points 136 to 142 of this Report.
(6) Twenty-second Competition Report, point 523.

rights to an undertaking, frequently the dominant carrier on the national market. The limits imposed on self-handling at many airports are a particularly serious illustration of the anti-competitive nature of the present system.(7)

366. An example of such restrictions was the refusal by the German authorities to allow British Midlands to receive the ground-handling services at Frankfurt airport which SAS was prepared to provide to it.(8)

This ban stemmed from national provisions stipulating that foreign airlines could provide such services only if reciprocal treatment was granted to German carriers in such foreign airlines' countries of origin. The German authorities pointed out in this connection that Lufthansa was subject to similar restrictions in Denmark and the other Scandinavian countries.

Since the imposition of such a reciprocity requirement on a Community operator was clearly illegal, the German authorities agreed, following representations by the Commission, to allow the complainant to receive the ground-handling services provided by SAS.

367. The Commission received many complaints in 1993 in respect of ground-handling services at several German, Italian, Portuguese and Spanish airports. Such complaints reflect the size of the problem and the risk that the expected benefits of air transport liberalization will be undermined by restrictions of competition in ground-handling services.

368. The Commission found that Spain had not put an end to discrimination in the form of reductions granted to Spanish airlines in charges for ground-handling services.(9)

On 14 June the Commission therefore sent a letter of formal notice to the Spanish Government challenging the reductions which the airline Iberia, as

(7) Twenty-second Competition Report, point 518.
(8) Twenty-second Competition Report, point 520.
(9) Twenty-second Competition Report, point 521.

concessionaire of such services throughout Spanish territory, was obliged to grant. The measures imposed by the Spanish authorities on Iberia requiring it to grant such reductions were viewed as infringing the provisions of Article 90(1) of the EC Treaty read in conjunction with Articles 7 (which prohibits discrimination on grounds of nationality), 59 (which prohibits restriction on the freedom to provide services) and 86 (which prohibits abuses of dominant positions, including the application of dissimilar conditions to equivalent transactions with other trading parties).

369. Over and above the normal pursuit of examination of individual cases, the Commission considers that the scale of the problem calls for the adoption of general measures.(10)

<T4> Ports

370. The Danish Government did not respond to the request to grant access to the port of Rødbyhavn to a company wishing to establish a sea link with the German port of Puttgarden.(11) The Commission accordingly adopted a decision under Article 90(3) of the EC Treaty.(12)

371. Following the formal abolition by decree-law of the monopoly of port handling operations enjoyed by port companies and groups(13) in Italy, the Commission noted that the decree-law had not been converted into law within the deadlines set, so that the Italian Government had been obliged to extend its effects through the successive adoption, up to the present date, of a series of decree-laws.

It is thus apparent that, since the Court's judgment of 10 December 1991 (Case C-179/90 Porto di Genova) declaring the monopoly to be incompatible with the provisions of Article 90(1) of the EC Treaty, read in conjunction with Articles 30, 48 and 86, a satisfactory solution had still not been found several months after the initiation of infringement proceedings.(14)

(10) See point 137 of this Report.
(11) Twenty-second Competition Report, point 522.
(12) See Annex III.B to this Report.
(13) Twenty-second Competition Report, point 524.
(14) Twenty-second Competition Report, point 524.

The Commission considers that repeated reliance on temporary emergency measures has not established the conditions of legal certainty which alone would allow interested economic operators, whether Italian or from other Member States, to enter the market and undertake appropriate investment.

This situation of uncertainty has consequently, in the Commission's view, frustrated the requirement that effective competition be established among the firms operating in the port.

<T4> Chapter II

<T2> Main decisions of the Court of Justice

<T3> §1. Court judgments concerning Article 90 of the EC Treaty

372. In its judgment of 19 May in Case C-320/91 Corbeau, the Court of Justice defined more closely the conditions for the application of Article 90(1) and (2) of the EC Treaty. Article 90(1) requires Member States not to enact or maintain in force any measure contrary to the rules contained in the EC Treaty in favour of public undertakings and undertakings to which they grant exclusive rights. Article 90(2) provides that undertakings entrusted with the operation of services of general economic interest are subject to the rules contained in the EC Treaty, in particular the competition rules, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them.

The facts underlying the judgment relate to the activities of a person (Mr Corbeau) who, in Liège and the surrounding areas, provides a service consisting of the collection of mail from the home of the sender and its delivery by midday the following day, provided that the addressees reside within the town. If they reside elsewhere, Mr Corbeau collects the mail from the sender's home and dispatches it by post.

As a result of these activities, Mr Corbeau was brought before the Liège criminal court accused of having contravened Belgian law on the postal monopoly, which provides that the post office, which is a corporate body governed by public law, has the exclusive right, throughout Belgium, to collect, transport and deliver all mail, the infringement of which is subject to penal sanctions. However, the criminal court questioned whether the monopoly was compatible with Article 90 of the EC Treaty.

In its reply, the Court noted firstly that the Belgian post office was an undertaking enjoying an exclusive right within the meaning of Article 90(1). However, the holding of a statutory monopoly within a substantial part of the common market may give rise to a dominant position within the meaning of

Article 86. The Court pointed out that, although Article 86 prohibits only abuse of a dominant position by undertakings and is not applicable to government measures, the Member States are nevertheless required not to take any measures that might thwart the full effectiveness of that provision.

In the Court's view, Article 90(1) must be read in conjunction with Article 90(2), whose content it reiterated. In the case in point, it considered that the post office was indisputably entrusted with the operation of a service of general economic interest within the meaning of Article 90(2), consisting of the duty to collect, transport and deliver mail, on behalf of all users, throughout the territory of the Member State concerned, at uniform prices and under similar conditions of quality, regardless of particular situations and the degree of economic profitability of each individual operation.

The Court then went on to examine how far a restriction of competition, or indeed the elimination of any competition, was necessary in order to allow the holder of the exclusive right to perform its task of general economic interest and, in particular, to operate under economically acceptable conditions.

The Court took the view that, if it were to perform its task in a profitable manner, the undertaking entrusted with the operation of a service of general economic interest must be able to offset its losses in one sector of activity by profits in another. Ensuring that this was so, meant that there was justification for restricting competition from private undertakings in the sectors that were economically profitable. Otherwise, such undertakings could concentrate their business in the profitable sectors and offer cheaper prices there than the undertaking entrusted with the operation of the service of general economic interest, since they would not have to offset any losses incurred in non-profitable sectors.

However, in the Court's view, banning competition is not justified where what is involved are specific services which are dissociable from the service of general interest, meet particular requirements of economic operators, and call for certain additional services that the postal service does not provide, such as home collection, more rapid or more reliable delivery or the

ability to specify a different addressee during delivery, and to the extent that such services do not undermine the economic equilibrium of the service of general interest provided by the holder of the exclusive right.

The judgment means that, where any extension of an exclusive right is not justified by Article 90(2), the undertaking enjoying the exclusive right is committing an abuse of a dominant position in breach of Article 86.

The judgment also confirms the direct applicability of Article 90(2), which the court requesting the preliminary ruling accordingly had to apply itself.

<T3> §2. Interpretation of the Directive on telecommunications terminal equipment

On 27 October the Court of Justice delivered three judgments interpreting Article 6 of Commission Directive 88/301/EEC of 16 May 1988 on competition in the markets in telecommunications terminal equipment, which requires Member States to ensure that the formalization of technical specifications, monitoring of their application and approval of equipment are carried out, as from 1 July 1989, by a body independent of public or private undertakings offering competing goods or services in the telecommunications sector. Two of the judgments were in response to requests for preliminary rulings by French courts (Case C-69/91 Decoster and Case C-92/91 Taillandier). In the third judgment, the referral for a preliminary ruling came from a Belgian court (Joined Cases C-46/90 and C-93/91 Lagauche, Evrard and others). All the cases related to proceedings instituted against traders who had sold telecommunications terminal equipment (fax machines and cordless telephones) that had not received type-approval. The parties had argued before the national court that the national laws requiring such approval were incompatible with the EC Treaty and the Directive, since there was no competent independent body to grant such approval.

In France, at the time of the facts to which the cases related, approval was granted by the general regulations department in the Ministry of Posts and Telecommunications, while commercial operation was the responsibility of France Telecom, which reports to the same Ministry. In the first two judgments, the Court of Justice thus had to assess whether organizational separation within one and the same Ministry was sufficient to comply with the requirement laid down in Article 6 of the Directive. The Court held that different departments within one and the same administrative authority could not be deemed to be independent. If this were not so, uniformity of application of the Directive in all Member States would be undermined. It is not yet clear whether giving responsibility to two different administrative authorities (or two different Ministries) would be sufficient to meet the independence criterion. In any event, the Decoster and Taillandier judgments mean that the measures taken by Member States to comply with this provision must be looked at again.

In the third judgment, in Joined Cases Lagauche-Evrard, the Court did not have to examine the question of independence, since the Belgian Government

acknowledged at the hearing that such division of activities had not been carried out in Belgium.

However, the significance of this judgment lies in the legal implications which the Court attached to the date of 1 July 1989 referred to in Article 6 of the Commission Directive. The Court held, firstly, that Article 90 of the EC Treaty read in conjunction with Article 86 did not prevent regulatory and operational roles from being combined within one and the same undertaking provided that the function of such undertaking was confined to examining approval applications submitted to the Ministry, such function being merely incidental to the exercise of Ministerial power, and, secondly, that, as regards equipment falling within the scope of application of Directive 88/301/EEC and in so far as the facts related to the period after 1 July 1989, Article 6 of the Directive was a bar to any requirement that terminal equipment be approved by a public undertaking offering goods or services in the telecommunications sector.

Consequently, the combining of functions was, in the Court's view, compatible in certain circumstances (subsidiary role of the operator, possibility of appeal) with Community law prior to 1 July 1989, but was no longer compatible after that date. This would appear to mean that a Directive based on Article 90(3) can do more than simply spelling out the requirements that already flow from the provisions of the EC Treaty.

By drawing a distinction between the legal situation before and after the entry into force of Article 6 of Directive 88/301/EEC, the Lagauche judgment thus invalidates the narrow interpretation of Article 90(3). Even if, in itself, the granting of regulatory functions to an operator is not contrary to Article 90 read in conjunction with Article 86, the Commission does nevertheless have the power to prohibit such combining of activities on the basis of the task conferred on it by Article 90(3) if it considers, subject to review by the Court of Justice, that such combining of activities could in some cases conflict with the rules laid down in the EC Treaty.

The Lagauche judgment thus underlines the Commission's powers to take preventative measures in order to ensure equality of opportunity on the markets on which public undertakings or undertakings having preferential rights operate. It highlights the Commission's particular responsibility to carry out the task conferred on it by Article 90(3) on such markets.

<T3> §3. Public enterprises and state aid

<T4> Communication on public undertakings

373. Giving judgement(1) on an appeal by France, the Court of Justice annulled the Commission's 1991 communication on public enterprises, in which Member States were asked to supply the Commission with annual reports on their financial relations with large public enterprises in the manufacturing sector.(2)

The Commission had based this requirement on Article 5 of its Directive (No 80/723/EEC) on the transparency of financial relations between the Member States and public undertakings. Paragraph 2 of this article provides that the Commission can ask the Member States to supply certain financial data on particular public enterprises whenever it deems this necessary. The Commission argued that Article 5(2) was a sufficient legal basis for the reporting requirement contained in the 1991 communication; the communication merely specified an existing obligation to supply the data on request.

Dismissing this argument, the Court held that a general obligation to supply reports systematically on all state-owned manufacturing enterprises above a certain size threshold, as the Commission was asking the Member States to do in the communication, was not covered by Article 5(2). Therefore, the communication was effectively imposing a new legal obligation on Member States, without an appropriate legal basis, and was null and void. The Court indicated that such a new obligation altering the requirements of Article 5(2) could only be imposed under Article 90(3) of the Treaty, like the original Directive.

In accordance with the Court's ruling, the Commission has now incorporated the reporting requirements in a new Directive amending that of 1980 and has reissued the communication minus the reporting requirement as a statement of policy on financial flows to public enterprises.(3)

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(1) Judgment of 16 June 1993, Case C-325/91 France v Commission, not yet reported.
(2) Twenty-first Competition Report, points 167 to 172.
(3) See points 399 and 400 of this Report.

<T5> Part Four

<T1> State aid

<T4> Chapter I

<T2> Main decisions and developments in the policy of the Commission

<T3> §1. General policy questions

<T4> Main developments

374. In 1993 the conduct of state aid policy was dominated by the crisis in the steel industry. One of the deepest recessions since the 1930s, pressure from imports and more difficult exporting conditions compounded the long-term decline in steel use to create an urgent need for further capacity cuts.(1) The Commission was prepared to play a coordinating role in bringing about these capacity reductions and in March the Council pledged EC funds to support the cost of closures. But first it was necessary to resolve a number of cases of aid Member States wanted to give to state-owned steel producers. The Commission's task was to ensure that, in return for the aid, the producers contributed their fair share to the restructuring. Agreement was finally reached in December, when the Council gave its approval for aid totalling some ECU 6.8 billion to six producers in return for 5.5 million tonnes of capacity cuts. The difficulty of this first step in the restructuring can be gauged from the fact that several meetings of the Council were needed to achieve it and that in July the Commission, for the first time, had to go to the lengths of issuing an injunction under Article 88 of the ECSC Treaty to prevent Italy writing off ECU 4 billion of the debts of Ilva, one of the six aided producers, which the Italian Government maintained did not involve aid at all.

375. Tight control also continued to be required on aid to the car industry.(2) Many of the cases involved rescues and restructuring. With overcapacity growing, aid for motor industry investment in Austria also came under close scrutiny and led to the imposition of countervailing duties.(3)

(1) See points 29 and 481 of this Report.
(2) See points 505 et seq. of this Report.
(3) See point 506 of this Report.

In shipbuilding the situation did not permit the ending of the special aid arrangements, and the Seventh Directive was extended for a further year.(4) Rescues and restructuring accompanied by aid packages were also the order of the day in many other industries, from engineering to airlines.(5) As always, cases involving publicly owned companies or privatizations posed the greatest problems from the point of view of aid control. But developments on state guarantees(6) and the new legal basis for the reporting obligations on public enterprises(7) promise to make such control easier in future. The Court of Justice also reiterated the duty of the Commission to carry out a full analysis of the impact of proposed aid on competitors.(8)

376. A more routine but none the less important part of state aid control work is the processing of notifications of types of aid that pose fewer problems for competition and can therefore be approved fairly easily provided certain limits and conditions, often laid down in frameworks and guidelines, are respected. For such aid too, the Commission is the sole aid control authority and Member States need its approval before they can give the aid. The Commission has a duty to provide such regulatory approvals within a reasonable time.(9) In a recession a fast service is especially important.

377. On national regional aid, the Commission pursued the established policy of limiting the coverage of assisted areas so as to increase the effectiveness of aid and maintaining differentials between the more-developed and the less-developed areas.(10) The Commission also continued work on aid given for capital-intensive investment projects.

(4) See point 497 of this Report.
(5) See points 531 et seq. and 536 et seq. of this Report.
(6) See points 386 and 401 of this Report.
(7) See point 399 of this Report.
(8) See point 395 of this Report.
(9) Judgment of 11 December 1973, Case 120/72 Lorenz v Germany [1973] ECR 1471, 1481 (para. 4).
(10) See points 465 and 466 of this Report.

378. Incentives for genuine job creation, for training and for small-firm development were given the sympathetic treatment they deserve.(11) The Commission virtually completed its reviews of existing aid schemes for small and medium-sized enterprises following the issue of the SME aid guidelines in 1992.(12) In another area of increasing importance, the environment, the Commission issued new aid guidelines which are considerably more detailed and comprehensive then those they replace.(13) It continued its work to ensure a level playing-field between public or publicly backed and private export credit insurers insuring short-term commercial risks in intra-EC and intra-OECD trade. A framework is expected to be adopted shortly.(14) Work also continued on possible distortions of competition through aid in other financial service sectors and in television. In the latter area the Commission launched an EC-wide study to help it in assessing the growing number of complaints from private broadcasters.(15)

379. At international level, state aid matters figured prominently in the accession negotiations with the Nordic countries (Finland, Norway and Sweden) and with Austria.(16) In the meantime, after the European Economic Area Agreement enters into force on 1 January 1994, these countries, and Iceland, will have the EC state aid rules applied to them by the EFTA Surveillance Authority. Given the need for close cooperation with the Authority, the Commission has devised arrangements under Protocol 27 to the Agreement for liaising with it on pending cases and for informing it of final decisions before they are published.(17) State aid provisions are also contained in the Europe Agreements signed with several central and eastern European countries(18). The Commission was involved in the talks which resumed within the OECD on an international agreement on shipbuilding and in the ongoing discussions about a Multilateral Steel Agreement. It played an active part in negotiating the new subsidies code in the GATT.(19)

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(11) See points 430 and 439 of this Report.
(12) Twenty-second Competition Report, point 342.
(13) See point 384 of this Report.
(14) See point 427 of this Report.
(15) See point 546 of this Report.
(16) See point 561 of this Report.
(17) See point 557 of this Report.
(18) See points 101 and 563 of this Report.
(19) See point 114 of this Report.

380. The single market, now in place, and the plan for economic and monetary union make state aid control more important than ever and increase the need for the Commission to use its finite resources efficiently. The procedural improvements described in last year's report(20) continued with the adoption of standard aid notification and report formats.(21) The trend towards codification of practice was maintained with the new environmental aid guidelines. Such frameworks increase the transparency and predictability of policy and boost confidence in the consistent enforcement of rules. They also facilitate the evaluation of the compatibility of many individual awards of aid of a relatively straightforward kind. The Commission discusses proposed new policy statements and other general issues at regular multilateral meetings with Member States. Two such meetings were held in 1993.(22) A "Wise Men's" group of prominent business economists and competition law experts was set up to discuss and advise on state aid policy. Publication of the new edition of the collection of source materials on the state aid rules, announced last year, was however postponed until 1994 to enable the latest papers (environmental aid guidelines, guide to procedures, etc.) to be included.

381. On 1 August the European Court of First Instance (CFI) was given jurisdiction to hear appeals brought by firms against state aid decisions. On that date eleven cases pending before the Court of Justice but not yet at the report stage were transferred to the Court of First Instance. Appeals from decisions of the CFI to the Court of Justice will lie on points of law only. Jurisdiction to hear appeals brought by Member States and to hand down preliminary rulings under Article 177 of the EC Treaty will remain with the Court of Justice.

(20) Twenty-second Competition Report, point 337.
(21) See point 385 of this Report.
(22) See point 382 of this Report.

<T4> Multilateral meetings

382. A multilateral meeting between experts from Member States' Governments and Commission officials(23) was held in June to discuss revised proposals for environmental aid guidelines and short-term export credit insurance(24) and new papers on aid in the tourism sector, R&D aid and the reference interest rates used in calculating aid intensities. The reception of the completely new draft of the environmental aid guidelines was relatively favourable and the guidelines were subsequently adopted by the Commission.(25) On export credit insurance, the discussion focused on remaining points of substance. A useful exploratory discussion also took place at the meeting on aid for tourism and on the Commission's practice towards aid for research and development when the aid is provided as a loan that is repayable if the project is successful but not if it fails. Finally, the Member States welcomed the proposal to change the reference interest rates used in the calculation of aid intensities more frequently to match fluctuations in market rates. As a result, the Commission revised the reference interest rates with effect from 1 July 1993 instead of the usual annual revision.(26)

383. A discussion of further improvements to the reference interest rate system was held at a second multilateral meeting in December. The delegations agreed to the proposal that in future the reference rates for the following year should be based on the average of the three months September to November, instead of on the average for the whole year, and that in the course of any year the reference rate would be revised if the rates on which it was based changed by more than 15%, instead of by 2 percentage points as previously. These changes were subsequently adopted by the Commission.(27)

The meeting also discussed cooperation with the EFTA Surveillance Authority under the European Economic Area Agreement. There was a consensus that the Authority should be invited to attend future multilateral meetings as an observer and that the Commission should send it monthly lists of pending aid cases. The handling of complaints lodged by firms and Member States in the

(23) See point 583 of this Report.
(24) Twenty-second Competition Report, points 339 and 340.
(25) See point 384 of this Report.
(26) See point 398 of this Report.
(27) See point 398 of this Report.

Community and EFTA against state aid in the other's territory was likewise considered.(28)

The meeting went on to discuss the question of the definition of "soft" aid, i.e. aid for training, consultancy help and similar purposes, which is allowed up to already high levels because of its beneficial effects on the general competitiveness of small and medium-sized businesses. The paper on "soft" aid was welcomed by most delegations and, after refinement of the definitions, the subject will be discussed again at the next multilateral meeting. Finally, the meeting considered the record of the Commission in securing the recovery of aid granted illegally and found to be ineligible for exemption. It emerged from a table of cases in which recovery had been ordered that conflicts with national procedural law were one of the main causes of delays in recovering aid.(29) In order to avoid such conflicts, it was necessary for Member States to begin proceedings to recover the aid immediately, even if the recovery decision was appealed, in accordance with the non-suspensive effect of legal action against Commission decisions.

<T4> State aid for environmental protection

384. The new environmental aid guidelines, adopted by the Commission in December, set out future policy in this area.(30) The guidelines they replace had been virtually unchanged since their introduction in 1974.(31) Many aid measures were not covered by them and had to be assessed on an ad hoc basis. The new guidelines codify the intervening developments in the Commission's practice and provide a more comprehensive and user-friendly frame of reference than hitherto, while maintaining progress towards full application of the "polluter pays" principle and reflecting the increased emphasis found in the Fifth Environmental Action Programme on "sustainable development" so as to prevent environmental problems arising.

(28) See point 98 of this Report.
(29) The table is reproduced as Annex ... to this Report. See point 396 of this Report.
(30) OJ ...; see point 166 of this Report.
(31) Fourth Competition Report, points 175 to 179; Tenth Competition Report, points 222 to 226; Sixteenth Competition Report, point 259. Pending the adoption of the new guidelines, the existing Framework, which was due to expire at the end of 1992, was extended to cover the first and second halves of 1993 in December 1992 (see Twenty-second Competition Report, point 448) and June 1993 respectively.

The guidelines lay down the rules or principles that should be observed in each type of financial instrument used in environmental policy. The most precise provisions concern aid for investment, where the rules are as follows:

- For investment undertaken to adapt existing plant to new environmental standards or other new mandatory requirements imposed to protect the environment, firms can receive aid equal to 15% gross(32) of the cost of the investment strictly required for this purpose. Existing plant is defined as plant in existence for at least two years when the new standard or requirement comes into force. Plant newer than that may not be aided. Aid may be granted for a limited period around the time the new standards or requirements are introduced;

- For investment in new or existing plant which allows higher levels of pollution control or other environmental parameters to be achieved than are required by standards or other legal obligations, firms can receive up to 30% gross of the investment cost strictly required for this purpose. If several standards are in force, e.g. a Community standard and special national or local provisions, it is the stricter of the standards that must be exceeded. The actual level of aid must be in proportion to the environmental improvement achieved and the scale of the investment required to achieve it; 30% is the maximum. Aid of up to 30% gross can also be authorized for entirely voluntary investment which helps protect the environment where there are no standards or mandatory requirements governing firms' behaviour;

- Small and medium-sized enterprises may receive an extra 10 percentage points of aid on top of the two limits mentioned above;

- In assisted areas the maximum level of aid is either the maximum allowable rate of aid for environmental investment or the prevailing rate of regional aid authorized by the Commission for the area, whichever is the higher;

- If an investment project partly involves adaptations to standards and partly exceeds standards or requirements, the limits are applied pro rata.

(32) That is to say, before tax. Under the previous framework, aid of 15% net (i.e. after tax) could be allowed for this purpose.

Besides investment, the following other activities are covered by the guidelines:

- dissemination of information;

- provision of training and consultancy help which benefit individual firms can be aided at rates of up to 50% for SMEs, as under the SME aid guidelines,(33) or up to the prevailing regional aid rate, if higher, in assisted areas;

- incentives for purchasing environmentally friendly products;

- collection, treatment and recycling of waste and relief from new environmental taxes to avoid unsustainable losses in competitiveness.

The guidelines cover all sectors, including those subject to special Community rules on state aid in so far as these rules do not provide otherwise, which is the case for some forms of investment in agriculture. They will also be applied to aid for energy conservation, except that here the cost reductions the firm achieves will be taken into consideration.

The guidelines will be in force from 1 January 1994 until the end of 1999, when the Fifth Environmental Programme ends, but will be reviewed in 1996. In order to bring existing environmental schemes into line with the new rules, the Commission will, before 30 June 1995, review under Article 93(1) all existing schemes that are not voluntarily renotified. It also decided to monitor application of the guidelines in 1994 to see whether or not it should be made a rule for Member States to notify all large individual aid awards under authorized schemes.

(33) OJ C 213, 19.8.1993.

<T4> Standardized notifications and reports

385. The Commission adopted a system of standardized notifications and reports that will make it easier for Member States to notify aid and will improve the flow of information which it receives on state aid. Aid proposals will in future have to be notified on the basis of a standardized questionnaire specifying the information which the Commission deems necessary for examining them. The new system should result in a considerable reduction in the number of requests for supplementary information which the Commission sends and should thus shorten the time needed to take decisions. As part of this process of streamlining administrative procedures, the Commission also decided that Member States would no longer be required to notify the refinancing of schemes that were authorized for an indefinite period or for a specified period that had not yet expired, if the new annual budget did not exceed by more than 20% the budget originally notified. In addition, the establishment of a system for the submission of standardized reports using a set layout will enable the Commission to check more effectively, pursuant to Article 93(1), whether the implementation of an aid scheme previously authorized subject to certain socio-economic conditions continues to meet the eligibility criteria for one of the exemptions provided for in Article 92. So as not to impose too heavy an administrative burden on Member States, detailed standardized reports will be required only for a very limited number of major aid schemes. The reports for other schemes will have to contain only a limited amount of information.

<T4> Issues clarified by Commission decisions and judgments of the Court of Justice

<T5> (a) Substantive questions

<T6> State guarantees

386. It is common for governments to support firms by guaranteeing their borrowing. Government loan guarantees usually involve state aid because, without the guarantee, the firm would be unable to raise the finance it requires and would have to abandon the project in question or indeed go into liquidation. The Commission approves many loan guarantee schemes and

individual guarantees to firms when they are notified to it, as they should be, under Article 93(3) of the EC Treaty and in accordance with the letters to Member States dated 1989. It always insists on it being a condition of the guarantee that the guarantee may be honoured only after the guaranteed creditor has recovered what he can of the debt through realization of the debtor's assets, if necessary via the winding-up of the company.

387. Loan guarantees from the state can, however, cause major distortions of competition when they are given in disregard of this condition and are not notified. In the EFIM case,(34) where the guarantee arose from Article 2362 of the Italian Civil Code, banks were induced to continue to lend to state-owned businesses that were in serious financial difficulties in the expectation that the government would repay their mounting debts. Such action provides continued funding to a company which should properly be restructured or rationalized, to the detriment of its unaided competitors. Moreover, in the EFIM case, it was not considered to be sufficient that the companies in question were in liquidation for creditors to be able to claim under the state guarantee. In the agreement that was eventually reached between the Commission and the Italian authorities, payment under the guarantee contained in Article 2362 of the Italian Civil Code was permitted. This was made possible by the fact that the Italian authorities agreed to reduce the debt of certain wholly owned companies by 1996 to levels acceptable to a market-economy investor and that they undertook to dispose of shares in the same companies, thereby nullifying the effects of the Article in the future.

<T6> Factors determining classification of measures as state aid under Article 92(1) of the EC Treaty

<T4> Financial benefit

388. Several cases decided by the Commission in 1993 illustrated the principle that, for a measure to involve state aid within the meaning of Article 92(1), it must confer a financial benefit on them with respect to normal market conditions.

(34) See point 401 of this Report (§ 2). A full list of all decisions taken by the Commission over the year in state aid cases is given in Annexe III.C. The list is subdivided by type of decision. References are given to the press release, if any, issued on the case and to the issues of the Official Journal in which the relevant decisions or notices on them were published when this is known at the time of writing.

In the Dutch gas case,(35) the Dutch Government had, as required by the Commission's decision in 1992,(36) notified the Commission of its intention to grant rebates to Dutch ammonia producers for certain periods of 1992 and 1993 when the prices of ammonia were so low that producers throughout Europe were making losses and having to shut down plants. The Commission found that the price reduction was normal commercial behaviour on the part of the 50 % state-owned monopoly supplier Gasunie since, if it were to ignore the falls in product prices and the resulting financial difficulties of its customers, it would be jeopardizing its future markets. There was also a danger that customers would switch to alternative raw materials. The prices at which Gasunie sold gas to suppliers in other Member States afforded them scope similarly to reduce their prices to ammonia producers.

The contracts which the German railway company, Deutsche Bundesbahn (DB), signs with firms on building or maintaining railway sidings and which offer them credit facilities and other help in this connection were also considered normal commercial conduct.(37) The Commission was satisfied that DB recouped its outlay on incentives in each individual case through the freight rates it later charged the firm and that there was no cross-subsidy to the scheme from other operations.

389. In a number of cases involving environmental subsidies the Commission examined whether the subsidies confer a financial advantage on the recipients. This was not considered to be the case for the payments made to collectors of waste oils in Denmark, which were considered a straightforward renumeration for services.(38) On the other hand, in the case of a Danish scheme which compensates the users of recycled raw materials for the higher incidence of waste involved in this process by charging them a lower rate of tax on waste offered at disposal facilities, the Commission considered that the tax treatment potentially contained a financial advantage for the beneficiaries with respect to the general tax system and therefore considered it as falling within Article 92(1).(39)

(35) See point 533 of this Report.
(36) Twenty-second Competition Report, points 434 to 437.
(37) See point 534 of this Report.
(38) See point 421 of this Report.
(39) See point 420 of this Report.

<T4> Selectivity

390. In relation to a number of job-creation schemes in Denmark, the Commission had to decide whether the schemes were aid schemes falling within Article 92(1) or "general measures". For a scheme that subsidizes firms for particular activities to fall within Article 92(1), it must "favour", i.e. particularly benefit, certain firms or industries. In other words, there must be an element of selection or discrimination in relation to the beneficiaries. This favoured group needs not be specified in the rules of the scheme or be readily identifiable. It is sufficient that the scheme could benefit certain firms particularly, though these are not identifiable in advance, and this is especially so if the authorities applying it have a degree of discretion in selecting beneficiaries or setting the level of subsidy. The Commission took two decisions on variants of a scheme offering wage subsidies to firms taking on long-term unemployed persons.(40) It was found in the first case that the Member State had little or no discretion. The scheme was automatically applied to any firm and unemployed person meeting the conditions, which were precise and well defined in the most important respects such as the terms of the employment contract. It was therefore considered to be a general measure and not an aid scheme. In the case of the modified scheme, however, a greater degree of discretion was found to have been introduced and the scheme was considered to be potentially selective, bringing it within Article 92(1). The authorities were now free to grant the subsidies for recurrent short periods of work experience without clear conditions as well as for periods of regular employment.

<T4> Levies

391. Levies are special taxes on the production or sale of certain goods or services. The proceeds of the special tax - which are to be considered as "state resources" within the meaning of Article 92(1) - may be used to finance state aid for various purposes in the industry on which the tax is levied. Such schemes raise a number of questions which were illustrated in decisions taken in 1993. First, in accordance with a long line of Court judgments and Commission decisions, such levies may not be charged on imports or remitted on exports. Both would make the levy scheme incompatible with Community law.

(40) See point 441 of this Report.

392. A second lesson which emerges from the various levy decisions is that the fact that the industry is itself paying for the scheme does not make it lose its character of a state aid.(41) The negative attitude usually adopted by the Commission towards sectoral aid schemes is, however, mitigated when the measure does not directly benefit any individual enterprise in the sector but is used to promote activities benefiting the sector as a whole such as research, training, trade exhibitions, maintaining or improving quality standards, etc. Thus, the Commission was able in 1993 to grant exemption from Article 92(1) to levies supporting the Danish fur and the UK wool trade(42) and French engineering (COREM). As usual, many levy schemes were also approved in agriculture.(43) On the other hand, a much more sceptical attitude was taken of sectoral aid schemes offering direct subsidies paid for by the exchequer.(44)

<T4> Sales of land for industrial or commercial development by public authorities

393. Aid can be given to firms through the sale of sites for industrial or commercial development by public authorities at prices below market rates.(45) The Commission investigates many complaints about allegedly subsidized land sales. Although land normally accounts for only a small part of investment costs,(46) subsidized prices could upset the delicately balanced differentials in the level of regional incentives and so disrupt regional policy. The Commission is considering recommending Member States to follow a code of practice in this area. In the cases on which formal decisions were taken in 1993 it was concluded, on the basis of detailed valuations of the sites, that the final selling prices were within the range that could be considered as the market value. In the case of Sony's purchase of a large piece of land near the Potsdamer Platz in Berlin,(47) the price was found to be below an official valuation made later, but within the margin of error for land valuations after adjustments had been made for

(41) See Case 78/76 Steinike und Weinlig v Germany, paragraph 22.
(42) See point 528 of this Report.
(43) See point 551 of this Report.
(44) See point 453 of this Report.
(45) Twentieth Competition Report, point 239; Twenty-second Competition Report, point 345.
(46) Estimated at roughly 5% in the 1971 coordination principles for regional aid, OJ C 111, 4.11.1971.
(47) Twenty-first Competition Report, point 264.

the intervening rise in land prices, obligations to preserve a listed building and to allow part of the site to be used for cultural purposes, and possible further planning restrictions unknown at the time of sale. A decision was also taken on the sale of land at Friedberg, Hesse, to the pharmaceutical firm Fresenius.(48) After an official valuation, the company had agreed to pay ECU 280 000 more for the site than initially agreed. Although this still left the selling price some 10% below the valuation, the Commission took into account the fact that the land had been on the market for some time before a buyer was found. The price agreed was thus likely to be a market price, close to the price that would have resulted from an open tender.

<T4> Breach of other provisions of Community law: a factor that immediately disqualifies aid schemes from exemption

394. An investment aid scheme in the Basque country of Spain again showed that aid schemes are disqualified from exemption if they infringe other provisions of Community law, in particular those concerning freedom of establishment.(49) No Member State may discriminate in the terms of an aid scheme against the nationals of other Member States who are resident on its territory. This principle has been applied many times to schemes supporting the film industry.(50) In privatizations too, discriminatory terms are not permitted, and this was the reason why approval was initially withheld for the privatization programme in Portugal.(51)

<T5> (b) Procedural questions

<T6> Article 93(2) proceedings and the balance between the rights of competitors and the prospective aid recipient

395. In the Cook(52) and Matra(53) judgments, the Court of Justice confirmed the circumstances in which the Commission is obliged to open proceedings under Article 93(2) of the EC Treaty in order to allow interested third parties, generally competitors, to comment on aid proposals.(54) In

(48) OJ C 21, 25.1.1994.
(49) See point 473 of this Report.
(50) Twenty-second Competition Report, point 442.
(51) See point 416 of this Report.
(52) See point 553 of this Report.
(53) See point 553 of this Report.
(54) See also Case 84/82 Federal Republic of Germany v Commission ("plan Claes"), judgment of 20 March 1984.

the Cook case the Court held that, wherever the market situation in the sector concerned was relevant to the decision, the Commission must carry out a market analysis before deciding to authorize aid without Article 93(2) proceedings. In the circumstances of the case, faced with a clear complaint from a competitor that the aid would worsen overcapacity and harm its position, the Commission should have carried out this analysis via Article 93(2) proceedings because it did not have the data required to reach a firm conclusion (on the existence of overcapacity) by itself. In the Matra case, on the other hand, the Court found that the Commission had been right not to open proceedings against the proposed aid for a new Ford/Volkswagen minivan plant in Portugal because it was able to make a thorough market analysis without this procedure.

<T6> Charging of interest on aid that has to be recovered

396. In its decisions ordering the recovery of illegally paid aid that is found to be ineligible for exemption, the Commission now normally requires interest to be charged on the aid from the date it was granted. This practice, formally announced in the letter on penalties for unnotified aid sent to Member States in March 1991,(55) was confirmed in the new decision on the recovery of aid granted to British Aerospace in connection with its takeover of the Rover Group.(56) However, the Commission decided that the policy of charging interest from the date the aid was granted should not be applied retrospectively in cases decided before the Commission's letter of March 1991. In such cases, interest would be charged only as from the date the principal sum became recoverable under the decision. In the BAe/Rover case, interest was therefore charged from the date in August 1990 when the original decision, which had been annulled by the Court of Justice on procedural grounds, became enforceable.

<T6> Writing a reserve clause into aid legislation to avoid breaches of notification obligation

397. The obligation to notify aid proposals in advance to the Commission laid down in Article 93(3) of the EC Treaty imposes a moratorium on "putting into effect" the aid plans before the Commission has given its approval. "Putting into effect" is taken to mean not only the actual granting of aid to

(55) Twenty-first Competition Report, point 159 and Annex II.7.
(56) See point 515 of this Report.

the recipient but also the conferment of powers enabling the aid to be granted without further formality. In 1989 the Commission wrote to Member States clarifying this point. Nevertheless, Member States still sometimes fall foul of the notification requirement by notifying aid legislation which confers the unreserved power to give aid, albeit not yet exercised, with the result that the aid case is classed as non-notified. To avoid such technical and often unintended breaches, the Commission recommends Member States' authorities to write a reserve clause into legislation whereby the aid-granting body can make payments only after the Commission has cleared the aid.

Both central and regional government authorities are increasingly following this practice. For instance, in 1993 the Region of Emilia-Romagna in Italy enacted general legislation which not only established the principle that the grant of aid is conditional on the Commission's approval but also required the regulations governing all aid schemes to include a clause stating that the aid measures can be implemented only after publication of a notice in the Region's official gazette announcing the Commission's approval.

<T6> Reference interest rates used for calculating aid values

398. Determining the aid value of concessionary financing involves comparison with a reference interest rate and discounting of financial benefits receivable in the future at such a rate. Future tax payments must also be discounted when determining the net (i.e. after-tax) value of aid, including grants. In making these calculations, the Commission uses a standard reference interest rate for each Member State which is set once a year. The method for setting such reference rates was laid down in the annex to the 1979 coordination principles for regional aid,(57) although they are now used to calculate aid values in most spheres of aid control, including aid for SMEs,(58) environmental protection,(59) and the de minimis facility.(60) Under the 1979 method, the reference rates were based on the average level of a specified base rate over the previous year and could be changed in the course of the current year only if the current level of the base rate diverged from the reference rate by more than two percentage

(57) OJ C 31, 31.2.1979.
(58) OJ C 217, 19.8.1992; Twenty-second Competition Report, points 78 and 342.
(59) See point 384 of this Report.
(60) See point 431 of this Report.

points. Because of the rapid falls in interest rates in late 1992 and 1993 the Commission found that the reference rates for 1993 in some Member States were considerably above market interest rates, leading to an overestimation of the subsidy element of financing. It therefore decided to revise all countries' reference rates for the second half of the year, aligning them on the average level of the base rate over the three months March to May 1993. Secondly, it decided that, so as to enable the reference rates to follow interest-rate movements more closely in future, the reference rates for 1994 and later years would be based on the average of the base rate over the three months September to November of the previous year and would be revised in the course of the year whenever the current level of the base rate over a three-month period diverged from the reference rate by more than 15% of the reference rate.

