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XXIInd REPORT

ON

COMPETITION POLICY

1992

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INTRODUCTION

Alongside the establishment of a common market, competition policy is one of the two great strategies by which the Treaty of Rome sets out to achieve the Community's fundamental objectives: the promotion of harmonious and balanced economic development throughout the Community, an improved standard of living, and closer relations between the Member States. Competition policy cannot therefore be pursued in isolation, as an end in itself, without reference to the legal, economic, political and social context.

Rapid changes in that context call for rigorous consistency and steadfastness in applying the competition rules, combined with greater flexibility in adapting to the new situation and staying in tune with the objectives which the Community has set itself for economic and social cohesion, industrial competitiveness, research and technological development, and the environment.

In addition to the completion of the internal market, the progress being made in technology, and the globalization of markets, there are two new factors which competition policy must take into account:

- the slowdown in economic growth, with its social consequences, and

- the application of the principle of subsidiarity.

These developments are combining to create an environment in which competition between firms is fiercer than ever, while the tendency to adopt a defensive and protectionist posture has never been so strong. At the same time the Maastricht debate shows that the greatest possible clarity is needed in the Commission's efforts to ensure that competition is not distorted.

This Report seeks to meet the demand for clarity and transparency by setting out in plain terms the Commission's thinking on competition. The policy

priorities detailed in previous reports remain unchanged; in particular, competition policy seeks to contribute to the achievement of a genuinely frontier-free area, and to economic and social cohesion, by throwing open markets which might otherwise be protected by exclusive rights, restrictive practices, the abuse of dominant positions, or state aid. This Twenty-second Report sets out to explain how in a context which has changed radically the Commission proposes to draw the necessary distinctions between, on the one hand, behaviour on the part of firms or Member States which contributes to progress and the restructuring of European industry and, on the other hand, behaviour which holds back the process of adaptation by partitioning markets, creating or strengthening dominant positions, or keeping firms alive when they are no longer viable, thereby damaging the dynamism and competitiveness of European industry.

As far as the conduct of firms is concerned, the Commission continues to enforce the competition rules strictly: anti-competitive agreements and mergers based on the defensive sharing of markets, and restrictive practices which reduce long-term capabilities and competitiveness, are and must be prohibited. But the Commission hopes that more rapid decision-making and greater legal certainty will facilitate those types of cooperation and merger which enable firms to adapt and to improve their overall competitiveness. The "one-stop shop" principle which was adopted in the Merger Control Regulation is a step in this direction. Further steps were taken in 1992 with a Commission notice on cooperative joint ventures, the extension of several block exemptions, and the drawing up of a programme for the acceleration of procedures.

The main challenges facing competition policy are without any doubt the introduction of competition into regulated sectors and the monitoring of state aid. State monopolies and exclusive rights have to be seen in their new context, which is the single market: change and competition are vital if the four fundamental freedoms are to be given practical effect, and the benefits of the single market are to materialize. This is particularly so as technological progress and the demands of users are removing the rationale of some monopolies, for example in telecommunications. But there has

to be a proper balance between this drive for economic efficiency and the need to take account of the social dimension and to maintain a universal service, or in the case of sectors such as gas and electricity to maintain security of supply as well.

There is just as delicate a balance to be observed in the field of state aid, particularly at a time when the economic going is difficult and strong pressure is being brought to bear on the public authorities by firms which face more intense competition and a slowdown in demand. The Commission looks at cases from a Community rather than a national angle, and seeks to distinguish aid whose harmful effect on competition is offset by its contribution to economic growth, to structural adjustment and to economic and social cohesion from aid which impedes development towards more efficient structures and serves merely to export problems to other Member States.

The globalization of markets and the knock-on effects of certain anti-competitive behaviour outside the Community mean that policy must broaden to take account of the international dimension. The scope of Community law is confined to conduct or measures implemented inside the Community. But some practices outside the Community may affect the Community market; and Community firms may have to contend with anti-competitive practices on non-Community markets. The main competition policy response to this situation is to seek to encourage the application of similar policies by the Community's main trading partners, by means of bilateral agreements or through multilateral negotiation. Unlike protectionism, a broadening of competition policy of this kind is ultimately in the interests both of the Community and of its partners.

The transparency and subsidiarity debates have also highlighted the need for wider familiarity with the objectives of the rules and mechanisms of competition policy as a factor in industrial competitiveness. The policy cannot be effective if its objectives are not embraced by the business community.

The Commission accordingly pressed ahead with its policy of transparency; it approved a considerable number of regulations and codes and published various explanatory booklets. Work also went ahead on the consolidation of existing rules.

A successful competition policy depends very much on proper application of the principle of subsidiarity, with matters being handled at the level at which they can be dealt with most effectively. The Commission is firmly in favour of a decentralized application of competition law, which would allow the appropriate authorities in the Member States to deal with cases, whose implications are essentially domestic, leaving the Commission free to concentrate its resources on the cases which it alone is capable of resolving. The process should be facilitated by the notice which the Commission approved this year on cooperation between national courts and the Commission in applying Articles 85 and 86 of the EEC Treaty. The measures taken to improve transparency should help to ensure the wide awareness which decentralization will require.

The general structure of the Twenty-second Competition Report is the same as that of its predecessor. A few changes have been made, however, in order to improve the content.

In Part One, which outlines the main thrust of Community policy, the chapter on the relationships between competition policy and other Community policies contains new sections on the environment and on small and medium-sized enterprises; in the preceding report it concentrated on the completion of the internal market, industrial policy, technology development and economic and social cohesion.

The main decisions of the Court of Justice regarding the application of Article 90 of the Treaty are now reviewed in Part Three, which deals with competition policy and state intervention, rather than in Part Two, which deals with competition policy towards enterprises.

Part Four includes several new sections describing the proceedings of the Advisory Committee on Restrictive Practices and Dominant Positions, the Advisory Committee on Concentrations, and the Conference of National Government Experts, and reporting on contacts between Commission departments and interested parties in the course of the preparation of legislation.

The annexes continue to be an important part of the Report. The first, detailing reaction to the Twenty-first Report in Parliament and the Economic and Social Committee, now contains the Commission's reply to the Economic and Social Committee's opinion as well as its reply to Parliament's opinion. Annex II gives the full text of legislation which will allow readers to update the Compendium of European Community Competition Law; the Commission is to publish a revised version of the Compendium shortly. Annex III contains summaries of the main decisions not described in the body of the Report, and references for decisions, notices and judgments relating to individual cases, but now adds a complete list of all Commission press releases on competition issues.

Changes to the last two annexes await the next report: the annex on the development of concentration, competition and competitiveness will be using new sources of data for the year 1993 onward, and the scope of the annex on competition law in the Member States will be expanded to cover the decentralized application of the Community competition rules.

<T1> PART ONE: MAIN DEVELOPMENTS IN COMPETITION POLICY

<T2> Chapter I: Maintaining a competitive environment

<T4> §1. Restrictive agreements and abuses of dominant positions

1. The year was a very busy one for the Commission, which handled a great many individual cases and approved a large number of general measures as well.

2. In the individual cases it dealt with the Commission continued to take vigorous action against restrictive agreements, both horizontal and vertical, and against the abuse of dominant positions. This has long been a key aspect of competition policy. The offending practices generally do damage of two kinds. They cause a loss of efficiency by preventing, restricting or distorting the competition which would otherwise spur business into a constant search for ways of improving efficiency. They also impede the integration of markets by restricting trade between Member States, and thus hold back the improvement in the economic efficiency of the Community's production structure which integration ought to produce. From the consumer's point of view the damage is reflected in higher prices and a narrower choice.

3. In the year under review this policy was extended to a number of industries in which it had not previously had occasion to bite. Examples are sea transport, the building industry, and the organization of sporting events. The year also saw the first decision imposing fines in the banking sector.

Policy continued to be strengthened in some areas where the Commission has already built up a considerable body of administrative precedent, such as the cosmetics trade, which provides a good illustration of the Commission's efforts to prevent distribution agreements from obstructing the integration of the common market.

4. The practices which the Commission contests have the effect of reducing or removing the incentive to greater efficiency provided by competition. As a general rule they also set out to prevent rival firms from entering the

market, or to drive them out. This means that they deprive the consumer of choice, and prevent him from optimizing the allocation of his income. Their basic thrust is usually to prevent the dynamic development which would otherwise be generated by competition and the establishment of the single market, and to defend a status quo which favours the firms taking part in them.

Similar considerations guide other aspects of competition policy, such as policy towards state aid or towards companies given special or exclusive rights. There is a fundamental consistency underlying these different areas of competition policy.

Thus the Commission continued to take an active approach to regulated sectors such as energy, telecommunications and transport. It is vital that these infrastructures adapt to the single market if the single market is to deliver all the gains in efficiency which the Community is entitled to expect from it.

The achievement of a single market requires that competition policy be energetically pursued in other regulated sectors too, and the Commission proposes to give greater attention to these. Services - primarily financial services but also legal and consultancy services - are a field where restriction can appreciably affect trade between Member States and competition in the common market.

5. But some forms of cooperation between firms are desirable, for example because they facilitate the entry of new firms to the market, generate synergies conducive to technological progress, or permit economies of scale. The Commission stepped up its efforts to encourage cooperation of this kind, particularly through various general measures which it adopted in the course of the year.

This was the thinking which prompted the Commission to broaden the scope of certain block exemption regulations. At the same time it approved a notice concerning the assessment of cooperative joint ventures. The two measures should improve the legal certainty available to firms by clarifying the rules with which they have to comply. This will facilitate certain kinds of cooperation between them, particularly those which promote R&D and the

transfer of technology in Community industry.

The Commission also reviewed its own internal procedures in order to see how they could be speeded up, particularly in cases which, while not involving a "concentration" within the meaning of the Merger Control Regulation, nevertheless have a structural dimension which requires rapid decision-making if the benefit of an agreement is not be held up by a long period of legal uncertainty.(1)

The same desire for efficiency underlay the Commission's efforts to encourage the "decentralized" application of Community competition law, where the Commission hopes to arrive at as rational a division of tasks as possible between the national authorities and itself. The approach is in accordance with the principle of subsidiarity.

Courts in Member States have an essential role to play here. In order to encourage the application of Community competition law by national courts the Commission published a notice on the subject, which spells out the assistance the Commission is prepared to provide in such cases.(2)

6. Another aspect which will in all likelihood be growing more important in future is the international dimension of the policy of prohibiting restrictive practices. As markets become more international and trade expands, an anti-competitive practice on a non-Community market is more and more likely to have a damaging effect on firms or consumers in the Community. Provisions on this subject have accordingly been included in the EEA Agreements and the agreements with Central and East European countries.

(1) See points 122 to 124 of this Report.
(2) See point 299 of this Report.

<T4>

§2. Merger control

7. Merger control occupies a central place in Community competition policy; it aims to reconcile two imperatives. Firstly, the mergers envisaged by industry will generally help to adapt industrial structures to the single market so that the market can in fact generate the desired efficiency gains. The notifications which firms submit have to be dealt with efficiently and rapidly in order to avoid the harm which would be caused by a prolonged period of uncertainty. It is fair to say that that objective has been achieved, since at the first stage of inquiry the Commission is settling a large number of cases which raise no serious doubts from a competition point of view. Another fundamental consideration here is the principle of the "one-stop shop", which means that a merger is considered once, at Community level, and that firms do not find themselves having to approach a number of different authorities.

8. Secondly it is likewise vital that mergers should not be allowed to establish dominant positions in the Community, with the holders of such positions no longer exposed to sufficient competitive pressure. They would not then need to pass on to consumers the benefit of the increased efficiency secured through the merger; instead they could exploit consumers' new dependence on them. In such cases the Commission must be able to take the measures necessary to maintain a competitive market structure in the Community, which is the only way of ensuring that the beneficial effects of the single market materialize in practice.

9. This was the second full year of Community merger control, and for the most part the Commission continued with the policy followed in 1991. In the great majority of cases a decision not to oppose the merger was taken at the first stage in the procedure. It did not happen, as it had the previous year, that the original plans could not be adjusted satisfactorily and a decision to prohibit the merger had to be taken. There were in fact more cases in which the plans notified were amended in accordance with Article 8(2) of the Regulation in order to allow a favourable decision to be taken. This is a welcome development from the point of view both of the Commission and of business, since it produces a result which is at the same time in the interests of competition and acceptable to the firms involved.

The conditions which the Commission imposed consisted mainly of obligations either to sell off part of the new group which the merger would create or to withdraw from particular markets where the new group would enjoy a dominant position. The Commission's objective was always to maintain a competitive structure on the relevant markets by preventing the establishment of a dominant position. This made it necessary to ensure proper market access for existing or potential competitors.

10. There were several cases which presented novel aspects of some importance in the development of Commission merger control policy. The Mannesmann/Hoesch case is of special interest: the Commission there allowed the establishment of an enterprise holding a very significant share of a national market, because it was clear that the position would be only a temporary one given that Community directives liberalizing the market were to enter into force very rapidly. The case provides an example of the need to take a dynamic view of markets; analysis may reveal that a market which at present is still a national one is likely to become a Community market in the near future. This approach allows account to be taken of the probable developments which firms themselves seek to anticipate, and of those developments' probable impact on the firms.

11. The Commission considerably clarified the scope of its merger control powers in its decision in the Nestlé/Perrier case, where it stated the principle that the purpose of the Regulation, which was to maintain competitive structures, required that the Commission be able to prevent the creation or strengthening not just of a dominant position held by a single firm but also of a dominant position held jointly by a number of firms. Thus the Commission has power to prevent restrictions of competition resulting from the creation or strengthening of a duopoly or oligopoly.

12. The first two legal actions challenging merger control decisions have now been brought before the Court of First Instance.

13. Cooperation between the Commission and the authorities of the Member States was satisfactory, with regular and close contact being maintained between them.

Another significant development came in the Steetley/Tarmac case.(3) The Commission for the first time agreed to refer aspects of a case to the national authorities on the ground that the relevant markets and the implications of the transaction were clearly confined to parts of the territory of a Member State. The case was an exception in that the market affected was clearly limited to certain areas in the United Kingdom. At the time the Regulation was adopted both the Council and the Commission emphasized the exceptional nature of this procedure. The German authorities too made a request for referral in the Mannesmann/Hoesch case. The Commission implicitly refused that request when it initiated proceedings and subsequently took a final decision in the case.

14. There will doubtless be further important developments in 1993, when the first review of the Regulation is to take place. The Regulation provides that the thresholds above which it is applicable and the mechanism for referral to the Member States are to be reconsidered. When the Regulation was adopted both Council and Commission commented that they were prepared to consider the method of calculating the turnover of joint ventures which is provided for in Article 5(5) of the Regulation, and possible inclusion of factors other than turnover. The Commission is preparing proposals.

15. The business interests concerned are generally satisfied at the way merger control has been handled by the Commission. The Commission is also pleased to note that on the whole the application of the Regulation aroused less controversy this year than it did in 1991. In the Commission's view this shows that there is growing acceptance of its own position that the essential objective of merger control must be the maintenance of a competitive market structure in the Community, because a competitive structure is vital to any improvement in the competitiveness of Community

(3) Another point to note here is that on 30 November the Commission received the first request made by a Member State under Article 22 of the Regulation, which allows a Member State to ask the Commission to look into a transaction which does not have a Community dimension in order to establish whether it creates or strengthens a dominant position on the market of that Member State (British Airways/Dan Air, OJ C 328, 12.12.1992, p. 4).

industry. An improvement of this kind is the main priority of Community industrial policy, and is crucial to success in other Community policies such as social and regional policy.(4)

(4) Twenty-first Competition Report, point 45.

<T4> §3. State aid

16. The main developments in the state aid field this year can be summarized as follows.

<T5> Strict control

17. The Commission continued to exercise very strict control of state aid as the establishment of the single market progressed. A single market will make sense only if customs barriers and other trade restrictions are not replaced by increased state aid. The Commission continued its policy of eliminating general schemes of aid to investment, for which the Treaty offers no justification, and taking a very tough line on schemes targeted at particular industries, which produce particularly acute distortions of competition. Like the Commission's established principle that regional aid should be concentrated in the regions which really justify it, and not granted in rich areas, this policy contributes to the Community's economic and social cohesion. The Third Survey on State Aid in the European Community, which was adopted this year, gives the Commission an overall picture of the effects of its state aid policy. It also allows the Commission to set priorities for the areas of work on which it will have to concentrate over the next few years.

The Commission made full use of the Treaty provisions dealing with state aid and of the rules developed in the judgments of the Court of Justice. It initiated the full inquiry proceedings provided for in Article 93(2) of the Treaty wherever a measure appeared on initial examination to be incompatible with the common market, or where the information supplied was insufficient, or where it had proposed appropriate measures to a Member State and the Member State refused to accept them. The Commission also invoked Article 93(1) in order to ask Member States to amend schemes it had previously approved. It brought proceedings before the Court of Justice under Article 169 of the Treaty in cases of failure to comply with earlier court judgments in state aid cases. It took one decision requiring that payment of aid be suspended in line with the Court of Justice's judgment in Boussac. It began applying the communication on public undertakings in the manufacturing sector which it published on 18 October 1991.

The Commission gave special attention to aid measures which had not been notified. As in the past it took up with the Member State concerned any cases where it learned from the press or from Parliamentary questions that state aid had been granted without the advance notification required by Article 93(3) of the Treaty. It also looked into complaints sent to it by Member States, by local and regional authorities, or by firms or trade associations. Such complaints are being made more and more often; they demonstrate the growing interest in the question of state aid among the parties concerned, and the confidence they are prepared to place in the Commission. In response to such complaints the Commission has had to look into areas of manufacturing or services not really explored hitherto and to intensify the supervision of assistance given by local authorities.

The international dimension of the control of state aid must also be mentioned here. This aspect was reflected in the Draft Treaty on the European Economic Area, which was signed this year; under the Treaty the EFTA Surveillance Authority is to have powers similar to those of the Commission, and the two institutions are to cooperate. The Interim Agreements concluded on 1 March 1992 with Hungary, Poland and the Czech and Slovak Federal Republic also contain provisions on state aid. The Commission examined one individual case of aid to the motor industry in Austria; after discussion with the Austrian authorities the level of assistance was significantly reduced.(5)

<T5> New aid codes

18. If there is to be strict control of state aid there must necessarily be clear rules defining the types of measure which will qualify for exemption under Article 92(2) and (3). The Commission has set out rules of this kind in the form of codes, now always published in the Official Journal, which provide governments and firms with guidance on the approach which the Commission intends to take in determining whether aid is compatible with the common market.

(5) See point 344 of this Report.

A particularly important code which was adopted this year was the Community Guidelines on State Aid for Small and Medium-sized Enterprises (SMEs). These guidelines, which will be considered in more detail elsewhere in this Report,(6) define what is meant by an SME and distinguish between different types of assistance by their form and purpose. Other codes adopted were the new Code on Aid to the Synthetic Fibres Industry(7) and the Community Guidelines for the Examination of State Aid in the Fisheries and Aquaculture Sector;(8) the Commission decided not to amend the Community Framework for State Aid to the Motor Vehicle Industry.(9)

The Commission made progress in the study of possible new codes, or amendments to existing ones, dealing with aid towards capital-intensive investment, aid for rescuing and restructuring firms in difficulty, aid in connection with export credit insurance, aid towards environmental protection measures and aid to the tourist industry. A new decision establishing Community rules for aid to the coal industry was submitted to the Council for its assent.

The synthetic fibres and motor industry codes are designed mainly to provide guidance for the examination of individual cases in which aid is to be granted under regional schemes; the Commission plans to review the usefulness of these two codes should a code on aid to capital-intensive investment be approved.

<T5> Control of aid in the former GDR

19. The Commission took a large number of decisions on aid measures in the former German Democratic Republic, which comprised both regional measures and individual projects in industries such as steel, shipbuilding, motor vehicles and synthetic fibres. It took full account of the socio-economic situation in the regions concerned, which was a consideration particularly relevant to regional aid and the steel and shipbuilding industries. But it did not hesitate to apply the rules in force and to initiate investigation proceedings where necessary.

(6) See points 78, 342 and 348.
(7) See point 401 of this Report.
(8) See point 510 of this Report.
(9) See point 405 of this Report.

The Commission adopted a decision on the activities of the privatization agency, the Treuhandanstalt. The decision is intended to ensure that the Commission is informed of certain measures planned by the agency and can thus form an opinion. The measures involved consist of loans and guarantees granted by the Treuhandanstalt to firms before privatization; the conditions of sale of groups of previously independent companies; compensation awarded to former owners repurchasing their firms, where it falls outside the scope of ordinary law; and sales at "negative prices". The obligation to notify is to apply only to fairly important cases; the Commission will deal with cases within specified deadlines which are shorter than those which normally apply.(10)

<T5> Exemption from notification requirement for certain aid measures of minor importance

20. The Commission decided that aid schemes which did not permit the grant of more than ECU 50 000 to one firm over a period of three years need no longer be notified. For a fuller account see Chapter V of this Report.

(10) See point 349 of this Report.

<T4>

§4. Special or exclusive rights

21. The policy of restricting monopolies has its basis in Article 90 of the Treaty, which states that competition law is to apply to "public undertakings and to undertakings to which Member States grant special or exclusive rights". The same goes for "undertakings entrusted with the operation of services of general economic interest... 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". Even then, "the development of trade must not be affected to such an extent as would be contrary to the interests of the Community".

22. Tackling monopolies is without any doubt one of the most fundamental challenges in competition policy. This is particularly true in the production and distribution of gas and electricity, in telecommunications, and in postal services. But the basic problems are the same in financial services or transport, where there are barriers to market entry as a result of national or local rules and regulations, and where access to networks or other vital facilities can be difficult. A broad outline of Commission policy is given here while the particular sectors are dealt with individually in Chapter II.

23. In most of these areas there have for many years been monopolies operating extensive networks under a public service obligation which requires them to supply basic services across all or part of the territory of a Member State. The rules of the Treaty, the demands of the single market and legal, economic and technological factors all call for a review of this form of organization.

24. The existing form of organization is based on a market divided along national lines and is therefore intrinsically incompatible with the Community competition rules, something which has become steadily clearer in the judgments of the Court of Justice. It is a structure which will often facilitate the abuse of a dominant position. It restricts freedom to supply services and the free movement of goods. It is often accompanied by discrimination on grounds of nationality.

25. Furthermore, the sectors involved are of vital importance to the quality of infrastructures in the single market. If Community businesses and consumers are to draw full benefit from the single market the regulated sectors must be made to match the scale of the single market in order to maximize the potential efficiency gains. Yet that result can be achieved only by establishing a competitive environment throughout the Community which will boost the volume and variety of supply and demand. The process of establishing a single market must encompass areas such as energy, posts and telecommunications. The competitiveness of the whole of the Community economy is at stake.

26. These industries are at the same time going through a period of exceptional structural change, induced especially by technological progress. One result has been that in most cases consumers are demanding more and more diversified services, far more complex than the basic services which monopolies were traditionally expected to supply. The capital needed to modernize these industries has increased in proportion, at a time when the resources available from public budgets have been falling, and this has prompted the authorities to seek to bring in private capital. In some cases technological progress has actually done away with the original justification for the monopoly.

The Commission has a duty to take steps to identify the sectors concerned and to ensure that an open and competitive environment prevails to the full extent required by the Treaty. Clearly the Commission has to balance the general requirements of the Treaty against the arguments which may be put forward in justification of a monopoly, such as security of supply or the maintenance of a universal public service, and it has to do so in the light of the principle of proportionality. But the Commission feels that the concepts invoked have now to be viewed not just in the national perspective but in a Community perspective too.

These imperatives do not necessarily conflict with free competition: indeed the relationship is more likely to be complementary. An example is the desirability of a universal service, which by definition ought to be available to everyone throughout the Community: the service will be less

expensive and its quality will be higher if there is competition to stimulate technical progress; this is particularly so because the introduction of competition into a regulated sector often leaves the old monopoly operator with part of its activity exposed to free competition while the rest, the universal service proper, continues to be its own reserved domain. But it is obliged to improve its efficiency in the competitive sector, and this can have beneficial effects in the monopoly section of its business. Thus competition can benefit a universal service rather than damage it. This is especially important in outlying regions of the Community, and consequently for the achievement of economic and social cohesion.

27. Some of these sectors rely on networks whose establishment and maintenance require substantial investment; new market entrants must have access to these networks if real competition is to be possible. Free access to the network by outsiders is therefore a constant objective in Commission policy. Access must be fair: account has to be taken both of the costs borne by the operator of the network and of the new entrant's need for a deal which allows him to be competitive; the difficulty is rendered more acute by the fact that the new entrant will often be in competition with the network operator himself, which creates a need for proper clarity in the structure of the operator's costs. State aid policy and the prevention of the abuse of dominant positions must combine to help ensure fair market access.

28. To ensure wide consultation in which all interested parties will have the opportunity to make their views known before any action on the Commission's part, the Commission published a review of the situation in the telecommunications services sector,(11) a communication on the telecommunications equipment industry,(12) and a Green Paper on postal services.(13) The basic question in these sectors is how to arrive at solutions which restrict competition and the fundamental freedoms of

(11) SEC(92)1048 final.
(12) SEC(92)1049 final.
(13) COM(91)476 final.

solutions which restrict competition and the fundamental freedoms of Community law as little as possible, while at the same time preserving a public service. A study has been launched of the accountancy problem in firms which operate both in reserved areas and in competitive ones.

29. In a judgment dealing with telecommunications services the Court of Justice confirmed earlier precedent allowing the Commission to take necessary measures in this sphere.[14]

14 See point 333 of this Report.

<T2> Chapter II: Application of the competition rules to particular industries

<T4> §1. Posts and telecommunications

30. Posts and telecommunications resemble one another in that they have both for a long time been protected from competition by monopolistic structures, and with the arrival on the market of new competitors and new services in recent years they have both been going through a far-reaching process of development. The Commission believes there is every reason to encourage these changes.

The influence of technological progress is growing: this has considerably broadened the range of services on offer, and has helped to render some national monopolies obsolete.

<T5> Telecommunications

31. The need to maintain a balance between liberalization and harmonization is central to the Commission's approach in this sector.[1] Efforts to harmonize telecommunications equipment and services are thus going ahead alongside efforts at liberalization.

32. Here too the Commission is trying to establish a competitive environment, which should substantially broaden the range of services on offer to consumers and at the same time ensure that prices reflect the lower costs engendered by competition and technological progress. The Commission believes that this objective is compatible with the maintenance of a public service accessible to all, and indeed that the two sets of requirements can complement one another. This objective is equally compatible with those of economic and social cohesion as long as the conditions expressed in paragraph 26 are present.

33. Several major steps have already been taken under this overall policy. The Council has approved harmonization measures in respect of open networks, and the Commission has so far adopted two liberalization directives dealing respectively with terminal equipment and telecommunications services. The

1 See point 511 of this Report.

Court of Justice has broadly upheld the lawfulness of these two directives, which had been contested by some of the Member States; the judgment in the second case came this year.[2]

Following the directives on open network provision (ONP) and telecommunications services, the Commission published a review of the situation in the industry.[3] The Services Directive requires the abolition of exclusive rights in telecommunication services, with stated exceptions, such as voice telephony provided to the general public. The review considers the present situation with regard to these exceptions, and puts forward proposals for further action. It notes in particular that prices continue to be high, particularly for cross-border calls; the price of a call between the same two places varies depending on which place the call is made from, and this is causing growing deflection of traffic; and the range of services and prices offered is limited.

34. The review concludes that of the available options the one which at this stage seems to conform most closely to the fundamental objectives of the Community is that of opening voice telephony between Member State to competition. That would allow the current price anomalies to be eliminated, without compromising the financial resources available to telecommunications organizations to meet their universal service obligations. The fact that these organizations would be exposed to competition in a segment of their business would increase their overall capacity to optimize their cost structures; and this should reduce the cost of supplying a universal service, so that the universal service can grow in volume, as has already happened in those countries which have made most progress towards liberalization.

35. The Commission also adopted a communication on the telecommunications equipment industry, which shows the benefit to the industry of the liberalization of services and market expansion which would ensue.[4] For this to happen there must be continued progress towards the achievement of a single market, through harmonization and liberalization; liberalization would also take in state aid and government procurement.

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2 See point 333 of this Report.

3 1992 Review of the Situation in the Telecommunications Sector (SEC(92)1048 final).

4 The European Telecommunciation Equipment Industry: the State of Play, Issues at Stake and Proposals for Action - Communication from the Commission (SEC(92)1049 final).

36. In 1993 the Commission will be continuing the wide-ranging process of consultation initiated in the review and communication just referred to by seeking the views of the many interested parties. It will be devoting particular attention to ensuring that the legislation already adopted is in fact implemented.

37. Current developments clearly show that the competition dimension is a vital component in a Community telecommunications policy based on a balance between liberalization and harmonization. The establishment of a genuine common market in telecommunications, in which the competition rules are properly applied and in accordance with the objective of economic and social cohesion, will permit an expansion of the market and an improvement in quality which will benefit producers and consumers wherever they may be in the Community. The policy also has an international aspect. The Community is seeking to have the same principles applied in its dealings with non-member countries, and to have their markets opened up in the same way as its own.

<T5>

Postal services

38. The Commission this year published a Green Paper intended to launch a debate on measures which might be taken in respect of postal services.(5) The fundamental objective is to achieve first-rate postal services which are better able to meet users' needs and the demands of a single market. The Green Paper suggests a series of harmonization and liberalization measures. It envisages the liberalization of express delivery services, the delivery of publications, direct mail, and cross-border post.

39. The Green Paper emphasizes the need for a universal service, a concept which has still to be defined. The Commission accepts that certain services could go on being reserved to monopoly organizations. But the business thus reserved should never be more extensive than it needs to be in order to ensure that a universal service can be provided. It could be defined by applying precise tests which give all the interested parties the legal certainty they need to be able to invest and compete on the market. It will be equally necessary to consider if the measures concluded on the basis of the 'Green Book' take fully into account the objective of economic and social cohesion.

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(5) See point 512 of this Report.

40. The Green Paper also draws attention to the advantages of better harmonization of postal services in the Community; this will require active participation on the part of users, operators and the national regulatory authorities, particularly with a view to technical harmonization and the improvement of services to users.

41. With regard to state aid, the Commission began a careful re-examination of two complaints which had been lodged with it by competitors of La Poste, the public body that provides postal services in France; the complaints concerned the transport of valuables in armoured vehicle and express delivery services.[6] The main allegation was that there was state aid to La Poste's monopoly business which ultimately benefited the sections of its business exposed to competition. The Commission's initial decisions were challenged in court, and this demonstrates the importance of the question, which must necessarily arise wherever the same organization is carrying on a monopoly business alongside other activities which are open to free competition: following the Green Paper, the Commission has taken up the two cases again.

6 See point 438 of this Report.

<T4>

§2. Financial services

42. Financial services have traditionally been heavily regulated by government. In some Member States outside firms have had a strong competitive presence, but in others competition, and particularly outside competition, have played only a marginal role. Community integration has advanced very little. There are substantial changes ahead. The Directives adopted this year,(7) coming on top of the legislation already approved, mean that here too the single market is imminent, and will shortly be widening the range of services available to consumers while significantly increasing openings for market participants.

43. Because more intense competition will now be possible in financial services it is essential that the Commission should exercise greater vigilance in its efforts to apply the competition rules, thereby ensuring that restrictive agreements between firms or the grant of unlawful state aid do not prevent competition from springing up and thus thwart the beneficial effects of the single market.

44. The Commission has been active in various sectors. It continued its investigations into interest rates, where it concluded its study of the replies to its requests for information of the previous year. Certain agreements were abandoned or amended as a result, and a statement of objections was sent in one case.

The Commission's current priority in the banking sector is the question of payment cards, an area which is in rapid expansion and is of great importance to traders and consumers. The antitrust authorities in different Member States have adopted strongly divergent solutions, making Commission intervention especially appropriate here. Problems identified so far include the usual matter of agreements on interbank commissions and that of the

(7) The Third Non-life Insurance Directive, Council Directive 92/49/EEC of 18.6.1992, OJ L 228, p. 1, and the Third Life Assurance Directive, Council Directive 92/96/EEC of 10.11.1992, OJ L 360, p. 1.

trader's freedom to pass commissions on to customers.

45. But the Commission is by no means opposed to all forms of cooperation between firms in this area, provided they satisfy the tests for exemption laid down in Article 85(3) of the Treaty. This is demonstrated, for example, by the block exemption regulation for insurance agreements which it adopted this year.(8) The regulation exempts categories of agreement covering a number of aspects: the calculation of "pure" premiums, that is to say the pure statistical cost of the risk, excluding expenses and profit; the establishment of standard policy conditions; the formation of co-insurance and co-reinsurance groups; and security devices.

46. The Commission is currently investigating several complaints against state aid in postal banking services and public credit institutions.(9) It is giving particular attention to the extent to which the special rules governing the organizations operating here might in some cases tend to generate state aid. The Commission will probably be making its findings known in the course of 1993.

47. The Commission this year adopted one of its first state aid decisions concerning the banking sector. It applied the principle of the private investor operating in normal market economy conditions to the recapitalization of the Banco di Sicilia and of the Centrale di Risparmio ("Sicilcassa").(10) It initiated proceedings under Article 93(2) of the EEC Treaty against Italian tax measures specifically for banks and insurance companies in Trieste.(11)

(8) Point 274 of this Report.
(9) Point 439 of this Report.
(10) Point 440 of this Report.
(11) Point 498 of this Report.

48. These developments show that as the single market brings the terms of competition more closely into line, state aid policy is of growing relevance in areas where it has not intervened in the past. They also illustrate the importance of the role which competition policy in general can play in opening up markets, particularly at the present time, when the single market is spreading to new sectors.

<T4>

§3. Energy

49. Energy is an industry which has for long been shielded from competition, and the results run counter to the establishment of a single market: consumers are generally dependent on monopoly producers or distributors, or both; they are not offered any choice in the matter. Yet greater choice in all areas of economic activity is one of the objectives of the single market. Complaints are becoming more frequent, which is a factor the Commission cannot ignore. There is a failure to make the best possible use of production and distribution infrastructures, and this damages the competitiveness of the Community economy as a whole. There continue to be substantial price gaps between Member States, illustrating the absence of a Community market here.

The Commission is determined to continue with its policy of liberalizing the energy market, in order to create a competitive environment which will generate efficiency gains to the advantage of both consumers and producers. It is well aware of the concern which is being expressed regarding security of supply and the maintenance of a public service accessible to all. The Commission remains convinced, however, that the application of the competition rules will make for better security of supply, by increasing the number of suppliers on the market, and that public service obligations can be met in a way compatible with the Treaty. Both of these concepts have in any event to be looked at in a Community context rather than a purely national one.

50. The proposals which the Commission put forward this year under Articles 57(2), 66 and 100a with a view to the achievement of a single market in gas and electricity(12) are still the subject of a wide-ranging debate, and the Commission is currently studying the conclusions which can be drawn from discussion in the Council. The main objectives of the proposals are to abolish exclusive electricity generation rights; to create an open and non-discriminatory system for the grant of licences for the construction of electricity and natural gas lines; to apply the concept of "unbundling",

(12) Proposal for a Council Directive concerning common rules for the internal market in electricity and proposal for a Council Directive concerning common rules for the internal market in natural gas, OJ C 65, 14.3.1992.

under which vertically-integrated enterprises are required to have production, transport and distribution handled by separate divisions with separate accounts; and to require transmission and distribution companies to allow outside access to their networks at a reasonable price (access would have to be available to large industrial consumers and distribution companies under certain conditions), subject to the availability of capacity. Access is vital to an increase in competition in both sectors, because new competitors cannot enter the market without it. At the Council meeting on energy held on 30 November there was an intense policy debate on the Commission proposals. The Council decided to continue the debate on the single energy market and to work towards more open, transparent, efficient and competitive electricity and gas markets. It asked the Commission to amend its proposals in the light of the Council discussions and of Parliament's opinion, which is expected at the beginning of 1993.

The question of market access also underlies the proposal for a directive under Articles 57(2), 66, 100a and 113 on the conditions for granting and using authorizations for the prospection, exploration and extraction of hydrocarbons.[13]

51. In putting forward these proposals inter alia under Article 100a, the Commission expressly reserved the right to exercise the powers conferred on it by the Treaty, and particularly by the competition rules. Thus the Commission initiated infringement proceedings against certain Member States regarding exclusive import and export rights, and also acted in the case of the independent generator Société Hydroélectrique de Grangevieille.[14] The Treaty rules on the free movement of goods are applicable too: there was an example in the Coramine case, which concerned a dispute between Electricité de France and Coramine regarding certain clauses which Electricité de France had included in its contracts. The Commission there put forward the view that

13 See OJ C 139, 2.6.1992, p. 12.
14 See points 142 et seq. of this Report.

exclusive transport, distribution and marketing rights for electricity could infringe Articles 30 to 37 of the Treaty. The case has since been settled.

52. The Commission continues to give favourable consideration to aid measures notified to it which are intended to promote energy efficiency, the development of new or alternative energy sources, or the diversity of energy supplies in the Community. It accepted the extension of the ERP scheme in Germany,(15) the introduction of a new scheme to promote the production of wind energy in Denmark,(16) and the grant of aid to Kraftwerke Ruhr by the authorities in Saxony-Anhalt in Germany for the construction of a lignite-fired power station.(17) But the Commission has always taken care to ensure that the objectives pursued do not conflict with the desire for a Community electricity market. It insisted that the aid to Kraftwerke Ruhr be substantially reduced from what had been proposed, and that no further aid of this kind be granted in Germany: by encouraging the consumption of lignite, which is produced locally, such aid is liable to distort trade in fuel and electricity within the Community.

53. It is clear in any event that the energy sector is one in which there are going to be very important developments in competition policy over the next few years.

(15) See point 453 of this Report.
(16) See point 449 of this Report.
(17) See point 433 of this Report.

<T4> §4. Transport

54. The Commission forcefully pursued its efforts to increase competition in transport. Here as elsewhere the achievement of the single market requires the establishment of structures which are competitive and consequently more efficient. The measures taken were concerned particularly with sea and air transport.

<T5> Sea transport

55. This year saw the first decision in a sea transport case.(18) The Commission clearly demonstrated its determination to apply the block exemption strictly, and showed that it would combat efforts to circumvent the terms of the exemption, for example where liner conferences and non-member operators concluded agreements restricting competition in a particular trade. The decision is a first step in a vigorous policy intended to open the sea transport market to competition. Success here is vital to the interests of the Community; 95% of trade between the Community and the rest of the world is carried by sea.

The Council this year granted the Commission powers to declare a block exemption for consortia, and the Commission began drafting a regulation. Consortia are a modern form of cooperation between liner shipping companies in which users receive a fair share of the benefit alongside the companies themselves. They enable shipowners to organize their services jointly, which gives users a better-quality service and allows the shipping companies to rationalize their activities.

56. The Commission studied the desirability of amending the rules on aid to shipowners. In line with discussions in the Council it continued to work on the establishment of a Community shipping register.

57. In several individual cases dealt with under Article 86, or under Article 90 in conjunction with Article 86, the Commission sought to ensure

(18) See points 147 et seq. of this Report.

that the competitive environment would extend to access to ports and port services,(19) an aspect essential to free competition on the market in sea transport services. This objective also requires a vigilant policy on state aid. Financial relations between public authorities and the ports are generally lacking in transparency.

<T5> Air transport

58. The year 1992 also saw the adoption of the "third package" of measures to liberalize air transport.(20) The package sets out to create a single market by 1 January 1993. There are to be exceptions, and a transitional period, but a solid start has none the less been made in the shape of the greater freedom airlines now have to set fares, and the freedom they will very soon have to offer their services throughout the Community.

59. Among the advances included in the third package there is an extension of the Commission's powers to apply the Community competition rules to air transport inside a single Member State. The Council also authorized the Commission to declare block exemptions in air transport beyond the date of 31 December 1992.

The problem which still has to be resolved here is that of market access for new entrants, which can be rendered impossible by traffic congestion at certain airports. The Council adopted a regulation which will increase new entrants' chances of obtaining worthwhile slots at saturated airports.(21)

60. The benefits of a single market must not be nullified by anti-competitive agreements between firms or by the abuse of dominant positions; both impose restrictions on competition which in practice take over from those which liberalization seeks to remove. Merger control also has a role to play here. The increase in competition is generating an increase in restructuring operations, which must not be allowed to establish new dominant positions.

(19) See points 219 and 525 of this Report.
(20) OJ L 240, 24.8.1992.
(21) Council Regulation (EEC) No 95/93 of 18 January 1993 on common rules for the allocation of slots at Community airports, OJ L 14, 22.1.1993.

61. One of the Commission's next policy objectives will be to extend the application of the competition rules to relations with non-member countries.

62. If it is to have its full effect liberalization must be accompanied by a vigilant state aid policy. The Commission sent the Council and Parliament a report on measures to assist Community airlines. In addition, the Commission had to consider an increase in the capital of Air France, through the issue of convertible bonds and subordinated debt securities with no fixed maturity; it found that the measures were in line with ordinary commercial practice and that no aid was involved. The Commission also approved the increase in the capital of Iberia, which it considered compatible with the common market in view of undertakings given by the Spanish Government regarding the restructuring of the company.

<T5> Road transport

63. Lastly, the Commission initiated proceedings under Article 93(2) of the EEC Treaty in respect of aid to Italian road hauliers. The decision was deemed necessary given the liberalization of the road transport market from 1 January 1993 onward.(22)

(22) See point 500 of this Report.

<T4> §5. Cinema and television

64. The cinema industry is one in which the Commission has taken a sympathetic approach to state aid, particular in the light of the cultural policy being pursued by the Community. But the decisions taken in recent cases have made it clear that the special nature of the industry will not prevent the Commission from checking whether any aid granted is in accordance with the various branches of Community law, and whether it is liable to interfere with competition.

65. The Commission this year took two decisions dealing with the French and German schemes of assistance to the cinema and television industries, in which it confirmed that it will not approve aid which does not comply with the fundamental principles of Community law, and particularly the principle that there is to be no discrimination on grounds of nationality.(23) The Commission had initiated proceedings under Article 93(2) of the Treaty in respect of the German scheme, which provided for example that aid could be granted towards the making of a film only if the director was of German nationality or from a German cultural background. The German authorities subsequently amended the legislation. The French scheme was likewise examined closely in this respect.

66. The two decisions concerning France(24) show how competition policy considerations can apply in the cinema and television industry. The Commission held that a capital injection into Société Française de Production, which produces films and television programmes and provides other related services, constituted state aid, on the principle of the private investor operating under normal market economy conditions; but the Commission concluded that the aid was compatible with the common market, because it was linked to a restructuring plan which was likely to produce a financially viable company. With regard to the overall aid scheme for the cinema and television industry, the Commission indicated that it would be

(23) See points 442 and 444 of this Report.
(24) See points 443 and 444 of this Report.

carefully monitoring a clause under which a French television channel which had contributed to the support fund was to have the first broadcasting rights in a subsidized work. The Commission took the view that the clause was liable to restrict trade in television productions between the Member States.

<T2> Chapter III: Competition policy and other Community policies

67. Competition policy is a vital dimension of several Community policies. It can make a decisive contribution to the achievement of their objectives. Application of the competition rules will prevent companies and governments from behaving in ways which in practice reconstruct the barriers the Community is trying to remove.

But competition policy is not purely a matter of dissuasion or punishment. The mechanisms of competition have an indispensable role to play in facilitating dynamic developments such as the adaptation of the productive system to environmental requirements, the involvement of SMEs in the single market, or progress towards economic and social cohesion. It is competition which gives consumers a fair share of the benefits of the single market.

<T4> §1. Completion of the internal market

68. The completion of the internal market is the result of a combination of Community policies. The removal of borders has to be understood in a very broad sense. It refers not just to physical barriers but also to differing technical standards, tax barriers, or restrictions on access to public contracts. The removal of borders is not an end in itself; it is intended to clear the way for the growth of the Community economy, which will benefit firms and households alike. The process has to be monitored in order to ensure that its benefits are felt throughout the Community and that small and medium-sized enterprises play a full part.

69. There is a growing consensus that the benefits of the single market will be real and durable only if they are backed up by vigilant enforcement of competition policy. The application of the competition rules prevents firms from partitioning markets between them, cancelling out the positive impact of

integration by establishing new barriers whose effect is identical to that of the government restrictions removed by the single market.

The ban on restrictive agreements is not the only aspect of competition policy which is relevant. The other competition rules make their own contributions to market integration. This is true of state aid policy and policy towards the abuse of dominant positions. A dominant firm must not be allowed to abuse its position and to partition the common market. Where trade between Member States might be affected the Commission polices the grant of aid to firms in order to protect the single market. And it is only in a competitive environment that firms are constantly spurred on to innovate and consequently to carry out the research and development necessary to reduce their costs or to improve their products. This benefits the consumer, because the pressure of competition obliges firms to pass on their productivity gains. Competition also induces firms to broaden their product ranges and improve quality.

70. There is one area of competition policy which deserves special mention here. This is the Commission's handling of distribution and licensing agreements. Such agreements can lead to more efficient distribution. But they often include territorial clauses which may have the effect of dividing the common market. It has been the Commission's constant practice to exempt such agreements only if they do not restrict trade between Member States to an unacceptable degree. Parallel imports must continue to be possible if the distribution benefits of the agreements are not to be offset by a damaging fragmentation of markets. The Commission confirmed its practice this year in decisions in the perfumery trade and in measures in respect of the motor trade, where as yet there is clearly no single market.

71. The policy of deregulating monopolies also merits a remark. Subjecting the existing monopolies to a measure of competitive pressure, by opening part of their business to competition, will oblige them to improve their

efficiency, and this may be of benefit in their reserved business too. The result should be better services supplied at better prices, and faster development of infrastructures, reducing the cost of connections in terms both of time and of money. This should be particularly useful to outlying regions, because it will lower the costs occasioned by the distance between them and the central regions, and will thus improve cohesion. It is clear, therefore, that there need not be a clash between the objective of developing competition and the objective of strengthening economic and social cohesion, and that they may in fact complement one another.

72. The contribution of state aid policy to the completion of the internal market is evident, as state aid policy seeks to ensure that particular firms are not given favourable treatment which might improve their capacity to export or curtail imports into the Member States in which they are established. The disappearance of state barriers to trade in the Community means that the distortion caused by unlawful state aid or infringements of Articles 85 and 86 is all the more serious, and strict control by the Commission is the only way of preventing damage to the operation of the single market.

73. Thanks to the one-stop shop principle, which means that firms do not need to deal with a number of separate authorities, Community merger control facilitates the adaptation of industrial structures to the single market, while preventing mergers which would produce dominant positions liable to compartmentalize the common market.

<T4>

§2. Consumer protection

74. Competition is basic to Community policy towards consumers, though consumer policy proper relies on other more specific measures. Competition policy may seem an abstract concept to the general public, but the benefits it brings to consumers are nevertheless substantial. Firms are forced to compete for consumers' favour. The single market and competition policy work together to allow consumers to choose between the goods and services offered by firms throughout the Community, at the best possible prices. Competitive pressure also provides a constant stimulus to firms to innovate and to reduce their costs in order to avoid losing their place on the market. They have to compete both in terms of quality and in terms of prices and the product ranges they offer.

Action to challenge the abuse of dominant positions and anti-competitive agreements must be seen against this background. The Commission is the only authority in a position to combat Community-scale restrictive practices whose harmful implications for consumers are well known. The same is true of merger control, which seeks to prevent the establishment of dominant positions, and thus to maintain sufficient diversity on the supply side to ensure that the consumer has freedom of choice between several actual or potential competitors, and is not left dependent on a single dominant enterprise. The decisions in the Nestlé/Perrier and Air France/Sabena cases illustrate this point very well; Nestlé/Perrier also shows that the consumer has to be protected not only against the dominant position held by a single company but also against those established by several companies together. The need to maintain diversity of supply likewise guided the decision in ICI/Du Pont, which makes it clear that the party whose choice is to be preserved need not necessarily be the final consumer but may also be an intermediate purchaser or producer.

The practical contribution made by competition policy to the integration of markets, and thus to freedom of choice for consumers, can be illustrated by three examples. Firstly there is the action taken by the Commission with regard to interest rates, where it requested information which helped it to

check whether restrictive agreements were being applied by banks or other financial institutions, preventing consumers from obtaining the best possible rates.(1)

Another area where Commission action is of evident interest to consumers is the motor trade, where following a report on car prices in the different Member States the Commission reminded manufacturers of their obligation to guarantee the consumer's freedom to buy the vehicle of his choice wherever he wishes in the common market.(2)

In the third place there is the area of exclusive rights. In some basic sectors there are monopoly rights granted by Member States which prevent the single market from having any practical impact, and leave households and firms with only a restricted choice or no choice at all. This situation is incompatible with the principles of market integration, and entails extra costs which are ultimately borne by the consumer whose choice is restricted. It is all the more serious as the sectors involved are basic sectors of which all consumers make considerable use.

The same is true of transport, by land, sea or air, where the Commission is trying to intensify competition in order to increase the diversity of supply and to reduce prices.

(1) See Annex III.A.1 to this Report.
(2) See point 290 of this Report.

<T4>

§3. Environment

75. Environmental policy, formally embodied into Community law by the Single Act, is a fundamental policy of the Community. The Article 130r which the Single Act inserted into the Treaty specifically requires Community action on the environment "to preserve, protect and improve the quality of the environment." The importance attached to the environment in our societies, and the legal constraints to which this has given rise, mean that the environment is a major concern with considerable financial implications, which firms have to incorporate into their cost structures, their pricing policies, and their general strategy. It is only natural, therefore, that there should be interaction between competition policy and environmental questions. The Commission this year examined several aid measures aimed at protecting the environment, and exempted them under Article 92(3)(c) of the Treaty. Three such measures deserve to be highlighted.

- Firstly, there were two cases in which energy-intensive industries were to be exempt from a tax on carbon dioxide emissions, in Denmark and the Netherlands.(3) Such a tax exemption is in line with the Commission's communication to the Council proposing the introduction of a carbon dioxide/energy tax, and the Commission decided that it constituted state aid compatible with the Treaty under Article 92(3)(c).

- The second example is that of a scheme to promote the recycling of manure in the Netherlands.(4) The Commission had initiated Article 93(2) proceedings against this scheme in 1991, but finally approved it in 1992, on condition that the variable costs of the new body which was to collect, store and dispose of manure were covered by the price paid by farmers, as the scheme would otherwise become operating aid to those farmers. This decision shows that the Commission studies the implications of environmental aid in other policy areas, and approves it only if it does not distort competition unduly.

(3) See point 451 of this Report.
(4) See point 450 of this Report.

76. The Commission made a thorough study of the possibility of recasting the Community code or framework which currently governs aid towards environmental protection. A draft was submitted to Member States' experts at meetings held during the year, and the Commission believes that new guidelines can be approved in the course of 1993. This move comes against the background of the Fifth Environment Programme, which puts forward a new strategy based on the principle of sustainable development. The strategy is aimed at achieving lasting economic and social progress which respects the environment and natural resources, with environmental objectives forming an integral part of other Community policies. The thrust of the draft guidelines on aid is as follows:

- the "polluter pays" principle would be confirmed, particularly where additional environmental investment by firms was undertaken in order to meet legal requirements: the tightening of environmental standards should as far as possible be achieved without financial support from government, and law-making should therefore proceed in stages;

- aid could be granted at low intensities to facilitate and accelerate adaptation to standards by firms with plant already working for at least two years before the new standards enter into force;

- aid could be granted at higher levels for environmental investment going substantially beyond the legal requirements, or in the absence of legal requirements: firms should be encouraged to make an extra effort, and should not be penalized if they do so by comparison with those who do not;

- cases of operating aid would be examined case by case, and the concept of "aid to promote the execution of an important project of common European interest" would be interpreted strictly.

77. As far as the application of Articles 85 and 86 is concerned, it is clear that agreements which restrict competition continue to be prohibited by Article 85(1) even if the parties invoke environmental protection in order to

justify them.(5) Article 85(3) may however be applicable. The tests it lays down must of course be satisfied; in particular, sufficient competition must be maintained, and the restrictions must be indispensable to the alleged economic benefit. Another problem arises where measures are taken by public authorities which might compromise the effect of the competition rules, for example by requiring firms to engage in behaviour which restricted competition. Such measures can have a very appreciable effect on competition and trade between Member States. In such cases the Court has held that Article 85 may apply, in conjunction with Articles 5 and 3(f) of the Treaty.

The Commission takes the view that the contribution which the competition rules make to environmental protection will grow in importance. The environment is a field where legislation is expanding and technology is advancing rapidly. The Commission's handling both of agreements between firms and of the rules being applied will have to develop too. The Commission is continuing its study of the matter. The following general points must be kept in mind.

Commission environmental policy is founded on the "polluter pays" principle; the effectiveness of the principle depends in particular on the proper operation of the price mechanism, which ought to translate into costs the negative effects of a particular process on the environment, so that prices can perform their signalling function which forms the basis of the market economy.

But if this is to happen the competition rules must be applied vigorously, so as to avoid the conclusion of agreements or the abuse of dominant positions which might prevent or restrict the operation of the price mechanism.

(5) For an example see the VOTOB case, point 177 of this Report.

If the price mechanism does perform its signalling function throughout the Community, thus enabling firms to convert the environmental cost of an economic activity into financial terms, competition will quite naturally generate the most efficient allocation of resources possible, by prompting businesses to reduce costs. This will benefit both the environment and the economy in general.

<T4> §4. Small and medium-sized enterprises

78. The new Community guidelines on state aid for small and medium-sized enterprises (SMEs), which the Commission approved this year, are a translation into competition terms of the active policy towards SMEs which the Commission has been pursuing for many years.(6) They acknowledge the principle that the existence of a large number of SMEs in an industry is a sign of healthy competition, and that SMEs are an engine of economic growth, as the European Council accepted in Edinburgh when it decided to set up the European Investment Fund.

The Commission feels that the development of SMEs should be encouraged, and an effort made to overcome the specific handicaps they face as a result of their size: the guidelines therefore accept that SMEs may qualify for investment aid even in regions which are not eligible for regional aid. However, the intensity allowed is deliberately set fairly low, at 15% for small enterprises and 7.5% for medium-sized ones, to avoid frustrating the objective of cohesion.(7) Such aid is also justifiable given the more limited impact SMEs can have on trade between Member States as compared with that of large companies.

The Commission takes the view that SMEs need primarily to improve their financial base, to secure access to better expert advice, to improve the level of training among their staff, to obtain information or credit which is normally available only to large companies, and the like; it is here that their fundamental handicaps lie. The Commission accordingly takes a favourable view of aid for these purposes, even at relatively high rates. Like aid for consultancy services or aid towards the establishment of public guarantee funds, such aid is well upstream from the market-place, involves only small amounts of money, and has only limited effects on competition.

Research is an activity which is often beyond the capabilities of SMEs. The Commission accordingly maintains the special clauses in the Community Framework for State Aids for Research and Development which authorizes

(6) See also point 342 of this Report.

(7) Higher intensities may be allowed on a case-by-case basis until the end of 1993 in areas which are not eligible for regional aid but do qualify for structural measures.

higher rates of assistance for SMEs. It plans to include a comparable clause in the Community framework for state aid towards environmental protection.

The Commission believes that the establishment and development of SMEs in areas eligible for regional aid makes a vital contribution to the development of those regions. It accepts that the rates of aid authorized may be increased by 10% in regions eligible under Article 92(3)(c) and by 15% in regions eligible under Article 92(3)(a), though of course the ceilings of 30% net grant equivalent and 75% net grant equivalent which are authorized there can never be exceeded.

Schemes of assistance to SMEs existing in the various Member States are gradually to be adapted to these guidelines.

79. The competition rules applying to firms take account of the fact that agreements which are on a small scale, as most agreements concluded by SMEs are, rarely restrict competition to an appreciable extent, even supposing that they do affect trade between Member States, something the Commission would have to prove. SMEs are particularly concerned by the Commission's efforts at transparency, and the Commission this year decided to publish a special brochure for their benefit.(8) The Commission's 1986 Notice on agreements of minor importance states that agreements between firms with a market share of no more than 5% and an aggregate annual turnover of no more than ECU 200 million need not be notified.(9) This means that SMEs need not normally notify their agreements in order to ensure that they are compatible with the competition rules. Several block exemption regulations, including some of those which the Commission amended this year,(10) give more favourable treatment to agreements between parties whose market shares are below a certain threshold. In particular, the Commission clarified the application of the de minimis principle to beer distribution agreements.(11) The amendments which the Commission made to the block exemption regulations

(8) To appear in the European Documentation series.
(9) OJ C 231, 12.9.1986.
(10) See point 265 of thise Report.
(11) See point 301 of this Report.

in respect of R&D, specialization, patent licensing and know-how licensing - amendments which are intended to make it easier to take advantage of the exemptions, particularly in the case of technology transfers and R&D projects - contain thresholds which allow for the fact that agreements between firms with only small market shares have a less restrictive effect on competition; this should benefit SMEs. Lastly, Article 86 protects SMEs against the abuse of a dominant position by a larger competitor.

<T4>

§5. Regional policy

80. It is generally recognized that economic and social cohesion is a necessary corollary of the single market. It is reflected in the reform of the Structural Funds, which have now been coordinated to operate in accordance with six precisely-defined objectives, with the monies allocated to them doubled. Once the Treaty on European Union enters into force the process will continue with the establishment of the Cohesion Fund, which will assist only Greece, Ireland, Portugal and Spain, and will have a budget of about ECU 15 000 million for the period 1993-99. The Structural Funds themselves will be able to draw on more than ECU 161 000 million over the same period. Mention should also be made of the financing of large trans-European networks, and of the fact that the EFTA countries are to participate in the Cohesion Fund.
This policy is intended to enable the less-favoured regions in the Community to take full advantage of the single market, and to prevent the single market from widening the gap between them and the richest regions.

81. The Commission began applying the guidelines it adopted in 1991 to ensure consistency between competition policy and the regional policy being followed at Community level through the Structural Funds. In the framework of the Delors II package it continued the preparation of a more coherent map of the regions eligible for the Structural Funds and for national regional aid schemes, with aid being concentrated geographically and differentiated in the light of the seriousness of the problems to be overcome.

The Commission sought to reduce the scale of assistance in more prosperous areas, taking account of the changing socio-economic situation: a good example is the relative severity with which the Commission assessed aid in west Berlin, where the need for aid is now debatable. The logical consequence of this approach should be that aid will be concentrated on the less-developed regions; it shows how a strong competition policy can help to support economic and social cohesion.

The importance of cohesion is reflected in the introduction of a regional component into most of the aid codes. The guidelines on aid for research,

and SMEs, for example, authorize higher rates of assistance in areas qualifying for regional aid. The same concern underlies the Commission's efforts to put an end to general or industrial aid schemes which are available without distinction throughout the territory of a Member State. Despite this, the Third Survey on State Aid in the Community shows that the share of total aid to industry accounted for by the four largest Member States is rising by comparison with the outlying countries, and that the four weakest among the outlying countries give less aid to industry per person employed than the Community average and a good deal less than the central and more prosperous States. This shows that the Commission's efforts must be continued.

Lastly, the Commission departments have begun studying the possibility of limiting regional aid towards capital-intensity investment, whose contribution to regional development is sometimes insufficient to justify high rates of assistance. They have also begun work on recasting and consolidating the rules governing regional aid, some of which date back to 1971.

<T2> Chapter IV: Community competition policy and developments in the rest of the world

<T4> § 1. General

82. As explained in last year's Report (Part One, Chapter IV, point 58), competition policy can play an important role in liberalizing trade and hence in promoting economic integration. This is why the Community generally negotiates the inclusion of competition rules in its bilateral trade agreements. Because the degree of integration sought varies from one bilateral relationship to another, the level of detail of the competition rules included in those agreements also varies, as does the degree of harmonization with the Community's own competition rules.

The Agreement on the European Economic Area,(1) which was signed on 2 May 1992, seeks to extend the single market to the EFTA countries and thus, in principle, to ensure between the Community and the EFTA countries in the areas covered by the EEA the same level of economic integration as exists within the Community. It was therefore decided that the same competition rules and policies had to apply throughout the EEA. It was felt that this situation even called for identical and largely parallel enforcement structures and procedures in the Community and in the EFTA countries. The entry into force of this Agreement had to be postponed after the Swiss referendum of 6 December, in which the Swiss people rejected ratification of the EEA.

The Europe Agreements with Hungary, Poland, the Czech and Slovak Federal Republic, Romania and Bulgaria, as well as the Interim Agreements with those countries, the first three of which entered into force during the year under review, do not envisage the same degree of economic integration and therefore do not contain the same ambitious competition rules as the EEA Agreement. However, because the Europe Agreements aim at achieving greater economic integration than the association agreements concluded with the EFTA countries in 1972, their competition rules go beyond those contained in the latter. One of the main differences is that the 1972 agreements do not provide for any procedures for enforcing the principles laid down in the competition articles, while the Europe Agreements and the Interim Agreements provide for the establishment, by the Association Council, of implementing rules. Another important difference resides in the fact that, unlike the 1972

(1) Twenty-first Competition Report, point 59.

agreements, the Europe and Interim Agreements ensure in principle that the substantive rules applied to trade between each of those countries and the Community will be very similar to the Community's rules.

Other bilateral relationships of the Community aim for even less economic integration, which is why competition rules are not as elaborate or are not provided for at all. In cases where existing agreements are being updated or renegotiated, the Commission intends to consider carefully whether competition provisions should be strengthened or inserted.

At the same time, the Commission will continue to step up cooperation with other competition authorities, either through bilateral agreements of the type concluded with the United States in 1991 or on an informal basis.

<T4> § 2. Competition policy as a tool to open up trade with third countries

83. The agreements referred to above, together with a number of others, thus lay down competition rules which apply to trade between the Community and many of its major trading partners. Although such agreements do not exist with all of the Community's trading partners, it has to be recognized that most of its major trading partners have competition rules and enforcement mechanisms. The existence of such rules and mechanisms both in the Community and in its trading partners should provide useful instruments for dealing with private-sector obstacles to trade between the two. The question is therefore not so much whether rules actually exist or the degree to which they cover all possible obstacles, but whether or not they are actively enforced. This is why emphasis has recently been placed by the Community on tightening the enforcement of competition rules both internationally and within the territories of its major trading partners.

84. Most of the recently concluded trade agreements which contain competition rules are thus no longer confined to laying down principles and substantive rules, but also deal with the enforcement issue. This is true in particular of the EEA, where the EFTA Surveillance Authority will help ensure that the competition rules are applied throughout the EEA in much the same manner, and of the Europe and Interim Agreements, which allow for the establishment of implementing rules by the Association Council and the Joint Committee respectively.

With regard to countries with which no international competition rules have been agreed and where anti-competitive practices will thus have to be dealt with on the basis of national competition rules, other procedures have to be followed.

One vehicle for doing this, as regards the OECD countries, is a provision (point I.B.4) in the 1986 OECD Recommendation on restrictive business practices (Sixteenth Report, point 14). This provision, now usually referred to as a "positive comity provision", is based on the recognition that anti-competitive practices in one OECD country may affect another country's important interests, e.g. by creating obstacles to market entry. In such a case, the country whose exporters are the victims of such practices can ask the other to apply its own competition rules in order to remedy the situation. The Commission would be more than happy to apply this positive comity principle in appropriate cases.

The Commission is seeking ways to strengthen this approach in both bilateral and multilateral forums. This has already led to the inclusion of a positive comity provision in Article V of the EC-US Agreement of September 1991 on cooperation in competition policy matters (Twenty-first Report, point 64). Similar provisions can also be found in several draft texts now being negotiated in GATT (services code, multilateral steel arrangement) and at regional level (European energy charter).

Therefore, although a number of procedures exist under which the Commission can tackle private-sector obstacles to trade with third countries, their actual application depends on the availability of concrete and detailed information about such obstacles. The Commission therefore repeats the invitation which it made to companies at the end of point 65 of last year's competition report and would like to extend to other persons as well as to other countries. It would welcome information from any person about restrictive practices in any third country which affect trade between that country and the Community. Where the information is sufficiently detailed to warrant action under one of the aforementioned positive comity provisions or other rules, the Commission will be most interested in acting accordingly.

<T4> § 3. Structures in Europe

85. Generally speaking, in its relations with other countries, the Community is seeking to establish a greater degree of economic integration in Europe than elsewhere in the world. During the reference period, the most important events having a bearing on competition in Europe were the signing of the EEA Agreement, the entry into force of the agreement with Norway and Sweden on civil aviation, the entry into force of the Interim Agreements with three Central European countries and the membership applications received from several European countries.

<T5> - European Economic Area

86. One of the main objectives of the EEA Agreement, apart from eliminating private-sector obstacles to trade, is to establish equal conditions of competition throughout the area.

The substantive competition rules in the EEA Agreement are based on existing Community legislation.

<T6> (a) Fundamental principles

87. Monitoring and application of the EEA competition rules will be guided by two fundamental principles: the two-pillar approach and the "one-stop shop" principle. This means that there will be two surveillance bodies, viz. the Commission and an independent EFTA Surveillance Authority having equivalent powers and similar functions to those of the Commission. In the case of restrictive practices, this includes the power to carry out investigations and impose fines. As regards the granting of state aid, the EFTA countries will be subject to control by the EFTA Surveillance Authority on the basis of the same rules and procedures as those applied to Community Member States. Each surveillance authority will examine the legality of state aid both from the standpoint of its own territory and as regards its impact on other territories.

To avoid any overlapping of responsibilities, the introduction of parallel procedures, and the danger that the two authorities may, on the basis of the same facts, adopt different decisions, the EEA Agreement establishes the principle of the "one-stop shop". This means that, in each individual case, it is either the Commission or the EFTA Surveillance Authority which assumes responsibility for the procedure and that the decisions taken will be valid and enforceable throughout the EEA. This approach has considerable advantages for the enterprises concerned as they will not need to refer the same case to two different authorities both of which may have jurisdiction in the matter.

88. This principle of the "one-stop shop" makes it necessary to reach agreement on simple and transparent allocation criteria. Such criteria are easy to define for cases involving state intervention, such as state monopolies, public enterprises or the granting of state aid. Here, each authority is responsible for "its" member states.

<T6> (b) Restrictive practices and abuse of dominant positions

89. As regards the control of restrictive practices and dominant positions, the allocation of cases poses no problems where the effects of a particular case are limited to Community or EFTA territory. Such cases will be dealt with by the authority competent for the territory concerned. Difficulties arise, however, in "mixed" cases, which involve both territories and for which either authority could, in principle, claim jurisdiction. Before the Court of Justice delivered its first opinion, the solution envisaged in the EEA Agreement was based on the turnover of the enterprises concerned. However, following that first opinion, the allocation of responsibility had to be modified, with the result that the Commission will be responsible for all "mixed" cases affecting trade between Community Member States, except where such cases have no appreciable effect in the Community. In that event, the EFTA Surveillance Authority will be competent, provided that the enterprises concerned achieve at least 33% of their turnover on EFTA territory; the Commission will also deal with cases affecting trade between

a Community Member State and one or more EFTA States, provided that the enterprises concerned achieve over 67% of their EEA turnover on Community territory.

<T6> (c) Merger control

90. The Commission will continue to act in merger control cases where the criteria as to turnover laid down in the Community Regulation on the control of concentrations (Merger Control Regulation) are met by the enterprises concerned.

However, under the EEA Agreement, the Commission will take account not only of the situation in the Community but also of that in the EFTA countries. Thus, in addition to the powers it enjoys under the Merger Control Regulation, it must prohibit a merger if it results in a dominant position on the market solely within the territory of the EFTA countries.

Where the Commission has no jurisdiction under the above criteria, EFTA will apply its own merger control arrangements, without prejudice, however, to the rights of Community Member States in this area.

<T6> (d) Cooperation between the surveillance authorities

91. The proposed system for monitoring the competition rules of the EEA calls for close cooperation, on both state aid and restrictive practices, between the two surveillance authorities, the Community Member States and EFTA countries.

<T7> . Cooperation in respect of restrictive practices and abuse of dominant positions

92. Cooperation will be necessary for the "mixed" cases and will, in principle, cover all the stages of the procedure. The three main principles on which it will be based are:

- exchanges of information and mutual consultation on the cases concerned;
- cooperation in investigations;
- application of decisions.

A copy of the notification of all "mixed" cases will be sent to the other surveillance authority, which, together with the respective countries, will have the right to attend and take part in hearings of the enterprises concerned and in meetings of the advisory committees but will have no voting rights. Cases notified to the wrong surveillance authority will be referred to the competent authority.

93. Cooperation on investigations is of particular importance. It may, for example, be necessary to carry out on-the-spot investigations on the territory of the other authority. In that event, the surveillance authority dealing with the case in question can ask the other authority to organize the investigation in accordance with its own rules. Representatives of the competent authority may be present when such investigations are being carried out and may play an active part in them.

Lastly, cooperation will also take place in the matter of the payment of fines and other financial obligations.

<T7> . Cooperation and merger control

94. Cooperation in the field of merger control will generally follow the principles set out above. The aim is to set up the most efficient machinery possible. Cooperation will thus take place in the following cases:

- if the enterprises concerned achieve at least 25% of their EEA turnover on EFTA territory;
- if at least two of the enterprises concerned achieve a turnover in excess of ECU 250 million on EFTA territory;
- if there is a risk that a dominant position will be created or strengthened on EFTA territory or on a substantial part of that territory.

Cooperation will also take place if the EFTA countries claim a legitimate interest within the meaning of Article 21 of Regulation (EEC) No 4064/89 or if they invoke the existence of a distinct national market within the meaning of Article 9 of that Regulation.

Cooperation must take place within the very specific deadlines provided for in the Community rules and may not lead to any extension of those deadlines.

<T7> . Cooperation on state aid

95. With regard to state aid, the two authorities will exchange information and views on matters of general policy and will each provide or provide on a case-by-case basis, at the other's request, information on programmes and individual state aid cases. If one of the surveillance authorities considers that application of the rules of the EEA Agreement on state aid by the other surveillance authority is leading to distortions of competition, it may, after consulting the other authority, adopt interim measures and, if the dispute cannot be settled by the EEA Joint Committee, replace them with definitive measures limited to what is strictly necessary to remedy the effects of any such distortions.

<T6> (e) State monopolies of a commercial nature

96. Under Article 16 of the EEA Agreement, it is for the Commission and the EFTA Surveillance Authority to make the necessary adjustments.

<T6> (f) Control by the courts

97. Decisions adopted by the Commission will be subject to the control of the Court of First Instance and/or the Court of Justice, while appeals may be lodged with the EFTA Court against any decision taken by the EFTA Surveillance Authority.

<T6> (g) Informing economic operators

98. To ensure that economic operators are informed about the competition rules applicable to enterprises under the EEA Agreement, an information brochure has been prepared jointly by the Commission departments and EFTA experts.

99. The entry into force of the EEA Agreement was initially scheduled for 1 January 1993 but was postponed following the Swiss referendum on 6 December 1992. A diplomatic conference is planned for the beginning of next year in order to take stock of the new situation.

<T5> - Civil aviation agreement with Norway and Sweden

100. With the entry into force on 18 July 1992 of the civil aviation agreement between the EEC, Norway and Sweden, air transport and associated matters in these two countries became subject to the same competition rules as apply within the Community. The agreement does not, however, create a "second pillar" for Norway and Sweden, as will be the case under the EEA Agreement.

The Norwegian and Swedish authorities must ensure that Articles 4 and 5 (which are identical to Articles 85 and 86 of the EEC Treaty) are applied within their territories and enforced with the same effect as in the Community. With regard to state aid granted by Norway and Sweden in the aviation sector, the Commission will play an active role, in particular by keeping under constant review all existing aid schemes in those countries and by proposing that they take appropriate measures.

Any cases of disagreement regarding the application of these provisions may be referred to a Joint Committee created by the agreement. The Joint Committee can take binding decisions by unanimity.

<T5> - Central and Eastern European countries

101. The Europe Agreements concluded on 16 December 1991 between the Community and its Member States, on the one hand, and Hungary, Poland and the Czech and Slovak Federal Republic, on the other, provide that the parties "shall gradually establish a free-trade area in a transitional period lasting a maximum of ten years".(2)
These agreements naturally include provisions on competition that also form

(2) Twenty-first Competition Report, point 63.

part of the Interim Agreements, which entered into force on 1 March 1992 (Articles 26, 33 and 35).(3)

102. These provisions go further than those of the association agreements signed in 1972 with the EFTA countries and have the following characteristics:

(i) they concern both industry and service activities;

(ii) they deal with ECSC products in a separate protocol;

(iii) they include the traditional principle that restrictive practices, abuse of dominant positions and state aid affecting trade are incompatible with the Community law and refer to the criteria arising from the application of the principles set out in Articles 85, 86 and 92 of the EEC Treaty;

(iv) they set a three-year deadline for the adoption of rules implementing these principles, a five-year deadline for the adjustment of state monopolies of a commercial nature, and a three-year deadline for compliance by public enterprises or enterprises granted special or exclusive rights with the principles of the EEC Treaty;

(v) they stipulate that, where state aid is concerned, the three countries in question will, for an initial period of five years, be regarded as Community areas as described in Article 92(3)(a);

(vi) they do not contain any provisions on mergers.

103. As regards the competition rules applicable to enterprises, and without prejudging any decisions of the Association Council, the aim is to eliminate anti-competitive practices affecting trade between the Community and the countries of Central and Eastern Europe without superimposing new regulations on those already in place. Articles 85 and 86 of the EEC Treaty will apply

(3) See point 555 of this Report.

as in the past to practices affecting intra-Community trade (e.g. in situations similar to the "Wood Pulp" case, where the unlawful practices were carried out by enterprises outside the Community).

104. As regards the rules applicable to state monopolies of a commercial nature, state aid and public enterprises or enterprises granted special or exclusive rights, the Association Council will be examining the necessary substantive and procedural rules for the proper operation of the Agreements.

If progress is to be made, an inventory of the aid measures applicable in each of the Central and Eastern European countries will, therefore, have to be drawn up on the basis of the methodology developed by the Commission. One of the difficulties will be to determine which authority will be responsible for monitoring aid liable to distort trade between the Community and the Central and Eastern European countries, the task already performed by the Commission as regards aid affecting intra-Community trade.
A similar exercise will have to be undertaken for state monopolies and enterprises granted special or exclusive rights.

105. Under the agreements, the Community or the Central or Eastern European country concerned may, if implementing rules do not exist or do not allow a practice regarded as incompatible to be dealt with in the correct manner, adopt appropriate measures after consulting the Joint Committee.

106. The agreements being negotiated with Bulgaria and Romania will include similar provisions on competition.

<T5> - <u>Accession of new Member States</u>

107. When Sweden, Malta, Finland and Cyprus submitted applications for accession, the Commission drew up for the Council an opinion, the most significant aspects of which concerned competition.

As regards the three EFTA countries that have applied for membership, the Commission took particular note of their commitment to radical reforms in the national rules applicable to restrictive commercial practices. Sweden in

particular has made considerable progress in harmonizing its national rules with those of the Community, while the reform undertaken in Finland, although not as extensive, should also allow anti-competitive practices to be monitored more effectively.

108. With regard to state aid, monopolies of a commercial nature and service monopolies, the Commission opinion identifies certain situations which will have to be brought into line with Community legislation, this being a task primarily for the EFTA Surveillance Authority pursuant to Articles 16, 59, 61 and 62 of the EEA Agreement and the relevant provisions concerning ECSC products.

The Commission took the same approach in its examination of the situation in Malta and Cyprus in order to identify potential difficulties as regards competition in the event of accession.

It also examined the membership applications submitted by Switzerland and Norway.

<T4> § 4. United States

<T5> - Agreement with the US antitrust authorities

109. The period under review saw the completion of the first full year of application of the agreement between the Commission and the US Government which came into effect on 23 September 1991.

The very positive results achieved during the first year are due essentially to the strengthening of the relationship of confidence between the respective competition authorities, through the meetings provided for in the agreement and less formal contacts as well as through cooperation in specific cases.

110. The agreement calls for officials of the respective competition authorities to meet twice a year to exchange information and discuss matters of common interest. Such meetings took place in November 1991(4) and September 1992.(5) In addition, there were informal bilateral contacts in January 1992 in Washington as well as on the sidelines of other meetings.

Experience has confirmed that, within the confines set by the agreement, and in particular the protection of confidentiality, there is much scope for useful exchanges of information regarding competition policies and enforcement activities when it comes to improving mutual understanding of policies and increasing their effectiveness.

111. While the more specific procedures laid down in the agreement have not been triggered, there has been cooperation in a number of individual cases.

These positive developments confirm the importance of close cooperation between competition authorities in the context of increasingly globalized economic activity and place future cooperation with the US competition authorities on a firm footing.

(4) Twenty-first Competition Report, point 362.
(5) See point 554 of this Report.

<T4>

§ 5. Japan

112. Contacts with the Japanese Fair Trade Commission have become both more frequent and more substantive during the year under review. A formal bilateral meeting took place in Brussels on 6 October and covered a broad range of issues. The breadth of the discussions was such that the one day initially planned proved to be insufficient and a further meeting was held in Paris on 2 December.(6) In addition to these formal contacts, a number of informal contacts took place as well, both on general and on specific issues.

These contacts have shown that the Japanese Fair Trade Commission is genuinely interested in a meaningful dialogue with the Commission. The Commission is pleased with these developments and hopes that they can make some contribution towards resolving the problem identified in the Commission's communication to the Council on "A consistent and Global Approach - A review of the Community's relations with Japan" as "the failure of competition and market mechanisms in many spheres".

(6) See point 558 of this Report.

<T4> § 6. Competition policy in multilateral organizations

113. The OECD, and in particular its Committee on Competition Law and Policy, has recently been increasing the scope and pace of work in areas which impinge upon the international dimension of competition policy. It has embarked on an important exercise looking at the scope for convergence in member countries' procedures and practices in the area of merger control.

In line with the OECD's tendency to adopt a multidisciplinary approach to the issues of internationalization of markets and globalization of economic activity, the Committee on Competition Law and Policy has discussed the interface between competition policy and anti-dumping policy, on which a report is being prepared. It has also considered the wider interactions between competition policy and trade policy, in cooperation with the OECD's Trade Committee, with which joint meetings have been held at working party level. The Commission has taken an active role in the work of the OECD, including continued participation in the OECD Industry Committee's work on "subsidies and structural adjustment".

114. During the year, efforts to conclude the Uruguay Round of GATT negotiations continued, through multilateral discussions as well as bilateral contacts with trading partners, in a bid to reach agreement on a number of outstanding issues. The Commission believes that it is vital to bring the Round to a successful conclusion so as to end the uncertainty surrounding the framework for international trade and investment and to put into effect the substantial improvements provided for in that framework. It takes the view that, after the conclusion of the current Round, the policy of encouraging the adequate enforcement of competition laws by trading countries should be complemented with new initiatives to promote international rules dealing with private anti-competitive conduct which distorts or restricts international competition.

<T2> Chapter V: Application of the competition rules

<T4> §1. Transparency

115. The interest generally paid to competition policy has grown considerably since the introduction of the Merger Control Regulation. Yet the only way that this policy will be understood and supported by economic operators, policymakers and the general public alike is to make it more transparent so that decisions and policy are better understood. The political events of the past year have shown that this is a problem affecting all Community policies as well as the European policies of Member States. The recent Sutherland report stressed the need to improve information and transparency in order both to increase the acceptability of Community policies and to make them more effective. For this, not only the national authorities in the broad sense but also individuals must be made aware of their rights and obligations.

Proper information is also a prerequisite if competition policy is to be decentralized in accordance with the principle of subsidiarity. An information campaign has, therefore, been running for a long time and is aimed as much at political and economic circles as at the general public since, clearly, competition policy must be accorded the broadest possible measure of support and understanding. In this connection, existing measures are being continued and new initiatives adopted.

116. All Article 85/86 decisions are published in the Official Journal of the European Communities and summarized every month in the Bulletin of the European Communities. This is also the case for each stage of the procedure followed in cases dealt with under the Merger Control Regulation and for opinions of the Advisory Committee whenever publication is requested by a Member State. Also published in the Official Journal are the notices in which the Commission states the position it proposes to adopt on a case after a preliminary scrutiny under Regulation No 17 and invites comments from any interested parties. An innovation in this area was introduced in 1992 in

a particular case[1] when the Commission published a notice informing third parties of a notification and requesting them to submit comments. As a result, comments were received at the start of the Commission's investigation, speeding up the procedure. The intention is to apply this method more systematically in cases involving "structural" cooperative joint ventures.[2]

Lastly, the Commission publishes press releases on all significant events. In addition, the annual Report on Competition Policy is designed to provide both an overview and a detailed picture of the Commission's activities.

117. At the request of the European Parliament and the Council, the Commission pressed ahead with its efforts to increase the transparency of state aid. It adopted its third survey on state aid in the Community,[3] which covers the period 1981-90 and provides an overall view of all the aid granted in the various Member States to manufacturing, the coal industry, agriculture, fisheries, railways and inland waterways. It identifies certain trends, compares types of aid and objectives by Member State, assesses the progress made by the Commission in tightening its policy and maps out future areas of activity. It is targeted both at Member States and at any other interested parties.

118. Most of the Commission decisions on aid are reported in press releases as soon as they are adopted, and are also summarized in the monthly Bulletin of the European Communities. Aid decisions, like the decisions adopted under Articles 85 and 86 of the Treaty, are published in the Official Journal, with the exception of the less important ones, which are adopted by accelerated procedure. Publication is in the form of a brief description of the main facts of cases involving aid approved without a detailed examination and should make it easier for third parties to seek redress; all other types of decision are published in full.

(1) Carlsberg/Allied case, see point 131 of this Report.
(2) See point 122 of this Report.
(3) See point 350 of this Report.

119. Three multilateral meetings on state aid were held in 1992 with experts from the Member States.(4) The topics discussed included draft frameworks on aid for exports to third countries, aid for environmental protection, aid to the synthetic fibres industry and aid for the motor vehicle industry. Such meetings allow the Commission to take account, wherever possible, of Member States' comments and suggestions. They should also help Member States' administrations to gain a better understanding of the frameworks, thereby enhancing legal certainty.

The Commission also continued to publish various notices and frameworks clarifying the rules applicable in such areas as aid to small and medium-sized enterprises, the application of Article 85 to cooperative joint ventures (joint venture guidelines) and the application of the de minimis principle to beer contracts.(5) It also adopted a notice on the application of Community competition law by national courts(6) and is preparing another on the application of Article 85 to commercial agents. Lastly, it adopted a Regulation amending four existing block exemption regulations.(7) The number and variety of texts adopted make a major contribution to improving transparency.

The Commission published its Green Paper on postal services,(8) a subject with implications both from a social and general economic standpoint and for competition policy. Its investigation into telecommunications also resulted in the publication of a document on services and another on equipment. In both cases, the documents are based on wide-ranging consultations. The Commission also started publishing general explanatory brochures aimed at providing the general public with essential information on competition policy.(9)

There are also several reference works containing decisions taken pursuant

(4) See points 339 to 341 of this Report.
(5) See point 301 of this Report.
(6) See point 299 of this Report.
(7) See point 265 of this Report.
(8) See point 512 of this Report.
(9) The first is entitled "Competition policy in the European Community", in the European File series.

to Articles 85 and 86 and under the Merger Control Regulation or the relevant body of rules. These publications are due to be updated and revised shortly as regards state aid.

The desire to improve transparency is also reflected in the increasing presence of Commission officials at information events targeted at various audiences and in the number of civil servants and trainees from Member States and elsewhere working in the Directorate-General for Competition.

<T4>

§2. Subsidiarity

120. The principle of subsidiarity, currently the focus of wide-ranging discussions, is particularly relevant to competition policy.

It is interesting to note that, well before this concept had acquired such prominence, it had influenced the drafting of the competition rules of the Treaty. Thus, Articles 85 and 86 allow the Commission to act only if competition is threatened in the common market and if the agreement or conduct in dispute affects trade between Member States. In its 1986 de minimis notice, the Commission considered that the restriction of competition must be more than insignificant.

The same observation can be made regarding the Merger Control Regulation, which provides for action by the Commission only where operations have a Community dimension, this being a function of the size of the enterprise concerned and the cross-frontier nature of its activities. Furthermore, even where the thresholds are exceeded, the Regulation allows the Commission to refer to the national authorities cases it regards as essentially the responsibility of Member States.

The principle of subsidiarity can also be relevant to the application of the competition rules. The Commission is already cooperating with national authorities on the procedures for applying Articles 85 and 86 as well as the Merger Control Regulation. But it is possible to go further in this direction. The Commission is, in principle, in favour of the national authorities dealing with complaints having an essentially national impact under national or Community competition law. This allocation of responsibilities would enable the Commission to focus its limited resources on cases of Community importance while guaranteeing that all other cases were dealt with appropriately under the competition rules. The Court of First Instance confirmed that the Commission was entitled to define its

priorities on the basis of the Community interest,(10) and the Commission has already gained some positive experience in applying this approach.

It should also be noted that, while the national authorities can assist the Commission in carrying out this task, the converse is also possible. The Commission can, if necessary, use its specific powers to act in a case initially examined by a national authority, as it did in 1992 during an investigation into the prices of audiovisual products following contacts with the Danish competition authorities.(11)

As noted in the Sutherland report, there are a number of factors currently militating in favour of greater involvement by national courts in the application of the competition rules. Articles 85 and 86 and the block exemption Regulations are directly applicable, and national courts can often respond rapidly to complainants' requests for interim measures. They can also rule on all aspects of a case at the same time, including any award of damages. To facilitate attainment of this objective, the Commission adopted a notice on the application of Community competition law by national courts.(12) The notice clarifies the various situations that might arise before national courts, which can also ask the Commission for assistance in obtaining any legal information or facts they require. The Commission has already satisfied such requests from national courts and is prepared to continue doing so.

121. The control of state aid is an area where, by definition, the principle of subsidiarity plays only a minor role. It would be difficult to imagine a Member State monitoring in pursuance of the Community interest the aid it itself grants on its own territory. The Commission has nevertheless adopted certain measures allowing it to devolve responsibility for aid of minor importance.

The Commission argues that, below a certain level, aid cannot affect trade between Member States and does not therefore distort competition at Community level. It follows that such aid measures are not caught by

(10) Automec judgment, see point 323 of this Report.
(11) See point 548 of this Report.
(12) See point 299 of this Report.

Article 92(1) of the Treaty and, consequently, it is for the Member States alone to decide whether to monitor the aid in accordance with competition criteria. The threshold was set at ECU 50 000 per firm over a three-year period. It is unlikely that the Commission will be able to develop this line of reasoning any further, although the scope of its notice should not be underestimated since the Commission acknowledged for the first time in a general instrument that certain aid measures were not covered by Article 92.

In addition, Commission monitoring of aid is crucially strengthened by the action of national courts dealing with complaints from firms injured by the unlawful granting of aid to a competitor.

The area of state aid, however, provides a good illustration of the second aspect of subsidiarity, namely, that action must be taken at Community level if it cannot be taken more effectively elsewhere. It should be noted here that the Community is responsible for the completion of the single market and that this requires uniform conditions of competition. In the final analysis, the only way of creating such conditions is by action that is sufficiently centralized. Clearly, therefore, the objectives of Community competition policy require that, in accordance with the principle of subsidiarity, the Commission should retain a central role in the application and definition of competition rules. Another example which comes to mind is afforded by horizontal agreements with a Community dimension, in respect of which only the Commission is empowered to conduct an investigation and to take the appropriate decision. In addition, the application of new Article 130b of the Maastricht Treaty will mean that decisions on state aid will have to take greater account of the need to strengthen economic and social cohesion.

<T4> §3. Adaptation of procedures

122. The policy of transparency both improves awareness and acceptance of the competition rules and increases their effectiveness. The same applies to the principle of subsidiarity, according to which those rules are applied by the authority best placed to perform this task. But the tighter application of Community law also means taking action at the level of the Commission itself in order better to equip it to carry out its responsibilities.

123. The Commission intends to expedite the procedures for applying Articles 85 and 86 of the EEC Treaty. Although a substantial reduction in workload has been achieved in recent years through a rationalization of DG IV's activities, these procedures are still considered to be too time-consuming. This is a general problem and the Commission is looking into ways of resolving it by improving working methods. Specific measures to that end have already been adopted for "structural" cooperative joint ventures.

124. This category comprises all forms of cooperation entailing major changes in the structures of the parties to the agreement. These are joint ventures pooling a significant number of assets, particularly in the production field and in connection with the manufacture and marketing of contract goods. Such arrangements should be dealt with rapidly and as a first priority. Only a speedy decision by the Commission on the agreement notified gives the parties concerned the legal certainty they need to carry out their plans.

The new system will be modelled in part on the experience acquired in applying the Merger Control Regulation. Within two months of the date on which it received all the information concerning the notified case, the Commission will inform the parties in writing if their agreement gives rise to doubts concerning its compatibility with the competition rules.

The content of the letter will vary according to the circumstances of the case:

- in cases not posing any problems, the Commission will send a comfort letter confirming that the agreement is compatible with Article 85(1) or (3);

- if a comfort letter cannot be sent because of the need to settle the case by formal decision, the Commission will inform the enterprises concerned of its intention to adopt a decision either granting or rejecting exemption;

- if the Commission has serious doubts as to the compatibility of the agreement with the competition rules, it will send a letter giving notice of an in-depth examination which may, depending on the case, result in a decision either prohibiting, exempting subject to conditions and obligations, or simply exempting the agreement in question.

In cases where a formal decision is envisaged, the Commission will inform the parties of the proposed date of adoption of the final decision, and of any change in that date caused by the circumstances in which the procedure takes place.

The new system, applicable since 1 January 1993, is based entirely on the principle of self-discipline by the relevant Commission departments. Internal instructions have been given for the implementation of the rules described above.

The system should allow the Commission to produce decisions more rapidly, to improve the transparency of procedures, and to increase the degree of legal certainty. Its application to a specific category of notifications could, at the same time, serve as a test of whether procedures could be expedited without any increase in staff. The experience gained will also enable the Commission to determine whether the system could be extended to other types of agreement in restraint of competition.

<T4> §4. Commission activities (quantitative description)

125. On 31 December the Directorate-General for Competition had a staff of 407 (national experts included). Of the available manpower, 44% was allocated to work under Articles 85 and 86 of the EEC Treaty, 12% to merger control cases, 3% to work under Article 90 of the EEC Treaty, 21% to state aid cases, 9% to international relations and coordination and 11% to data processing, documentation and other horizontal duties.

126. On 31 December there were 1 562 cases pending under Articles 85 and 86 of the EEC Treaty. As compared to the 2 287 cases pending on 1 January of that year, this represents a reduction of more than 30%; the effort to reduce the number of cases pending will be continued and is expected to benefit from more intense application of Articles 85 and 86 by national courts, which will be made easier by the new notice on the subject.(13) During the year a total of 399 cases were added to the Commission's workload; they comprised 246 applications or notifications, 110 complaints and 43 own-initiative procedures; on the other hand, a total of 1 124 cases were terminated in 1992. The Commission's workload under Articles 85 and 86 on 31 December 1992 consisted of 1 064 applications or notifications, 287 complaints and 211 own-initiative proceedings.

Of the cases terminated, 176 were closed by the sending of comfort letters, where the undertakings concerned had agreed to a written statement of position by the Directorate-General for Competition; a notice was published in accordance with Article 19(3) of Regulation No 17 in eight of these cases. A further 553 cases were settled because the agreements were no longer in force, their impact was too slight to warrant further consideration, the complaints had become moot or because investigation had not revealed any anti-competitive practices. In 1992 20 agreements or practices led to a formal decision on their compatibility with the competition rules. In five cases the Commission found that agreements infringed Article 85(1) without imposing a fine; in five further cases a fine was imposed. Four decisions granted a formal exemption to an agreement under Article 85(3) of the EEC Treaty. Finally, in three cases, the Commission found that an abuse of a dominant position under Article 86 of the EEC Treaty had been committed and a fine was imposed.

(13) See point 299 of this Report.

In addition, the Commission adopted three decisions imposing a fine because of an undertaking's failure to comply with a verification decision. It also adopted seven formal decisions rejecting complaints.

127. As regards the implementation of the Merger Control Regulation, 59 new cases were notified to the Commission during the year, while 61 cases were concluded by a final decision.

In nine of the 61 final decisions, the Commission found that the notified operation was not a concentration within the scope of the Regulation (Article 6(1)(a) of Regulation (EEC) No 4064/89). In 47 cases, it found that the concentration was compatible with the common market and did not have to be opposed (Article 6(1)(b)). It adopted four decisions authorizing concentrations under Article 8(2) of the Regulation following the initiation of proceedings; in three of these, conditions and obligations were attached. Finally, one case led to a decision authorizing the concentration without conditions. There were seven cases pending on 1 January 1992 and eight on 1 January 1993.

128. The competition provisions of the ECSC Treaty gave rise in 1992 to one decision under Article 65 and 10 under Article 66. A further 17 cases under Article 65 were settled by means of an administrative letter and 30 concentrations of minor importance benefited from an exemption under Decision 25/67. There is no backlog of cases under the ECSC rules.

A total of 76 inspections were carried out on the declared production of coal and steel undertakings subject to the levy (Articles 49 and 50 of the ECSC Treaty).

129. With regard to state aid, the figures in Table 1 show that the number of cases notified by the Member States in 1992 varied only slightly from the figure for 1991. On the other hand, the number of procedures initiated under Article 93(2) of the EEC Treaty and the number of negative final decisions or conditional decisions fell sharply. This confirms the trend noted last year and reflects the fact that Member States now take far more account than in the past in their notifications of the rules on competition and the case-law established by the Commission and the Court of Justice. The Commission's

efforts to increase transparency and maintain strict control have thus borne fruit. Similarly, the increase in the number of projects notified and later withdrawn by Member States shows that they are responsive to the guidelines given by the Commission following its scrutiny and prefer, if the Commission informs them of its opposition, to avoid the initiation of proceedings and the adoption of a negative decision, with the consequences this will have for the enterprises concerned.

In 1992 the Commission also registered 102 cases that had not been notified in accordance with Article 93(3) of the EEC Treaty.

It did not raise any objections in respect of 71 cases of this type and initiated the Article 93(2) procedure in respect of 18 cases.(14). The number of unnotified aid cases is down on 1991 (145 cases). If the trend continues over the next few years, it will reflect better compliance by the Member States with Article 93(3), and this undoubtedly has something to do with the Commission's determination and the power to suspend unlawful aid conferred on it by the Court of Justice in the Boussac case.

(14) The number of cases registered in 1992 does not necessarily correspond to the number of decisions taken. Certain cases registered in 1991 were decided on only in 1992.

Table 1 - Activity in the control of state aid (excluding aid to agriculture, fisheries and transport)

Year	Number of proposals notified	Action taken by the Commission[1]				
		No objections raised	Initiation of proceedings under Article 93(2) EEC or Article 8(3) of Decision 2320/81/ECSC	Termination of proceedings under Article 93(2) EEC or Article 8(3) of Decision 2320/81/ECSC[2]	Final decision under Article 93(2) EEC or Article 8(3) of Decision 2320/81/ECSC[3]	Proposals notified and later withdrawn by Member States
1981	92 (of which steel = 16)	79 (of which steel = 11)	30 (of which steel = 9)	19 (of which steel = 4)	14	-
1982	200 (of which steel = 81)	104 (of which steel 25)	86 (of which steel = 56)	30 (of which steel = 13)	13 (of which steel = 1)	-
1983	174 (of which steel = 4)	101 (of which steel = 18)[4]	55	18	21 (of which steel = 9)	9
1984	162 (of which steel = 10)	201 (of which steel = 66)[4]	58 (of which steel = 1)	34	21[5]	6
1985	133 (of which steel =7)	102 (of which steel =21)[4]	38 (of which steel =1)	31	7	11
1986	124	98	47	26	10	5
1987	326	205	27	32	10	1
1988	375	311	31	32	13	-
1989	296	254	37	27	16	7
1990	429	352	33	24	12	2
1991	472	383	53	25	9	21
1992	459	393 (N aid) 468 (all E/N/NN aid)	26 + 2 under Article 6(2) of Decision 322/89/ECSC	33	8	25

NB: The figures in the first column do not match those of the next four columns on account of carry-overs from one year to the next and because, if proceedings under Article 93(2) EEC or Article 8(3) of Decision 2320/81/ECSC are initiated, the Commission has to take two decisions, one to initiate proceedings and then a final decision terminating them.

(1) For details, see the Annexes to this Report. Actions in respect of steel include both EEC and ECSC steel products and, because of the tranche system, the number of actions exceeds the number of notifications.

(2) In most cases, after amendments have been negotiated during the proceedings to remove those aspects which a priori made the proposal incompatible with the common market.

(3) Published in the Official Journal.

(4) Including tranches of aid released under the decisions of 29 June 1983.

(5) Excludes the "conditional" decision on French investment aid (see Fourteenth Competition Report, point 253).