<T3> §2. Public enterprises and privatization

<T4> Public enterprises

<T7> Communication on public enterprises

399. As expected,(61) the Court of Justice delivered its judgment(62) on France's appeal challenging the legal basis of the reporting requirement imposed on Member States by the Commission's 1991 communication on public undertakings.(63) The Commission based the requirement to supply annual reports disclosing financial transfers to major public enterprises in the manufacturing sector on Article 5 of Directive 80/723/EEC concerning the transparency of financial relations between Member States and their public undertakings.

The Court found in favour of the applicant and annulled the communication, holding that the general and systematic reporting obligation which the Commission wanted to impose went further than the obligation imposed by Article 5 of the 1980 Directive to supply certain financial date on particular public enterprises as and when necessary. The new reporting obligation would have constituted an amendment of the 1980 Directive and thus could not be imposed on the basis of a communication.

As a result of this judgment, the Commission decided to incorporate the reporting requirements that were previously contained in the 1991 communication in an amending directive.(64) The new directive imposes an obligation on Member States to provide the Commission with financial data in respect of their public undertakings operating in the manufacturing sector that have an annual turnover in excess of ECU 250 million.

As the rest of the 1991 communication merely described existing law and practice on the criteria for judging financial flows between public authorities and public enterprises, the Commission sent an amended version of the 1991 communication(65) to Member States at the same time as the directive.

(61) Twenty-second Competition Report, point 529.
(62) Case C-325/92 French Republic v Commission. See point 373 of this Report.
(63) Twenty-first Competition report, point 170.
(64) OJ L 254, 12.10.1993.
(65) OJ C 307, 13.11.1993.

<T7> France

<T8> Bull

400. The Commission decided[66] in October to initiate the Article 93(2) investigative procedure in respect of Bull, the French computer manufacturer. This decision, under which the Commission will investigate the French State's payment, without notification to the Commission, of an advance on a future capital injection amounting to ECU 380 million, follows the decision[67] taken in July 1992 which found that a previous capital injection of ECU 600 million into Bull represented aid.[68]

The new case was noteworthy in that neither of Bull's minority private-sector shareholders (NEC and IBM) took part in the advance, whereas they had participated in the 1992 capital injection. This had led the French authorities in 1992 to argue that the 1992 recapitalization passed the test of the 1984 communication on public authorities' holdings in company capital in which the participation of private shareholders in the capital increase meant that no aid was present. However, this argument had not been accepted by the Commission as the investment decision by the French State had been taken before the acquisition by NEC and IBM of Bull's shares and these investments were not economically significant.

Before the end of the year the Commission wrote to the French authorities about a further injection of ECU 1 300 million into Bull by the French State and France Télécom in December.

(66) OJ C 346, 24.12.1993.
(67) OJ C 244, 23.9.1992.
(68) Twenty-second Competition Report, point 425.

<T7> Italy

<T8> EFIM

401. The Commission adopted two partial final decisions(69) in connection with EFIM, the Italian state holding company which is in liquidation.(70) These decisions, taken in August and September, concerned the aid implications of the global guarantee for EFIM's debts arising under Article 2362 of the Italian Civil Code.

The Commission considered that the payment by the Italian State of the debts of EFIM group companies in liquidation constituted state aid because, following the IOR/Finalp decision,(71) a market-economy investor would not have accepted the greater risk associated with unlimited liability, resulting from Article 2362 of the Italian Civil Code in the case of full ownership, without a corresponding increase in the return. Furthermore, such an investor would have taken action to limit his financial exposure, by the sale of investments, restructuring, etc. once it was realized that debts were mounting with little likelihood of a reversal in the process.

Since EFIM did not provide its shareholder (the Italian State) with either an adequate or an increased return and since its management (ultimately the Italian State) did not take remedial action to contain the mounting debts, the repayment of the group's borrowings by the State could not be considered to be the behaviour of a market-economy investor and, therefore, constituted aid.

Although the money was to be given to companies in liquidation, it would still distort competition. This was because the companies in liquidation had borrowed from banks and had then lent these funds to the group's operating companies. Repayment of these external debts by the State would lead to cancellation of the operating companies' intra-group debts and thus to a benefit being granted to these companies, resulting in continued distortion of competition.

(69) OJ C 267, 2.10.1993 and OJ C 349, 29.12.1993.
(70) Twenty-second Competition Report, points 475 to 478.
(71) OJ L 183, 3.7.1992.

The Commission decided, however, that the repayment of debt on the basis of Article 2362 of the Italian Civil Code was compatible with the common market under Article 92(3)(c) following an agreement with the Italian Government in which it undertook:

- to freeze the debts, at 31 December 1993, of certain holding and subholding companies which are wholly owned by the Italian Treasury;

- to reduce these companies' debts to levels similar to those in comparable private-sector companies at the latest by 1996;

- to reduce the State's shareholding in these companies, at the end of the debt-reduction process, to a level that will inactivate the unlimited-liability aspects of Article 2362 of the Italian Civil Code;

- to submit this debt-reduction programme, together with the companies' financial and industrial restructuring plans, to a monitoring exercise to be undertaken in conjunction with the Commission.

The Commission considered that the financial and industrial restructuring plans would assist these Italian public undertakings in becoming competitive and that the eventual disposal of some of the Treasury's shareholdings in the companies, by cancelling the unlimited guarantee, would prevent hidden subsidies being provided to the companies in future via bank lending not warranted by their performance. The decision to authorize the repayment of creditors did not cover continuing aid to Alumix, whose case is still open.

<T4> Privatizations

402. The Commission continued to apply the principles it had developed over the years(72) to the privatization of state-owned companies. While in some countries the privatization process was nearing completion, in others it was only beginning or being resumed after interruption. The Commission wrote to countries in the latter category setting out its approach in these area. Thus it had contacts with Belgium, Italy and France in respect of their general plans for privatization and requested data from the Dutch and

(72) Twenty-first Competition Report, points 248 et seq.; Twenty-second Competition Report, points 464 et seq.

Spanish authorities about the sale of individual companies. A final decision was taken on the Portuguese privatization programme.

403. For the sake of transparency, it is worth reiterating the general principles which the Commission applies to privatizations and which have been built up over the years on the basis of scrutiny of individual cases.

As stated in Article 222 of the EC Treaty, Community law is neutral with respect to the private or public ownership of undertakings. Accordingly, aid that facilitates privatizations may not as such benefit from a derogation from the basic principle of incompatibility of state aid with the common market laid down in Article 92(1).

When the privatization is effected by the sale of shares on the stock exchange, it is generally assumed to be on market conditions and not to involve aid. Before flotation, debt may be written off or reduced without this giving rise to a presumption of aid as long as the proceeds of the flotation exceed the reduction in debt.

If the company is privatized not by stock-exchange flotation but by a trade sale, i.e. by sale of the company as a whole or in parts to other companies, the following conditions must be observed if it is to be assumed, without further examination, that no aid is involved:

- a competitive tender must be held that is open to all comers, transparent and not conditional on the performance of other acts such as the acquisition of assets other than those bid for or the continued operation of certain businesses;

- the company must be sold to the highest bidder; and

- bidders must be given enough time and information to carry out a proper valuation of the assets as the basis for their bid.

Privatizations by flotation or competitive tender on the above conditions need not be notified to the Commission in advance for examination of aid implications, but Member States may notify if they desire the added legal security of a formal clearance. In other cases, trade sales must be examined

for possible aid implications and must therefore be notified. This is so in particular in the following cases:

- sales after negotiation with a single prospective purchaser or a number of selected bidders;

- those preceded by the writing-off of debt by the State, other public enterprises or any public body;

- those preceded by the conversion of debt into equity or capital increases; and

- sales on conditions that are not customary in comparable transactions between private parties.

In all cases, there must be no discrimination based on the nationality of prospective buyers of the shares or assets concerned.

Any sales on terms that cannot be considered normal commercial terms must be preceded by a valuation carried out by independent consultants. Privatizations(73) in sensitive sectors (synthetic fibres, textiles, the motor industry, etc.) must all be notified to the Commission beforehand.

404. In 1993 decisions were taken on privatization programmes or individual cases in the following Member States.

<T7> Germany

405. The Commission continued its scrutiny of the operations of the Treuhandanstalt in the former German Democratic Republic. Under its decision of November 1992,(74) several transactions of the Treuhandanstalt were examined by the Commission under the accelerated procedure agreed with the German Government. The Commission also looked into new financing and privatization models developed by the Treuhand. A characteristic of the East German privatizations is the scale of the restructuring and the large

(73) See points 480 et seq. of this Report.
(74) Twenty-second Competition Report, points 19, 349 and 466. See also Twenty-first Competition Report, point 249.

injections of funds necessary for this purpose. The Commission was concerned to prevent the operations giving the resulting businesses any artificial advantages over their competitors, especially when the industry was suffering from overcapacity. Thus, some of the financial arrangements were modified to accommodate initial objections raised by the Commission. In several cases the Commission investigated allegations that funding granted in connection with the privatization was being used to undercut the selling prices of competitors. The main cases dealt with in 1993 are described below.

406. The Commission approved aid in connection with privatization of the fertilizer producer Stickstoff-Werke AG, Piesteritz (Saxony-Anhalt). The takeover of the majority of the company's assets by SKW-Stickstoffwerke Piesteritz GmbH, a subsidiary of the buyer (SKW-Trostberg AG), prepared the way for final privatization of the company. During the restructuring process, 95% of losses up to specified ceilings will be covered by the Treuhandanstalt. In total, guarantees and credits amounting to ECU 280 million are to be made available. Since the restructuring results in a reduction of the company's production capacity and involves a withdrawal from sectors with a general problem of overcapacity while restoring its profitability, the Commission decided that the aid was compatible with the common market.

407. The Commission authorized two batches of aid to Buna AG (Saxony-Anhalt). Buna is the second-largest chemical producer in the new Länder with factories located in the East German chemicals centre of Halle-Merseburg. The first aid consisted of a guarantee for investments of ECU 228 million and liquidity loans of ECU 54 million. Later, the Commission approved additional loans of ECU 115 million. In view of the ongoing restructuring of Buna, which is reducing the company's production capacity in order to restore profitability and improve its chances of being privatized, the Commission considered the aid compatible with the common market.

408. The Commission also approved aid from the Treuhandanstalt and the Land of Saxony-Anhalt for the Leuna refinery. A privatization contract concluded between the Treuhandanstalt and the TED syndicate led by Elf provides for the combined acquisition of assets of the existing refinery of Leuna Werke AG and the shares of the distributing company Minol AG,(75) the construction

(75) Twenty-second Competition Report, point 264.

of a new refinery and the operation of the old refinery by an Elf subsidiary. The Commission did not object to the Treuhand's covering the losses of up to ECU 380 million that the old refinery will incur until the new refinery is operational. A monitoring system will ensure that neither Elf nor its affiliates will benefit from this aid. The Commission also approved investment aid of ECU 500 million by the Land of Saxony-Anhalt for the construction of the new refinery.

409. Aid granted by the Treuhandanstalt to Sächsische Olefinwerke, Böhlen (Saxony), to accompany its restructuring was also authorized. The company produces mainly ethylene, propylene and other monomers and was to receive aid of ECU 115 million in guarantees and ECU 127 million in loans. In view of the reduction in capacity and because the restructuring will enhance the privatization efforts, the Commission decided that the aid was compatible with the common market.

410. The Commission opened Article 93(2) proceedings against alleged misuse of aid from the Treuhandanstalt to Leuna AG for its production and marketing of caprolactam, a raw material for nylon and other man-made fibres.(76)

Following complaints submitted by other manufacturers, the Commission investigated the prices at which Leuna sells caprolactam in the Community and the financing of this company by the Treuhandanstalt. It concluded, on the basis of the available information, that Leuna was selling caprolactam at prices below its production cost and was continuing production of a product that had no prospects of profitability, given the situation of general overcapacity in the Community.

411. The Commission closed, however, the Article 93(2) procedure it had opened in 1992(77) against alleged misuse of aid granted by the Treuhandanstalt to Buna for its production and marketing of butyl acetate (butac), a product used in the paint industry. It concluded that Treuhandanstalt aid should not be used to continue production of a product that had no reasonable prospects of profitability. With even the most efficient producers of butac making losses on an oversupplied market, continued loss-financing of Buna for this product would indeed be a misuse of the aid that the Treuhandanstalt was allowed to provide to the company.

(76) OJ C 220, 14.8.1993.
(77) Twenty-second Competition Report, point 416.

However, as Buna had decided in July to cease production of butac, the Commission closed the procedure.(78)

412. The Commission allowed a guarantee of ECU 114 million and a loan of ECU 46 million granted by the Treuhandanstalt to the process plant and machinery builder SKET to be extended until the end of June 1993, when a restructuring plan detailing the required reduction in workforce and capacity was to be concluded.

It subsequently allowed the guarantee and the loan to be further extended until the end of May 1994 and additional loans totalling ECU 72 million to be provided.

The aid was to facilitate the restructuring of SKET by ending unprofitable activities and transferring the remaining activities to six independent subsidiaries. The restructuring is a prerequisite for the privatization of these enterprises.

413. The Commission closed the Article 93(2) procedure opened in 1991(79) regarding aid granted by the Treuhandanstalt and the Land of Thuringia for the privatization and restructuring of Carl Zeiss Jena, Jenoptik and Jenaer Glaswerk. The German Government had modified the aid package to eliminate the possibility of open-ended aid. The Commission concluded that the remaining ECU 960 million aid was justified.(80)

414. Aid of up to ECU 794 million from the Treuhand was authorized in connection with the partial privatization of the former East German potash mining company, Mitteldeutsche Kali AG. Following an open tender, Mitteldeutsche Kali is being taken over by the West German producer Kali und Salz AG, a subsidiary of BASF. Kali und Salz will own 51% of the shares of the merged company, Mitteldeutsche Kali GmbH, and Treuhand the other 49%. The merger with Kali und Salz was investigated under the Merger Control Regulation and authorized.(81) The aid consisting of an ECU 539 million capital injection, non-repayment of ECU 160 million of bank loans, an amount of up to ECU 70 million to cover future losses and an amount of

(78) OJ C 16, 19.1.1994.
(79) Twenty-first Competition Report, point 250.
(80) OJ C 97, 6.4.1993.
(81) See point 297 of this Report.

ECU 24 million for redundancy costs is being granted for restructuring that will reduce production capacity by two thirds and the workforce to only one tenth (3 000) of its size in 1989. Kali und Salz AG is likewise greatly reducing its production capacity so that in 1994 the combined capacity of the merged company will be only 56% of that of its two original parents (3.1 million tonnes in 1994 against 5.5 million tonnes in 1989).

415. The Commission approved aid of ECU 130 million in connection with the privatization of Neptun Industry Rostock GmbH. The former shipyard had already ceased building new ships and, under the terms of the sale, was to discontinue its ship-repair activities and to retain only various engineering businesses. The aid was for restructuring and investment and included ECU 48 million of regional aid.

<T7> Portugal

416. In July the Commission decided to terminate the Article 93(2) proceedings(82) which it had initiated in respect of a discriminatory clause based on the nationality of potential acquirers of shares in enterprises being privatized under Law 11/90 of 5 April 1990 (which allows restrictions to be placed on the total number of shares in the enterprise undergoing privatization that can be purchased by foreign companies),(83) after establishing that the clause was not linked to the granting of aid.

The Commission therefore decided to approve the privatization programme, under Article 92 of the Treaty, subject to the following conditions:

- prior notification, in accordance with Article 93(3) of the EC Treaty, of privatization cases in which the Portuguese authorities propose to use the restricted or direct-sale procedure;

(82) OJ C 253, 17.9.1993.
(83) OJ C 26, 29.1.1993; Twenty-second Competition Report, point 465.

- communication to the Commission, by 30 June of the following year, of an annual report on the state of progress of the privatization programme.

The Commission accordingly pursued separately the Article 169 proceedings initiated against the nationality clause.

<T3> §3. Horizontal aid

<T4> Investment aid

<T5> Review of existing schemes under Article 93(1) of the EC Treaty

417. In 1993 the Commission all but completed the exercise launched in 1990[1] to eliminate general investment aid schemes, i.e. schemes offering aid for investment to companies of any size, including those located outside assisted areas. As noted in the guidelines on aid for small and medium-sized enterprises,[2] such schemes run counter both to economic and social cohesion and to SME policy.

418. In Belgium, following the Commission's decision on the repeal of the 1959 Economic Expansion Law, the Flemish Region adopted the necessary regulations to implement the decision.

<T4> Aid for environmental protection and energy conservation

419. The environmental aid framework was extended for a further six months until the end of 1993 when the new guidelines were adopted by the Commission.[3] In the meantime a considerable number of environmental aid schemes or awards were authorized, many of them for purposes not catered for by the previous framework, so as to encourage voluntary action to reduce pollution in excess of any legal requirements.

420. In February the Commission approved, pursuant to Article 92(3)(c), tax relief in Denmark for companies using a minimum of 50% recycled material as raw material in their production. The tax on waste delivered by companies to a disposal facility had been increased. The relief was justified by the fact that companies using recycled materials were left with considerably larger quantities of waste than companies using primary raw materials. The tax relief would thus, generally speaking, place the companies receiving it on an equal footing with other companies with regard to the waste tax and

(1) Twentieth Competition Report, points 171 and 247; Twenty-first Competition Report, points 240 and 241; Twenty-second competition Report, point 454.
(2) OJ C 213, 19.8.1992.
(3) See points 166 and 384 of this Report.

would promote the use of recycled material. Most of the firms benefiting would be SMEs.

421. The Commission also approved an amended scheme in Denmark to pay firms engaged in the collection of waste oils. However, it considered in this case that the payments were straightforward remuneration for services, and not aid. The scheme was part of the arrangements introduced to implement the Council Directive on the disposal of waste oils.(4)

422. In September(5) the Commission approved an aid scheme introduced in Belgium by the Flemish regional authorities for investment which reduced pollution, conserved energy or raw materials, or improved the environmental acceptability or safety of products. To qualify for aid, the investment had to take the firm beyond legal requirements for pollution control or to achieve an exceptional performance in the conservation of energy or raw materials, product safety, etc. Aid equal to 20% gross of the investment costs could be granted from an annual budget of around ECU 18 million.

423. In February the Commission approved proposed aid for an investment programme being carried out by two Belgian companies, Solvic & Cie CNC and Solvay Interox S.A., with a view to restricting environmental damage resulting from the companies' production methods and products (PVC, hydrogen peroxide and sodium perborate). The new processes developed by the two companies are innovatory and allow existing statutory requirements to be exceeded. They will not affect the production capacity of the factories.

The aid is in the form of an ECU 5 million grant for Solvic & Cie CNC and an ECU 3.6 million grant plus a five-year exemption from property tax for Solvay Interox S.A. The net grant equivalent of the aid was below 10% in both cases.

424. In September the Commission approved aid for Phenolchemie, a chemicals company situated at Doel in East Flanders.

(4) OJ L .... , ...
(5) See point 432 of this Report.

The company was planning to install a gas turbine with a generator and a steam-recovery boiler, for combined heat and power generation. The project will substantially reduce CO_2 emissions.

Of the total cost of the investment project (ECU 31 million), only the part directly relating to energy conservation and environmental protection (ECU 21 million) was taken into account by the Flemish regional authorities in granting the firm a subsidy of less than ECU 3 million.

The project went beyond the statutory constraints imposed by the public authorities as regards elimination of pollution or nuisances and did not entail any increase in the recipient company's production capacity.

425. The Commission decided to initiate Article 93(2) proceedings against two decrees by the Walloon Regional Executive on renewable energy sources and the environment. The decrees presented a number of problems relating both to their legal basis and to the fact that both allowed aid to be granted to equipment manufacturers and not just to firms installing new equipment designed to conserve energy or reduce pollution.

426. The Commission opened Article 93(2) proceedings against the proposal by the province of Trento in Italy to grant aid to Cartiere del Garda, a manufacturer of coated printing paper located at Riva del Garda.(6) The aid of ECU 100 million would compensate the company for the additional investment cost it would face should it decide for environmental reasons to expand not at Riva, but at Mori 20km away.

The Commission took a final decision prohibiting the authorities from granting the aid.(7) It considered that the aid would not respect the polluter-pays principle laid down in Article 130r(2) of the EC Treaty, that it would run counter to the objective of cohesion and that it would adversely affect trading conditions to an extent contrary to the common interest, given the existing overcapacity in this sector.

(6) OJ C 75, 17.3.1993.
(7) OJ L 273, 5.11.1993.

<T4> Export aid

427. Intensive work continued throughout the year on a draft communication applying Articles 92 and 93 of the EC Treaty to short-term export credit insurance.(8) New discussions with the experts of Member States at a multilateral meeting in June and at several meetings of the Council Export Credits Group clarified the remaining issues, in particular the possibility of governments' providing reinsurance cover to their export-credit insurers. The communication would require Member States to eliminate completely any remaining subsidies for a limited range of business (short-term commercial, or "marketable", risks) which is now mostly done by private insurers or by official export-credit agencies acting on their own account. The Commission hopes to issue the communication in 1994.

428. The Commission continued to process schemes offering guarantees or other incentives to reduce the risks of investment in central or eastern European countries. In March it approved a scheme in the Netherlands whereby the State will guarantee subordinated loans extended by the Nationale Investeringsbank to enterprises in eastern Europe in which Dutch companies have at least a 40% stake. The total financial commitment of the Dutch Government under the scheme is some ECU 68 million.

In June the Commission approved Italian Law No 100 of 1990 comprising measures to promote participation by firms in joint ventures in eastern Europe. Subsidized loans may be granted, through the public-sector company Simest, to firms acquiring holdings in such joint ventures. The budget for the scheme is some ECU 135 million.

429. Aid to improve the export performance of small and medium-sized firms in particular may be authorized, provided that it is limited to training, consultancy help, attendance at trade fairs and similar activites and does not subsidize actual exporting activity. In such cases the support does not need to be limited to non-EC markets. Several aid schemes providing for such support were approved in 1993, including the UK wool industry levy scheme(9) and a scheme in Northern Ireland.

(8) Twenty-first Competition Report, point 166; Twenty-second Competition Report, point 339; see point 382 of this Report.

(9) See point 528 of this Report.

<T4> Aid to small and medium-sized enterprises

430. As expected,(10) the issue of the guidelines for aid to SMEs and the associated procedural improvements eased considerably the work of approving aid schemes for the small-firm sector.(11) Member States generally speaking adapted their new or renotified schemes to the definitions and aid intensities of the guidelines of their own accord or after a reminder from the Commission. Far more schemes than before qualified for the accelerated clearance procedure, which was widened last year.(12) In many cases the Commission was also able to tell Member States which had notified a scheme offering aid below the de minimis limit that formal clearance was not required. Many of the smaller schemes of this nature supported craft businesses or cooperatives in Spain and Italy. Training and consultancy help ("soft aid") figured prominently in the activities supported by these schemes, many of which are co-financed by the Community's Structural Funds. Some of the larger SME schemes approved in 1993 are discussed below.

431. In March the Directorate-General for Competition sent the Member States a guidance note on the use of the de minimis facility.(13) This explained which categories of aid could be granted up to the de minimis limit without notification, clarified the rules for cumulation of de minimis aid with aid under authorized schemes in the same three-year period, explained how aid in forms other than grants could be converted into cash grant equivalent, and suggested ways in which the Member States could monitor the proper use of the facility.

432. The Commission approved an aid scheme for SMEs in Belgium that was introduced under a decree of the Flemish regional authorities and will also offer aid for environmental protection and energy conservation.(14) Aid will be available for investment and for consultancy and training. Both in terms of definition and in terms of aid intensities, the scheme conformed to the guidelines. The Flemish Region's guarantee can be granted in exceptional circumstances provided that the conditions stipulated by the Commission in this respect are complied with, namely payment for the guarantee and use

(10) Twenty-second Competition Report, point 467.
(11) See point 159 of this Report.
(12) Twenty-second Competition Report, point 348.
(13) See Annex II.B of this Report.
(14) See point 422 of this Report.

of it only after all other means of recovery from the recipient and the other guarantors have been exhausted.

433. A scheme was approved in Denmark for developing quality management in SMEs in the manufacturing and service sectors through consultancy and training. The projects eligible under the scheme are aimed mainly at improving management and developing human resources in accordance with the so-called "total quality concept", and not at the development of specific products or production processes. The scheme, with a maximum aid intensity of 50%, has a budget for 1993-95 of ECU 32 million.

434. The Commission authorized an extension of the special accelerated depreciation allowances scheme for SMEs in Germany. The existing accelerated depreciation allowances allow very small businesses to deduct 20% of investment costs more than the standard rate of depreciation from taxable profits in the first year. Under the extended scheme the same businesses can form a tax-free reserve up to two years before the investment in respect of up to 45% of anticipated investment costs. This two-year tax-free loan to the firm will be worth between 2% and 3% net of the investment and, when added to the ordinary accelerated depreciation, will remain within the aid limits for SMEs under the guidelines. The extended scheme is to be introduced in 1995. It will release an extra ECU 450 million for investment by small firms.

435. The Commission also approved an extension of the equity loan scheme which provides long-term subordinated loans to small and medium-sized firms in the new eastern Länder of Germany. Introduced after unification, the scheme was originally intended to expire at the end of 1993 but will now continue until the end of 1995. The new scheme now offers loans when a new partner puts capital into an existing business, and not only for start-ups and expansion. Before approving the extended scheme, the Commission satisfied itself that the aid was principally for investment and not for working capital or rescues and that the maximum aid levels for SMEs in the region were observed. Around ECU 520 million a year is spent on the scheme.

436. The Commission approved a number of smaller SME schemes in the new eastern German Länder, including an investment aid scheme in Thuringia for start-ups or for SMEs faced with difficulties in adapting to new market conditions. Under this scheme, only firms with good prospects of viability evidenced by a sound business plan were eligible. The maximum aid intensity

allowed will be the highest regional aid authorized by the Commission for Thuringia, currently 35%, plus the 15% supplement for SMEs allowed by the SME aid guidelines in assisted areas qualifying under Article 92(3)(a) of the EC Treaty. The annual budget for the scheme will be ECU 7 million. A scheme was also approved that will help smaller manufacturing businesses in Thuringia through acute financial difficulties due mainly to the burden of debt with which they were privatized and the delayed recovery of their markets. The support is limited to firms with sound prospects located in the parts of the Land with the highest unemployment rates and is intended largely for rescheduling old debt with loans at slightly concessionary rates. Funds of ECU 17 million for 1993 and ECU 52 million for 1994-96 have been allocated to the scheme.

437. The French tax credit scheme for capital increases, approved last year for 1992 only,(15) was again authorized for 1993. Although the tax credit was available to companies larger than SMEs according to the Community definition, the figures for 1992 showed that, in practice, the scheme had been used mainly by very small businesses. This, together with the low amount of aid per firm and the expiry of the scheme at the end of 1993, persuaded the Commission to overlook the failure to adapt the scheme to the SME aid guidelines sooner.

438. The position was similar in the case of Italian Law 317 of 5 October 1991. In May the Commission cleared the package of SME aid measures provided for by this Law, after the Italian authorities had reduced the level of investment aid outside assisted areas to the maximum amounts allowed by the SME aid guidelines.(16) An amending decree was issued in July containing the new investment aid rates and other changes and adapting the definition of SMEs to that used in the guidelines. The Commission did not ask for recovery of any of the aid which had been paid unlawfully after its original one-year authorization ran out at the end of April 1992, because the detailed reports supplied by the Italian authorities had shown that, in practice, the aid awards had not exceeded the guideline limits and were very low in amount, the aid being widely spread throughout industry.

(15) Twenty-second Competition Report, point 469.
(16) Twenty-second Competition Report, point 471.

<T4> Employment aid

439. This year, with the economic recession creating increasingly higher levels of unemployment, the Commission paid particular attention to the financial incentives introduced by Member States to promote employment for the jobless, especially those who find it more difficult to enter the employment market, such as young people and the long-term unemployed. Where such incentives are general and automatic, they may fall outside the scope of Article 92(1).

However, while its approach to such measures is generally favourable, the Commission seeks to ensure that, when implemented, they are genuine job-creating instruments and not merely a means of subsidizing labour costs. If the latter were the case, the aid would be operating aid, the effect of which might be to keep in businesss firms faced with overcapacity, with the result that the same unemployment problem would be passed on to other Member States, boosting unemployment there.

440. The Commission authorized the implementation by the Walloon regional authorities in Belgium of a draft decree providing for the granting of aid to small and medium-sized businesses that recruit between one and five unemployed persons to work on "development projects", i.e. studies and research in certain specified areas such as the development of new products, environmental protection, energy conservation and the promotion of alternative energy sources, and compliance with stricter quality standards than those required by law. The aid will be made available in the form of degressive wage subsidies and may not exceed 50% of the cost of the project, unless the firm is a small enterprise as defined in the Community guidelines on aid for SMEs and is recruiting from among certain categories of unemployed persons who are particularly difficult to integrate or reintegrate into the labour market.

Such aid, which is available only for study or research programmes that do not entail any production activity, falls within the limits specified in the guidelines on aid for SMEs. The exception allowed in the case of recruitment by small businesses of unemployed persons facing particular employment difficulties is justified by the serious concern to find work for this category of job-seekers and by the size of the recipient firms.

441. The Commission approved three major job-creation schemes in Denmark which are designed to take up to 100 000 persons a year off the unemployment register over the period 1994-96. Two of the schemes had been approved in February and April in a slightly different form and were renotified for approval in December. The schemes will cost around ECU 2 billion a year. Two offer wage subsidies to firms and institutions taking on unemployed people to work for them, the other offers subsidies to unemployed persons starting up their own business.

442. Under the largest scheme, any firm taking on an unemployed person (in practice, those unemployed for over a year) can claim a grant of ECU 5.5 per hour, or around 42% of average wages in Denmark. The maximum subsidized period is 12 months, making the maximum grant around ECU 9 300 per person. There must be a net increase in employment in the company and, if the wages subsidies are provided for over six months, the worker must be kept on for a certain period after the subsidy ends or given training. The second scheme is similar except that it is directed at groups of unemployed experiencing particular difficulties in finding a permanent job such as immigrants, and the workers will tend to be employed by institutions providing public services. Under this scheme, the subsidy can rise to around 70% of average wages and can last for more than 12 months. The same conditions as to continuation of employment after the ending of the subsidy or provision of training apply. Finally, the third scheme offers grants of 50% of the top rate of unemployment benefit for a maximum period of two-and-a-half years to unemployed persons setting up their own business. On the basis of the current top rate of unemployment benefit, the maximum grant can reach some ECU 19 000 per person.

The Commission considered that all the schemes fell within Article 92(1) of the EC Treaty because the authorities exercised some discretion, especially with regard to the period and the level of the subsidies granted as well as to the terms on which the people taken on were employed under the first two schemes. In February it regarded the version of the first scheme notified at the time as a "general measure" not falling within Article 92(1) since the conditions, particularly with regard to the terms of employment, left little or no room for discretion and hence ruled out the possibility of the schemes being applied selectively. In the later decisions, the schemes with their discretionary aid element were in any event found to be in line with Community policy on employment creation and hence to qualify for exemption.

443. In June the Commission decided to terminate the proceedings it had initiated in respect of the draft Italian law providing for aid of a very high intensity to any firm managed or controlled by a majority of women and to authorize its implementation.(17) The Italian authorities have limited the scope of the scheme in such a way that the aid will be available only to small enterprises as defined in the guidelines on state aid for SMEs and will be restricted either to the maximum intensities laid down in the guidelines or to amounts that may be deemed to be aid of minor importance (over a three-year period, per firm, ECU 50 000 for investment aid and ECU 50 000 for other objectives, i.e. a maximum of ECU 100 000 in total).

The scheme as defined is thus in line with two objectives which the Commission generally supports, namely the promotion of employment and equality of opportunity for women and the development of SMEs.

<T4> Aid for rescuing and restructuring firms in difficulty

444. The recession brought forth many new cases of government-supported rescues and restructuring of firms that were in financial difficulty. In dealing with them and in deciding cases that had arisen in previous years, the Commission applied the well-established principles governing such aid, which is designed to prevent competitors being unduly harmed by the operation.(18) The Commission distinguishes between rescues, which are a holding operation while the future of the firm in difficulty - closure or restructuring - is being decided, and restructuring. The means which governments may use for rescues are short-term bridging loans at market rates or loan guarantees. The bridging finance should normally not be provided for more than six months, although the Commission recognizes that the period may be extended at the Member State's request until an investigation under the Article 93(2) procedure has been completed.(19) Restructuring aid must restore the viability of the company through a sound restructuring plan whose implementation is closely monitored but, besides this sine qua non, the restructuring must make an additional contribution to reducing overcapacity in the industry if the industry is in this situation, as it typically is. Otherwise, competitors which are having to finance restructuring from their

(17) Twenty-second Competition Report, point 474.
(18) Eighth Competition Report, points 227 and 228.
(19) See point 527 of this Report.

own resources will suffer harm. In cases where there is no overcapacity in the industry, restructuring aid should still be conditional on some contribution to the common interest, although this need not take the form of extra capacity cuts or reduction of market share.

Many of the cases dealt with in 1993 concerned the steel and motor industries, other sensitive sectors and privatizations, especially in eastern Germany. These are reported in the relevant section. The following cases are some of the other cases.

445. In western Germany, the Commission authorized aid to the machine tool manufacturer Berstorff Machinenbau GmbH, Hannover, in the form of a credit guarantee provided by the Lower Saxony authorities under an approved scheme. Berstorff manufactures machine tools used in the production of rubber and synthetic products. The guarantee covered 80% of an ECU 8 million loan extended to the company on market conditions.

The firm was carrying out a restructuring plan drawn up by an independent consultant with a view to restoring its viability in the near future. Its difficulties were due to the loss of markets in eastern and central Europe.

446. The Commission authorized the Bavarian Land Government to guarantee until the end of 1993 an ECU 9 million loan to a pulp mill, Bayerische Zellstoff GmbH, Kelheim. The company had gone bankrupt as a result of the loss of production due to teething troubles with a new process which avoids the use of sulphur or chorine and is therefore less harmful to the environment.

447. The Bavarian authorities were also authorized to grant an interest subsidy on an ECU 15.5 million loan extended by private banks to two machine tool manufacturers, Maho AG and Deckel AG, which were restructuring and merging their activities. The interest subsidy, worth ECU 1.3 million, was the only public funding for the rescue and restructuring operation, which involved the workforces of the two companies, suppliers and private bank creditors. Private banks were writing off ECU 52 million of debt, while ECU 15.5 million was coming from sales of land and a similar amount in new equity from the shareholders.

448. The Commission closed the Article 93(2) proceedings against aid offered by the Basque Government for restructuring Esmaltaciones San Ignacio S.A., a producer of enamelled steel cookware, gas bottles and industrial boilers, located at Vitoria (Álava). The Commission had initiated the procedure in July 1992.(20)

The aid consisted of a seven-year guarantee for a loan of ECU 7 million at market interest rates. The guaranteed credit was to be used by the company to finance part of a restructuring programme which involves a major reduction in its labour force.

In its final decision, the Commission noted the fact that the revised restructuring plan presented by the Spanish authorities appeared capable of restoring the company's long-term viability. The restructuring involved closing down loss-making lines and a reduction in its remaining capacity by about 13 %. The Commission also took into consideration the very low aid intensity of a guarantee on a loan at market interest rates when the loan is fully secured by assets and the beneficiary has a sound restructuring programme.

449. The Commission also terminated the Article 93(2) proceedings started in July 1990(21) in respect of aid granted by the Spanish authorities in connection with the sale of certain selected assets of the engineering group Cenemesa to Asea Brown Boveri (ABB).

Although not the owner, the Spanish State had been actively involved in seeking a purchaser for the group. In August 1989 it accepted an offer from ABB to acquire the group. Under the terms of the agreement, the State promised that the group's public-sector creditors would waive their claims to some ECU 230 million of debts and unilaterally relinquish the mortgages held on assets and also agreed to cover the costs of an early retirement scheme for some 1 700 employees.

The Commission considered that, in waiving debts and agreeing to finance redundancies, the Spanish State had not acted like a private creditor but as a provider of aid. It took the view that the agreement between ABB and the Spanish State was not part of a normal liquidation procedure and that ABB had

(20) Twenty-second Competition Report, point 423.
(21) Twentieth Competition Report, point 275.

benefited from being able to acquire the assets of the Cenemesa group as a going concern without having to take over the debts normally associated with such a purchase.

However, ABB had supplied information endorsed by the Spanish authorities and showing that the former industrial activities of the group, now run by ABB, would be restructured according to a plan which may be considered satisfactory from the Community point of view. The restructuring programme has reduced production capacity in all business lines by an average of more than 50%. This action has removed excess capacity in the Spanish market and was likely to make ABB's Spanish operation profitable and viable. ABB has contributed substantial funds and know-how to put the assets back on a viable footing.

Lastly, the Commission took into consideration the fact that the restructuring plan would secure jobs in areas with specific problems of underdevelopment and industrial decline.

450. The Commission closed the Article 93(2) proceedings(22) it had opened in July 1992(23) in respect of a proposal by the Basque authorities to provide aid in the form of an ECU 33 million state guarantee for the restructuring of La Papelera Española, a group of companies producing and processing pulp and paper.

The Spanish Government had submitted a revised restructuring plan drawn up by the Basque authorities and the beneficiary group. The plan was likely to restore the group's profitability by 1995 by increasing productivity and quality and by reducing capacity. The Commission also took into account the very low aid intensity of the guarantee.

451. The Commission extended the investigation begun in March 1992 and first extended in September 1992(24) to cover possible additional aid to the mechanical engineering enterprise CMF Sud SpA and its successor company CMF SpA. The old aid and the new are being vetted by the Commission in the light of the group's restructuring programme, which is under discussion with the Italian authorities.

(22) OJ C 123, 5.5.1993.
(23) Twenty-second Competition Report, point 422.
(24) Twenty-second Competition Report, point 426.

Following the extension of the proceedings in September 1992, the Italian authorities informed the Commission of a reorganization of CMF Sud SpA, whereby the holding company IRITECNA would set up a new company, CMF SpA, to which CFM Sud SpA would sell its core business for a token sum initially set at ECU 100 000.

Afterwards, CMF Sud SpA would go into voluntary liquidation and IRITECNA would meet all its liabilities during liquidation.

The Commission considered that the provision of capital to the new company, the transfer to it of the old company's core business for a token sum, and the guaranteeing of all the old company's debts during liquidation involved aid.

452. The Commission opened Article 93(2) proceedings against the financing made available to Avenir Graphique, a printing house at Torcy (Marne la Vallée), by three state-owned banks in 1991. The banks later waived most of their claims when Avenir Graphique was taken over by another printing group.