<T1> PART TWO: COMPETITION POLICY TOWARDS ENTERPRISES

<T2> Chapter I: Main decisions and measures taken by the Commission(1)

<T3> A. Restrictive agreements

<T4> §1. Horizontal agreements

<T5> - Establishment of joint ventures

<T6> (a) Carlsberg/Courage

130. Carlsberg was among the first foreign brewers to enter the United Kingdom beer market. Initially it exported its lager beers directly from Denmark, subsequently establishing its own brewery in the United Kingdom in joint ownership with the United Kingdom brewer Grand Metropolitan, and then in 1980 acquiring full ownership of that brewery. With sales outweighing its own United Kingdom production capacity, it entered at the same time into a ten-year partial production/distribution agreement with Grand Metropolitan. This arrangement was formally exempted by the Commission.(2) The Commission took into particular account the fact that Carlsberg did not have its own sales network in the United Kingdom and that, as a result of the direct ownership of a majority of the pubs by the United Kingdom brewers, it was practically impossible at that time for an outsider to supply the on-trade without the cooperation of one of the United Kingdom brewers. The expiry of this agreement coincided with the take-over by Courage of Grand Metropolitan's brewing business in 1991.(3) Carlsberg renewed its arrangement (on amended terms), but now with Courage (the second largest brewer in the United Kingdom).

The arrangement with Courage involved extensive cooperation between the two parties. Courage acquired the right to brew for ten years some Carlsberg beer under licence, it received the exclusive distribution right for Carlsberg beers to the off-trade (supermarkets and other shops) for a period of five years, and a non-exclusive distribution right to the on-trade (pubs,

(1) The cases not dealt with in this chapter are summarized in the annexes, which also give all the references.
(2) Commission Decision in the Carlsberg case, OJ L 207, 2.8.1984.
(3) Twenty-first Competition Report, point 86.

restaurants) for a period of ten years. Under the arrangement Courage was required to purchase minimum volumes of Carlsberg beers.

Shortly after the conclusion of this arrangement Carlsberg announced its intention of amalgamating its entire brewing and beer sales activities in the United Kingdom - including its arrangement with Courage - with those of Allied Lyons in a joint venture Carlsberg-Tetley("CT").(4) As a result of that transaction Carlsberg would not only jointly control with Allied Lyons the United Kingdom's third largest brewer, but also achieve direct access for its beers to the pubs owned by Allied.

The Commission considered the two arrangements incompatible with one another. It informed the parties that it could not accept the exclusive distribution right for Courage (neither de jure nor de facto) for the off-trade, as there was no justification for granting such a right to a competitor. This conclusion was further strengthened by the creation of CT, which had itself a strong position in off-trade sales. Whereas the arrangement for the on-trade was non-exclusive, in particular the minimum volumes involved - which ensured privileged access for Carlsberg to the pubs supplied by Courage - required continued cooperation between the two parties. The Commission considered that, in view of the position of CT as third largest brewer, Carlsberg would not require extensive cooperation with Courage for the sales of its beers to the on-trade. It considered that under these circumstances effectively only a very limited arrangement would be justifiable, namely only for the supply of those pubs which would otherwise not be accessible to Carlsberg. The Commission therefore informed the parties that their arrangement for the on-trade should be limited to the supply of Carlsberg beers to the pubs that were tied to Courage. This necessitated a halving of the minimum volume requirement and a reduction in the duration of the agreement, so that its termination would coincide with the date at which the pubs tied to Courage would become free houses.(5) The parties amended their agreements accordingly. As a result the Commission was able to close the file by way of an Article 85(3) comfort letter.

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(4) See point 131 of this Report.

(5) As a condition to the approval of the Courage Grand Metropolitan takeover, the parties undertook to ensure that the supply of their pubs would be open to competition after a certain period of time. Those pubs continuing to be owned by Grand Metropolitan would become open to competition after four years, whereas their jointly owned pubs would be released from their tie seven years after the transaction. For further details, see point 86 of the Twenty-first Competition Report.

<T6> (b) Carlsberg/Allied Lyons

131. At the end of 1991 Carlsberg and Allied Lyons publicly announced their intention of amalgamating their United Kingdom brewing and beer wholesale activities through the creation of a 50-50% joint venture Carlsberg-Tetley ("CT"). At the time, the five largest brewers accounted for almost 80% of United Kingdom beer production and slightly more in the case of lager. Following the establishment of CT, they would account for some 90% of United Kingdom lager production. CT would become the third largest brewer in the United Kingdom.

132. It was envisaged that both parties would transfer to CT all related assets, business activities and relevant staff and management. Allied Lyons retail business was not included in the transaction. Its managed and tenanted retail estate would remain owned and controlled by its subsidiary Allied Retail. Carlsberg and Allied Lyons would furthermore each retain the ownership of their respective beer brands in the United Kingdom. CT would however receive an exclusive licence to brew and sell these products in the United Kingdom. In addition it would enter into a ten-year exclusive purchase agreement with Allied Lyons for certain wines and spirits, and with Britannia Soft Drinks (a joint venture between Allied Lyons, Bass and Whitbread) for certain soft drinks. In turn CT would acquire a seven-year exclusive right to supply beer, wines, spirits and soft drinks to Allied Retail's on-trade estate of managed and tenanted houses.

133. The first issue was whether this transaction would fall within the ambit of Regulation (EEC) No 4064/89 (the Merger Regulation) or Articles 85 or 86 of the Treaty.

134. Because Carlsberg and Allied Lyons would retain the ownership of their beer brands and have a final say in commercial policy with regard to their brands, the Commission considered CT would not constitute an autonomous economic entity, but rather a vehicle through which both parties would coordinate their market behaviour, and in particular their brand policies. The joint venture was therefore considered to be of a cooperative nature. The result of this view was that the British authorities were equally competent to vet it.

135. The transaction was subsequently notified to the Commission under Regulation No 17. In view of its importance, and in order to be able to take

the views of third parties into consideration at as early a stage as possible, the Commission published a Notice in the Official Journal(6) requesting third parties' comments on the transaction. The Commission received a number of observations.

136. Following an in-depth examination, the Commission concluded that the transaction would lead to the strengthening and further foreclosure of an already oligopolistic market (the United Kingdom lager market). The effects were considered particularly pronounced in the on-trade, which is characterized by a high degree of vertical integration (pubs being owned by breweries). The Commission informed the parties on 28 July of the conditions which it considered necessary in order for the transaction to be acceptable. The British authorities announced similar conditions at the same time. The conditions sought were:

- a reduction in the duration of the exclusive beer supply agreement between CT and Allied Retail from seven to five years;

- within two years, the pub tenants and lessees of Allied Retail should be free to purchase at least 50% of their total annual lager requirements from any supplier.

137. In addition the Commission required that:

- the exclusive purchase agreement between CT and Allied Lyons for certain wines and spirits be reduced in duration from ten to five years;

- the exclusive purchase agreement between CT and Britannia Soft Drinks be amended so as to enable CT to acquire and resell carbonated soft drinks from any supplier, and its duration likewise be reduced from ten to five years;

- the exclusive supply agreement between CT and Allied Retail for wines, spirits, cider and soft drinks be reduced in duration from seven to five years.

The relevant agreements were amended accordingly. However, the second condition, concerning the opening-up of Allied Retail's on-trade estate to

(6) OJ C 97, 16.4.1992

competing lager beers, was subject to further negotiations. As a result the parties undertook instead to release, from the second year, a specific number of Allied Retail's pubs completely from their tie (for all beers). Since the estimated volume to be released as a result was equivalent to that under the second condition, the case was closed. CT and its associated supply agreements received an Article 85 (3) comfort letter.

<6> (c) Fiat/Hitachi

138. On 21 December the Commission adopted a decision pursuant to Article 85(3) of the EEC Treaty with respect to the joint venture set up by Fiat and Hitachi for the production, distribution and sale of medium to large hydraulic excavators.(7)

The agreements notified by the parties provide for the joint venture to begin trading by taking over the existing Fiat range of excavators and cylinders and to develop a new Fiat-Hitachi range using Hitachi technology. The parties agree not to compete with the JV in Western Europe (including the whole of the Community), the Mediterranean basin and Africa.

After discussions with the Commission, the parties amended their agreements in such a way as to allow Hitachi, as far as the Community was concerned, to carry out passive sales in the joint venture's exclusive territory. This means that, although Hitachi will not seek to sell to Community-based contractors, it will accept orders coming from such purchasers.

The arrangements provide for the joint venture to buy all its motors from Iveco (which is part of the Fiat group) and all hydraulics which it does not manufacture itself from Hitachi. Although these exclusive purchasing provisions foreclose sales opportunities for third party manufacturers of motors and hydraulics, this restriction results from the setting-up of the joint venture and appears to be reasonably necessary to its operation.

(7) OJ L 20, 28.1.1993.

<T6> (d) Ford/VW

139. The Commission exempted, by a formal decision under Article 85(3) of the EEC Treaty, an agreement between the car manufacturers Ford and Volkswagen (VW) to set up a joint venture (JV) in Portugal for the common development and production of a multi-purpose vehicle (MPV).

Ford and VW will build a plant near Setubal with a capacity of 190 000 units annually, which is to commence production in 1995. The MPVs produced by the JV will be sold in differentiated versions by Ford and VW under their own trade marks and through their separate sales networks.

MPVs constitute a relatively new and distinctive market segment by virtue of their specific product features (designed to carry up to seven persons, considerable space for luggage, car-like handling). The MPV segment in the Community is characterized by the strong leadership of the Renault 'Espace' (over 50% of the segment), which was conceived and is assembled by Matra SA (Matra). All other competing products are Japanese or US-produced vehicles.

The Commission found that the conditions for an exemption under Article 85(3) of the Treaty were fulfilled as the cooperation will, inter alia, result in the production of a new, competitively priced, high quality product designed to meet the needs of the European consumer and enhance competition in the European MPV segment. Its decision to authorize the JV between two leading car producers also took into account the exceptional circumstances of this case, e.g.:

- the low volume of the MPV market segment;

- the fact that neither Ford nor VW have been a significant supplier in the MPV segment in Europe;

- the structure of the MPV segment, i.e. having one supplier in a strong leading position;

- the fact that the vehicle will be produced in a purpose-built and modern plant;

However, in view of the existing high degree of cooperation in the car industry, the exemption was made subject to a number of strict conditions and

obligations, predominantly in order to limit possible "spill-over" effects of the cooperation which could damage competition between the partners in neighbouring sectors (e.g. estate cars, light vans) and to ensure that Ford and VW actively compete against each other by distributing separately.

The Commission also rejected a formal complaint by Matra against the agreement as being contrary to Article 85.

<T5> - Agreements in the financial services sector

<T6> (e) Assurpol[8]

140. On 14 January the Commission granted exemption under Article 85(3) of the EEC Treaty to the EIG Assurpol and its rules of procedure for a period of seven years.

Assurpol is a co-reinsurance pool for the covering of environmental damage risks (accidental and gradual pollution) originating in certain industrial and commercial installations situated, notably, in France. The membership is made up of 50 insurance companies (the insurer-members) and 14 reinsurance companies (the participant-members).

Insurer-members are not prohibited from placing reinsurance outside the pool and are free to withdraw at the end of each accounting year subject to three months' notice. Entry into the pool is open to any insurance or reinsurance company authorized to operate in France.

The agreements exempted allow the insurer-members individually to underwrite the risks of liability for damage to the environment (accidental and gradual pollution) by providing them with a guarantee of the availability of reinsurance through the pool.

Each member takes part in the co-reinsurance of the risks ceded to the pool by the insurer-members (90% of their liabilities) up to the amount of his share calculated on the basis of his capacity committed in relation to the total capacity of the pool (currently FF 131 million).

At the Commission's request, a number of amendments were made to the notified agreements so as to ensure that premiums ceded by way of co-reinsurance no longer include commissions paid to intermediaries or the administration costs of insurer-members. Insurer-members therefore remain free to apply different commercial premiums for the Assurpol policies they underwrite, even if risk premiums and the contribution towards the co-reinsurance pool's operating costs are fixed in common.

(8) OJ L 37, 14.2.1992; Bull. EC 1/2-1992, point 1.3.63.

Exemption was possible in the present context of worsening ecological problems, even though the insurer-members taken together already cover 70 to 80% of potential consumers regarding other liability risks, since Assurpol policies account for only 3% of the estimated amount of premiums in the environmental damage liability insurance market in France and since the pool is only a very minor player in the reinsurance market, which is a worldwide market. Furthermore, the restrictions of competition resulting from cooperation within Assurpol are counterbalanced by rationalization, an increase in financial capacity and the creation and development of a technique for improving the insurance of risks for which there is only very limited experience in providing cover.

The decision shows that the setting-up of a reinsurance pool does not necessarily involve the joint determination of commercial premiums for direct insurance contracts and that it is not essential for the participants to be totally prohibited from covering risks outside the pool.

<T6> (f) Eurocheque: Helsinki Agreement[9]

141. On 25 March the Commission adopted a decision in the "Eurocheque: Helsinki Agreement" case imposing a fine of ECU 5 million on the Groupement des Cartes Bancaires, which represents all the French banks which are members of the Eurocheque system, and a fine of ECU 1 million on Eurocheque International for concluding an agreement in 1983 and in force until 1991 under which French banks charged French retailers the same commission for cashing foreign Eurocheques as they charged for payment by bank card. Not only did the agreement constitute a pricing agreement caught by the prohibition in Article 85(1), but it also infringed the Package Deal agreement of 1980, which the Commission exempted in 1984 on the understanding that a Eurocheque would be free of charge to the recipient, with the payee's bank receiving an interbank commission debited to the drawer's bank.

The decision rejects the request for exemption submitted in 1990.

This is the first time the Commission has imposed fines in the banking sector. The Commission bore this in mind when determining the amounts of the fines and also took account of the share of responsibility and the profit earned from the agreement by the participants.

(9) OJ L 95, 9.4.1992; Bull. EC 3-1992, point 1.2.40.

<T5> - Agreements in the energy sector

<T6> (g) SHG/EDF and ENEL

142. The Commission intervened in a dispute between an independent French generator and the French and Italian electricity monopolies, EDF and ENEL.

143. The independent generator, whose power station was for geographical and technical reasons linked only to the Italian grid, could not sell its electricity direct to ENEL because of the exclusive export rights enjoyed by EDF. It was therefore obliged to sell its electricity to EDF, at the rate applying to French independent generators, although its output was intended for Italy.

144. Since the prices paid to independent generators in France were lower than those in Italy, the owner of the power station was suffering a financial loss.

145. The Commission's action in the case resulted in a compromise between the parties under which the French generator will be paid by EDF at rates based on those granted by ENEL to independent Italian generators, so as to take account of the power station's very specific situation, namely the fact that it can be linked up only to the grid of the Member State to which the electricity is exported.

The Commission has thus made it clear that the competition rules laid down in Articles 85 and 86 of the EEC Treaty apply fully to the energy sector, irrespective of the measures taken by the Commission to complete the internal market in energy.

<T6> (h) Jahrhundertvertrag

146. In its decision of 22 December approving the "Jahrhundertvertrag", the Commission again confirmed the applicability of competition rules in the energy sector. The Commission confirmed that the energy market must not be excluded from competition and that, against the background of further development of the internal market, restrictive measures must be limited to what is necessary to guarantee basic security of supply.

The "Jahrhundertvertrag" (century contract) is a set of agreements by which private and public German electricity producers are obliged to purchase stipulated amounts of German coal for the purpose of electricity generation. The Commission found that these agreements fall under the competition rules of the EEC and the ECSC Treaty. The exclusive and long-term purchase obligation for German coal prevents German electricity producers from importing coal or other primary energy sources from other Member States and also impedes the import of electricity.

In the decision the Commission again confirmed its policy that the proportion of input energy used for electricity generation which is obtained on a priority basis from domestic energy sources and is thus shielded from competition must be limited to the amount necessary to safeguard basic electricity supplies. The Commission exempted the agreements since it was satisfied that such was the case here.
The Commission takes the view that at the end of 1995 this proportion should not exceed 20% of the input energy used to cover gross electricity consumption and that it must be reduced to 15% by the end of the millennium.

The Commission emphasized that this decision did not prejudice its assessment of the compatibility of aid to the German coalmining industry with Community rules.

<T5> - Agreements in the maritime transport sector

<T6> (i) French-West African shipowners' committees

147. The Commission found that the "shipowners' committees" set up in respect of trade between France and eleven West African and Central African countries(10) constituted agreements which were contrary to the provisions of Article 85 of the EEC Treaty and that their practices were in breach of Article 86.(11) The decision followed a number of complaints lodged by independent shipowners against a whole set of practices the effect of which was to establish a cartel covering a large proportion of the bilateral trade between the Community and the West African and Central African countries. The Commission accordingly initiated procedures against four liner conferences(12) and the eleven shipowners' committees covered by the decision.

148. The purpose of the shipowners' committees was to apportion between their members all the freight carried by liners, with machinery to supervise this arrangement set up to cover each of the shipping lines. The members of the shipowners' committees systematically shared out between them, on a monthly basis, all the traffic between France and eleven African countries. Competition was accordingly eliminated, leading to excessively high freight rates.

In addition, after seeking the adoption, by the authorities in the African countries concerned, of measures intended to reserve all freight traffic for them, the members of the shipowners' committees took a willing and active part in the implementation of such measures with a view to denying shipowners wishing to operate outside the committees access to the traffic concerned.

149. The Commission pointed out that, in accordance with Council Regulation (EEC) No 4056/86 of 22 December 1986,(13) shipowners are entitled to be members of liner conferences that have been granted a block exemption. However, in adopting this decision, the Commission made it clear that it

(10) The countries in question are: Benin, Togo, Congo, Senegal, Mali, Guinea, the Central African Republic, Cameroon, Gabon, Niger and Burkina Faso.

(11) Decision of 1 April 1992, OJ L 134, 18.5.1992.

(12) The Commission has reached a decision in one case (CEWAL) and is continuing to examine the other three.

(13) OJ L 378, 31.12.1986.

would take action against any attempts to establish a cartel in respect of the whole of a trade or a number of trades so as to hinder outsiders from securing access, with the object or effect of eliminating all effective competition.

150. The infringement was deemed to be a major and serious breach of the law, and the Commission decided to impose fines totalling ECU 15 million on the Delmas Group, Société Navale de l'Ouest, Société Navale Caennaise and the Hoegh-SWAL Group. In fixing the level of the fine, the Commission took account of the fact that the Bolloré Group (which had subsequently purchased the Delmas and Hoegh groups) had given certain important undertakings that would ensure that active steps were taken to open up the market to intensive competition.

Lower fines (of between ECU 2 400 and ECU 56 400) were imposed on thirteen cross-traders who were members of the shipowners' committees; in fixing the level of these fines, the Commission took account of the fact that such shipowners, who were not signatories to the agreements setting up the shipowners' committees, played only an ancillary role within them.

151. Lastly, the Commission emphasized that, leaving aside the decision, it was ready to enter into talks with the authorities in the West African and Central African countries with a view to helping those countries' carriers secure a greater share of the traffic generated by their external trade.

<T6> (J) CEWAL Liner Conference

152. The Commission imposed fines totalling ECU 10.1 million on four shipowners for anti-competitive practices on behalf of the CEWAL liner conference (Associated Central West Africa Lines). The Compagnie Maritime Belge (CMB) was fined ECU 9.6 million, while the remainder was imposed on Woermann Linie, Dafra Line (both currently owned by CMB) and Nedlloyd.

In determining the size of the fines, the Commission took account of the minor role played by Woermann, Dafra and Nedlloyd, and their small market share, compared to the CMB. The fines also aimed to reflect certain mitigating circumstances which came to the Commission's attention.

153. Following complaints from the Danish Government and from several shipowners, the Commission initiated proceedings against 11 shipowners' committees and four liner conferences (CEWAL, MEWAC, COWAC and UKWAL). Regarding the shipowners' committees, the Commission imposed a heavy fine in April 1992 for infringing the EEC Treaty (Articles 85 and 86) in traffic between France and 11 West and Central African countries.(14)

154. This decision(15), the first against a liner conference, primarily concerned CEWAL, which groups together several shipping companies in order to provide a regular shipping service between Western European ports and the ports of Zaïre and Angola. The decision only applied to traffic between northern European ports (except the United Kingdom) and Zaïre.

155. The Commission found that on these routes the members of CEWAL abused their dominant market position, in breach of Article 86, in three different ways in order to eliminate competition from their chief competitor, G & C (a common service between the Belgian shipowner Cobelfret and the Italian shipowner Grimaldi):

1. They participated in a cooperation agreement with the Zaïrean maritime authorities (Ogefrem: l'Office Zaïrois de Gestion de Fret Maritime) under which all cargo on this line would be carried by CEWAL members.

(14) Commission Decision of 1 April 1992, OJ L 134, 18.5.1992.
See point 147 of this Report.
(15) Decision of 23.12.1992, OJ L 34, 10.2.1993, p. 20.

2. They used the "fighting ships" method. If a competitor offered cheaper rates than those set by CEWAL, the conference would hold a meeting to undercut that competitor, and ensure that CEWAL members scheduled their sailings at or around the same time as those of the competitor in order to win over its customers. Charges equivalent to the losses incurred by the competitor would then be shared out among CEWAL members.

3. CEWAL imposed 100% loyalty rebates, under which members would have to surrender all their cargo to the conference in order to qualify for a rebate. Blacklists would be drawn up with the names of shippers who broke the 100% rebate system. This went beyond the terms of the rules (Article 5(2) of the "block exemption" Regulation No 4056/86) exempting liner conferences from EC competition rules under certain conditions.

In addition, the Commission found that all three conferences - CEWAL, COWAC and UKWAL - had infringed Article 85 of the EC Treaty by means of a market-sharing agreement. Through this agreement, each shipowner refrained from competing on the geographical territory of the two conferences other than its own. The Commission decided not to impose a fine for this particular infringement.

<T5> - Agreements concerning fisheries and agriculture

<T6> (k) Scottish Salmon

156. The Commission adopted a decision(16) condemning an agreement between Fiskeoppdretternes Salgslag (FOS - the Norwegian fish farmers' sales organization), the Scottish Salmon Farmers' Marketing Board Ltd (SSB), the Scottish Salmon Growers' Association Ltd (SSGA) and the Shetland Salmon Farmers' Association (SSFA) to fix minimum prices for farmed salmon. Producers in Norway and Scotland account for over 90% of farmed salmon supplied in the Community.

157. The Commission's inquiry focused on the period at the end of 1989 when the salmon industry was in crisis. Despite a significant rise in consumption of farmed salmon in the Community, prices had been steadily declining. In December 1989, Community producers lodged a complaint with the Commission in respect of dumping in the EC of Norwegian salmon.(17)

158. At the same time, FOS took steps to restore the effectiveness of its minimum price system. However, before implementing the new measures, FOS contacted the Scottish organizations to advise them of the new plan. On 20 December 1989, FOS organized a telephone conference with producers of farmed salmon in Europe, the purpose of which was to secure their support for the new measures. Following the telephone conference, SSB/SSGA and SSFA sent circulars to their members urging them to bring their prices into line with the new Norwegian minimum prices and giving new Scottish prices based on the Norwegian minimum price plus the traditional Scottish premium of 5-10%.

159. There were two aspects to the agreement - on the one hand, FOS measures, i.e. minimum prices backed by a freezing scheme and on the other hand, supporting measures taken by SSB, SSGA and SSFA to ensure price discipline on the part of their members. The agreement terminated at the end of 1991.

(16) Decision of 30 July 1992, OJ L 246, 27.8.1992

(17) A Commission Decision taken on 15 March 1991 found that Norwegian salmon was being sold in the Community with a dumping margin of 11.3%.

160. The Commission's decision was aimed at establishing principles in respect of the relationship between anti-dumping proceedings and anti-trust proceedings, in particular in relation to the agricultural/fisheries sector having regard to the provisions of Council Regulation No 26/62. Undertakings or associations of undertakings, when confronted by a dumping practice are not permitted under Regulation No 26/62, either in addition to or instead of an anti-dumping procedure, to enter into a restrictive private agreement in order to remedy the situation. The same principle applies with regard to other similar procedures, such as safeguard clauses which are provided for in certain Community regulations to prevent market destabilization.

<T6> (I) Milk Marketing Board

161. The Commission has been in discussion with the United Kingdom authorities about the possible new milk marketing arrangements that could be put in place following abolition of the current statutory schemes.

162. Under the current statutory arrangements virtually all dairy farmers in the United Kingdom have to sell their milk to one of the statutory Boards (one for England and Wales, three in Scotland, and one in Northern Ireland). Under the reform proposals, which have been submitted by all Boards to the United Kingdom Government, these constraints would disappear. Dairy farmers would be free to choose where they sell their milk. Similarly, dairy companies would be free to decide where they buy their milk and in particular would be free to negotiate directly with farmers. Each of the five statutory Boards would be replaced by a single producers' cooperative. Dairy farmers would be free to decide whether or not to join these new organizations.

163. The United Kingdom Government has sought an indication of the compatibility of the reform proposals with Articles 85 and 86 of the EEC Treaty.

164. With respect to the proposal of the Milk Marketing Board for England and Wales, it has been noted by the Commission that the arrangements now proposed are considerably less restrictive of competition than were earlier proposals. In particular, the complete separation of the current commercial subsidiary of the MMB for England and Wales, Dairy Crest Limited, and a substantial liberalization of the leaving terms for members of the future new cooperative are major improvements in the competitive structure of the proposed marketing arrangements. In the context of a single voluntary cooperative succeeding the existing England and Wales Board, which accounts for more than 80% of the total milk production, both aspects are essential elements in creating a competitive environment, and ensuring the compatibility of the new arrangements with EC competition rules.

165. It was further noted by the Commission that full details of the new cooperative were not yet decided, and that it was still uncertain to what extent farmers will join it and consequently what the exact competitive position of the new body on the United Kingdom milk market will be. This will become clearer only if and when the reorganization has had enough time to take effect and the industry started to adapt to the new situation. In

addition, the proposed leaving terms are significantly more liberal than those which the EC Commission accepted in the Campina case under Article 85 of the EEC Treaty.(18)

166. Against this background, it was concluded that there were no grounds for action under Articles 85 and 86 with regard to the proposed new cooperative, for an initial period of two years. During this initial period the market position of the new cooperative, and in particular the effects of the leaving terms on competition in the market, should be carefully monitored. If market developments did not sufficiently point in the direction of real competitive pressures, the Commission would have to decide whether or not the present proposed contract terms, in particular the 2% penalty payable on 3 months' notice, could still be justified. On the other hand, if they did, the Commission would be ready to consider proposals from the new cooperative, to be allowed greater freedom in the choice of contract terms to offer to milk producers.

167. With respect to the other proposals relating to the Scottish area and Northern Ireland, the view has been taken that the competition problems related to these proposals, although in substance not different from the English and Welsh ones, did not have a real Community dimension. The future milk marketing arrangements in Scotland and Northern Ireland are likely to have only regional effects. In the absence of an appreciable effect on trade between Member States, these arrangements should be dealt with exclusively by the competent United Kingdom authorities.

This case exemplifies the opening-up to competition of statutory structures in the agricultural sector. It has to be seen in parallel with the policy followed by the Commission concerning trade associations in the same sector, including the obligation imposed on them not to take discriminatory measures which deny market access to operators from other Member States.(19)

(18) Twenty-first Competition Report, points 83 and 84.
(19) See for instance the British Cattle and Sheep Breeders' Associations case in Annex III.A.1.

<T5> - Agreements relating to intellectual property

<T6> (m) Chiquita/Fyffes

168. On 4 June the Commission decided to terminate the proceedings which were initiated under Articles 85 and 86 of the EEC Treaty against Chiquita following a complaint by Fyffes PLC.

169. In the past, Chiquita's banana sales in the United Kingdom were made through Fyffes Group Ltd, an English company which was until 1986 a wholly-owned subsidiary of Chiquita, trading bananas in the United Kingdom under the Fyffes name and trade mark. At the same time Chiquita Europe used the Fyffes trade mark, first as its main brand and after the introduction of the Chiquita brand as a secondary brand, for the sale of its bananas on the European mainland. In 1986 Fyffes Group Ltd was sold by Chiquita to the Irish company FII (now known as Fyffes PLC). In a subsequent agreement (the "trade mark agreement"), Fyffes Group Ltd granted Chiquita the exclusive right to use the Fyffes trade mark outside the United Kingdom and Ireland for a period of three years from 1986. The trade mark agreement also contained a provision (the "non-use clause") prohibiting Fyffes Group from using the Fyffes brand for the sale of fresh fruit, including bananas, outside the United Kingdom and Ireland until the year 2006, or such earlier date as might be decided solely by Chiquita. After the expiry of the three-year period in 1989, Chiquita no longer used the Fyffes trade mark, but otherwise relied upon the non-use clause to prevent Fyffes from using the Fyffes trade mark in continental Europe.

170. In its Statement of Objections of April 1991 the Commission considered that Chiquita, by preventing Fyffes from selling its bananas under the Fyffes trade mark on the EC continental banana markets, had infringed both Article 85 and Article 86 of the EEC Treaty.

171. The Commission concluded that the non-use clause deprived Fyffes of the competitive advantage to be gained from selling its bananas Europe-wide under the strong Fyffes label. To the extent that the non-use clause applied beyond the initial three-year period following the transfer of the Fyffes Group business, it could not be considered to be a legitimate protection of Chiquita's continental goodwill attached to the Fyffes name and trade mark. This clause therefore constituted an anti-competitive agreement prohibited by Article 85(1) of the EEC Treaty.

172. Furthermore, the non-use clause was found to have an important effect on the structure of competition in the banana market. Although Fyffes was not restricted from selling bananas on the continental market, provided it used trade marks different from the Fyffes mark, the prohibition on using Fyffes as a strong single brand Europe-wide constituted a significant barrier for Fyffes to effectively compete with Chiquita on that market. Hence, it had the effect of protecting Chiquita's current dominant position in those EC Member States with non-protected dollar banana markets i.e. the Benelux, Denmark, Germany and Ireland. It was therefore concluded that Chiquita, by agreeing to the non-use clause, and by relying on it since 1989, abused its dominant position, contrary to Article 86 of the EEC Treaty.

173. The fact that, both before and after 1986, in several of the continental Member States, Chiquita was the sole registered owner of the Fyffes trade mark did not affect this conclusion. In fact, the Commission considered that, having consented to the division of the ownership of the Fyffes trade mark in different Member States through a partial assignment in favour of Fyffes Plc, Chiquita would not be allowed under the Treaty rules on the free circulation of goods to rely on the trade mark legislation of certain Member States to oppose the importation of bananas which had lawfully been marketed by Fyffes in another Member State.

174. On this basis, the Commission found moreover, in its supplementary Statement of Objections of December 1991, that Chiquita had also abused its dominant position by relying upon the Fyffes trade marks registered in its name in English legal proceedings, and by threatening Fyffes with the use thereof, to prevent Fyffes from selling its bananas bearing the Fyffes mark in continental Europe. This conclusion was all the more justified in this case since Chiquita had itself ceased using the Fyffes trade mark for the selling of its bananas by 1989 at the latest and had introduced a new secondary brand called Consul. Similar to Chiquita's reliance upon the non-use clause, such behaviour had a serious effect upon the structure of competition by its tendency to block Fyffes' entry as an effective competitor on the continental banana market.

175. Following the Commission's objections, Chiquita agreed with Fyffes to cease blocking access for Fyffes' bananas bearing the Fyffes trade mark to the EC continental banana market.

176. This settlement fully meets the objectives pursued by the Commission's proceedings. It ensures effective access for Fyffes' bananas to the continental EC banana market, and hence contributes to an improved structure of the banana market by strengthening competition between different brands. The Commission therefore decided to terminate its proceedings.

The case illustrates the limits competition law imposes on the exercise of intellectual property rights.

<T5> - Agreements relating to charges connected with environmental protection

<T6> (n) VOTOB

177. Although the Commission welcomes voluntary initiatives to improve the environmental conditions in a given sector, it has to ensure that undertakings competing in that sector do not resort to agreements which go beyond what is necessary to achieve that goal, to the detriment of competition.

178. This is the position maintained by the European Commission since commencing proceedings against a Dutch association of companies in the chemicals storage business.

179. The association, Vereniging van Onafhankelijke Tankopslag Bedrijven (VOTOB), groups six undertakings offering tank storage facilities (land tanks) in Amsterdam, Dordrecht and Rotterdam. They are independent operators, offering storage services for third parties only. They decided to increase prices charged by VOTOB members to their customers by a uniform, fixed amount as from 1 April 1990. This uniform "environmental charge" (to be applied for an undetermined period) was to cover, albeit in part only, the costs of investment required to reduce vapour emissions from members' storage tanks. VOTOB took this decision after concluding a covenant with the Dutch Government to improve environmental standards. However, this covenant made no mention of a uniform, fixed price increase, nor was there any obligation on VOTOB by the Dutch Government to adopt one.

180. The Commission objected to this charge as being incompatible with Article 85 for three reasons. Firstly, it is fixed. All members are to apply it regardless of their own considerations. Secondly, it is uniform. Though varying from product to product, the increase is identical for all VOTOB members. Thirdly, it is invoiced to customers as a separate item, suggesting it is a "charge" imposed by the government.

181. When a price or an element of it is fixed, competition on that price element is excluded. By fixing the charge and thus a source of recovery members have less incentive to make investments as cheaply and efficiently as possible. This has a knock-on effect on the market for undertakings providing reconstruction and improvement services. There will be less

incentive for members to contract with those undertakings which can achieve the best results for the least expenditure or effort.

182. Uniform adoption of the charge ignores differences in each individual member's circumstances. The covenant with the Dutch Government stipulates an agenda for vapour emission reduction that spans the period 1990 to 2000. The first phase is to end in 1994. Some members are already very close to the 1994 objectives, while others are not. Furthermore, members employ different techniques to reduce emissions, and do not expend investment costs simultaneously. The charge ignores this. In addition, all VOTOB members retain the proceeds of the charge individually.

183. The Commission maintains that had there been no horizontal fixing of this particular cost element, individual members could have calculated the cost of necessary investment, decided whether to meet it from their own profit or to pass it on to their customers, and , if they decided to pass it on to their customers, determined by how much to increase their prices. This would have been done by the companies independently, having regard to prevailing market conditions and according to their own competitive position.

184. Prior to the Commission's proceeding to a decision, VOTOB agreed to renounce its separate charging system as from 1 January 1993, taking account of the fact that contracts with customers are negotiated on a calendar-year basis, and to stop invoicing in this manner as from 1 July 1992 for new contracts. The uniformly fixed charge will no longer be applied as from 1 January 1993.

185. The case makes clear that the Commission is not opposed to the possible passing on to customers of "polluter pays" investment costs, since this makes them more aware of environmental problems and their implications. However, customers should not be barred from challenging price increases and shopping around for the smallest increase. A system whereby members invoiced a total price, stating that it included the additional environmental investment cost, would be acceptable to the Commission. Customers reluctant to accept a higher price would, while becoming environmentally aware, remain in a position to negotiate conditions.

186. The Commission agreed to suspend proceedings and review the situation in the light of VOTOB's undertakings.

<T5> - Cartels

<T6> (o) Building and construction industry in the Netherlands

187. On 5 February the Commission adopted a decision imposing fines totalling ECU 22.5 million on 28 construction associations in the Netherlands for having operated a cartel in the Dutch building and construction industry.(20)

188. Under the auspices of their joint federation SPO ("Vereniging van Samenwerkende Prijsregelende Organisaties in de Bouwnijverheid" - Association of cooperating price-regulating organizations in the construction industry), a comprehensive set of complex and detailed regulations was adopted and implemented, their aim being to coordinate the competitive conduct of building and construction firms in the process of awarding contracts for projects put out to competitive or successive single tender, whether by public authorities or private individuals.

189. The regulations include the so-called UPR (Uniform Price-regulating Rules) and Code of Honour, which primarily aim to arrange for the client to pay for the tendering costs incurred by all contractors competing for a particular bid and to designate one from among them as the so-called "entitled bidder"; this bidder is protected from any attempt by the client to negotiate or bargain the terms of the contract with other participants. To this effect, the rules provide for a system of pre-tender meetings, to be attended by all those building firms interested in competing for a particular work. During these meetings, the participants exchange information on the basis of which the costs of the contract are compared, the collective decision may be taken to increase the offers in order to have the costs of calculating their bids reimbursed by the client and the "entitled bidder" may be designated. Each participant at the meeting may ask for his bid to be given preference or may, upon having been informed of all intended offers, withdraw his bid. In particular in cases in which the participants fear strong outside competition, they may refrain from increasing the tender figures or from designating the "entitled bidder", thus organizing a collective and effective defence against this outside competition. The Code of Honour, in force since 1980, lays down penalties for breaches of the regulations and provides for a quasi-judicial procedure to examine such breaches.

(20) OJ L 92, 7.4.1992.

190. The Commission found that the regulations severely restrict competition as between participants, by effectively prohibiting each bidder from freely setting the price and other conditions of his offer. Clients are unable to freely choose between offers of several contractors, which result from exchange of information among the participants and from collective decisions as to significant elements thereof. Equally, the Commission found that competition as between participants and non-participants is severely restricted, the outside contractor being faced with a concerted and flexible response by the participants designed to limit or impede its ability to enter the market.

191. The Commission considered that the regulations do appreciably affect intra-Community trade, both on the supply side and on the demand side. The 28 member-associations of the SPO represent over 4 000 Dutch builders, including all of the large and most of the medium-sized firms. The SPO's rules are binding on these firms, whilst another 3 000 companies participate on a case-by-case basis. Among them are about 150 firms established in other Member States. The Commission's inquiry revealed that the implementation of the SPO's regulations covers virtually all contracts put out to tender in the Netherlands in the sectors of the construction industry to which the SPO rules apply. Since these regulations apply to any invitation to tender for a contract in the Netherlands, any foreign client wishing to put out to tender a construction contract in that Member State cannot escape the application of these regulations.

192. The Commission-initiated inquiry focused on the period as from the end of 1980 (entering into force of the first uniform regulation, the Code of Honour). In the course of the inquiry, the SPO notified the Code of Honour and the UPR in its version as applied since 1 April 1987, thus replacing similar ones, adopted by its member-associations. The Commission held that the regulations did not satisfy the conditions for exemption under Article 85(3) of the EEC Treaty. Also in the course of the inquiry, the municipality of Rotterdam filed a complaint concerning some aspects of the regulations.

193. In determining the amount of the fines to be imposed, the Commission took account of the fact that this was the first case in the construction sector in which Article 85(1) of the EEC Treaty had been applied. Furthermore, the Commission held that the Dutch authorities had adopted certain measures which could lead cartel members to believe that their activities were condoned by the State. The Commission is currently bringing separate proceedings against the Netherlands in this matter under Article 169 of the EEC Treaty.

<T4> §2. Distribution

<T6> (a) Newitt/Dunlop Slazenger International[1]

194. Dunlop Slazenger International Ltd (DSI), a subsidiary of the UK conglomerate BTR, is one of the main European and world producers of sports goods. More specifically, it is the market leader within the EEC for tennis and squash balls.

Newitt Ltd, a UK distribution company, accused DSI of using various means to block its exports, mainly of tennis and squash balls, to other Community Member States. It alleged that DSI had first suspended deliveries and then applied discriminatory new tariffs in order to prevent it from remaining competitive in export markets.

The investigation carried out following the complaint showed that DSI did indeed pursue a policy of restricting exports from the United Kingdom with the aim of protecting its sole distributors in other Community countries.

This policy took the form primarily of a general ban on exporting imposed on British traders, a ban which dated from 1977 at least.

This general ban on exporting was implemented, as from 1985 at least, by a series of concrete measures intended to prevent any exports to countries where DSI had sole distributors. In addition, the investigations showed that, at least as regards the Netherlands, the implementation of these measures was undertaken in collaboration with DSI's distributors in that country, and sometimes at their own instigation.

The concrete measures identified by the Commission during its investigations were as follows:

(1) OJ L 131, 16.5.1992; Bull. EC 3-1992, point 1.2.39.

1. specific refusal to supply products intended for export;
2. prices imposed on UK traders with a view to preventing them from remaining competitive in export markets;
3. buying-in of low-price parallel exports with a view to preventing them from exerting pressure on the prices charged by Dunlop Slazenger International's exclusive distribution network;
4. the marking of products with a view to establishing their origin and final destination;
5. exclusivity for the DSI distributors in the use of the Dutch Tennis Federation's quality mark.

These measures were clearly aimed at the implementation of DSI's general policy of preventing any export bound for a country where it had a sole distributor.

It should be noted that, at the end of the Commission's investigations, DSI acknowledged that it had infringed the Community's competition rules in a number of ways and altered its practices to a large extent.

However, barriers to exports resulting from agreements or concerted practices between companies have consistently been considered, in the case-law of the Commission and of the Court of Justice, as serious infringements of Article 85(1) of the EEC Treaty, as they challenge the free movement of goods and consequently the objective of economic integration pursued by the Treaty.

The Commission consequently adopted a decision on 18 March prohibiting the measures under Article 85 of the EEC Treaty and imposing a fine of ECU 5 million on Dunlop Slazenger International and a fine of ECU 150 000 on All Weather Sports, its sole distributor of the Dunlop brand in the Benelux countries.

<T6> (b) Mars/Langnese & Schöller

195. On 25 March the Commission imposed interim measures in order to prevent Langnese-Iglo GmbH and Schöller Lebensmittel GmbH & Co. KG from enforcing contractual rights obliging retailers to purchase single-item ice-cream exclusively from them. The interim measures were imposed following a complaint by Mars GmbH, which alleged that these rights were damaging the sale of its own ice-cream bars in Germany.(2)

On 23 December, the Commission gave its final rulings on the outlet exclusivity agreements operated by the two companies concerned in Germany. It:

(a) found that the agreements concluded by Langnese and Schöller requiring retailers established in Germany to purchase single-item ice-cream for resale only from these undertakings infringe Article 85(1) of the EEC Treaty;

(b) refused an exemption for the agreements referred to above under Article 85(3) of the EEC Treaty and withdrew the benefit of the block exemption declared by Commission Regulation (EEC) No 1984/83, in so far as these agreements would have qualified for that block exemption;

(c) declared that Langnese and Schöller may not conclude agreements of the kind referred to above until after 31 December 1997.

This decision clarifies the Commission's attitude towards exclusive purchasing agreements. In general, the Commission considers these agreements to be beneficial to competition in normal market conditions because they strengthen the position of the undertaking which has concluded the exclusivity agreement. If, however, access by other suppliers to the relevant market is impeded as a result of the market structure and other significant barriers to entry to this market, any further strengthening of that position by exclusivity agreements cannot be accepted. Such a situation arises in the present case, where Langnese and Schöller operate a duopoly and where access to the market is made particularily difficult as a result of freezer exclusivity arrangements.(3)

(2) See point 309 of this Report.
(3) See point 309 of this Report.

The Commission also made clear two important points of law concerning the application of Article 85 (1) of the EEC Treaty to exclusivity agreements having a cumulative effect on the market as well as the conditions under which the benefit of the block exemption under Regulation No 1984/83 will be withdrawn.

As to the first point, the Commission applies a three-tier test:

- Does the agreement itself have an appreciable effect on competition or trade between Member States?
- If not, do all agreements of this kind entered into by the undertaking concerned have this effect?
- If not, do all agreements of this kind which exist in the relevant market have this effect?

If one of these questions is answered in the affirmative, the conditions for the application of Article 85(1) are met.

As to the second point, it is clear that the benefit of the block exemption can only be withdrawn by a decision following proceedings under Regulation No 17. In the present case it had been coupled with the finding of an infringement and an order to bring it to an end. In order to prevent the anticompetitive practices from reoccurring and to allow the opening up of the market, it was necessary to ban the conclusion of exclusive purchasing agreements by the undertakings concerned for five years.

<T6> (c) Givenchy

196. The Commission adopted a formal decision under Article 85(3) of the EEC Treaty with regard to a standard-form selective distribution contract laying down the conditions for the marketing within the EEC of perfume, skin care and beauty products manufactured by the French company Parfums Givenchy.(4) The decision applies until 31 May 1997.

197. The decision confirms and supplements the principles which the Commission had established in its Yves Saint Laurent Parfums decision of 16 December 1991.(5)

198. Following a general examination of selective distribution systems in the perfume sector, the Commission had commenced proceedings against Parfums Givenchy and against Yves Saint Laurent Parfums with a view to covering, in two basic decisions, all the pertinent legal issues and defining the principles of Community competition law applicable to all companies within this sector.

199. In this context, the Commission decided to revise the position adopted in 1974(6) and to strengthen the application of the Community competition rules in this sector. In particular, the Commission challenged the acceptability of certain contractual clauses which had hitherto been tolerated in the sector.

200. Compared with the clauses examined in the Yves Saint Laurent Parfums decision, Givenchy's selective distribution system contained one particular clause which made the retailer's inclusion or maintenance in the distribution network subject to his being authorized to sell a minimum number of competing brands included on a restricted list drawn up by Givenchy. Several companies in this sector had adopted a similar practice.

(4) OJ L 236, 19.8.1992.
(5) OJ L 12, 18.1.1992.
(6) Fourth Competition Report, point 93.

201. The minimum number of four competing brands hitherto imposed by Givenchy was deemed to be a requirement which, without being excessive, made it possible to ensure that distribution was based on a variety of competing brands being sold alongside Givenchy products. However, the Commission opposed any restriction on the authorized distributor's choice of suitable brands to make up the required environment. In particular, the Commission considered that such a clause had the effect of limiting access to the distribution network for new retailers and, consequently, of restricting intra-brand competition. Furthermore, it was liable to limit the ability of new or lesser known brands to penetrate and establish themselves on the market, thereby also restricting inter-brand competition.

202. Following the Commission's intervention, Givenchy deleted the clause, replacing it with a new provision which allowed each retailer the freedom to choose to sell any other luxury perfume brand alongside the contracted goods.

203. Apart from the above-mentioned aspect, the Givenchy decision confirms the position which the Commission adopted in the Yves Saint Laurent decision of 16 December 1991 with regard to the abolition of purely quantitative selection criteria, the conditions for the admission of retailers to the distribution network, recognition of the freedom of the authorized distributor to determine its own retail prices, the liberalization of cross-supplies among authorized retailers and the conditions designed to ensure that the manufacturer did not impose on retailers excessive requirements regarding minimum purchases.(7)

204. The decision is an example of the Commission's policy on selective distribution, which aims to ensure that the advantages of selective distribution are not undermined by the harmful effects of compartmentalization of the common market.

(7) Twenty-first Competition Report, points 134 to 136.

<T6> (d) Viho/Parker Pen[8]

205. On 15 July the Commission adopted a decision imposing a fine of ECU 700 000 on the British company Parker Pen and a fine of ECU 40 000 on Herlitz AG, its distributor in Germany, for having included an export ban in an agreement concluded between them.

Following a complaint from the Dutch company Viho, it was found that Parker Pen and Herlitz AG had concluded an agreement in August 1986 on the distribution of Parker Pen products in Germany, under which all exports that did not have Parker's written consent were prohibited. The products concerned were Parker pens and similar articles in the medium price range, sold mostly in department stores.

The Commission took the view that the infringement was such as to obstruct the achievement of a fundamental objective of the Treaty, namely the integration of the common market.

The level of the fine imposed on Parker Pen took account, however, of Parker's cooperative behaviour during the investigation and the fact that Parker drew up a programme to ensure compliance with Community competition law.

In the case of the fine imposed on Herlitz AG, the Commission took account of the fact that Herlitz's responsibility was less than that of Parker, since it could be supposed that Herlitz AG was merely complying with Parker's wishes.

(8) OJ L 233, 15.8.1992; Bull. EC 7/8-1992, point 1.3.37.

<T6> (e) 1990 Football World Cup

206. On the basis of a complaint made by a travel agency, the Commission examined the general distribution system for tickets and package tours set up by the organizers of the football World Cup held in Italy in 1990.

207. The Federazione Italiana Giuoco Calcio (FIGC) was appointed by the Federation of International Football Associations as organizer of the 1990 cup. The FIGC, acting jointly with FIFA, set up a local "Organizing Committee" to carry out this task. This Committee established the system for distributing advance tickets to the event.

208. The concerns of the Commission in this case focused on the method chosen by the Organizing Committee for distributing tickets to package tour operators. The Organizing Committee granted to an Italian tour operator, "90 Tour Italia", the exclusive right to sell entry tickets as part of a package tour. All other tickets were sold subject to the explicit condition that they are not resold to travel agencies.