453. The Commission took a final decision(25) on a scheme introduced by the Lazio regional authorities in Italy to assist the ceramics sector. Article 93(2) proceedings had been opened in December 1992(26) against the ECU 3.5 million operating and investment aid to manufacturers of sanitary ware and crockery.

The Commission decided that aid exceeding the limits it had set out in its guidelines on state aid to small and medium-sized enterprises(27) was incompatible with the common market and therefore could not be granted but that aid falling within those limits could be allowed.

(25) OJ L 238, 23.9.1993.
(26) Twenty-second Competition Report, point 429.
(27) Twenty-second Competition Report, point 342.

<T3> §4. Aid for research and development

<T4> General policy developments

454. The Commission considers that the Community framework for state aid for research and development,(28) as originally published, continues to be an appropriate instrument for the monitoring of R&D aid.

455. At the multilateral meeting held in June, Commission staff discussed with experts from the Member States the arrangements regarding aid provided in the form of an advance that is repayable if the research is successful. Most Member States have aid schemes of this type.

In its administrative practice, the Commission allows such advances to cover initially 40% of the costs of the applied research or development projects. Where these are successful, the aid is repaid so that the actual intensity of the aid does not exceed a gross grant equivalent of 25%.

The conclusion drawn from the discussions was that there were not sufficient arguments for the Commission to change its policy on this type of aid for the time being.

456. All the aid authorized in 1993 was cleared under the exemption provided for in Article 92(3)(c), except for two EUREKA projects (HDTV EU 95 and JESSI EU 127), which were cleared under Article 92(3)(b). Some of the more important decisions are described below.

<T7> Belgium

457. In connection with the federalization of Belgium, the Commission authorized in March the R&D aid scheme for the Walloon Region, which replaces two national schemes ("IRSIA industrie" and "Prototypes") already approved by the Commission. The budget for 1993 is ECU 73 million and will be used to finance all stages of research carried out by public institutions and by firms.

(28) OJ C 83, 11.4.1986.

The aid for basic research takes the form of a 50% subsidy (60% in the case of SMEs). The aid for applied research and development is in the form of a 40% advance (50% for SMEs) that will be repaid in the event of success so that the actual intensity will be 25% (35% in the case of SMEs). No repayment will be required if the research is not successful.

<T7> Germany

458. The Commission authorized state aid for research relating to the "VERBMOBIL" project. The aid, in the form of a grant, is intended for universities, research institutes and firms working on a project designed to allow sponanteous dialogue to be captured by machine and translated automatically.

The project leader is the German centre for artificial intelligence. The aid will amount to ECU 30 million over four years, with a gross intensity of 47%. Since the project relates to basic research and since the criteria regarding additionality and the common interest are complied with, the Commission applied the exemption provided for in Article 92(3)(c) of the EC Treaty.

459. The Commission also gave the go-ahead for the "Arbeit und Technik" research programme. This scheme, which has a budget of some ECU 163 million for the period 1993-96, will finance fundamental research and basic industrial research into the protection of health at the workplace by reducing and providing safeguards against dangerous loads, and into the adaptation of work and technology to the individual. Two thirds of the budget will go to scientific establishments and one third to firms, 50% of whose costs may be financed (60% in the new Länder).

460. The Commission did not raise any objections to a collaborative research programme for SMEs. The scheme, which covers the period from 1993 to 2000, has a total budget of ECU 150 million. The objectives of the programme are to give SMEs access to research carried out at both national and international level and to help research workers move from industry to public research centres and vice versa. The level of intensity allowed is 35% (40% in the new Länder) of the cost of the project, with a maximum ceiling of ECU 155 000 (ECU 210 000) per firm for national collaboration and ECU 260 000 (ECU 310 000) for international cooperation. As regards the transfer of research workers, the maximum intensity will be 40% (50%) of gross salary.

461. The Commission approved an extension of the major transport research programme "Verkehrsforschung" for 1993, which had originally been approved in 1989 and 1990.(29) The bulk of the budget of ECU 82 million was for further work on the "Transrapid" magnetic levitation train system, with smaller amounts for basic research on other aspects of high-speed train operation, urban public transport, goods transport and "transport chains".

462. Also approved were two major research programmes in laser technology and in "microsystems", i.e. systems that are able to sense, process and react to stimuli and have potential applications in health care, environmental protection and transport. The laser technology programme has a budget of ECU 84 million until 1997 and the microsystems technology programme ECU 130 million for 1994-99. In line with the R&D aid framework and established practice, the normal aid rates can be increased by 10 percentage points for SMEs and for firms in the new Länder (15 percentage points for SMEs in the new Länder).

<T7> France

463. In January, February and April the Commission approved the annual refinancing of four French schemes covering research, development and innovation.

The schemes are, firstly, the Atout-Puma programme, which is mainly intended for SMEs and, through grants and repayable advances, funds R&D projects on the integration of advanced materials into industrial technologies. The second is the Research and Technology Fund (FRT) scheme, which assists firms in their fundamental research or basic industrial research projects with grants that may cover up to 50% of project costs.

The third scheme, "Major innovative projects", is intended for industrial firms working on very specific technological developments such as intelligent and flexible machines, clean and energy-efficient vehicles, advanced high-speed trains and major innovatory industrial processes.

(29) Nineteenth Competition Report, point 145; Twentieth Competition Report, point 197.

The last programme relates to Anvar ("Agence National pour la Valorisation de la Recherche"), which covers all stages of R&D, focusing on applied research. Aid to firms is provided in the form of advances which are repayable where the projects are successful (85% of the budget) and direct grants (feasibility studies). The total budget for the four schemes approved was ECU 536 million in 1993.

<T7> *United Kingdom*

464. In May the Commission approved state aid for research by Shorts PLC, Belfast (Northern Ireland), for the design and development of a new executive jet known as the Learjet 45. The aid is provided in the form of an advance that is repayable if the project is successful, this being defined as the sale of 101 planes. The advance covers 25% of the costs borne by the firm.

Although the project is not covered by the July 1992 agreement between the European Community and the United States on trade in large-capacity civil aircraft,(30) the terms of the aid are in line with the provisions of the agreement.

(30) Twenty-second Competition Report, point 356.

<T3>

§5. Regional aid

<T4>

General developments

465. In monitoring national regional aid, the Commission continued to pursue the objective of increasing economic and social cohesion between the more developed and the less developed parts of the Union so as to reinforce the effect of the Structural Funds.(31) Cohesion requires the authorization of higher levels of national aid in the more disadvantaged regions. In other words, the less developed regions must be free to offer higher levels of aid to attract investment than the more developed ones. Furthermore, in the more prosperous regions, whose development problems are relatively speaking less severe, regional aid must be concentrated on the areas genuinely needing it, leading to a gradual reduction in the assisted-area coverage. Competing forms of aid in the non-assisted areas of developed countries must clearly also be strictly controlled, with investment incentives being confined to small and medium-sized firms or to special purposes like environmental protection.(32)

466. In presenting its proposals on amendments to the Regulations governing the Structural Funds,(33) the Commission committed itself to achieving greater coherence between structural and state aid policies. This greater coherence is to be assured thanks to the adoption of a timetable governing the eligibility of a region for aid within the framework of the two policies in question as well as ensuring that the regions eligible for structural fund aid are also eligible for national regional aid when a Member State so wishes it. It goes without saying that, in accordance with Art. 7 of Reg(EEC)n° 2081/93 of the Council of 20 July 1993, support given by the Structural Funds must be in conformity with Community policies, including those concerning the rules of competition.

(31) Twenty-first Competition Report, points 54 to 56.
(32) See points 419 et seq. and 430 et seq. of this Report.
(33) COM(93)67 final, p. 15.

467. The Commission continued work on a policy for tackling the major distortions of competition that can be caused by aid for capital-intensive investment.(34) On the basis of data supplied by the Member States, it explored the possibility of calculating aid in relation to value added as analternative to the investment cost/job criterion. However, this calculation does not appear feasible in the short run. The main decisions on national regional aid schemes are reported below.

<T7> Belgium

468. The Commission initiated Article 93(2) proceedings against an aid scheme for firms participating in European industrial programmes covered by specific international agreements. In addition to procedural irregularities, the scheme allowed operating aid to be granted in regions eligible for regional aid under Article 92(3)(c) of the EC Treaty, whereas such aid is acceptable, subject to certain conditions, only in regions eligible under Article 92(3)(a).

Denmark

469. The Commission authorized the setting-up of six enterprise zones within the assisted areas of Bornholm, Nordjylland and Storestrøm. The level of aid to be offered in the enterprise zones, mainly in the form of accelerated depreciation, remains within the limits the Commission has already authorized for the areas. In an effort to channel more investment funds to Bornholm, the Danish authorities decided that tax allowances offered to employers and small businesses for investment there would not be subject to the normal restriction of being an active partner in the business invested in. The Commission also approved this scheme.

<T7> Germany

470. The Commission approved the general plan of the main regional aid programme for 1993, i.e. the Federal Government/Länder joint programme ("Gemeinschaftsaufgabe"), which was only slightly changed from previous years. Continuing the pattern since unification, one which is likely to

(34) Twenty-first Competition Report, point 164.

persist in the future, some 89% of the ECU 5.2 billion or so of aid to be paid out under the programme in 1993 was to be spent in the new Länder.

471. The Commission agreed to a number of improvements in the range of regional incentives in the new Länder. The system of special accelerated depreciation for investment there will now be extended until the end of 1996,(35) injecting an estimated ECU 5.4 billion more into the economy of the new Länder. The guarantee scheme introduced in 1991 for investment in the former German Democratic Republic(36) was extended to restructuring cases in areas suffering from especially high unemployment. Finally, the Commission authorized the sale of industrial land owned by the Government in the new Länder at half its market value and allowed the Berlin authorities to subsidize rents for industrial and commercial buildings in assisted parts of the city (in non-assisted parts, the lower rents will be available only to SMEs).

472. The Commission closed the Article 93(2) proceedings against the grant of aid under the special ERP investment aid scheme for the new Länder, the "ERP-Aufbauprogramm", in the former West Berlin.(37) The German authorities had agreed to stop giving aid under the scheme to companies in West Berlin, and the aid already granted had been within the limits laid down by the SME aid guidelines. With regard to a provision of the investment allowance scheme in the new Länder(38) allowing those resident there before the ending of the old regime to claim a higher rate than companies that had set up later, the Commission asked the German Government to repeal this discriminatory provision by 30 June 1994.

<T7> Spain

473. In May the Commission adopted a negative final decision on a system of tax aid for investment in the Basque Country.(39) In its decision the Commission confirmed the position it had taken when proceedings were initiated,(40) particularly as regards the discrimination in breach of Article 52 of the EC Treaty, which relates to freedom of establishment.

(35) Twenty-second Competition Report, point 484.
(36) Twenty-first Competition Report, point 285.
(37) Twenty-second Competition Report, point 485.
(38) Twenty-second Competition Report, points 483 and 486.
(39) OJ L 134, 3.6.1993.
(40) Twenty-first Competition Report, point 292.

Such discrimination is moreover one of the main reasons why the Commission considers that the scheme is caught by Article 92(1) of the EC Treaty and isnot a general measure.

The authorities concerned were therefore asked to end the distortions in respect of Article 52 by 31 December 1993 at the latest. In addition, the Commission decided that the Spanish authorities must, within two months of notification of the decision and until such time as the discrimination was abolished, ensure that the aid granted was restricted to the areas and ceilings authorized for regional aid.

<T7> France

474. The Commission decided not to raise any objections to the credit policy pursued by the "Institut d'Émission des Départements d'Outre-Mer" (IEDOM). A particular feature of that policy is the rediscount agreements under which the IEDOM refinances, at a reduced rate, certain assistance provided by credit institutions in the overseas departments to local firms.

The Commission took the view that such measures constituted aid for the credit institutions, since it reduced the cost of their resources, and for firms, since they obtained loans more cheaply.

It decided not to raise any objections to the aid since it was intended for disadvantaged regions eligible for the exemption provided for in Article 92(3)(a) of the EC Treaty, in respect of which the Council, in its Decision of 22 December 1989 establishing the Poseidom programme,(41) recognized the need for specific measures.

<T7> Italy

475. The Commission approved a number of provisions adopted by the Sicilian authorities that anticipate or replace national aid schemes for the Mezzogiorno in respect of which a considerable payments backlog has built up. The backlog entails substantial costs for investors, who are obliged, pending payment of the aid, to borrow from banks at market rates in order to carry out their planned investment.

(41) OJ L 399, 30.12.1989.

The scheme comprises subsidized loans for SMEs and advance payment of aid due to firms under Law No 64/86, within the limits allowed by the Commission for extraordinary aid in the Mezzogiorno.

476. For similar reasons, i.e. in particular to mitigate the delays in the payment of aid under Law No 488/92 on extraordinary aid in the Mezzogiorno, the Commission authorized the region of Sardinia to grant subsidized loans to SMEs. The maximum ceilings authorized by the Commission in the region must be complied with where such loans are combined with aid granted under other regional, national or Community schemes.

477. The Commission terminated the Article 93(2) proceedings initiated in September 1992(42) in respect of certain aid provided for under Law No 102 of 2 May 1990 on the reconstruction and development of La Valtellina.

The aid consisted of grants, interest repayments, subsidized loans, guarantees and tax reliefs for firms in La Valtellina and surrounding areas affected by the 1987 flooding.

During the proceedings, the Italian authorities undertook to adjust the scheme so as to restrict eligibility to SMEs, to comply with the aid ceilings stipulated by the Commission, to turn the operating aid into investment aid and, in other cases, not to exceed the levels of aid of minor importance.(43) In view of the proposed adjustments, the Commission declared the aid compatible with the common market.

<T7> Portugal

478. In July the Commission approved aid under the RETEX programme notified by the Portuguese authorities. The programme comprises various types of measures most of which involve aid within the meaning of Article 92 of the EC Treaty. The aim of the programme is to promote economic diversification in the regions affected by the restructuring of the textile and clothing industry. The aid is in the form of outright grants, interest-free loans and acquisition of public holdings financed by a risk capital fund. Most of

(42) Twenty-second Competition Report, point 497.
(43) Twenty-second Competition Report, point 337. See also point 431 of this Report.

the aid relates to services and to expenditure not directly linked to production.

The individual measures under the programme provide for varying intensities of aid. The measures may be combined with one another, in respect of the same eligible expenditure, up to a maximum intensity of 75% (gross). They may also be combined with other aid in the form of tax relief. However, the combined total of programme aid and tax aid must likewise not exceed 75% (gross).

The national budget provided for in the programme to cover financing of the aid in the period 1993-97 is ECU 48 million (1993 prices). The aid is part of the Community's RETEX programme and is thus jointly financed by the Structural Funds.

<T7> United Kingdom

479. In July the Commission decided not to raise any objections to the new assisted areas map in the United Kingdom. This replaces the map approved in December 1984 and consists of travel-to-work areas (TTWAs) and parts of such areas.

The assisted areas have, as in the past, been divided into two categories: development areas, in which aid may amount to 30% net grant equivalent, and intermediate areas, in which aid is restricted to 20% net grant equivalent.

The main scheme in force in the assisted areas in the United Kingdom is the regional selective assistance scheme, which was approved at the same time as the previous assisted areas map; the aid is provided in the form of capital grants, and its intensity is limited to the abovementioned ceilings.

Some TTWAs have been divided in two, with one part having the status of development area and the other that of intermediate area (Birmingham, Blaenau, Gwent and Abergavenny, Pontypridd and Rhondda, Wirral and Chester).

The TTWAs of which only part is covered by the new map are the following: Newport, Shotton, Flint and Rhyl, Wrexham, Dorchester and Weymouth, Cardiff (Objective 2 part) and London (a small part representing 0.5% of the total UK population). The part of London was included in the assisted areas map because of its high level of unemployment, which is due to the steady deterioration of the industrial base in that part of the city.

A significant new development is the inclusion in the assisted areas map of a large part of the County of Kent (the Thanet, Dover and Deal, Folkestone, Sittingbourne and Sheerness TTWAs) as a result of the anticipated loss of jobs connected with the port, the ferry link with the continent and the customs services once the Channel tunnel has been opened.

The proportion of the population covered (35.15% of the total population) is only very slightly lower (0.15 percentage points) than previously.

<T3> §6. Aid to sectors of industry subject to special Community rules on state aid

<T4> General

480. In 1993 the need for strict aid control in industries with severe structural problems was brought home with increased force.(1) It is in recessions that the special aid frameworks and codes in these sectors prove their worth. As in the mid-1980s, it fell to the Commission to initiate an orderly restructuring of the steel industry and prevent a subsidy race.(2) The difference between the 1980s and 1993 was that the steel aid code no longer allows aid for restructuring except for plant closures, with the result that the assent of the Council under Article 95 of the ECSC Treaty had to be obtained in several cases. In the shipbuilding, synthetic fibres and motor vehicle industries too, the determined enforcement of the aid rules by the Commission maintained confidence in a level playing-field while firms undertook necessary restructuring.

<T5> (a) Aid to the steel industry

<T6> Steel covered by the ECSC Treaty

481. At the end of the year the Commission succeeded in removing one of the obstacles to much-needed capacity cuts in the Community's steel industry when it secured the Council's agreement that special derogations under Article 95 of the ECSC Treaty be granted to allow certain Member States to provide aid packages in support of the restructuring and, in some cases, privatization of public loss-making steel companies. These cases involved six companies in four Member States: Ilva in Italy and CSI and Sidenor in Spain,(3) EKO Stahl and SEW Freital in the former German Democratic Republic and the Siderurgia Nacional in Portugal.

The settlement of these cases removed one of the obstacles to the private steel companies proceeding with a wider round of voluntary capacity reductions which the Council in February promised to support with additional

(1) See points 29 and 374 of this Report. See also Twenty-second Competition Report, point 375.
(2) Fifteenth Competition Report, points 177 et seq.
(3) *Twenty-second Competition Report, points 392 to 398.*

Community funds to help with redundancy costs and possible ECSC loans to steel companies making capacity reductions under voluntary arrangements.

In examining the six Article 95 ECSC cases, the Commission's approach was to ensure (where appropriate, with the assistance of outside consultants) that the restructuring plans were viable, that the aid would be limited to the amount absolutely necessary and that it would not adversely affect trading conditions within the Community to an extent contrary to the common interest by requiring counterpart measures, commensurate with the aid involved, in the form of capacity reductions to contribute towards the necessary structural adjustment of the sector. With the objective of providing equality of treatment as regards the latter aspect, the Commission aimed at a capacity reduction/aid ratio of around 750 000 tonnes/year (t/y) per ECU 1 billion in aid. This ratio was considered to be appropriate given the prevailing market situation.

After lengthy and, in some cases, difficult negotiations with the Member States concerned and after repeated unsuccessful discussions in the Council throughout the year, an amended set of proposals was accepted on 17 December by the Council. This cleared the way for the Commission to adopt decisions authorizing these aid packages early in 1994.

482. The Council and the Commission stressed the finality and exceptional nature of these derogations and pledged that there would be no further aid to these producers that was not allowed under the steel aid code. Moreover, there were a number of important conditions attached to the approval of the aid. These included capacity reductions required as a counterpart for the aid amounting to a total of around 5.5 million t/y of hot-rolled products. In order to ensure that these reductions are definitive and irreversible, the installations concerned must be scrapped or sold for use outside Europe. In addition there must be no increase in remaining capacity, apart from productivity improvements, for at least five years as from the date of the last capacity closure or payment of aid in respect of investments under the plan, whichever is the later. Other conditions included requirements that the recipient companies should have a minimum level of financial charges of 3.5% of turnover, should not benefit from tax relief on past losses and should carry out on time all the restructuring measures laid down in the restructuring plans.

In order to ensure that all the conditions are met, the restructuring plans will be subject to close monitoring for the next five years, with the Member States required to submit six-monthly and, if necessary, quarterly reports to the Commission containing full information on the recipient company and its restructuring such as to allow the Commission to assess whether its conditions and requirements are fulfilled. Particular attention will be paid to the following: capacity and employment reductions; investments; compliance with the timetable for closures; production and effects; results in the financial markets; where appropriate, privatization and creation of new companies; the source and terms and conditions of any further financing; and progress towards viability.

In order to verify the accuracy of the information supplied, the Commission may make checks in accordance with Article 47 of the ECSC Treaty and, in the event of a complaint in respect of underpricing by an aided company, may launch investigations under Article 60 of the ECSC Treaty.

The Commission will submit six-monthly reports to the Council to keep it informed of developments. It may decide to mandate independent consultants, with the agreement of the governments concerned, to assist in its monitoring task. It is empowered to order the suspension or recovery of aid if the conditions are not fully respected. If necessary, recourse will be had to Article 88 of the ECSC Treaty in cases where Member States fail to comply with any such decisions. The Commission may also require additional measures to reinforce the restructuring if progress towards viability is not being achieved.

The capacity cuts pledged by the countries authorized to grant aid will make an important contribution towards the wider restructuring effort. The total reductions necessary to restore viable conditions on the Community steel market are estimated by the Commission at a minimum of 19 million t/y of hot-rolled products and 30 million t/y of liquid steel production. A special representative of the Commission, Mr Fernand Braun, was charged with identifying potential cuts of this order of magnitude in cooperation with the industry. In November the Commission agreed to allocate ECSC funds for lending to companies contributing to a restructuring pool out of which some of the closure costs would be met.

Details of the Article 95 ECSC cases and other important cases dealt with in the course of the year follow.

<7> Belgium

483. The Commission carried out an investigation into an ECU 12.5 million bridging loan granted to Forges de Clabecq by Société Wallonne pour la Sidérugie, a public holding company wholly owned by the Walloon Regional Executive.(4) It closed the case after the Walloon authorities had proposed to raise the interest rate on the loan by 0.5% to 9.3%, a level which would include an appropriate risk premium and therefore represented a realistic commercial interest rate for a steel producer under present conditions.(5)

<T7> Germany

484. One of the two German cases approved by the Council in December under Article 95 of the ECSC Treaty concerned aid for restructuring at Sächsische Edelstahlwerke, Freital (Saxony). The aid amounted to some ECU 177 million, of which ECU 37 million was allowed by the Commission under Article 5 of the steel aid code and Article 92 of the EC Treaty.(6) The Commission had proposed a positive decision on the remaining ECU 140 million as early as May, in view of the substantial capacity reduction (53%) in hot-rolled finished products of 160 000 t/y.

485. The second decision approved by the Council in December concerned EKO Stahl, Eisenhüttenstadt (Brandenburg). It was agreed that the Treuhand could provide ECU 428 million in aid to the company to cover restructuring and part of the cost of investment in a new hot strip rolling mill, which for a five-year period after the last aid payment under the plan or after the last closure of capacities under the plan, whichever was the later, would be limited to a capacity of 900 000 t/y. It was decided that 60% of EKO Stahl would be sold to the Italian private steelmaker Riva. While EKO Stahl itself was creating hot-rolling capacity with the new mill, a net reduction in capacity in the East German steel industry of 462 000 t/y compared with 1990 (when it entered the Community) would be achieved. This included the

(4) OJ C 248, 11.9.1993.
(5) OJ C 71, 9.3.1994.
(6) OJ C 302, 9.11.1993.

closure, agreed in December, of a 320 000 t/y capacity medium section mill at a plant already owned by Riva, at Hennigsdorf. A further ECU 158 million in aid was to be provided for the investment at EKO Stahl under the regional investment aid schemes, as allowed by Article 5 of the steel aid code.

In April the Commission had come out against an earlier restructuring plan for EKO Stahl which would have involved nearly ECU 1 billion in aid. This was based on a so-called stand-alone concept, without private capital being involved.

In November, following a new proposal by the German Government, the Commission took the view that the relation between the state aid proposed (ECU 464.7 million) and the associated capacity reduction in hot-rolled products (142 000 t/y) was still not sufficient to justify a proposal for the Council to approve the aid involved under Article 95 of the ECSC Treaty. In the Commission's view, the required capacity reduction for such a level of aid should amount to 350 000 t/y.

486. As it had done in 1992 for the main regional aid schemes,(7) the Commission approved under Article 5 of the steel aid code the possible granting, under the main ERP schemes,(8) of aid to the steel industry in the new Länder until the end of 1994.(9) Over the year it also authorized several awards of regional investment aid, under Article 5 of the steel aid code, to steel companies in the new Länder, including ECU 18 million and 12 million to Hennigsdorfer Elektrostahlwerke and Brandenburger Elektrostahlwerke respectively, which were taken over by Riva last year,(10) and to a number of scrap-treatment firms in the new Länder.

487. The Commission initiated an investigation under Article 6(4) of the steel aid code into ECU 17 million in aid which the Lower Saxony Land Government planned to give to Georgsmarienhütte, Lower Saxony, formerly Klöckner Edelstahl, for costs associated with the construction of a new electric arc furnace.(11) The aid was notified for approval as aid for R&D, but the Commission had doubts whether it should not be considered as aid for investment.

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(7) Twenty-second Competition Report, points 386 and 391.
(8) Twenty-second Competition Report, point 468.
(9) OJ
(10) Twenty-second Competition Report, point 388; OJ ...
(11) OJ C 71, 9.3.1994.

<T7> Spain

488. The aid and restructuring package approved by the Council in December included aid of ECU 515 million in support of a restructuring plan for the special steels company Sidenor. Some 379 000 t/y of hot-rolled capacity would be closed during the restructuring. Approval of the plan had been held up since November 1992, and this made certain modifications necessary.(12)

489. At the same time ECU 2 817 million in aid was authorized for restructuring the state-owned integrated steel company, Corporacion de la Sidérugia Integral (CSI). In November 1992 the Commission had come out against an earlier version of the restructuring plan which proposed some ECU 3 592 million in aid in return for a net reduction in hot-rolling capacity (taking into account the proposed investment in a compact strip production unit at Sestao) of only 1.3 million t/y which would not be achieved until 1997.(13) The revised plan agreed by the Council reduced the amount of aid subject to Article 95 of the ECSC Treaty, brought forward closure of the hot strip mill at Ansio to the end of 1995 at the latest, and uncoupled the investment at Sestao from the aided restructuring plan by making the project dependent on genuine and long-term majority private-sector participation unsupported by state aid. This increased the reduction under the aided restructuring plan in hot-rolling capacity to 2.3 million t/y.

<T7> Italy

490. In July the Commission initiated proceedings under Article 6(4) of the steel aid code against the Italian Government's plan presented to the Commission in April to write off some ECU 4 billion of the debt of the public steel group Ilva before it was reconstituted as the new public enterprise Nuova Siderurgica.(14) The Commission noted that the group was facing an extremely delicate economic and financial situation and that it had recorded substantial losses in 1991 and 1992 and a considerable increase in indebtedness. In 1993 the situation continued to deteriorate. Despite the gravity of the situation, the Ilva group was able to continue its activities

(12) Twenty-second Competition Report, point 393.
(13) Twenty-second Competition Report, point 394.
(14) OJ C 213, 6.8.1993.

thanks to public financial assistance, and in particular the passive attitude of its only shareholder, the Italian State, which enabled it to increase its indebtedness on the basis of the explicit guarantee that was provided for in Article 2362 of the Italian Civil Code and amounted to a credit facility.

491. On the same occasion, the Commission adopted for the first time interim measures based on Article 88 of the ECSC Treaty and calling upon the Italian Government to waive the implementation of the plan to write off most of the debts of the Italian public steel industry. The decision gave the Italian Government formal notice to present its comments within fifteen days, failing which the Commission would take a reasoned decision finding that it had failed to fulfil an obligation under the Treaty. Before the end of July the Italian authorities informed the Commission that they would comply with the Commission's request.

492. The final restructuring plan for Ilva agreed in December involved the writing-off of ECU 1 579 million of debt before the assets of the company were split into a flat-products business and a stainless-steels business - Ilva Laminati Piani and Acciai Speciali Terni respectively - and privatized. The remainder of Ilva's debts, estimated at ECU 5.4 billion at the end of 1993, would either be transferred to the purchasers or covered by the selling price. The aid to the public steel group Ilva also involved a capital injection of ECU 351 million and restructuring and winding-up expenditure of ECU 643 million. To sum up, the total aid amounts to ECU 2 573 million. In return for the aid, it was agreed that 1.2 million t/y of hot-rolling capacity would be cut at Taranto with the closure of two reheating furnaces, that the Bagnoli wide-strip mill would be completely closed and that closures of another 500 000 t/y of capacity would be carried out by the company acquiring the Taranto plant within six months of privatization.(15)

<7> Portugal

493. Also as part of the package agreed in December, the Council gave its unanimous assent for ECU 306.3 million in aid for restructuring the publicly-owned Siderurgia Nacional. In return, the company would reduce

(15) OJ ...

hot-rolling capacity by 140 000 t/y at its plants at Maia and Seixal. The restructuring plan also includes aid towards redundancy costs and for environmental protection investment that will be examined by the Commission separately under the steel aid code. The decision took account of Portugal's position as a small Member State with only one major steel company.(16)

<T6> Non-ECSC steel sectors

<T7> Germany

494. The Commission initiated the procedure provided for in Article 93(2) of the EC Treaty against a proposal to grant ECU 186 000 in regional investment aid to Berg-Spezial-Rohr GmbH, which makes large welded tubes at Siegen. The investment would increase capacity in a sector suffering from considerable overcapacity in the Community.(17)

495. On the other hand, the Commission authorized investment aid of ECU 9 million in grants and tax allowances plus an ECU 15.5 million loan guarantee for the pipe producer Klöckner Rohrwerk Muldenstein GmbH of Saxony-Anhalt.(18) The company was reducing its capacity by 25% overall and by 80% in the case of small-diameter pipes.

<7> Spain

496. Following the judgment of the Court of Justice in the Cook case,(19) which had found that the Commission had been wrong to reject a complaint about aid to PYRSA, a Spanish company making steel castings, without a further investigation of the market situation, the Commission opened proceedings against the aid consisting of grants of ECU 1.4 million and a guarantee and interest subsidy on a loan of ECU 3.8 million.(20)

(16) OJ ...
(17) OJ C 122, 4.5.1993.
(18) OJ ...
(19) See points 395 and 553 of this Report.
(20) OJ C 281, 19.10.1993.

<T5> (b) Aid to shipbuilding

<T6> General

497. On 16 December the Council adopted Directive 93/115/EC extending the period of validity of the Seventh Council Directive on aid to shipbuilding (90/684/EEC) for a further twelve months until 31 December 1994. In the light of a consultant's report, the Commission maintained the production aid ceiling for 1994 at 9% for large vessels and at 4.5% for vessels with a contract value of less than ECU 10 million and for ship conversions.

498. Negotiations continued under the auspices of the OECD on a new international instrument to curb unfair trading practices in shipbuilding.(21) The talks covered both direct and indirect aid such as production subsidies and home credit schemes, restrictions on traffic rights of foreign-built ships and export financing.(22)

499. In a judgment on two appeals brought by Belgium against decisions requiring it to reduce subsidies on loans to Belgian shipowners for having ships built in Belgian yards, the Court of Justice confirmed that aid to shipping companies placing orders for ships has to be counted towards aid ceilings for shipbuilding.(23)

<T6> Decisions on individual cases

<T7> Belgium

500. In October the Commission approved a restructuring package for Boelwerf, the main shipyard in Flanders. The yard will undergo a 40% reduction in workforce and a reduction in shipbuilding capacity of more than 50%, to be achieved in part by the irreversible closure of the site at Hoboken. The aid package includes ECU 53 million operating aid in conformity with the aid ceiling applicable under the Seventh Directive and ECU 26 million closure aid to defray costs related to the redundancies.

(21) Twentieth Competition Report, point 9.
(22) See point 575 of this Report.
(23) See point 555 of this Report.

<T7> Germany

501. The Commission approved operating aid totalling ECU 790 million for four East German shipyards - Warnow Werft, Peene Werft, Elbe Werft Bolzenburg and Volkswerft - all in Mecklenburg-Western Pomerania. Directive 92/68/EEC provides a derogation from the Seventh Directive for the East German yards under which they can receive production aid up to 36% of a reference annual turnover for a three-year period ending in 1993.(24) A decision on a fifth yard, MTW, was postponed until it had been settled whether a change in the site of this yard disqualified it from the 1992 derogation. The Commission also approved tranches of investment and closure aid for the first four yards as their investment plans were found to be in conformity with the required capacity reduction of 40% from 1990 levels.

502. In April the Commission took a negative decision on aid to Bremer Vulkan in connection with its acquisition from Krupp of a company specializing in naval electronics.(25) It established that ECU 65 million of unlawful state aid had been paid to Bremer Vulkan when it bought a majority stake in Krupp Atlas Elektronik via HIBEG, the investment vehicle owned by the Land of Bremen. The decision requires Bremer Vulkan to repay the aid to HIBEG, which transferred ECU 65 million more to Krupp in return for the stake than the stock-exchange value of the Bremer Vulkan shares it acquired. HIBEG was able to do so thanks to a guarantee granted by the Land of Bremen.

<T7> Spain

503. Under Article 9 of the Seventh Directive, Spain had been exempted until 1 January 1992 from the operating aid rules laid down in Chapter II of the Seventh Directive (with the exception of Article 4(5)), provided that inter alia it carried out a restructuring programme in 1991/92 which would allow its shipbuilding industry to operate with the same aid level as the other Member States. As provided for under Article 9(2) of the Directive, the restructuring plan has been the subject of regular monitoring reports from an independent consultant, jointly appointed by the Spanish Government and the Commission. The consultant's final report for 1992 concluded that overall the restructuring plan had achieved its targets. However, performance at individual yards had been patchy, and this, together with the uncertain

(24) Twenty-second Competition Report, point 376.
(25) OJ L 185, 28.7.1993.

prospects for new orders, raised some doubts about future levels of competitiveness. Article 9 provides in such circumstances for additional measures to be taken to reinforce the restructuring. The Commission is discussing the consultant's findings with the Spanish authorities.

<7> United Kingdom

504. The Commission authorized the United Kingdom Government to offer up to ECU 9 million (UKL 7 million) in production aid to the Swan Hunter yard to enable it to compete for two or three orders for merchant ships in 1994 and 1995 (if aid is permitted in that year) with a view to facilitating the sale of the yard and avoiding its closure. Swan Hunter had never been physically closed to merchant shipbuilding. Only access to the national Shipbuilders' Intervention Fund was not allowed since 1986. The United Kingdom Government undertook that this was a one-off operation, that the aid would be granted in compliance with the rules laid down in Articles 4 and 12 of the prolonged Seventh Directive, and that it would not constitute a precedent for any of the other military yards. The Commission considered that, in the light of the abovementioned undertakings given by the United Kingdom Government, it was appropriate to authorize this small amount of aid to the Swan Hunter yard.

<T5> (c) Aid to the motor vehicle industry

505. The Commission's policy of monitoring aid for investment in the motor industry was vindicated when the Court of Justice upheld the decision to authorize aid to Ford and Volkswagen for building a new minivan plant in Portugal.(26)

506. In December the Council imposed countervailing duties of 4.9% on gearboxes imported into the EC from a new General Motors plant in Vienna for which the company had received an investment subsidy. Negotiations under the EC/Austria Free Trade Agreement had failed to find a mutually satisfactory solution to the problem. Another motor industry case concerning Steyr Nutzfahrzeuge AG was settled after the aid had been reduced to a level which the Commission considered reasonable for a comparable area in the Community.

507. The Commission took the following decisions pursuant to the framework on state aid to the motor vehicle industry. In December 1992 it had reviewed the framework but decided to leave it unchanged.(27)

<T7> Belgium and the Netherlands

508. In October the Commission initiated the procedure under Article 93(2) of the EC Treaty with regard to possible state aid granted by the Dutch State and the Region of Flanders to the truck producer DAF. DAF's financial situation had gradually deteriorated over recent years, during which time the company had asked the public authorities to postpone repayment of, or to reschedule, outstanding loans and to provide new loans. The Dutch and the Flemish authorities had not notified the transactions. Unless they are reversed and any aid refunded to the respective governments, they will be further examined under the procedure.

After the bankruptcy of DAF in March 1993, the new company DAF Trucks N.V. was formed and purchased the core assets from the former DAF company. While the Dutch and Flemish Governments had agreed with the private shareholders that the public shareholding would be reduced to less than 50%, it remained at 61%. The Dutch State and the Flemish Region contributed ECU 72 million

(26) See point 553 of this Report.
(27) Twentieth Competition Report, points 250 and 251; OJ C 36, 10.2.1993.

and ECU 24 million equity capital and ECU 21 million and ECU 9 million risk-bearing loans respectively. In order to determine the extent to which these measures constitute state aid, the business plan of the new company will be examined in the light of the provisions of the framework on the state aid for the motor vehicle industry relating to rescue and restructuring aid. The Commission will also examine whether the sale of the assets of the former DAF to the new company, without being offered to other possible buyers, led to the price being below market value.

If its assessment of the case should confirm that illegal state aid incompatible with the common market was granted, the Commission will determine whether any of the aid, including that awarded to but not repaid by the former DAF, should be reimbursed by the new company.

<T7> Germany

509. In June the Commission approved guarantees given by the Treuhandanstalt on commercial loans of up to ECU 77 million for Sächsische Automobilbau GmbH (SAB). SAB forms part of a large-scale Volkswagen project to establish modern car production in Germany's new eastern Länder.

This project had been awarded direct and indirect aid of about ECU 670 million by the German authorities, including certain operating losses of SAB that the Treuhandanstalt has agreed to cover. The Commission considered the proposed Treuhandanstalt guarantees to contain elements of state aid to SAB. These guarantees constituted rescue aid but fulfilled the conditions set by the Commission for such aid in general and in respect of the motor vehicle industry in particular, as defined by the sectoral framework. The granting of the guarantees was also in line with the Commission's general position toward guarantees to Treuhandanstalt-owned companies in cases where the continued financing of such companies by the Treuhandanstalt is under scrutiny after initiation of the Article 93(2) procedure.(28) The need for SAB to increase its cashflow by recourse to the financial markets arose de facto as a consequence of the Article 93(2) procedure initiated in December 1991,(29) by which all aid payments for the Volkswagen project were suspended until a final decision was taken. A decision on the whole Volkswagen project in eastern Germany is expected shortly.

(28) See point 405 of this Report.
(29) Twenty-first Competition Report, point 235.

510. In October the Commission approved regional aid to Saginaw, a wholly-owned subsidiary of Adam Opel AG, in support of its investment plans in Kaiserslautern. The project involved the installation of a new production and testing line for diesel engines by Saginaw in the existing buildings of Opel's Kaiserslautern plant, replacing an existing engine line. The project will take place over the years 1993-96 at a total cost of ECU 260 million, of which ECU 220 million is eligible for regional aid. The aid is in the form of an ECU 33 million grant to the project that will be paid from 1994 to 1996. This amounted to a gross grant equivalent of 14%. In approving the state aid, the Commission assessed the regional development benefits against possible adverse effects on the sector as a whole, such as the creation of significant overcapacity. It undertook an analysis to establish the net regional disadvantages that Saginaw/Opel faced by investing in the assisted area of Kaiserslautern. These disadvantages were found to be in proportion with the proposed regional aid. The project was not expected to have negative effects on the sector within the Community, as it will partially substitute extra-Community imports of engines by the company. For these reasons, the aid was compatible with the criteria for regional aid set out in the framework.

511. Also in October the Commission approved regional aid to MAN Nutzfahrzeuge in support of its investment plans in Salzgitter. The project involves the extension of buildings and the installation of new machinery in order to expand the production of buses and bus components. The project will take place over the years 1991-94 at a total cost of ECU 48 million, of which ECU 46 million is eligible for regional aid.

The proposed aid, in the form of a grant of ECU 1.6 million to the project, has a gross grant equivalent of 2.8%.

In approving the state aid, the Commission concluded that the project complies with the criteria for regional aid set out in the framework for state aid to the motor vehicle industry. It is satisfied that the project will make a noticeable contribution towards overcoming the problems of high unemployment in the region, while it will not lead to the creation of significant overcapacity, particularly in view of the growing demand in eastern Germany, where much of the former bus capacity has been closed down.

<T7> Spain

512. In April the Commission decided to approve state aid to Cadiz Electronica S.A., a wholly-owned subsidiary of the Ford Motor Company. The project involved installation of new, more flexible machinery in order to rationalize the manufacture of the current type of electronic modules and to create facilities for manufacturing electronic modules for advanced braking systems. The investment would cost ECU 46 million and create 150 jobs. The aid for the project consisted of a regional grant of ECU 12 million from the central administration. In assessing the aid, the Commission did not apply the same strict discipline as it does to final vehicle assembly or engine production projects, since this would lead to unfair treatment by comparison with aid to projects being undertaken by independent component producers, which are not notifiable under the framework. Since the increase in capacity was restricted to the new production of ABS electronic modules that are only used for ABS systems in Ford cars and since the notified aid was far below the ceiling for the assisted area, no significant distortions were to be expected.

513. In July the Commission approved regional aid to SEAT in support of its investment plans in Arazuri (Pamplona). These plans stemmed from the Volkswagen Group's decision to centralize all production of the Polo model in one plant and to use the capacity released in Wolfsburg by this transfer to increase the production of the Golf and Vento models there. The project had a total cost of ECU 375 million, of which ECU 367 million was eligible for regional aid. The investment would increase employment by 1 425 workers to 4 369. The company was to receive investment grants and employment aid of ECU 36 million, giving an aid intensity of 8% gross grant equivalent. In approving the state aid, the Commission concluded that the project complied with the criteria for regional aid set out in the framework because the aid only compensated for the net regional disadvantages SEAT faced in investing in the assisted region of Navarra. Taking into account all other capacity changes by the same manufacturer at group level within the relevant segment of the market, SEAT's investment in Arazuri would involve a capacity increase. Therefore, in order not to distort competition, the Commission asked the Spanish authorities to ensure that the effective nominal aid intensity did not exceed 9.7% of the eligible costs, which was equivalent to the estimated level of net regional handicap.

<T7> France

514. In June the Commission approved state aid to Renault and PSA for a joint R&D project on car and road safety entitled "Véhicule et Sécurité Routière". The project, which was concerned with passive and active safety of vehicles and the avoidance of accidents and was divided into four subprojects, was complementary to the Eureka Prometheus programme and the Community's Drive Research programme. The research project, which will be carried out over a five-year period, will cost an estimated ECU 99 million and will be coordinated by the joint company GIE PSA Renault, with many component producers participating. The aid, under two schemes administered by the Ministries of Research and Technology and of Industry and External Trade, takes the form of grants of ECU 32 million. It will cover up to 50% of the eligible expenditure on basic research and 25% of the expenditure on applied research, giving an average intensity of 32%. In approving the state aid, the Commission concluded that the project fulfilled the criteria of the Community motor vehicle and R&D frameworks. In particular, the aid limits laid down in the latter framework were met.

<7> United Kingdom

515. In March 1992 the Commission initiated Article 93(2) proceedings against undisclosed aid paid by the United Kingdom authorities to British Aerospace for its purchase of Rover Group over and above that authorized by the Commission in 1988.(30) It had already taken a decision on the unauthorized aid in July 1990, but the decision had been annulled by the Court of Justice on procedural grounds in February 1992 because the Commission had failed to give the United Kingdom authorities an opportunity to reply under Article 93(2) proceedings before taking the decision. In March 1993 the Commission took a new decision under Article 93(2) proceedings. It came to the conclusion that the additional financial concessions made in 1988 by the United Kingdom authorities to British Aerospace constituted state aid incompatible with the common market.(31) It decided that not only the aid itself should be refunded, but also the interest advantage which the beneficiaries had enjoyed. The United Kingdom authorities later confirmed that British Aerospace had paid the aid plus interest, amounting to some ECU 73 million, to the Department of Trade and Industry. Interest was

(30) Twenty-second Competition Report, point 413.
(31) OJ L 143, 15.6.93.

charged over the period from 18 August 1990 (the date on which the principal became due under the 1990 decision) to 23 May 1993. In choosing this starting date instead of the date on which aid was granted, the Commission accepted the contention of the United Kingdom authorities and the aid recipients that the new policy on this matter initiated in March 1991 - whereby interest on the aid to be recovered was to run from the date of effective payment of the aid - should not be applied retroactively. It welcomed the compliance by the company and the United Kingdom authorities with its new decision.(32)

516. In June the Commission approved regional aid to Leyland Daf Vans (LDV) in support of an investment project forming part of the rescue of DAF's van business. The project, which will be carried out over a five-year period, has a total investment cost of ECU 34 million, of which an estimated ECU 27 million is eligible for regional aid. Grants of ECU 6.4 million will be available, giving an aid intensity of less than 15% net grant equivalent, below the regional ceiling of 20% net. On the basis of regional aid criteria, the Commission concluded that LDV was suffering significant net operating disadvantages by investing in the old overlarge installations of DAF. Hence, the regional aid would not cause noticeable trade distortions in a market segment where there was no structural overcapacity at EC level. The regional aid would also help stem further job losses in the Birmingham area, which suffers from high unemployment. On the basis of restructuring criteria, the Commission concluded that the aid to rescue the van activities of the old Leyland DAF would not allow LDV to increase its small market share at the expense of its unaided competitors. LDV was not only diversifying its business but also concentrating its van sales on a niche market in the United Kingdom, mainly serving large fleet customers. As a result, the effect of the restructuring aid to LDV on other EC van producers would be minor.

(32) See point 396 of this Report.

<T5> (d) Aid to the synthetic fibres industry

517. The new code on aid to the synthetic fibres industry came into force on 1 January 1993. The code, which will be in force until 31 December 1994, requires notification of any plan to grant aid - in whatever form - to producers of synthetic fibres, as defined by the code. Germany initially accepted the code for only one year, 1993, but in December 1993 it indicated its acceptance also for 1994. All other Member States had already accepted the code for both years.

Under the code, authorization is conditional on a significant reduction in the production capacity of the assisted company. In assessing the significance of the reduction in each case, the Commission takes into account, among other matters, the intensity of the aid, the location and size of the investment as well as the contribution, if any, the investment makes to the cohesion of the Community and to the trend of the average rate of capacity utilization of the aid recipient, any industrial group to which it belongs and the industry generally.

<T7> Germany

518. The Commission opened proceedings under Article 93(2) of the EC Treaty in four cases of aid to companies in the new Länder, namely:

(i) Märkische Faser AG, Brandenburg, in respect of matters arising out of the privatization of the company,(33) the purchase of real estate and certain capital injections;

(ii) Rhône-Poulenc Rhotex GmbH, Brandenburg (ECU 3.75 million in aid for new plant for the texturization of polyamide textile filament yarn);

(iii) SST Garngesellschaft GmbH, Thuringia (ECU 2.5 million in aid for new plant for the production of polyester staple fibre); and

(iv) Textilwerke Deggendorf GmbH, Thuringia (ECU 22 million in aid for new plant for the processing of polyester and polyamide textile filament yarn).

(33) Twenty-second Competition Report, point 402.

519. Two of the cases were later closed with approval of the aid. The aid for Rhône-Poulenc Rhotex was allowed in view of the fact that Rhône Poulenc was significantly reducing its capacity for this process both in the former German Democratic Republic and at group level. Similarly, the Commission considered that, as a specific element of the strategy by which the synthetic fibres industry of the former German Democratic Republic was being restructured in order to reduce its capacity to 143 075 t/y, the aid to SST Garngesellschaft was also allowed.

<T7> France

520. Following the judgment of the Court of Justice on 24 March which had annulled the Commission's original decision authorizing the aid,(34) the Commission opened Article 93(2) proceedings in respect of some ECU 30 million in aid to Allied Signal Fibers Europe SA, Meurthe-et-Moselle, for construction of new plant for the production of polyester industrial filament yarn.

<T7> Ireland

521. The Commission authorized aid of ECU 180 000 to Wellman International Ltd, Cavan, a polyester and polyamide fibre producer, for the conversion of existing equipment and the design of new energy-efficient processes. It decided to approve the aid because the investment would be accompanied by a reduction in production capacity which was considered significant in terms of the code, particularly given the intensity of the aid and the location of the investment.

<T7> Portugal

522. The Commission authorized aid of about ECU 2 million to Têxtil António Falcão Lda, Braga, for a new polyamide and polyester yarn extrusion facility. The proposed aid was notified before the new code came into force and was therefore assessed under the previous code, which expired at the end of 1992. The Commission decided to approve the aid because of the location of the investment and the minimal effect on intra-Community trade.

(34) See point 554 of this Report.

<T7> United Kingdom

523. The Commission opened Article 93(2) proceedings against the proposal to award around ECU 1 million of aid to Abingdon Carpets plc for facilities for polypropylene yarn production installed at its carpet factory in Gwent in 1989. Although the company applied for aid for the project in 1988, the United Kingdom authorities did not notify the proposal to grant aid until September 1993.

524. In line with the code, which requires notification of any proposal to award aid to a producer of synthetic fibres, the Commission was notified of a proposal to award ECU 1.2 million aid to Bonar Textiles Ltd, Tayside, for new equipment to increase production capacity for polypropylene tape. On 21 April it decided not to raise any objections because polypropylene tape did not constitute a fibre within the meaning of the code.

<T5> (e) Textile and clothing industries

525. Although the current rules governing aid to the textile and clothing industry, which date from 1977, do not specifically require individual awards of aid under authorized, e.g. regional or SME, schemes to be notified, as is the case with synthetic fibres, aid to this sector, which is facing structural adjustment problems, needs to be closely monitored and any aid with a capacity-increasing impact should be individually notified. In 1993 the Commission dealt with the following cases, which were notified to it under other general schemes or were themselves special sectoral schemes.

526. The Commission approved proposed aid of some ECU 4 million, with an intensity of 8%, for Sofisilk, Mouscron (Hainaut), Belgium. The aid consists of a grant and an interest subsidy.

The proposed aid will not increase textile production on the market since Sofisilk has no spinning and weaving capacity but operates downstream. The aid therefore complies with the requirements laid down by the Commission for textiles and with the conditions of a regional aid scheme for the Province of Hainaut approved by the Commission in 1975.

527. The Commission initiated an investigation under Article 93(2) of the EC Treaty into aid offered by Lower Saxony to Nino Textil AG, Nordhorn. The Land authorities proposed to honour a bank guarantee of ECU 13 million which the Commission had approved in 1990 and to waive the repayment claim against Nino.

The Commission considered the honouring of the guarantee without attempting to repay the loan by realizing the firm's assets to be new aid which should be notified under Article 93(3) of the Treaty.

However, during the proceedings the Commission allowed the company to receive a new temporary bank guarantee for a loan limited to the minimum necessary to keep Nino in operation for up to six months until the Commission reached its final decision under the Article 93(2) proceedings. Without such rescue aid, the company would not survive this period.(35) Should the Article 93(2) proceedings not be concluded within six months, the Commission

(35) See point 444 of this Report.

would consider a request to extend the guarantee for the remainder of the period covered by the proceedings.

528. The Commission cleared an existing scheme to raise the profile of the export activities of the wool textile industry in the United Kingdom. The scheme is run by the British National Wool Textile Export Cooperation and those eligible are predominantly small and medium-sized entreprises. The scheme is financed through a levy paid by companies carrying out specified activities in the wool-processing fields and is completely self-financing, having a very small budget. No levies are charged on imports, and exports are not exempted from paying the levy. The scheme was therefore exempted.

529. The Commission started an investigation under Article 93(2) of the EC Treaty into proposed aid totalling ECU 76 million for investment by the Hualon Corporation in Belfast.

The investment plan (in four phases covering the period 1993-2000) involves the construction of buildings and the installation of the necessary plant for spinning, dyeing and finishing some 23 000 tonnes of polyester, polyamide and polycotton fabrics.

The aid was not covered by the code on aid to the synthetic fibres industry since the code applies to the manufacture of synthetic fibres and Hualon's activities will be downstream of such production. The aid was, however, covered by the guidelines for textiles laid down by the Commission in 1971 and 1977, which state that aid must not lead to increases in capacity and must take account of the situation of the industry in the Community as a whole. Although the level of the aid (38%) was below the limit for the region, the Commission considered that it was unable at this stage, in view of the fact that the investment will be completed only in 2001, to assess the balance between the aid's regional benefits (creation of 1 800 jobs in Northern Ireland) and its adverse effects on the textile sectors concerned.

<T5> (f) Aid to the coal industry

530. Pursuant to Decision No 2064/86/ECSC establishing Community rules for state aid to the coal industry,(36) the Commission ensured in 1993 that financial measures planned for the coal industry complied strictly with the Decision.

Financial measures were authorized only where they were in line with the objectives and application criteria of the Decision and with the specific objectives laid down in Articles 2 and 3 of the ECSC Treaty.

The Commission approved, by decision, the 1993 aid proposals for the Federal Republic of Germany on 24 December 1992,(37)(38) for Belgium on 24 February 1993,(39) for France on 18 May 1993(40) and for Portugal on 7 December 1993.(41)

By decisions of 23 December 1992(42)(43) addressed to the Spanish Government, the Commission authorized financial measures for the Spanish coal industry for 1993. In those decisions the Commission also ruled on the various other financial assistance measures for 1991 and 1992 which the Spanish Government proposed to implement following the measures for restructuring, rationalizing and modernizing the coal industry, and on the financial assistance represented by the compensatory amounts to be paid to electricity generators under the Ofico aid scheme for 1992.

The United Kingdom did not notify any aid for current production for the coal industry in the financial year 1993/94. This reflects the United Kingdom

(36) OJ L 177, 1.7.1986.
(37) OJ L 58, 11.3.1993.
(38) OJ L 59, 12.3.1993.
(39) OJ L 85, 6.4.1993.
(40) OJ L 198, 7.8.1993.
(41) OJ L 23, 28.1.1994.
(42) OJ L 57, 10.3.1993.
(43) OJ L 57, 10.3.1993.

Government's policy of restricting the granting of aid to redundancy costs and other social costs connected with the restructuring, rationalization and modernization of the coal industry.

In accordance with Article 16 of Decision No 2064/86/ECSC, the Commission presented to the Council the annual report on the application of the Decision in 1992.(44)

Since the Community's current rules on financial assistance provided by Member States to the coal industry (Decision No 2064/86/ECSC) were to expire on 31 December, the Commission adopted on 28 December Decision No 3632/93/ECSC establishing new rules for state aid to the Community coal industry, to enter into force on 1 January 1994.(45)

On 25 March the Commission adopted the report on the market for solid fuels in the Community in 1992 and the outlook for 1993.(46) A revised version of the report was approved by it on 23 September.(47)

(44) COM(93)589 final, 26.11.1993.
(45) OJ L 329, 30.12.1993.
(46) SEC(93) 441 final, 25.3.1993.
(47) SEC(93) 1399 final, 23.9.1993.

State aid to the coal industry

Aid for current production in 1992 and 1993

(million ECU)

	Belgium		Germany		Spain		France		Portugal		United Kingdom		Community	
	1993	1992	1993	1992	1993	1992	1993	1992	1993	1992	1993	1992	1993	1992
Aid under Decision No 2064/86/CECA														
1. Direct aid														
- Article 3	-	33.5	139.4	177.7	355.4	379.7	191.3	186.9	6.1	5.0	-	-	692.2	782.8
- Article 4	-	-	1513.3	1787.7	-	-	-	-	-	-	-	-	1513.3	1787.7
- Article 5	-	-	-	-	24.9	-	-	-	-	-	-	-	24.9	-
- Article 6	-	-	61.6	65.6	-	-	-	-	-	-	-	-	61.6	65.6
- Other	-	-	-	-	-	66.3	-	-	0.6	0.8	-	-	0.6	67.1
TOTAL	-	33.5	1714.3	2031.0	380.3	446.0	191.3	186.9	6.7	5.8	-	-	2292.6	2703.2
ECU per tonne	-	153.67	26.66	28.15	20.56	23.94	21.33	19.72	27.73	26.36	-	-	14.33	14.64
2. Indirect aid	-	7.4	2566.7	2466.7	15.5	17.3	-	-	-	-	-	-	2582.2	2491.4
TOTAL	-	40.9	4281.0	4497.7	395.8	463.3	191.3	186.9	6.7	5.8	-	-	4874.8	5194.6
ECU per tonne	-	187.61	66.58	62.34	21.39	24.87	21.33	19.72	27.73	26.36	-	-	30.47	28.14

<T3>

§7. Aid to other industries

531. The bulk of the aid cases dealt with in 1993 in industries other than those subject to aid codes or frameworks involved rescues and restructuring of firms in difficulty and are reported above.(48) A number of schemes supporting particular industries through levies were also considered. The problems arising from levy schemes are described in the introductory section of this chapter.(49) The remaining cases, in the energy sector, are reported below.

<T4>

Energy

532. In July the Commission authorized the United Kingdom Government to continue to charge a levy on electricity bills in order to support the development of renewable energy in England and Wales. The Fossil Fuel Levy was introduced in 1990 at the time of the privatization of most of the electricity supply industry in Britain, and the bulk of it is used to help finance the decommissioning and waste management costs of nuclear power stations. Although the levy also supports some renewable-generated electricity, the Commission, in authorizing it in 1990,(50) limited it to the period up to 1998 because of the nuclear component.

For renewables, which require longer-term support, the time limit was acting as an obstacle to development. The Commission therefore lifted the limit as far as renewable energy was concerned, allowing the United Kingdom to continue the levy into the next century to finance a further 900 MW of renewable capacity in England and Wales. At its peak, the levy will yield around ECU 240 million a year for renewables support. In July and August the Commission also authorized schemes to subsidize renewable-generated electricity in Northern Ireland and Scotland. The latter two schemes represent a total of 300 MW.

Aid arrangements for renewable-generated electricity are not counted towards the limit of 20% of electricity demand which the Commission applies to subsidies or other protective arrangements for indigenous fuels.(51)

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(48) See point 444 of this Report.
(49) See point 391 of this Report.
(50) Twentieth Competition Report, point 293.
(51) Twenty-second Competition Report, points 149 and 433.

533. In 1992 the Commission had decided that a new tariff for supplies of natural gas by Gasunie to nitrate fertilizer producers in the Netherlands did not involve aid, but it asked the Dutch Government to notify to it any applications of a revision clause whereby the producer could be given rebates off the tariff prices.(52) These rebates should, however, not take the prices below those charged for gas exported from the Netherlands for use as a raw material. In 1993 the Dutch authorities notified the Commission that Gasunie wished to grant Dutch ammonia producers a rebate of 0.88 cts/m^3 for the period March to October 1992 and 0.58 cts/m^3 for the period May to July 1993. Both periods had seen sharp falls of up to 20% in the prices of ammonia, the main raw material for nitrate fertilizer production. The rebates amounted to around 6% and 3.8% respectively of the tariff price and still left the prices well above those at which Gasunie was supplying distributors in Belgium, Germany and France. The Commission judged that the rebates were normal commercial behaviour for Gasunie. Owing to the falls in prices due in part to low-priced imports from eastern Europe, Gasunie's customers were having to close ammonia plants to stem heavy losses. The rebates did not give Dutch producers a competitive advantage over foreign ammonia producers as the export prices for Dutch gas were still below those charged to Dutch producers.

(52) Twenty-second Competition Report, points 434 to 437.

<T3> §8. Aid in the transport sector

<T5> (a) Land transport

534. State aid for the maintenance of essential public services is a vital element in the common transport policy. Article 77 of the Treaty allows aid to be granted to compensate for the discharge of public service obligations. As regards rail transport, Regulation (EEC) No 1893/91(1) has, since 1 July 1992, allowed the competent authorities to conclude contracts to ensure the provision of services. The Commission intends to examine the way in which this new facility is utilized so as to ensure that it is fully effective.

In the light of the provisions of Directive 91/440/EEC(2) as they relate to the separation of infrastructure costs and operations, the whole question of the payment of infrastructure charges, particularly for freight, has come into sharper focus. Pursuant to Article 93(3) of the Treaty, the United Kingdom notified the Commission of its intention to institute a freight facilities grant and a track charging scheme. Following examination, the Commission decided not to raise any objection to the schemes, which should facilitate the Commission's objective of making better use of the rail system for freight movements.

The Commission decided that certain financial facilities provided by the German railways (DB) to firms to encourage them to have sidings built or to maintain existing sidings did not involve state aid. It considered the arrangements - loans and the provision of materials and staff - were completely financed out of the freight charges later paid to DB by the company and were thus in line with the commercial investor principle.

In the inland waterways sector, Commission Regulation (EEC) No 3690/92(3) introduced changes to the financial arrangements for scrapping so as to permit further vessels to be removed from the fleet and thus reduce the overcapacity in this sector. These measures came into force on 1 January 1993.

(1) OJ L 169, 29.6.1991.
(2) OJ L 237, 24. 8. 1991.
(3) OJ L 374, 22.12.1992.

Having initiated proceedings under Article 93 (2), the Commission took a negative decision with regard to an Italian decree of 28 January 1992 which introduced a tax credit for Italian road haulers. The Commission decided that such aid was incompatible with the Treaty as it did not meet any of the conditions for the derogation laid down in Article 92(2) and (3) of the Treaty or in Council Regulation (EEC) No 1107/70.

In 1991 the Commission also initiated Article 93(2) proceedings with regard to a draft Law of the Italian Government which contained state aid for the restructuring of the Italian road transport sector. In March 1993 it decided to extend the proceedings to include another Italian Law adopted in February 1992 and containing identical state aid to that in respect of which the proceedings had been initiated in 1991.

Finally, in May 1993 the Commission authorized a Spanish programme of aid amounting to a maximum of ECU 81 million for the improvement of the road transport sector for the years 1993-95. The authorization was based inter alia on the fact that the programme will reduce overcapacity in the sector by at least 8%.

<T5> (b) Maritime transport

535. The Commission is currently examining a number of cases involving state aid and is continuing its work in reviewing its Guidelines for the examination of state aids to Community shipping companies, adopted in 1989, in the light of developments since then.

It has also undertaken a study on the question of the transparency of financial relations between public authorities and ports which will be finalized by the end of the year.

The Commission took decisions on a number of state aid cases concerning maritime transport and ports during the year. A new interim state aid to stimulate shipping in the Netherlands was approved by it in July. The budget envisaged for the calendar year 1993 is ECU 27 million and the measure will apply for one year only.

The Commission authorized two state aid schemes for maritime transport in Germany. One allows financial contributions to be made to shipowners using

modern ships flying the German flag. The scheme, approved in December, has been put in place for 1993 and 1994 only, and the total budget for the two years amounts to some ECU 110 million.

In October aid to assist with the privatization of Deutsche Seereederei Rostock was approved by the Commission. This amounted to ECU 170 million and will help maintain levels of employment in Mecklenburg-Western Pomerania.

The Commission initiated Article 93(2) proceedings against aid proposed by the Basque authorities for a new shipping line between Bilbao and Portsmouth. The proceedings should allow the Commission to determine whether the aid, amounting to ECU 8.5 million, is compatible with the common market.

In respect of ports, the Commission authorized in July the payment of certain aid to support the restructuring of the Italian port sector (ECU 70 million). However, it initiated Article 93(2) proceedings in respect of aid of ECU 34 million to reduce the commercial deficits of port companies.

Financial support worth ECU 3 million granted by the Spanish authorities to the leisure ports of Catalonia was considered by the Commission to be compatible with the common market under Article 92.

<T5> (c) Air transport

536. Since the entry into force on 1 January 1993 of Regulations (EEC) Nos 2407/92, 2408/92 and 2409/92,(4) representing the third and final stage of the Community air transport liberalization measures, a more rigorous approach has become necessary in assessing aid for Community air carriers.

The Commission decided to consider as compatible with the common market under Article 92(3)(a) aid notified by the Portuguese Government aimed at compensating for the accrued deficit of TAP incurred during the period 1978-91 in carrying out public service obligations on the routes to the autonomous regions of the Azores and Madeira.(5) The aid amounted to some ECU 178 million (ECU 163 million debt write-off and ECU 5 million capital injection). In the same decision the Commission initiated Article 93(2)

(4) OJ L 240, 24.8.1992.
(5) OJ C 178, 30.6.1993.

proceedings with regard to the new method adopted by the Portuguese authorities to compensate for the losses incurred by TAP in fulfilling public service obligations on the same routes. According to this method, compensation is calculated on the basis of the difference between the tariffs imposed on TAP and those which TAP would apply taking into consideration its commercial interest. The proceedings were initiated because this method involves a risk of overcompensation of the deficit and is not transparent.

Article 93(2) proceedings were also initiated with regard to non-notified aid involved in the privatization and sale of the Dutch pilot school RLS to KLM.(6) The Dutch Government sold the pilot school RLS to KLS (wholly owned by KLM) for the token sum of HFL 1 and committed itself to covering the operating deficit made by the school in the five years following privatization. The Commission initiated proceedings because it doubted that HFL 1 reflected the real market price of the school and had serious doubts as to the compatibility of the covering of operating deficits with the common market.

537. In November the Commission initiated Article 93(2) proceedings with respect to the subscription, through a subsidiary of the Caisse de Dépôts et Consignations - Participations, of the bonds issued by Air France last March. The ECU 224 million issue consists of two types of bonds: bonds repayable in shares (ECU 112 million) and subordinated progressive-interest securities carrying share subscription vouchers.

The Commission's decision to initiate proceedings reflects doubts about the commercial character of the operation, which, in the light of Air France's financial position, appears to constitute state aid within the meaning of the Treaty.

The Commission will therefore investigate whether the financial operation is linked to a restructuring plan presented by the French carrier at the end of 1992 to restore the company's viability. It will verify the impact of the aid on competition within the common market, in the light of Air France's competitive position in the air transport sector, and in particular in its domestic market.

(6) OJ C 293, 29.10.1993.

538. The Commission decided in December to authorize the Irish Government to inject ECU 216 million equity into Aer Lingus. This equity injection, to be carried out in three tranches, will enable Aer Lingus to implement a comprehensive restructuring plan which the Commission considers will restore the airline's commercial viability over two years.

The Commission's approach in the context of increased competition in the air transport sector, following the entry into force of Regulations (EEC) Nos 2407/92, 2408/92 and 2409/92 (the "third package") on 1 January 1993, is that there must be a strict policy of control of state aid so as to avoid any effects which would be contrary to the common interest.

In general, airlines which receive state aid must compete fairly and freely in the single market, taking account of existing demand and future market growth. However, it would be unfair if they were allowed to obtain increased capacity to compete with other EC carriers.

The Commission therefore required specific undertakings that the state aid will not be used to allow Aer Lingus to compete unfairly within the common market.

The Irish Government's commitments, which have been given for the duration of the restructuring programme, relate mainly to the following points:

- the cost-reduction programme will be carried out as envisaged;
- the Irish Government will periodically report to the Commission on the financial and economic development of Aer Lingus and the development of the programme;
- Aer Lingus will not expand its operating fleet;
- the Irish Government will not grant any further aid to Aer Lingus;
- if created before the end of the restructuring period, the low-cost subsidiary Aer Lingus Express will operate within Aer Lingus's operating fleet;
- the European operations, the Transatlanic operations and, if and when created, Aer Lingus Express will become and operate as separate legal entities with separate accounts to allow transparency of operations;

- Aer Lingus will not increase seats offered for sale to the public on scheduled flights on the Ireland/UK market as well as on the Dublin-London (Heathrow) route beyond clearly specified ceilings based on the traffic level achieved in the twelve months before notification;
- Aer Lingus will use the money for restructuring purposes only and will not acquire shareholdings in any Community carrier.

539. The Commission addressed two recommendations under Article 93(1) of the Treaty to the German and Portuguese governments(7) with a view to abolishing the general tax exemption for TAP and the accelerated depreciation system for airlines established in Germany. As a consequence of the German Government's refusal to abolish the accelerated depreciation system, the Commission initiated Article 93(2) proceedings with regard to this tax privilege.(8)

The Commission is at present updating its guidelines for the assessment of aid schemes for Community carriers. It will take into account the conclusions reached by the "Committee of Wise Men". For this purpose, the new guidelines will be published after the Committee has completed its work on the future of Community civil aviation.

(7) OJ C 163, 15.6.1993.
(8) OJ C 16, 19.1.1993.

<T3> §9. Aid to other service sectors

<T4> Financial services

540. The liberalization of financial and postal services continued to generate complaints from private competitors of state-owned banks and postal administrations. The complaints concerned special privileges enjoyed by the public-sector operators, injections of public funds when businesses are privatized, and extensions of activities into markets previously served only by the private sector.

541. In implementing the guidelines set out in the Green Paper on postal services,(1) the Commission examined the measures taken by the Belgian authorities with respect to the OCP (Office des Chèques Postaux) and the OCCH (Office Central de Crédit Hypothécaire) as well as measures adopted in France in 1990 regarding the taxation of financial services provided by the post office.

(1) COM(91)476 final, 11.6.1992.

<T4> Horse-race betting

542. In December 1990 the Commission initiated Article 93(2) proceedings in respect of certain financial assistance granted to Pari Mutuel Urbain (PMU).

Since three of the aid measures had not been suspended following the initiation of proceedings, the Commission adopted a provisional decision in June 1991 calling on the French authorities to suspend such measures within fifteen days.

A feature of horse-race betting is that competition and trade between Member States have developed only in the last few years. There are few competing companies, and trade involves bets taken in one Member State on horse-races run in other Member States and the exchange of televised pictures of such races. For these reasons, the Commission had some difficulty in reaching a well-founded assessment of any state aid that might arise from the measures taken by the French Government in support of PMU.(2)

In September the Commission terminated the Article 93(2) proceedings; the main points of its decision are as follows.

Of the three measures in respect of which the Commission had taken an interim decision, two were deemed to be aid incompatible with the common marke. In particular, the amounts received by PMU as a result of exemption from the employer's contribution to the building of subsidized housing must be repaid by it. The other measure, involving exemption from the one-month delay rule for VAT payments, although amounting to aid that was incompatible with the common market, was offset by a permanent deposit of funds lodged with the Treasury, so that its effect on competition and trade was nullified. The other measures must be deemed to form part of the normal funding arrangements of the PMU and do not therefore call for any objections under Article 92(1) of the EC Treaty.

(2) See Annex III.A.1(c) to this Report.

<T4> Publishing

543. In May the Commission authorized four aid schemes operated by the Coopérative d'exportation du livre français (CELF) in support of the sale of French-language books in non-French-speaking countries. Although the schemes subsidized exports of books, albeit in small quantities, they were justified on cultural grounds in view of the fact that all French-language book publishers in the Community could benefit. The decision was subsequently challenged by the Société internationale de diffusion et d'édition (SIDE) before the Court of First Instance.(3)

<T4> Film and broadcasting

544. In June the Commission cleared a proposal by the French Government to extend the system of levies on cinema admissions and television station revenue, the proceeds from which are used to finance film productions and high-quality television programmes, to include sales of prerecorded videocassettes.(4) With video sales accounting for an ever-increasing proportion of film revenues, the French Government wanted this distribution mode to contribute to its film industry support system. In 1992 the Commission had approved the German film aid scheme, which contains a levy on prerecorded videocassettes.(5)

545. In October the Commission approved an ECU 6 million grant by the Brandenburg Land Government for Studio Babelsberg. The old "Ufa/Defa" studios, where many of the most famous pre-war German films were made, has been purchased from the Treuhand by an international consortium which plans to make it into a modern European film production centre. The grant by the Land Government was for investment in the sound studios.

546. Four private television stations in Spain, France and Portugal have complained to the Commission about alleged unfair competition through subsidies and anti-competitive practices by public broadcasters. The subsidy complaints are that the public funding of state broadcasters, through television licence fees, capital injections and other payments, overcompensates public broadcasters for any public service obligations they

(3) Case T-49/93, OJ C 272, 8.10.1993.
(4) Twenty-second Competition Report, point 444.
(5) Twenty-second Competition Report, point 442.

may have to perform and for any advertising restrictions they may face and therefore represents distortive state aid. To assist it in assessing the complaints, the Commission is having a study made by outside consultants into the balance between the respective rights and obligations and financial resources of public and private television in the European Community. The results of the study will be ready by mid-1994.

<T3> §10. State aid in the agricultural sector

547. In the agricultural sector, Commission activity is largely determined by the provisions of the common agricultural policy, the principles of which are laid down in numerous Council regulations. This applies above all to the common market organizations, which are in principle exhaustive regulations for the products concerned and exclude additional national market support measures via state aid. In the field of agricultural structural and environmental measures, Commission policy concerning the assessment of state aid under Articles 92 and 93 of the EC Treaty is similarly largely determined by Council regulations. In this context the introduction of Council Regulation (EEC) No 2078/92 on agricultural production methods compatible with the requirements of the protection of the environment and the maintenance of the countryside(1) is of particular importance. This Regulation constitutes one of the accompanying measures of the 1992 CAP reform. Regulation (EEC) No 2078/92 provides that Member States can introduce additional state aid measures with different conditions and higher amounts of aid than those set in this legislation. For the assessment of these state aid schemes, the Commission has to take into account the basic criteria of this Regulation. In comparison to the criteria which were applied before under Council Regulation (EEC) No 2328/91, which previously set the parameters for environmental measures, the following changes are important :

- aid can also be given for the maintainance of certain farming practices including those not under any immediate threat;

- the aid programmes can cover whole regions and are not restricted only to environmentally sensitive areas;

- the aid rate (e.g. premium per ha) can provide an incentive and thus be higher than any income losses or possible additional costs associated with the requirements of environmental protection.

The full extent of the new parameters set by this legislation remain to be defined. However, it is already evident that a very wide spectrum of conditions may now be considered as conferring environmental benefits.

(1) OJ No L 215, 30.7.1992, p. 85. See also point 384 of this Report.

Consequently state aid related to the environment can now be the source of additional income to the agricultural sector in those Member States able and willing to avail their farmers of the new possibilities opened up by Regulation (EEC) No 2078/92, over and above that flowing from Community co-financed actions.

548. As mentioned above, the Commission as a general rule raises objections to aid which concerns national market support measures for products subject to the various common market organizations. This is done because normally such national aid per unit of output or input is liable to disturb Community market mechanisms and, as operating aid, has no lasting effect on the development of the sector concerned. In this context the Commission took final negative decisions against two Italian aid schemes, one of them concerning aid to olive oil producers which went beyond the total amount of aid permitted by the market organization for oils and fats, the other concerning aid for the private storage of nuts.

The Commission initiated Article 93(2) proceedings with regard to the apparent misuse of a scheme approved in 1992[2] for the export of mushrooms from Ireland. It regarded this aid as an infringement of the market organization for fruit and vegetables and as operating aid with no lasting effect on the development of the sector. According to the information available to the Commission, the aid was based on the quantity of mushrooms exported and reduced the exporters' costs. Thus this aid is regarded as not being in conformity with an approved aid scheme of which it is part, which was intended to avoid massive lay-offs in small and medium-sized enterprises whose earnings had dropped sharply due to the depreciation of the pound sterling. The Commission had raised no objections to this aid scheme in 1992 on the understanding that products such as mushrooms for which common market organizations exist were excluded from direct support to avoid an infringement of the market organizations.

Another reason for initiating proceedings in this case was that a condition for the grant of the aid constituted a measure having equivalent effect to a quantitative trade restriction in contravention of Articles 30 et seq. of the Treaty. According to the information available to the Commission, the aid

(2) Twenty-second Competition Report, point 470.

was granted only to producers buying compost from one or more of the five Irish composting companies. This case illustrates that in assessing state aid the Commission has to take account of other Treaty provisions. It deems any aid incompatible with Article 92 if the conditions for its grant are in contravention of another provision of Community law.

Another case in the context of a common market organization where the Commission decided to initiate proceedings under Article 93(2) of the EC Treaty was in regard to aid taking the form of the transfer of assets of the Milk Marketing Board for England and Wales, which currently constitutes a virtual monopoly for the collection and marketing of milk, to a new cooperative to be called Milk Marque.

On the basis of this transfer, Milk Marque will issue certificates of entitlement to milk producers. These will not be transferable and can be cashed in by producers not joining the new cooperative on the fifth anniversary of the day on which it is set up. Milk Marque is to pay interest of 7% per annum on them after a one-year moratorium.

The Commission considered that these arrangements, which may also involve an underestimation of the value of the assets due to be transferred to Milk Marque, do not reflect normal market conditions but violate the open market principle as established by the Court of Justice in its judgment in Case 177/78 (Pigs and Bacon Commission v McCarren and Company Ltd). Milk producers who do not wish to become members of Milk Marque would be forced investors in the new cooperative, which would accordingly not be established on a genuinely voluntary basis. Consequently the Commission also had to consider the measure as an infringement of the market organization for milk and milk products.

549. In the wine sector, the Commission initiated Article 93(2) proceedings in December 1992 with regard to German aid for supplementary distillation of wine in Rhineland-Palatinate going beyond the quantities provided for in the provisions of the common market organization. The Council subsequently decided in February 1993 to allow this aid under the terms of the third subparagraph of Article 93(2) of the EC Treaty, on the grounds that exceptional conditions were present - a criterion which the Commission is not permitted to invoke in its assessment of state aid.

However, it has to be mentioned that it is not the only case in recent times where the Council has made use of this Treaty provision to allow aid in the wine sector against which the Commission had decided to initiate proceedings.(3) During 1992 and 1993 the Council took a total of four decisions invoking "exceptional" circumstances for aid in the wine sector.

550. Concerning aid to investments for improving processing and marketing conditions of agricultural products, Community policy is laid down in Council Regulation (EEC) No 866/90 and further defined in the Commission decision of 7 June 1990 on the selection criteria to be adopted for these investments, otherwise referred to as "sector limits". Although Council Regulation (EEC) No 866/90 allows Member States to introduce aid under different conditions through Articles 92 and 93 of the EC Treaty, this freedom is confined by the selection criteria under Regulation (EEC) No 866/90 applied by analogy for the assessment of state aid.

This is Commission practice because these "sector limits" were established to take account of the Community market situation for the products concerned and not to reflect relative priority for use of Community funds. Thus, for reasons of consistency of Community policy, it would be inappropriate to encourage investments in sectors which are excluded from aid as a consequence of Community market and structural policy by allowing state aid in these restricted sectors.