As a result of this, 90 Tour Italia acquired a monopoly in the organization and sale of package tours to the World Cup. Other tour operators were unable to compete, as they could not offer alternative packages, even at cheaper prices. Equally, travel agencies could only offer a limited choice of package tours to the World Cup, and were unable to "shop" between several tour operators in order to obtain more advantageous conditions for their customers.

209. The Commission therefore considered that the agreement concluded between the organizers and 90 Tour Italia had restricted competition at the expense of the consumers who purchased package tours, and had thus infringed Article 85(1) of the EEC Treaty.

210. In reaching this conclusion, the Commission examined very carefully whether the exclusive distribution system could be justified by the need to guarantee safety at the matches. However, it was clearly demonstrated that a number of other tour operators could have fully complied with the Organizer's requirements and would therefore have been able to offer competing package tours without in any way undermining safety. It is important to note that

this was accepted by the Organizing Committee representatives during the proceedings in this case.

211. The following undertakings were considered by the Commission to be responsible for this infringement of the Community's competition rules: FIFA, the Federazione Italiana Giucco Calcio (FIGC), Coi Italia (acting as a joint agency of the FIFA and of the FIGC), 90 Tour Italia and CIT Spa/Italiatour (as parent companies of 90 Tour Italia).

212. This was the first time that the Commission adopted a formal decision under its competition rules concerning the sale of tickets at sporting events. In the light of this, and taking account of the fact that the infringement was of short duration, the Commission decided not to impose a fine in this case.

213. However, the Commission intends to ensure that the distribution systems of major sporting events fully comply with its competition rules in future. In this way it can guarantee that consumers who wish to attend such events are able to purchase entry tickets or package tours on advantageous conditions as a result of competition between several distributors.

<T6> (f) UIC

214. The Commission adopted a decision against the International Union of Railways for infringement of the provisions of Article 85 of the EEC Treaty.

The UIC is a worldwide association of railway companies through which its members cooperate at a technical and commercial level. Within the framework of this organization the railways acted in concert to lay down the conditions for granting approval to travel agencies to sell railway tickets, and the conditions under which the agencies could sell such tickets.

Under the terms of the provisions implemented by the UIC, the appointment of a travel agency in a Member State could only be made by the national railway company. Thus the railway could control the number of travel agencies which could compete with it for ticket sales, even though a higher number of approved agencies would probably have appreciably improved the service to the consumer.

The railways also acted in concert to set a single rate of commission paid to the agencies for ticket distribution as well as uniform conditions for payment of the commission. These arrangements prevented the agencies from obtaining better conditions, conditions which might have proved beneficial to their consumers.

In addition, the provisions adopted by the railways forbade the passing-on by the travel agencies of part of their commission to their customers. This infringement was particularly serious because its objective and effect was to prevent competition both between travel agencies, and between the travel agents as a group and the railway undertakings. This practice particularly penalized the consumer who could not benefit from a reduction in price which would have been possible if the passing on of commission was allowed. It must be pointed out that this practice was clearly identified as anti-competitive by the Court of Justice in a 1987 case.

Generally, the Commission considered that the establishment of certain common conditions by the railways for the approval of travel agencies and for the sale of tickets by those agencies might indeed improve ticket distribution. However, in this case the Commission did not believe that the conditions established, limiting the commercial autonomy of the travel agencies and competition between ticket vendors, were to the benefit of the consumer.

The infringement was serious and took place over a prolonged period. However, the railway companies undertook to comply with Community law. The Commission therefore decided to impose only a moderate fine (ECU 1 million) on the international Union of Railways, the party responsible for the anti-competitive practices.

This decision is an example of the Commission's determination to ensure the adoption of a dynamic and effective distribution system for railway tickets, so that rail will play a greater role in passenger transportation.

<T6> (g) Ford Agricultural

215. The Commission adopted a decision(9) concerning Ford New Holland, which included in relations with its dealers a prohibition on the import and export of tractors and a number of other provisions intended to hinder parallel trade.

These relations formed part of a detailed system set up by Ford to prevent trade in its tractors. Firstly, Ford established a "tracking" system that enabled it to identify parallel imports, and to trace their sources. In the United Kingdom, for example, Ford made considerable use of the information contained in the relevant vehicle registration documents, which were made available to the trade association for statistical purposes.

Once a parallel import, and its source, had been identified, Ford threatened or carried out one of the following actions:

- cancellation of the dealership;
- delaying delivery when it was believed that the tractor was intended for export;
- charged higher prices or reclaimed discounts;
- made discounts conditional on registration within the territory;
- made discounts conditional on the dealer obliging the purchaser not to re-sell the vehicle;
- refused to honour guarantees for parallel imports;
- sought to profit from differing safety regulations by refusing to supply operating manuals in the importers language.

The dealership agreements signed by Ford were therefore, in these circumstances, a clear infringement of Article 85(1).

(9) OJ L 20, 28.1.1993.

<T3> B. Abuse of a dominant position

<T6> (a) British Midland/Aer Lingus

216. Following a complaint by British Midland, the Commission found that Aer Lingus had abused its dominant position by terminating its interline agreement with British Midland. The Commission imposed a fine of ECU 750 000 on Aer Lingus and ordered it to resume its interline[1] relationship with British Midland during a limited period.

Aer Lingus is the dominant airline on the London-Dublin route. After British Midland announced its intention in 1989 to start its own service on that route and to compete with Aer Lingus, the latter terminated its interline relationship with British Midland. As a result of that action, passengers holding British Midland tickets could no longer change flights on to Aer Lingus services and travel agents could no longer issue tickets combining flights by both airlines.

The withdrawal of interline facilities made British Midland's flights less attractive to travellers - in particular business travellers who prefer the higher-priced fully flexible tickets - and to travel agents. By terminating its interline relationship, Aer Lingus made it more difficult for British Midland to compete during the initial period of its presence on the route with an increased number of flights. British Midland was deprived of

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1 Twentieth Competition Report, points 73-76. Interlining is essentially based on an IATA agreement pursuant to which most of the world's airlines have authorized the other signatories to sell their services. As a result travel agents can offer passengers a single ticket providing for transportation by different carriers (e.g. leaving on the airline issuing the ticket and returning on another airline serving the same route, or continuing to destinations not served by the issuing airline).

In addition, airlines recognize each other's authority to change a ticket so that passengers can change reservations, routings on airlines after the ticket has been issued. These changes would normally require the consent of the airline indicated on the ticket for the sector concerned ("endorsement"), but most airlines have agreed to waive this requirement in practice.

As a result the interline system benefits airlines, travel agents and passengers alike; it enables the issuing of travel documents for complex journeys and allows flexible uses of these documents with minimal constraints. It is a very significant part of the worldwide air transport system and is of particular value to business travellers.

significant revenue and forced to incur higher costs in order to overcome the handicap imposed on it.

217. The Commission found that Aer Lingus had infringed the conditions governing participation in tariff consultations designed to ensure that they are compatible with Article 85 of the EEC Treaty. The applicable block exemption[2] requires airlines discussing tariffs with their competitors to interline with all other airlines operating intra-European services.

218. This decision is evidence of the Commission's determination to act against airlines holding dominant positions, if they attempt to prevent the development or maintenance of competition. At a time when the European air transport industry is being liberalized, airlines making use of the new opportunities for competition should be given a fair chance to develop and sustain their challenge to established carriers.

Airlines holding dominant positions should not penalize this competition. They should not withhold facilities which the industry traditionally provides to all other airlines, and they should take care to compete strictly on the merits of their own services.

The Commission consequently took the view that Aer Lingus should resume its interline relationship with British Midland. However, it also accepted that new entrants should not be able to rely indefinitely on frequencies and services provided by their competitors, but must be encouraged to develop their own frequencies and services. Therefore the duration of a duty to interline should be limited to the time period which was objectively necessary for a competitor to become established on the market. Taking into account the fact that three years had lapsed since British Midland started its new services, the duty to interline imposed by the decision was limited to two years, subject to review in the light of the development of competition on the relevant route.

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2 Article 4 of Commission Regulation (EEC) No 2671/88 of 26 July 1988, OJ L 239, 30.8.1988, since replaced by Article 3 of Commission Regulation (EEC) No 8491/90 of 5 December 1990, OJ L 10, 15.1.1991.

<T6> (b) B&I/Sealink, Holyhead

219. Following a complaint by B&I (an Irish ferry operator), the Commission found that Sealink (a British ferry operator which is also the port authority at Holyhead, Wales) had, prima facie, abused its dominant position in breach of Article 86 of the EEC Treaty. In its capacity as port authority at Holyhead, Sealink permitted changes to its own ferry sailing times which might have caused serious damage to B&I. The Commission ordered interim measures against Sealink which obliged it to alter some of its sailing times. In this context it is important to stress that a port, an airport or any other facility, even if it is not itself a substantial part of the common market, may be considered as such in so far as reasonable access to the facility is indispensable for the exploitation of a transport route which is substantial for the purposes of the application of Article 86 of the EEC Treaty. The Commission recalls that, in the case British Midland/Aer Lingus (mentioned above), it was the route that was taken into account and not solely Heathrow airport.

Sealink and B&I use different berths at Holyhead, B&I using a berth in the mouth of the harbour. Due to the port's limitations, when a Sealink vessel passes a moored B&I ship, the water in the harbour rises. As a result, the ramp to the B&I ship must be disconnected for safety reasons and loading or unloading of the vessel is interrupted.

In October 1991 Sealink informed B&I that it intended to introduce new sailing times on 9 January 1992; which would involve the movement of two ships past the B&I vessel while it was in its berth. In the past only one vessel passed a B&I ferry while it was loading. B&I asked the Commission to adopt interim measures to prevent the implementation of Sealink's new schedule on the grounds that its services would be severely disrupted due to the reduced time available in which to carry out its loading and unloading operations.

The Commission considered that a company which both owns and uses an essential facility - in this case a port - should not grant its competitors access on terms less favourable than those which it gives its own services. This consequence of Article 86 is of essential importance in the context of deregulation, which regularly raises the problem of market access for new entrants. On 11 June the Commission adopted a decision ordering Sealink

either to return to its original schedule or to adopt any other schedule which would not lead to two vessels passing a B&I ferry during loading. The aim of the interim measures was to prevent irreparable damage to B&I's business while the Commission continued its examination of the case, and the duration of the interim measures was therefore limited to the peak summer season (27 September) or until the date of coming into force of any schedule agreed by both parties. The parties subsequently reached an agreement and notified the Commission accordingly on 8 July. As a result of this agreement, Sealink withdrew its application for suspension and annulment of the decision, which it had made to the Court of First Instance.

<T6> (c) Gillette/Wilkinson Sword

220. The Commission adopted a decision under Articles 85(1) and 86 of the EEC Treaty(3) ordering Gillette, the US razor group, to dispose of its interest in Eemland, the parent company of Wilkinson Sword and Gillette's main competitor in the market for wet shaving products. Gillette was also required to reassign to Eemland the Wilkinson Sword businesses in all the EFTA countries as well as the former German Democratic Republic, Czechoslovakia, Hungary, Poland, Turkey and the former Yugoslavia. Gillette was given a fixed period from the adoption of the decision to carry out the disposal and reassignment.

Gillette occupies a dominant position in the Community's wet shaving market, which is a highly oligopolistic market in which the combined market shares of Gillette and Wilkinson amounted to nearly 85%. The decision found that Gillette's holding in Wilkinson Sword, its principal competitor in the Community, constituted an abuse of its dominant position. Gillette, which had acquired all of Wilkinson's businesses before being obliged to dispose of them, acquired a substantial equity stake in Eemland as well as becoming one of its principal creditors. Though lacking many of the usual minority shareholder's rights, Gillette acquired pre-emption and conversion rights and options in Eemland, which prompted the Commission to conclude that Gillette would be able to exercise some influence over the commercial policy of Eemland. The change in the structure of the wet shaving market brought about by the link between Gillette and Eemland would weaken competition. Consequently, Gillette's involvement in the overall arrangement constituted an abuse of its dominant position.

Furthermore, the agreements between Gillette and Eemland relating to the geographical separation of the Wilkinson Sword trade mark between the Community and neighbouring countries would have necessitated commercial cooperation between the respective owners of the trade mark. There were also supply arrangements between the parties whereby Gillette would obtain Wilkinson Sword products from Eemland for sale outside the Community, and this would have constituted another element of cooperation.

(3) Decision of 10 November 1992, not yet published. IP(92)909, 11.11.1992.

<T3> C. Merger control

221. A number of new points were established this year in implementing the Merger Control Regulation. As part of its policy of transparency, the Commission is therefore giving a detailed analysis of the decisions taken in 1992.

222. The analysis of a case implies dealing with two questions: first of all, one has to assess whether the notified operation falls within the scope of application of the Regulation; secondly, one has to assess its compatibility with the common market i.e. to determine whether or not it creates or strengthens a dominant position as a result of which effective competition would be significantly impeded in the common market.

<T4> §1. Scope of application

<T5> 1. Community dimension (Article 1)

223. The Commission continued its established practice of considering the economic substance of an operation rather than accepting the chosen legal form as decisive. In Eucom/Digital, the notified operation was the creation of a new company to be jointly controlled by Digital and Eucom. However, Eucom is a holding company that develops specific value added network services by cooperating with other partners or by investing in existing companies. It is a 50/50 joint venture between France Télécom and Deutsche Bundespost Telekom. The Commission therefore looked through Eucom and treated its two parent companies as undertakings concerned within the meaning of Article 1. Theirs were therefore the turnovers to be taken into account to calculate whether the concentration had a Community dimension.

<T5> 2. Calculation of turnover thresholds (Article 5)

224. The Regulation only applies if the undertakings concerned reach a certain turnover. There are special rules in Article 5(3) for the calculation of the equivalent of turnover for credit and other financial institutions and for insurance undertakings. In Torras/Sarrio, the Commission concluded that the holding of fixed interest securities, which was part of the investment activity of the Kuwait Investment Office, should be treated as a means of giving credit to third parties. Consequently, fixed interest

securities constitute loans and advances within the meaning of Article 5(3) and should therefore be included when turnover is calculated. On the other hand, in GECC/Avis, it was held that Article 5(3) does not apply to operating leases under which Avis provided full service vehicle contract hire. These leases, under which the risk of ownership is retained by the lessor and ownership is not transferred to the lessee at the end of the lease term, were distinguished from financial leases which function primarily as a loan. For interbank lending, the Commission decided in Honk Kong & Shanghai Bank/Midland Bank that loans and advances should be attributed geographically to the country in which the borrowing bank branch is located even though in risk assessment, which is at the heart of lending decisions, banks take into account the place of incorporation of the borrowing bank. The location of the branch of the bank to which the loan is made is presumptively the place at which the loan will be used.

225. The second subparagraph of Article 5(2) provides that two or more transactions which take place within a two-year period between the same persons or undertakings are to be treated, for the purpose of calculating turnovers, as one and the same concentration arising on the date of the last transaction. It was invoked for the first time in the Volvo/Lex(2) case. Volvo acquired the operating assets of an Irish subsidiary of Lex, having previously acquired the assets of its UK subsidiary.(1)

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

226. The Commission has continued to develop its practice in defining a concentration. In particular, the Commission has been mindful of the need to clarify the distinction between concentrative joint ventures which fall under the Merger Regulation and cooperative joint ventures which are to be examined under Articles 85 and 86 of the Treaty.(2) There is a concentration when an undertaking acquires sole control of another undertaking, or of a joint venture which it previously controlled jointly with another party; or when several undertakings jointly acquire control of an undertaking, or create one.

(1) See Volvo/Lex decided on 21.5.1992 and Volvo/Lex(2) decided on 3.9.1992.
(2) See the notice on concentrative and cooperative joint ventures, Twentieth Competition Report, p. 304.

<T6> (a) Sole control

227. The acquisition of more than half of the capital of a company is the usual means of acquiring sole control. However, it is possible for a minority shareholder to exercise sole control. In CCIE/GTE, the acquiring company obtained only 19% of the voting rights in the target company, but in addition it will have a permanent seat on the board and will appoint the Chairman and CEO. The director appointed by the acquirer will have a veto over all significant decisions of the target company and it was therefore concluded that the acquiring company will be able to exercise sole control.

228. In ABB/Brel, sole control was obtained by ABB which had previously had joint control of Brel. There was thus a change of control which was treated as a concentration following established practice.(3) This practice was also applied in Solvay-Laporte/Interox where the division of a joint venture was considered to be two concentrations. Each parent company took over a distinct part of the jointly controlled business, thereby acquiring sole control of it. The Commission reached its conclusion notwithstanding that the operation was governed by one master agreement which related to the division of a single undertaking (i.e. the joint venture). The economic and legal result of the operation is that two independent undertakings each move from a position of joint to sole control for two different sets of specific assets and products. The Commission noted in its decision that there may be situations where the division of an undertaking between its owners could give rise to an operation that might be considered as one whole.(4)

229. Several operations were considered as one single concentration in Mannesmann/Hoesch. The parties brought together their precision steel tube business through the establishment of a joint venture to which they transferred their existing business, and Mannesmann acquired a 50% holding in an existing Hoesch subsidiary. In addition Hoesch transferred ownership of one of its subsidiaries to Mannesmann. Since these operations were carried out by the same parties and relate to the same sectors of an industry with each operation representing part of an overall agreement between the parties to restructure their steel tube activities, they were treated as one single concentration.

(3) See ICI/Tioxide, Twentieth Competition Report, point 149.
(4) See Campsa, Twenty-first Competition Report, p.352.

<T6> (b) Joint control

230. The most common situation of joint control is where two undertakings each hold half of the share capital of a joint venture, and there is no shareholders' agreement which confers control on either of the undertakings. If there is an agreement between the shareholders, joint control can be established despite unequal shareholdings. In Thomas Cook/LTU/West LB, the two shareholders had respectively 90% and 10% of the shares of Thomas Cook, but they also entered into a shareholders' agreement which provides that the consent of both parties is required for important strategic decisions relating to the joint venture, which the Commission therefore concluded was jointly controlled. Likewise in Eucom/Digital, a shareholding of 74.9/25.1% was accompanied by a shareholders' agreement providing for joint control.(5) By way of contrast a 59.5/40.5% split in Pepsico/General Mills did not allow the minority shareholder to exercise joint control. It is possible, of course, for more than two shareholders to exercise joint control.(6)

These cases are to be distinguished from a situation where there can be changing alliances in the decision-making process, as in Eureko and Koipe-Tabacalera/Elosua. Although the matter was not decisive in either of these cases, changing alliances are generally inconsistent with the existence of a mecanism or a procedure guaranteeing joint control.

In a pre-existing joint venture company where there is a change of control, as in James River/Rayne, with one shareholder being replaced by a new shareholder, the transaction constitutes a concentration since the new shareholder acquires joint control.

<T6> (c) Concentrative joint venture

The two conditions which must be fulfilled under the second subparagraph of Article 3(2) for a joint venture to be regarded as concentrative are that it must perform on a lasting basis all the functions of an autonomous economic entity and that it must not give rise to coordination of the competitive behaviour of the parties amongst themselves or between them and the joint venture. These two conditions are illustrated below. If they are not

(5) See also Ahold/Jerónimo Martins, Air France/Sabena, British Airways/TAT, Ericsson/Ascom, Linde/Fiat, Northern Telecom/Matra and Rhône-Poulenc/SNIA.

(6) See Avesta/British Steel/NCC/AGA/Alex Johnson.

fulfilled, the joint venture is not a new competitor on the market, but rather a vehicle through which two competitors cooperate, and may therefore fall under Article 85.

<T6> (i) Full-function joint venture established on a lasting basis

In Elf Atochem/Rohm & Haas, the parties set up a new joint venture company to which they transferred their activities relating to the production of acrylic glass. The operation was treated as a merger because the joint venture constituted an autonomous economic entity for the following reasons:

- the physical and human resources necessary for the production and sale of the product where transferred to the joint venture and the construction of a new factory was to start soon thereafter;
- the parent companies granted exclusive and irrevocable licences to the joint venture in respect of all the intellectual property rights needed for the production of the acrylic glass concerned;
- the joint venture will have its own research and development facilities;
- the joint venture will have its own distribution network;
- there will be a guaranteed supply of raw materials for the joint venture, but it will be free to choose its suppliers;
- the agreement is for a period of 99 years.

By contrast in Flachglas/Vegla, the Commission concluded that the proposed joint venture company set up to recycle scrap glass would not be an independent buyer or seller on the market in the future. It would only perform an auxilliary function for its parent companies and, because it could not be considered as an autonomous economic entity, the operation did not constitute a merger.

<T6> (ii) Absence of coordination

Where the parent companies setting up a joint venture will not be active in its markets, and remain neither actual nor potential competitors of each other or of the joint venture, there will normally be no coordination of competitive behaviour so the operation can be treated as a concentration. For example, in Péchiney/Viag, both parent companies transferred their existing cored wire business to the joint venture, including the means of production, thereby making their re-entry into this market very unlikely. The joint venture operation was therefore a concentration. Likewise in Saab/Ericsson,

both parties pooled their space activity in the joint venture and withdrew on a lasting basis from this market. In Ahold/Jerónimo Martins, concerning food retailing in Portugal, one of the parent companies, Ahold, retained important food retailing operations in other geographic markets (the Netherlands and the USA) but had no operations in Portugal. The Commission concluded that since there is no interaction between these different geographic markets, there was no risk of coordination of competitive behaviour between Ahold and the joint venture in the Portuguese food retail market. Furthermore, there were no indications that either of the parent companies could enter this market independently in the foreseeable future. Their agreement not to operate in the Portuguese general food retail market except through the joint venture was additional evidence of their permanent withdrawal from this market.(7) The operation was therefore a concentration.

A limited and insignificant presence of the parent companies on the same product or geographic market as the joint venture is generally not sufficient to bring about coordination and so does not exclude the application of the Merger Regulation.(8) The Commission also considers any vertical relationships between the parties and any possible spill-over effects on markets retained by the parent companies. In James River/Rayne, the joint venture was active in the tissue paper market and James River retained small subsidiaries in the Community which produce printing and writing paper and a 50% stake in a joint venture which manufactures table top products (paper plates and cups) and Rayne retained a company producing packaging material. The Commission took the view that it is improbable that the parties' limited presence on different neighbouring markets would result in concerted market strategies in the paper sector. In Saab/Ericsson, it was concluded that there would be no appreciable spill-over effects from the joint venture in the space business even though the parent-companies remain active in the electronic industry and the defence sector. Vertical relationships were examined in Volvo/Atlas where between 5% and 11% of the products produced by the joint venture were sold to its parent companies, on arm's length terms. Since these sales represent less than 0.05% and 0.5% of the purchases of Volvo and Atlas respectively, the vertical relationships were considered to be insignificant.

(7) See also Ericsson/Ascom and Thomas Cook/LTU/West LB.
(8) See Del Monte/Royal Foods/Anglo-American.

The Commission has observed in a number of cases that where one parent company remains a significant player on the same market as the joint venture, and assumes a leading role in the management of the joint venture, the operation will be treated as a concentration. In such cases, it would not be appropriate to be concerned about any coordination of the competitive behaviour of this parent company and the joint venture because there is no room for the coordination of the competitive behaviour of undertakings which remain independent. For example, in Linde/Fiat, a joint venture was established in the field of forklift trucks and warehouse equipment. It was considered highly unlikely that Fiat would re-enter the markets of the joint venture since it would not be economically reasonable for it to do so. However, Linde continues to operate on these markets and will assume the overall responsibility for the commercial strategy and the day-to-day management of the joint venture, since it has considerable experience and expertise in the markets concerned. Linde and the joint venture are present not only on the same product markets but also on the same geographic market, but in view of the leading role which Linde will have in the joint venture, the operation was considered to be a concentration.

In Ericsson/Kolbe, the parties established a joint venture in the field of public digital transmission. Kolbe transferred all its business in this field to the joint venture, but Ericsson remains a competitor of the joint venture and will not withdraw from the transmission markets. The Commission came to the view that Ericsson will assume the overall industrial responsibility for the joint venture, and that Kolbe's interest in the joint venture company will become financial rather than commercial in nature over time. Consequently, it appears that there is no room for the coordination of the competitive behaviour of undertakings which remain independent within the meaning of Article 3(2) of the Regulation and the operation was treated as a concentration.(9)

The Commission also examined a number of joint venture operations which it decided did not fall within the scope of the Merger Regulation because the operation had as its object or effect the coordination of competitive behaviour. In most of these cases, the parent companies remained actual or potential competitors of each other and the joint venture. So in Sunrise, for example, the Commission concluded that the joint venture arrangement would

(9) See also Air France/Sabena, British Airways/TAT, Ericsson/Ascom, Fortis/La Caixa, Northern Telecom/Matra.

give rise to coordination in the sale of television advertising between the regional broadcaster parents and between them and Sunrise, the joint venture. Even at the lowest regional level, the arrangement linked the principal commercial broadcasters in the London region.

In Herba/IRR, the parties established a joint venture to produce and sell rice. One of the parent companies, Herba, remains a competitor of the joint venture in the rice market, but the other parent, IRR, currently has no rice interests. However, IRR is part of the Ferruzzi group, which has considerable interests in the food sector, where new entry is relatively easy, and therefore it was considered to be a potential competitor of the joint venture and Herba. For this reason the joint venture was considered to fall outside the scope of the Merger Regulation.(10)

In BSN-Nestlé/Cokoladovny, the Commission considered the risk of vertical coordination between the parent companies and the joint venture. BSN, which is a major producer of biscuits, and Nestlé, which has a significant position in the production of chocolate, acquired joint control of Cokoladovny, which manufactures and markets sugared chocolate biscuits as well as sugared and chocolate confectionery in Czechoslovakia. The Commission took into account the similarity of the respective products concerned and the prospective opening of the markets of the Community and the markets of Central and Eastern Europe and concluded that it could not rule out that the parents may coordinate their competitive behaviour with that of the joint venture. Consequently, the operation did not fall under the Merger Regulation.

(10) See also Eureko, Koipe-Tabacalera/Elosua and VTG/BPTL.

<T4> §2. Appraisal of concentrations (Article 2)

231. Once an operation has been defined as a concentration within the meaning of the Regulation, its compatibility with the common market must be assessed.This 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, in particular the question of dominance. The relevant product and geographic markets determine the scope within which the market power of the new entity must be assessed. The Commission often leaves 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> 1. Determination of the relevant product market

232. The various decisions illustrate that the Commission has employed two basic criteria for determining product markets: substitutability and conditions of competition.

<T6> (a) Substitutability

233. The Commission has employed the 'classical' criterion of demand-side substitutability whereby a product market comprises "all those products which are regarded as interchangeable or substitutable by the consumer, by reasons of the products' characteristics, their prices and their intended use". In Du Pont/ICI, the Commission held that there was a distinct market for nylon fibres, as against other fibres, for the purpose of carpet manufacture, given the superior performance characteristics of nylon and its substantially higher price. Again, in Nestlé/Perrier, the Commission concluded that the market for bottled source waters was distinct from that for soft drinks, in view of substantial differences in consumption patterns and present and historic price levels, despite a limited substitutability in terms of functionality.(11)

234. The Commission has also considered the implications of supply-side substitutability, that is, in particular, whether suppliers have the facility to switch production to the product field in question.

(11) See also Torras/Sarrio, Henkel/Nobel, Linde/Fiat and Air France/Sabena.

In some cases, notably Du Pont/ICI and Nestlé/Perrier, the Commission has cited the absence of supply-side substitutability, in conjunction with the absence of demand-side substitutability, as evidence of a narrow product market.

In other cases, the Commission has considered situations in which products have been substitutable from the point of view of suppliers, but not from the point of view of customers (demand). In Torras/Sarrio, coated papers were considered to be a separate market from uncoated papers because of limited demand-side substitutability, even though it was relatively easy for a producer to switch from one to the other,(12) the latter fact being still relevant for the assessment of dominance. However, in Steetley/Tarmac, despite the fact that substitutability between different types of bricks regarding end-use was limited, the Commission held that it was inappropriate to distinguish separate markets because technical and marketing costs incurred by producers in switching production would not be significant.(13)

<T6> (b) Conditions of competition

235. Products which are technically substitutable may nevertheless be classified as belonging to separate markets in view of different structures of supply or demand; conversely, quite heterogeneous products may be considered as a group when marketed along the same channel of distribution.

In Accor/Wagons-Lits, the Commission considered motorway restaurants to constitute a separate market from other types of restaurant since, on the demand-side, customers are restricted to motorway travellers and, on the supply-side, quite distinct operating conditions apply.(14)

In Inchcape/IEP, the Commission decided that the product market concerned was the wholesale motor vehicle distribution service. Since, for a given marque, a model range covering different market segments (e.g. small, medium and large) is normally distributed along the same channel, the Commission

(12) See also Péchiney/Viag.
(13) See also Elf Atochem/Rohm & Haas and Avesta/British Steel/NECC/AGA/Axel Johnson.
(14) See also Virgin/EMI and Thomas Cook/LTU/West LB.

considered it unnecessary to analyse distribution channels by product market segments of vehicles distributed.(15)

<T5> 2. Determination of the relevant geographic market

236. 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 assessment. It is important to stress that the assessment to be made is a dynamic one, taking into account in particular the effect of market integration.

237. The Commission 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'.

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 general indicators, and factors exerting a possible determining influence on market delineation:

- geographical distribution of market shares(16)
- geographical distribution of relative prices(17)
- geographical location of major suppliers(18)
- shipment patterns(19)
- cross-border imports/exports(20)
- barriers to entry (fiscal, technical, regulatory, cultural)(21)

(15) See also Promodes/BRMC.
(16) See Solvay-Laporte/Interox, Péchiney/Viag and Nestlé/Perrier.
(17) See Nestlé/Perrier, Solvay-Laporte/Interox and Generali/BCHA.
(18) See Torras/Sarrio, Thomas Cook/LTU/West LB, Linde/Fiat and Sextant/BGT-VDO.
(19) See Steetley/Tarmac, Torras/Sarrio, Volvo/Atlas and Elf Atochem/Rohm & Haas.
(20) See Nestlé/Perrier, Du Pont/ICI, Torras/Sarrio, Solvay-Laporte/Interox, Elf Atochem/Rohm & Haas and Rhône-Poulenc/SNIA.
(21) See Du Pont/ICI, Elf Atochem/Rohm & Haas, Rhône-Poulenc/SNIA, Linde/Fiat, Volvo/Atlas, Accor/Wagons-Lits, Thomas Cook/LTU/West LB and Waste Management International plc/SAE.

- consumer preferences(22)
- transport costs(23)
- distribution systems(24)
- product differentiation (brands)(25)
- the impact of forthcoming changes, e.g. in the technical or regulatory environment.(26)

238. It may in general be observed that in the decisions the extent of the geographic market was determined by certain of the above factors, or certain combinations of these factors.

239. Thus, transport costs or distribution systems were determining factors in the establishment, of local markets. In Steetley/Tarmac, local markets for bricks were established, since bricks are both heavy and bulky and transport represents a signficiant percentage of total selling price. In Promodes/BRMC, the geographic market for retail distribution of consumer food and related products was held to be local, since consumers are unwilling to travel more than a certain distance to make such purchases.(27) In Waste Management International plc/SAE, the market for the disposal of non-hazardous waste was deemed to be probably local in nature, given high transport costs, and also in view of national and local regulatory constraints.

240. Distribution systems and transport costs are also important in the determination of national markets. In Inchcape/IEP (contract hire and leasing of passenger cars) and Torras/Sarrio (paper distribution), the necessity for close proximity between supplier and customer was held to indicate markets at most national in scope.(28) In Nestlé/Perrier, the fact that bottled water is a low value/high volume product which cannot bear transport costs over long distances was among the factors limiting the relevant geographic market

(22) See Nestlé/Perrier, Solvay-Laporte/Interox, BTR/Pirelli, Accor/Wagons-Lits, Promodes/BRMC, Thomas Cook/LTU/West LB, Generali/BCHA, Du Pont/ICI, Inchcape/IEP and Sextant/BGT-VDO.
(23) See Nestlé/Perrier, Steetley/Tarmac, Elf Atochem/Rohm & Haas, Du Pont/ICI, Torras/Sarrio, Volvo/Atlas, Péchiney/Viag, BTR/Pirelli and Waste Management International plc/SAE.
(24) See Nestlé/Perrier, Torras/Sarrio, Inchape/IEP, Generali/BCHA, Promodes/BRMC and SPAR/Dansk Supermarket.
(25) See Nestlé/Perrier and Pepsico/General Mills.
(26) See Mannesmann/Hoesch.
(27) See also SPAR/Dansk Supermarket and Avesta/British Steel/NCC/AGA/Axel Johnson.
(28) See also Thomas Cook/LTU/West LB and Generali/BCHA.

to France, combined with the fact that regulations require the product to be bottled at the site of production.

In the decisions, other factors which determined national markets were barriers to entry, consumer preferences and product differentiation (national brands). Thus, in Accor/Wagons-Lits, the relevant market for motorway restaurants was held to be France in view of the regulatory barriers which made it more difficult for non-French enterprises to operate in this sector. In Nestlé/Perrier, different consumer preferences for bottled water as between different countries was among the factors determining a market limited to France.(29) Again, in Nestlé/Perrier, the existence of long-established brands of bottled water indicated a national market.(30)

241. The existence of Community-wide markets was established in several decisions, and such markets were normally characterized by a combination of some of the following factors:

- a high level of intra-Community shipments,
- the presence of major suppliers in several Member States, with significant market shares,
- little variation in price between Member States,
- European-wide purchasing policies on the part of consumers,
- relatively low transport costs,
- relatively low trade levels between the Community and the rest of the world, and the existence of an EC external tariff.

Thus, for example, in Solvay-Laporte/Interox, the Commission found that in the persalts market, all major suppliers had significant market shares in several Member States, there was a significant degree of market interpenetration, large customers had a pan-European centralized purchasing policy, there was little price variation between Member States, but there was a low level of imports into the Community which levies a 7% external import tariff.(31)

(29) See also Thomas Cook/LTU/West LB, Accor/Wagons-Lits, Pepsico/General Mills and Generali/BCHA.
(30) See also Pepsico/General Mills.
(31) See also Torras/Sarrio, Elf Atochem/Rohm & Haas, Péchiney/Viag, Volvo/Atlas, Linde/Fiat, Rhône-Poulenc/SNIA, BTR/Pirelli and Du Pont/ICI.

242. A world market for equipment for civil aircraft was found in Sextant/BGT-VDO, given the physical presence or activities of the same suppliers throughout the world, and a worldwide purchasing policy on the part of aircraft manufacturers.

243. In its analysis of conditions of competition in geographic markets, the Commission has taken into account future structural developments, in particular the likely elimination of remaining barriers to trade. This dynamic approach must be balanced with the potential damage to competition and consumers.

Thus, in BTR/Pirelli, the Commission held that there was a Community market for rubber-based car components despite a transitional import duty currently levied by Spain, which will be abolished from the beginning of 1993. However, in Accor/Wagons-Lits, the Commission decided that the effects of the Community public procurement Directive would not be sufficient in the short-term to warrant a geographic market definition of motorway restaurants wider than France. In Mannesmann/Hoesch, the Commission held that the effectiveness of the Community public procurement Directive would increase with the completion of the technical harmonization process for gas line pipes, but that in the short-term, it was proper to relate the assessment of the concentration to the German market.(32)

<T5> 3. Assessment of compatibility

244. In 1992 the Commission authorized 47 notified mergers in the first phase of proceedings (Article 6(1)(b) decisions). In four cases, it had serious doubts about the compatibility of the merger with the common market and started in-depth examination known as second phase proceedings. Out of the 47 phase I cases, certain mergers(33) raised serious doubts and were cleared only after legally binding and irrevocable commitments were entered into by the undertakings concerned vis-à-vis the Commission so as to change the factual basis on which the merger could be assessed and declared compatible with the common market. In phase II, no prohibition decision was adopted in 1992. The Commission authorized [one] merger(34) without attaching conditions and obligations to its decision (Article 8(2) subparagraph 1

(32) See also ABB/Brel.
(33) See Grand Metropolitan/Cinzano, Ifint/Exor, Elf Aquitaine/Minol, Air France/Sabena and British Airways/TAT.
(34) See Mannesmann/Hoesch.

decision). In three other cases, the Commission concluded that the creation of a dominant position would result from the merger. Dominant positions were found in Accor/Wagons-Lits (catering services on motorways in France), Nestlé/Perrier (sale of bottled water in France) and Du Pont/ICI (sale of nylon carpet fibres in the EEC). However, such dominant positions were removed by modifications of the original concentration plan which enabled the Commission to adopt a declaration of compatibility subject to certain conditions and obligations (Article 8(2) subparagraph 2 decisions). In one case (Siemens/Philips), the parties abandoned the transaction after the initiation of proceedings.

245. In the Nestlé/Perrier case, the Commission interpreted for the first time Article 2(3) of the Merger Regulation as covering both single firm and joint oligopolistic dominance. This interpretation is based on the principle that Article 3(f) of the EEC Treaty and Article 2(3) of the Merger Regulation pursue the maintainance of effective competition. Effective competition may be significantly impeded as the result of the exercise of market power by either one firm behaving alone or more firms behaving jointly to an appreciable extent independently of other competitors and of consumers. If oligopolistic dominance was not covered by the Merger Regulation, this would create a loophole in the fundamental Treaty objective of maintaining effective competition at all times in order not to jeopardize the proper functioning of the common market.

246. In its assessment of mergers, the Commission generally follows the classical four-step analysis, i.e.:

(i) the market position of the merged firm (market share and other advantages over competitors);
(ii) the structure of supply (the strength of remaining established competition);
(iii) the structure of demand (the buying power of customers);
(iv) the potential competition (new market entry or entry by the manufacturer of a neighbouring product or capacity expansion by established competitors).

247. For the assessment of single firm dominance, the level of the market share of the merged firm is a significant, but not determinative factor. The importance of the market share varies according to the structure of the

market in relation to supply, demand and future potential competition. In 1992 the highest market share accepted for clearance amounted to 48% in the whole of the Community and 79% in one Member State. The lowest market share giving rise to a creation of dominance was 43% in the EEC and 53% in one Member State.

248. For the assessment of oligopolistic dominance, market shares are relevant for the determination of the degree of concentration of the market concerned, which is one important factor in the analysis of the question of whether or not, in conjunction with all other market structures and conditions, the exercise of joint market power by the merged firm and a limited number of other firms is possible and likely to occur.

249. The Commission also examines the past and likely future evolution of market shares. The strength of the merged firm differs according to whether its market share is increasing, stable, declining(35) or uncertain, for example due to the size of the contracts or to dual or triple sourcing policy of buyers.(36) The strength of the merged firm also increases or decreases in direct proportion to the gap between its market share and that of the next competitor. Equally, the closer the eliminated competitor is in terms of competition (identical products, similar or better quality, lower prices, high volume of sales), the stronger is the reduction of competition and the increase in power for the merged firm.(37)

250. The assessment also has to take into account other competitive advantages or disadvantages of the merged firm compared to remaining competitors such as: the financial power of the merged firm,(38) scale economies,(39) other cost advantages,(40) product range,(41) access to technology,(42) position in terms of quality and technology,(43) brand image resulting from long standing and high advertising,(44) vertical integration,(45) etc. Without holding such competitive advantages against

(35) See SPAR/Dansk Supermarket, Torras/Sarrio, Accor/Wagons-Lits, Péchiney/Viag, Elf Acquitaine/Minol.
(36) ABB/BREL and Du Pont/ICI.
(37) See Du Pont/ICI and Nestlé/Perrier.
(38) See Accor/Wagons-Lits and Laporte/Interox.
(39) See Accor/Wagons-Lits.
(40) See Du Pont/ICI.
(41) See Nestlé/Perrier, Du Pont/ICI.
(42) See Laporte/Interox.
(43) See Du Pont/ICI.
(44) See Nestlé/Perrier, Du Pont/ICI.
(45) See Du Pont/ICI.

the merged firm, one has to take into account that they can contribute to the erection of entry barriers for other competitors and therefore lead to the creation of market power in the hands of the merged firm. If this is not the case and barriers to entry are low, these competitive advantages are generally pro-competitive and, under the pressure of competition, the merged firm will have to allow consumers a fair share of the resulting benefit.

251. The three factors which can create a countervailing power by bringing competitive pressure to bear on the merged firm are remaining established competition, buying power and potential competition. These three factors were carefully examined in all major cases decided in 1992. They will be highlighted in the following summary of individual cases. Hereafter seven cases will be described, three which did not create any dominance and four which created either single firm or oligopolistic dominance.

<T6> (a) Cases where no dominance was created

<T7> . THORN EMI/VIRGIN (Phase I case)

252. This case concerned the acquisition by Thorn EMI, one of the five major record companies worldwide, of Virgin, a competing record company. The main effects of this merger lay in the markets of music recording and music publishing.

Given the market share of the merged firm and the presence of other major competitors, the merger raised no problem of single firm dominance in either music recording or music publishing. However, the structural features of the market for recorded music (90% pop) could indicate a situation of oligopolistic dominance among the five major record companies, i.e. Thorn EMI, Sony, Polygram, Warner and Bertelsmann (BMG). In order to address this question, the Commission examined both the intensity of actual and potential competition between these five companies and the actual and potential competition from outside that oligopoly.(46)

As to competition between the five major record companies, the Commission considered the following elements:

(46) See also Henkel/Nobel and Linde/Fiat.

- On the one hand:

  . High degree of concentration before the merger: the top five companies had a market share of 77% for the EEC as a whole and 70 to 80% in individual Member States. The merger increased this degree of concentration to 83% in the EEC and 70% to 95% in individual Member States.
  . The market shares of the five major companies were fairly comparable.
  . Their market shares have remained stable over the past and their combined market share, as a group, had increased at the expense of the smaller record companies.
  . There existed a number of cooperative agreements involving the five major companies relating to record compilations, distribution, electronic ordering and rack jobbing.

- On the other hand:

  . The market for recorded music is characterized by the heterogeneous nature and short life cycle of its products, the constant change in consumer preferences and the significance of individual artists or hit records to a record company's profitability rather than the development of brand loyalty to individual record labels on the part of the consumer.
  . The main parameters for competition in the market for recorded music are the promotion of records through advertising and the provision of a wide variety of artists and types of music through new releases and signing up new artists to meet the demand for constant changes in music tastes and fashion. Thus, the scope for price competition seemed to be limited.
  . The Commission also examined past market behaviour of the main participants in the market. There was no sign that the market was performing in an anti-competitive way.

As to competition from outside the oligopoly, the Commission observed the following elements:

- The smaller competitors lacked a large and varied collection of titles in their catalogues which provides the major record companies with a source of income enabling them to make higher investments and to take

higher risks in the investment in artists. Only the major companies are able to compete for major artists.

- Over the last five years, there had been numerous entrants to the record music business in the EEC but none had become a significant market force. However, MCA, a major record company, had started business in the United Kingdom, Ireland and Germany.
- The music recording industry has grown significantly in value (around 10% annually) and volume since the introduction of the compact disc. This growth rate is expected to continue at least in value terms.

On the basis of the above factors, in particular the nature of the products and the parameters of competition in the market concerned, the Commission concluded that the increase in the degree of concentration resulting from the merger would not, on its own, imply a perceptible lessening of competition in the market.

<T7> . RHÔNE POULENC/SNIA (Phase I case)

253. Rhône-Poulenc and SNIA created a joint venture for all their fibre activities used for carpets, textile applications and industrial applications.

In the field of <u>fibres for carpets</u>, the combined market share of the joint venture in the EEC (below 25%) and the market shares of two other competitors (Du Pont and ICI) which were similar in size to that of the joint venture led the Commission to the conclusion that no single firm dominance was created. However, since the three leading firms held approximately 66% of the EEC market for carpet fibres, the Commission also investigated the question of oligopolistic dominance. The Commission concluded that the structure of the market was such that parallel behaviour resulting from oligopolistic interdependency could not be expected for the following reasons:

- existence of a large variety of differentiated products;
- importance of innovation and development of new products to satisfy specific demands of carpet manufacturers;
- unequal position of the three leading firms: Du Pont and ICI enjoyed clear competitive advantages in R&D, product range and reputation for quality.

As a result of this market structure, oligopolistic interdependency between the three leading firms was not likely to occur.

In the field of fibres for textile and industrial applications, the joint venture would in each field of application achieve an important market share in the EEC (between 40 and 50%). However, there remained in each market at least one strong competitor with a market share of 20 to 30%. Furthermore, in both markets potential competition in the form of product substitution was very strong. Producers of carpet fibres use the same basic technology as producers of textile fibres or industrial fibres. A change of production from carpet fibres to these two other types of fibres could be carried out very rapidly (within less than one day) and at very low cost. Thus, a price increase in textile fibres or industrial fibres by the merged firm could provoke quick product substitution and thus make the price increase unprofitable. As a consequence, no single firm dominance could be created by the merger. Oligopolistic dominance was excluded for the same reasons as for carpet fibres.

<T7> . MANNESMANN/HOESCH (Phase II case)

254. Mannesmann and Hoesch created two joint ventures, one for their precision steel tube businesses and one for their non-precision steel tube businesses. The competition problem only arose in the sector of gas line pipes in Germany, the relevant geographic market. In that market, the parties held a very high market share (over 70%).

The next biggest competitor had a market share of below 15% and all other competitors were below 5%. However, among these competitors were important steel producers such as Klöckner, Hoogovens, Ilva, British Steel and Usinor Sacilor. The merged firm had no significant competitive advantages compared with these large West European competitors.

The demand was rather fragmented, but, given the high market share of the merged firm, the larger customers, e.g. the German gas utilities, have an incentive to seek alternative sources of supply by involving the major West European suppliers. They will also have an obligation to respect the requirements of the Public Procurement Directive, which enters into force on 1 January 1993 and which obliges the utilities to practise open and public tendering.

Entry into the German market of gas line tubes is at present still difficult due to legal and technical barriers resulting from different specification requirements. However, the incentives for future market entry or increased participation of West European suppliers in the German market were considered to be significant, in particular for the following reasons:

- high overcapacities for steel tubes throughout Europe,
- very high level of demand on the German market,
- entry into force of the Public Procurement Directive on 1 January 1993 followed by gradual technical harmonization,
- the potential competitors, i.e. Ilva, British Steel and Usinor Sacilor, are amongst the largest steel producers: they are already active in Germany on neighbouring tube markets and they already have regulatory approval for part of their product range,
- market entry does not involve substantial sunk costs.

Specific circumstances existed which led the Commission to take into account a longer period of time for the assessment of the impact of potential competition than in other cases. Although full harmonization of technical standards at European level will not be achieved before 1996, the Commission considered that the Community steel suppliers would anticipate the progressive structural change resulting from the implementation of the Public Procurement Directive in 1993 and the following harmonization of standards. Given these specific circumstances, the Commission considered that there existed a high probability that potential competition from West European suppliers would have a perceptible impact on the German market before full harmonization was completed.

On the basis of these elements, the Commission came to the conclusion that, even if there was a strong indication that the merger would create a dominant position at the outset of the concentration, this position would only subsist for a limited period of time because of the high probability of new competition which would quickly erode the position of the merged firm on the German market for gas line tubes.

This case exemplifies the importance of the dynamics of the single market, the effect of which will be to increase significantly potential competition, which is a factor to be included in order to qualify an assessment of dominance.

<T6> (b) Cases where single firm or oligopolistic dominance was created

<T7> . ACCOR/WAGONS-LITS (Phase II case)

255. This case concerned a public bid by Accor, a French group active in catering and hotel services, for the totality of the shares of Wagons-Lits, a Belgian group active in catering, hotel and tourist services. The merger created a dominant position of Accor only in the field of catering services on French motorways, a field which is composed of two separate markets, i.e. catering services stricto sensu and light catering services ("croissanteries" and light meals).

256. The merger would have raised Accor's market share to over 80% for catering services stricto sensu and to over 60% for light catering services. These market shares were not likely to decrease in the near future given the limited number of catering establishments on motorways and the long duration of the licenses for such establishments. Accor would also have had much stronger financial power than its competitors and would have improved its purchase power and its coverage of French motorways in terms of subsequent catering establishments.

Competitors were much smaller and very dispersed. No one exceeded a market share of 5%.

Barriers to entry were very considerable: legal barriers for establishment, long duration of licenses, heavy administrative burdens for small undertakings, limited number of motorways, uncertainty about the development of the French motorway network and difficulty for foreign firms to penetrate the French market.

Accor claimed that the merger contributed to the development of technical and economic progress, in particular through the modernization of certain activities. In reply to this claim, the Commission observed that:

- the claim of Accor was too vague;
- possible efficiencies resulting from the merger might be eliminated by increased costs resulting from the bigger size of the merged firm;
- the claimed technical and economic progress, if it existed, could be obtained by other means, and

- the dominant position of Accor was so substantial that it would have no incentive to pass the claimed efficiencies on to consumers.

All these elements led the Commission to the conclusion that the new firm would acquire a dominant position within the meaning of Article 2(3) of the Merger Regulation in respect of catering services on French motorways.

However, Accor entered into a commitment vis-à-vis the Commission to divest all the acquired activities of Wagons-Lits in the field of catering services on French motorways. Accor thus modified its original concentration plan in such a way that no addition of market shares occurred on the markets concerned. Therefore, the Commission declared the merger compatible with the common market subject to the obligation to divest within a fixed time period according to certain conditions agreed upon with the Commission.

<T7> . NESTLE/PERRIER (Phase II case)

257. This case concerned a public bid by the Swiss company Nestlé for the acquisition of 100% of the shares of Perrier, the leading supplier on the French bottled water market with various famous brands. Nestlé's bid was supported by BSN, the second main supplier on the French bottled water market. Prior to its bid, Nestlé had granted BSN an irrevocable option to acquire one of the main water sources of Perrier, i.e. the Volvic source, if Nestlé acquired control over Perrier. The acquisition of Perrier by Nestlé led to the elimination of the main supplier of bottled waters on the French market and to the sharing of Perrier's activities between BSN and Nestlé who were respectively the second and third supplier on that market.

Given the option granted to BSN, the Commission examined the proposed acquisition of Perrier on the basis of two possible situations: one where Volvic was not transferred to BSN and one where BSN was to acquire Volvic. The Commission came to the conclusion that if Volvic stayed with Nestlé, the acquisition of Perrier would create a single-firm dominant position, while if Volvic was sold to BSN, the acquisition of Perrier would create an oligopolistic dominant position exercised jointly by Nestlé and BSN.

Without the sale of Volvic to BSN, Nestlé would have acquired the power to behave alone to an appreciable extent independently of its competitors and its customers on the French bottled water market for the following reasons:

- acquisition of the leading supplier on the French water market owning by far the biggest capacity reserves and sales volumes and the biggest portfolio of well-known brands,
- a combined market share exceeding 50% in value and volume of the total French water market exceeding more than twice the market share of the next biggest competitor (BSN),
- the only other national supplier, BSN, was facing capacity restraints in the medium and long term which limited its ability to respond to an increase in demand in the future,
- other water suppliers were small regional suppliers which could not significantly constrain the scope of action of Nestlé,
- the buying power of retailers/wholesalers was limited because they would have been largely dependent on the well-known brands of Nestlé,
- there was no sign of price-constraining potential competition from newcomers which could quickly and effectively enter the French water market.

With the sale of Volvic to BSN, Nestlé and BSN would have acquired the power to behave jointly to an appreciable extent independently of their competitors and their customers on the French bottled water market. Before coming to this conclusion, the Commission examined the existing and likely future competition both between Nestlé and BSN and from outside this group of suppliers.

As to the competition between Nestlé and BSN, the Commission considered the following elements:

(a) the very high degree of concentration on the French bottled water market: two suppliers would hold 94.1% of the market for all mineral waters; their combined market shares were relatively stable over the last 5 years;

(b) the reduction of the number of national water suppliers from three to only two (duopoly);

(c) after the merger, the two remaining national suppliers would have had similar capacities and similar market shares: a symmetric duopoly in which there was a strong common interest and incentive to maximize profits by engaging in anti-competitive parallel behaviour;

(d) due to a low cross-price elasticity of demand between national mineral waters which enjoy a very high consumer loyalty and local spring waters, a small but significant price increase (for instance 5%) was not likely

to lead to losses in volume which would offset the result of the price increase; there was thus an incentive and possibility for Nestlé and BSN to jointly maintain high prices or even further increase prices because this would result in the maintenance or increase of total revenue and profits; this possibility had already been recognised by Perrier, Nestlé and BSN because they had constantly increased their prices in real and nominal terms in a parallel way since at least 1987 (past price parallelism); there were strong indications that prices for mineral water distributed by Perrier, BSN and Nestlé were already at a very high supra-competitive price level;

(e) neither Nestlé nor BSN had a significant cost advantage which could have given either one of them an incentive for aggressive competitive action vis-à-vis the other;

(f) in the bottled water market, no significant technological development could be expected which might quickly erode acquired market positions and reduce the interdependency between the two major suppliers by allowing effective competition on parameters other than price;

(g) the joint reaction of Nestlé and BSN to the bid of the Agnelli group and the agreement between Nestlé and BSN to share Perrier (sale of Volvic to BSN) were signs of cooperative rather than competitive behaviour by these two companies on the French water market;

(h) the high market transparency: there existed various practices which permit each supplier to follow and control the evolution of the market positions of the others.

From all these elements, the Commission concluded that already before the merger the French water market was characterized by a narrow oligopoly of three suppliers between whom price competition was considerably weakened and that the elimination of Perrier strongly increased the likelihood of anti-competitive parallel behaviour between Nestlé and BSN.

As to competition from outside the duopoly Nestlé/BSN, the Commission observed the following:

(a) imports to the French water market were negligeable (between 1-2%);

(b) local water suppliers were not able, at least not in the short term, to provide significant competition;

(c) retailers and wholesalers had some purchasing power due to their purchase volumes; however, this was only true to a degree for some of them. Moreover, it was counterbalanced by their dependency on the well-known brands, built up over years, of Nestlé and BSN;

(d) there existed significant barriers and risks to entering the French bottled water market for the following reasons:

- moderate growth rate of the French water market compared to other EEC markets,
- mature market in terms of number of brands and products; difficulty of introducing an additional brand in retail stores,
- established suppliers grant volume rebates linking the whole range of their products; this strategy raises barriers to entry for newcomers which would have to offer much higher rebates to induce retailers to sell their products,
- the high reputation of the established brands of Perrier, BSN and Nestlé:
- the establishment of a new brand is very costly, time-consuming and risky; in case of failure , all the investment is lost; moreover, newcomers cannot recuperate these costs on high current sales volumes,
- effective entry could only be made through the acquisition of a major source all of which were however foreclosed following the acquisition of Perrier by Nestlé and BSN,
- Nestlé and BSN had engaged in clear joint deterrence action vis-à-vis newcomers by jointly opposing the public bid of the Agnelli group and by sharing Perrier between themselves.

On the basis of all these elements, the Commission considered that there did not exist sufficiently strong potential competition from outside the duopoly. The Commission stressed that meaningful and effective potential competition supposed that entry could and would be likely to take place on a volume and price basis which would quickly and effectively constrain a price increase or prevent the maintenance of a supracompetitive price. The entry would have to occur within a time period short enough to deter the companies concerned from exploiting their market power.(47)

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(47) Compare with the test in the decision of Aérospatiale-Alenia/de Havilland : "strong evidence of high probability of strong and quick market entry."; see also Accor/Wagon-Lits, collective catering services in Germany and Spain : new entry was possible, likely and successful.

Given this market structure, the Commission concluded that the merger between Nestlé and Perrier, followed by the sale of Volvic to BSN, would create an oligopolistic dominant position enabling Nestlé and BSN to jointly maximize profits and to act to an appreciable extent independently of other competitors and of customers.

In order to avoid a prohibition decision, Nestlé entered into a commitment vis-à-vis the Commission by which it undertook to divest a number of sources and brands, the total of which will amount to 3 000 million litres water capacity. This capacity represents approximately 20% of the total capacity previously held by Nestlé, Perrier and BSN. The divestiture must be made to a strong purchaser to be approved by the Commission and create a viable competitor able to effectively compete with Nestlé and BSN on the French water market. Subject to the compliance with this commitment, the Commission declared the merger compatible with the common market. In case of failure to divest to a credible buyer, the Commission may revoke its decision in accordance with Article 8(5)(b).

<T7> . DU PONT/ICI (Phase II case)

258. This case concerned the acquisition by Du Pont, the world leader in the nylon industry, of the nylon activities of ICI, the leading European producer of nylon fibres. The merger raised a problem of dominance only in the field of nylon fibres used for carpets (EEC market).

After the merger, the new entity would have had an EEC market share exceeding 40%, which was about twice that of its next competitor, Rhône-Poulenc/SNIA. Du Pont and ICI also had a number of other competitive advantages such as:

- leading companies in terms of quality of products and technological development: they sell high-value branded fibres;
- both companies have a very large product range;
- both companies are integrated nylon fibre producers;
- Du Pont is the lowest cost producer in the world and one of the world's largest chemical companies.

ICI was Du Pont's closest competitor. The merger would thus lead to a considerable reduction of competition, in particular with regard to competition in product development.

The established competitors of Du Pont/ICI did not cover the whole range of fibres supplied by Du Pont and ICI and were not likely to develop a significantly broader range of high-quality fibres before a considerable period of time. Product differentiation is however a key element of competition in this market.

The customers, the European carpet manufacturers, were said to follow a strategy of multiple supply to avoid dependency on one supplier. Following the merger between Du Pont and ICI there could thus occur some shift of demand to another supplier. Some carpet manufacturers had also integrated backwards into nylon fibre production which gave them some buyer leverage.(48)

Potential competition from new entrants was unlikely. The industry is characterized by overcapacity. Over the last decade, there was no significant entry into the EC nylon fibre industry, which has undergone a trend of concentration with the exit of a number of firms. There was no indication that the very limited imports from outside the EEC (less than 5%) would increase in the foreseeable future. However, there was a certain degree of indirect competitive pressure on the merged firm arising from the retail price of carpets made from other fibres, in particular polypropylene fibres.

The Commission concluded on balance that, in spite of some constraint on Du Pont resulting in particular from Rhône-Poulenc/SNIA and the possibility for carpet manufacturers to switch to other suppliers, the merger would considerably reduce competition in product development which had existed between Du Pont and ICI before the merger. Since this competition is a key element in the market concerned, the Commission considered that it was reasonable to assume that the position of Du Pont after the merger would be such as to enable it to act to an appreciable extent independently of its competitors and customers.

In recognition of the Commission's concerns, Du Pont entered into commitments vis-à-vis the Commission by which it undertook:

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(48) See also BTR/Pirelli.

- to reserve capacity and to manufacture up to 12 Kt per annum of nylon fibre for a period of five years (renewable) for the benefit of an independent third party who must be a supplier of nylon fibres;
- to transfer to such third party a free-standing carpet research and development facility;
- to license exclusively or assign to such third party ICI's trademark "Timbrelle".

In the opinion of the Commission, the modifications of the original concentration plan would enable a third party to replace ICI partially as a supplier of high-quality fibres. The transfer of the research and development facility would also significantly improve the competitiveness of the third party, in particular as regards its product range and future product development. This will substantially reduce the likelihood that Du Pont could be able to determine alone the degree of product development and innovation in the market. The Commission thus cleared the merger subject to the fulfilment by Du Pont of its commitments.

<T7> . AIR FRANCE/SABENA (Phase I case)

259. This case concerned the acquisition of 37.58% of the shares of Sabena by Air France giving the latter joint control with the Belgian State over Sabena. The competition problems arose only in respect of certain air transport routes and in respect of the planned creation of a "hub and spoke" basis at the Belgian airport Zaventem.

The merger would have created a monopoly on three routes between Belgium and France: Brussels-Lyon, Brussels-Nice and Brussels-Paris. This monopoly was not likely to change in the near future for the following reasons:

- stagnant demand making new entry difficult: new entry would require a minimum of frequencies;
- the strong positions held by Air France and Sabena on their respective national airports;
- given this situation, the freedom of access established by the third package of liberalization measures in Community air transport was not likely to lead to effective competition before a long period of time;
- the possible substitution between plane and train on the route Brussels-Paris is imperfect and will only be improved by the TGV after a long period of time.

The position of Air France/Sabena would further be strengthened by their planned introduction of a shuttle service between Brussels and Paris and by the creation of a "hub and spoke" basis at the Belgian airport which would serve 75 European destinations. These two projects would increase the number of flights of Air France/Sabena between Belgium and France and thus make entry by newcomers even more difficult.

However, the Commission received commitments from the parties and from the French and Belgian Governments which eliminated the risk of creation of a dominant position on the three routes concerned:

- as regards Brussels-Lyon and Brussels-Nice: withdrawal from these routes by one of the parties if a competitor wants to enter any of these routes;
- as regards Brussels-Paris: guarantee to other airlines of a number of flights equal to those of Air France/Sabena; this may imply a transfer of slots from Air France and Sabena to other airlines; a withdrawal by Air France or Sabena from the Bruxelles-Paris route was not possible because this would have endangered the creation of the shuttle service on that route which was to the benefit of consumers.

The merger also created very high market shares on certain routes to Turkey and Hungary and on certain routes to Africa. These situations were equally resolved by commitments to open up these routes to other airlines either by "multidesignation" or by a reduction in flights by Air France or Sabena to the benefit of newcomers.

Finally, the planned creation of a "hub and spoke" basis at Zaventem would have been likely to render access by other airlines to the Belgian airport much more difficult by reducing the number of available slots and by foreclosing the Belgian airport on a "hub and spoke" basis to competing airlines. In order to prevent these effects from occurring, the parties have committed themselves to limit their slot share at Zaventem to a certain percentage leaving a guaranteed percentage of slots to competitors (35%). In addition, the French Government committed itself to allow the creation of a competing "hub and spoke" basis at an airport presenting similar advantages to that of Zaventem. In the light of these commitments, the Commission decided to clear the merger in the first phase.

<T4> §3. Restrictions ancillary to concentrations

260. The last sentence of the second subparagraph of Article 8(2) of Council Regulation (EEC) No 4064/89[49] states that "the decision declaring the concentration compatible shall also cover restrictions directly related and necessary to the implementation of the concentration".

261. The Commission considers that this provision, which reiterates the terms of the twenty-fifth recital in the preamble to the Regulation,[50] applies to both first-stage and second-stage decisions in which the Commission finds that a concentration is compatible with the common market.

262. The concept of ancillary restriction is also dealt with in a Commission notice[51] in which, after having explained the principles underlying its evaluation, the Commission indicates what it considers to be "common ancillary restrictions" meeting the criteria set out in the Regulation in the case of transfers of undertakings, joint acquisitions and concentrative joint ventures. This is an important aspect of Commission policy.

263. A look at the 51 decisions adopted by the Commission in 1992[52] shows three key features in the Commission's decision-making practice regarding ancillary restrictions.

- Mergers involving ancillary restrictions account for almost half of the decisions adopted: 24 out of the 51 decisions included an assessment of such restrictions.

- All the mergers involving ancillary restrictions fell within one of the categories defined in the notice.

(49) OJ L 395, 30.12.1989.
(50) OJ L 395, 30.12.1989.
(51) OJ C 203, 14.8.1990.
(52) From 1.1.1992 to 31.12.1992.

- Only one decision, of a rather specific nature from this point of view,(53) concerned a demerger under which an undertaking was divided in two and which the Commission broke down into two separate operations. Of these, only the Solvay merger fell within the scope of the Merger Regulation. It was only the ancillary restrictions relating to it that had to be examined by the Commission.

In its decision, the Commission based itself on point III of the notice, which deals with acquisitions, recognizing as constituting ancillary restrictions various agreements designed to ensure the full value of the acquisitions by ensuring their viability. Such agreements included various contracts on the provision of services, purchases and supplies, a non-competition clause covering a period of three years and an undertaking not to make public or use business information or information on the know-how involved in the activity retained by the other party. On this latter point, the Commission accepted that the term of the agreement should not be limited in time.

The vast majority of the restrictions ancillary to the mergers examined by the Commission relate to one of the "common restriction" categories set out in the notice,(54) as may be seen from the breakdown in the following table based on the 24 decisions that included an analysis of ancillary restrictions.(55)(56)

(53) Solvay-Laporte/Interox decision of 30.4.1992.
(54) OJ C 203, 14.8.1990.
(55) The total number of ancillary restrictions (51) differs from the number of decisions involving such restrictions (24), since each decision deals with a varying number of ancillary restrictions.
(56) Where in one and the same decision a number of agreements deemed to be ancillary restrictions related to one and the same category, they were counted only once in the table.

	Non-competition clause	Licences of industrial and commercial property rights and of know-how	Purchase and supply agreements	Other restrictions
Transfer	6	6	4	7
Joint venture	14	6	6	2

With regard to the ancillary restrictions falling within one of the common restriction categories set out in the notice (i.e. 37 out of 44), it should be stressed that, on various occasions, the Commission granted the agreements between the parties the status of ancillary restriction for only a limited period, less than that for which they had been concluded. Examples included the Inchcape/IEP case (decision of 21 January 1992), the Thomas Cook/LTU/West LB case (decision of 14 July 1992) and the GECC/Avis Lease case (decision of 15 July 1992).

264. The decisions relating to ancillary restrictions not belonging to any of the categories mentioned in the notice may be classified as follows:

- in three decisions (the Inchcape/IEP and Solvay-Laporte/Interox decisions mentioned above and the BTR/Pirelli decision of 17 August 1992), the Commission agreed to consider a clause ruling out the poaching of employees to be a restriction ancillary to an acquisition;
- in the Inchcape/IEP and Solvay-Laporte/Interox decisions, the Commission also considered the ban imposed on the seller, for an unlimited period, on making public or using business secrets concerning the entity sold to be an ancillary restriction;
- in its BRT/Pirelli decision of 17 August 1992, the Commission considered the clause requiring the seller not to change the substance of the activity of the entity transferred between the date on which the agreement was concluded and that on which it was implemented to be an ancillary restriction;

- in two decisions relating to the chemicals industry (the Elf Atochem/Rohm & Haas decision of 28 July 1992 and the Rhône-Poulenc/SNIA decision of 10 August 1992), the Commission considered that contracts designed to lay down the mutual obligations of the parties where the productive capacities of the joint venture are integrated within an industrial complex which remains the property of one of its parents were acceptable.

  Thus, in the Rhône-Poulenc/SNIA decision, the agreements providing for the occupation of certain sites and the provision of utilities physically linked to the occupation of such sites were considered to form an integral part of the concentration;

- this approach fits in with the Commission's general approach of distinguishing in each individual case the restrictions ancillary to the contractual arrangements forming part of the elements making up the concentration.

  Thus, in its CCIE/GTE decision of 25 September 1992, the Commission considered various loan, research and development and supply contracts assessed together with the concentration under Article 2 of the Regulation to be substantial and an integral part of the concentration;

- lastly, in its British Airways/TAT decision of 27 November 1992, the Commission agreed to the use of joint computer services between TAT and TAT E.A. and the use by the latter of the TAT trade mark. Such agreements were regarded as necessary to the viability of the joint venture TAT E.A., formerly under the sole control of TAT.

<T4> §4. Suspension of concentration (Article 7)

In three cases, the Commission had to adopt a decision pursuant to Articles 7(2) and 18(2) of the Merger Regulation to continue the suspension of a notified concentration until adoption of a final decision in the case.(57) In a number of other cases, the parties voluntarily and irrevocably agreed to suspend their operation until the Commission's final decision on the substance of the case.

In two cases, the Commission granted a derogation from the suspensive effect imposed by Article 7(1) of the Merger Regulation pursuant to Article 7(4) of the Regulation. In Nestlé/Perrier, a derogation was requested by Nestlé with respect to the exercise of the voting rights in the ordinary annual shareholders' meeting of Perrier. The derogation was granted in relation to three resolutions which were very specific and limited in scope and in time because they related only to the previous fiscal year.

In Elf Aquitaine-Thyssen/Minol, a request was made by Elf Aquitaine which was acquiring Minol from the Treuhandanstalt. Pending completion of the acquisition the Treuhandanstalt agreed that Minol should enter into an agreement under which Elf Aquitaine would assist the board of directors of Minol in the management of the company. Although the Commission considered that the management agreement represented the beginning of the implementing of the proposed concentration, it was satisfied as to the need for management assistance, and therefore granted the application for a derogation from suspension of the operation.

(57) See Du pont/ICI, Ifint/Exor and Nestlé/Perrier.

<T4> §5. Referral to the competent authorities of the Member States
(Article 9)

The Commission received three communications from Member States pursuant to Article 9 during the year. The United Kingdom authorities informed the Commission that the proposed joint venture Steetley/Tarmac threatened to create or strengthen a dominant position as a result of which effective competition would be impeded on the market for bricks (or sub-markets within the brick sector) in local markets in the North-East and South-West of England, and in the market for clay tiles in Great Britain. The new joint venture would have obtained high market shares in the markets concerned, which have significant barriers to entry. The Commission therefore concluded that since the brick markets were local in nature and the competition issues identified were limited entirely to the territory of the United Kingdom, a reference should be made. In the case of the clay tile market, the Commission decided to refer this market too, since although it covered the whole of Great Britain, the low level of trade flows for clay tiles between Great Britain and the rest of the Community resulted in the economic consequences of the merger being materially limited to the United Kingdom. The Commission cleared the remaining aspects of the merger in the first phase of proceedings.

In Mannesmann/Hoesch, the German authorities requested a referral, which was subsequently amended to include only the market for gas line pipes. The Commission did not have to decide on the request because it took in time the preparatory steps (communication of a statement pursuant to Article 18) in order to deal with the case itself. Following further investigation, the Commission resolved the serious doubts which it had had about this operation's compatibility with the common market and adopted a final decision pursuant to Article 8(2), clearing the merger.

In Siemens/Philips, the Commision received a request from the German authorities in relation to the markets for copper cables for local subscriber networks, optical fibre cables, switching cable and broad band communication cables. The Commission decided to carry out a detailed second phase investigation of the case but the operation was subsequently abandoned by the parties, so that no decision was needed.

<T3> D. Substantive and procedural rules

<T4> §1. Block exemptions[1]

<T6> (a) Regulation amending the block exemption Regulations

265. The thinking which prompted the Commission to adopt the notice on cooperative joint ventures also lay behind its adoption of the Regulation[2] amending Commission Regulations (EEC) Nos 417/85, 418/85, 2349/84 and 556/89 on the application of Article 85(3) of the Treaty respectively to categories of specialization agreements,[3] research and development agreements,[4] patent licensing agreements[5] and know-how licensing agreements.[6]

Like the notice on cooperative joint ventures and the programme for speeding up procedures, the amending Regulation is intended to facilitate cooperation between firms and to bring the treatment of cooperative joint ventures, assessed under Article 85 of the Treaty, as much as possible into line with that of concentrative joint ventures, which are covered by the Merger Regulation. The amending Regulation accordingly broadened considerably the scope of application of the block exemption Regulations, to the benefit of joint ventures amongst other things. The Regulations on research and development agreements and on specialization agreements now no longer exclude from the benefit of exemption cooperative joint ventures that perform all the functions of a normal enterprise, including selling. Similarly, the Regulations on patent licensing and know-how licensing agreements now also apply to the licences granted by the joint venture's parents in respect of its activities.

266. Regulation (EEC) No 417/85 now also applies to contracts under which a number of firms forgo manufacture of certain products in favour of a joint

(1) All the new Regulations are published in full in the Annexes.
(2) OJ L 21, 29.1.1993, p. 8.
(3) OJ L 53, 22.2.1985.
(4) OJ L 53, 22.2.1985.
(5) OJ L 219, 16.8.1984; corrigendum OJ L 280, 22.10.1985.
(6) OJ L 61, 4.3.1989.

venture which they set up. This arrangement may apply to products already being manufactured or to products to be manufactured in the future. The setting up and the activity of the joint manufacturing venture are exempt from the ban on restrictive agreements provided that the combined market share of the undertakings concerned does not exceed 20%.

Agreements under which the parents also entrust the distribution of the contract products to a joint venture are similarly covered by the block exemption Regulation, though subject to stricter conditions. The combined market share of the undertakings concerned must not exceed a maximum of 10%. In addition, for the duration of the contract, the parent companies must withdraw from the product market of the joint venture and may not exercise any distribution or production activity on it.

The Commission thought it appropriate to extend automatic exemption to cover specialization agreements involving undertakings of a certain size and accordingly raised from ECU 500 million to ECU 1 000 million the turnover figure linked to the opposition procedure, which will be maintained.

267. Regulation (EEC) No 418/85 provides for an exemption for joint R&D ventures, whose activity may extend as far as including the joint exploitation of the results of the research. The concept of exploitation includes the manufacture of the new or improved products and the use of the new or improved processes, the marketing of the products of the research and development activity and the granting of production, utilization or distribution licences to third companies.
This Regulation also makes exemption from the ban on restrictive agreements subject to quantitative conditions. Cooperation between the parent companies in a joint venture whose activity includes research, development, production and licensing policy is allowed up to a limit of a combined market share of 20%. However, if the parent companies entrust the distribution of the contract products to a joint venture, the block exemption applies only if the market shares do not exceed 10%, rather than 20%.

268. Regulation (EEC) No 2349/84 is also applicable to agreements under which a parent company grants a licence to the joint venture in so far as

such agreements relate to the activity of the joint venture. If the parent companies are competitors, the block exemption applies only if the combined market shares do not exceed a specified limit. This is 20% if the joint venture is entrusted only with production and 10% if it is also responsible for distributing the licensed products. The Regulation exempts the granting to the joint venture of exclusive production or distribution licences for a specified territory, the protection of the territory granted to the joint venture or reserved to one of the parent companies against active or passive competition from the partner company throughout the duration of the contract, and the protection of the territory granted to the joint venture against competition from other licensees.

269. Regulation (EEC) No 556/89 on the application of Article 85(3) of the Treaty to certain categories of know-how licensing agreements contains similar rules, but the territorial protection in relations between the joint venture and the parent companies is limited to ten years, as from the day on which the first know-how licensing agreement entered into in respect of territories within the Community is concluded. That day also marks the beginning of the period in which the joint venture may be protected against active competition (ten years) and passive competition (five years) from other licensees.

270. The amending Regulation is one aspect of the overall policy being pursued to help joint ventures, the other two being the speeding up of procedures for some of them, namely those involving structural changes, and the notice on the treatment of cooperative joint ventures.(7) Thanks to the notice and to the amending Regulation, all cooperative joint ventures will now enjoy increased legal certainty. In addition, those which do not fall within the scope of a block exemption Regulation and which are notified to the Commission will benefit from the accelerated procedure, if they have structural effects.(8)

(7) See point 294 of this Report.
(8) See point 122 of this Report.

<T6> (b) Application of the block exemption Regulations

<T7> Specialization and research and development

271. The Commission received only one notification in 1992 under the opposition procedure provided for in Article 7 of Regulation (EEC) No 418/85 on research and development agreements.(9) The case is at present still under examination.

As far as Regulation No 417/85 on specialization agreements(10) is concerned, the opposition procedure provided for in Article 4 still continues to be little used. No notifications under Article 4 were received in 1992.

<T7> Patent licensing and know-how licensing

272. During the period covered by the report, the Commission received one notification in which the parties requested application of the opposition procedure provided for in Article 4 of Regulation (EEC) No 2349/84 on patent licensing agreements(11) and one notification under Article 4 of Regulation (EEC) No 556/89 on know-how licensing agreements and mixed know-how and patent licensing agreements.(12)

In the first case, the Commission was not able to agree to the request for application of the opposition procedure, since the information provided by the parties in their notification was incomplete and since in particular there was no indication of which clauses in the agreement were to be covered by the opposition procedure. In the second case, the six-month period has not yet ended, and the case is still under examination.

In addition, in two of the cases notified in 1991 under Article 4 of Regulation No 556/89, the parties amended their agreements in such a way as to make them compatible with Article 85, so that the Commission was able to terminate the procedure by sending a comfort letter.

(9) OJ L 53, 22.2.1985.
(10) OJ L 53, 22.2.1985.
(11) OJ L 219, 16.8.1984; corrigendum OJ L 280, 22.10.1985.
(12) OJ L 61, 4.3.1989.

<T7> Franchising agreements

273. During the year, the Commission received two notifications asking for application of the opposition procedure provided for in Article 6 of Regulation (EEC) No 4087/88.(13) In one case, the Commission ruled that the opposition procedure was not applicable, firstly because the agreement included a clause explicitly not exempted by the Regulation, namely a restriction preventing the franchisee from determining the selling prices of the franchised goods and secondly because the condition provided for in Article 4(a) of the Regulation, namely that the franchisee should be free to purchase the products from other franchisees or from another network of authorized distributors, was not fulfilled. Examination of the case is continuing on the basis of Regulation No 17. In the other case, examination is still under way.

(13) OJ L 359, 28.12.1988.

<T6> (c) Insurance block exemption

274. The Commission has adopted a block exemption for the insurance sector by making use of the powers granted to it by the Council, in order to facilitate certains forms of cooperation which the Commission feels are justified in this sector.

Council Regulation (EEC) No 1534/91 of 31 May 1991[14] empowers the Commission to exempt, by means of a Regulation and in accordance with Article 85(3) of the Treaty, categories of agreements between undertakings, decisions of associations of undertakings and concerted practices in the insurance sector which have as their object cooperation with respect to:

(a) the establishment of common risk premium tariffs based on collectively ascertained statistics or the number of claims;
(b) the establishment of common standard policy conditions;
(c) the common coverage of certain types of risks;
(d) the settlement of claims;
(e) the testing and acceptance of security devices;
(f) registers of, and information on, aggravated risks, provided that the keeping of these registers and the handling of this information is carried out subject to the proper protection of confidentiality.

275. The Commission has acquired sufficient experience to make use of such power in respect of the categories of agreements specified in points (a), (b), (c) and (e) of the list. It has in particular adopted decisions concerning tariff recommendations,[15] standard policy conditions[16] and co-reinsurance pools.[17] It has examined a large number of other cases on such types of agreements which have been notified to it, but on which it has not yet taken a decision. It has also made an analysis of agreements

(14) OJ L 143, 7.6.1991.
(15) Decisions of 5 December 1984 in Case IV/30.307 - Fire insurance in Germany, OJ L 35, 7.2.1985, and of 20 December 1989 in Case IV/32.265 - Concordato Incendio, OJ L 15, 19.1.1990.
(16) Decision of 20 December 1989 in Case IV/32.265 - Concordato Incendio, loc. cit.
(17) Decisions of 30 March 1984 in Case IV/30.804 - Nuovo Cegam, OJ L 99, 11.4.1984; of 16 December 1985 in Case IV/30.373 - P & I Clubs, OJ L 376, 31.12.1985; of 20 December 1989 in Case IV/32.408 - TEKO, OJ L 13, 17.1.1990; and of 14 January 1992 in Case IV/33.100 - Assurpol, OJ L 37, 14.2.1992.

relating to the approval of security devices in connection with the granting and conditions of insurance cover, notably in relation to a petition lodged with the European Parliament (No 783/90).

276. With regard to agreements relating to the settlement of claims (point (d)) and registers of aggravated risks (point (f)), the Commission does not as yet have sufficiently broad information to make an overall legal assessment of the restrictions which they involve and to establish the conditions which such types of agreement should comply with in order to qualify for automatic exemption. It was therefore not opportune to include them within the scope of the Regulation, though appropriate proposals will be drawn up once sufficient experience has been gained to allow conclusions to be drawn.

277. The Commission has always recognized that the specific characteristics of the insurance sector justified certain forms of cooperation designed to improve knowledge of risks and share costs. In many cases, such collaboration goes beyond what the Commission, in its notice concerning cooperation between enterprises,(18) regarded as not being covered by the prohibition in Article 85(1).

278. This cooperation must therefore be examined from the perspective of its compatibility with the four conditions for exemption specified in Article 85(3) (improving economic and technical progress, benefit to consumers, indispensability of the restriction to the attainment of the objective pursued, and maintenance of effective competition in the markets concerned). The Regulation spells out these conditions for four of the categories of agreement listed above.

279. The block exemption covers cooperation between insurance undertakings or within associations of undertakings in respect of the compiling of statistics on the number of claims, total amounts paid in respect of claims or the amount of capital insured, and their use to establish indicative pure premium tariffs - defined as corresponding to the average cost of covering the risks - or, in the case of insurance involving capitalization, mortality tables. Joint studies on the probable impact of extraneous circumstances that may influence the number or size of claims are also exempted. The Regulation also reflects the case-law of the Court of Justice and the previous decisions taken by the Commission by stipulating that concerted

(18) OJ C 75, 29.7.1968; corrigendum OJ C 84, 28.8.1968.

practices on commercial tariffs, i.e. the premiums actually charged to policyholders and comprising a loading to cover administrative and commercial costs are not exempted and that even a pure premium tariff can have only reference value.

280. The establishment of common standard policy conditions has the advantage of improving the comparability of cover for the consumer and of allowing risks to be classified more uniformly, which facilitates both the compiling of statistics and the sharing of risks by means of co-insurance. However, it must not lead either to the standardization of products or to the creation of too captive a customer base. Accordingly, the Regulation exempts the establishment of common standard policy conditions provided that they are not binding, but serve only as models, that they do not contain any systematic exclusion of particular types of cover without providing for the express possibility of including that cover by agreement and that they do not provide for the contractual relationship with the policyholder to be maintained for an excessive period or go beyond the initial object of the policy.

Moreover, the Commission reserves the right to withdraw the benefit of exemption when it finds that common standard policy conditions contain clauses which create, to the detriment of the policyholder, a significant imbalance between rights and obligations.

281. In addition, so as to ensure that there is real transparency for consumers, the Regulation stipulates that the common standard policy conditions must be accessible to any interested person.

282. The establishment of co-insurance or co-reinsurance pools must be viewed favourably in so far as it allows a greater number of undertakings to enter the market and, as a result, increases the capacity for covering risks that are difficult to cover because of their scale, rarity or novelty.

283. However, so as to ensure effective competition, the Regulation makes exemption of such pools subject to the condition that the participants must not hold a share of the relevant market in excess of a given percentage. The percentage is 15% in the case of co-reinsurance pools. It is reduced to 10% in the case of co-insurance pools. The reason for this is that residual

competition between members of a co-insurance pool is particularly limited. These percentages apply only to the insurance products brought into the group, where this group covers catastrophe or aggravated risks. The mechanism of co-insurance requires uniform policy conditions and commercial tariffs, and the Regulation allows this restriction in respect of pools operating in this way.

284. In the case of co-reinsurance pools, the Regulation covers the common determination of the probable cost of covering the risks, the operating cost of the co-reinsurance and the remuneration of the participants in their capacity as co-reinsurers.

285. Making pool cover subject to the application of common or accepted conditions of cover, the requirement that agreement be obtained prior to the settlement of large claims, joint retrocession, and the ban on retroceding individual shares are allowed in both cases. The requirement that all risks be brought into the pool is not accepted.

286. Pools are free to define the conditions governing participation in them, their areas of business and their mode of operation. However, the Commission reserves the right to withdraw the benefit of exemption if they are used or managed in such a way as to give one or more participating undertakings the means of acquiring or reinforcing a dominant influence in the relevant market or if they result in market sharing.

287. The Commission recognizes the usefulness of cooperation in the testing of security devices, in so far as it removes the need to grant repeated approval of individual devices. Accordingly, the Regulation lays down the conditions for exempting the establishment of technical standards and the procedures for assessing and approving security devices and persons installing them. The purpose of such conditions is to ensure that all manufacturers may apply for approval and that approval is granted on the basis of criteria that are objective, qualitative and in proportion to the level of protection sought.

288. Lastly, such agreements must not result in a limitative list, and each undertaking must remain free to accept devices not approved under the common procedure.

<T6> (d) Sea transport

Consortia

289. As announced in the Twenty-first Competition Report, the Council adopted the Regulation(19) authorizing the Commission to issue a block exemption for agreements, decisions and concerted practices between liner shipping companies; such arrangements, known as consortia, are aimed mainly at supplying jointly organized services.

The Commission was authorized under the Regulation to grant a block exemption to consortia only in respect of their sea transport activities and not in respect of their land transport activities.

On this basis, the Commission is at present drawing up, for discussion with the Member States and the parties concerned, an initial draft block exemption Regulation that will specify the conditions and obligations which consortia must comply with under Article 85(3) of the Treaty in order to qualify for the block exemption.

(19) Council Regulation (EEC) No 479/92 of 25 February 1992 on the application of Article 85(3) of the Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies (consortia): OJ L 55, 29.2.1992.

<T6> (e) Motor Vehicle Distribution

<T7> - Regulation (EEC) No 123/85(20)

290. On 6 May 1992 the Commission published a report on car price differentials in the common market.(21) This investigation was to measure the extent of car price differentials in the Community. The report revealed very large price differentials on certain models over some of the time periods examined in the investigation. Selective distribution systems, as they currently operate, contribute to sustaining such differentials, in so far as they limit trade between Member States and thereby reduce effective pressure on manufacturers to align prices more closely.

Accordingly, the Commission decided on a twofold strategy of practical action in order to increase public confidence that the selective distribution system is compatible with a single market, as well as to reduce price differentials. Firstly, the Commission has asked manufacturers to confirm to their distributors that distributors are free - in accordance with Regulation No 123/85 - to sell to other approved distributors throughout the single market as well as to end-users in other Member States, and to intermediaries representing them, and to ensure that cars will be made available to fulfil such demand. There have already been positive results in this area. The number of complaints received from individual consumers wishing to purchase a car in another Member State has decreased over the months since the report was published. This is especially so in the case of right-hand-drive models, which in the past were the subject of the most numerous complaints.

Secondly, the car manufacturers have been asked to publish price lists which enable consumers to compare prices beween different Member States for models with the same specification.

The car manufacturers - through their industrial organization ACEA - have now acknowledged this as a useful step, especially in view of the single market. The ACEA has agreed for its members to take the following action:

(20) Block exemption Regulation covering the selective distribution system for motor vehicles.
(21) See point 121 of Twenty-first Competition Report for details of results.

Every six months car manufacturers will compile, on a standard form, comparable pricing data for one widely sold model in each car line. Details of the recommended retail price will be supplied in local currencies, with prices quoted both before and after tax. The relevant conversion rate to ecus will be given to facilitate comparison between prices in different Member States.

This form will, in particular, show the prices for right-hand-drive versions and for the major options (air conditioning, automatic gearbox, power steering and Automated Breaking System), as well as information concerning the duration of the warranty. The standard form will state whether roadside assistance and delivery costs are included in the recommended retail price.

The agreed price information will be given, for all Member States, to the Commission, which will pass on the information to consumer associations and to the specialized motor press. It is hoped that at a later stage the manufacturers will disseminate the information directly.

The figures which are made public in this way will not include the prices in Denmark and Greece, because both these countries levy car taxes of over 100%, which tends to drive down pre-tax prices. It was therefore accepted in Regulation No 123/85 that cars from these markets would be available for trade into other Member States only at the price available in the next cheapest market. In these circumstances it would mislead consumers to publicize the prices available within Greece and Denmark.

The Japanese manufacturers have expressed their wish to cooperate fully.

291. During the year under review the Commission received a number of complaints concerning the refusal of dealers to carry out guarantee work on cars imported from other Member States. These cases almost exclusively concerned the new German "Länder" and were predominantly due to a lack of information on the part of dealers in the newly established distribution network regarding the relevant provisions of Regulation No 123/85. The problems were finally resolved with the car producers concerned.

292. Following the Peugeot/Eco System decision[22] and the publication of a notice outlining the scope of activity of a car intermediary operating in the common market,[23] a substantial improvement in this area has been observed. Any difficulties which have since been communicated to the Commission by intermediaries were resolved without having to resort to administrative proceedings.

<T6> (f) Air transport

293. In air transport, Regulation (EEC) No 3618/92 extended until 30 June 1993 the block exemptions for computer reservation systems and agreements between airlines provided for in Regulations Nos 83/91 and 84/91. The block exemption for ground handling services provided for in Regulation (EEC) No 82/91 expired on 31 December 1992.

(22) Twenty-first Competition Report, points 104 and 122.
(23) OJ C 329, 18.12.1991.

<T4> §2. Notices

<T6> (a) Cooperative joint ventures

294. Following intensive consultations with the Member States and representatives from business and industry, the Commission adopted at the end of 1992 a notice on the assessment of cooperative as opposed to concentrative joint ventures.(24)
According to Article 3(2) of Regulation (EEC) No 4064/89,(25) a joint venture is cooperative in nature if it does not constitute an autonomous economic entity or if, though constituting such an entity, it gives rise to coordination of competitive behaviour by the parents in relation to each other or to the joint venture.

Cooperative joint ventures are outside the scope of the provisions of the Merger Regulation, but must be assessed under Article 85(1) and (3) of the Treaty.

In its competition policy, the Commission has always endeavoured to facilitate cooperative arrangements that make economic sense, provided they take appropriate account of the interests of consumers, do not impose disproportionate restrictions on the undertakings concerned and do not jeopardize the maintenance or development of effective competition. This basically favourable attitude has been reflected in numerous decisions and notices in individual cases.

In the new notice, which contains numerous references to its administrative practice to date, the Commission has tried to specify the categories of cooperative joint ventures that are compatible with Article 85, so as to provide the necessary legal certainty in this area and encourage the setting up of joint ventures that have a beneficial economic impact without significantly affecting competition. The notice forms the counterpart to the notice regarding concentrative and cooperative operations(26) and

(24) OJ C 43, 16.2.1993, p. 2.
(25) OJ L 395, 30.12.1989; corrigendum in OJ L 257, 21.9.1990.
(26) OJ C 203, 14.8.1990.

the notice on restrictions ancillary to concentrations,(27) which clarify the Merger Regulation. Links between undertakings other than joint ventures are not dealt with in the new notice, even though they often have the same effect on competition in the common market and on trade between Member States. On the basis of the Commission's experience to date, however, no generally applicable conclusions can yet be drawn.

295. The Commission begins by referring back to earlier notices in which it listed categories of joint ventures that by their nature did not entail restrictions of competition(28) or which had no appreciable impact on market conditions.(29)

As far as other cooperative joint ventures liable to be caught by Article 85(1) are concerned, the Commission states that their impact on competition must be assessed in the light of various factors, including competition between the parent companies, competition between the parent companies and the joint venture, and the effects of the joint venture on the position of third parties. Competition will not be restricted if the parents are not actual or potential competitors and if the joint venture is to operate on a market on which neither of the parents is present. The assessment of potential competition must be carried out on the basis of the realistic approach set out in the Thirteenth Competition Report.

However, competition between the parents and the joint venture may be restricted if the joint venture carries out its activity on the same markets as the parents or if it operates on a market upstream or downstream or on an adjacent market. Serious restrictive effects on the position of third parties may arise if the joint venture confines itself to selling and purchasing on behalf of the parents, with the result that the parents no longer operate as purchasers or suppliers.

296. If the joint venture performs only certain auxiliary functions vis-à-vis its parents - for example, in the areas of research and development, purchasing, production or sales - the Commission will apply the

(27) OJ C 203, 14.8.1990.
(28) OJ C 75, 29.7.1968; corrigendum in OJ C 84, 28.8.1968.
(29) OJ C 231, 12.9.1986.

assessment principles laid down for cooperation agreements having the same purpose which do not take the form of a joint venture.
However, if cooperative joint ventures perform on a lasting basis all the functions of an autonomous economic entity, the Commission believes that they generally represent a factor making for greater competition. Consequently, such joint ventures will qualify for favourable treatment under Article 85(3).

Such joint ventures are exempted from the ban on restrictive agreements where they fulfil the conditions laid down for block exemption. The block exemption Regulations amended this year by the Commission(30) allow cooperation between firms within a joint venture for the purposes of specialization and joint research and development. Under the Regulations on patent licensing and know-how licensing agreements, certain restrictions of competition in respect of technology transfer by the parents to the joint venture are exempted from the ban on restrictive agreements.

297. Cooperative joint ventures intended either to develop new technologies, or to facilitate entry to new markets, or to extend or rationalize existing production, may be assessed favourably even where they do not fulfil the conditions laid down by the block exemption Regulations, provided they are not a cover for price-fixing, quota and market-sharing agreements or do not serve as an instrument for coordinating the investment policy of the parents. However, since the cooperation includes distribution in such cases, particular care must be taken to ensure that the combining of all the business functions and the simultaneous merging of the resources of the parents do not create or strengthen a dominant position. Thus, if the aggregate market shares of the undertakings concerned do not exceed a maximum of 10%, the Commission considers that full-function joint ventures may be deemed in general acceptable. Beyond that threshold, a more detailed examination is necessary.

298. This policy stance adopted by the Commission will help to reduce the existing imbalance between concentrative and cooperative joint ventures

(30) See point 265 of this Report.

resulting from the fact that concentrative joint ventures are subject to the more rapid merger control procedure, whereas cooperative joint ventures are subject to the Regulation No 17 procedure. The same result may be expected from the Commission's general approach to ancillary restrictions. The Commission makes a distinction between restrictions of competition which arise from the creation of a joint venture and additional agreements which would, on their own, constitute restrictions of competition. Additional agreements which are directly related to the joint venture and necessary for its existence must be assessed together with the joint venture. Thus, if a joint venture does not fall within the scope of Article 85(1), than neither do any additional agreements ancillary to it. Additional agreements which are not ancillary to the joint venture normally fall within the scope of Article 85(1), even though the joint venture itself may not. The notice lists various restrictions, stating whether or not they may be regarded as ancillary.

<T6> (b) Cooperation between the Commission and national courts

299. The Commission also adopted a notice on cooperation between the Commission and national courts in applying Articles 85 and 86 of the EEC Treaty.(31) The purpose of the notice is to facilitate the application of Community competition law by national courts. It sets out the principles governing relations between national courts and the Commission, proposes specific cooperative measures and stipulates how the Commission will take account of the powers of national courts in deciding on its priorities in dealing with individual cases.

The powers of national courts in applying the Community competition rules derive from the direct effect of Articles 85(1) and (2) and 86 and from the regulations laying down block exemptions under Article 85(3) of the EEC Treaty. The purpose of such powers is to safeguard the individual rights of parties subject to Community law.

The Commission, whose actions in the competition area are governed by public interest considerations, has for a number of years been seeking to encourage decentralized application of Article 85 and 86, notably by national courts, which had not hitherto performed their role here in a satisfactory manner. This objective was spelt out in 1983(32) and was reaffirmed on a number of occasions thereafter.(33) The new notice marks a first step towards achieving this policy. Its aim is to get Articles 85 and 86 applied more by the national courts.

Increasing the role of national courts brings a number of advantages. There are firstly procedural advantages for individuals. Cases brought before national courts give individuals the chance to obtain adequate compensation

(31) OJ C 39, 13.2.1993, p. 6.
(32) Thirteenth Competition Report, points 217 and 218.
(33) Fifteenth Competition Report, points 38 and 43, Sixteenth Competition Report, points 41 and 42; Seventeenth Competition Report, points 55 and 56; Twentieth Competition Report, point 4 and introduction, p. 16; Twenty-first Competition Report, points 69 to 71.

for infringements of Community law through injunctions, interim measures and damages. Secondly, a more active and reliable role by the national courts enables the Commission to restrict its action to cases involving sufficient Community interest and to pursue a more coherent competition policy. Lastly, greater effectiveness on the part of the national courts has a general advantage in that it reflects the spirit of the principle of subsidiarity. Community law will be implemented at a level close to the individual. The individual will be more aware that Community law is not merely the concern of remote administrative bodies, but something that directly confers subjective rights on him.

The notice will soon be supplemented by an explanatory brochure concerning the procedural rules in Member States governing the implementation of Articles 85 and 86 by national courts. The Commission intends thus to create the conditions for improving the sharing of tasks between the Commission and the courts in the Member States, which, in conjunction with the planned speeding up in the Commission's internal procedures, should improve considerably its speed of action.

<T6> (c) Contracts with commercial agents

300. In 1992 the Commission continued its work on updating the notice on contracts with commercial agents.(34) It drew up a new amended version of the draft submitted to government experts in 1990.(35)

(34) OJ 139, 24.12.1962.
(35) Twentieth Competition Report, point 4.

<T6> (d) Application of the "de minimis" principle in exclusive beer supply arrangements

301. Following its 1990 beer market review(36) and a ruling of the European Court of Justice,(37) the Commission has now adopted a notice setting out criteria under which exclusive beer supply contracts may be considered to be of minor importance and thus not be caught by Article 85(1) of the EEC Treaty. The notice will clarify the status of agreements concluded by smaller breweries, thus reducing red tape and providing legal certainty.

302. Such contracts, whether they are "loan ties" or "property ties" (within the meaning of Articles 6 and 8 of Regulation No 1984/83)(38) will, in principle, fall outside the scope of Article 85(1) if three conditions are met:

- the brewery's market share on the national market for the resale of beer on premises (i.e. in pubs, hotels, restaurants) is not higher than 1%;

- the brewery does not produce more than 200 000 hls of beer per year;

- the duration of the contracts does not exceed 7½ years, if they are for the exclusive supply of both beer and other drinks, or 15 years, if they cover only beer.

303. These criteria take account of the case-law of the Court and reflect the concern to ensure - particularly by setting the 200 000 hls threshold - that not too large a segment of the beer market (i.e. the part represented by smaller breweries) will be taken out of the scope of Article 85(1) and thus possibly closed to both domestic and foreign competition.