The Commission had to deal with several cases which concerned aid for the modernization of undertakings in excluded sectors (grainmills, oil seeds processing) in the new Länder of Germany. The Commission decided to initiate the proceedings under Article 93(2) of the EC Treaty because it saw no reason to allow derogations from the abovementioned limits if motivated solely by the general argument of the special situation in the new Länder. Derogations from the "sector limits" might in general, however, be warranted for a given case provided there is a solid justification based on an economic analysis which included the Community interest.

(3) See, e.g., Twenty-second Competition Report, point 503.

Such a derogation was made when the Commission raised no objections to an investment aid for an animal feed production plant, which is normally an excluded sector (except units of small size); this derogation was allowed because the Danish authorities could provide assurances that the measure, located on the island of Bornholm had no impact on trade between Member States.

These assurances were based on the particular circumstances of the case, especially the geographical location of the investment and its isolation from the relevant markets elsewhere in the Community.

551. In the case of aid financed by parafiscal charges (compulsory levies), the Commission has to examine the financing of the aid as well as the aid itself. The case of a German aid scheme for publicity financed by parafiscal charges (Absatzfondsgesetz) highlighted new aspects of the examination of these kinds of aid. The Commission raised no objections against this aid scheme although for some products (e.g. oilseeds) only that part of production was taxed (in this case oil production) which benefited from the aid. In this case the aid was used exclusively for publicity for oils on the domestic market. Thus the exclusion from the tax of production either for export or for uses other than oil production was not considered as indirect operating aid for these exempted products.

With regard to aid financed by parafiscal charges on products imported from other Member States, the Commission's policy, based on the case-law of the Court of Justice, is to consider such aid to be normally incompatible with the common market because of the way in which it is financed. Only in cases where there is substantial processing of such products after importation, having the effect of changing the origin of the processed products, and where the charge is levied only on the products thus processed, can the aid-financing aspect be deemed compatible with the common market.

The Commission was thus able to terminate Article 93(2) proceedings in respect of aid for research financed by a parafiscal charge levied on processed fruit and vegetables, the proceedings having been initiated because of the taxation of fresh products imported from other Member States. After the Dutch authorities had altered the regulations governing the levying of the parafiscal charge, the situation was such that the charge was levied only

on fruit and vegetables that had undergone substantial processing, so that the products obtained were of Dutch origin.

Acting under Article 93(1) of the Treaty, the Commission recommended that the French Government halt the granting of aid by the French national association of table wines and regional wines. The aid was incompatible with the common market because it was financed by a contribution levied when the products were released to the home market and also on export, with products imported from the other Member States also being taxed at those two stages.

The Commission did not consider that the blending of French table wines and wines imported from other Member States amounted to substantial processing that could alter the origin of the wines from the other Member States.

Furthermore, the Commission noted that the table wines supplied for processing in France are not subject to the charge, whereas table wines are always liable to the contribution on export, whether or not they are intended for processing. The contribution was therefore regarded as a tax having an equivalent effect to an export duty.

<T3>

§11. Aid in the fisheries sector

552. In 1993 the Commission registered 23 new aid schemes and two aid schemes notified after their adoption by the Member State in question.

The Commission decided not to oppose the implementation of 21 aid schemes.

During 1993 the Commission initiated Article 93(2) proceedings in relation to one Danish aid measure and one Italian aid measure. During the same period, the Commission decided to terminate Article 93(2) proceedings with regard to three aid measures introduced by France and Italy.

The table below gives an indication of the evolution of the number of aid schemes adopted in the fisheries and aquaculture sector which have been examined by the Commission and the number of decisions taken by the Commission concerning the compatiblitiy of these aid measures with the competition rules and Community fisheries legislation. The data are based on the date of the decision and do not necessarily reflect the number of aid measures registered or examined.

Year	Total	Decision by the Commission			
		No objection	Initiation of Article 93(2) proceedings	Termination of proceedings	Negative decision
1990	23	12	2	2	1
1991	45(1)	18	7	4	-
1992	33(2)	28	10	9	-
1993	25(3)	21	2	3	-

(1) Seven registered aid measures were subsequently withdrawn from the register of aid before the examination process commenced.

(2) One registered aid measure was subsequently withdrawn from the register of aid before the examination process commenced.

(3) Five registered aid measures were withdrawn from the register of aid before the examination process commenced.

<T4> Chapter II

<T2> Main decisions of the Court of Justice

<T3> §1. Weighing of rights of third parties and prospective aid recipients in decisions whether or not to initiate proceedings under Article 93(2) of the EEC Treaty

553. Third parties may be hurt by failure to initiate proceedings under Article 93(2) because their rights to have their views heard is infringed. As far as prospective aid recipients are concerned, the initiation of Article 93(2) proceedings has important legal effect because of the suspensive effect of those proceedings.(1) In two judgments(2) the Court confirmed the extent of the Commission's obligations towards third parties and prospective aid recipients when deciding whether or not to open investigation proceedings under Article 93(2).

In the Cook judgment, the Court annulled the decision of the Commission to raise no objections to several sets of aid granted to PYRSA, a Spanish manufacturer of foundry products, which would increase the production capacity of the company.

The Court considered that the Commission had based its decision not to raise objections on the absence of overcapacity in the sub-sector in question. At the same time, the Commission did not have at its disposal all the necessary figures or statistics showing with any degree of certainty that its assessment of the capacity situation was correct.

Consequently, the Commission was facing serious difficulties in determining whether the aid could be considered compatible with the common market, and therefore should have initiated the procedure under Article 93(2) of the Treaty in order to verify its assessment.

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(1) See [1992] ECR I-4117; Twenty-second Competition Report, point 532 and Case C-47/91, Italian Republic v Commission ("Italgrani"), judgment of 30 June 1992.

(2) Cook v Commission, Case C-198/91, judgment of 19 May 1993; Matra v Commission, Case C-225/91, judgment of 15 June 1993.

In the Matra case, however, the Court upheld the Commission's decision to allow regional aid granted by the Portuguese Government to Volkswagen and Ford for building a new multi-purpose van plant at Setubal. The Commission had not opened proceedings; it had been satisfied as to the absence of overcapacity from a consultant's report. In these circumstances, not having serious doubts about the compatibility of the aid with the common market, it had not been obliged to open proceedings. If the Commission was sure without opening proceedings that the aid was permissible under the exceptions to Article 92(3), it should not do so.

<T3> §2. Legal status of aid frameworks and their interpretation

554. In the CIRFS v Commission judgment(3) of 24 March 1993, the Court reaffirmed the binding nature of rules setting out the Commission's practice in controlling aid where the rules have been recommended to the Member States and accepted by them under Article 93(1) of the Treaty.

The Court found that the Commission had made a mistake in interpreting the scope of the synthetic fibres aid framework when it had held that aid for an investment project by Allied Signal did not need to be notified because it concerned man-made fibres for industrial uses. The Commission had based its interpretation on that given in a previous decision under which it had approved aid to a German man-made fibres producer. However, the Court held that an act of general scope could not be altered implicitly by an individual decision. It therefore annulled the Commission's decision not to initiate Article 93(2) proceedings in respect of the aid granted by France to Allied Signal.

The Commission has since initiated Article 93(2) proceedings against the aid.(4)

(3) CIRFS v Commission ("Allied Signal"), Case No C 373/89, judgment of 24 March 1993.

(4) See point 520 of this Report.

<T3> §3. Aid to shipping companies placing orders for ships to be counted towards aid ceilings for shipbuilding

555. The Court dismissed two applications by the Belgian Government seeking the annulment of Commission decisions concerning aid in the form of subsidized loans granted to shipowners for the building of ships in Belgian shipyards.(5) The grant equivalent of the loans exceeded the maximum aid ceiling laid down by the Commission pursuant to Article 4(1) of the sixth Council Directive on aid to shipbuilding.(6) In its decisions, the Commission required the Belgian Government to review the terms of the loans in such a way as to bring their grant equivalent within the limits set for 1989.

The Belgian Government argued that part of the aid thus granted did not constitute support for shipyards, but was merely aid for the operation of sea transport under the Belgian flag, and that the compatibility of the aid should therefore be examined in the light of the exemptions provided for in Article 92(3)(a), (b) and (c) of the Treaty.

556. In its judgment, the Court confirmed that the aid to shipowners that was granted for the purchase of ships was aid to shipyards and should be fully subject to the common ceiling rules, and that the Council directives based on Article 92(3)(d) had already taken account of the aspects contained in Article 92(3)(a), (b) and (c).

(5) Belgium v Commission, Joined Cases C-356/90 and C-180/91, judgment of 18 May 1993.

(6) Council Directive 87/167/EEC of 26 January 1987.

<T5>

Part V

<T1>

International dimension

<T3>

§1. EFTA countries

557. In the referendum of 6 December 1992 the Swiss people decided that Switzerland would not become part of the European Economic Area. Consequently, the Agreement had to be amended and an additional protocol was concluded. That protocol did not change any of the competition provisions. Liechtenstein has also decided not to join the EEA for the time being but could still do so at a later stage.

All the other countries involved were able to conclude their ratification procedures during the period under review so that the EEA could enter into force on 1 January 1994.

The EFTA Surveillance Authority (ESA) will be responsible for enforcing the competition rules on the EFTA side. During the review period the Commission cooperated closely with EFTA's Preparatory Committee for the Surveillance Authority in order to help it prepare in the best possible way for the tasks awaiting it upon the entry into force of the EEA.

On 15 December the Commission adopted new notification forms on which companies will notify their agreements or a proposed merger to the Commission so that account can be taken of the EEA dimension.(1)

<T4>

The Free Trade Agreements of 1972

558. The Commission continued to apply the competition rules of the 1972 Free Trade Agreements, particularly in the state aid sector.(2)

As the EEA Agreement covers only state aid granted and anti-competitive practices taking place after 1 January 1994, the Commission intends to continue to monitor state aid as well as anti-competitive practices in EFTA countries which date back to before the entry into force of the EEA and to propose to the Council that remedial action is taken where needed.

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(1) OJ L 336, 31.12.1993.
(2) See points 98 and 101 to 104 of this Report.

<T4> Sectoral agreements in the aviation sector

559. The Agreement between the Community and the Kingdoms of Norway and Sweden which entered into force on 6 July 1992 was amended on 10 September 1993 in order to extend the application of the so-called "third package" in the area of civil aviation to these two countries. Although the Agreement was originally set to expire on the date that the EEA entered into force, the three Parties realised that this would lead to a particular problem. The EEA does not as yet include the third package in the "acquis communautaire" as defined in its Annex 13. This incorporation will take place at a later stage. It has therefore been decided to maintain in force the Agreement with Norway and Sweden as regards the third package, in principle until the incorporation of the latter has taken place.

560. After Switzerland decided not to become part of the EEA Agreement, the Swiss Government expressed an interest in concluding an agreement similar to the one with Norway and Sweden on civil aviation. In addition, it asked for an agreement covering road transport. In September the Commission recommended that the Council instruct the Commission to open negotiations on such agreements. These negotiations should follow a two-track approach, i.e. cover both the transport policy aspects and the competition aspects. The main problem will be the enforcement of those rules. Unlike the Agreement with Norway and Sweden, which was always intended to apply for a limited period only, an agreement with Switzerland could remain in force indefinitely. For this reason, the enforcement issue presents itself with more urgency.

<T4> Accession talks

561. The ongoing talks on enlargement with Austria, Finland, Norway and Sweden have been greatly helped by the work already done on competition for the European Economic Area.

Acceptance of the "acquis communautaire" is thus not presenting any major difficulties, although the negotiations have highlighted two particularly sensitive issues as far as the applicant countries are concerned, one concerning the adjustment of state monopolies of a commercial nature and

the other regional aid schemes. The applicant countries stated among other things that account should be taken of essential public health requirements in connection with the alcohol and alcoholic drinks' monopoly and of the characteristics of sparsely populated areas in the northern regions.

It was agreed in an exchange of letters between the Commission and the Swedish authorities, on the one hand, and the Finnish authorities, on the other, that the exclusive rights for the wholesale importation, production and marketing of alcohol monopolies in those countries would be abolished. As regards exclusive rights in the retail trade, existing Community legislation does not require the abolition of existing state monopolies but imposes the elimination of any discrimination in their operation. The Commission also considered that the foregoing arrangements should be applied as soon as the EEA Agreement entered into force.

562. In accordance with the conclusions of the Copenhagen summit, the Commission opinion on accession applications from Cyprus and Malta analysed the competition situation in these countries.

<T3> §2. Central and Eastern Europe

563. During the period under review, the Community and its Member States concluded a Europe Agreement with Romania, while an Interim Agreement between that country and the Community was also concluded. In addition, the Commission continued its technical assistance programmes with the countries of central and eastern Europe with a view to helping them meet the obligation under the Interim as well as the Europe Agreements to harmonize their competition rules with those of the Community and acquire the necessary experience in applying their competition laws.

564. Negotiations continued on partnership and cooperation agreements with Russia and several other former republics of the Soviet Union. The Commission has proposed that a competition article be included in the draft agreement with Russia, which is at a more advanced stage than the other agreements. Because the draft agreement does not aim to create a free trade area with the Russian Federation, it was not felt appropriate to propose a competition article which was as ambitious as those included in the Europe Agreements.

<T4> Other countries

565. Discussions about possible trade agreements are also taking place with the Baltic States and with Slovenia. The intention is that the agreements should include provisions on competition similar to those contained in the Association Agreements with the central and eastern European countries, since it may be in the interests of economic operators that as many Community partners as possible form a coherent whole from the standpoint of competition rules and their implementation.

566. As regards relations with Israel, the competition rules contained in the 1975 Agreement were to be strengthened and extended to cover service activities in particular, while the arrangements for implementing the agreed principles were to be set out more clearly.

567. As regards the Euro-Maghreb agreements to be negotiated with Morocco and Tunisia, the same approach to competition rules could be taken as for the central and eastern European countries. A major argument for including such rules is the mutual advantage to the contracting parties in applying harmonized competition rules instead of adopting defensive trade measures.

568. A 1964 agreement between the Community and Turkey, which was supplemented by a protocol in 1973, provided that, when a transitional period of 22 years from that date had expired, a customs union would be set up. Discussions have therefore started with a view to preparing for the change, which should take place in 1995. It is clear that the competition rules are an important aspect of the negotiations as they ensure that distortions of trade will not result from the conduct of undertakings, an essential feature of any treaty that provides for the abolition of all customs restrictions.

<T3>

§3. North America

569. The Agreement which the Commission concluded with the Government of the United States on 23 September 1991(3) continued to be applied both by the Commission and the US competition authorities.

Thirty-six notifications were received and thirty-three sent. Those notifications concerned mainly mergers and acquisitions while others dealt with price fixing or licences.

Although the operation of the agreement should have been reviewed at the latest 24 months after the entry into force of the Agreement, i.e. before 23 September 1993, it was decided to defer such a review until the Court of Justice had taken a decision in Case 327/91 (France v Commission).(4) The Advocate-General dealing with the case delivered his opinion at the end of 1993, suggesting that the Agreement be annulled. No date has yet been set for the Court judgment.

Bilateral meetings between DG IV and the US authorities were held in Brussels on 20 September and in Paris on 9 December. At those meetings, the parties discussed enforcement priorities, with particular emphasis on those of the new US Administration, exchanged views on certain international aspects of competition policy and explored ways of cooperating more closely on certain specific cases.

A number of other contacts took place, inter alia in the margins of international meetings at the OECD and in relation to specific enforcement cases.

570. During the year under review no formal bilateral meeting took place between DG IV and the Canadian Bureau of Competition, mainly because of personnel changes in Canada. A number of informal contacts did take place, however, in the day-to-day application of the competition rules.

(3) Twenty-first Competition Report, points 64 and 362.
(4) Twenty-first Competition Report, point 64.

<T3>

§4. Japan and Korea

571. Relations with the Japanese Fair Trade Commission (JFTC) entered a new phase when the Commission and the JFTC organized a joint seminar on competition policy in the EC and Japan on 4 November in Tokyo. The success of the seminar led to a decision in principle to organize a follow-up seminar in Brussels during the course of 1994.(5) At an informal meeting in Paris on 9 December, it was decided that this seminar should focus on enforcement issues in the EC and Japan.

The seminar was preceded by the eighth bilateral meeting between the Commission and the JFTC on 2 November, also in Tokyo. A number of issues of mutual interest were discussed, including exchanges on sectoral studies undertaken by the JFTC into four sectors (automobiles, car parts, paper and flat glass). One of the purposes of those sectoral studies is to examine whether anti-competitive practices in those countries may give rise to market access problems in Japan. The Commission is currently examining those studies and may ask the JFTC to deal with certain problems highlighted in the studies.

572. On 13 December a delegation from the Korean Fair Trade Commission visited Brussels for their first bilateral meeting with DG IV. The meeting was given over mostly to an exchange of views on recent enforcement activities in the EC, in order to identify areas where the Community's experience could provide the Korean authorities with useful guidance as regards enforcement policies in their country.

(5) See point 110 of this Report.

<T3> §5. Multilateral organizations

<T4> OECD

573. During the period under review the OECD Committee on Competition Law and Policy (CLP) held a number of meetings. Some joint meetings also took place between CLP Working Parties and the Trade Committee on the relationship between trade and competition policies. The Commission took an active part in these discussions since they may form a preparatory stage for the possible discussions within the GATT on international competition rules. Other topics discussed in the CLP were vertical and horizontal restraints.

574. The Commission took part in the work of the Industry Committee on subsidies and structural adjustment. This involved drafting and finalizing common concepts and methodologies for assessing state aid to industry with a view to producing a detailed questionnaire for OECD members.

The questionnaire is an important stage in the project aimed at quantifying the net cost to OECD public authorities of subsidies to industry.

575. The Commission continued to be involved in the ongoing talks in the OECD about fair trading rules in the shipbuilding sector.(6)

<T4> Unctad

576. The Unctad Intergovernmental Group of Experts on Restrictive Business Practices (IGE) held its 12th meeting in Geneva on 18-22 October 1993.

(6) See point 498 of this Report.

<T5>

Part Six

<T1>

Contacts with Community institutions and external organizations

<T3>

§1. European Parliament

577. In the course of 1993 Parliament paid a great deal of attention to competition matters. Its constructive contributions are greatly appreciated by the Commission. It is the Commission's aim to maintain the regular dialogue with Parliament on issues of competition policy.

On 8 February Parliament adopted its resolution on the Twenty-second Competition Report. The resolution and the Commission's response are annexed to this Report.(1)

Two other resolutions were adopted which have a bearing on competition. They concerned:

- shipbuilding (adopted on 16 November) and

- the situation of Daf/Leyland (adopted on 11 February).

578. During the year Members of Parliament submitted 159 written questions on competition (141 in 1992); a further 29 questions were submitted for oral reply (66 in 1992).

(1) Annex I.A.

<T3> §2. Economic and Social Committee

579. On 24 November the Economic and Social Committee delivered its opinion on the Twenty-second Competition Report. The opinion and the Commission's response are reproduced in Annex I.B.

On 30 June the Committee delivered an opinion on state aid to shipbuilding.

580. The Commission appreciates the constructive observations made by the Economic and Social Committee and hopes for a continuation of the good working relationship with it.

<T3> §3. Advisory Committee on Restrictive Practices and Dominant Positions

581. The Advisory Committee met six times to examine preliminary draft Commission decisions pursuant to Articles 85 and 86 of the EC Treaty. Two of the decisions involved interim measures.

The Committee delivered a total of seven opinions. It was also consulted in 13 cases where the Commission was considering sending comfort letters to firms following publication of a notice pursuant to Article 19(3) of Regulation No 17. It was also kept informed of progress in several major cases.

In its various compositions, the Committee held four meetings on matters concerning legislation. Three of them dealt with a number of preliminary draft regulations amending the block exemption regulations covering air transport. One meeting was given over to discussion of a new block exemption regulation relating to shipping consortia.

<T3> §4. Advisory Committee on Concentrations

582. The Advisory Committee on Concentrations met five times. It delivered opinions on the draft decisions in KNP/Bührmann Tetterode/VRG, Pilkington-Techint/SIV, Kali+Salz/MDK/Treuhand and Mannesmann/Vallourec/ILVA.

The review of Regulation (EEC) No 4064/89 was discussed at two meetings with government experts from the Member States. The Commission drew very widely on the results of the discussions in drafting its report to the Council.(2)

The meeting of Directors-General for Competition that was held on 15 October was given over entirely to problems of cooperation between the Commission and the competent authorities in the Member States. Discussions of this question will be pursued within a working party of experts.

(2) See points 43 et seq. of this Report.

<T3> §5. Conference of national government experts

583. At their 44th conference, held in Brussels on 7 December, the government experts on restrictions of competition examined the preliminary draft of a new Commission regulation on the form, content and other details of applications and notifications pursuant to Regulation No 17 and the preliminary draft of a new Form A/B. It was agreed to carry out a second reading of the two preliminary drafts once the Commission had finished consulting the relevant representatives of business and industry.

<T3> §6. Contacts with the competition authorities in the Member States

<T5> (a) Restrictive agreements, dominant positions and mergers

584. In accordance with a general principle of law enshrined in all the regulations implementing Articles 85 and 86, the Commission carries out its proceedings in close and constant liaison with the competent authorities of the Member States. Such contacts, which were once again very numerous in 1993, not only involve an exchange of views on the individual cases being dealt with by the Commission. They also allow assessment of the scope for cooperation at the investigation stage and, where appropriate, for the sharing of tasks, in accordance with the principles of subsidiarity and decentralization.(3)

585. It was in this spirit that the Commission decided to share with the Member States a number of investigations to be carried out into firms in the spectacle industry. The investigations were conducted partly by the national authorities acting under Article 13 of Regulation No 17 and partly by Commission officials acting under Article 14. In one case concerning the distribution of office requisites, the Commission asked the authorities in three Member States to carry out on its behalf investigations on their respective territories into alleged restrictive practices. In two cases which resulted in proceedings for infringement of Articles 85 and 86 and related respectively to the foodstuffs and building materials industries, the Commission decided to separate out from the facts resulting from its investigation those which were more national in character and to refer them to the competent authorities in the Member States concerned.

(3) See Part One, Chapter V, §2 of this Report.

<T5> (b) Aid

586. The Commission held two multilateral meetings with officials from national ministries responsible for aid matters to discuss issues of state aid policy. These meetings are dealt with elsewhere in this Report.(4)

(4) See points 382 and 383 of this Report.

<T3> §7. Competition law in the Member States

587. The year saw a continuation of the tendency for competition law in the Member States to move into line with the Community competition rules. Measures were taken in several Member States to replace, amend or supplement the existing legislation with this objective in view. Similar legislation was being drafted in other Member States.

588. In Belgium the Act of 5 August 1991 on the protection of economic competition entered into force on 1 April 1993, along with the necessary implementing orders. It is closely based on Articles 85 and 86 of the EC Treaty and introduces a ban on restrictive practices, with scope for exemption, a ban on the abuse of dominant positions, and a system of merger control. A number of bodies are involved in its application. Cases are to be investigated by a Competition Office in the Ministry of Economic Affairs. Decisions on these cases are to be taken by a Competition Council made up of six professional judges and six specialists in competition matters. The Council's decisions can be challenged before the Brussels Appeal Court, which also has power to deliver preliminary rulings on the interpretation of the Act at the request of other courts. The Minister for Economic Affairs is empowered to declare block exemptions. There is also a joint Competition Commission which is to play an advisory role.

589. In Portugal the decree-laws on competition and merger control were incorporated into a single text. Important changes were made at the same time. The new legislation resembles the EC competition rules in that it no longer seeks to cover the case of an ordinary firm engaging in restrictive practices individually. The previous rules on unfair and discriminatory practices and on refusal to supply have been dropped. The ban on the abuse of a dominant position has been supplemented by a ban on the abuse of another's position of dependence. The merger control rules have been reformulated so as to align them on the principles and concepts laid down in the EC Merger Control Regulation. The new legislation also prohibits any

state aid which might significantly restrict or otherwise affect competition. At the request of an interested firm, the Minister for Trade is to investigate cases of state aid. If necessary, he will recommend to the minister responsible the measures needed to restore competition.

590. The Dutch authorities are preparing a thoroughgoing reform of the 1956 Economic Competition Act. The system of supervision based on the concept of abuse is to be replaced by new legislation prohibiting restrictive practices and the abuse of dominant positions which would correspond closely to Articles 85 and 86. The possibility of merger control legislation is also under consideration. Plans have now been submitted to the appropriate advisory bodies. In advance of the forthcoming reform, the Government tightened up the supervision of certain horizontal agreements. Orders were made banning price agreements, market-sharing agreements and restrictive agreements in respect of tenders. Exemptions can be granted only in individual cases. To qualify for exemption, an agreement must be shown to be in the general interest.

591. In Ireland a bill was drafted which would amend the Competition Act 1991 in order to make the application of the law more efficient. The Minister for Enterprise and Employment doubled the thresholds at which mergers must be notified. The Competition Authority declared exemptions for exclusive distribution and exclusive purchasing agreements for motor fuels which correspond closely to those provided for in the Community block exemption regulations, viz. Regulations (EEC) Nos 1983/83 and 1984/83.

592. In Denmark a committee was set up to draft a prohibition-based competition bill and to examine the advantages and disadvantages of a reform of the existing law. It is also to consider the introduction of merger control.

593. The Government of the United Kingdom pressed ahead with its plans to reform the rules on the abuse of economic power. A document setting out various legislative options has been the subject of extensive consultations

with all interested parties. The new rules are to be enacted together with rules banning restrictive practices as soon as parliamentary time can be found.

594. The Commission welcomes these moves, which in some cases go hand in hand with a liberalization of markets and an ending of privileged treatment for particular sectors, since they represent a decisive step towards the harmonization of the competition policies of the Community and the Member States and improve the scope for closer cooperation between competition authorities and for decentralized law enforcement. This is an objective to which the Commission has attached considerable importance and which is being taken up more and more widely. In two other Member States, France and Portugal, legal provision has now been made for the application of Articles 85 and 86 by the domestic competition authorities. As yet there is no such legislation in Denmark, Ireland, Italy, the Netherlands or the United Kingdom. The Commission will continue its efforts to secure the introduction of similar provisions in these countries too.

595. Those national authorities which do possess the necessary powers have been applying Articles 85 and 86 more extensively. Eighteen new cases of this kind were brought to the Commission's attention in 1993 (two in Germany, six in Spain, eight in France and two in Portugal). In the large majority of cases the Community prohibitions were applied in conjunction with the corresponding prohibitions under domestic competition law. In the two German cases, only the ban in Article 85(1) was applied because in the industry concerned, the energy sector, domestic law gave the competition authorities only very limited powers to supervise abuse.

596. The number of court cases in which the Community competition rules are applied has also been increasingly rapidly. Member States' reports to the Commission for 1993 list about 60 such decisions, with special mention being made of 37 of them which are deemed to be of particular importance. Most of the national competition authorities do not possess complete statistics on

such cases and so the total number of such judgments may well be a great deal higher. The Commission considers that this development too provides support for its policy of decentralized application.

597. Details of developments in Community law in the Member States are given in the country-by-country reports in the annex.

<T3> §8. Other contacts

598. In addition to the contacts mentioned in this Report, the Commission, in the course of preparation of its legislative work and general policy documents, continues to receive submissions from, and have contacts with, organizations representing consumers, employers and other relevant groups. The Commission is in regular contact in particular with the European Bureau of Consumers' Unions (BEUC), the European Round Table and the Union of Industrial and Employers' Confederations of Europe (UNICE). It also maintains contacts with chambers of commerce representing not only the Member States but also our main trading partners, notably the United States.

Commission officials also spoke in a personal capacity at several conferences relating to competition matters; this is a valuable means of increasing the transparency of Community policy and of obtaining feedback from business and other circles on the impact of competition policy in the market place. The Commission welcomes these contacts with consumers, employers and other relevant groups in monitoring the impact of competition policy.

599. The Commission replied to the questionnaire sent to it by Mr Charié, Chairman of the French National Assembly's working party on disfunctions of competition, and reported on progress in the work being carried out on the issues dealt with in the questionnaire, including abuse of economic dependence, dominant positions, price transparency and refusal to sell. The Charié report draws widely on the Commission's comments.

<T4> National representative organizations

600. During the year Commission officials also met with the national employers' organizations in Germany, Spain, France, Ireland and the United Kingdom. The Commission invites employers' organizations or other interested groups to make contact with its relevant departments if they would like a similar opportunity to explain their points of view on general questions and policy.

601. Finally, submissions were made to the UK House of Lords for its enquiry into competition law, with regard in particular to procedures in individual cases under Articles 85 and 86.

ANNEXES

<T4> Annex III

<T2> Decisions, notices and judgments relating to individual cases

<T9> A. Competition policy towards enterprises

<T3> 1. Case summaries

<T4> (a) Restrictive agreements

<T5> * Horizontal agreements

<T6> International Securities Market Association (ISMA) (formerly AIBD)

1. This case concerns a notification made by ISMA of its Rulebook. ISMA is an association of traders or "bond dealers" in international securities, for the most part "Eurobonds". It has some 900 member banks. Most of the notifed rules relate to arrangements devised by ISMA for maintaining the orderly functioning of the market (such as harmonization of settlement and matching procedures, and procedures for making good a failure to deliver etc.). Most of the notifed rules did not pose any problem from a competition point of view although some minor amendments were requested to be made in the rules and procedures governing membership.

Within ISMA there exists a sub-group known as the Council of Reporting Dealers (CRD), which has approximately 100 members. A market maker is a trader who undertakes to "make a market" in a specified category of security, i.e. to quote a buying and selling price in that security during a specified period and for a minimum quantity to other market makers. A reporting dealer is the term usually used to denote a market maker who is also a member of the CRD. Brokers can also be members of the CRD. A broker's role is to introduce a buyer to a seller and arrange the deal for them. There are basically two types of broker - first the agency broker who merely introduces the parties and acts for their account; and secondly the "matched principal" broker who acts as principal entering into "back-to-back" transactions with the buyer and the seller. He does not disclose the name of the parties and does not hold securities on his books. The notified rules were concerned exclusively with this latter kind of broker.

An Article 19(3) notice was published on 14 December 1991 declaring that the Commission intended to take a favourable view of ISMA's rules. Subsequently, the Commission received two complaints alleging that Rules 931 and 932 infringed Article 85 of the EC Treaty. Rule 931 stated that brokers "shall exclusively effect business between reporting dealers and shall give an undertaking ... not to effect business with or between other parties." Under Rule 932, reporting dealers were obliged to deal only with brokers who had agreed to abide by Rule 931. As a result of these complaints, new facts came to light which led the Commission to review its assessment of Rules 931/2 and to conclude that:

(a) Rule 931 constituted an appreciable restriction of competition within the meaning of Article 85(1) in that it prohibited brokers from dealing with traders who were not CRD market makers and prevented them from dealing with their existing clients (many of whom are not CRD market makers). One of the objects and the effect of this prohibition is to facilitate the maintenance of artificially high prices and to increase the prices available to dealers who are not CRD market makers and to the "end investor". An exemption could not be justified since the restriction did not produce any benefits other than for the CRD market makers while at the same time producing harmful effects on other market participants.

(b) Rule 932 also constituted an appreciable restriction of competition since it is designed to reinforce the restrictive effect of Rule 931 by preventing CRD market makers from dealing with brokers who are not willing to restrict their dealing to CRD market makers. An exemption could not be granted since this restriction produces benefits only for CRD market makers.

Following an informal letter stating the objections to Rules 931/2, ISMA agreed to abandon these rules. The Commission was then able to issue an administrative letter confirming that the Rulebook was in conformity with Article 85 (1). This comfort letter was without prejudice to the question of the CRD sub-committees, their rules and structure, and was subject to the usual caveat regarding a change in circumstances.

<T6> ACRISS

2. On 29 May the Commission published a notice pursuant to Article 19(3) of Council Regulation No 17 regarding a notification of ACRISS (The Association of Car Rental Industry Systems Standards). The notification concerned the ACRISS constitution, and also a code of conduct, car classification system, special equipment code and standard rental voucher scheme relating to the procurement of car rental in the Community through the use of Computerized Reservation Systems (CRSs).

ACRISS is at present composed of the five leading car rental firms operating in the EC, Avis, Budget, Hertz, Europcar Interrent and EuroDollar. However, the system is open to all car rental firms.

CRSs, which have been used in the airline sector for some time,(1) are now also being used by the car rental industry in the EC. ACRISS has formulated a code of conduct for the companies seeking to sell car rental through CRSs. This code is largely based on the code of conduct drawn up by the Commission for application in the distribution and sale of air tickets through CRSs. The object of the code is said to be to ensure that Computer Reservation Systems are used in a fair, non-discriminatory and transparent way.

The Commission has concluded that the arrangements fall within Article 85(1) of the EC Treaty because the availability of market information through a CRS enables car rental firms to be informed, on a continuous basis, of their competitors' prices and conditions of supply.

Nevertheless, the Commission considers that, overall, the arrangements contribute to the enhancement of competition in this sector and has decided to issue the parties with a comfort letter.

In its assessment, the Commission has particularly taken into account the fact that all car rental firms are allowed to participate, for a reasonable fee, and that the EC consumer is provided with easily accessible, comprehensive and accurate information on a competitively priced car rental service.

(1) Exempted from Article 85(1) by Commission block exemption Regulation (EEC) No 83/91, OJ L 10, 15.1.1991.

However, given that this is a new departure in the EC car rental market, the Commission is particularly keen that the present arrangements do not preclude the right of all interested parties to pursue any grievances which they may have through recourse to independent arbitration/appeal. Furthermore, the Commission will intervene immediately if there is any evidence of price coordination between participating companies or any indication that a concerted effort is being made to restrict competition in any way. It is also to be expected that there would be no constraints on the variety of information which can be offered and, as far as technically possible, included in the CRS. Finally, if the participating companies wish to make additional concessions available to their clients, e.g. discounts and special offers, without displaying such concessions on the CRS, they should clearly be free to do so.

<T6> UTC (Pratt & Whitney) / MTU(2)

3. The Commission authorized, by the dispatch of a comfort letter, a cooperation agreement concluded in the commercial aero-engine sector between the American company United Technologies Corporation (Pratt & Whitney division) and the German company MTU Motoren- und Turbinen-Union.

Under the agreement, MTU's involvement in existing programmes is to increase, and the two companies are to divide between them the work on future engine programmes. MTU will thus play a more prominent part in the supply of components and in the overhaul and repair of engines, and it will share with P&W the risks associated with, and revenues earned from, such programmes.

The draft originally notified to the Commission provided for "strategic" collaboration of a general nature going beyond collaboration on specific industrial projects. However, following publication of a summary of the notified agreement and in the light of comments submitted by third parties, the parties undertook, at the Commission's request, to limit their cooperation in the large-engine sector to particular projects. Such cooperation will henceforth concern specific families of commercial aero-engines.

The Commission accordingly considers that the cooperation will help to promote competition because it involves a significant transfer of technology. However, whenever it is faced with such framework agreements, it is the Commission's policy to exempt only specific cooperation projects, especially where the relevant markets are oligopolistic.

This was the first time the Commission had to assess a cooperation agreement in this sector. A review of the situation will therefore be carried out in ten years' time to see what impact the agreement has had on the market.

(2) Twenty-second Competition Report, Annex III.A.1.

<T6> Datacentralen - Mærsk Data

4. Datacentralen A/S ("Datacentralen"), a company owned by the Danish State, and Mærsk Data A/S ("Mærsk"), a company belonging to the Danish A.P. Møller Group, which have world-wide activities in shipping, manufacturing, aviation, oil production and trade, notified a set of agreements for the establishment of two joint venture companies on a fifty-fifty basis, Dan Computer Management A/S ("DCM"), and Dan Software International A/S ("DSI"). Further information was requested on several points and, having received the information, the Commission was able to close the file by sending a negative clearance comfort letter within the two months provided for in the accelerated procedure.

Datacentralen and Mærsk are both computer service companies, dealing with "systems development" (analysis, design, programming, testing) and "operative performance" (production) or "facilities management" ("FM") of computer assignments. Datacentralen has mainly supplied FM to undertakings in the public sector. Its activities abroad consist essentially in systems development outside the Community. Mærsk provides in particular computer services to the A.P. Møller Group. Like DC, it has no FM activities in the Community apart from Denmark.

The main object of the agreements is to implement a decision of the Danish Government for the privatization of Datacentralen. Accordingly, DCM takes over the FM activities of Datacentralen and Mærsk, but reserves services for the A.P. Møller Group. DSI is intended to work as a joint systems-export undertaking.

The parties have negligible market shares in the Community as a whole and the Commission considered that the putting together of Mærsk's and Datacentralen's goodwill and know-how in respect of FM is not likely to have any appreciable impact on the scope for undertakings established outside Denmark to win contracts in that country.

<T6> * BP/Montedipe agreements

5. An agreement was reached by which Montedipe (MD) agreed to sell and BP agreed to purchase MD's business of the sale and distribution of the acetyls products manufactured by MD at Porto Marghera and Priolo. MD will continue to produce, but entirely for BP.

The agreement provided for the transfer of all the goodwill and other assets and relevant sales/commercial personnel, as well as all the liabilities, pertaining to MD's going concern. MD also covenanted not to compete either directly or through its affiliates with BP in the business for a period of five years.

The sale and purchase agreement envisaged the execution by MD and BP of certain ancillary agreements relating, inter alia, to the toll-manufacture of the above acetyls products by MD for sale by BP; a proportion of the vinyl acetate monomer will be sold to MD associates.

The ancillary agreements provided, inter alia, as follows :

- MD is to convert raw materials supplied by BP for an initial period of 10 years with a right to extend such period for up to five further periods of one year each. It is envisaged that the plants will by then have exhausted their useful economic life. MD has the obligation to allocate its entire production capacity to BP and to operate the plants to their full capacity.

- BP has the right to require MD temporarily to shut down the plants, further to permanently close them and, if necessary, demolish them.

- It was further provided that the responsibility for the operation of the plants remains with MD, who must indemnify BP against any and all environmental risks and hazards caused by the operation of the plants and the handling, distribution and storage of raw materials and finished products.

- The cost of the conversion by MD will be equal to MD's fixed and variable costs together with the reimbursement of agreed capital costs and an element of profit or service charge (or toll-fee).

- It was also agreed that such quantities of ethylene as are required for conversion by MD to acetaldehyde would be supplied by MD from its Priolo ethylene plant. Such arrangement, based on an arm's length relationship, is to continue for the duration of the acetyls toll-agreement.

The Commission stated that the agreements in question between some companies of the BP Group and some companies of the ENI Group were agreements between competitors restricting competition between them because they gave rise to coordination of competitive behaviour between the parties with respect to the supply and production of the products in question. They therefore fell under Article 85 (1) of the EC Treaty.

This restriction of competition was appreciable, particularly in the case of ethyl acetate, because BP had a fairly high share within the EC market in 1991.

However, the Directorate-General for Competition took the view that the parties had provided sufficient (prima facie) justification for an exemption to be granted by the Commission. It appeared in particular that the agreements had certain advantages, notably environmental ones, because the know-how acquired by Montedipe on the legal and technical requirements of Italian law for environmental protection would allow environmental issues to be handled efficiently. The question was not one of determining whether MD's know-how was preferable to that of BP: since MD had been the previous operator of the site, the sharing of environmental responsibilities no longer posed any problems, and since MD was operating other production units on the same site, the sharing of environmental responsibilities between the various plants was avoided.