304. The Commission's intention is to define as precisely as possible - for all national markets characterized by the existence of networks of similar agreements having a cumulative effect on competition - those agreements which do not significantly contribute to that effect and are therefore not caught by EC competition rules. However, even if larger breweries' beer supply agreements are caught by Article 85(1) because the thresholds for minor importance are exceeded, such agreements may still continue to benefit from

(36) Twentieth Competition Report, points 84 and 395.
(37) Case C 234/89 "Delimitis/Henninger Bräu" of 28 February 1991, Report 1991, I, p. 935.
(38) OJ L 173 of 30.6.1983.

the block exemption provided for in Regulation No 1984/83, so long as the conditions it lays down are met.

305. The same principles apply for beer supply contracts concluded by wholesalers, but taking into account the position of the brewery whose beer is the main subject of the agreement in question.

306. Beer supply contracts involving breweries which exceed the above thresholds, may, in individual cases, nevertheless be considered to be of minor importance, particularly if the number of tied outlets is limited in relation to the total number of outlets on the market.

307. This notice fills a gap in the Commission's 1986 notice on agreements of minor importance,(39) which does not apply to agreements which are part of networks of similar agreements having a cumulative effect on the market. It is clear, however, that agreements concluded by companies - whether breweries or wholesalers - which individually exceed the thresholds set in that notice (5% market share and ECU 200 million turnover) are liable to be caught individually by Article 85(1) to the extent that they contain restrictive clauses.

308. Finally, it should be remembered that, where agreements are considered to be of minor importance with no real effect on intra-Community trade and therefore to fall outside the scope of Community law, it is up to national legislation to provide such measures as appear necessary. The objective of the notice is not to give preferential treatment to smaller brewers, but to come to a reasonable allocation of responsibility between the Community and the Member States in line with the Commission's policy on subsidiarity.

(39) OJ C 231, 12.9.1986.

<T4> §3. Interim measures

<T5> - Mars I

309. The Commission imposed interim measures following a complaint by Mars, which alleged that its access to the German market for single-item ice-cream was illegally barred.

310. The relevant product is distributed in Germany through various channels, including the "traditional" retail trade, comprising small and medium-sized sales outlets. The marketing of the ice-cream involves two types of contractual arrangements. Firstly, there are the freezer exclusivity arrangements under which a producer provides the retailer with a freezer which remains his property and in which the retailer undertakes to stock only ice-cream manufactured by the producer. Secondly, there are sales outlet exclusivity contracts under which a retailer undertakes to sell only the products of the manufacturer with which he has a contract.

311. Mars, which is seeking to penetrate the market using the name of its well-known chocolate products, based its complaint on the argument that the two largest undertakings operating on the market, Langnese (Unilever group) and Schöller, had such a network of exclusivity contracts that Mars was unable to find a sufficient number of retailers to market its products.

312. The Commission took the view that the contractual arrangements in question did significantly restrict access to the market and that there was therefore a presumption of an infringement of Article 85 of the Treaty. In addition, the Commission considered that, unless it took immediate action, Mars would suffer serious and irreparable harm, through being prevented from penetrating the market at a time when competitors were about to introduce, or had recently introduced, new products comparable to its own.

Since, in the Commission's view, the conditions specified by the Court in its "La Cinq SA" judgment were fulfilled, the Commission, having weighed the interests involved, imposed interim measures that were confined to the sales

outlet exclusivity arrangements. Langnese and Schöller were prohibited from using such exclusivity to prevent retailers thus bound to them from selling Mars products in competition with their own. By Order of 16 June, the President of the Court of First Instance, to which Langnese and Schöller made application concerning the interim measures, limited Mars' access to petrol stations alone.

<T2> Chapter II: Main cases decided by the Community lawcourts

This Report covers a total of 21 judgments delivered by the Court of Justice or the Court of First Instance.(1) With certain exceptions, it does not cover orders made by the President of either Court.

<T4> §1. Application of Article 85(1) to restrictive practices in the polypropylene sector

313. Having delivered seven judgments in the polypropylene case in 1991,(2) on 10 March the Court of First Instance gave judgment on the six remaining applications (Cases T-9/89 Hüls; T-10/89 Hoechst; T-12/89 Solvay; T-13/89 ICI; T-14/89 Montedipe; and T-15/89 Chemie Linz). The grounds of the latter set of judgments broadly correspond to those of the judgments delivered in 1991. However, a number of new points had to be considered.

One of the applicants denied involvement in the infringement. Shell maintained that the Decision could not be addressed to it as it was not a producer capable of fixing polypropylene prices and sales volumes. The Decision should have been addressed to one of the operating companies in the Shell group. The Court did not accept this argument; it held that Shell and the operating companies constituted a single undertaking for purposes of the Community rules on competition.

Another aspect is the calculation of fines. Where undertakings involved in a competition proceeding display a cooperative attitude it is the Commission's practice to take that into consideration in determining the amount of the fine. That is why the Commission had reduced the fines imposed on ICI by 10%. The Court found that this did not go far enough. At the Commission's request, ICI had furnished highly detailed information which concerned not

(1) The references are given in the Annexes.
(2) Twenty-first Competition Report, point 143.

only its own conduct but also that of the other undertakings. Without that information the Commission's investigation would have been much more difficult. ICI had thus contributed to bringing the infringement to an end. The Court accordingly reduced ICI's fine from ECU 10 million to ECU 9 million.

<T4> §2. Application of Article 85 to a cooperative

314. In its judgment of 2 July in Case T-61/89 Dansk Pelsdyravlerforening v Commission the Court of First Instance set forth the principles governing the application of Article 85(1) to cooperative associations. The Commission had by Decision imposed a fine on Dansk Pelsdyravlerforening on account of various clauses in its Rules and certain concerted practices which restricted competition between the association, whose business is the sale of skins, and third parties, and also between the association's members themselves.

After pointing out that the products concerned were not mentioned in Annex II to the Treaty, which rendered Regulation No 26 inapplicable here, the Court considered whether the no-competition clauses, the supply obligations and the concerted practices to which the Commission took objection in its Decision were actually restrictive of competition.

The Court accepted most of the Commission's arguments, but annulled some of the articles of the Decision for lack of proof or sufficiently precise reasoning.

<T4> §3. Application of Article 85 to a selective distribution system

315. In 1985, the French cosmetics manufacturer Vichy notified to the Commission its system of distributing its products in France exclusively through dispensing chemists.

In 1988, following various decisions by the French authorities declaring the system to be contrary to Article 85 of the EEC Treaty, Vichy revised it, thereby rendering the notification null and void.

In 1989 a new system was notified, applicable to all Member States with the exception of Denmark. In France the grant of approval as a distributor of Vichy products was subject to possession of a diploma in pharmacy, whereas in the other Member States distributors had to be practising dispensing chemists.

The Commission sent Vichy a statement of objections concerning the distribution system in Member States other than France, giving it an opportunity to submit its observations, and subsequently adopted a Decision under Article 15(6) of Regulation No 17. It was that Decision which was the subject of the application. It was a preliminary Decision whereby the Commission withdrew the benefit of the immunity from fines which attached to the notification.

In its judgment(3) the Court summed up the case law of the Court of Justice on selective distribution. It declared that, in the present case, the criterion for approval was quantitative in nature and that by all estimates it was disproportionate and had affected trade between Member States by eliminating parallel imports. As far as Article 85(3) was concerned, the applicant had not proved that assistance could be given to customers only by practising dispensing chemists and not by a qualified chemist who was not practising. To that extent, the consumer would not receive a fair share of any benefit.

(3) Judgment of 27 February 1992, Case T-19/91, not yet reported.

<T4> §4. Non-applicability of Article 85 to statutory restrictions on imports and exports of electricity

316. In Rendo and Others v Commission[4] the applicants asked the Court of First Instance to annul in part the Commission Decision in the IJsselcentrale case,[5] which concerned restrictions on imports of electricity into the Netherlands for supply to the public and on exports of electricity from the Netherlands, to the extent that the Commission had refrained from applying Article 85 to the import and export prohibitions imposed on generators in the area of public supply on the ground that they originated in a legislative measure. The Decision did not look into the question whether the restrictions on imports were justified in the light of Article 90(2), as that would have meant examining the relevant Dutch Act, which was not the Decision's purpose. The Commission had, however, indicated that proceedings would be brought under Article 169 of the Treaty against the Dutch Government for the latter's failure to fulfil its obligations.

317. The Court found that, although Rendo's complaint concerning electricity imports had not been rejected but had remained pending during the Article 169 proceedings, the application was admissible. The complainants' procedural rights would be more circumscribed in Article 169 proceedings, so that their legal position had indeed been affected, which was sufficient grounds for them to be able to bring an action for annulment.

The application was, on the other hand, inadmissible as far as it related to the restrictions on exports in the area of public supply. Although the question had been raised in the Decision's recitals, the substantive provisions, which were the only part that was relevant, did not give any indication as to what the Commission's definitive position was.

The fact that the complainants were mentioned in the Decision did not allow them to contest it as a whole when the scope of their complaint was narrower, as they were not individually concerned by matters outside their complaint.

(4) Judgment of 18 November 1992 in Case T-16/91, not yet reported.
(5) Decision of 16 January 1991, OJ L 28, 2.2.1991, p. 32.

The Court stressed it had no power to issue direct orders to the Commission.

On the substance of the case, the Court held that the Commission was not obliged to act on a complaint that an infringement had been committed unless the subject of the complaint fell within its exclusive jurisdiction. That was not the case with Article 90(2), which could be applied by national courts. Moreover, where a complaint concerned an undertaking entrusted with the operation of services of general economic interest, the Commission was a fortiori not obliged to act if the investigation of the complaint led to a national law's compatibility with the Treaty being assessed.

Where a restriction stemmed from the existence both of a national law and of an agreement between undertakings, the law had to be examined first, applying the procedure for failure to fulfil an obligation, as the agreement could not have any practical effects except in so far as the restrictions it laid down exceeded those arising from the law. In that event, the complainant might, of course, be adversely affected, but the priority given to the failure to fulfil the obligation meant that the complaint would remain pending before the Commission and hence would be investigated subsequently.

In the present case, the Commission had not considered whether the restrictions on imports were justified under Article 90(2). They therefore constituted an infringement of Article 85 as long as that question had not been settled. The Court did not accept the complainants' argument that the agreement was provisionally valid as long as Article 90(2) had not been declared inapplicable.

<T4> §5. Refusal to exempt a net price system for imported books

318. In Publishers Association v Commission(6) the Court of First Instance had to consider whether the Commission's refusal to exempt a set of agreements notified by the Publishers Association was justified. The Association, which represents the vast majority of publishers in the United Kingdom, had introduced a system for the sale of books in the UK at collectively fixed prices. The Commission had taken the view that, in so far as they applied to trade in books between Member States, the agreements were contrary to Article 85(1) of the Treaty and did not qualify for exemption as they involved restrictions which were not indispensable.(7)

The applicant's main contention was that the reasoning on which the Decision was based was incorrect. This contention was rejected by the Court, which upheld the Decision in its entirety.

In its judgment, the Court stated that it was for those making a notification to prove that their agreement satisfied all the conditions laid down in Article 85(3) of the Treaty, whereas the Commission was entitled at any time before the definitive adoption of the Decision to find that any one of the conditions was not met.

The Commission had been right to maintain in the present case that there was no need for the net price system to be collective. Both publishers and booksellers could carry on their activities in a system where each publisher formulated individually its own conditions of sale.

(6) Judgment of 9 July 1992, Case T-66/89, not yet reported.
(7) Decision of 12 December 1988; Eighteenth Competition Report, point 52.

<T4> §6. The concept of effect on trade between Member States

319. In the flat glass case,(8) the Court of First Instance held that an agreement between the leading Italian flat-glass producers dealing with prices and conditions of sale was necessarily capable of affecting trade between Member States.

320. In the context of criminal proceedings against a driving instructor who had broken a law prohibiting the giving of driving lessons in a district other than that in which the driving school was situated, the Lisbon Court of Appeal asked the Court of Justice to give a preliminary ruling on the question whether Article 85(1) of the Treaty precluded such a restriction.

The Court replied in the negative,(9) ruling that, although Member States were required under the second paragraph of Article 5 of the Treaty to refrain from enacting or maintaining in force any measure capable of rendering the competition rules ineffective, Article 85 applied only to the extent that the anti-competitive practices were capable of affecting trade between Member States. This condition was fulfilled only if it was established that the national legislation had the effect of denying new entrants access to the market, which was not the case with the legislation in question.

(8) Judgment of 10 March 1992, Joined Cases T-68/89, T-77/89 and T-78/89 Società Italiano Vetro, Fabbricca Pisana et PPG Vernante Pennitalia v Commission, not yet reported.

(9) Judgment of 19 March 1992, Case C-60/91 Batista Morais v Ministério Público, not yet reported.

<T4> §7. Abuse of a collective dominant position

321. The flat glass case[10] concerned a Commission Decision of 7 December 1988.[11]

In its Decision the Commission had found that three Italian flat-glass producers were infringing Article 85 of the Treaty by participating in concerted practices relating to their prices and conditions of sale to the principal Italian wholesalers, the Fiat group and another customer, by fixing quotas for the last two customers and by exchanging products with a view to sharing the market. The Commission had also found that the firms occupied a collective dominant position in so far as they denied customers the possibility of bringing price competition into play between suppliers and fixed quotas for the automotive market.

The main lesson to be learned from the judgment delivered by the Court of First Instance (paragraphs 357 to 360) is that the Court has acknowledged that Article 86 can be infringed by a collective dominant position. This can be the case where two or more independent economic entities are united by such economic links in a specific market that together they hold a dominant position vis-à-vis other operators. The Court cited as an example of such links the case where such undertakings jointly have, through agreements or licences, a technological lead over their competitors. The Court found support for its interpretation in the wording of Regulation (EEC) No 4056/86, which provides that liner conferences are incompatible with Article 85(1).

However, to establish an infringement of Article 86 of the Treaty, it is not sufficient to "recycle" the facts constituting an infringement of Article 85.

In the present case the Court found that not all the infringements that were alleged to have taken place had been established, and it annulled the Decision in its entirety in respect of one undertaking and partially in respect of the other two, reducing the fines accordingly. There is another lesson to be learned from this judgment, namely the extreme importance of documentary evidence and the way it is presented in a Commission decision.

(10) Referred to above.
(11) Eighteenth Competition Report, point 48.

<T4> §8. Procedure

<T6> (a) Non-existence of a decision

322. The PVC cases[12] turned on the interpretation of the Commission's Rules of Procedure. Article 12 of those Rules provides that acts adopted by the Commission are to be authenticated in the language or languages in which they are binding by the signatures of the President and the Executive Secretary.

The Court of First Instance held that the Rules had been infringed in these cases.

Firstly, the draft Decisions submitted to the Commission on 14 December 1988 in English, French and German differed from the Decisions ultimately served upon the companies. The differences were more than just linguistic and affected both the reasoning on which the Decisions were based and the Decisions' substantive provisions. They therefore violated the principle that a measure was unalterable once it has been adopted, and infringed Article 190 of the EEC Treaty.[13]

Secondly, the Member of the Commission responsible was not competent to issue the contested Decisions. It was clear from the minutes of the Commission meeting that the Decisions had not been adopted in Dutch and Italian, which were authentic texts within the meaning of Article 12 of the Rules of Procedure. In the Court's view, Article 27 of the Rules did not allow the Commission to delegate the preparation of such instruments. The Member of the Commission therefore had no authority to sign the Decisions in those languages. Nor was he competent to sign ratione temporis. When, on the last day of his term of office, he signed the letters notifying the contested measures, the various language versions of those measures had not yet been finalized and could therefore not be notified. This defect could have been remedied had the Commission proved that he had signed only copies of the Decisions notified to the undertakings and that the originals had been signed by a duly authorized person. However, the Commission was unable to produce the original versions.

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(12) Judgment of 27 February 1992, Joined Cases T-79, 84, 86, 89, 91, 92, 94, 96, 98, 102 and 104/89; E.C.R. II-499 seq..

(13) Case 131/86 United Kingdom v Council [1988] ECR 905.

The textual alterations and the lack of competence of the authority issuing the measures could have been considered grounds for annulling the Decisions. However, the Court examined instead the applicants' arguments as to the measures' non-existence. In the Court's view a measure may be declared non-existent where it is vitiated by particularly serious and manifest defects. The plea of non-existence concerns a matter of public interest which may be relied upon at any time during the proceedings and which a court must raise of its own motion. In the light of the serious defects already found to exist, the Court called upon the Commission to produce the Decisions in their original, authenticated form. The only documents submitted by the Commission were the draft Decisions in the three languages, two extracts from minutes and a letter dated 5 January 1989 signed by a Member of the Commission.

The Court held that, under the circumstances, it could not be established that Article 12 had been complied with. That provision was of fundamental importance as a means of creating legal certainty for those subject to measures adopted by the full Commission, because only adoption by the full Commission and authentication by the minutes of the meeting made it possible to be certain of a measure's existence and of its content and to be sure that it corresponded exactly to the Commission's intentions. The importance of authentication was borne out by the fact that natural and legal persons could rely upon the institution's Rules of Procedure in so far as the provisions thereof created rights and contributed to legal certainty for such persons. The Court referred in this connection to Article 192 of the Treaty, which empowers national courts to verify the authenticity of Community measures.

The Court considered that, as a result of the lack of authentication in the present case, it was impossible to determine precisely the date and content of the measures and the authority issuing them. It concluded that the measures could not be regarded as decisions within the meaning of Article 189 of the Treaty. Hence the applications had been made in respect of non-existent decisions and were dismissed as inadmissible.

The Commission disagrees with virtually all the Court's findings and has appealed against the judgment.

<T6> (b) Commission's power to reject complaints

323. Underlying the Automec case[14] is a decision by BMW Italia not to renew its agreement with Automec for the distribution of BMW vehicles in the Italian province of Treviso. Automec complained to the Commission, alleging that BMW's conduct infringed Article 85 of the Treaty. Automec considered that BMW's distribution system was a selective distribution system within the meaning of Regulation (EEC) No 123/85 and that Automec fulfilled the criteria laid down. As a result, Automec asked the Commission to issue an injunction requiring BMW to execute the orders Automec had placed and to authorize Automec to use the BMW trade marks.

The complaint was rejected on 28 February 1990 by decision of the Member of the Commission responsible for competition matters, on the ground inter alia that the case was one which could be dealt with by a national court. It was against that decision that Automec lodged this application, which the Court of First Instance dismissed as inadmissible.

The Court had first of all to decide whether the Commission had a discretionary power to reject complaints submitted to it, or, on the contrary, whether it was required to open an investigation whenever it received a complaint.

The practical significance of this question is considerable.

The Court found that the Commission was not obliged to investigate every complaint. Complainants were not entitled to a decision as to the existence or otherwise of the infringement they alleged had been committed, except where the subject-matter of the complaint fell within the Commission's exclusive jurisdiction, as was the case, for example, with the withdrawal of an exemption.

The Commission was therefore free to define priorities in dealing with complaints.

Of course, it had always to examine carefully the points of law and fact to which the complainant had drawn its attention. In the present case the Court held that this condition had been satisfied.

(14) Judgment of 18 September 1992, Case T-24/90, not yet reported.

The second question which the Court considered in this context was no less important: was the Commission, in determining the degree of priority to be applied to the examination of alleged infringements, justified in referring to the Community interest of the case?

The Court answered this question too in the affirmative: the Commission was an administrative authority which had to act in the public interest.

The Court said that such reference to the Community interest could not be made in an abstract manner. The Commission was required to set forth the factual and legal considerations which prompted it to conclude that there was insufficient Community interest. It should take into account inter alia the impact of the alleged infringement on the functioning of the common market, the probability of being able to establish its existence and the extent of the necessary investigation measures.

The Commission was also entitled to take into account the real possibility that the intervention of a national court might enable proper effect to be given to Article 85(1).

Lastly, the Court pointed out that the existence of a block exemption Regulation, assuming it was applicable, was a factor the Commission could take into account in assessing the Community public interest in carrying out an investigation. The principal objective of block exemptions was to limit the need for notification and individual scrutiny of the contracts employed in the area of activity concerned. The existence of such Regulations also facilitated the application of competition law by national courts.

The Court's detailed analysis of the Commission's power to reject a complaint afforded it an opportunity to reaffirm, in the light of previous judgments, in particular that in Delimitis,(15) the major role national courts could play in applying Community competition law. This development is taken fully into account by the Commission in its Notice on the subject.

(15) Case C-234/89 [1991] ECR I-935.

<T6> (c) Application for a finding that, by rejecting a complaint, the Commission had improperly failed to act

324. In Asia Motor France the Court of First Instance pronounced on the admissibility of an action for failure to act, with an application for compensation for that failure.(16) The applicants claimed that the Commission was at fault for not acting on their complaint concerning the existence of a restrictive agreement between the French importers of five makes of Japanese car. The agreement, which had been concluded under the auspices of the French Government, sought to prevent the importation into France of other makes of Japanese car. The Commission had rejected the complaint on the ground that the undertakings whose conduct was put in question had no operational leeway in the matter. But the Commission's rejection of the complaint had come after the action for failure to act had been brought. The Court held that the nature of such an action was to require the defendant institution to act, in pursuance of Article 176. Consequently, the action became devoid of purpose if, as in the present case, the institution had acted after the commencement of proceedings but before delivery of the judgment.

The Court dismissed the claim for compensation as the applicants had not substantiated the loss they alleged they had sustained. On the other hand, it ordered the Commission to pay most of the costs owing to the lateness of its action.

<T6> (d) Commission's power to adopt interim measures

325. By its judgment of 24 January in Case T-44/90 La Cinq the Court of First Instance annulled the Decision whereby the Commission had refused to take interim measures in response to a complaint by a French television channel, La Cinq, alleging that the conduct of the European Broadcasting Union (EBU) infringed Articles 85 and 86.

La Cinq submitted that it satisfied the criteria for membership of the EBU (which would have afforded it access to the Eurovision network for news and sport), but that the EBU had rejected its application in a discriminatory manner.

The Commission had refused to act upon the complaint on the grounds, firstly,

(16) Judgment of 18 September, Case T-28/90 Asia Motor France and Others v Commission, not yet reported.

that it did not appear prima facie from a summary consideration of the facts that any infringement had been committed, and secondly, that no irreparable damage had been suffered by La Cinq, which had at all events been able to join the EBU network on a contractual basis.

In its judgment the Court made the preliminary observation that only two conditions had to be met before interim measures could be granted: the existence of practices which were prima facie likely to constitute a breach of the competition rules, and a risk of serious and irreparable damage. In the Court's view, the concept of urgency was included in the second condition.

The Court went on to state that, in the present case, the Commission had committed two errors of law.

Firstly, contrary to what the Commission had maintained, the first condition did not mean that the existence of a clear and flagrant infringement had to be established at the stage of the mere prima facie assessment. The requirement of a prima facie infringement could not be equated with the requirement of certainty which a final decision had to satisfy.

Secondly, the second condition should not be interpreted as meaning that only damage which could not be remedied by a subsequent decision could be regarded as irreparable. It was sufficient that it should no longer be possible to remedy it by any decision which the Commission might take at the end of the administrative procedure. The Commission had also committed a manifest error of judgment when it considered that the possibility for La Cinq to secure contractual access to Eurovision film was equivalent to membership of the EBU. It followed that the Commission had failed to fulfil its obligation to take into account all the relevant facts in the present case in order to determine the existence of a risk of serious and irreparable damage.

Although it annuls the Commission Decision, the judgment actually increases the scope for Commission interim measures in future, in that it interprets the conditions laid down in the Camera Care judgment(17) less restrictively than the approach which the Commission has followed so far.

(17) Case 792/79R Camera Care Ltd v Commission [1980] ECR 119.

<T6> (e) Cooperation with national authorities

326. In its judgment in the Spanish banks case,(18) which was delivered in response to a reference for a preliminary ruling from the Spanish Competition Court, the Court of Justice set forth the conditions under which national competition authorities may use information supplied to them by the Commission under Article 10 of Regulation No 17.

That Article provides that the Commission shall forthwith transmit to the competent national authorities a copy of the applications and notifications lodged with it by undertakings in accordance with Articles 2, 4 and 5 of Regulation No 17, together with copies of the most important documents sent to it and of any requests for information addressed to the undertakings under Article 11 of the same Regulation.

In the present case, the Spanish banks considered that the competition authority, the DGDC, had initiated proceedings against them for infringing Spanish law on the strength of information obtained, not by that body itself, but by the Commission.

The court making the reference asked whether the national authority responsible for applying Articles 85 and 86 could use information obtained by the Commission following a request for information or a notification where the authority applied either national competition law or Community competition law, or both national and Community competition law.

In its reply the Court did not draw any distinction based on the nature - whether national, Community or both - of the rules applied.

Basing its considerations on the general scheme of Regulation No 17, it replied in the negative in all three cases. It pointed out in particular that the information furnished to national authorities by the Commission was communicated under a Regulation which was not concerned with proceedings conducted by Member States' competent authorities, even where the purpose of those proceedings was to implement Articles 85(1) and 86. The proceedings

(18) Judgment of 16 July 1992, Case C-67/91 Dirección de Defensa de la Competencia (DGDC) v Asociación Española de Banca Privada and Others, not yet reported.

conducted by those authorities were distinct from those conducted by the Commission and the gathering of evidence by those authorities was governed by national law. Even the implementation of Articles 85(1) and 86 by national authorities was subject to national procedural rules.

Regulation No 17 required Member States' competent authorities and their officials to refrain from communicating confidential information. That provision thus implemented in its field of application the general obligation of professional secrecy imposed by Article 214 of the Treaty. In addition, the rights of the defence would not be observed if an authority other than the Commission could use information acquired under Regulation No 17 as evidence in proceedings which were not governed by that Regulation.

The Court moderated the force of its prohibition, however, by acknowledging that such information could be treated by the national authorities receiving it as evidence capable of justifying the initiation of a national proceeding. But in order that facts mentioned in such material might validly form the subject of a national proceeding, proof of their existence had to be established, not by the documents gathered by the Commission, but by evidence which was appropriate to national law and which observed the guarantees laid down by that law.

<T6> (f) Conditions governing the application of Article 15(6) of Regulation No 17

327. The judgment of the Court of First Instance in Vichy[19] confirmed the extent of the Commission's power under Article 15(6), while clarifying in certain respects the procedures for applying that provision.

The Court held that the measure adopted on the basis of Article 15(6) was indeed a decision capable of forming the subject of an action for annulment.

The application of Article 15(6) to the only company to have notified its agreement, while other producers operated the same system without informing the Commission, was in no way discriminatory. The only effect of the

(19) Referred to above.

decision taken under Article 15(6) had been to restore Vichy to the position in which it would have remained had it not notified its agreement.

The opinion of the Advisory Committee did not have to be sought before a decision was taken under Article 15(6), as that body had to be consulted only during the final stage of the proceeding (paragraphs 1 and 3 of Article 10 of Regulation No 17, read together).

The fact that any consultation of the Advisory Committee had necessarily to be preceded by a hearing did not mean that, conversely, any hearing had to be followed by consultation of the Advisory Committee.

Similarly, the fact that a decision was involved did not automatically mean that the Advisory Committee had to be consulted.

A decision based on Article 15(6) had to respect the company's fundamental rights, and in particular its right to a fair hearing. A statement of objections therefore had to be sent to the company. Consultation of the Advisory Committee served a different purpose, and did not form part of that body of fundamental rights. Vichy had been granted a hearing, so the question whether a hearing was obligatory did not arise in this case. The judgment stated only that the company must be given an opportunity, as required by Article 19(1) of Regulation No 17, to defend its viewpoint regarding the Commission's objections.

In checking whether there had been a serious and manifest infringement of the competition rules which justified a decision under Article 15(6), the Commission could rely on a combination of factors, even if each of them on its own might be insufficient to establish the serious and manifest nature of the infringement.

<T6> (g) Commission's lack of power to issue an injunction on the basis of Regulation No 17

328. Automec afforded the Court of First Instance an opportunity to answer the question whether the Commission had the power to enjoin an undertaking to execute orders placed by an intending distributor. Such a power might have

been based on Article 3(1) of Regulation No 17, which authorizes the Commission to require undertakings to bring any infringements it establishes to an end, read in conjunction with Article 85(1). The Court answered the question in the negative. The Treaty provided only that an agreement which infringed Article 85(1) was null and void, this being laid down in Article 85(2). The further consequences flowing from a breach of Article 85 were a matter to be determined by the national courts. Consequently, only national courts could oblige an economic operator to contract with another economic operator, if that was appropriate and in accordance with national law.

This judgment is also based on the principle that freedom of contract has to remain the rule. The principle is all the more essential where there are other means of bringing an infringement to an end, as is the case with infringements resulting from the operation of a distribution system.

<T6> (h) Procedure before the Court of First Instance

329. Before the Court delivered judgment in the polypropylene cases, the applicants requested that the oral procedure be reopened so that an inquiry could be conducted. They argued that the contested Decision was non-existent within the meaning of the Court's judgment in PVC, as the Commission's decision-making practice in the present case was the same as that described in that judgment. It therefore had to be determined whether the Commission had actually adopted a Decision concerning them. The Court held, however, that there were no grounds for ordering the reopening of the oral procedure for that purpose.(20) Only if the parties furnished sufficient evidence of the non-existence of the contested measure did it have to consider the question as a matter of course. In the present case the applicants' arguments were not sufficiently compelling. An alleged breach of the rules on languages and a general presumption that the Commission had amended its Decision after the event were not enough to refute the measure's apparent legality.

330. The Dutch banks case(21) involved a Commission Decision of 19 July 1989 relating to several agreements and provisions adopted by Dutch banking associations.

(20) Order of 26 March 1992, Case T-4/89 Rev. BASF v Commission and Order of 4 November 1992, Case T-7/89 Rev. DSM v Commission, not yet reported.

(21) Judgment of 17 September 1992, Case T-138/89 NBV and NVB v Commission, not yet reported.

The Decision had granted both negative clearance and an exemption.

The associations concerned were not satisfied, however, and sought the partial annulment of the Decision pursuant to Article 173 of the Treaty. The application was directed more specifically at the Commission's reasons for finding that there were no grounds for taking action under Article 85(1) against an agreement concerning bank charges for handling certain charitable transactions. In the Commission's opinion, the agreement was restrictive of competition but had no appreciable effect on trade between Member States. The applicants challenged the view that their agreement restricted competition.

The Court of First Instance held, firstly, that an action under Article 173 could be brought only against a measure liable to affect a specific legal position. Only the substantive provisions of a Decision were capable of having such a legal effect. The reasons on which the Decision was based could be subject to judicial review, but only inasmuch as they formed the essential basis for the contested substantive provisions.

Secondly, the Decision in question gave satisfaction to those requesting it and was therefore inherently incapable of changing their legal position. Negative clearance, on the other hand, could adversely affect the economic interests of a third party. Such a measure could therefore be contested by a third party with a legitimate interest. The position of the interested third party and that of the addressee of the Decision should therefore not be confused.

Thirdly, an economic operator had to show evidence of a real and immediate interest in having the contested measure annulled. That was not the case here, for two reasons. Firstly, the applicants had only a hypothetical interest, that is to say the possibility of an action before a national court and the supposition that that court might reach a different conclusion from the Commission concerning the effect on trade between Member States. Secondly, should a change in circumstances result in the agreement in question affecting trade to an appreciable extent, that change might justify a review of the case and prompt the Commission to reconsider the grant of negative clearance. The applicants could still assert their right in that eventuality.

In the light of these considerations the Court declared the application inadmissible.

331. In flat glass[22] the Court of First Instance stated that it did not have jurisdiction to remake a contested decision (except, of course, with regard to fines): it could only annul it, in whole or in part. The assumption by the Court of such jurisdiction could disturb the inter-institutional balance established by the Treaty and would risk prejudicing the right of defence.

332. Actions for the suspension of a contested act or for the grant of interim measures have been numerous this year. They have been brought not only against final decisions adopted by the Commission, but also against procedural steps and provisional measures taken by it.

The President of the Court of First Instance was asked to order interim measures under Articles 185 and 186 of the EEC Treaty in connection with an action for the annulment of a Commission decision; the Commission had refused to communicate various documents requested by the applicants with a view to their exercising their right of defence against a Statement of Objections (Order of 23 March 1992 in Joined Cases T-10/92, T-11/92, T-12/92, T-14/92 and T-15/92R cement). The President rejected the requests essentially on the grounds that the application was manifestly inadmissible in so far as it was directed against a purely procedural act (a statement of objections which was notified solely to the parties as those concerned) and in addition because no irreparable harm existed because, if the Court were to find in favour of the applicants in the main action the Commission would be obliged to recommence the administrative procedure, paying due regard to the requirements relating to access to the file. Such an approach is probably valid for most actions brought against procedural measures taken by the Commission before it adopts a final Decision. It was confirmed, moreover, by the Court in its judgment on the substance of the case, in which it declared the applications lodged inadmissible on those grounds.[23]

(22) Referred to in point 321 of this Report.

(23) Joined Cases T-10/92, T-11/92, T-12/92 and T-15/92 SA Cimenteries CBR, Blue Circle Industries plc, Syndicat National des Fabriquants de Ciments et de Chaux, and Fédération de l'Industrie Cimentière asbl v Commission.

The Langnese and Schöller case involved an application for the suspension of interim measures adopted by the Commission (Order of 16 June 1992, Case T-24/92R). The President of the Court of First Instance weighed the balance of interests at stake in the same way as he would have done on an application for interim measures against a final Commission Decision.

In an Order made in SPO and Others v Commission(24) the President of the Court of First Instance dismissed most of an application for interim relief, but suspended the operation of part of the contested Decision so as to enable the applicant association SPO to continue functioning. The SPO amended its rules following delivery of the Order.

(24) Order of 16 July, Case T-29/92R, not yet reported.

<T4> §9. Article 90

<T6> (a) Commission's powers under Article 90

333. The Court of Justice delivered its second judgment in a case involving a Directive adopted by the Commission under Article 90(3) in the telecommunications field,(25) namely Directive 90/388/EEC of 28 June 1990 on competition in the markets for telecommunications services.

The Court basically reaffirmed the position it had already taken in its first telecoms judgment.(26) This may be summed up as follows.

Article 90(3) gives the Commission the power to lay down general rules specifying the obligations incumbent on Member States with respect to the undertakings referred to in that Article. This power is not confined to simply monitoring the application of existing Community rules, and is not restricted by the fact that the Council has acted or may act under Articles 100a and 87. This holds true even if the Directive at issue gives further substance to Article 59 of the Treaty and no instrument has been adopted by the Council concerning freedom to provide services in the telecommunications sector. For the Commission to be able to act, it is sufficient that Article 59 be directly applicable.

The Commission did not exceed its powers by laying down a rule of law relating to Article 86 (the requirement that the person exercising the powers of authorization, control and supervision be distinct from the telecommunications organizations) while leaving Member States free to choose the means of complying therewith.

It was not necessary for the Commission to carry out a detailed inquiry into the conduct of telecommunications organizations before adopting the Directive. An extension without any objective reason of the monopoly over the establishment and operation to telecommunications services is in itself incompatible with Articles 90 and 86.

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(25) Judgment of 17 November 1992, Joined Cases C-271/90, C-281/90 and C-289/90 Spain and Others v Commission, not yet reported.

(26) Judgment of 19 March 1991, Case C-202/89 France and Others v Commission, not yet reported; Twenty-first Competition Report, point 153.

The Court nevertheless partly annulled the Directive, inasmuch as it did not define in detail the special rights to which it related and inasmuch as it applied to certain behaviour which in reality was adopted by undertakings on their own initiative.

334. In another case the applicants sought the annulment of a Commission Decision of 20 December 1989 concerning the provision in the Netherlands of express delivery services.(27) The Commission had considered that the Dutch Act which reserved to PTT Post BV the express delivery of letters weighing up to 500 grammes at a price below a set level was contrary to the Treaty. Consequently the Commission Decision, which was adopted under Article 90(3) of the Treaty, stated that the Act was incompatible with Article 90(1) read in conjunction with Article 86.

The applicants argued first of all that the Commission did not have the power to establish infringements of the Treaty by means of decisions under Article 90(3).

The Court rejected this argument on the following grounds.

Article 90(3) authorized the Commission to act by way of directives, that is to say to lay down general rules specifying the obligations which the Treaty imposed on Member States in relation to the undertakings referred to in Article 90(1). It also authorized it, however, to take decisions finding that a particular national measure was incompatible with the Treaty and specifying the measures which the addressee state had to adopt in order to comply with its obligations under Community law.

The Court compared this power to take decisions with those which the Commission had under Article 93. In both cases the Commission had the power to intervene, not vis-à-vis the undertaking which had been placed in a position where it could flout the competition rules, but vis-à-vis the Member State responsible for the impairment of competition.

(27) Judgment of 12 February 1992, Joined Cases C-48/90 and C-66/90 Kingdom of the Netherlands, Koninklijke PTT Nederland NV and PTT Post BV v Commission, not yet reported.

It is important to note that the Court clearly confirmed here the Commission's power to take decisions under Article 90(3) to bring to an end specific infringements of the Treaty.

<T6> (b) Procedure to be followed in taking a decision under Article 90(3)

335. In the same case(28) the applicants maintained that the Commission had not respected the general principle of the defendant's right to a fair hearing. The Court of Justice agreed with them on this point and consequently annulled the Commission's Decision.

The Court held that the principle required that, before a Decision was adopted, the Member State in question be sent a precise and full summary of the objections the Commission intended to formulate regarding it, and that it be given an opportunity to make known its views on any comments submitted by interested third parties. These two conditions had not been met in the present case, and the Dutch Government's right to be heard had therefore been infringed.

This also applied to the franchisees. As the direct beneficiaries of the contested national measure, being named therein and expressly mentioned in the Commission Decision, the economic consequences of which they bore directly, they likewise had a right to be heard. Despite this, they had had only informal talks with the Commission, and the latter had never told them precisely what it was in the national measure that it objected to.

(28) Referred to above.

<T1> PART THREE - COMPETITION POLICY AND STATE INTERVENTION

<T2> Chapter I - Main decisions and measures taken by the Commission

<T3> A. State aid

<T4> §1. General policy questions

<T5> - Main developments

336. The completion of the single market programme and a series of other developments, imminent or longer-term, are making increasing demands on state aid policy. In the single market, the control of aid needs to be tighter. This is necessary not only to prevent distortions of competition between firms and industries, but also to foster balanced development of the Community's regions, in the interests of economic and social cohesion, a key objective of the Community. Aid to public enterprises must also be dealt with. Other demands arise from the constantly widening coverage of state aid work to newly deregulated sectors, especially services,(1) the moves towards economic and monetary union, the European Economic Area Agreement and the prospective enlargement of the Community to new countries.

In all these areas, mentioned in last year's Report,(2) further progress was achieved in 1992. In May the Commission issued Community guidelines on aid to small and medium-sized enterprises,(3) which codify and somewhat tighten up policy towards this widespread type of aid. A revised framework was issued for aid for synthetic fibres,(4) while work continued on a revision of the framework for environmental aid(5) and on guidelines for aid to capital-intensive investment projects(6) and export credit insurance.(7) The Commission dealt with many cases of capital injections into public enterprises, monitored privatizations in the former eastern Germany, Greece and Portugal,(8) and analysed the first year's batch of reports on financial transfers to state-owned firms under the reporting system introduced in

(1) See points 438 to 447 of this Report.
(2) Twenty-first Competition Report, point 158.
(3) See point 342 of this Report.
(4) See point 401 of this Report.
(5) See point 448 of this Report.
(6) See point 480 of this Report.
(7) See point 339 of this Report.
(8) See points 464 to 466 of this Report.

1991.(9) With a view to the future constraints of EMU, the Commission kept up the pressure on Member States with large budget deficits to reduce their aid spending. The third survey on state aid in manufacturing, published in July,(10) again showed how large a factor aid expenditure is in such deficits. With the agreement setting up a European Economic Area between the European Community and the EFTA countries due to enter into force in 1993, the Commission prepared for its wider responsibilities under the agreement. These will include taking into account the effects of aid in the EC on EFTA countries and vice versa and for this purpose consulting and providing information to its counterpart, the EFTA Surveillance Authority.(11) Finally, the Commission analysed the state aid situation in the EFTA and other countries that have applied for membership of the Community. Reports on the aid situation in Austria, Finland, Sweden and Switzerland were incorporated in the opinions on their accession applications which the Commission has sent to the Council.

337. To cope with the increasing demands on its resources, the Commission is following two main routes : codification of rules and simplification of procedures. The first route is reflected in the frameworks and guidelines, which cover a growing proportion of state aid control work. The second is shown in moves to reduce the work generated by minor aid schemes that have little, if any, effect on competition and trade and by minor amendments of existing authorized schemes. Following its adoption of the SME aid guidelines in May, the Commission issued a revised notice on the accelerated clearance of aid schemes for SMEs and of amendments of existing schemes.(12) The notice widens the scope of the accelerated procedure, under which following a pro forma notification, clearance is obtained virtually automatically within 20 working days of notification, to many more schemes for SMEs than previously as the limits on the size of businesses covered have been raised to those in the SME aid guidelines.(13)

A more far-reaching simplification of procedures has been introduced by the SME aid guidelines themselves. A de minimis facility removes altogether the obligation on Member States to notify to the Commission aid schemes which

(9) Twenty-first Competition Report, points 167 to 172, and points 528 to 531 of this Report.
(10) See points 350 to 353 of this Report.
(11) See points 82 to 84 and 343 and 344 of this Report.
(12) OJ C 213, 19.8.1992. This procedure was formerly referred to as "aid of minor importance", see OJ C 40, 20.2.1990.
(13) See point 342 of this Report.

limit a firm to ECU 50 000 of aid for a particular broad class of expenditure (such as investment or training) over three years. Like the accelerated procedure, the de minimis facility is a move towards subsidiarity as well as a means of concentrating the Commission's resources on the more important cases. However, further relaxations of state aid control are not considered appropriate at present. This is an area, par excellence, where a strong central control authority is required.

338. The Commission continued to improve the transparency of the state aid rules. Three multilateral meetings were held at which the Commission discussed policy papers with Member States.(14) Progress was made on standardizing notification forms and reporting obligations and on preparing a new edition of the collection of source materials on the state aid rules,(15) which will come out in 1993. The new edition will, for the first time, contain a simple guide to procedures in state aid cases.

<T5> - Multilateral meetings

339. A multilateral meeting between experts from all the Member States' Governments and Commission officials was held in February to discuss two sets of draft guidelines on export aid.(16) One of the papers proposed stricter controls on aid to public or state-backed export credit insurers that are in competition with private insurers for business in underwriting "marketable risks" (i.e. short-term commercial risks) within the Community; the other laid down rules for the level of interest subsidies on export credits in extra-EC trade. Reactions to the short-term export credit insurance paper were broadly favourable, but were more mixed towards the export subsidies proposal. Therefore, the Commission is considering pursuing only the former proposal under Article 92 of the EEC Treaty and leaving the latter area to a Council directive under Article 113. Action on interest subsidies was in any case much less urgent as a tightening of the OECD Consensus had much reduced the scope for such subsidies in trade with developed countries.

(14) Twenty-first Competition Report, point 162.
(15) EC Commission, Competition Law of the European Communities, Volume II: The State aids rules, Brussels/Luxembourg, 1993.
(16) Twenty-first Competition Report, point 166.

340. In October a second multilateral meeting was held on a draft revised framework on aid for environmental protection and revised guidelines for aid to the synthetic fibres industry. The new environmental aid framework will replace the framework that has been in force in virtually unchanged form since 1974. The new rules are not merely a continuation of the existing framework, but take account of new developments in Community environmental policy and of experience gained in dealing with environmental aid cases that were not covered by the previous framework. The draft was discussed again at a third multilateral meeting in December, where disagreements emerged on some issues. In view of this, the Commission decided to extend the current framework for a further six months until 30 June 1993. The revised synthetic fibres aid code, however, received broad support at the October meeting and was adopted by the Commission in December.(17)

341. The third meeting, in December, was mainly devoted to the future of the car aid framework, including the question whether the rules should be extended to certain basic components. However, it was decided simply to renew the framework.(18) The Commission also discussed with Member States how the de minimis facility should be used and monitored.(19) It plans to issue guidance on these technical matters early in 1993.

<T5> - Aid to small and medium-sized enterprises

342. In May the Commission issued guidelines on state aid to small and medium-sized enterprises.(20) The guidelines, the first-ever detailed codification of policy on aid to the vitally important SME sector, were finalized after further consultations with the Member States in February-March through correspondence and at bilateral meetings. The rationale of the Commission's policy towards aid for SMEs was described in last year's Report. In the guidelines, a number of basic rules have now been established and will be applied to all SME aid schemes.

The definition of small and medium-sized enterprise is an enterprise which:

(17) See point 401 of this Report.
(18) See point 405 of this Report.
(19) See point 337 of this Report.
(20) OJ C 213, 19.8.1992; Twenty-first Competition Report, point 165.

- has no more than 250 employees and
- either
  - an annual turnover not exceeding ECU 20 million,
    or
  - a balance sheet total not exceeding ECU 10 million,
    and
- is not more than 25 % owned by one or more companies not falling within this definition, except public investment corporations, venture capital companies or, provided no control is exercised, institutional investors.

"Small" enterprises, which receive preferential treatment under the guidelines with respect to the permissible levels of investment aid in non-assisted areas, are similarly defined as firms with up to 50 employees, turnover of up to ECU 5 million or a balance sheet total of up to ECU 2 million, and a maximum 25 % dependence on a larger company.

Besides the definition, the guidelines set maximum permissible intensities of aid to SMEs for investment in both non-assisted and assisted areas and for consultancy, training and similar activities that are relatively distant from the market place ("soft aid"). For the maximum levels of aid for other purposes, such as R&D, the guidelines refer to the relevant special framework, which likewise allow higher rates of aid for SMEs.(21) The maximum levels of investment aid in non-assisted areas, i.e. areas not eligible for national regional assistance independently of Structural Fund programmes, are 7.5 % gross for all SMEs and 15 % gross for small enterprises. In areas which are eligible for national regional aid, the rule is that in Article 92(3)(c) areas up to 10 percentage points of aid can be added to the prevailing rate of regional aid, and in Article 92(3)(a) areas 15 percentage points. However, the absolute ceiling on investment aid in the two areas is 30 % and 75 % net respectively. In parts of the Community that have been designated as eligible for aid from the Structural Funds under Objective 2 or 5b but are not areas eligible for national regional aid, the Commission will decide the level of investment aid allowed for SMEs on a case-by-case basis until the end of 1993. "Soft aid", that is aid to encourage firms to enlist the help of consultants or to obtain training in areas such as management, finance, new technology and pollution control, can generally be authorized at rates of up to 50 %.

(21) See R&D framework, OJ C 83, 11.4.1986.

Existing SME aid schemes authorized in the past will remain valid until reviewed by the Commission under Article 93(1) of the EEC Treaty. Such reviews have already commenced.(22)

<T5> - The European Economic Area agreement

343. The agreement on the European Economic Area (EEA), which should enter into force between the EC and the EFTA States except Switzerland in 1993 after renegotiation, covers the field of state aid in its Articles 61 to 64 and in a number of Annexes and Joint declarations and provides that the same rules on state aid as are applicable within the Community will also be applied by the contracting EFTA States. The agreement will be without prejudice to the existing Treaty rules on state aids, but as soon as state aid granted by an EC Member State affects or can affect trade and competition within the EEA, the EEA agreement provisions are applicable. This also applies for the EFTA, which through an independent EFTA Surveillance Authority will be responsible for dealing with all state aid granted by the EFTA member countries to their industries.

344. Before the EEA agreement entered into force, state aid cases continued to be dealt with under the bilateral EC/EFTA country agreements. Thus, in November, a compromise was agreed between the Commission and the Austrian Government on aid for an automobile plant at Graz building a Chrysler multi-purpose vehicle. The Austrian Government agreed to reduce the aid intensity to 14.4% from the 33% originally proposed.

<T5> - Lessons to be drawn from Commission practice and the case-law of the Court of Justice

<T6> (a) Questions of substance

<T7> * Aid in connection with sales of factory or office building sites

345. The aid involved in the sale of land on preferential conditions by a local authority is difficult to quantify. Recent decisions show that, in examining individual cases, the Commission now systematically asks

(22) See point 468 of this Report.

Member States to send it an independent expert's report on the market value of the land so that it can determine whether the price does not contain an aid element.

<T7> * Guarantees provided by public authorities

346. The Commission has traditionally been opposed to operating aid, particularly that which artificially allows ailing firms to stay in business without any prospect of a return to viability. It does not therefore accept guarantees granted to credit institutions by public authorities where such guarantees have no other purpose than to prop up firms which would otherwise be obliged to shut down. However, the Commission's current practice is to accept such guarantees where they are limited to six months and are intended to allow the firm to draw up and implement a restructuring plan, provided that the general rules on public guarantees are complied with. This approach is soon to be codified in the guidelines on aid for rescuing and restructuring firms in difficulty.

<T6> (b) Procedural questions

<T7> * Scope now available to Member States to apply to the Court of Justice for annulment of decisions initiating Article 93(2) proceedings

347. The main development this year as far as procedures are concerned was undoubtedly the two judgments delivered by the Court of Justice on 30 June declaring admissible appeals lodged against decisions to initiate proceedings under Article 93(2) of the Treaty.(23) The Court held in its judgments that the decision to initiate proceedings involved a choice on the part of the Commission as to the nature of the aid and hence the procedure relating to it, since such a decision had different effects depending on whether the aid was deemed to be new aid within the meaning of Article 93(3) or existing aid subject to the rules of Article 93(1).

(23) See point 532 of this Report.

<T7> * Accelerated procedures for aid schemes for SMEs and for amendments to existing schemes

348. The Commission extended to SMEs, as defined in the new SME aid guidelines, the benefit of the accelerated examination procedure (20 working days), leading virtually automatically to clearance, for certain aid schemes.(24)

<T7> * Derogation from the procedural deadlines for certain aid granted by the Treuhandanstalt

349. So as to take account of the difficult socio-economic situation in the former German Democratic Republic and of the specific nature of the Treuhandanstalt's activity, the Commission agreed that some of the aid granted by the Treuhandstalt(25) should be examined within shorter deadlines than usual. The aid proposals will normally be decided on within 15 working days of being notified, though in exceptional cases the German Government may request that the period be reduced to ten working days. Similarly, the Commission may exceptionally indicate that it needs an additional five working days to analyse the notification. If the notification proves to be incomplete, a request for supplementary information can be sent. Every effort will be made to avoid sending such a request. Once it has received the information, the Commission will have 15 further working days. These deadlines are appreciably shorter than the 30 working days that apply to individual aid awards notified under approved schemes.

(24) See point 337 of this Report.
(25) See point 19 of this Report.

<T4>

§2. Third survey on state aid

350. In July the Commission published its third survey on state aid in the Community. The survey covers aid to manufacturing industry, agriculture, fisheries, coal-mining and transport (railways and inland waterways). It updates for the period 1988-90 the data compiled in the previous surveys, which covered the period 1981-88.(1)

351. The main purpose of the survey is to describe, in as transparent a manner as possible, the present structure of state aid to firms in the Community, to make an overall assessment of the progress achieved in the Commission's tightening of its state aid policy, and to identify the areas on which the Commission's future policy could focus more.

352. Total aid granted in the twelve Member States averaged ECU 89 billion in the period 1988-90 as against ECU 92 billion in the period 1986-88. Of this total amount, 40% went to manufacturing industry, detailed analysis of which is central to the survey; its amount also remained considerable, with annual expenditure between 1988 and 1990 amounting to ECU 36 billion. Although the figures show that, at Community level, aid to manufacturing industry decreased between 1986 and 1990, a slight increase at the end of the period, in 1990, suggests that the Commission must keep a very close watch on its trend, so that it does not jeopardize the general downward trend in state aid in the Community.

Leaving aside Greece, for which the figures available are only provisional, the highest aid levels (expressed as a percentage of value added) in manufacturing industry are found in Italy, Portugal and Ireland. The lowest levels are in Germany, Denmark and the United Kingdom. Taking the four largest European economies, the level of aid in Italy measured as a percentage of value added is three times as high as in the United Kingdom, more than twice as high as in Germany and more than one and a half times as high as in France. This shows clearly that the disparities between Member States remain considerable.

(1) Eighteenth Competition Report, points 162 and 163; Twentieth Competition Report, points 188 to 192.

In addition, the figures show that the total amount of aid per person employed granted in the peripheral regions with limited budgetary resources remains relatively low compared with that granted in the four most prosperous countries in the Community. The ratios for Greece, Spain, Ireland and Portugal are below the Community average and much lower than in most of the richer and more central countries. Similarly, in manufacturing, government aid granted in the four largest Community economies accounted for 75% of the aid granted to industry in the Community between 1986 and 1988. This figure rose to 79% between 1988 and 1990.

353. The fact that the relative level of support for industry in the most prosperous Member States is increasing to the detriment of the peripheral countries must be seen as a serious danger to cohesion. The Commission will therefore continue to do all it can to limit the adverse effects of this trend on competition and on economic convergence and if possible to reverse it. Through its policy on state aid, it will thus help to ensure greater cohesion in the Community.

State aid to manufacturing industry
Annual averages 1988-90 and 1986-88 (in brackets)

	as a percentage of value added		ECU per person employed		ECU million*	
	(1986-88)	1988-90	(1986-88)	1988-90	(1986-88)	1988-90
Belgium	(4.3)	4.1	(1606)	1655	(1175)	1211
Denmark	(1.9)	2.1	(593)	634	(316)	333
Germany	(2.7)	2.5	(994)	984	(7869)	7865
Greece	(24.3)	14.6	(2983)	1502	(2074)	1072
Spain	(6.8)	3.6	(1749)	936	(4491)	2499
France	(3.8)	3.5	(1437)	1380	(6479)	6106
Ireland	(6.4)	4.9	(2114)	1734	(447)	368
Italy	(6.2)	6.0	(2139)	2175	(10760)	11027
Luxembourg	(2.3)	2.6	(988)	1270	(37)	48
Netherlands	(3.1)	3.1	(1215)	1327	(1101)	1225
Portugal	(2.2)	5.3	(302)	758	(245)	616
United Kingdom	(2.6)	2.0	(770)	582	(4101)	3133
EUR 12	(4.0)	3.5	(1325)	1203	(38835)	35503

* 1986-88 averages at 1989 prices

Source: Third survey

<T4> §3 - Aid for research and development

<T7> General policy developments

354. The Commission still bases its assessments of national R&D programmes and projects on the criteria laid down in the Community framework for state aid for research and development,(1) which was adopted in 1986.

355. Point 8.2. of the framework stipulates explicitly that R&D aid must have as its effect the encouragement of additional effort in the R&D field over and above the normal operations which firms carry out in their day-to-day operations or must enable them to respond to exceptional conditions for which their own resources are too limited. In other words, the Commission must ensure that the aid does not simply replace the firm's own R&D expenditure, i.e. it should have an incentive effect.

The Commission's view is that, as a result of the aid received, firms should carry out more research than they would have done if they had not received the aid.

In order to verify this criterion in the case of individual projects, the Commission examines the structure and the evolution of the R&D costs of a given company over the past years, notably R&D expenditure, R&D as a percentage of the turnover and, when the information is available, the number of employees working on R&D.

356. On 17 July the Agreement concerning the application of the GATT Agreement on trade in civil aircraft for large capacity planes (over 100 seats) was signed between the United States and the European Community. The core of the Agreement is the possibility of granting direct government support (in the form of repayable advances) for the development of future large civil aircraft programmes up to 33% maximum when a reasonable expectation of recovering the outlay within 17 years from the date of first disbursement is established. Repayments have been made dependent upon the actual delivery of aircraft.

(1) OJ C 83, 11.4.1986.

The Article 92(3)(b) exemption was used only for Eureka projects HDTV (EU95), Jessi (EU127), ESF (EU43) and Eurolaser (EU 226), since the aid given to companies participating in these projects promotes the execution of an important project of common European interest.(2)

Some of the more interesting(3) decisions are described below.

<T8> Denmark

357. In October the Commission authorized the Danish Government to allocate ECU 132 million to a fund to finance product development. The fund, called the Industrial Development Fund, will be managed by an independent board and will be self-financing after the initial capital injection, as it will cover the losses on its lending operations - the loans are only repayable if the project is successful - from income from financial investments. The authorized intensity of aid is 40% in case of failure of the research. Otherwise the loans have to be repaid with interest at market rate.

<T8> Germany

358. A major programme was approved by the Commission in February. It concerns the "Förderungsprogramm Biotechnologie 2000" with a budget of ECU 749.3 million for the years 1990-95. The aid, in the form of outright grants, will go to industry (ECU 163.3 million of the total budget) and to universities and research institutes. Public research institutions conducting fundamental research may be financed at 100%, no state aid being involved in such cases. For basic industrial research an intensity of 50% was approved and for applied research 25%. An enhancement of 10% was considered to be allowable for the former GDR in line with point 5.4 of the Community framework for state aid for research and development,(4) which allows for a

(2) Twenty-first Competition Report, point 180 and OJ C 83, 11.4.1986.
(3) The full list of the aid decisions adopted by the Commission this year is given in the Annexes. The list is broken down by type of decision. The Official Journal reference of each decision or decision summary is given where it was available when the Report went to press, as is the number of the aid so as to enable the reader to obtain the relevant press release if there was one. Some of the decisions are summarized in one of the Annexes.
(4) OJ C 83, 11.4.1986.

higher aid intensity for projects taking place in the least favoured regions. The latter three percentages refer to companies as well as to research institutes, in so far as they are engaged in collaborative research.

359. For the programme "Physikalische Technologien" the German Government notified a budget of ECU 233.2 million, of which ECU 103.1 million was meant for industry. The Commission found in February that the aid intensities for the different stages of research were in line with its policy and consequently raised no objections to the aid under the exemption provided for in Article 92(3)(c) of the EEC Treaty.

360. The same exemption was used in March in the case of the notified programme "Materialforschung" with a budget amounting to ECU 376.8 million for 1989-94. The aid intensity of 50% for basic industrial research by firms and research institutions with an extra 10% for the former GDR(5) was approved.

361. In July, the Commission decided to terminate the procedure provided for in Article 93(2) of the EEC Treaty with regard to the German aid for research into solid-state lasers (Eureka project 226)(6) and it allowed the aid under the exemption provided for in Article 92(3)(b) of the EEC Treaty. The Commission was able to do so since it became clear that the intensities calculated on the basis of new information were in line with the limits which are laid down by the R&D guidelines.

362. The aid programme "Luftfahrtforschung und Luftfahrttechnologie" was given the green light in October. The programme has a budget of ECU 86 million for 1989-91 and supports applied research conducted by companies and research institutes. Taking into account the particular features of the aerospace industry, the Commission applied point 5.4 of the Community framework for state aid for research and development, which allows for a higher aid intensity in cases of very high specific risks. The aid intensity amounted to 50% gross.

(5) See point 5.4 of the Community framework for state aid for research and development (OJ C 83, 11.4.1986), which allows for a higher aid intensity for projects taking place in the least favoured regions.

(6) Twenty-first Competition Report, point 185.

<T8> Spain

363. In March the Commission granted authorization under the derogation provided for in Article 92(3)(c) of the EEC Treaty for an aid scheme to encourage research and industrial development by firms in the Valencia region.

The programme, which has a four-year budget of ECU 15 million, provides for grants of 50% in net grant equivalent of eligible costs for basic research and 25% for applied research and development. An increase of 10% is allowed for SMEs in line with point 5.4 of the Community framework for state aid for research and development. The Commission took the view that the regional authorities were right to encourage cooperation between firms, create the necessary infrastructures and develop a policy that would broaden research, development and innovatory activities in firms, given the nature of the industrial base in the Valencia region, consisting of small firms producing low-technology, labour-intensive consumer goods.

<T8> France

364. In the period from January to July the Commission examined the 1992 refinancing of the research aid schemes Anvar, "Major Innovative Projects", Puma and the Research and Technology Fund, which are the main schemes in force in France. These schemes were allocated a total budget of ECU 490 million in 1992.

365. In July the Commission decided to terminate the Article 93(2) proceedings initiated against Bull in respect of aid put at ECU 380 million which the French Government proposed to provide to finance its R&D programme.(7) The programme, labelled a "technical project", covers a period of four years with a budget of some ECU 2 billion.

The aid intensity amounts to 27% in net grant equivalent of the eligible costs.

(7) Twenty-first Competition Report, point 259.

It was verified that the aid met all the criteria relating to aid intensity, additionality and eligibility of expenditure.(8)

<T8> Italy

366. In June the Commission terminated the Article 93(2) proceedings initiated against the pharmaceuticals company Sigma-Tau.(9) The effective aid rates (31.6% net grant equivalent for the project as a whole) proved to be much lower than the Commission had thought when the procedure was initiated and were in line with the framework on research aid.

367. In July, applying the derogation provided for in Article 92(3)(b) of the EEC Treaty regarding the execution of an important project of common European interest, the Commission authorized aid by the Italian Government for SGS-Thomson Microelectronics Srl, which is participating in the Eureka 127/T1 project (Jessi), for the development of 16 megabit programmable memories (Eprom). The project, covering a period of four years, represents an investment of ECU 96 million for the Italian participant and comprises aid, in the form of a capital grant, of ECU 36.6 million.

The grant will be provided under Laws 46/82 (Fondo Speciale Ricerca applicata) and 22/87 (Eureka projects), and its intensity (38.2% net grant equivalent) is in line with the Community framework for state aid for research and development.

The aid intensity, bearing in mind very strong intra-Community competition in the sector, seemed too high for the research project, in view of its distance from the market.

Additional information received by the Commission showed that basic research accounted for around 30% of the project and that, consequently, the intensity of the aid was permissible.

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(8) The capital injections into Bull approved with the research aid are dealt with in point 425 of this Report.

(9) Twenty-first Competition Report, point 184.

The project, which is in the medical field, provides for investment of ECU 30 million, a six-year research period and aid of ECU 9.4 million in the form of a capital grant and low-interest loan.

<T8> Netherlands

368. In May the Commission approved the Dutch industrial R&D programme for the gasification of coal. The objective of the programme is to enlarge technological knowledge in the field of electricity generation by means of coal gasification in combination with steam and gas turbines.
The budget up to the end of 1996 amounts to approximately ECU 13 million. The mixture of 36% basic industrial research and 64% applied research is funded at an aid intensity of 31% gross.

369. The Dutch D2TV foundation received aid amounting to ECU 15 million for the period up to and including 1996. The Commission approved in May the aid on the basis of Article 92(3)(c) of the EEC Treaty because of its permissible intensity of 10.8% gross but also because it allows development activities aimed at broadcasting, decoding and receiving transmissions in the HD-MAC and D2-MAC standards. The decision was in line with the Commission's policy on high-definition television.

370. In September the Commission used the exemption of Article 92(3)(b) of the EEC Treaty to clear the way for around ECU 20 million granted to Philips in 1992 for its participation in Eureka projects JESSI (EU 127) and HDTV (EU 95).

371. The Dutch steel enterprise Hoogovens participates in the Eureka project CARMAT (EU 13). It carries out specific parts of basic industrial research for which the Netherlands Government proposed a subsidy of ECU 1.23 million. As the aid intensity was 25% gross, the Commission in October did not raise any objections.
The aid was also assessed under Commission Decision No 3855/91/ECSC of 27 November 1991[10] which established Community rules for aid to the steel industry.

(10) OJ L 362, 31.12.1991.

<T8> United Kingdom

372. In July the Commission raised no objections to the refinancing of four UK R&D aid schemes. ATP, LINK and GICP encourage projects of collaborative research between companies, universities and research institutions. The Eureka initiative stimulates British participation in Eureka projects. The total amount of the budgets was ECU 139 million.

373. The UK authorities also notified state aid in the form of an outright grant to different companies, research organizations and universities participating in the Eureka project 194 (Industrial application of evaluation of high power lasers). The budget for the period 1991-96 amounts to around ECU 2.5 million. The aid was found to be compatible with the common market under Article 92(3)(c) of the EEC Treaty, the intensity being 37.9% for basic industrial research and 13.9% for applied research.

374. In December the Commission raised no objections to the aid scheme "collaborative research in the construction sector". The aid is tied to an R&D contract concluded with industrial firms on the basis of a competitive bidding procedure. All rights in the results are vested jointly in the Crown and in the contractor. Since the results do not accrue exclusively to the State but also to the participating firms, the Commission considered the scheme to fulfil the conditions of Article 92(1) of the EEC Treaty. On the basis of aid intensity, additionality and common interest, the scheme was approved under the exemption of Article 92(3)(c) of the EEC Treaty.

<T4> §4 - Aid to industrial sectors subject to a Community framework on state aid

<T5> - General

375. A number of industrial sectors are covered by frameworks on state aid. These are sectors which are undergoing or have undergone major restructuring that has resulted or is liable to result in the short term in considerable job losses. In addition, all of them are subject to particularly intense international competition.

In view of this situation, the Commission felt that even stricter control of aid was necessary and that certain or indeed all aid proposals should be notified, even where the aid was to be granted under schemes that had already been approved. The Commission considers that with such a system it is better able to assess the sectoral impact of aid granted and to prevent competition between Member States for mobile investment projects. The guidelines and rules laid down in the frameworks also give greater legal certainty to Member States and firms.

Except in the sectors covered by the ECSC Treaty, which are dealt with by Commission decisions requiring the assent of the Council, and shipbuilding, where directives have been adopted by the Council on the basis of Article 92(3)(d) of the Treaty, the Commission makes use of Article 93(1). This allows the Commission to recommend to Member States as an "appropriate measure" a framework amending the schemes approved in the sector concerned. In the event of disagreement, the Commission can initiate Article 93(2) proceedings culminating in a decision requiring the Member State to comply with the framework, subject to any derogations which the national authorities have been able to obtain during the proceedings.

The utility of these frameworks could be reexamined if guidelines on aid to highly capital-intensive investments were adopted.

<T6> (a) Shipbuilding industry

<T7> . Amendment to the Seventh Directive (ex-GDR)

376. On 20 July the Council adopted Directive 92/68/EEC amending the Seventh Directive 90/684/EEC(1) on aid to shipbuilding. Whereas the Seventh Directive forms the general framework for such aid, the new Directive creates a special transitional arrangement for the former German Democratic Republic in order to allow it to restructure and become competitive. Under the new Directive, up until 31 December 1993 operating aid for the shipbuilding and ship-conversion activities of these yards may not exceed a ceiling of 36% of the yards' reconstructed turnover before aid. This ceiling is considerably higher than the one prevailing for other Community yards. In exchange, the German Government, before 31 December 1995, has to achieve, according to a timetable accepted by the Commission, a genuine and irreversible net capacity reduction amounting to 40% of the capacity of 545 000 cgt existing in the former German Democratic Republic on 1 July 1990. The implementation of the above will be closely monitored by the Commission and reported to the Member States.

The Commission also decided to maintain in 1993 the shipbuilding aid ceilings that applied in 1992.

<T7> . Specific aid schemes

<T8> Germany

377. In July the Commission decided to prohibit a development aid package proposed by Germany for the Chinese shipping company COSCO, after having initiated, in October 1991, the procedure provided for by Article 93(2) of the EEC Treaty to enquire whether development aid proposed by Germany should be treated as permissible development aid to China or as operating aid to the German shipyards where the ships would be built. The Commission found that the proposed aid did not constitute genuine development aid but rather operating aid to the Bremer Vulkan (West Germany) and Mathias-Thesen (former German Democratic Republic) yards where the orders were to be placed and that the notified aid should be prohibited.

(1) OJ L 380, 31.12.1990; Twentieth Competition Report, points 181 to 183.

378. In December the Commission decided to approve the release of a first tranche of aid for the Meeres-Technik-Werft, former Mathias-Thesen-Werft (MTW) in Wismar, Mecklenburg-Western Pomerania (former German Democratic Republic). The first tranche consists of ECU 93.2 million operating aid,ECU 46.2 million investment aid and ECU 8.8 million closure aid. The release of further tranches is conditional on the German Government demonstrating to the Commission's satisfaction that the aid will continue to respect the rules laid down in the Seventh Directive on aid to shipbuilding and more specifically the new Directive 92/68/EEC providing a derogation from the Seventh Directive to allow the extra aid needed for the restructuring of the yards in the new Länder.

<T8> Greece

379. In December the Commission decided to terminate Article 93(2) proceedings on the aid schemes on operating aid in Greece for repairs and on aid granted to the Neorion shipyard.

At the same time, under Article 10 of the Seventh Directive on aid to shipbuilding, the Commission approved aid in the form of debt write-offs for financial restructuring linked to the sale of four publicly owned shipyards.

The Greek Government undertook to ensure that if all the yards were not disposed of by sale by 31 March 1993 the yards would be closed and that this closure would be irreversible as provided for by Article 7 of the Directive.

One of the yards, Shipyards of Elefsis, had already been sold. The other three yards, Neorion Shipyards of Syros, Hellenic Shipyards and Nafsi Shipyard, were all under special liquidation proceedings according to existing Greek legislation. For Neorion, an open bidding procedure had resulted in an agreement for sale to the highest bidder, but it was still to be finalized. For Nafsi an open bidding procedure was under way. Hellenic is expected to close down its commercial shipbuilding activities. It will continue its naval shipbuilding activities which represent no more than 51% of the value of the company as provided by Article 10(3) of the Seventh Directive.

<T6> (b) Steel covered by the ECSC Treaty

<T7> Steel aid code

380. On 1 January the new steel aid code (Decision No 3855/91/ECSC) entered into force for a five-year period expiring on 31 December 1996,(2) with certain amendments as compared to the previous code. Apart from the modification of Article 2 (aid for research and development), the main amendment relates to aid granted under general regional investment aid schemes to steel undertakings in the territory of the former German Democratic Republic.

381. Under Article 2, aid granted for R&D may be deemed compatible with the common market if it is in compliance with the rules laid down in the Community framework for state aid for research and development, thus bringing the provisions for the steel sector more into line with those for other sectors.

382. Under Article 5 of the code, investment aid may be allowed to steel undertakings in the former German Democratic Republic, provided that the aid is accompanied by a reduction in the overall production capacity of that territory. In the Commission's decision in the first major aid case involving "Walzwerke Ilsenburg GmbH", the Commission more closely specified its interpretation of Article 5. It decided to require an overall reduction in capacity of hot-rolled finished products in the order of 10% of the capacity installed in 1990 (the year of German unification), and to take this condition into account in the examination of each individual case of state aid to steel undertakings in the former German Democratic Republic.

383. In this respect, Article 5 equally stipulates the period within which such regional aid may be granted in the former German Democratic Republic (until 31 December 1994 and until 31 December 1995 for the special tax concessions), which departs from the general period of validity of the code. This is due to the exceptional character of regional investment aid and the appropriate period for the modernization of the steel plants concerned, which is set at three years.

(2) Twenty-first Competition Report, point 208.

<T7> CO_2-tax in Denmark and the Netherlands

384. In July, after obtaining the Council's assent, the Commission amended the steel aid code in order to allow aid to Danish and Dutch steel firms in the form of relief from new CO_2/energy taxes introduced in the two countries.

385. Both countries had notified these tax arrangements to the Commission in accordance with Article 93 of the EEC Treaty. The Commission decided not to oppose the granting of the aid(3) in general. However, aid for this purpose is not provided for by the steel aid code and is therefore prohibited under Article 4(c) of the ECSC Treaty. Because the additional costs incurred by Danish and Dutch steel firms as a result of the tax will affect their competitiveness vis-à-vis foreign competitors, which would be an unjustified effect, the Commission also decided to authorize the aid in these sectors by an amendment to the steel aid code.

<T8> Germany

386. In February the Commission approved the application of several regional aid schemes to the ECSC steel industry in the territory of the former German Democratic Republic. The decision concerns the largest regional scheme, the Joint Federal Government/Länder programme for improving regional economic structures (20th outline plan), giving the possibility of granting an investment subsidy. The Commission also approved the application of the tax allowance for investment (Investitionszulagengesetz 1991) and the use of the special depreciation schemes to the steel industry in the former German Democratic Republic.

387. Within this framework, it has become possible to use regional aid to assist productive investment in the steel sector up to an intensity of 23% gross. This aid may be combined with different forms of investment aid or other assistance, up to a maximum of 12%, so that the aggregate assistance for a single investment project may not exceed an intensity ceiling of 35%, as approved by the Commission in accordance with the provisions of the EEC Treaty.

(3) See point 451 of this Report.

388. The Commission examined the sale by the Treuhandanstalt of the Stahl-und Walzwerk Brandenburg GmbH and the Hennigsdorfer Stahl GmbH, two steel companies in the former German Democratic Republic, to the Italian steel group Riva. The purpose of the investigation was to establish the compatibility of the operation both with the Commission's decision of September 1991 on the activities of the Treuhandanstalt, and with the Community's steel aid code. However, in April the Commission cleared the privatization, considering that the operation contained no aid elements, given the ample international publicity that preceded the sale and the fact that Riva had submitted the best offer.

389. In June the Commission took a decision on the first important investment project in the East German steel industry involving public aid, approving the granting of investment aid to Walzwerke Ilsenburg GmbH under two regional aid schemes which it had approved in February. The Commission considered the proposed aid in the light of Article 5 of the steel aid code, and established that the investment did not increase production capacity of the Ilsenburg plant and was accompanied by a sharp reduction in capacities for crude steel and hot-rolled finished products as compared to 1990. This reduction was achieved through definitive closures of some plants in 1990, and through the gradual reduction of old capacities which would not be fully replaced by new ones.

390. In September the Commission approved the extension of the 21st outline plan of the Joint Federal Government/Länder programme for improving regional economic structures to the steel industry in the new German Länder.

391. In December the Commission approved the extension of the application of the "Investitionszulagengesetz 1992" (tax allowance for investment), which replaces the "Investitionszulagengesetz 1991", to the ECSC steel industry in the territory of the former German Democratic Republic. In particular, this approval covers the possibility of granting a tax allowance with an intensity of 8% for investments in that territory started before the end of June 1994 and terminated before the end of 1996, and a tax allowance with an intensity of 5% for those investments started and terminated within the period from 1 July 1994 to 31 December 1996. The Commission has requested the German authorities to ensure that each individual aid applied for under the said scheme is notified to the Commission pursuant to Article 6 of the steel aid

code (Decision No 3855/91/ECSC of 27 November 1991). Each individual aid project notified will have to be evaluated by the Commission as to its compatibility with the provisions, and in particular Articles 5 and 1 of the Decision.

<T8> Spain

392. In July 1991 the Commission initiated the procedure under Article 6(4) of the steel aid code to investigate certain aid granted to the Spanish special steels producer Acenor enabling the company to continue to operate despite its financial difficulties.

393. In November the Commission sent a communication to the Council recommending that aid totalling up to ECU 505 million in support of a restructuring plan for Sidenor, incorporating Acenor and Foarsa, be approved under Article 95 of the ECSC Treaty. The restructuring involved a 31% reduction in capacity and a 39% reduction in the workforce.

394. At the same time the Commission sent a communication to the Council concerning the proposed restructuring plan for the Spanish public integrated steel company, Corporación de la Sidérurgia Integral (CSI), incorporating Ensidesa and Altos Hornos de Vizcaya. The Commission considered that the plan was viable and represented a courageous and constructive approach to the restructuring of the Spanish steel industry. However, in the light of the difficulties on the Community steel market, the Commission took the view that the relation between the aid intensity (aid totalling up to ECU 3 986 million, most of which was incompatible with the steel aid code and could only be approved through recourse to Article 95 of the ECSC Treaty) and the extent of the restructuring proposed needed to be improved. The Industry Council, at its meeting on 24 November 1992, was not prepared to agree to the Spanish proposals and further discussion was deferred until early 1993.

<T8> Italy

395. In July the Commission decided to initiate the procedure set out in the steel aid code (Article 6(4) of Decision No 3855/91/ECSC[4] in order to investigate possible aid to the publicly owned Italian steel company Ilva. Ilva's shareholder, the state-owned holding company IRI, has decided to increase Ilva's capital by ECU 421 million in two instalments. The first

(4) OJ L 362, 31.12.1991.

capital increase of ECU 227 million will take the form of the inclusion of an IRI company, Sofin Spa, into Ilva, while the second increase will come directly from IRI.

396. The capital increases are part of a wider plan to improve the financial situation of the company. Under a plan put to the Commission earlier this year Ilva would sell off a variety of assets which are not part of its core business thereby raising at least a further ECU 421 million and would raise ECU 647 million by selling shares on the stock exchange.

397. However, since in June 1992 Ilva announced a loss on its 1991 operations, the raising of ECU 554 million from Ilva's flotation on the stock exchange could not take place as previously envisaged since in Italy only companies which have made profits in three consecutive years prior to flotation can be quoted on the stock exchange. The Commission considered that IRI could have known, at the time it put forward its plan, that the company risked making a loss in 1991 and that it would not be possible to sell Ilva's shares on the stock exchange in 1993 as envisaged.

398. In these circumstances, it is doubtful that a commercial investor would go ahead with the rest of the plan or without developing a better alternative before committing further capital to the company. Therefore the Commission considered that the capital increase could contain state aid.

<T6> (c) Non-ECSC steel sectors

399. In March the Commission approved the granting of investment aid to Mannesmann-Röhrenwerke Zeithain/Sachsen, a producer of seamless steel tubes in the former German Democratic Republic, under two regional investment aid schemes (investment subsidy and tax allowance) it had approved in February.

<T6> (d) Aid to the coal industry

400. In 1992 the Commission continued its examination of aid in the light of Decision No 2064/86/ECSC establishing Community rules for state aid to the coal industry(5) and the provisions of the ECSC Treaty.

Financial measures planned by Member States for the coal industry 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 made its authorization subject to the requirement that the Member States' planned aid for the Community coal industry should be sufficiently degressive and accompanied by restructuring, modernization and rationalization plans.

By decisions of 11 December 1991 and 30 September 1992 the Commission authorized the 1992 aid proposals for Belgium(6) and France.(7) By decision adopted on 30 September 1992,(8) the Commission authorized a number of direct financial measures to assist the coal industry in the Federal Republic of Germany.

On 25 November 1992(9) the Commission authorized for 1991 and 1992 the financial assistance provided by Germany in the form of compensation to electricity generators under the third Law on electricity produced from Community coal. In its decision, the Commission also ruled on supplementary financial assistance under the above mentioned Law for 1989 and 1990 and on financial measures in the form of compensation between mining areas and compensation for coal with a low volatile matter content for 1990, 1991 and 1992. For the compensatory payments the Commission restricted its

(5) OJ L 177, 1.7.1986.
(6) OJ L 22, 31.1.1992.
(7) OJ L 310, 27.10.1992.
(8) OJ L 310, 27.10.1992.
(9) OJ L 21, 29.1.1993.

authorization to the payment intended to cover current expenditure both for 1991 and 1992 and for the amount of 1990.

On 23 December 1992[10] the Commission authorized for 1992 financial compensation to electricity generators under the Spanish Ofico scheme. In another decision adopted on the same date[11] the Commission also decided on various other financial measures taken by the Spanish Government for 1991, 1992 and 1993.

On 23 December 1992[12] the Commission authorized for 1992 financial measures to assist the Portuguese coal industry.

Lastly, the Commission adopted a general decision setting out the new rules for aid to the coal industry, which it sent to the Council for assent.

(10) Awaiting publication.
(11) Awaiting publication.
(12) Awaiting publication.

State aid to the coal industry

Aid for current production in 1991 and 1992

(ECU million)

	Belgium		Germany		Spain		France		Portugal		United Kingdom		Community	
	1992	1991	1992	1991	1992	1991	1992	1991	1992	1991	1992	1991	1992	1991
Aid under Decision No 2064/86/ECSC														
1. Direct aid														
- Article 3	33.5	53.4	177.7	209.6	379.7	390.0	186.9	165.3	5.0	4.5	-	-	782.8	822.8
- Article 4	-	-	1624.6	1656.7	-	-	-	-	-	-	-	-	1624.6	1656.7
- Article 5	-	-	-	-	-	11.3	-	-	-	-	-	-	-	11.3
- Article 6	-	-	65.6	66.8	-	-	-	-	-	-	-	-	65.6	66.8
- Other	-	-	-	-	66.3	217.6	-	-	0.8	-	-	-	67.1	217.6
Total	33.5	53.4	1867.9	1933.1	446.0	618.9	186.9	165.3	5.8	4.5	-	-	2540.1	2775.2
ECU/Per tonne	90.54	84.36	25.73	26.55	23.47	34.00	19.27	16.36	21.48	19.40	-	-	13.62	14.37
2. Indirect aid	7.4	7.8	2466.7	2569.6	17.3	48.50	-	-	-	-	-	-	2491.4	2625.9
Total	40.9	61.2	4334.6	4502.7	463.3	667.4	186.9	165.3	5.8	4.5	-	-	5031.5	5401.1
ECU/Per tonne	110.54	96.68	59.71	61.85	24.38	36.66	19.27	16.36	21.48	19.40	-	-	26.98	27.95

<T6> (e) Aid to the synthetic fibres industry

Extension of the aid code

401. In the synthetic fibres industry, the Commission, after having extended until 31 December 1992 the framework that was to have expired on 18 July 1992, drew up a new framework that will be applicable from 1 January 1993 to 31 December 1994. The new guidelines develop and reinforce the rules which have been applied since 1977.

The scope of the new guidelines as regards industrial processes is extended to include polymerization where this is integrated into production in terms through the machinery used.

In assessing aid proposals, the Commission will focus on the requirement that prospective recipients of aid must reduce their production capacity significantly.

The reduction will be assessed in the light of the specifics of each proposal, including the intensity of the aid, the amount of the investment, its location, its contribution to regional development and the trend of the average rate of capacity utilization of the industry, the firm and the group to which the firm belongs.

<T8> Germany

402. The Commission examined aid to firms situated in the new Länder. It adopted decisions approving the aid in view, in particular, of its regional impact:

- by decision of 30 September it authorized two aid proposals for Hoechst Guben and Märkische Faser, both situated in Brandenburg;

- by decision of 28 October the Commission similarly approved aid proposals for Thüringische Faser/Schwarza, in Thuringia.

<T8> Italy

403. In May the Commission decided to initiate Article 93(2) proceedings in respect of proposed aid of ECU 80 million for SNIA-Fibres.

The Commission took the view that the positive impact of the proposed aid in terms of its expected regional effects (job creation in the Mezzogiorno) could be cancelled out by its sectoral implications. The synthetic fibres industry is faced with growing overcapacity, prompting the Commission to assess aid proposals for firms in the industry in the light of the trend of their productive capacity and their rate of capacity utilization.

As the firm is to reduce its productive capacity by 10% by 1995, the Commission authorized the proposed aid in a final decision adopted in December.

<T8> Luxembourg

404. In September the Commission terminated the proceedings initiated in October 1991[13] in respect of proposed aid of ECU 370 000 for Technofibres SA. It took the view that the proposed aid was aimed at improving product quality without leading to an increase in the firm's output, which would have been contrary to the requirements of the framework. The Commission also took the view that the aid would contribute to the development of the region concerned.

(13) Twenty-first Competition Report, Annex III.B.1.

<T6> (f) Aid to the motor vehicle industry

405. In December 1988 the Commission first introduced, on the basis of Article 93(1) of the EEC Treaty, the Community framework on state aid to the motor vehicle industry for a period of two years with effect from 1 January 1989, at the end of which its activity and scope would be reviewed.(14) In December 1990 the Commission decided to renew the framework without setting a time-limit on its application. However, the Commission undertook to review it after two years and decide on possible amendments, or its repeal, following consultation with the Member States.(15)

As promised in December 1990 the Commission reviewed the framework with the Member States during a multilateral meeting which took place on 8 December 1992. During the meeting a large majority of Member States expressed their satisfaction with the present application of the framework and wished to see it continuing over the years ahead. Member States had, however, opposing views as to the Commission's proposals for amendment or extension of the present framework.

Therefore, the Commission decided in December not to amend the framework. It will remain in force until next reviewed by the Commission.

406. The Commission took the following decisions pursuant to the framework on state aid to the motor vehicle industry.

<T8> Belgium

407. In February the Commission decided to approve aid for innovation (ECU 0.6 million grant and exemption from property tax) and for environmental protection (ECU 1.7 million grant and exemption from property tax) for investment by Volvo Europe Car NV in Ghent. The overall intensity of the aid, to be provided under the 1959 Law on Economic Expansion by the Flemish Regional Government, is around 6.5% in net grant equivalent. In the case of aid for innovation, the gross rate is 8%. The projects involve innovation at European level with a high commercial risk. In the

(14) Nineteenth Competition Report, point 127.
(15) Twentieth Competition Report, point 251.

case of the aid for environmental protection, the gross rate of 15% is in line with the Community framework on environmental aid. The Commission took account of the fact that the project will not entail any increase in capacity, but will improve the firm's flexibility and productivity.

<T8> Germany

408. In April, following the initiation of Article 93(2) proceedings on 27 February 1991,(16) the Commission took a decision on the purchase by Daimler-Benz AG of a site in Berlin.(17) It found that the difference between the price at which the site was sold by the Berlin Senate and the valuation made by an independent expert, i.e. ECU 43.8 million, constituted aid within the meaning of Article 92(1) of the EEC Treaty. Some of the aid, i.e. ECU 26.8 million, qualified for the derogation in Article 92(2)(c) ("aid granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany, in so far as such aid is required in order to compensate for the economic disadvantages caused by that division"), since it was granted before German unification and compensated for the additional costs borne by Daimler-Benz because of the urban planning requirements implicitly imposed by the local authorities as a result of the division of the city. The remaining aid, i.e. ECU 17 million, qualified for none of the derogations provided for in the Treaty and had to be repaid.

This decision, following that on the establishment of Toyota in the United Kingdom in 1991,(18) shows that the Commission is paying growing attention to aid for the purchase of land and tends to take its decisions after having asked the national authorities to send it a report, drawn up by an official and independent valuer, on the market value of the land.

409. In December the Commission terminated the Article 93(2) proceedings initiated in December 1991(19) in respect of proposed aid for investment by Opel AG in Eisenach (former German Democratic Republic). The regional

(16) Twenty-first Competition Report, point 255.
(17) OJ L 263, 9.9.1992.
(18) Twenty-first Competition Report, point 239.
(19) Twenty-first Competition Report, point 235.

assistance involved, which had an intensity of 28.9% in gross grant equivalent, was acceptable as it served to cover the extra cost due to the location. It should also have a substantial impact on the new Länder, where the socio-economic situation is difficult, most notably by creating 2 000 jobs directly and a further 2 500 indirectly. Environmental aid intended to reduce pollution from the paintshop was likewise acceptable as the project went further than previous efforts in this field.

<T8> Italy

410. In September the Commission decided to approve state aid to Iveco for the development of its new truck engine and transmission series, codenamed Elena. The aid was notified by the Italian Government under the Community framework for state aid to the motor industry and will be awarded under Law 46/82 on aid for industrial innovation. Elena is a joint venture Eureka project being carried out mainly by Iveco in association with a pan-European network of manufacturing companies, mainly motor component suppliers, and laboratories. The project will take place over the period 1990 to 1995 at a total cost - to Iveco - of ECU 144.9 million.

The proposed aid will take the form of a soft loan of ECU 80.1 million. The state aid element entailed in the loan is estimated to be equivalent to 17.4% of the eligible cost in gross grant equivalent terms.

In approving the aid the Commission took account in particular of the highly innovative nature - by Community standards - of the development expenditure entailed in the project. The proposed aid also meets the criteria set out in the Community framework on state aid for research and development. A further positive aspect of the project is that the results of the research and development being carried out should be disseminated widely considering that a broad range of motor component firms are involved in the joint venture.

411. In December the Commission decided to terminate the Article 93(2) proceedings which it initiated in October 1991[20] in respect of aid to the Fiat group in support of its second Mezzogiorno investment plan. The

(20) Twenty-first Competion Report, point 236.

regional aid component amounted to ECU 2 903 million (an intensity of 30.5% in gross grant equivalent), and the R&D aid was in the form of a low-interest loan of ECU 455 million (17% in gross grant equivalent). The regional aid was acceptable as it corresponded to the extra cost to Fiat of building plants in the south rather than in the north of Italy. It should also have a substantial impact on one of the least developed regions of the Community where regional aid ceilings run from 59% to 74% in gross grant equivalent. The R&D aid was likewise acceptable given the highly innovative and ambitious nature of the project.

<T8> Netherlands

412. In February the Commission decided to initiate proceedings to investigate possible aid elements contained in agreements between the Dutch State, Volvo Car Corporation and Mitsubishi Motor Corporation on the ownership, development plans and future financing of Volvo Car BV (VCBV). The aspects to be investigated during the proceedings were to include the price and terms on which Mitsubishi would acquire a holding in VCBV, the interest-free loan by the Dutch State to VCBV and a number of clauses in the agreements between the parties.

<T8> United Kingdom

413. The Commission decided to initiate Article 93(2) proceedings in respect of aid to British Aerospace for its purchase of the Rover Group in 1988. The decision was in response to the judgment of the Court of Justice of 4 February 1992(21) annulling the Commission Decision of 17 July 1990,(22) which required British Aerospace to repay ECU 60 million to the United Kingdom Government.(23) The Court found in particular that before deciding that an aid measure was incompatible with the Treaty, the Commission always had to initiate proceedings under Article 93(2) of the

(21) See point 533 of this Report.
(22) Twentieth Competition Report, point 260.
(23) OO C 21, 29.1.1991.

EEC Treaty in order to give interested parties the opportunity to submit their observations to it or to bring the case before the Court of Justice. The Commission took the view that the ECU 60 million constituted state aid granted in breach of the terms of Decision 89/58/EEC,(24) and was consequently incompatible with the common market.

(24) OJ L 25, 28.1.1989; Eigthteenth Competition Report, point 233.

<T4> §5. Aid to other industrial sectors

414. The decisions adopted this year by the Commission confirm its basically unfavourable attitude to sectoral aid, which creates significant distortions of competition, while being of highly doubtful effectiveness.

<T8> Belgium

415. In June the Commission took a final negative decision on unnotified aid granted by the Government of the Region of Brussels to Siemens SA. This decision was the result of the investigation under Article 93(2) initiated in July 1991 in respect of 17 awards of grants totalling ECU 8 million by the regional government under the general aid scheme established by the Economic Expansion Law of 1959.(1) None of the awards in question had been notified to the Commission pursuant to Article 93(3) of the EEC Treaty.

The grants were made to assist several items of expenditure by Siemens.

After detailed examination of the aided expenditure programmes, the Commission came to the following conclusions:

- aid of ECU 1.9 million granted towards investments of Siemens in equipment for internal use and in building acquisition was legally awarded within the limits authorized by the Commission for the operation of the Economic Expansion Law; accordingly, the Commission had no further comments on these aids;

- aid of ECU 500 000 towards expenditure on training was illegally awarded in breach of Article 93(3) since such expenditure was not eligible for aid under the Economic Expansion Law; however, after examination of the aided programmes, the Commission decided to approve the aid pursuant to the exemption laid down in Article 92(3)(c);

(1) Twenty-first Competition Report, Annex III.B.3.

- aid of ECU 6.3 million towards expenditure on equipment rented to clients, publicity campaigns and market surveys, was also illegally awarded in breach of Article 93(3) since such expenditure was not covered by the Economic Expansion Law; after detailed appraisal of this operating assistance, the Commission concluded that it did not meet any of the conditions for such aid to be compatible with the common market. The Commission therefore took a negative decision on this aid and asked the Belgian authorities to recover it from the company.
  The Economic Expansion Law of 1959 was repealed by the Belgian authorities, with effect from 31 July 1991, as proposed by the Commission pursuant to Article 93(1) of the EEC Treaty.(2)

<T8> Germany

416. In December the Commission decided to initiate Article 93(2) proceedings against aid granted by the Treuhandanstalt (THA) to Buna AG for its production and marketing of butac (butyl acetate), a product used by the paint industry.

Following complaints by another manufacturer of butac, the Commission investigated the prices at which Buna sold butac in the Community, and the financing of the company by the THA, to which it belongs.

On the basis of information provided by the German Government, the Commission concluded that guarantees and loans provided by the THA to Buna had been misused, allowing this company to continue to produce and sell butac on conditions that would not be profitable even to its more modern and efficient competitors.

A request by the Commission to the German Government to cease this misuse not having been replied to, the Commission decided to initiate proceedings under Article 93(2).

(2) Twentieth Competition Report, point 247.

<T8> Spain

417. In March the Commission took decisions on capital injections made to three companies (Imepiel, Hytasa and Intelhorce) by the state agency, 'Patrimonio del Estado', during the period 1986 to 1989, and upon the companies' privatization in 1989 and 1990. The Commission had initiated Article 93(2) proceedings against Imepiel in December 1989 (extended in July 1990), and against Hytasa and Intelhorce in July 1990.(3)

418. Imepiel, a footwear manufacturer, is located in the Valley d'Uxo and received ECU 46 million between 1986 and 1988 and a further ECU 65 million on privatization. The price at which it was sold by the State was ECU 0.75 million.

419. Hytasa, a cotton and wool textiles producer, has its production facilities at Seville. The company received ECU 55 million before privatization; a further capital increase of ECU 33 million was made in July 1990 when the company was privatized. This company also was sold for ECU 0.75 million.

420. Intelhorce, a cotton textiles producer, is based at Malaga and received ECU 60 million before privatization with a further ECU 45 million in August 1989, the date of its sale into private ownership at a price of ECU 9.3 million.

421. All three companies operate in sectors where there is intense competition. These industries are also characterized by the presence of a growing number of producers from developing countries.

Before reaching final decisions, the Commission analysed data supplied by the Spanish authorities and took account of submissions by various Member States and interested parties.

The Commission employed the market economy investor principle in assessing whether the various capital injections involved aid; in addition, it reviewed the various restructuring plans submitted by the Spanish authorities to ascertain whether the proposed changes to the companies' operations would lead to their long-term viability. The Commission decided that aid

(3) Twentieth Competition Report, points 270 and 272.

was involved in all three cases. The aid was to be considered as "rescue aid", i.e. money paid to a company in difficulty which simply enables it to continue trading without carrying out comprehensive restructuring in order to return it to commercial viability.

In its decisions the Commission took account of the fact that since 1986 many sectors of Spanish industry have been faced with the need to carry out restructuring in order to adjust to the requirements of Community membership. Consequently, it found the capital injections into the three companies prior to privatization compatible with the Treaty under Article 92(3)(c).

However, the capital injections at the time of privatization were incompatible with the Treaty since they were not accompanied by restructuring plans which ensured the viability of the companies. Moreover, production levels in the companies were maintained, which increased the risk that the aid would distort competition to the detriment of competitors. Consequently, the Commission requested the Spanish Government to recover this part of the aid granted to the companies.

An appeal against the decisions has been lodged with the Court of Justice.

422. In July the Commission decided to initiate proceedings against a proposal by the Basque authorities to provide aid for the restructuring of La Papelera Española, a group of companies producing and processing pulp and paper. The aid was to be given in the form of a guarantee for seven years on loans totalling ECU 34 million. The Commission took particular account of the fact that the restructuring plan would increase the group's sales and its market share in Spain and that the plan did not take account of the group's worsening performance.

423. In July the Commission opened Article 93(2) proceedings against a loan guarantee granted by the Basque Government to Esmaltaciones San Ignacio, SA (ESISA). ESISA is a producer of cookware and gas bottles located at Vitoria (Alava).

The guarantee covered a credit line of ECU 7.5 million at market interest rates that would be available for

nine years (1992-2000) with a three-year grace period.

The restructuring planned by ESISA appeared to be aimed at reviving the company's operations, but the Commission doubted whether the programme would return it to long-term viability.

The Commission therefore decided to initiate proceedings against the nine-year loan guarantee, but not to object to a loan guarantee limited to six months. This second decision was based on the Commission's present approach on rescue and restructuring aids. This allows Member States to grant rescue aid in the form of loan guarantees during a limited period of six months while the beneficiary draws up necessary and feasible recovery measures. This period should enable the Basque Government and ESISA to submit a revised restructuring plan that may be assessed by the Commission while the proceedings are pending.

424. The Commission decided in September not to object to aid granted in 1991 by the Spanish Government to Grupo de Empresas Alvarez (GEA), a manufacturer of crockery in Galicia. The Commission found that the sale of GEA by the state-owned industrial holding company INI in that year involved aid of ECU 24 million which had not been properly notified pursuant to Article 93(3). This aid had served to clean up GEA's balance sheet and to facilitate its restructuring and privatization. On the basis of GEA's restructuring plan, which significantly reduced the company's production capacity while restoring its profitability, and taking into account the regional problems in Galicia, the Commission decided that the aid was compatible with the common market.

<T8> France

425. In July the Commission decided to terminate the Article 93(2) proceedings in connection with Bull, the French state-owned computer manufacturer, which had been initiated in July 1991.(4)

(4) Twenty-first Competition Report, point 259; OJ C 202, 1.8.1991.