It was considered that the notification of the case could be dealt with by means of a comfort letter closing the file.

<T6> Bio-ethanol

6. The Directorate-General for Competition examined the conditions under which fuel additives are marketed. It carried out inspections of oil companies so as to see why they refused to purchase a new product on the market, bio-ethanol. The oil companies adduced technical and commercial arguments in support of their refusal to purchase the product. The Commission's investigation did not identify any factors indicating that any illegal concerted practices were involved. It therefore decided to discontinue the investigation.

<T6> International Energy Agency

7. On 12 December 1983 the Commission adopted a decision granting a ten-year exemption, under Article 85(3) of the EC Treaty, for the concerted practices between oil companies that were necessary to allow application of the emergency oil allocation system provided for under the International Energy Agency.

The undertakings concerned asked for the exemption, which expired on 31 December 1993, to be renewed for a period of ten years. The Commission accordingly initiated the procedure and, before taking a decision under Article 85(3) of the Treaty, published a notice pursuant to Article 19(3) of Regulation No 17 in the Official Journal.

<T6> Solvay-Asahi joint venture

8. A comfort letter closing the file was issued in the case of a joint venture between Solvay and Asahi Glass in respect of a trona mine and natural soda ash plant in the United States formerly owned by Tennelo. Solvay, the largest European producer of synthetic soda ash, acquired the capital stock of a United States company in May 1992, which gave it an 80 % share in the trona and soda ash operation. The other 20 % was held by Asahi Glass. The output of the mine is allocated between Solvay and Asahi in proportion to their interests.

The ancillary selling arrangements expressly stipulated that they did not apply to Europe. Asahi Glass is however the owner of one of Solvay's major customers for natural soda ash in the Benelux. The 20% shareholding gives it direct access to natural soda ash from the United States. Having obtained assurances from Solvay that there was no agreement or understanding relating to the sharing of customers in the EC, the Commission was able to close the file.

<T6> Enimont-Orkem

9. In 1989 Enimont (now Enichem) and Orkem (now Elf Atochem) reached agreement on the bases for a reciprocal transfer of activities between the two groups. Under the agreement, Orkem transferred to Enimont its radical low-density polyethylene production (Dunkirk and Carling Saint-Avold plants) and its standard linear low-density polyethylene production (Dunkirk plant). Enimont transferred to Orkem the company Vedril (Rho, Italy), which produces methyl methacrylate and polymethyl methacrylate, and Vedril Deutschland GmbH, which operates a polymethyl methacrylate plant at Stockstadt, Germany. Enimont also transferred to Orkem its polymethyl methacrylate production plant at Porto Marghera, Italy. In addition, Enimont and Orkem had planned to operate under a joint stucture the Dunkirk cracking plant and to share ownership of Stocknord, which operates the necessary storage facilities at that site, and the associated services.

The agreements, and in particular the reciprocal transfer of activities, are intended to enable each of the parties to specialize in its strongest areas, namely polyethylene in the case of Enimont and methyl methacrylate in the case of Orkem. Following the exchange, the two parties ceased being competitors on the relevant markets, since polyethylene and methyl methacrylates are completely different products. When the French public sector chemical industry was reorganized in 1990, Orkem's activities were redeployed between the chemicals subsidiaries (Atochem and Total-Chimie respectively) of the Elf-Aquitaine and Total-CFP groups. Orkem's chemical activities were thus regouped with those of Atochem. However, whereas Orkem had decided to withdraw completely from the sector of activity transferred to Enimont (polyethylene), Atochem was at that time already active in that sector.

After Atochem had intervened in the negotiations, the agreements concerning the Dunkirk steam cracker (under which Enimont had the option of increasing its share in ownership and operation from 50% to 100%) were amended in such a way as to guarantee Atochem a 30% right of ownership and operation of the steam cracker.

In 1991 Enichem succeeded Enimont and has for some time been planning to carry out a programme to rationalize its own activities. In accordance with the programme and with Elf Atochem's desire to consolidate its presence in the polyethylene sector, it was decided in 1993 to terminate part of the agreements previously signed between Orkem and Enimont. In particular, the Carling linear low-density polyethylene production plants (which had previously been transferred by Orkem to Enimont) are retransferred to Elf Atochem.

The Commission took the view that the agreements as a whole represented cooperation that was caught by Article 85(1) of the EC Treaty.

However, the agreements made it possible to rationalize production in the sectors concerned and to organize more efficient distribution on larger geographical markets than those previously operated on by each party. The parties are thus able to offer consumers a wider range of complementary products and to concentrate their efforts on those activities in which they are more efficient, and consequently to improve their products. The Commission accordingly closed the case by sending a comfort letter.

<T6> Abim Card

10. On 6 August 1992 a notification was made concerning an arrangement between four oil companies, Aral AG, BP Oil International Ltd, Italiana Petroli S.p.A. and Mobil Petroleum Company, Inc. (the "participants") to enter into an arrangement under which each participant will individually issue its own international commercial cards for the cashless purchase of fuel and related products and services ("commercial cards") by haulage and fleet operators ("commercial customers") in all suitable service stations throughout Europe designated by each participant. The venture will facilitate the mutual acceptance of commercial cards issued by each participant throughout the venture network, called the "ROUTEX" network.

Technical aspects of the venture are contained in additional agreements, including a purchase and sales agreement and a trade mark management agreement.

The venture was designed to respond to the growth in cross-border road transport in Europe, as truck and fleet operators extend their pan-European activities, and to meet the increasing demand from commercial customers for an easy and convenient means of obtaining fuel without cash wherever in Europe they may be. Since none of the participants was in a position to offer the density and spread of service stations throughout Europe that commercial customers demand, each participant agreed to accept each other's commercial cards on a reciprocal basis. Participants envisaged that this international card acceptance arrangement would enable them to develop a viable network of sufficient size to meet commercial customers' expectations by providing them with service opportunities and network coverage on a European-wide basis.

The cooperation provides that each participant accept certain obligations, namely (i) to implement the venture in each European country in which a participant maintains authorized outlets; (ii) to use its best efforts to promote commercial cards; (iii) to issue a commercial card marked by a common trade mark and (iv) to recogize commercial cards issued by the other participants.

By participating in the venture each participant also agreed to further acceptance of the UTA (Union Tank Eckstein GmbH) truck card at its designated service stations and to grant UTA market-related terms for diesel fuel.

Except for a few transitional arrangements limited in time, a number of restrictions of competition were deleted at the Commission's request. The Commission was particularly concerned that no commonly agreed discounts among participants and between participants and UTA or commonly agreed rebates given to commercial customers or a commonly authorized product range were part of the arrangements, and that dealers would not be prevented from freely determining whether the additional cost relating to a card payment should be charged to customers.

The final agreements, as amended, were submitted in October 1993 and the case was closed by the issuance of a comfort letter.

<T6> MPEAA/NOS and NOS Programme Coordination Rules

11. This case concerns a number of rules coordinating the purchase and production of television programmes by the Dutch public broadcasting organizations. The latter cooperate within the central broadcasting organization "NOS", which operates the aforementioned system of programme coordination.

The main suppliers of television programmes to the Dutch public broadcasting organizations are the large American producers. Motion Picture Export Association of America (MPEAA), an association of film producers and distributors, and its member companies filed a complaint with the Commission against the above rules on 5 April 1989. The Programme Coordination Rules were notified to the Commission by the NOS on 20 September 1990.

After a notice pursuant to Article 19(3) of Regulation No 17 concerning these rules was published, the system was exempted by comfort letter of 1 March 1993. The exemption was based upon the fact that the system presents advantages in terms of organization and cost efficiency for the operation of the Dutch public broadcasting system. The complainants did not raise any objection to the case being closed by means of a comfort letter.

<T6> BSB/Football Association

12. Following publication of a notice pursuant to Article 19(3) of Council Regulation No 17, the Commission closed the file concerning agreements between the English Football Association (FA), the BBC and BSkyB (formerly BSB). Under their agreements with the FA, the BBC and BSkyB were granted exclusive television coverage for the 1988/89-1992/93 football seasons. The agreements related to all national and international matches of which the FA is the owner of the television rights, i.e. matches of the national cups organized by the FA (FA Cup and Charity Shield) and international matches involving the English national team. The BBC and BSB, which had bid jointly for the rights, shared the rights between them by alternating transmission.

The Commission took the view that the exclusivity granted to the BBC and BSkyB was caught by Article 85(1). In order to allow all channels a fair chance to obtain access to major football matches, the duration of contracts should as a general rule be limited to one football season. However, in this particular case, an exemption was justified since BSB (now BSkyB), which came into operation only in 1990, needed a longer-term contract in order to facilitate its entry into the new developing market for direct-to-home satellite broadcasting. This assessment is without prejudice to the view the Commission may take on any future contracts to be concluded by the parties.

Originally, the BBC and BSB (now BSkyB) were also granted exclusive permission to televise football matches from abroad, which under Article 14 of the UEFA Statutes was subject to the prior permission of the FA. At the Commission's request, this clause, which was the main subject of the complaint by the Independent Television Association, was removed from the agreements in 1992. Pending the Commission decision on Article 14 of the UEFA Statutes, the FA undertook not to discriminate between, on the one hand, the BBC and BSkyB and, on the other, third-party broadcasters, such as the ITV companies, which want to show football matches from abroad.

<T6> BBC Enterprises

13. In December 1991 BBC Enterprises Limited, a subsidiary of the British Broadcasting Corporation ("BBC"), submitted a request for negative clearance or exemption to the Commission under EC competition rules in respect of a standard copyright licensing agreement for the purpose of facilitating retransmission of United Kingdom television programmes to subscribers in Ireland to diffusion services (i.e. cable networks and multipoint microwave distribution systems, "MMDS").

The licensors participating in the agreement with BBC Enterprises Limited are other United Kingdom terrestrial broadcasters and organizations which represent the owners of copyright and related rights in television programme services broadcast in the United Kingdom, including the Independent Television Association, Channel 4 and the Association de Gestion Internationale Collective des Oeuvres Audiovisuelles "AGICOA" of Switzerland. The licensees with whom agreements have been concluded to date are various cable television undertakings and undertakings proposing to operate MMDS services in Ireland, including Cablelink Limited in Dublin and Cork Communications Limited.

The Commission considered that the agreement contained restrictions which came within Article 85(1). In the context of its assessement of the request for exemption under Article 85(3), it accepted the view of the notifying parties that collective licensing was the most effective means by which an operator of cable or MMDS systems could be sure of not infringing copyright or neighbouring rights in retransmitting television broadcasts to its subscribers.

Notwithstanding this, and in view of the fact that in certain Member States broadcasters had in the past been excluded from similar agreements, the Commission had to ensure that such risks were minimized here in the interest of fair competition. The agreement was thus modified by the parties, at the Commission's request, to ensure adequate access by broadcasters not at present party to the agreement.

Following the publication of a notice[3] pursuant to Article 19(3) of Council Regulation 17,[4] in response to which no observations were received, the Commission advised the notifying parties on 8 July by comfort letter that the criteria for an exemption had been fulfilled.

(3) OJ C 105, 16.4.1993.
(4) OJ 13, 21.2.1962.

<T6> Philips/Matsushita - DCC

14. In November 1991 Philips International BV ("Philips") notified to the Commission for exemption or negative clearance a series of agreements relating to patent licensing in connection with the development and exploitation of the Digital Compact Cassette ("DCC") and the DCC player. DCC is a new type of magnetic tape cassette recording and reproduction system producing digital sound as opposed to the present analogue sound of traditional cassettes. The other principal undertakings party to the agreements are Matsushita Electric Industrial Company Ltd and Sony Corporation, both of Japan, together with Thomson Consumer Electronics SA, a company within the French Thomson group. In addition, a memorandum of understanding relating to the prevention of copyright piracy in this context between Philips and the International Federation of the Phonographic Industry ("IFPI"), representing the international music industry, was also notified.

Notwithstanding the fact that the agreements contained restrictions of competition falling within Article 85(1) of the Treaty, namely pooling of patents and know-how together with standardization of specifications, the Commission took the view that there were sufficient grounds for an exemption under Article 85(3).

Following the publication of a notice pursuant to Article 19(3) of Council Regulation No 17, in response to which no observations were received, the Commission advised Philips on 29 April by comfort letter that the criteria for an exemption had been fulfilled.

<T4> (b) Abuse of a dominant position

<T6> IBM undertaking

15. The Commission continues to monitor the undertaking given by IBM on 1 August 1984. The undertaking provides for the disclosure of interface information for attachment of competitors' products to IBM System/370 products and SNA (System Network Architecture).

Since its inception, there has been a total of 189 requests from 23 competitors containing 1 487 individual questions. Seven of these companies have signed and received information under technical information disclosure agreements.

<T4> (c) Decisions to reject complaints

<T6> Exelvision - France Télécom

16. The Commission formally rejected by decision a complaint lodged in 1987 by the French company Exelvision against France Télécom for abuse of a dominant position consisting in the offering free of charge by the latter of Minitel terminal equipment to be used for the provision of videotex value-added services to end-users.

The complainant was a manufacturer of terminals with similar features to those offered by France Télécom.

The assessment of the case was made complicated by the change in the regulatory framework, in France and in the entire EC, as regards the provision of value-added services that has taken place since the complaint was lodged. Whereas in 1987 the provision of value-added services was still under monopoly in France, it was liberalized in 1988.

In its reasoning, the Commission considered that, for a limited period of time, the offering by France Télécom of the basic Minitel terminals free of charge to end-users was a promotion action intended, like many others, to ensure a quick starting up of the videotex service so as to make it attractive for potential providers of services and end-users. That was what happened in fact, and now over 90% of the videotex terminals in the EC are installed in France. In addition, many countries are following, to a greater or lesser extent, the French strategy.

In respect of the period after the liberalization of the videotex service, the Commission assessed whether the behaviour of France Télécom could amount to an abuse of a dominant position by trying to eliminate a competitor by predatory action. In so doing, the Commission took into consideration the facts that France Télécom was not actually manufacturing the terminals but buying them in large series following public tendering procedures, in which the complainant never took part, and that from 1989 onwards France Télécom introduced a monthly rental fee for the new Minitel terminals and stopped the acquisition of the older models.

The result of the assessment showed that no abuse of a dominant position could be deemed to exist because no intention to eliminate Exelvision was proven and because no indication of pricing below average variable costs was found either as regards the entire videotex service or the new Minitel terminals.

<T6> Tiercé Ladbroke (B)/PMU-DSV-French "sociétés de courses"

17. In 1990, Tiercé Ladbroke, the Belgian subsidiary of Ladbroke Group, the largest bookmaker in the United Kingdom, lodged a complaint with the Commission alleging that Articles 85 and 86 of the EC Treaty had been infringed by:

- GIE Pari Mutuel Urbain ("PMU"), a body running a totalizator betting system which was set up under French law by the ten racecourse organizers in France, the "sociétés de courses";
- the ten "sociétés de courses" themselves;
- Pari Mutuel International SA ("PMI"), a subsidiary of PMU set up to manage its rights abroad;
- Deutscher Sportverlag Kurt Stoof GmbH & Co. ("DSV"), Cologne, which is PMU's sublicensee in Germany.

The object of the complaint was twofold:

1. The ten "sociétés de courses" hold the intellectual property rights to the races they organize; Ladbroke claimed that they had infringed Article 86 of the EC Treaty by refusing to supply Tiercé Ladbroke in Belgium with television coverage of French races comprising sound, pictures and commentary. French racing provides the basis for a large proportion of the odds betting service offered by Ladbroke in Belgium. The French "sociétés de courses" supply sound, pictures and commentary to PMU's own betting shops in France, and through PMI to DSV, which transmits this coverage to German bookmakers.

   The Commission decided that the relevant market here was not the Belgian market in horse-race betting but the market in the televised distribution of sound, pictures and commentary covering horse-races in general. It had not been demonstrated that PMU, PMI, DSV or any

individual race organizer held a dominant position on this market. Ladbroke had not shown that the ten "sociétés de courses" together held a collective dominant position.

Even supposing that they did hold such a position, however, the Commission concluded that they remained free to choose, market by market, whether or not to grant licences in respect of their rights. So far they themselves did not transmit sound, pictures and commentary covering their races to the Belgian market. The position would be different if the "sociétés de courses" were to decide to grant licences to certain bookmakers and not to others. Conduct of that kind might constitute discrimination caught by Article 86.

2. Ladbroke also challenged, under Article 85 of the EC Treaty, the validity of conditions in contracts which prevented PMU and DSV from transmitting to other countries the sound, pictures and commentary they received from the French "sociétés de courses".

The Commission concluded that, as Community law stood at present, these were restrictions which a licensor was entitled to impose and were not caught by Article 85(1) of the EC Treaty.

The Commission accordingly decided to reject the complaint.

<T6> Ladbroke Racing Ltd (UK)/PMU-French "sociétés de courses"

18. In 1989 Ladbroke Racing Ltd, the main UK bookmaker, lodged a complaint against ten of the associations known as "sociétés de courses", which organize horse races in France. The ten associations (five in the Paris region and five in the provinces) were authorized to take off-course totalizator bets by a decree of 11 July 1930, and the complaint alleged that they had infringed Articles 85 and 86 of the EC Treaty by entrusting the organization of off-course betting to a single body, GIE Pari Mutuel Urbain (PMU).

A law of 16 April 1930, and the implementing decree of 11 July 1930, authorized five Paris "sociétés de courses" and five provincial ones jointly to take bets away from their own racecourses. The ten authorized associations entrusted the organization of their off-course betting business to the company Société du PMU s.a.r.l.. A law of 23 December 1964 gave the same associations the exclusive right to take bets on foreign races. A decree of 14 November 1974 required "sociétés de courses" wishing to take off-course bets to do so through the PMU. A decree of 13 September 1985 stipulated that a "société de courses" could take off-course bets on races run in France only at its own racecourse or through the PMU.

The Commission rejected Ladbroke's claim that the associations acted unlawfully in choosing a single organization, the PMU, to organize their off-course betting between 1962 and 1974. It found that the designation of a single organization to be responsible for computing the total stakes and calculating and paying out winnings was a legal obligation imposed on the associations by the 1930 decree authorizing off-course betting. Before the 1974 decree made the PMU's involvement compulsory, Ladbroke never asked the associations to designate it in the PMU's place. Contrary to the claims put forward by Ladbroke, the 1930 decree prevented the associations from designating an individual operator.

The Commission also found that there had not been any ex post legalization of restrictive agreements or practices prohibited by Article 85 of the EC Treaty, as the EC Treaty did not exist when the 1930 decree was issued.

It took the view that the agreements entered into by the associations for the organization of betting, such as arranging the racing calendar, were a logical consequence of the 1930 decree. The other issues raised by Ladbroke were considered in the course of separate proceedings.

<T6> Tiercé Ladbroke (B)/French PMU and PMU Belge

19. In 1991 Tiercé Ladbroke, the Belgian subsidiary of the largest British group of bookmakers, lodged a complaint with the Commission against the French PMU (GIE Pari Mutuel Urbain) and the PMU Belge, which comprises Pari Mutuel Unifié Belge asbl and the Société coopérative auxiliaire PMU Belge, which was set up by the PMU Belge for the taking of totalizator bets in Belgium. The complainant charged that the parties against which it was complaining had, on 25 May 1990 and 18 March 1991, concluded agreements which, as from 20 March 1991, allowed bettors in 17 departments in Northern France to place totalizator bets four times a month, in the outlets of the French PMU, on races organized in Belgium by the Belgian "sociétés de courses".

The system is as follows: the bets are taken in France by the French PMU in its outlets and totalized by it. The bets are subsequently transferred to the Belgian totalizator system, at which point a 35% levy is deducted in accordance with Belgian law. Of this 35% levy, 26% are kept by the PMU Belge and the remaining 9% are returned to the French PMU, which, together with the "sociétés de courses", keeps 5%, the remaining 4% going to the French Government, whereas on French races, the percentage retained by the PMU and the "sociétés de courses" is 10% and the State's levy 18%.

In France and in Belgium, the PMUs are the joint organ of the "sociétés de courses" and are authorized by law to take bets on domestic races in accordance with the totalizator principle. Whereas in France only the totalizator is authorized and consequently the PMU enjoys a monopoly position, in Belgium bookmakers are also authorized to take not only odds-type bets, but also on-course totalizator bets, under the control of the "sociétés de courses", to which they pay a fee. They are also authorized, and are the only ones to have such authorization, to take odds-type bets on foreign races.

The Commission considers that the relevant geographic markets are France on the one hand and Belgium on the other, since national legislation on the taking of bets in the two countries has the effect not only of making the conditions of competition uniform within each country, but also of making them different from those in all the other Member States.

In view of the legislative provisions currently in force on the French market, where bets can be placed only with the French PMU, there can be neither any abuse of a dominant position within the meaning of Article 86 nor any restriction of competition within the meaning of Article 85(1) of the EC Treaty for the simple reason that no competition may be exercised.

As far as the Belgian market is concerned, since the PMU Belge does not hold a dominant position, it cannot have committed any infringement of Article 86 of the Treaty. Furthermore, the marketing abroad of the betting medium constituted by the races which its members, i.e. the "sociétés de courses", organize must be seen as merely a sale of services from one Member State to another which, though it may affect trade between Member States, has neither the object nor the effect of preventing, restricting or distorting competition within the common market; this means that the PMU Belge has not committed any infringement of Article 85(1) either.

<T6> Tiercé Ladbroke (B)/PMU Belge

20. In 1992, Tiercé Ladbroke (the Belgian subsidiary of the leading British group of bookmakers) lodged a complaint with the Commission against the PMU Belge. The PMU Belge comprises Pari Mutuel Unifié Belge asbl and the Société Coopérative Auxiliaire PMU Belge, to which the "sociétés de courses" entrust the taking of off-course totalizator bets on the races which they organize.

The complainant charged that the PMU Belge, which had accredited it as its agent for the taking of totalizator bets on Belgian horseraces from 1982 to 1988, had refused to renew its accreditation for the taking of such bets.

In the meantime, (in December 1991), the PMU Belge and four chairmen or members of Belgian "sociétés de courses" had taken control of one of Tiercé Ladbroke's competitors, Tiercé Franco-Belge, which the PMU Belge continued to accredit as its agent for the taking of this type of bets.

Tiercé Ladbroke claimed that the PMU Belge had as a result excluded it from the market for the taking of bets on Belgian races, which meant that, under Belgian law, it could take bets only on foreign races.

It concluded that the PMU Belge, which, in its view, had a monopoly for the taking of off-course bets on Belgian races, was abusing its dominant position in breach of Article 86 of the EC Treaty.

The Commission took the view that no such monopoly existed any longer since the Brussels Court of Appeal (in a judgment delivered on 11 May 1993) recognized the Ostend racecourse's right to entrust the taking of bets on its races to an agent other than the PMU Belge. Furthermore, the Ostend racecourse immediately availed itself of this right for the 1993 summer season and entrusted the taking of bets on its races to Tiercé Ladbroke.

The Commission also took the view that the PMU Belge (and its subsidiary, Tiercé Franco-Belge) was not in a dominant position on the relevant market, which is that for the taking of bets in Belgium on horseraces, irrespective

of where they are run and the type of betting involved. It is in fact Tiercé Ladbroke which has the largest share of that market.

Lastly, it took the view that, even supposing that the PMU Belge and Tiercé Franco-Belge were in a dominant position, the refusal to accredit Ladbroke would not have affected trade between Member States, since the taking of bets at the Franco-Belgian frontier is of only marginal significance and since the bets to which the complaint relates are taken in Belgian outlets on Belgian races and do not involve any financial transfer between Belgium and another Member State.

It consequently rejected Tiercé Ladbroke's complaint.

<T6> MTVE/VPL-IFPI

21. In June 1992 the Commission received a complaint from MTV Europe ("MTVE"), a pan-European satellite television station, which broadcasts pop music videos, against Video Performance Limited ("VPL"), the International Federation of the Phonographic Industry ("IFPI") and the five major worldwide record companies, Sony, Polygram, Warner, BMG, and Thorn/EMI ("the majors").

VPL licenses and administers broadcast and other performance rights in relation to music videos under UK law for its members, including the five majors. IFPI is an international association of record and video-producers which coordinates the activities of its members, including the majors, in the various national collecting societies to which they belong.

MTVE complained (a) that the existence of VPL and its operations in the licensing of copyright in the music videos of its members within the EC and its joint activities with IFPI, which enable record companies to operate pan-European licensing through joint selling agreements (80 % of which is on behalf of the five majors), was contrary to Article 85(1) and (b) that VPL and IFPI jointly occupy a dominant position in the Community within the meaning of Article 86 as they are able to exercise absolute control over the licensing of their members' music videos. According to MTVE, they have abused this dominant position in the relevant market by imposing unfair prices on MTVE for the licensing of pan-European transmission of music videos.

MTVE had first concluded an agreement with VPL/IFPI in 1987 for the rights described above. This had been renewed in 1990 but was due to expire on 31 July 1992, and MTVE was concerned that VPL and IFPI would not be prepared to renew it. Therefore, in conjunction with the complaint, it requested the Commission to adopt interim measures, requiring VPL and IFPI to enter into a new agreement with it. However, following intervention by the Commission, VPL and IFPI agreed to extend the agreement with MTVE to 31 July 1993. (It was subsequestly extended to 31 July 1994).

On 11 May 1993 the Commission rejected MTVE's request for interim measures, on the sole ground that, in view of the extension of the agreement, no risk

of serious and irreparable damage to MTVE which would justify the adoption of interim measures existed.

In view of this, it was not necessary for the Commission to make any finding in that context in relation to the existence, or otherwise, of a prima facie case of infringement of the Community's competition rules.

The substantive examination of MTVE's complaint by the Commission is proceeding.

<T6> Pentos

22. The Commission refused to grant interim measures following a complaint by Pentos Retailing Group, a UK retail bookseller, concerning the Net Book Agreements (NBA).

The NBA provides for uniform standard conditions of sale to be imposed by British publishers on retailers for the resale of "net" books. Following the Commission's Decision of 12 December 1988 not to exempt the NBA(5) and the judgment of the Court of First Instance of 9 July 1992 upholding the Decision,(6) Pentos filed a complaint with the Commission contending that the continued operation of the NBA, and in particular the application of the clause concerning the reimportation from other Member States of books printed in the United Kingdom (the circumvention clause), prevented it from adopting price promotion measures, thus adversely affecting its sales.

The Commission took the view that, in relation to the circumvention clause, a prima facie case of infringement of Article 85 could not be excluded. However, the Commission considered that the condition of serious and irreparable harm was not fulfilled because of lack of sufficient evidence put forward by Pentos.

(5) Eighteenth Competition Report, point 52.
(6) Twenty-second Competition Report, point 318.

<T6> ECSC inspection

As in the past, the ECSC inspection department carried out a number of checks on coal and steel production subject to the levy (Articles 49 and 50 of the ECSC Treaty).

In all, 103 checks of declared production were carried out at the head offices and works of coal and steel undertakings.

<T9> B. Public enterprises and national monopolies

<T4> Decisions pursuant to Article 90 of the Treaty

<T6> Port of Rødby[1]

On 21 December the Commission adopted a decision under Article 90(3) of the EC Treaty requiring the Kingdom of Denmark to bring to an end an infringement of Article 90(1), read in conjunction with Article 86 of the EC Treaty, in relation to a refusal to grant access to port facilities at Rødby (Denmark).

The Danish authorities had refused to allow Euro-Port A/S, a subsidiary of STENA Rederi AB, access to existing port facilities at Rødby or, alternatively, to construct new facilities on land adjacent to the existing port. Euro-Port A/S wished to enter the market for ferry services on the Rødby/Puttgarden (Germany) route. The port of Rødby is owned and managed by DSB, the state-owned railway company, which holds the exclusive right for the organization of rail traffic in Denmark. DSB also operates ferry services from the port in conjunction with Deutsche Bundesbahn, a German public undertaking.

The Commission found that an undertaking which owns and manages an essential facility, i.e. a facility or infrastructure without which its competitors are unable to offer their services to customers, and refuses to grant them access to such a facility is abusing its dominant position. Specifically, an undertaking which owns and manages essential port facilities from which it provides a maritime transport service may not, without objective justification, refuse to grant a shipowner wishing to operate on the same maritime route access to that facility without infringing Article 86. Moreover, Article 90(1) prohibits a Member State placing an undertaking in a position in which it could not have placed itself by its own conduct without infringing Article 86. Therefore, where a Member State refuses to grant access to essential port facilities and has strengthened the effects of the refusal by also refusing to authorize the construction of a new port, it constitutes a breach of Article 90(1), read in conjunction with Article 86.

(1) Commission Decision 94/119/EC, OJ L 55, 26.2.1994.

Having examined the argument of the parties, the Commission found that there was no objective justification for the double refusal of the Danish authorities and that it effectively prevented competitors to DSB entering the market for ferry services between Denmark and Germany, thus strengthening the joint dominant position of DSB and Deutsche Bundesbahn on the Rødby/Puttgarden route, contrary to Article 90(1), read in conjunction with Article 86.

<T5>

Annex IV

<T1>

The evolution of concentration and competition

<T4>

Introduction

23. As announced in the XXII Annual Report, the collection of data directly by the Commission (DOME), which was the source for the preparation of the statistical information contained in this annex, was interrupted in 1992. From this year, the inforamtion presented in this section of our Annual Report will come from outside databases. Most of the information presented here comes from the AMDATA database, a product of Acquisitions Monthly and Computasoft Ltd. to which the Commission services are subscribed. AMDATA figures have been completed with information on joint ventures provided by KPMG(1). This has been necessary to improve our coverage of these types of operations, which are not the specifically addressed by AMDATA.

The characteristics of the AMDATA and DOME databases have been the subject of a comparative study carried out by the Directorate General for Economic and Financial Affairs, which has been published in European Economy. For our own purposes, it is important to point out the following features of AMDATA as compared to DOME.

a) AMDATA has a much broader coverage than DOME. This is reflected in the large number of operations that it captures as compared to DOME (see figure 1). Furthermore, AMDATA registers not just the operation in itself but a greater number of variables and characteristics of the operation, including its value (although not always).

b) As figure 1 shows despite the differences in coverage between the two databases, the comparison of the time series of mergers and majority acquisitions provided by DOME has a time profile similar to the series on number and value of these types of operations provided by AMDATA(2).

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(1) We would like to thank KPMG for kindly providing this information.

(2) The comparison of figures on minority acquisitions and joint ventures is not possible given the relatively recent coverage of these types of past operations by AMDATA and KPMG.

c) AMDATA provides detailed information about the nationality of the bidder and target companies. This allows us to improve our knowledge about the cross-border flows of takeover activity.

d) AMDATA also provides detailed information about the Standard Industry Classification of the operation which allows us to improve the sectorial analysis of the deals.

In order to maintain some continuity in our publication, we have tried to maintain a format of presentation as similar to the old one as the differences in our statistical sources allow us. We have also kept the annual period unchanged and data presented below cover years running from 1st June to 31st May. The date of each operation corresponds to the date of announcement of the deal as reported by AMDATA.

Finally, it is worth recalling that the objective of this annex has always been and will be in the near future to provide a description of the main patterns of evolution of merger and concentration activity in the EC. We do not enter here into any in-depth analysis of the causes behind this evolution. Our main purpose is a descriptive one.

<T9>A. Takeovers (including mergers and majority acquisitions), minority acquisitions and joint ventures in 1992/1993

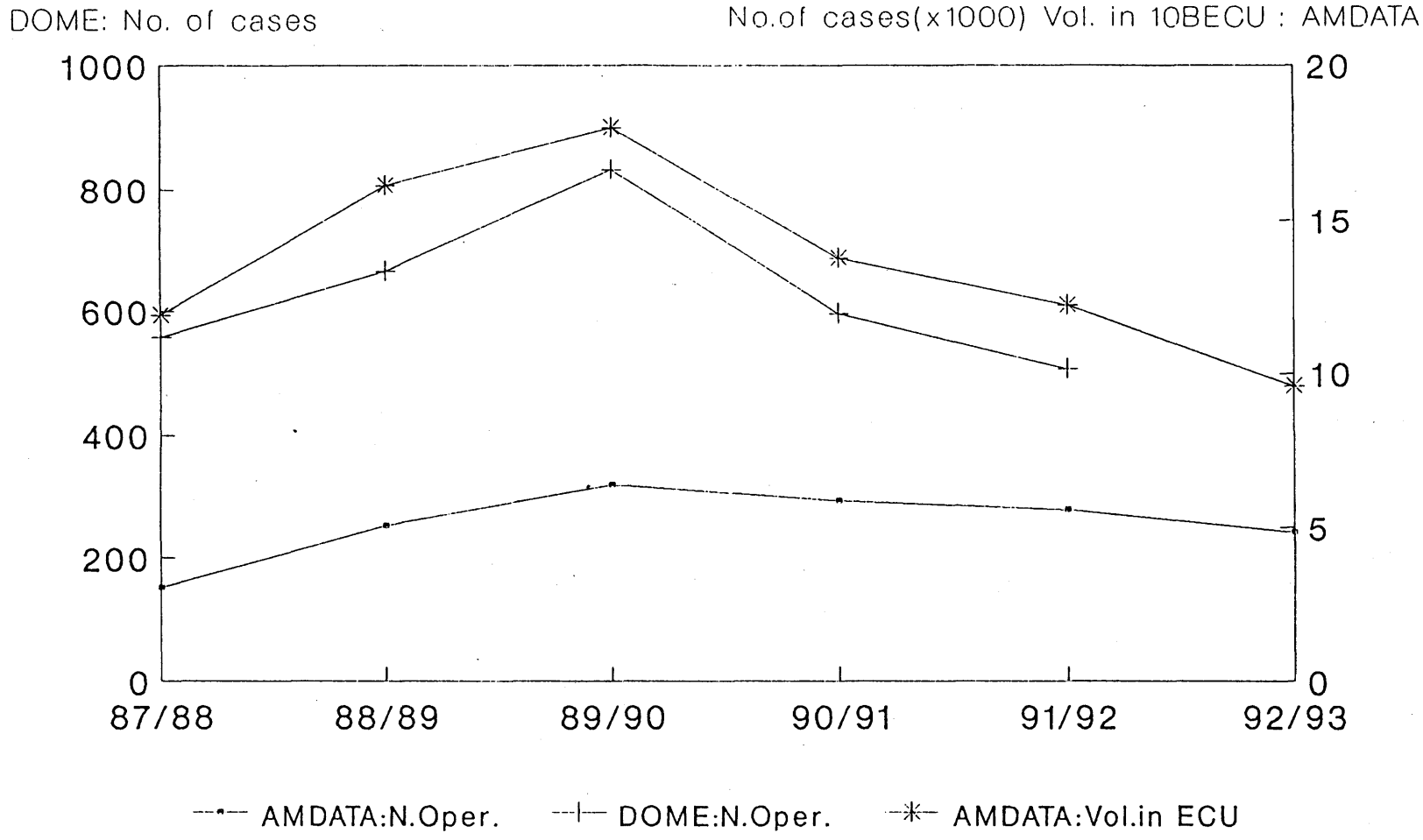
<T4> A general overview

24. Table 1 shows the evolution between 1987/1988 and 1992/1993 of mergers and majority acquisitions, minority acquisitions and joint ventures. The first part of the table includes data on agriculture, mining, utilities, construction and manufacturing and the second one gives information on services. Sectors of activity are defined at one digit level according to the British Standard Industrial Classification as given by AMDATA. At the two digit level, this classification is practically equivalent to the NACE code. Entries in blank correspond to information not available in the two sources.

Operations are classified according to their geographical dimension. We have defined five categories. National deals are operations between firms of the same country. Community deals include operations involving firms from at least two different Member States. For majority and minority acquisitions,

Mergers and majority acquisitions as measured by DOME and AMDATA

Graphic 1



Sources: AMDATA and DOME databases

we have distinguished extra-EC operations depending on the nationality of the bidder and the targetted firm. 'EC-international' designates operations in which EC companies acquire firms of non-EC origin. International-EC deals are operations in which the bidder is a firm from outside the Community and it acquires one or several EC firms. The last category (outside EC) includes deals in which there was not any involvement of EC firms.

25. As graphic 1 and Table 1 show, concentrative activity has maintained during the last year the declining trend started in 1990/1991. Both the number of operations and the total value of deals has declined even more sharply than last year. The decrease in the number of deals is general affecting almost all sectors. In manufacturing, there is a fall of approximately 12% in the number of mergers and majority takeovers. The subsector with the largest contraction in concentrative activities was metal, engineering and cars with a 15% decrease in 1992/1993. However, this sector had maintained its 1990/1991 levels in 1991/1992. All manufacturing susbsectors showed in 1992/1993 frequencies of operations similar to those achieved in 1988/1989, just before the 1989/1990 peak. In agriculture, mining and utilities, the rate of decrease of concentration activity was higher than in the manufacturing sectors.

26. In the service sector, the evolution has not been so uniform. For instance, the distribution and tourist sector attained a high level of concentration activities in 1991/1992, though inferior to 1989/1990 figures. However, in 1992/1993, mergers and acquisitions of majority stakes fell a considerable 22% with respect to 1991/1992 figures. The banking and financial sector also experienced a reduction in the number of deals, although this was of lesser magnitude (6%). 'Other services' was the only subsector that had an increase in concentrative activity, reaching a number of deals similar to the 1990/1991 figure (even higher if we add minority acquisitions). This subsector includes health and sanitary services, education, research and development and recreational, cultural and personal services.

This contraction in concentration activity shows very different patterns depending on the geographic nature of the operations. In manufacturing, cross-border operations involving EC firms (i.e. intra-EC operations or deals between European and a non-European firms) have fallen by less than national operations (10% and 18% respectively). However, the evolution of cross-border operations has not been uniform. Intra-Community operations have in

Table 1

CONCENTRATIVE OPERATIONS BY SECTOR AND GEOGRAPHIC TYPE 1987/1988 – 1992/1993

SIC code (1 digit) / Years	Mergers and majority acquisitions					Minority acquisitions					Joint ventures					TOTAL				
	Nation. operat.	Commun. operat.	EC/ intern.	Intern./ EC	Outside EC	Nation. operat.	Commun. operat.	EC/ intern.	Intern./ EC	Outside EC	Nation. operat.	Commun. operat.	EC/ intern.	Intern./ EC	Outside EC	Nation. operat.	Commun. operat.	EC/ intern.	Intern./ EC	Outside EC
Agriculture																				
1987/1988 6	2	8	0	0												6	2	8	0	
1988/1989 11	3	5	3	4		0	0	0								11	3	8	4	
1989/1990 35	6	2	2	5		0	0	0		0						35	6	4	5	
1990/1991 33	8	3	1	1		0	1	1	0	0						33	9	5	1	
1991/1992 27	6	1	3	1		3	0	0	0	0						30	6	4	1	
1992/1993 13	1	1	7	3		3	0	0	0	0						16	1	8	3	
Energy/Water																				
1987/1988 26	6	20	1	3												26	6	21	3	
1988/1989 36	21	16	4	12		2	0	0								38	21	20	12	
1989/1990 44	10	16	5	7		0	0	0		0						44	10	21	7	
1990/1991 48	18	12	10	6		1	2	1	1	1						49	20	24	7	
1991/1992 65	11	17	9	11		6	5	2	2	3						71	16	30	14	
1992/1993 42	5	18	16	11		9	1	4	0	3						51	6	38	14	
Miner./Chem.																				
1987/1988 84	37	72	22	17												84	37	94	17	
1988/1989 195	105	94	58	32		0	0	0								195	105	152	32	
1989/1990 247	151	117	79	47		0	0	0		0		12	40	26		247	163	236	73	
1990/1991 271	134	77	107	62		9	1	2	2	1		22	90	87		280	157	278	150	
1991/1992 230	92	88	79	61		9	4	6	5	9		17	65	84		239	113	243	154	
1992/1993 194	94	73	91	63		14	4	3	3	9		34	75	68		208	132	245	140	
Met./Eng/Cars																				
1987/1988 399	50	102	37	36												399	50	139	36	
1988/1989 568	160	148	102	80		0	0	0								568	160	250	80	
1989/1990 715	178	130	208	107		0	0	0		0		30	129	65		715	208	467	172	
1990/1991 647	182	130	178	88		8	3	2	5	2		46	176	15		655	231	491	105	
1991/1992 687	169	122	176	69		9	7	10	7	14		28	138	166		696	204	453	249	
1992/1993 564	123	118	136	102		18	6	11	12	10		34	77	131		582	163	354	243	
Manufactur.																				
1987/1988 385	50	85	40	21												385	50	125	21	
1988/1989 675	180	131	104	63		1	2	0								676	182	235	63	
1989/1990 777	249	114	167	62		0	0	0		1		3	21	21		777	252	302	84	
1990/1991 846	209	104	147	79		12	7	2	2	5		19	60	60		858	235	315	144	
1991/1992 851	164	98	117	48		25	15	2	9	9		13	54	81		876	192	280	138	
1992/1993 701	122	118	120	69		29	11	5	5	9		14	51	60		730	147	299	138	
Construction																				
1987/1988 59	4	6	0	1												59	4	6	1	
1988/1989 80	12	7	5	3		1	0	0								81	12	12	3	
1989/1990 107	35	6	16	6		0	0	0		0		1	8	3		107	36	30	9	
1990/1991 92	25	8	9	9		5	4	1	0	0		6	19	10		97	35	37	19	
1991/1992 127	16	6	12	2		6	4	0	1	2		7	13	9		133	27	32	13	
1992/1993 106	15	5	12	2		4	3	0	0	2		6	9	8		110	24	26	12	

Table 1 continued

CONCENTRATIVE OPERATIONS BY SECTOR AND GEOGRAPHIC TYPE 1987/1988 – 1992/1993

SIC code (1 digit) Years	Mergers and majority acquisitions					Minority acquisitions					Joint ventures					TOTAL				
	Nation. operat.	Commun. operat.	EC/ intern.	Intern./ EC	Outside EC	Nation. operat.	Commun. operat.	EC/ intern.	Intern./ EC	Outside EC	Nation. operat.	Commun. operat.	EC/ intern.	Intern./ EC	Outside EC	Nation. operat.	Commun. operat.	EC/ intern.	Intern./ EC	Outside EC
Distr./Hotels																				
1987/1988	399	48	79	12	16											399	48		91	16
1988/1989	602	121	85	57	41	0	0	0								602	121		142	41
1989/1990	744	214	110	109	38	1	0	1		0	8		39	13		745	222		258	51
1990/1991	570	157	70	108	36	14	4	2	5	0	29		75	73		584	190		258	109
1991/1992	768	121	53	87	44	12	10	9	7	5	16		30	74		780	147		177	123
1992/1993	508	104	82	103	44	15	8	6	4	7	15		30	41		523	127		219	92
Transp./Comm.																				
1987/1988	78	9	6	2	3											78	9		8	3
1988/1989	113	24	15	26	19	1	0	0								114	24		41	19
1989/1990	152	53	10	38	12	0	0	0		0	6		19	19		152	59		67	31
1990/1991	164	33	23	37	22	5	0	1	2	2	10		49	48		169	43		111	72
1991/1992	159	23	23	33	14	12	6	4	2	6	19		67	60		171	48		125	80
1992/1993	138	33	20	33	17	6	4	7	3	8	13		30	54		144	50		86	79
Bank/Fin/Ins.																				
1987/1988	540	41	121	46	17											540	41		167	17
1988/1989	704	123	139	80	53	4	2	1								708	125		219	53
1989/1990	859	206	122	122	64	4	2	2		0	41		58	32		863	249		302	96
1990/1991	800	168	106	122	69	33	21	4	8	6	125		130	108		833	312		366	183
1991/1992	683	136	76	73	63	73	27	13	12	16	47		87	77		756	210		248	156
1992/1993	606	122	82	108	51	80	17	10	12	2	18		67	82		686	157		269	135
Other services																				
1987/1988	134	5														134	5		0	0
1988/1989	203	12	19	8	3	0	0	1								203	12		27	3
1989/1990	173	20	28	22	8	0	0	0		0	9		8	1		173	29		58	9
1990/1991	167	15	17	10	4	6	1	1	0	1	9		13	18		173	25		40	23
1991/1992	123	22	13	16	13	8	4	1	0	3	4		16	17		131	30		45	33
1992/1993	132	15	20	30	19	18	4	3	3	4	15		24	22		150	34		77	45
Totals																				
1987/1988	2110	252	489	160	114	0	0	0	0	0	0		0	0		1151	103		266	36
1988/1989	3187	761	659	447	310	9	4	2	0	0	0		0	0		1627	282		429	116
1989/1990	3853	1122	655	768	356	5	2	3	0	1	110		322	65		1933	569		685	187
1990/1991	3638	947	550	729	376	93	44	17	25	18	266		612	247		1759	570		775	387
1991/1992	3720	760	497	605	326	163	82	47	45	67	151		470	228		1838	435		595	392
1992/1993	3004	634	537	656	381	196	58	49	42	54	149		363	199		1503	368		651	351

Source: AMDATA (acquisitions) and KPMG (joint ventures).

Note: Joint ventures values for 1990/1991 go from January 1991 to May 1991 only.

fact declined by more than national deals, with a 20% decrease with respect to last year figures. On the contrary, the number of deals involving European and non-European firms shows a certain resistence to fall with decreases in the range of 3% to 4%.

This trend appears even more clearly in the service sector. Here, domestic operations fell by 20% last year while cross-border operations increased by 9%. Once more, this is due to the increase in the number of operations between EC and non-EC firms that increased considerably while intra-Community deals decreased by 9%.

The figures of operations between firms from outside the EC showed remarkable increases in manufacturing during the last two years. The metal, engineering and cars sector explains this upsurge in extra-EC merger activity. Although the coverage by the database of this type of operation is not comparable to its EC coverage, the evidence provided by Table 1 seems to suggest that the contraction in concentration activities has been more important in Europe than in the rest of the world during the last years.

<T4> Distribution by sector of mergers and majority acquisitions

27. Table 2 gives a detailed account of the distribution by sector of the mergers and majority acquisitions involving EC firms that took place during 1992/1993. The first three columns give us the information concerning the geographic dimension of those operations and column four and the rest of columns give us the aggregate figures for the period 1987/1988 to 1992/1993. This table includes only mergers and majority acquisitions which result from the addition of the following categories supplied by AMDATA: public bids, private bids, management buy-outs, divestments, reverse takeovers(3).

The first part of the table shows the number of operations of these types that took place in agriculture, mining and utilities, construction and manufacturing. This latter category has been subdivided in three groups: minerals and chemicals, metal, engineering and motor industries and general manufacturing. The second part of the table includes all the service sectors divided in four subgroups: distribution and hotels, transport and communication, banking, financial sector and insurance and other services.

(3) For a definition of three categories, see the section on distribution by size and bid type below.

Table 2

MERGERS AND MAJORITY ACQUISITIONS BY SUBSECTOR

Geo. dimension and yr Target SIC (2 digits)	1992/1993 National	Community	EC/non-EC	Total	TOTALS 1987/1988	1988/1989	1989/1990	1990/1991	1991/1992
Agriculture & Horticulture	11	1	5	17	14	21	39	38	36
Forestry	1	0	0	1	1	0	1	2	0
Fishing	1	0	3	4	2	1	5	5	1
AGRICULTURE	13	1	8	22	16	22	45	45	37
Coal mining & solid fuels	2	0	5	7	10	9	9	7	5
Mineral oil & natural gas	7	2	13	22	42	24	30	20	35
Mineral oil processing	5	1	1	7	6	17	14	15	16
Nuclear fuel production	2	0	3	5	0	1	1	2	3
Electricity/Gas & other energy	24	1	11	36	2	8	12	30	39
Water supply industry	2	1	1	4	2	18	9	14	4
ENERGY & WATER	42	5	34	81	53	77	75	88	102
Metalliferous ores	1	1	6	8	6	7	9	10	17
Metal manufacturing	37	9	17	63	23	65	96	108	58
Other mineral extraction	15	3	12	30	9	30	35	23	36
Non-metal mineral products	76	35	30	141	69	141	166	192	145
Chemical industry	64	45	97	206	107	204	283	252	226
Production of man-made fibres	1	1	2	4	2	5	5	4	7
MINERALS/CHEMICALS	194	94	164	452	215	452	594	589	489
Other metal goods manufacture	87	15	23	125	85	131	146	154	156
Mechanical engineering	225	47	95	367	184	302	445	392	415
Office machinery/data proc. equipment	18	2	15	35	35	58	50	36	34
Electrical & electronic eng.	127	34	77	238	187	308	353	320	321
Motor vehicles & parts	38	14	12	64	26	67	87	80	80
Other transport equipment	38	3	11	52	30	49	65	64	73
Instrument engineering	31	8	21	60	41	60	83	91	75
METAL/ENGINEERING/OMS	564	123	254	941	588	975	1229	1137	1154
Food industry	114	29	35	178	76	140	195	235	217
Sugar & sugar by-products	104	15	54	173	71	146	184	215	203
Textile industry	44	16	11	71	46	78	94	74	111
Leather & leather goods	4	0	4	8	2	9	13	15	7
Footwear & clothing industries	69	9	14	92	40	97	101	98	76
Timber & wooden furniture	52	6	14	72	54	117	110	91	101
Paper manufacture & products	239	29	56	324	170	304	386	381	337
Rubber & plastics processing	52	15	37	104	71	157	174	148	136
Other manufacturing industries	23	3	13	39	30	42	50	49	42
MANUFACTURING	701	122	238	1061	560	1090	1307	1306	1230
Construction/civil engineering	106	15	17	138	69	104	164	134	161
CONSTRUCTION	106	15	17	138	69	104	164	134	161
Total	1620	360	715	2695	1501	2720	3414	3299	3173

Table 2 continued

MERGERS AND MAJORITY ACQUISITIONS IN AGRICULTURE, MINING UTILITIES, MANUFACTURING AND CONSTRUCTION BY SUBSECTOR

Geo. dimension and yr Target SIC (2 digits)	1992/1993 National	Community	EC/non-EC	Total	TOTALS 1987/1988	1988/1989	1989/1990	1990/1991	1991/1992
Distribution – wholesale	262	73	125	460	288	480	614	455	526
Scrap dealing/waste materials	10	0	1	11	8	6	11	3	18
Distribution – retail (domestic)	95	10	10	115	89	114	141	140	256
Distribution – retail (other)	78	6	17	101	77	135	227	185	136
Hotels and catering	56	14	31	101	70	116	155	103	75
Repair of goods & vehicles	7	1	1	9	15	12	25	13	14
DISTRIBUTION/HOTELS	508	104	185	797	547	863	1173	899	1025
Gen. transp./Communication	9	0	1	10	0	3	15	15	4
Railways	3	0	1	4	0	3	2	0	2
Other inland transport	36	6	7	49	39	56	47	62	68
Sea transport	11	3	5	19	6	21	33	21	29
Air transport	12	3	4	19	7	17	25	23	21
Transport support services	17	3	6	26	13	11	18	15	30
Other transp. serv./storage	49	18	26	93	36	67	110	108	72
Postal serv./telecoms	1	0	3	4	0	0	3	13	12
TRANSPORT/TELECOMMUNICATIONS	138	33	53	224	95	178	253	257	238
Banking & finance	123	28	43	194	78	195	242	280	243
Insur. (ex social security)	48	15	21	84	44	81	94	98	73
Business services	333	66	110	509	498	608	773	685	535
Renting of movables	29	7	8	44	62	92	104	53	39
Owning/dealing in real estate	73	6	8	87	66	70	96	78	78
BANK/FINANCE/INSURANCE	606	122	190	918	748	1046	1309	1194	968
Sanitary services	33	5	16	54	20	48	23	57	49
Education	10	0	6	16	12	10	38	16	11
Research & Development	8	3	5	16	8	12	31	16	19
Medical/Health serv.; vets	13	1	3	17	12	32	13	15	5
Other public services	0	0	2	2	2	0	25	8	1
Recreational/cultural serv.	63	5	15	83	46	74	96	87	75
Personal services	5	1	3	9	66	66	17	10	14
OTHER SERVICES	132	15	50	197	159	242	243	209	174
TOTALS	1384	274	478	2136	1549	2329	2978	2559	2405

Source: AMDATA

As Table 1 already showed, the general manufacturing group and metal, engineering and motor industries are the two subgroups with the greatest number of mergers and majority acquisitions in 1992/1993. This has been a constant since 1987/1988. The geographic distribution of these operations presents significant differences though. While cross-border operations have more or less the same number of cases in these two subsectors, the number of national operations in general manufacturing is much higher than in metal/engineering/cars.

General manufacturing, paper and paper products, food and sugar were the subsectors with the highest frequency of operations during last year. Despite the general decline in the number of deals, the paper subsector maintained a high level of concentration activity in 1992/1993. As a result, it has increased its relative share within the manufacturing group, accounting for more than 30% of all deals in this group. The shares of the food and sugar subsectors experienced a substantial reduction in the number of deals but still maintained their relative importance, which is greater than in 1987/1988.

In the metal, engineering and automobile sector, we have to note that the two main subsectors - mechanical engineering and electrical and electronic engineering - have behaved differently over time. Both subsectors had approximately the same number of deals in 1987/1988. Since then, concentrative activity in mechanical engineering has grown far more rapidly than in electrical and electronic engineering. It is also worthwhile noticing that national deals are more frequent in mechanical than in electrical engineering.

Despite its small number, the progression in the number of deals in the 'electricity, gas and other energy' subsector is quite remarkable.

In services, there is a high concentration of deals in two subsectors that account for approximately 50% of the total number of mergers and majority takeovers. These are distribution at the wholesale level and business services in the financial group.

Almost all subsectors have followed the general trend in concentration activity over time, with a peak around 1989/1990 and 1990/1991 followed by

the present decline. This gives a very stable distribution of operations by sector over time with just a few noteworthy events:

a) first, the relative decline of business services versus wholesale distribution, although the former still maintains its leadership in terms of deals registered;

b) the banking subsector has increased its relative importance steadily over the years but suffered a drastic reduction in the number of deals in 1992/1993;

c) all the other financial services (i.e. insurance, renting of movables and real estate) have had more deals in 1992/1993 than in 1991/1992, although the increase was relatively small;

d) non-domestic retail distribution had an unusually low level of concentrative activity in 1991/1992 and the important increase of last year must be considered as the re-establishment of a normal level of concentrative activity;

e) domestic retail distribution had an unusually high number of deals in 1991/1992, but in 1992/1993 concentrative activity in this subsector has diminished to the level of previous years.

To conclude this section, Table 3 shows the distribution by country of all the intra-Community operations - i.e. national plus Community-wide - registered in 1992/1993.

The United Kingdom has the highest number of deals in six out of the ten economic sectors included in the table (agriculture, metal and engineering, general manufacturing, distribution and hotels, banking and insurance and other services). Germany has the greater number of deals in four sectors (energy and utilities, minerals and chemicals, construction and transport and communications). This high level of concentrative activity in Germany seems to reflect the influence of German re-unification given the nature of the sectors in which Germany occupies the first place. The third country with respect to the total number of operations of intra-Community dimension was France.

Table 3

MERGERS AND MAJORITY ACQUISITIONS OF INTRA-COMMUNITY DIMENSION BY SECTOR AND TARGET NATIONALITY – 1992/1993

National/Community 92/93 Target nationality Target SIC	B	DK	Irl	F	D	Gr	I	Lux	NL	PT	SP	UK	Total
Agriculture	2	1	1	1	1	0	0	0	2	0	3	3	14
Energy & Water	2	0	0	4	22	0	2	0	4	0	2	11	47
Mins/Chemicals	13	11	3	31	87	1	31	2	11	1	29	68	288
Metal/Eng./Cars	13	41	2	131	185	1	64	1	45	0	13	191	687
Manufacturing	27	32	13	158	184	3	93	1	60	4	40	208	823
Construction	6	4	1	11	47	0	2	0	6	0	1	43	121
Distrib./Hotels	20	19	4	82	199	1	13	0	40	4	24	206	612
Transport/Comm.	9	12	1	28	45	1	17	0	25	0	6	27	171
Bank/Fin./Insur.	43	38	7	125	114	2	70	3	74	4	45	203	728
Other services	5	3	1	20	39	0	10	0	6	1	3	59	147
TOTALS	140	161	33	591	923	9	302	7	273	14	166	1019	3638

Source: AMDATA

<T4> Geographic distribution of concentrative operations

28. The AMDATA database allows us to give a detailed breakdown of the geographic distribution of concentrations. In this section, intra-Community operations are presented separately from those involving Community and non-EC companies in the same operation.

<T5> Intra-Community operations

29. Table 4 presents the distribution of mergers and majority acquisitions involving firms from the Member States only. The diagonal of this table shows operations of purely national dimension while the remaining entries are Community-wide operations, i.e. operations between firms of at least two different Member States. This table includes all the operations that occurred during 1992/1993 in all sectors (agriculture, mining and utilities, manufacturing and services).

Table 4 shows that the three countries which are targetted more often for mergers and majority acquisitions of national and Community dimension (UK, Germany and France) have also been the countries of origin of the greater number of bids to acquire companies within the Community. The UK is the first country in both cases. In 1992/1993 there were more operations of this kind within the UK than anywhere else within the Community. Just the number of national operations in the United Kingdom is greater than the total number of operations anywhere else in the EC: there were 929 purely national operations in the UK while the total of national plus Community operations targetting Germany (which occupies the second place) was just 923. France had the third highest levels of concentrative activity in 1992/1993, both in terms of nationality of the bidding and targetted firms.

However, the table shows some important differences between these three countries. The number of cases with the UK appearing as bidder nationality is slightly greater than the number of cases of that country appearing as target nationality (1,101 and 1,019 respectively). Therefore, we could say that the UK is a 'purchasing country' in the EC context as the net balance in terms of number of operations is negative, i.e. with more purchases of

Table 4

COUNTRY DISTRIBUTION OF MERGERS AND MAJORITY ACQUISITIONS OF INTRA-COMMUNITY DIMENSION (national and Community) (all sectors) – 1992/1993

Target nationality Bidder nationality	B	DK	Irl	F	D	Gr	I	Lux	NL	PT	SP	UK	Total
Belgium	78	1	0	8	3	0	0	3	4	0	3	3	103
Denmark	1	134	0	3	3	1	1	0	1	1	2	16	163
Ireland	1	0	25	0	2	0	0	0	4	0	1	19	52
France	19	3	0	477	34	2	25	1	11	2	28	23	625
Germany	5	13	0	26	801	0	8	2	14	0	8	16	893
Greece	0	0	0	1	0	4	0	0	0	0	0	0	5
Italy	1	1	0	18	6	1	249	1	1	1	8	2	289
Luxembourg	1	0	1	1	0	0	0	0	0	0	2	1	6
The Netherlands	22	4	1	7	29	0	3	0	215	1	7	9	298
Portugal	0	0	0	0	0	0	0	0	0	4	1	0	5
Spain	0	0	0	2	2	0	0	0	0	4	89	1	98
United Kingdom	12	5	6	48	43	1	16	0	23	1	17	929	1101
TOTALS	140	161	33	591	923	9	302	7	273	14	166	1019	3638

Source: AMDATA

foreign companies by UK firms than of British firms by foreign companies(4). Nevertheless, the UK is a country where the proportion of domestic operations with respect to Community operations is relatively high: for each bid for a foreign firm of a different Member State made by a UK firm, there are 5,4 operations involving British-only companies.

In 1992/1993 at least, France showed a different profile. As in the UK, French firms appear more often as buyers of foreign firms from other EC countries than as targets for intra-EC operations(5). But domestic operations are relatively less important in France (in comparison with Community operations) than in Britain: for every cross-border operation there were 3.2 national majority acquisitions of national firms by French companies.

Germany has a differnt profile too. Firms of German nationality have been targetted more often than German firms have targetted companies in another Member State. In this sense the situation in Germany is different from that of the UK and France. However, as in the UK, national operations (801) were relatively much more important than acquisitions of foreign firms by German companies (92) or than acquisitions of German firms by foreign companies (122).

The rest of the Member States follow more or less closely these three patterns. Belgium, Greece and the Iberian countries are targetted more often than they appear as bidders abroad but within the Community. In this sense, they look like Germany. Belgium shows a great degree of 'openness' in concentrative operations within the Community. As in France, the ratio of national to Community deals is proportionately smaller compared with other countries. The opposite seems to apply to Italy for instance where 82% of all intra-Community deals were strictly national.

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(4) Of course, the real net balance should be given in terms of the value of the operations, but given the high number of cases with missing data of bid value, it is considered here that the number of operations is a better indicator. In the case of the UK and operations of Community dimension, the balance in value terms is also highly negative: the value of bids by British firms was 7,7 bil. ECU while the value of bids of targetted British firms was just 2,6 bil. ECU.

(5) However, the balance in terms of aggregated bid values is more or less balanced in the French case.

<T5> EC/non-EC operations

30. Tables 5 and 6 complement the picture of transnational concentrative activities. Table 5 shows the distribution of majority acquisitions by European firms in non-EC countries according to the nationality of the targetted firms. Table 6 shows the nationality of origin of companies from outside the Community merging or acquiring majority participations in EC firms.

As table 5 shows, North America was the preferred target nationality for EC firms acquiring or merging with a non-EC firm. On the buyers' side, the UK was again the most active EC nationality followed by Germany and France. But again, these countries show different patterns. About 50% of UK firms acquiring companies outside the EC chose the USA or Canada as the target nationality. On the other hand, Germany and France distributed their target nationalities more evenly among North America and Western (non-EC) and Eastern Europe. It is remarkable that the fifth largest EC acquiring country according to table 5 was Denmark where over half the operations were in Scandinavia(6). The relatively high activity of Italian firms in Latin America is also noteworthy.

Table 6 shows that Germany was in 1992/1993 the favourite country of destination of foreign funds from outside the Community to acquire EC companies. In 88 cases, North America companies acquired majority participations in German companies. Western Europe ranked second with 62 cases, which is a significant figure. Those two world regions, followed by Scandinavia, accounted for most of the operations as expected. The Far East was the fourth largest investor, but considering the size of these Asian economies like Japan, they show a relatively low level of concentrative activity with EC firms. This becomes apparent if we compare the figure for Scandinavia (91 operations) with the figure for Far East Asia (62 operations).

The sectorial breakdown of mergers and majority acquisitions by EC firms of companies outside the Community shows that they tend to concentrate their acquisitions in the metal, engineering and cars and in the manufacturing

(6) In fact Denmark accounts one third of all EC acquisitions in Scandinavia.

Table 5

DISTRIBUTION BY WORLD REGION OF MERGERS AND MAJORITY ACQUISITIONS BY EC FIRMS OF COMPANIES OF NON-EC NATIONALITY (all sectors)
1992/1993

Target nationality Bidder nationality	USA/Can	Scandinavia	Rest of West. Europe	Far East	Latin America	Middle East	East Europe	Australia	Asia	Africa	International	TOTAL
Belgium	4	0	0	1	1	0	4	0	0	0	0	10
Denmark	7	21	1	2	0	0	4	1	1	0	0	37
Ireland	6	1	0	0	0	0	1	0	0	0	0	8
France	24	4	19	6	5	3	19	1	0	4	0	85
Germany	25	12	27	3	0	0	25	2	0	3	1	98
Greece	1	0	0	0	0	0	1	0	0	0	0	2
Italy	10	2	2	1	10	0	7	0	0	1	0	33
Luxembourg	0	0	1	0	1	0	0	0	0	0	0	2
The Netherlands	14	8	5	6	1	0	9	3	2	1	4	53
Portugal	0	0	0	0	0	0	0	0	0	0	0	0
Spain	2	0	0	0	2	0	0	0	0	1	0	5
United Kingdom	102	15	25	15	5	1	9	14	3	5	7	201
TOTALS	195	63	80	34	25	4	79	21	6	15	12	534

Source: AMDATA

Table 6

DISTRIBUTION BY BIDDER NATIONALITY OF MERGERS AND MAJORITY OF

ACQUISITIONS OF EC FIRMS BY COMPANIES FROM OUTSIDE THE EC (all sectors) – 1992/1993

Target nationality Bidder nationality	B	DK	Irl	F	D	Gr	I	Lux	NL	PT	SP	UK	Total
USA & Canada	5	6	3	35	88	2	19	1	19	0	20	75	273
Scandinavia	2	16	0	5	26	0	7	0	11	0	12	12	91
Western Europe	4	3	0	21	62	1	13	0	16	4	10	11	145
Caribbean	0	0	0	0	0	0	1	0	1	0	0	2	4
Far East	1	1	0	11	15	0	4	0	1	0	3	26	62
Latin America	0	0	0	0	2	0	0	0	0	0	5	0	7
Middle East	0	0	0	2	4	0	0	0	0	0	1	1	8
Eastern Europe	0	1	0	1	2	0	1	0	0	0	0	0	5
Australasia	0	0	1	1	4	0	0	0	4	0	0	5	15
Asia	0	0	0	0	5	0	0	0	0	0	0	0	5
Africa	0	0	0	2	3	0	0	0	1	1	2	5	14
International	0	0	1	3	3	1	2	0	3	0	5	9	27
TOTALS	12	27	5	81	214	4	47	1	56	5	58	146	656

Source: AMDATA

sector (with 118 operations each) followed by the distribution and hotels and the banking, insurance and finance sectors (with 82 operations each). This follows the general pattern of the sectorial distribution of operations seen in Table 2. However, the distribution by world regions shows some differences. In concentrations between North America and EC firms, there is a substantial difference in the number of cases registered in the metal, engineering and car sector (50 cases) and the number of cases in general manufacturing (33 cases, which is similar to the number of cases in chemicals, 31, distribution and hotels, 30 and banking, 30). When EC firms acquire or merge with companies in Eastern Europe, the general manufacturing sector is the one with the highest frequency of operations (31 deals) followed by metal and engineering and distribution and hotels (with 18 and 10 operations respectively). The number of operations affecting Eastern Europe in the banking, insurance and finance is limited to 5 only. By contrast, the financial sector has the highest number of concentrative operations targetting firms from Australasia. For Western Europe, manufacturing, metal and engineering and chemicals (with 18, 17 and 13 deals respectively) were more often targetted than the service sectors (12 cases in distribution and 10 in the financial sector). Finally, 19 Scandinavian companies were targetted in the metal and engineering sector and 15 in the distribution and hotels sector.

The sectorial distribution of concentrative operations in which a non-EC company targetted an EC company shows some differences with respect to the sectorial distribution of intra-EC deals that we examined in Table 3 above. First of all, there were more concentrative operations in the metal and engineering sector in 1992/1993 than in the general manufacturing sector (136 and 120 operations respectively). This is the opposite to the situation found for intra-Community deals, where general manufacturing occupies the top position among targetted sectors. The number of operations that targetted the financial sector was also relatively higher when the bidding firm was of non-EC origin, compared with the number of cases in which all the firms involved were European (17% compared with 20%). The same applies to chemicals, mining and utilities and agriculture. The high concentration activity involving foreign companies that acquired EC firms in the metal and engineering sector was due in part to the large number of deals of these types in which German firms were targetted (56 cases which account for 41.2% of the deals in that sector). The huge weight of Germany in the geographic distribution of deals determines to a large extent the sectorial distribution

(Germany attracted 32.6% of the operations of this kind). Very important too was the activity in the German distribution sector with 48 cases of non-EC firms targetting German firms in that sector. The UK shows once more its specilisation in the financial sector with 42 cases of British firms being the target of non-EC firms in 1992/1993. In France, the distribution was relatively even among the main five sectors. The case of Belgium is remarkable as the number of operations targetting Belgian firms with a non-EC bidder was significantly low compared with the number of deals registered with an EC bidder.

<T4> Flows of concentration activity

31. The identification of the nationality of the bidder and target company in each operation permits a detailed description of the flows of concentrative activities between countries. The combination of this information and the geographical dimension of operations can help to identify patterns or characteristics of each Member State as regards to its position in the international flow of concentrative operations. In this section, we will define three indicators to help determine the pattern for each country.

- The first one refers to the role of each Member State as bidder or targetted country in operations of intra and extra-EC dimension. This classification is based on the propensity of each country to target (or to be targetted by) firms (from) inside or outside the EC.

- The second indicator, the net-balance index is a sort of external balance for each country measuring the difference between the number of cross-border deals in which that country appears as bidder and target nationality.

- Finally, the 'openness index' gives us an idea about the ratio between national and cross-border deals involving companies from a certain Member State. Graphics 2 and 3 summarize the characteristics of the Member States based on these indexes.

32. In order to identify the role as internally or externally targetted country for each Member State, we divide the corresponding entries of the last two rows of Tables 3 and 6. It can be seen that the number of operations with EC bidders is much larger than the number of cases with a

non-EC company as bidder. For instance, there were 3,638 operations of intra-EC nature and only 656 cases of non-EC firms acquiring EC companies. This means that for each time that a non-EC firm took over an EC company, there were 5.55 deals of EC firms acquiring majority holdings in other EC firms. This can help us to characterise Member States according to their propensity to be targetted from inside or outside the EC. Countries with a ratio lower than 5.55 would then be countries which have a propensity to be targetted by firms from outside the EC higher than the Community average. On the other hand, if the ratio is higher than 5.55 we can say that firms of that nationality are more often targetted, in relative terms, by firms from inside the EC than the EC average. Following to this method, we find that Greece, Portugal, Spain, Germany and The Netherlands are Member States relatively more open to concentrative activity from outside than from inside the Community. The opposite happens in the other Member States, with Belgium at the top with 11.7 intra-EC operations for each operation with a non-EC firm as bidder.

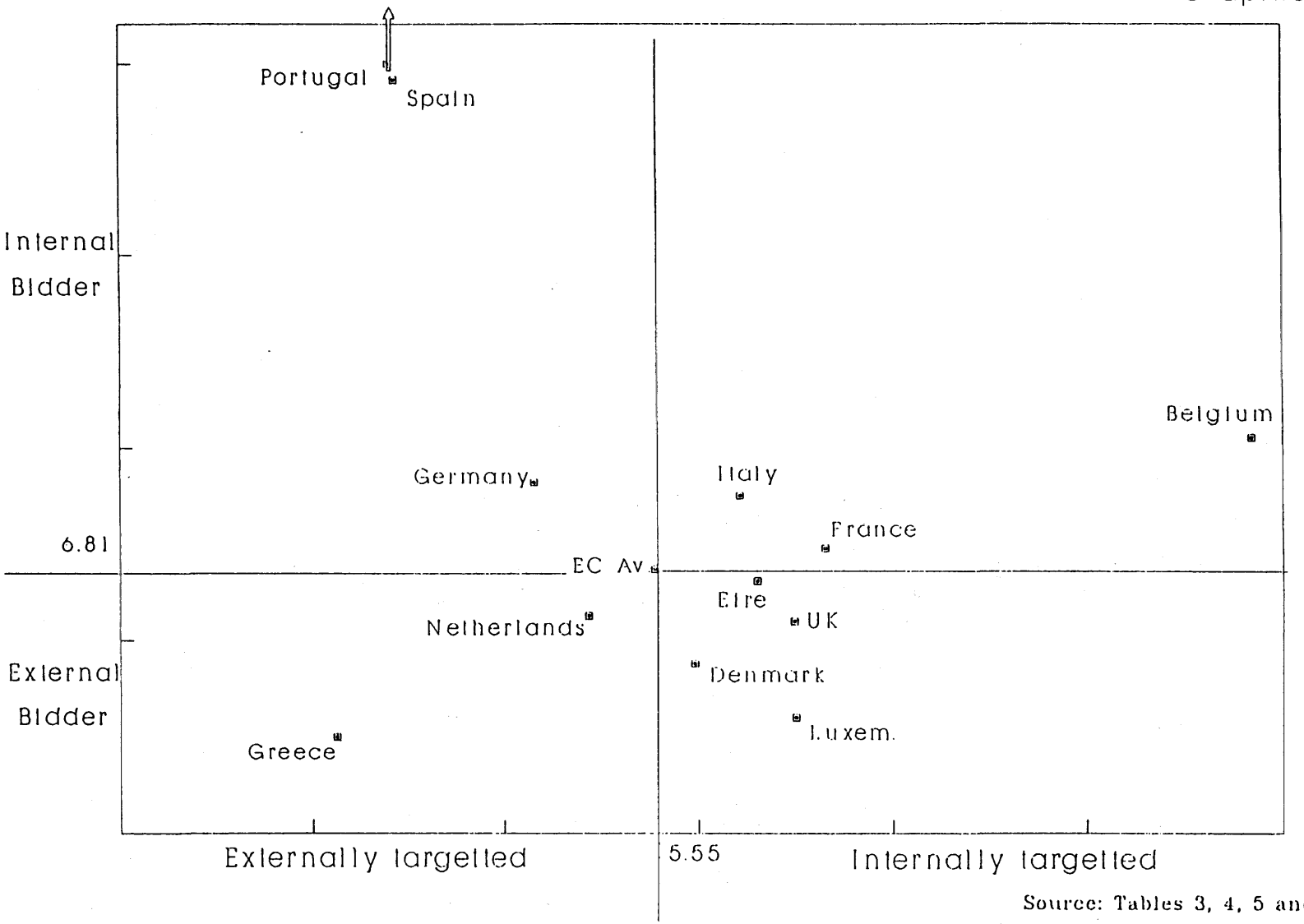
A similar analysis can be made with Tables 4 and 5 to measure the relative propensity of EC firms from each Member State to bid in concentrative operations within the Community or target firms outside the Community. For that purpose we can divide term by term the entries of the last columns of these two tables. On average, each time an EC firm takes over a firm from outside the Community, 6.81 EC firms are taken over by an EC company. Countries with a ratio below 6.81 indicate a propensity to take over firms from outside the Community higher than the Community average. If the ratio is greater than 6.81 it can be said that a country has a relatively greater tendency to be a bidder in intra-EC deals than in EC/non-EC deals than the Community average. This classification gives Portugal, Spain, Germany, Italy, France and Belgium as having a relatively higher propensity for intra-EC bidding, Greece, The Netherlands, Denmark, Luxembourg, Eire and the UK as countries with a propensity to bid more outside the EC than within the EC.

These criteria give a picture of EC Member States according to their intra or extra-EC concentration activities as presented in graphic 2. Of course, the smaller the absolute concentrative activity is for any country, the more volatile is the position of one country in the graphic. Thus, the picture for countries such as Greece, Portugal or Luxembourg should be considered as

EC Member States as bidder or target

countries from inside and outside the EC

Graphic 2



Source: Tables 3, 4, 5 and 6

highly unstable as the small numbers of operations in those countries can make their position fluctuate a great deal from one year to another.

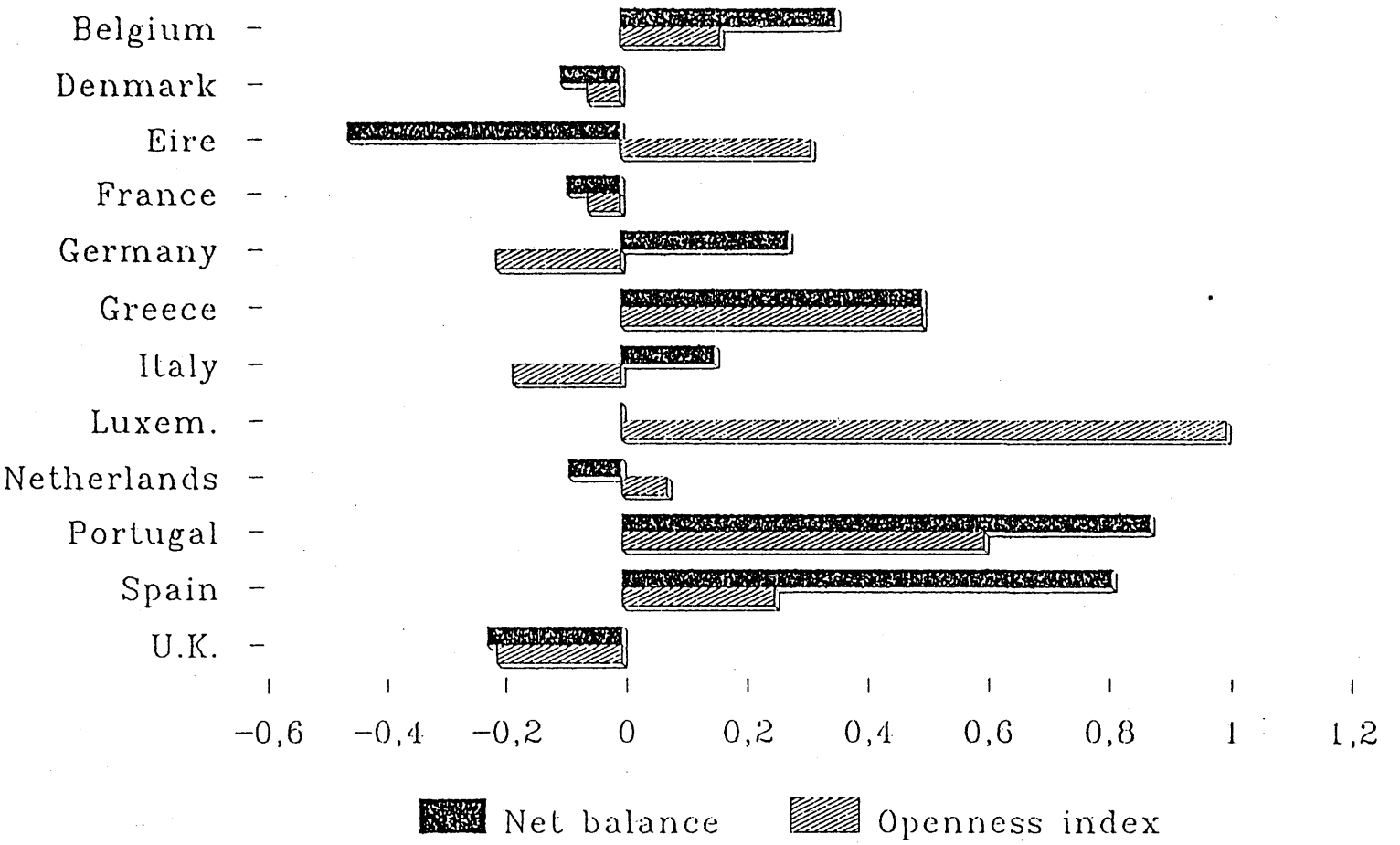
Graphic 3 provides some further information about the characteristics of Member States as far as international concentration activities are concerned. The net balance index has been calculated for each Member State as the difference between the number of cross-border deals(7) in which firms of that country appear as targetted from abroad and as bidders in extra-EC operations, divided by the total number of international deals for that country. Only five countries appear with a negative balance, i.e. as countries whose firms are more often bidders acquiring firms in other EC or non-EC countries than targetted by foreign firms. Ireland and the UK have the most negative balance followed by Denmark, France and The Netherlands. On the other hand, Portugal, Spain, Greece, Belgium and Germany, followed by Italy have a positive net balance in the number of operations involving firms from outside their national borders.

Graphic 3 also includes an openness index. This index measures the relative importance of cross-border concentrative activity in one country compared with the number of national deals. It is calculated as the difference between all international deals and national operations, divided by the sum of both. Small countries such as Luxembourg, Portugal, Greece and Ireland tend to be very open as one would have expected, while large countries such as Germany tend to be less open. However, it is interesting to notice some exceptions. In particular, Denmark has a negative index which shows that internal concentrative activity is very important relative to international operations. It is also interesting to note that France has a negative index but very small in absolute terms (as compared with Italy for instance), which shows a certain balance between the number of cross-border and national deals involving French firms. Among the countries with positive net balances and openness indexes, there are some important differences. For instance, the net balance is approximately the same in Spain and Portugal. However, the openness index in Spain is less than half of the Portuguese index, which shows a much more important concentrative activity of domestic nature in Spain than in Portugal.

(7) Both of EC and non-EC nature, but excluding national operations.

Net balance and openness index of EC countries in terms of M&Maj.acquisitions

Graphic 3



Source: AMDATA

<T4> Distribution of concentrative operations by bid-value intervals and bid type

33. The AMDATA database does not provide information on the turnover of the companies involved in concentrations as the DOME database did. Therefore, it is not possible to give an account of the size of the companies involved in the operations. Nonetheless, AMDATA provides certain information which can give us an idea about the size distribution of the operations themselves instead of the size of the firms involved. AMDATA gives information of the value of the bid in each deal. However, as Table 7 shows, there is a large percentage of operations for which the bid value remains unknown. The bid value is given for only one third of the total number of operations involving European firms (i.e. national and Community deals plus operations involving a European and a non-EC firm). The percentage of missing bid values is not the same for all the sectors. This problem is worse in intra-EC operations in the construction sector, where the bid value is known in approximately only one out of six operations. On the other hand, the problem is a minor one in EC/non-EC deals in the energy and water sector where the bid value is not known for only 13 of a total of 34 operations.

Intra-EC operations are usually of smaller dimension than those involving EC firms and firms from third countries. For instance, in general manufacturing 65% of intra-EC deals had bid values below 10M ECU while that percentage was 43% in the case of EC/non-EC operations. However, 56% of EC/non-EC deals in that sector had bid values between 10 and 500M ECU, and 34% of intra-EC operations were included in the same bid value interval. Nonetheless, there were 2 intra-EC operations with bid values of over 200M ECU.

The distribution of the size of the deals by sector of activity and by bid value intervals shows some interesting facts. The energy and water sector has a high average size of operations. In the case of intra-EC deals, 31% of all operations for which figures are available had bid values above 200M ECU. In the EC/non-EC case, that percentage goes up to 38% with 3 deals having bid values of over 900M ECU. The chemicals and extractive sectors also had bid values greater than the average ones. 47 operations of extra-EC dimension had bid values above 50M ECU and 7 deals exceeded the 500M barrier. The financial sector, metal and engineering and general manufacturing are next more important in terms of in average size of deals.

Table 7

DISTRIBUTION BY BID-VALUE INTERVALS AND SECTOR OF ACTIVITY OF CONCENTRATIONS – 1992/1993

Bid value bands in MECUS Target SIC		No value	< 10M	< 50M	< 100M	< 200M	< 500M	< 900M	Over	Totals
Agriculture										
	intra-EC	7	6	1	0	0	0	0	0	14
	EC/non-EC	6	1	1	0	0	0	0	0	8
Energy & Water										
	intra-EC	31	8	3	0	4	1	0	0	47
	EC/non-EC	13	5	5	3	4	1	0	3	34
Mins/Chemicals										
	intra-EC	187	55	30	9	5	2	0	0	288
	EC/non-EC	102	15	25	10	5	6	0	1	164
Metal/Eng./Cars										
	intra-EC	466	151	52	12	3	2	1	0	687
	EC/non-EC	171	36	31	10	4	1	1	0	254
Manufacturing										
	intra-EC	600	144	59	9	5	4	0	2	823
	EC/non-EC	156	29	24	11	8	9	0	1	238
Construction										
	intra-EC	98	16	5	2	0	0	0	0	121
	EC/non-EC	10	4	1	2	0	0	0	0	17
Distrib./Hotels										
	intra-EC	398	138	54	9	6	4	2	1	612
	EC/non-EC	130	27	18	8	2	0	0	0	185
Transport/Comm.										
	intra-EC	129	24	13	3	1	1	0	0	171
	EC/non-EC	35	9	5	3	0	0	0	0	52
Bank/Fin./Insur.										
	intra-EC	469	143	59	24	25	6	2	0	728
	EC/non-EC	126	28	21	8	4	4	0	0	191
Other services										
	intra-EC	97	32	15	2	1	0	0	0	147
	EC/non-EC	28	8	7	3	1	0	0	0	47
TOTALS		3259	879	429	128	78	41	6	8	4828

Source: AMDATA

Table 8 gives the distribution of concentrative operations (excluding joint ventures and minority participations as in the previous tables) by type of operation. Public bids identify deals in which any acquiree is quoted on a stock exchange anywhere in the world. The private acquisitions category includes any transaction where the acquiree is not quoted on a stock exchange and the transaction does not fall into any other category. Management buy-outs are those operations in which the acquiror is identified as being owned, partly or in total, by members of the management of the company being acquired. Divestments are defined by AMDATA as acquisitions with a divesting company registered in the United Kingdom. Finally, reverse takeovers account for operations in which a stock exchange quoted company buys a non-quoted company and the issue of shares as consideration results in the non quoted company taking control of the quoted company(8).

Table 8 shows that private acquisitions are, by far, the most frequent type of operation with 3,821 deals out of 4,828 intra-EC and EC/non-EC operations. They are particularly frequent in EC/non-EC operations as only 184 deals of extra EC concentration activities belong to other categories. On the other hand, reverse takeovers are very seldom found with only 3 cases registered in 1992/1993. Management buy-outs were relatively frequent in the intra-EC group with more than 12% of the total number of deals. Most of the 184 cases of the extra-Community deals were concentrated in the divestments category. Those deals were relatively frequent in the distribution and financial sectors. Public bids of intra-EC dimension were particularly important in the banking, finance and insurance sector with 60 operations.

As can be seen, AMDATA allows for a much more detailed bid type classification than DOME, which had mergers and majority acquisitions, minority acquisitions and joint venturs as the only three types of operations. It is worthwhile noticing that AMDATA does not include a separate category for mergers. Even in the case of two companies that merge into a new one, disappearing as the entities originally in existence, AMDATA does not include a separate category for mergers. If two companies that merge into a new one, disappearing as the entities originally in existence,

(8) AMDATA includes 'strategic alliances' (minority) stakes and 'demergers' as additional categories which do not fall under the majority acquisition general heading. Minority stakes are presented in the next section.

Table 8

DISTRIBUTION OF OPERATIONS BY BID TYPE AND SECTOR OF ACTIVITY – 1992/1993

Bid type / Target SIC	Public bids		Private acq.		Man. buy-outs		Divestments		Rev. takeovers		Totals	
	intra-EC	EC/non-EC	intra-EC	EC/non-EC	intra-EC	EC/non-EC	intra-EC	EC/non-EC	intra-EC	EC/non-EC	intra-EC	EC/non-EC
Agriculture	1	0	9	6	1	1	3	1	0	0	14	8
Energy & Water	5	3	38	24	0	0	4	7	0	0	47	34
Minerals/Chemicals	12	12	209	133	30	3	37	16	0	0	288	164
Metal/Engineering/Cars	17	5	492	230	117	3	61	16	0	0	687	254
Manufacturing	29	3	617	214	97	2	80	19	0	0	823	238
Construction	1	1	94	15	19	1	7	0	0	0	121	17
Distribution/Hotels	17	8	467	156	65	0	63	20	0	1	612	185
Transport/Communication	2	3	140	45	20	1	9	3	0	0	171	52
Bank/Finance/Insurance	60	9	532	156	80	2	55	23	1	1	728	191
Other services	3	4	107	37	16	0	21	6	0	0	147	47
TOTALS	147	48	2705	1016	445	13	340	111	1	2	3638	1190

Source: AMDATA

AMDATA identifies at least one of the companies as having some control or priority over one or the others, just as in a takeover or in a majority acquisition. In terms of this database, there is always (at least) one bidder and one target company(9). Besides, it is this accounting method, which allowed us to make the geographic analysis of flows of concentrative activities based on the nationality of the bidder and target companies.

<T4> Minority acquisitions and joint ventures

34. Tables 1 and 9 give information on the evolution of minority acquisitions(10) during last year in comparison with the 1987/1988 to 1991/1992 period. Contrary to what happened with mergers and majority acquisitions, the purchase of minority stakes has not fallen very drastically with respect to 1991/1992 figures. National operations and EC international operations grew relative to the 1991/1992 figures. The evolution was relatively similar in manufacturing and services. The number of operations of this type experienced some increase in metal, engineering and cars and in the financial sectors and other services. The highest concentration of minority acquisitions took place in the banking, insurance and financial sector with 80 national operations and 39 cross-border deals involving EC companies. This high level of activity was already present in the previous years, although the incomplete time coverage of these types of deals by AMDATA before 1990/1991 does not allow us to make long term comparisons.

Table 9 gives a summary of international activity of minority acquisitions involving EC firms. Intra-EC deals were much more abundant than deals involving firms from outside the EC. France was the country with the highest number of national operations in 1992/1993 followed by Italy. In the United Kingdom and Germany, two countries with very high levels of concentration activities in terms of majority acquisitions, the number of minority acquisitions was quite small.

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(9) Although this may be difficult at times, and therefore questionable, it is also true that the number of 'pure' mergers is proportionately very small.

(10) AMDATA defines minority acquisitions or stakes as operations in which the acquiror does not own more than fifty per cent of the acquiree. The thresholds for inclusion are either that the size of the stake being acquired is greater than thirty per cent or if less, the transaction value is greater than £ 10M.

Table 9

BIDDER AND TARGET NATIONALITIES OF MINORITY ACQUISITIONS – 1992/1993

Target nationality / Bidder nationality	B	DK	Irl	F	D	Gr	I	Lux	NL	PT	ES	UK	Total	USA&Can	Scand.	West Eur.	Far East	Latin Am.	East Eur.	Other	Total	TOTAL
Belgium	8	0	0	1	1	0	0	0	1	0	0	0	11							0		11
Denmark	0	14	0	0	0	0	0	0	0	0	1	0	15	0	2	0	0	0	1	0	3	18
Ireland	1	1	1	0	0	0	0	0	0	0	0	0	3	1	0	1	0	0	0	0	2	5
France	1	1	0	77	3	0	5	1	0	1	3	1	93	4	0	3	2	3	1	1	14	107
Germany	0	0	0	0	11	0	2	0	1	0	2	3	19	1	2	5	3	0	1	0	12	31
Italy	0	0	0	2	0	0	41	0	0	0	3	0	46	0	0	1	0	0	1	1	3	49
Luxembourg	1	0	0	0	0	0	0	0	0	0	0	0	1									1
spain	0	0	0	0	1	0	0	0	0	1	15	0	17	1	0	0	0	0	0	0	1	18
United Kingdom	0	0	0	5	0	0	3	0	3	0	3	14	28	3	1	0	3	1	0	4	12	41
The Netherlands	3	0	0	1	0	0	1	0	15	1	0	0	21	0	0	0	0	1	1	0	2	23
Total intra-EC	14	16	1	86	16	0	52	1	20	3	27	18	254	10	5	10	8	5	5	6	49	304
USA & Canada	1	0	0	5	2	0	2	0	1	1	0	2	14									
Scandinavia	0	1	0	0	0	0	1	0	1	0	1	1	5									
Western Europe	1	1	0	3	1	0	1	0	1	0	1	1	10									
Far East	0	0	0	1	0	0	0	0	1	0	2	3	7									
Middle East	0	0	0	0	1	0	0	0	0	0	0	0	1									
Eastern Europe	0	0	0	1	0	0	0	0	1	0	0	0	2									
International	0	0	0	0	0	0	1	0	0	0	1	1	3									
Total Rest of World	2	2	0	10	4	0	5	0	5	1	5	8	42									
TOTAL EC + Rest of World	16	18	1	96	20	0	57	1	25	4	32	26	296									

Source: AMDATA

France was also the main bidder nationality in cross-border operations of this kind, with 16 intra-European operations and 14 deals with firms from non-EC countries. France was also targetted very often for this type of operations by other firms from both inside and outside the EC (19 cases). It is also worthwhile noticing that Spain, with 17 international operations, was another frequent target nationality. Italy was third with 16 operations.

The data for joint ventures are limited to those contained in Table 1. These data have been kindly offered by KPMG. These time series include figures of three types of agreements:

a) Agreements between two or more companies, not being daughter companies of the same parent company, to set up something new. This could be a new company, the development of an oilfield or whatever as long as they start something new and independent.

b) Agreements creating a consortium which will make acquisitions or develop goods or services on a permanent or long term basis.

c) Agreements by which two separate companies merge some of their subsidiaries.

This implies that the categories included in Table 1 under different headings are not completely mutually exclusive. Furthermore, it must be borne in mind that joint ventures are counted every time one company goes across the border. This means that if a joint venture is being formed by three companies of which two companies are going cross-border, the operation is counted twice.

The KPMG database does not include information concerning national joint ventures as we indicated before. Moreover, the EC/non-EC deals are counted without making reference to bidder or target nationality of the firms, given that this is more difficult or even sometimes impossible to establish in this kind of operation.

Table 1 shows that the number of intra-EC joint ventures in manufacturing increased considerably during last year but it was still below the 1991/1992 figure. However, EC/non-EC deals in manufacturing continued their decreasing

tendency started in 1991/1992. It is worthwhile noticing that joint ventures in manufacturing between EC and non-EC firms are much more frequent that intra-EC operations. The metal, engineering and car sector contained most of the intra and extra Community joint ventures in manufacturing, followed by minerals and chemicals and general manufacturing.

The evolution in the service sector was more uniform with decreases in all types of deals. The number of joint ventures of an intra-Community nature has been reduced to one third of the 1991/1992 figure in the service sector. The decrease has been also constant although less dramatic in the EC/non-EC area.

Most of the operations of this kind are found in banking, insurance and financial services with 85 joint ventures involving EC firms created in 1992/1993. It is also important to take note of the high level of activity in the creation of joint ventures registered by KPMG outside the EC.

<T9> B. The 1993 studies programme

35. During 1993 eight studies were commissioned by DG IV. One of these studies entitled "Analysis of technical and economic problems concerning the application of competition rules to the electricity sector" is intended for publication. Two studies will not be published. The first one of them deals with price differentials for consumer electronics goods. The second one examines the issue of cross-subsidies. Five confidential studies were commissioned last year. These studies have been instrumental for the internal work of DG IV. Given the confidential nature of these studies, we cannot present an abstract of their findings in this section.

<T4> Summary of studies intended for publication

<T5> Analysis of technical and economic problems concerning the application of competition rules to the electricity sector

36. The study, comprising four chapters, looks at the problem of price discrimination in the electricity sector. The first chapter analyses the problem on the basis of a methodological approach which determines the structure of the rest of the report. The second chapter looks at the various types of goods and services in respect of which price discrimination may be practised; it also sets out the cost concepts that may be applied in analysing discrimination. The third chapter looks at price discrimination from the cost angle. The fourth chapter examines how price discrimination can be explained in terms of normal economic behaviour or may be justified in regulated behaviour.

The first chapter analyses the problem of price discrimination in the electricity sector. The three types of discrimination usually identified in economic theory are presented. It is concluded that all three are relevant to an analysis of the electricity sector. The chapter also draws a distinction between the regulated and non-regulated markets; it argues that, while the regulated market is at present the natural framework for examining discrimination issues in the electricity sector, there is also a need to look at any discriminatory practices resulting from normal economic behaviour. Such practices are a function of the type of competition prevailing on the

market. The electricity sector is, from this point of view and in present circumstances, relatively simple to deal with since the typical situation is that of a monopoly. There are various possible reasons for the discriminatory practices obtaining on the regulated markets. Among such practices, it is necessary to draw a distinction, as explicitly recognized in US regulatory practice, between justified and unjustified discrimination. Justification is based on an improvement in economic efficiency, and any discrimination that does not bring about any such improvement is regarded as unjustified. Applying those concepts, the study of discrimination can thus be broken down into five topics, each involving a particular characterization of discriminatory practices. The first topic relates to the legal characterization of discrimination, which might be different from the characterization usually applied in economics. This law-related topic is not dealt with in the report. The second topic is the economic characterization of discriminatory practice in the electricity sector. Such characterization calls for a definition of the goods and their variants and of the cost concepts applied. The third and fourth topics relate to the characterization of discrimination resulting from normal economic behaviour and from regulated behaviour respectively. As far as the fourth topic is concerned, the question of the level of discrimination that can be justified by an improvement in economic efficiency is of particular importance. The fifth and final topic is the numerical characterization of the impact of discrimination in terms of economic efficiency (measured by a welfare function). By definition, this question involves case-by-case studies and cannot be dealt with here. It is concluded, however, that it should be possible for such studies to be carried out successfully in the electricity sector as long as one remains within the framework of normal economic behaviour under a monopoly and within the framework of regulated behaviour.

The second chapter defines the market within which questions of discrimination and the cost concepts applicable for the purposes of the analysis are to be studied. So as to avoid any technical or mathematical discussion, the analysis is based exclusively on examples. It is important to note that, in most cases (interruptibility defined in terms of power and energy being an exception), this does not restrict the general validity of

the concepts. The concepts presented here on the basis of examples may be extended to actual cases applying appropriate calculation tools. The relevant market is defined as that for the supply of electricity and for electricity transmission services. Such supply and services are marketed in different variants. They may vary in terms of geographical location, volume, regularity and interruptibility. They may be combined (supply including generation and transmission) or separate (transmission service separate from generation). Various cost concepts may be applied in attempting to justify price differences. The concepts of allocated, incremental and marginal costs are presented.

The third chapter deals with the economic characterization of discrimination. While the concept does not pose too many difficulties for the stylized models that are usual in economic theory, application difficulties emerge once reference has to be made to real costs. The analysis is presented in terms of the different variants of supply and services established in Chapter 2. It makes use of the cost concepts introduced in that chapter. It is evident that conclusions as to the existence of discrimination may differ widely depending on the context within which the transactions have been concluded and depending on the cost concepts applied. Marginal costs lend themselves least well to the practice of discrimination. However, they raise questions of practical implementation, are sometimes difficult to interpret and are, in any event, difficult to verify. Incremental costs avoid some of these difficulties but introduce degrees of freedom that may be exploited for the purposes of discrimination. The characterization of discrimination thus poses questions as to the application of uniform cost-assessment methods. A minimum requirement is that any undertaking justifying price differentiation through incremental cost differences should be asked to demonstrate that it is applying a cost-calculation approach that is properly formalized and applied in a non-discriminatory manner to its various transactions. A better solution is to standardize the calculation of incremental cost at national or Community level. These remarks apply to an even greater extent to allocated costs. By definition, allocated costs lend themselves more easily to discriminatory practices. Unless it can be validated on the basis of other approaches (marginal or incremental cost), justification of price differences by differences in allocated costs is not economically sound. However, allocated costs do have a major advantage in that they are the most

easily verifiable on the basis of accounting information. Here too, a minimum requirement seems to be that any justification of price differences based on differences in allocated costs should derive from a formalized procedure applied in a non-discriminatory manner. The ideal situation would be for cost-allocation procedures to be standardized to some extent as between undertakings in the member countries.

The fourth chapter looks at the characterization of discrimination resulting from normal economic behaviour and regulated behaviour. Normal economic behaviour covers a vast range of potential discrimination. In practice, if recourse to normal economic behaviour is not to be used to explain practically any type of discrimination, it is important to characterize, both legally and through statistical assessments of welfare, discrimination which, although compatible with normal economic behaviour, constitutes an abuse of a dominant position. The concept of excessive prices could considerably facilitate such characterization.

Similarly, regulated behaviour may cover a vast range of discriminatory practices. Here again, it seems essential to be able to characterize either legally or through statistical assessments of welfare regulatory requirements that may be acceptable. Within such acceptable regulatory requirements, discriminatory practices must be justifiable in terms of economic efficiency. This may be partially achieved on the basis of non-statistical analyses.

<T4> Summary of studies not intended for publication

<T5> Study on consumer electronics prices

37. This study was carried out by the International Economics Research Centre of the University of Sussex (United Kingdom). The study was a combination of data sources to compare EC prices of several consumer electronics products: CD players, colour TV sets, video cameras and video cassette recorders. The main conclusion of the study is that there are significant price differences for some individual products from market to market and that certain EC markets seem to have markedly higher prices than

other markets. On the other hand, prices seemed to display considerable convergence on average if one considers only France, Germany and the United Kingdom. Although the study is not a complete survey, it presents an illustration of price differences and the problems of measuring them.

The study covers the United Kingdom, France and Germany quite extensively and it also includes information on certain European countries: the Netherlands, Denmark, Belgium, Spain, Greece and Italy as well as Japan.

In the United Kingdom, France and Germany, it was not easy to find evidence of significant price variations (VAT included) for those products for which identical models were on sale in several countries. However, for some models, prices differed significantly across these three countries. Some of the evidence suggests that for radio cassette players, prices were higher in France than in the other two countries. Exchange rates in Autumn 1992 raised French prices to above 20% above UK prices.

The relative similarity in prices among these three Member States did not extend to the whole Community.

In Italy, Greece, Denmark and (to a lesser extent) Spain prices were often significantly higher than in France, Germany and the United Kingdom. Denmark for instance shows prices 50% higher for VCRs, radio cassette players and TV sets, although Danish VAT rates are not so much higher.

Within this pattern, at the level of average prices, there were a number of individual differences for some models. Price differentials emerged at the brand level. For instance, some brands appeared to be relatively more expensive in certain markets even where the general level of prices in those markets might not have been exceptional.

Very crude sampling of prices in the Japanese market did not appear at first sight to indicate that many EC items were dearer in Japan than in the EC.

The study has also pointed out some technical problems establishing price comparisons. For instance, technical differences were rife in all products except pure audio, and since identical models were not always available, the exact price equivalencies were not easy to establish. Moreover, differences

on guarantee terms added further complications. Also, figures for average differences between markets will be very sensitive to the sampling approach and the method of averaging.

<T5> Cost allocation and cross-subsidies

38. The study examines the issue of cross subsidies between different activities within one enterprise and which have consequences for competition policy.

Cross subsidies, within an enterprise, can arise where costs are common to two or more activities. The allocation of such costs between these activities can have an influence on the process of competition. Similarly, cross subsidies can arise in the context of monopoly power. In such circumstances a monopolist who also operates in a competitive market may be able to absorb some of the costs of the latter in the monopoly sector and so distort competition in the competitive sector. A monopolist can also be in a position where there are substantial common costs.

These matters are of particular interest to competition authorities especially where exclusive rights are being withdrawn from monopolists, allowing for competitive entry to previously closed markets.

When a monopolist cross subsidises competitive activities from monopoly activities there is a clear problem for competition policy. However, the existence of common costs resulting from shared assets can give rise to productivity gains. Nevertheless, competition issues can ensue where there is an inappropriate allocation of costs.

39. The study examines three methods for the allocation of costs in these circumstances. These three methods are: Fully Distributed Cost, Incremental Cost, and Stand Alone Cost allocation, each of which can be used to identify cross subsidies. Each of these methods is sensitive to bases on which they are made. Typically enterprises make choices between these three methods and much depends upon the information they wish to generate, the market context of enterprise concerned and the regulatory environment.

40. State-owned network frequently have weak cost accounting systems. This situation will change as markets are liberalised. When such a state enterprise is privatised the accounting for cross subsidy issue becomes more important as the enterprise seeks to eliminate any redistributional cross subsidy or uses cross subsidies as a barrier to entry. In some instances this type of enterprise has accounting systems imposed upon them by a national regulatory authority.

41. The study emphasises the link between pricing principles and accounting systems for common costs and cross subsidies in networks. This is especially the case where constraints have been imposed on pricing e.g. 'universality', 'affordable prices' or 'geographic averaging'. The study recognises, in these circumstances, the possibility of contradictions where such networks face competitive new entrants.

42. The study demonstrates the importance of the cross subsidy and cost allocation issue to the Single Market. Economic integration could be influenced by the response to these issues in sectors such as energy and telecommunications. Consequently, tackling these issues is deemed to be an important policy issue.

43. Some possible policy solutions to the accounting and cross subsidy problems are suggested and examined. Structural separation of the relevant activities would provide a solution but at the cost of lost economies of scope. Equally, the detailed regulation of accounting systems would offer a solution but again this would impose costs on the economy.

44. The results of the study suggest that the best policy would be to resort to broad statements of principle and to place upon the enterprises concerned the obligation to maintain management accounting records of a nature sufficient to enable it to demonstrate that its conduct does not infringe these principles. The study argues that once these broad principles have been established, they should be supported by a survey of allocation methodologies in place, by the further development of the 'market economy investor principle' and by the application of the competition rules.

<T4> Confidential studies

- Study of the restructuring plan for the Spanish integrated steel company CSI.

- Study of the restructuring plan for the Spanish special steels company Sidenor.

- Study of the shipbuilding market 1993.

- Planned capacity reductions in former GDR shipyard.

- Examen des pratiques de la gestion collective des droits afférents à la cablodistribution en Belgique.

<T9> C. Statistical note on concentration operations notified under Council Regulation (EC) No 4064/89

<T3> §1. Introduction

45. Council Regulation (EEC) No 4064/89 on the control of concentrations entered into force in September 1990. In line with the practice established by the two previous competition reports the Commission has prepared a detailed statistical analysis of the cases dealt with in the application of the Regulation to September 1993. For the purposes of consistency the same methodology as used last year has been followed.

46. The tables presented below give a statistical description of the cases classified according to the type of concentration, the geographic dimension, the economic sectors involved and the nationality of the firms concerned.

47. Cases officially notified to the Commission but not falling within the scope of the Regulation have been excluded. Cancelled or withdrawn notifications have also been omitted.

48. The cases have been grouped into three periods of time (1990/91, 1991/92 and 1992/93). Each group covers notifications (or decisions) made in the period from 21 September to 20 September of the following year. This grouping, which is determined by the date of entry into force of the Regulation, does not coincide exactly with the periods used in part A of this annex.

<T3> §2. Type of operation and geographic dimension of the concentrations (Table 1)

49. Table 1 shows the breakdown of the operations that took place in 1990/91, 1991/92 and 1992/93 by type of operation and by geographic dimension.

50. There are six different types of concentration. 'Majority acquisitions' represents cases where one or more undertakings purchase securities or assets by contract or by other means, thereby acquiring direct or indirect control

of the whole or parts of one or more undertakings. However, those cases where the acquisition takes place under the form of a public offer for the securities of the acquired company have been excluded from the 'majority acquisitions' heading. Public-bid cases have been further divided into those in which the bid has been contested by the acquired firm and those in which the bid was commonly agreed. The group 'Others' includes a cross-shareholding deal in both 1990/91 and 1992/93 and one demerger case in 1991/92.

51. With respect to geographic dimension, the same four groupings as last year have been used : national deals, which are those involving two or more companies from the same country (not necessarily a Member State), operations of Community dimension which are those involving companies of at least two different Member States, the third category which includes deals between at least one Community company and at least one company from a non-Member State and lastly, extra Community deals which involve only companies from at least two different non-EC countries without the participation of any company from any Member State.

52. In 1992/93 the total number of cases falling under the Regulation was somewhat down on the total in the previous year (52 compared 57 cases). This is perhaps not surprising in the less positive economic climate, currently prevailing.

53. Joint ventures and the acquisition of a majority holding were again by far the most common type of concentrations and represented respectively 51 % and 35 % of total cases notified in 1992/93. It would appear that the marked increase in the percentage of joint venture cases that occurred in 1991/92 compared to 1990/91 (49 % compared 32 %) has now stabilised at a level of around 50 % of all cases, since the 1992/93 figure shows only a marginal increase (ie. 51 %). For the other types of concentration, namely agreed and contested public bids, mergers and other, the number of cases remains small and is comparable to the position in previous years.

54. With regard to the geographic dimension of the operations, the most remarkable feature of this year's statistics would seem to be the substantial increase in operations of a pure Community dimension not involving non-EC companies. In 1991/92, these operations represented 33 % of the total but in 1992/93 this rose to over half of the total (51 %). This is an indicator of increasing cross-border integration within the Community. The counterpart to

the increase in purely Community operations was a strong decrease in the number of deals concerning Community and non-EC companies. The total number of such operations fell from 20 in 1991/92 to only 10 in 1992/93.

<T3> §3. Economic sectors of the operations (Table 2)

55. Notified cases are classified by NACE code of the main economic activity of the concentration resulting from the operation. This sectorial breakdown is further analysed by the geographic dimension of the concentration.

56. In 1992/93 there was a larger number of cases in the service sector compared to manufacturing as a whole. This reverses the position observed in the two previous years. Whilst manufacturing activities, namely the broad categories 1, 2 and 3 of the NACE classification, accounted for 62 % and 58 % of total operations in 1990/91 and 1991/92 respectively, these classifications accounted for less than half of all operations notified (23 deals corresponding to 44 %) in 1992/93. The increase in activities in the service sector is largely explained by the sharp rise in the number of operations in real estate, computer and professional services, as well as the maintained high number of concentrations in transport, community and financial services. In 1992/93 there were 9 cases in the former sector compared to only 3 in the previous year, whereas the latter was the sector with the highest number of operations in 1992/93 and experienced a total of 13 cases.

<T3> §4. Operations by nationality of the companies involved (Table 3)

57. Table 3 includes information regarding the nationality of the firms involved in the operations. Given that two or more companies of the same or different national origin can be involved in the same deal, this information can be presented in different ways. To simplify the analysis and facilitate a comparison over the last three years, a breakdown by nationality of the companies involved in the operations falling under the Regulation is

presented in Table 3. Countries are ranked according to the frequency of companies with the corresponding nationality and are divided in two groups : Member States and non-Member States.

58. As can be expected on general grounds, there is a relatively strong correlation between frequency of company nationality and the economic size of the corresponding country. The five larger Member States head the list for EC countries and the United States has the greatest number of mentions for non-EC countries.

59. In 1992/93, as was the case in 1990/91 and 1991/92, France, Germany and the United Kingdom had the largest number of cases. French companies were again particularly active in mergers and acquisitions in 1992/93 and over the three years they have the largest number of mentions (80 mentions) compared to United Kingdom (64 mentions) and Germany (59 mentions). Italian and Spanish companies figure less strongly in the list in 1992/93 compared to 1991/92 (8 and 5 mentions respectively compared to 16 and 11 for the previous year). Companies from the Netherlands were relatively more active in 1992/93 with 8 mentions compared to only 3 in 1990/91 and 1991/92.

<T3> §5. Analysis of cases leading to a decision under Article 8(2) or Article 8(3) (Table 4)

60. Table 4 provides detailed information on the individual decisions taken under Article 8(2) and 8(3) of the Regulation. Although most of the notified cases falling under the scope of the Regulation are cleared with the usual one month deadline by meahs of an Article 6(1)(b) decision, where the proposed operation raises serious doubts with regard to its compatibility with the common market, the Commission will open a more exhaustive second stage of analysis by means of an Article 6(1)(c) decision. This procedure is normally(1) terminated by means of an Article 8(2) or Article 8(3) decision.

61. The number of cases leading to an Article 8 decision are relatively few in number to allow a large number of general conclusions to be drawn. Nevertheless, the number of cases leading to second stage proceedings appears

(1) This was in fact the rule for all but one operation. This operation concerned case No IV/M.238 - Siemens/Philips, where the parties withdrew their notification after the Commission had decided to initiate second stage proceedings.

to be relatively stable at about 4 cases a year (4 in 90/91, 3 in 91/92 and 4 in 92/93). This corresponds to somewhat less than 10 per cent of all cases falling under the Regulation. However, it should be noted that these statistics only take account of cases closed within the year under review and that towards the end of the year 1992/93, the Commission opened second stage proceedings in three other cases which will appear in the statistics for 1993/94.

62. Examination of the individual decisions in Table 4 show that relatively few cases involve joint ventures (only 2 out of 11 cases) and that with one exception all cases involved the manufacturing sector.

Table 1 Operations by type of concentration and geographic dimension

	1990/91					1991/92				
Type of concentration	A	B	C	D	Total	A	B	C	D	Total
Acquisition of majority holding	5	11	8	2	26	6	6	9	1	22
Agreed public bid	0	0	1	1	2	0	2	1	0	3
Contested public bid	0	0	1	1	2	0	0	1	0	1
Joint venture/Control	2	7	5	1	15	3	10	9	6	28
Merger	0	0	0	1	1	1	0	0	1	2
Other	0	0	1	0	1	0	1	0	0	1
Total	7	18	16	6	47	10	19	20	8	57

	1992/93				
Type of concentration	A	B	C	D	Total
Acquisition of majority holding	3	9	7	0	19
Agreed public bid	1	1	0	1	3
Contested public bid	0	0	0	0	0
Joint venture/Control	5	15	4	2	26
Merger	1	1	0	0	2
Cross shareholding	0	0	0	1	1
Acquisition of minority	1	0	0	0	1
Total	11	26	11	4	52

A= national, B= Community, C= Community plus non-EC, D= extra-Community
Source: MTF Database.

Table 2 Operations by economic sector and geographic dimension

NACE code	1990/91 A	B	C	D	Total	1991/92 A	B	C	D	Total	1992/93 A	B	C	D	Total
1. Food, textiles and clothing	2	1	2	0	5	0	2	1	1	4	0	1	3	1	5
2. Wood, paper, refining chemicals, metal & machinery	3	6	1	1	11	3	5	7	3	18	4	3	5	0	12
3. Elect. and transport equipment & furniture	2	3	6	2	13	2	2	5	2	11	0	5	1	0	6
4. Public utilities and construction	0	1	0	0	1	1	0	0	0	1	0	1	0	0	1
5. Wholesale, trade hotels & restaurants	0	4	1	0	5	2	5	1	0	8	0	5	1	0	6
6. Transport, commun. & financial services	0	3	0	2	5	1	4	5	2	12	3	8	0	2	13
7. Real estate, computer services and prof. services	0	0	5	0	5	1	1	1	0	3	4	3	1	1	9
8. Education and public health	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
9. Community, social and personal serv.	0	0	1	1	2	0	0	0	0	0	0	0	0	0	0
Total	7	18	16	6	47	10	19	20	8	57	11	26	11	4	52

A= national, B= Community, C= Community plus non-EC, D= extra-Community
Source: MTF Database.

Table 3 Operations by nationality of the companies involved

	1990/91	1991/92	1992/93	TOTAL
France	27	23	30	80
United Kingdom	16	31	17	64
Germany	14	25	20	59
Italy	6	16	8	30
Spain	5	11	5	21
Netherlands	3	3	8	14
Belgium	1	5	4	10
Portugal		1	3	4
Denmark		2	2	4
Ireland			1	1
Luxemburg			1	1
Greece				0
USA	14	13	7	34
Sweden	3	12	2	17
Switzerland	5	6	6	17
Japan	5		3	8
Canada	1	2	2	5
South Africa		2	2	4
Kuwait		2		2
Australia		1		1
Austria		1		1
Finland	1			1
Hong Kong		1		1
New Zealand			1	1
Virgin Island		1		1
Total companies	101	159	119	
Total operations	47	57	52	

Table 4 Breakdown of final decisions resulting from proceedings initiated under Article 6(1)(c) of Council Regulation 4064/89

	1990/91			1991/92		
	Article 8(2) decisions		Article 8(3) decisions	Article 8(2) decisions		Article 8(3) decisions
	With condition	Without conditions		With conditions	Without conditions	
No of cases	3	1	0	2	0	1
Type of operation	Acquisition of majority (2) Joint venture/ control (1)	Acquisition of majority	-	Agreed bid Contested bid	-	Acquisition of majority
Geographical Dimension	Nat. (1) Comm. (2)	Extra-EC	-	Community (1) Community/ non EC (1)	-	Community/non-EC (1)
NACE code	31 (2) 32 (1)	29	-	159 55	-	35
Nationality of firms involved	French/Italian (2) German/German	Swedish/Swiss	- -	Belgian/French French/Swiss	- -	Canadian/French/ Italian

	1992/93		
	Article 8(2) decisions		Article 8(3) decisions
	With condition	Without conditions	
No of cases	2	1	0
Type of operation	Acquisition of majority (1) Merger (1)	Joint venture/ control	-
Geographical Dimension	National Comm./non-EC	National	-
NACE code	211-247	272	-
Nationality of firms involved	Dutch/Dutch/ Dutch English/American	German/German	-

NACE codes

159 Mineral water
29 Manufacturing of machinery and equipment N.E.C.
31 Manufacturing of electrical machinery and apparatus N.E.C.
32 Manufacturing of radio, television and communications equipment
35 Manufacturing of other transport equipment
55 Hotels and Restaurants
211 Paper
247 Manufacturing of nylon fibres
272 Steel tubes

Source: MTF Database.

Table 5: Initiation of proceedings under Article 6(1)(c)

	1990/91	1991/92	1992/93
No of cases	5	4	4
Type of operation	Acquisition of majority (4) Joint venture/ Control (1)	Aquisition of majority (1) Joint venture/ Control (1) Agreed Bid (1) Contested Bid (1)	Acquisition of majority (1) Joint venture/ Control (2) Merger (1)
Geographical dimension	National (1) Community (2) Community/non-Community (1) non-Community/ non-Community (1)	National (1) Community (1) Community/non-Community (2)	National (2) Community (2)
NACE codes	314 (2) 32 295 353	55 159 247 272	211 241 261 272
Nationality	German/German French/Italian (2) French/Canadian/ Italian Swiss/Swedish	German/German French/Belgian Swiss/French American/English	German/German Dutch/Dutch/Dutch German/French/ Italian English/Italian

159 Mineral water
211 Paper
241 Potash products
247 Manufacturing of nylon fibres
261 Flat glass
272 Steel tubes
295 Packaging machines and foodstuffs
314 Manufacturing of accumulators, cells and primary batteries
353 Manufacturing of aircraft and spacecraft
55 Hotels and restaurants

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