In its decision the Commission assessed both the capital injections of ECU 570 million and the aid of ECU 380 million for research and development. It concluded that both these amounts represented aid but that in both cases the aid was compatible with the common market.

It was clear that the capital injections involved aid because the historic performance of Bull, its future prospects and level of indebtedness would not have led a private investor to make this investment. However, Bull's restructuring plan allowed for reductions in capacity through the closure of production facilities and cuts in the workforce. The reductions should lead to a fall in Bull's future market share. Moreover, Bull's future prospects were enhanced by the acquisition of minority stakes by NEC and IBM. On this basis the Commission decided that the capital injections were compatible with the state aid rules.

The research and development aid was assessed in relation to the Commission's guidelines. It met all of the criteria with regard to intensity, additionality and eligibility of expenditure. It was therefore approved.(5)

France has appealed the decision to the Court of Justice.(6) The appeal alleges that the Commission was wrong to consider the capital injections to involve aid and that it also exceeded its powers in calling for the notification of all future capital injections.

In December the Commission approved the aid granted by the French Government to the VEV group in view of the financial and industrial restructuring undertaken by the group in order to restore its competitiveness.

<T8> Italy

426. In March the Commission decided to open an investigation under Article 93(2) of the EEC Treaty against the injection of ECU 22 million of new capital by the state-owned group Italimpianti into its subsidiary

(5) See point 365 of this Report.
(6) Court case 367/92.

Costruzioni Metalliche Finsider (CMF) SUD SpA. CMF SUD is a wholly-owned subsidiary of the Italimpianti Group, which in turn is a wholly-owned subsidiary of the Italian public holding IRI. CMF SUD designs and builds steel products and structures and also operates as a construction company.

The capital injection, decided in May 1991, was intended to cover all the company's accumulated operating losses and to reconstruct the company's capital base so that it could continue operating. The Commission employed the commercial investor principle in assessing whether the capital injection was aid. It found that CMF SUD had a very poor record of profitability with an average return on net assets of minus 42% during the period 1986-90. In these circumstances, the Commission doubted whether a private investor would have invested ECU 22 million of new money in the company without taking remedial action to restructure its activities or to reduce its exposure to a level commensurate with the risk and potential return on its investment.

The Commission also took into consideration several complaints received from Community competitors reporting prices allegedly charged by CMF SUD for public contracts, which were considered unrealistic and below normal cost-based prices. In this connection, the fact that the capital injection was partially to cover operating losses could mean that the Italian State was in fact covering negative margins on construction projects undertaken by the company.

In the light of the observations submitted by the Italian Government during the Article 93(2) proceedings, in September the Commission decided to extend the investigation to cover new aid to CMF SUD. This included capital injections of ECU 33 million that had been used to offset 1991 operating losses and a proposed new injection of ECU 10 million to reconstruct the company's capital base again.

427. In April the Commission decided to terminate the Article 93(2) proceedings initiated in June 1991[7] against aid the Italian Government had granted to Vifan, a manufacturer of oriented polypropylene

(7) Twenty-first Competition Report, point 258.

fibre. The Italian authorities had provided sufficient data to demonstrate that the aid to Vifan fell within the scope of Law 183/76 concerning regional aid.

428. In May the Commission closed the Article 93(2) proceedings initiated in April 1991 against the REL scheme.(8) The investigations had shown that the temporary maintenance of shareholdings and other measures had supplemented the restructuring plan approved in 1984 and in 1985 and had not entailed any increase in the budget. The Commission therefore no longer had any objections.

429. In December the Commission opened Article 93(2) proceedings against a scheme introduced by the Lazio region in Italy to assist the ceramics sector.

The scheme financed promotion of sanitaryware and crockery produced in Lazio and also offered grants covering 25% of investment costs for the manufacturers of the products to improve quality. The budget of the scheme was ECU 3.5 million.

The Commission felt that the scheme, which had not been properly notified to the Commission before it was adopted by the regional authorities, would distort competition and affect trade to the detriment of manufacturers of ceramic sanitaryware and crockery elsewhere in the Community. On the basis of the information available to it, the Commission could find no justification for the aid, and therefore decided to carry out a full investigation.

<T8> Portugal

430. In December the Commission closed Article 93(2) proceedings against aid to the public-sector petrochemicals company CNP. The proceedings were initiated in October 1991.(9)

(8) Twenty-first Competition Report, point 253; OJ C 184, 16.7.1991.
(9) Twenty-first Competition Report, point 262.

The aid was intended to remedy a situation which predated Portugal's accession to the Community. It formed part of an overall restructuring plan which should allow a return to viability. The company is of major importance in employment and regional terms, being located in the province of Alentejo, one of the worst-off parts of Portugal and of the Community as a whole. The aid was accordingly deemed to be compatible with the common market.

<T8> United Kingdom

431. In July the Commission opened Article 93(2) proceedings against a proposal of the UK Government to provide ECU 28.5 million of investment aid to SCA Aylesford, a manufacturer of newsprint. The Commission noted that Aylesford was not in an assisted area and considered that the UK Government had failed to demonstrate that the investment would not take place without the aid.

432. In December the Commission closed the proceedings. It had established that SCA intended to set up and finance the collection of 350 000 tonnes of post-consumer waste paper annually, in addition to 100 000 tonnes of pre-consumer waste. Most of this would be collected by SCA Recycling Maybank, the remainder being purchased from other waste paper merchants. The Commission noted that all the cost of this operation would be financed by SCA itself, whereas in many Member States local authorities contributed to waste paper collection costs.

The Commission also noted that the investment project, involving the refurbishment of one paper making machine and the installation of a new machine, both of which would exclusively use waste paper as raw material, had been on hold for several years in view of the cost and risk involved. Other sites in assisted regions in the Community had been considered and rejected by the company, because the additional commercial risk there outweighed any regional aid offered. Aylesford had the advantage of being located in the vicinity of large potential supplies of waste paper and a major concentration of newspaper publishers. Consequently, the proposed ECU 25 million aid under the Assistance for Exceptional Projects scheme was necessary for the project to take place at all.

The Commission also took into consideration the fact that SCA had shut down two newsprint machines in Sweden in 1990, the capacity of which will be replaced by part of SCA's additional production capacity.

The Commission concluded that the aid proposed by the UK Government qualified for the derogation provided for in Article 92(3)(c) of the EEC Treaty in favour of aid to facilitate the development of certain economic activities, without adversely affecting trading conditions to an extent contrary to the common interest.

<T5> Aid to the energy sector

433. In July the Commission authorized the Government of Saxony-Anhalt in the former German Democratic Republic to pay an ECU 291 million subsidy to Veba Kraftwerke Ruhr to build an 800 MW ECU 1310 million power station at Schkopau which will use locally-mined lignite. The grant will cover the bulk of the extra cost of the lignite station by comparison with the coal-fired plant that the operators originally intended to build on the site. Originally a grant of ECU 334 million had been offered. The Commission considered that the reduced subsidy was justifiable on environmental and technological grounds, because the continuation of active lignite mining would facilitate the extensive reclamation work needed in old lignite workings and the advanced power station would have technological spin-offs. However, it made it clear that it would not allow any further aid in Germany that directly or indirectly subsidized the use of lignite for electricity generation in preference to other fuels. Such aid would be an obstacle to the integration of the Community electricity market. The Commission aims to limit the protection of indigenous fuels in each Member State to a maximum of 20% of final electricity demand. In Germany this quota is taken up by the protection for hard coal.(10) This principle is reflected in a provision of the Commission's proposal for opening up the electricity market.(11)

(10) Point 146 of this Report.
(11) COM(91) 548 final - SYN 384-385.

434. On 7 April 1984 the Commission terminated the Article 93(2) proceedings initiated in respect of a special tariff known as tariff F for supplies of gas to Dutch nitrate fertilizer producers. It took the view that the savings achieved by Gasunie, the Dutch gas distributing company, on gas supplies to large consumers exceeded 5 cts/m^3 and justified the introduction of tariff F. Following an appeal to the Court of Justice lodged by the French competitors of the Dutch nitrate fertilizer producers, the Court of Justice annulled in July 1990 the Commission's decision terminating the proceedings. On the basis of a report drawn up by experts, the Court found that the savings on supplies achieved by Gasunie under tariff F amounted to 0.5 cts/m^3 at the most and that consequently the Commission had made a clear error of assessment.

435. The Commission accordingly had to reexamine the case and take a new decision with regard to tariff F. It again concluded that tariff F did not fall within Article 92(1) and decided in December to terminate the proceedings. It found that tariff F was justified on commercial grounds.

436. The Commission found that the prices of gas to Dutch nitrate fertilizer producers were no lower than those at which other Community producers could obtain gas supplies in the other Community countries. Tariff F did not therefore place the Dutch producers at an advantage over producers in other Member States.

437. On 1 January 1992 Gasunie introduced new tariffs that no longer included tariff F. The Commission has not for the time being opposed the introduction of the new tariffs, but has decided to reexamine a review clause which they contain.

<T4> §6. Aid in the services sector

<T5> - Mail and special delivery services

438. Following the adoption of the Green Paper on the development of the single market for postal services(1) the Commission is continuing to monitor developments in the various segments of the market, notably as regards the public monopolies' activities in the sectors subject to competition. It commissioned a general study on the problem of cross-subsidization, which should be available in 1993 and will allow the problems in this sector to be identified.

The Commission examined and rejected two complaints by competitors of the French Post Office concerning the transport of valuables in armoured vehicles, which is managed by the Post Office subsidiary Securipost, and express delivery services, managed by the Post Office subsidiary SFMI.(2)

After the decisions rejecting the complaints were appealed to the Court of Justice,(3) the Commission decided, in view of certain elements in the appeals, to withdraw the decisions and to examine the matter further. The cases are currently under examination.

<T5> - Banking and insurance

439. Numerous articles in the press and a number of cases brought to its attention by operators in the sectors concerned prompted the Commission to examine the situation of the various actors on the market for financial services and in particular those enjoying special status as subsidiaries of state monopolies or public institutions governed by provisions exempting them from ordinary law. This includes in particular post office banking services and public credit institutions.

Since this is an area in which experience in applying the rules governing state aid is limited, work on an appropriate approach to the problems that

(1) COM(91) 476, 11.6.1992.

(2) The express courier services have now been reorganized through the setting-up of a joint venture by the German, Canadian, French, Dutch and Swedish Post Offices, which was authorized by the Commission on 2 December 1991 under Regulation No 4064/89.

(3) Cases C 117/92 (Securipost) and C 222/92 (SFMI).

arise must necessarily take account of the interests of all the actors involved and of changes in competitive conditions, arising in particular from Community legislation to establish a single market in financial services. Consequently, the Commission has not yet taken any formal decisions on these cases; it is, however, continuing to study the situation and to seek new information to enable it to take up a position on some of the issues in the near future.

440. The Commission did, however, adopt an initial decision in this area in May, finding that the recapitalization of the Banco di Sicilia and of the Cassa Centrale di Risparmio ("Sicilcassa") did not involve aid under Article 92(1) of the Treaty. Applying the commercial investor principle, the Commission noted that the banks concerned had never been in financial difficulty and that the recapitalization was required by the change in the banks' status to ordinary companies.

<T5> - Aid to the audiovisual industry

441. The decisions taken in 1992 reflected the Commission's long-standing practice that aid schemes can only be approved if they comply with all aspects of Community law (and, in particular, if they do not contain discrimination based on nationality) and do not affect trading conditions and competition in the Community to an extent contrary to the common interest.

<T8> Germany

442. In January the Commission initiated proceedings under Article 93(2) of the EEC Treaty against a bill amending the Film Industry Support Act ("Filmförderungsgesetz"). The Act governs support for film productions and film distribution which is financed from a levy on the turnover of cinemas, television stations and video distributors. Objection was taken not to the aid scheme itself - the Commission has always had a favourable view of financial support for the European film industry, given its cultural importance - but solely to the discriminatory provisions of the draft legislation. Contrary to an understanding reached with the Commission in

1986 that the last discriminatory conditions would be abolished by the end of 1992, the German Government wished to maintain a requirement, for example, that the director of an aided film must be a German national or from a "German cultural background". Similar nationality restrictions were imposed for coproductions. To continue to accept such restrictions would run counter to the established policy of the Commission.(4) In October the Commission was able to terminate the proceedings as the German Government had agreed to do away with all discrimination by treating nationals of other EC countries like Germans for the purposes of funding under the amended legislation, which has applied since 1 January 1993.

<T8> France

443. In March the Commission agreed to an injection of ECU 45 million of new public funding into the Société Française de Production, which provides audiovisual services and produces films and television programmes. The Government had already written off the debts of SFP in 1990-91. The Commission took the view that the capital injection was aid in view of the company's financial situation, but that the aid, like that given the previous year, was compatible with the common market as it would help finance a restructuring plan intended to return the company to viability. The French Government undertook that it would not step in to help the company again.

444. In July the Commission approved the support arrangements for film and television programmes production. The schemes subsidize the production of films and high-quality television programmes through the proceeds of special levies on cinema admission tickets and on television station revenue. The Commission considered that the eligibility conditions for the aid were consistent with Community law, and in particular the principle of non-discrimination. However, it felt that the requirement that the first broadcasting rights for an aided production must be held by a French television station that had contributed to the levy was liable to retard the integration of the Community's audiovisual production industry, and the announced that it would keep the situation under review.

(4) Nineteenth Competition Report, points 191-194; Twenty-first Competition Report, Annex III.B.1. (Netherlands).

<T8> United Kingdom

445. In December the Commission closed an investigation into the promotion on BBC television of magazines published by the BBC's publishing subsidiary, BBC Enterprises. The publishers of rival magazines had claimed that the free advertising was an unfair subsidy to BBC Enterprises magazine titles. Under pressure from the Commission and the United Kingdom competition authorities, the BBC agreed to curtail its promotion of the magazines and the complainants settled legal proceedings pending in the United Kingdom and withdrew their complaint to the Commission.

<T5> - Aid for tourist and craft activities

446. In line with the position it has consistently adopted in this sector, the Commission approved various Spanish and Italian aid schemes to promote tourist and craft activities. The Commission takes a favourable view of such schemes because they are important for diversifying and maintaining economic activity and for increasing employment, notably in less favoured areas, and are usually intended for SMEs. Most of the schemes approved in these sectors help to finance projects that may be part-financed by the ERDF within the framework of Community regional development programmes.

<T5> - Aid for the cooperative, mutual and non-profit sector

447. The Commission continued in 1992 to support the cooperative, mutual and non-profit sector by approving various Spanish aid schemes to promote investment, training and technical assistance for cooperatives and limited companies whose shares are mainly held by their employees. Such aid measures, which help job creation (notably among the worst-off sections of the population), are in line with the Commission's objectives set out in its communication on businesses in the "Economie Sociale" sector.(5)

(5) SEC(89)2187 final.

<T4> §7. Horizontal aid schemes

<T5> - Aid for environmental protection and energy conservation

448. The current framework on aid for environmental protection was extended until 30 June 1993, pending the adoption of a new code next year.(1)

449. The Commission continued its policy in favour of aid schemes to encourage use of renewable energies. Among the schemes authorized in 1992 was a scheme to stimulate investment in wind power in Denmark. The scheme guarantees private windmill operators a price of 85% of the local electricity companies' pre-tax selling price to domestic consumers. Together with a grant amounting to ECU 0.02 per kWh authorized by the Commission as part of the CO_2 tax package in April,(2) the private windmill operators will receive an average price subsidy of around 55%. The total annual budget is expected to be ECU 15.8 million in 1992. The scheme also provides that the costs connected with the enlargement and/or reinforcement of the grid are to be borne by the electricity companies. At present private windmills with a total capacity in 1992 of 670 MW produce only approximately 2.5% of total Danish electricity production.

450. In March the Commission took a final decision on a scheme to promote the recycling of surplus manure. Article 93(2) proceedings had been initiated in May 1991.(3) The Dutch authorities had set up a national manure bank (Stichting Landelijke Mestbank), which was to collect manure from farmers, store it and deliver it to processing plants. Part of the cost was to be met from a levy charged to farmers on surplus manure. The Commission considered that the protection of the environment, which was the main objective of the scheme, justified a compulsory levy to meet the manure banks' fixed costs. Variable costs, however, should be met out of the fee paid by farmers, as the scheme would otherwise

(1) See point 76 of this Report.
(2) See point 451 of this Report.
(3) OJ C 189, 20.7.1991; Twenty-first Competition Report, Annex III.B.3.

subsidise their operating costs. The Commission therefore made its approval of the scheme subject to the condition that the variable costs should not be met from the levy after 1994. For the period 1992 to 1994 the Commission agreed that variable costs could also be covered by the levy in view of the innovative character of the scheme and the need to allow farmers to become familiar with it.

451. In April the Commission authorized Denmark and the Netherlands to introduce new CO_2/energy taxes with partial relief for energy-intensive firms. The relief counted as state aid as it was targeted at particular firms and went against the logic of the tax, which is of course intended to reduce energy consumption and CO_2 emissions. However, the tax relief was exemptible because the overall tax burden had been increased and without relief the firms concerned would have suffered a sharp loss of competitiveness. Similar reliefs or exceptions are proposed in the Commission's proposal for a Community-wide CO_2/energy tax.(4) As the steel aid code does not allow such aid for the steel industry, the Commission obtained the Council's assent to grant the necessary exemptions from the code for the two countries' steel firms(5). In addition, the Commission approved in December, also in Denmark, a scheme offering incentives to private firms to carry out energy conservation measures. The scheme is part of the package of measures to reduce energy consumption and CO_2 emissions. The level of subsidy for energy conservation is between 30 and 50% and the annual budget of the scheme is ECU 25 million.

452. In May the Commission approved the draft contract between the city of Wiesbaden (Germany) and Apura. Over a five-year period, Apura will qualify for a reduction in the waste-collection tax paid to the city of Wiesbaden in return for its commitment to purchase from the city, at current market prices, all waste paper collected. The Commission regarded the tax reduction as aid, but as compatible with the common market given the commitments made by Apura to the city of Wiesbaden.

(4) COM(92)226 final.
(5) Commission Decision 92/411/ECSC of 31 July 1992, OJ L 223, 8.8.1992; see points 384 and 385 of this Report.

453. The Commission approved, also in May, pending a review in relation to the new environmental aid framework,(6) the German SME aid schemes for effluent treatment, waste management, air pollution control and energy conservation that are operated as part of the ERP (European Recovery Programme) subsidized loans programme.(7)

<T5> - General investment aid

<T6> (a) Review of existing schemes under Article 93(1) of the EEC Treaty

454. The benefits of reviews were described in last year's Report.(8) The current exercise continued to receive high priority, but was widened from general investment aid schemes to investment aid schemes for SMEs following the issue of the guidelines for SME aid.(9) Progress on the main investment aid cases is reported below.

<T6> (b) Main decisions

455. The Commission considered the separate aid programmes proposed by the Flanders, Wallonia and Brussels regions to replace the Economic Expansion Act which was repealed in 1991.

456. In November the Commission terminated the proceedings under Article 93(2) of the EEC Treaty which it initiated in respect of the draft order of the Brussels Region providing for various types of aid to promote economic growth, some of the aid having been deemed incompatible with the common market. As a result of the substantial amendments made to the initial draft, the Commission authorized its implementation on the basis of the derogation provided for in Article 92(3)(c) of the EEC Treaty.

457. Aid under the Brussels scheme may now be granted only where it is for a project that is co-financed by Community aid, fulfils the conditions laid down by the Community frameworks on state aid, notably the guidelines on aid for SMEs, or supports participation

(6) See point 76 of this Report.
(7) See point 468 of this Report.
(8) Twenty-first Competition Report, points 240-241.
(9) See point 342 of this Report.

in important projects of common European interest within the meaning of Article 92(3)(b) of the EEC Treaty.

458. The provision for R&D aid was withdrawn from the draft order.

459. The Flemish and Wallonian programmes are still under consideration.

460. The Commission terminated the proceedings initiated in July 1990[10] in respect of the Italian scheme providing interest subsidies for SMEs and various measures. However, it began a review under Article 93(1) of the aid to ailing firms under Law No 95 of 1979 ("legge Prodi"). The review may result in the Commission's proposing appropriate measures required by the development or functioning of the common market.

461. The Commission completed its review of the activities of the Luxembourg state-owned banking institution, the Société Nationale de Crédit et d'Investissement. Closing the case in February, the Commission found that the low-interest loans arranged by the bank mainly for small and medium-sized companies involved only a low degree of subsidy. Its other activities were on a fully commercial basis.

462. In December the Commission authorized the implementation by the Luxembourg Government of a draft framework-law intended to replace the Law of 14 May 1986 and comprising four aid schemes.[11] Two of the schemes are new (scheme for SMEs and scheme relating to environmental protection), while the third is an amended form of the existing aid scheme for research and development; the fourth scheme is an unamended codification of the regional investment aid scheme already authorized by the Commission.

After examining the new and amended aid schemes in relation to the requirements of Articles 92 and 93 of the EEC Treaty, and, in particular, their compliance with the Community codes on aid for SMEs, research and

(10) Twentieth Competition Report, Annex II.2.
(11) Twenty-first Competition Report, point 247.

development and environmental protection, the Commission concluded that the schemes qualified for the exemption under Article 92(3)(c).

<T6> (c) Other general investment aid schemes

463. In July the United Kingdom Government agreed to reconsider its notification of a new budget allocation for the Assistance for Exceptional Projects scheme first authorized in 1989. The Commission had indicated that it would be unlikely to be able to authorize the scheme again, given its general investment character, although the United Kingdom authorities would be free to notify proposed awards of aid individually under Section 8 of the Industrial Development Act 1982.(12) However, proceedings under Article 93(2) of the EEC Treaty were opened against one proposed award.(13) There was no objection to the R&D part of the AEP scheme.

<T5> - Aid examined in the context of privatizations

464. The Commission this year again examined a number of cases of aid granted in connection with the privatization of companies. It applied the criteria established over recent years and set out in last year's Report:(14) aid in such cases does not qualify for preferential treatment and no specific exemption is applicable to it; the sale of public enterprises may give rise to aid if it is not carried out in a fully transparent manner and in particular if bids are not invited or if conditions are imposed on the sale by the public authorities.

465. The Commission examined Law 11/90 of 5 April 1990 relating to the Portuguese privatization programme. It decided in December not to raise any objections to the Law, which provides, in most instances, for a transparent transfer procedure based on public bids in which the highest bidder is accepted and the principle that the value of the enterprises should be established by independent consultants. However, it:

(12) Twenty-first Competition Report, point 242.
(13) See points 431 and 432 of this Report.
(14) Twenty-first Competition Report, point 248.

- asked the Portuguese authorities to notify it of all cases covered by Article 6(3)(a) and (c) of the Law, which provide for specific and non-transparent procedures;

- initiated Article 93(2) proceedings in respect of Article 13(3) of the Law, whose nationality clause appears to be in breach of Articles 52 and 67 of the Treaty.

466. Throughout the year the Commission closely followed the operations of the Treuhandanstalt (THA) in the former German Democratic Republic on the basis of the decision of September 1991.(15) It also took a general decision under Article 93(1) of the Treaty, discussed earlier in this Report.(16)

Apart from the cases described elsewhere in this Report,(17) the Commission investigated various other privatizations and also looked at the financing of certain companies still held by the THA.

<T5> - Aid to small and medium-sized enterprises

467. Schemes to aid the development of small and medium-sized firms continued to account for a large proportion of the Commission's state aid control work. In future the work generated by them should decline as many of the smaller schemes are no longer notifiable or can be cleared rapidly and virtually automatically.(18) However, major schemes will still require close scrutiny under the new guidelines for state aid to SMEs approved this year,(19) especially to check their conformity with the limits for investment aid in non-assisted areas.

<T8> Germany

468. In July the Commission reviewed the detailed conditions of the various ERP (European Recovery Programme) schemes in Germany in the light of the guidelines on state aid to SMEs. The schemes provide loans at a low aid intensity mainly for business start-ups, pollution control and energy

(15) Twenty-first Competition Report, point 249.
(16) See points 19 and 349 of this Report.
(17) See points 388, 417 et seq. and 424 of this Report.
(18) See point 337 of this Report.
(19) See points 78 and 342 of this Report.

conservation investment, and venture capital. Since reunification the bulk of the funds (ECU 4.85 billion out of ECU 6.8 billion in 1992) has been spent in the new eastern German states. In terms of the intensity of aid for investment in non-assisted areas, the schemes were found to be well within the guideline limits. The German Government undertook to bring the definitions of small and medium-sized enterprises into line with the guidelines by 1993 and duly did so in the 1993 programme which the Commission approved in December.

<T8> France

469. In February the Commission approved a large package of tax reliefs and other measures for SMEs, some of which did not involve state aid. The main measure, a tax credit of up to 25% on capital increases of up to ECU 290 000 for firms that reinvest profits in the business, was authorized for 1992 only, although it was due to be offered also in 1993, because firms larger than the Commission's then definition of SMEs - later broadly confirmed in the SME aid guidelines - were eligible, namely those with sales of up to ECU 71 million.

<T8> Ireland

470. In November the Commission approved a scheme providing temporary help to SMEs to adjust to the currency changes that had taken place in the ERM since mid-September and had caused the Irish pound to appreciate sharply against the pound sterling. The Commission considered that the heavy dependence of Irish manufacturers on sales in competition with United Kingdom firms on the United Kingdom and Irish markets justified one-off temporary support to maintain employment while the Irish firms were adjusting to the new situation. The development of Ireland would suffer a serious setback if many of these firms went bankrupt, pushing up the rate of unemployment, which was already the highest in the Community. The scheme, time limited to the end of March 1993, had a budget of ECU 66 million.

<T8> Italy

471. In December the Commission initiated Article 93(2) proceedings against the package of SME aid measures provided for by Law 317 of 5 October 1991.(20) The Italian Government had continued to grant

(20) Twenty-first Competition Report, point 269.

investment aid under the legislation after the Commission's authorization expired at the end of April, and the level of aid, at 20% or 25%, was above that permitted in non-assisted areas by the SME aid guidelines. The Commission also had insufficient information on several of the other schemes to judge whether they were in line with its policy on aid for SMEs.

<T5> - Aid for employment and training

472. As in previous years, the Commission took a generally favourable view of the aid schemes introduced or extended by a number of Member States to promote the employment of certain categories of workers experiencing particular difficulties in entering the labour market, either as employees, self-employed, or workers in the cooperative, mutual and non-profit sector.

473. Member States have developed a variety of active labour market policies, programmes and measures to raise the quality of their labour forces and improve the flexibility of their labour markets. The growth problem in the last two years following a period of improvement in the late 1980s, has also resulted in a series of special measures targeted on the unemployed.

It is accepted within Community competition policy that vocational training is eligible for public financial support in all regions. However, some of the labour market schemes developed by governments - for example, assistance to the unemployed to become self-employed, or support for particularly disadvantaged categories of people such as the long-term unemployed - have raised issues which need to be resolved in order that they do not, inadvertently, create distortions.

The Commissions's review of such schemes would aim at a more coherent approach to the treatment of the wide range of manpower measures currently employed by the Member States and supported through the Structural Funds in many cases, so as to ensure that the wider objectives of economic and social cohesion can be pursued, both between and within Member States, and any competition problem avoided.

<T8> Italy

474. The Commission initiated Article 93(2) proceedings against of a draft Italian Law providing for aid to any firm managed by a majority of women and to bodies providing advice, technical assistance or training mainly for women. Since the aid could be combined with any other national, regional or Community aid, it was possible for the assistance for a project to cover as much as 80% of costs.

Although not having any objections in principle to aid to promote women's employment, the Commission felt that, except for the aid for training, the legislation was not exemptible because it was too broad in scope and offered levels of aid that were too high. Provided the minimum percentage of women was complied with, the aid was available to any firm irrespective of size or location and could reach considerable sums. The scheme was therefore liable, in the Commission's view, to have adverse effects in the Community by counteracting regional aid schemes both in Italy and in other Member States in the competition for mobile investment.

<T5> - Rescue and restructuring aid

<T8> Italy

475. In July the Italian State holding company, EFIM, was placed in liquidation by the Amato Government. Subsequently, several Decree Laws were issued which introduced a number of measures to assist EFIM. These included an advance of ECU 120 million from the Cassa dei Depositi e Prestiti, a guarantee for the totality of the group's debts and a reduction in electricity tariffs for Alumix. Most importantly, the Decree Laws did not include any indication as to how transparency would be ensured in the liquidation process.

476. EFIM was in liquidation before the above assistance was granted, leading the Commission to conclude that aid was involved in these measures. Moreover, the presence of the group in both Community and world markets, and specifically the SIV, Alumix and Agusta operations, would mean that such measures would distort trade.

477. Consequently, due to the lack of information with which to assess the measures' compatibility, the Commission decided to initiate Article 93(2) proceedings in December.

478. At the same time the Italian Government notified further measures to assist EFIM, including an increase in the advance to ECU 2.3 billion. Therefore, the Commission decided, in January 1993, to extend the proceedings to take account of these subsequent measures.

<T4> §8 - Regional aid

<T5> - General developments

<T7> . Cohesion

479. The Commission continued to direct its regional aid policy towards the strengthening of cohesion.(1) Its reviews of national regional aid schemes were aimed at increasing the concentration of aid and its decisions reflected the need to improve the coherence between economic and social cohesion policy and competition policy, in accordance with the general approach pursued by it since December 1991.(2)

480. It also continued to study the impact on intra-Community trade of aid towards capital-intensive investments. It will consider whether to propose measures to the Member States in this respect.

<T8> Belgium

481. In May the Commission approved a scheme for the redevelopment of derelict industrial sites in the Brussels Capital Region.

The aid is granted to the owners of such land, either in the form of a contribution to the cost of studies and redevelopment work or in the form of an exemption from property tax for five years following site rehabilitation.

It is available only to small and medium-sized enterprises and must not exceed the aid intensities provided for in the Commission rules on aid to SMEs.(3)

(1) See point 80 of this Report.
(2) Twenty-first Competition Report, point 56.
(3) See point 342 of this Report.

<T8> Germany

482. The policy of the Commission is essentially to concentrate aid in the new Länder and to limit aid in regions that are not in urgent need of assistance, notably West Berlin.

483. In December the Commission initiated the procedure under Article 93(2) of the EEC Treaty in respect of certain provisions of the Investment Allowance Law aimed at promoting investment in the new Länder and in West Berlin ("Investitionszulagengesetz 1991").(4) The Law, which has an budget of some ECU 6 billion, offers aid for investment in plant and machinery begun before the end of 1992 and completed before the end of 1994. The German authorities had implemented the Law without complying with the obligation to give prior notification pursuant to Article 93(3) of the EEC Treaty.

In June, in view of the difficult socio-economic situation in the new Länder, the Commission decided to close the case as far as the investment allowances in the former GDR were concerned.

However, in July the Commission prohibited investment allowances in West Berlin altogether in respect of investments made after 31 December 1992 and limited the allowances to 8% for investments made there after 31 December 1991. It required the allowances in excess of 8% to be repaid.

In its decision, the Commission considered that West Berlin did not meet the criteria set out in its method for the application of Article 92(3)(a) and (c) to regional aid(5) and was not therefore eligible for regional aid under those two exceptions, and that no other exceptions provided for in the EEC Treaty could be applied. It also took the view that the granting of new aid to West Berlin would have the effect, given the considerable advantages the city enjoyed in terms of infrastructure and skilled manpower and its

(4) Twenty-first Competition Report, point 290.
(5) OJ C 212, 12.7.1988.

unique geographical position, of attracting new businesses and stimulating the expansion of existing firms. This would make it more difficult for firms in the new eastern German states to adjust and would simply slow down the catching-up process.

484. In December 1991 the Commission had initiated Article 93(2) proceedings in respect of Section 6 of the Assisted Areas Law ("Fördergebietsgesetz"), which provides for tax-exempt reserves to promote investment in West Berlin and in the new Länder. The scheme had been put into effect without prior notification.(6)

As in the case of the "Investitionszulagengesetz", and for the same reasons, the Commission decided in June to terminate the procedure as regards the aid to the new Länder and declared in July that the parts relating to the creation of tax-exempt reserves for investments in West Berlin were illegal and incompatible with the common market. The aid already granted would have to be recovered within two months.

485. In May, and again for the same reasons as set out above, the Commission decided to initiate proceedings in respect of the application in West Berlin of a regional soft loan scheme ("ERP-Aufbauprogramm") for investments in the new Länder and in West Berlin. This scheme, too, had been put into effect before authorisation, contrary to Article 93(3) of the EEC Treaty.

486. In November the Commission decided to authorise an amendment and extension of the investment allowance scheme in the new eastern German states. Application of the scheme to the new Länder had been approved in June. The old scheme covered investments begun before the end of 1992 and completed before the end of 1994 and provided for allowances of 12% for investments completed before the end of June 1992 and of 8% for later investments. As a result of the change in the Law, an allowance of 8% will also be available for investment in the new Länder begun before the end of June 1994 and

(6) Twenty-first Competition Report, point 291.

completed before the end of 1996, and investment begun and completed in the period from 1 July 1994 to 31 December 1996 will qualify for an allowance of 5%. The extended scheme involves additional aid of ECU 8.85 billion on top of the ECU 5.5 billion earmarked initially.

487. In July and September, the Commission approved the 21st Outline Plan for the joint Federal Government/Länder scheme for improving regional economic structures. The list of assisted regions and the arrangements for granting the aid had already been approved in 1991 for the period from 1 January 1991 to 31 December 1993.(7)

The 1992 budget for the scheme totals ECU 3 415 million in payment appropriations and ECU 4 400 million in commitment appropriations, of which ECU 2 730 million and ECU 4 100 million are earmarked for the former GDR, reflecting the priority given at Federal level to the development of the former GDR. The part of the scheme relating to the former GDR is part-financed by the structural Funds, providing an additional ECU 500 million a year.

<T8> Spain

488. In July the Commission approved a regional aid scheme run by the national Government for Objective 1, 2 or 5(b) areas in which employment in textiles accounts for at least 10% of industrial employment. The aid takes the form of grants for training, studies, R&D, design and quality, and the setting-up of associations. It covers the period from 1992 to 1996 and has a total budget of ECU 129 million.

As well as the scheme's contribution to regional development, the following other factors influenced the Commission's decisions: the R&D aid complied with the Community framework; the impact of the other aid

(7) Twenty-first Competition Report, point 289.

measures on competition was limited; some of the aid to firms larger than SMEs could not be granted after 31 December 1993; the scheme provided only for certain aid for the acquisition of equipment which was limited to SMEs and would be discontinued by 31 December 1993 in areas not covered by national regional aid schemes.

<T8> France

489. In April the Commission decided to initiate the Article 93(2) procedure in respect of aid apparently granted illegally in the canton of Modane.

490. The aid had not been notified to the Commission and consisted chiefly in a reduction granted by the Savoie General Council of up to 25% of the price of electricity for a period of not more than five years.

491. The procedure was terminated in December, the Commission having determined that most of the aid in question came under schemes that had already been approved. As regards the electricity price reductions, the French authorities communicated to the Commission a draft decree stipulating that the reductions could not exceed ECU 50 000 per enterprise and per three-year period, in accordance with the de minimis rule laid down in the Commission communication on aid for small and medium-sized enterprises.(8) The new decree must be implemented by 1 March 1993.

492. In September the Commission decided to approve a diversification scheme for areas dependent on the textile and clothing industry. In its scrutiny of the scheme, the Commission checked in particular that the terms of its recent communication on aid for small and medium-sized enterprises(9) had been met, in particular as regards aid intensity and the size of eligible enterprises.

493. In November the Commission decided to approve a draft law providing for the creation of two special investment areas in Nord/Pas-de-Calais. Firms setting up in one of these areas will benefit from a tax credit on profits of

(8) See point 337 of this Report.
(9) OJ C 213, 19.8.1992; see point 342 of this Report.

up to 22% of the investment made during their first three years in operation. The scheme is to apply for five years from the creation of the area.

The Commission noted that the areas in question were eligible for regional aid. It checked that the scheme did not involve operating aid and that the aid intensity did not exceed the ceilings applicable to central regions of the Community.

<T8> Italy

494. In May the Commission initiated the Article 93(2) procedure against grants provided under an agreement between Valle d'Aosta and the Società di Servizi (SDS SpA). However, the procedure was terminated in December, the Italian authorities having informed the Commission that they had withdrawn the agreement in view of the initial position taken by the Commission.

495. The Commission also decided in May to propose appropriate measures under Article 93(1) of the EEC Treaty in respect of the aid scheme applicable in the free zone of Gorizia which had been in existence since before the EEC Treaty.

The scheme provided in particular for various tax exemptions for both private individuals and firms in Gorizia. As regards aid to individuals, the Commission considered that the entire population of Gorizia could not be regarded in view of the socio-economic indicators for the area as in need of social aid. Aid to firms in the nature of operating aid can be granted only in the least-favoured areas of the Community, yet the economic indicators for Gorizia did not allow it to be classified among those areas.

The Commission reached the preliminary conclusion that the scheme was not compatible with the common market and proposed that the Italian Government abolish it.

In December it nevertheless decided to approve the scheme under Article 92(2)(a) and (3)(c) after the

Italian authorities had made certain changes which will enter into force on 1 January 1994. The changes consist in limiting the quotas of tax-free products reserved for the population and bringing the rules on aid for firms into line with the Community frameworks in force, thereby abolishing all operating aid.

496. In June the Commission decided to initiate the Article 93(2) procedure against the proposed new budgets for:

- the scheme of regional investment incentives provided for by Mezzogiorno Law (ECU 14.35 billion);

- the general reductions in firms' social security contributions in the Mezzogiorno provided for in the same Law (ECU 4 393 million);

- the selective higher relief of social security contributions for enterprises in the Mezzogiorno (ECU 2 727 million).

The Commission has traditionally taken a favourable view of development aid for the Mezzogiorno and in 1988 approved the aid scheme under the Mezzogiorno Law until the end of 1993 in view of the clearly defined conditions for granting the aid.

However, the Italian authorities had failed to comply with the obligation imposed by the 1988 decision to provide the Commission with a report on all the tax reliefs granted. The Commission was therefore unable to assess their impact and, consequently, to assess the compatibility of the proposed new budgets.

The Commission also considered that the provisions of the Decree-Law allocating the new budgets were vague as regards both the duration of the scheme and the precise budget allocated. It also found that the reductions in social security contributions exceeded those authorized and that the scheme would in future be targeted at specific sectors and had been implemented before the Commission had taken a decision.

For these reasons, the Commission felt that on the basis of the information in its possession it was unable to determine whether the measures in question were compatible with the common market.

The Italian authorities subsequently informed the Commission that the provisions governing the continuation of the general reductions in social security contributions and the special higher rates of relief had lapsed and were now contained in a new draft law. The Commission therefore closed the proceedings opened in June against these two provisions and in October opened proceedings under Article 93(2) in respect of the new draft law.

On the other hand, in December the Commission was able to terminate the proceedings against the new ECU 14.35 billion budget for regional incentives for 1993. The Italian Government had adopted a new approach in this matter which was set out in Decree-Law No 415 of 22 October 1992. The new legislation limits the aid to certain ceilings depending on the degree of development of the region and the size of the recipients, in line with the rules in other Community regions with a similar level of economic development. In addition, the tax exemptions will be converted into tax credits. Up to ECU 6 billion of aid can be granted under the old rules for aid applications pending on 14 August 1992.

497. In September the Commission approved under Article 92(2)(b) of the EEC Treaty various aid granted for the reconstruction of La Valtellina and to compensate firms that suffered damage during the 1987 flooding.

However, it opened Article 93(2) proceedings against other aid (grants, low-interest loans, tax reductions and exemptions, etc.) providing general support for business activity in the region and going beyond the mere restoration of firms damaged by natural disasters.

498. In November the Commission examined Law No 19/91 on the development of Friuli-Venezia Giulia and other areas adjacent to the former Yugoslavia.

On the basis of the information in its possession, the Commission considered that the tax measures concerning the Trieste Financial and Insurance

Services Centre were incompatible with the common market and initiated the Article 93(2) procedure. It considered that the measures involved operating aid and were not justified by the economic situation of the region, that financial and insurance services did not normally require aid and that the intense competition in these sectors meant that aid would have a particularly distorting effect.

<T8> United Kingdom

499. In March the Commission approved the setting-up of an enterprise zone in North Lanarkshire, Scotland. New investment in this area will enjoy the same advantages as in other enterprise zones in the United Kingdom, such as accelerated tax depreciation for industrial buildings, exemption from local taxes and charges, and more streamlined administrative procedures. Like the others, the enterprise zone has been set up for ten years. The specific aid granted to it does not constitute operating aid and complies with the regional aid ceilings for the region.

The region in question is a development area with a very high level of unemployment due to the decline of traditional industries, in particular the steel industry.

<T4> § 9. Aid in the transport sector

<T6> (a) Land transport

500. The bulk of the aid granted in the land transport sector is still that allocated to national railways, either as compensation for public service obligations under Regulation (EEC) No 1191/69,(1) as amended by Regulations (EEC) Nos 1893/91(2) and 1192/69,(3) or as aid within the limits laid down by Regulation (EEC) No 1107/70.(4) Most member countries are considering a fresh definition of the financial relationship between the State and the railways, within the framework of Directive 91/440/EEC of 29 July 1991 on the development of the Community's railways. The Commission informs the Council of the scale of such aid in the two-yearly reports provided for in Council Decision 75/327/EEC. As a result of the new possibilities created by that Directive, the Commission is currently considering the position for the future.

On 10 June 1992 the Commission adopted a communication to the Council concerning the creation of a European combined transport network and its operating conditions (COM(92) 230), Annex 4 to which contains the latest report on the granting of aid for combined transport under Regulation (EEC) No 1107/70 and a proposal amending that Regulation. On 7 December 1992 the Council adopted Regulation (EEC) No 3578/92.(5) The Regulation, which amends Regulation (EEC) No 1107/70, extends the period for granting aid until 31 December 1995 and increases the scope of admissible aid.

The opening-up of the transport market as from 1 January 1993 will have consequences for competition in the road transport sector. The Commission will have to increase its monitoring of subsidies that could unfairly benefit particular operators. At the same time, the assessment of specific state aid measures is becoming increasingly complex.

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(1) OJ L 156, 28.6.1969.
(2) OJ L 169, 26.6.1991, p. 1.
(3) OJ L 237, 24.8.1991.
(4) OJ L 130, 15.6.1970
(5) OJ L 364, 12.12.1992, p. 11.

The Commission initiated the Article 93(2) procedure in respect of an Italian Decree of 28 January 1992 introducing a tax credit for Italian road hauliers. The procedure should enable the Commission to determine whether the aid in question is compatible with the common market.

In the inland waterway sector, the scrapping operation begun in 1989 under Council Regulation (EEC) No 1101/89 of 27 April 1989 on structural improvements in the industry was supplemented in 1991 by measures involving vessels in the new German Länder and was completed in 1992. All the vessels available for withdrawal from the market were scrapped before 1 December 1992.

<T6> (b) Sea transport

501. The Commission examined a number of state aid cases and continued its work on adjusting the "Guidelines for the examination of state aids to Community shipping companies", which it had adopted on 3 August 1989 to take account of market developments.

In addition, it intensified its efforts to develop further its proposal for the establishment of a Community ship register (EUROS).(6) This register would provide a transparent, common framework for state aid to Community shipowners, thereby eliminating the need for Member States to introduce or maintain national schemes, including second registers, which risk distorting competition between Community fleets. In-depth discussions on EUROS are being held within the Council. The Commission intends to reassess its proposal in the light of these discussions.

As regards ports, the Commission authorized state aid of ECU 115 million for workers made redundant in connection with the restructuring of ports in the United Kingdom. The restructuring was provided for in the Dock Work Act 1989, which the United Kingdom authorities notified to the Commission.

The question of transparency of financial relations between public authorities and ports will be the subject of a study being commissioned from an independent expert.

The intention is to recommend a form of financial statement which ports will be required to complete and to include in their annual accounts.

(6) OJ C 19, 25.1.92, p. 10

<T6> (c) Air transport

502. The Commission presented to the Council and Parliament a report on the evaluation of aid schemes for Community air carriers (SEC(92) 431 final). The document summarizes inter alia the main features of the liberalization process and competition policy in the aviation sector, as well as the criteria, set out in Memorandum No 2 on the common transport policy, for assessing aid schemes under the rules of the Treaty.

The report also contains a table showing aid granted by Member States to the air transport sector and lists the aid measures being closely scrutinized by the Commission.

The aid in question is granted in a variety of forms, and not just in the form of the usual financial injections by the state such as capital increases, preferential tax schemes or general guarantee schemes for loans to carriers. The Commission found that certain carriers benefited from aid specific to the sector in question, such as grants for the operation of certain routes. It requested the Member States concerned to provide further information on all these aid measures so that it could assess their compatibility with the Treaty rules.

In the light of the third air transport package, the Commission has started work on updating the guidelines, in accordance with Articles 92 and 93 of the Treaty, for the assessment of aid to air carriers.

The Commission took a decision on the second and third tranches of the capital increase for Air France, namely the issue of convertible bonds and undated subordinated loan instruments. Following a thorough examination, it decided that the operations could be regarded as normal financial transactions.

The Commission decided not to raise objections to the increase in the capital of Iberia in view of the firm undertakings given by the Spanish authorities to the effect that:

- it would be the last capital injection involving state aid;
- the resources would not be used to acquire shares in other Community airlines;
- the Spanish Government would replace the nationality clause in Iberia's statute with a Community clause conforming to the provisions of the third air transport package.

The Commission did not raise any objections, pursuant to Article 92(3)(c), to a proposal to grant aid to two United Kingdom airlines, New Air and Cumbria Aero Club, operating out of Carlisle Airport. The aid for New Air would be in the form of a grant, while that for Cumbria Aero Club would be in the form of a low-interest loan.

<T4> §10. Aid in the agricultural sector

503. The scope of Commission activity under Articles 92 to 94 of the EEC Treaty continues to be determined, in the agricultural sector, by the Council (Article 42 of the EEC Treaty). For most products in Annex II, Articles 92 to 94 apply. Any aid which is liable to disturb Community market mechanisms (for example, aid per unit of input or output) is considered not to be only at variance with state aid provisions but also illegal under the terms of the Council Regulations establishing the common market organizations. Recent CAP reform has not changed this situation.

A number of instances of such aid were encountered, and in all cases the Commission decided to initiate Article 93(2) proceedings. The Italian authorities proposed aid for a supplementary harvest in the nuts sector, the total cost of which was to be ECU 7 million. The Commission was of the view that it appeared to constitute an operating aid to which none of the exceptions of Article 92 of the EEC Treaty apply and at the same time an infringement of the common market organization for fruit and vegetables and Council Regulations (EEC) Nos 789/89 and 2159/89 concerning specific measures for nuts and carobs. The Italian authorities subsequently withdrew the aid plan. A similar position was adopted by the Commission with regard to Italian aid for the private storage of a maximum total of 45 000 tonnes of carrots for a period of four months. The Commission thereafter adopted a final negative decision on this measure. Article 93(2) proceedings were initiated in respect of further Italian aid for short-term private storage of table wine and grape must, whereupon the measure was withdrawn. Italian aid for producer groups and unions in the olive oil sector - total budget of ECU 4 million for a period of one year - was also considered by the Commission to be in breach both of state aid rules and of the common market organization for fats and oils. A final negative decision was taken on Italian aid for exports of citrus fruit to the countries of Eastern Europe and the former USSR. In the sugar sector, the Italian authorities notified aid totalling ECU 50 million to beetgrowers. One part of the measure sought to compensate growers for loss of income as a result of lower prices paid to them by industry than those laid down in Community rules. A second aspect concerned aid designed to contribute to the financing of storage costs by compensating for the effects of exchange-rate fluctuations in Italy. The common market organization for sugar provides facilities in this area under precise conditions, which appeared not to be respected in this instance.

Turning to France, aid was notified for preventive distillation of wine to supplement that authorized by the Community. Although the French authorities argued that, in their view, a level playing field no longer existed in Community wine production, the Commission deemed that the objective of the measure was to increase incomes of producers in France to a level above that provided for by virtue of the common market organization for wine. The Commission came to the view that the aid constituted a breach of Treaty provisions and was in conflict with the common market organization for wine; it initiated Article 93(2) proceedings and called upon France not to grant the aid. It may be noted that the Council subsequently decided to allow this aid under the terms of the third subparagraph of Article 93(2) of the EEC 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.

German aid for the distillation of wine in the Rhineland-Palatinate region was the subject of a negative decision. The Commission came to the view, which was not contested by the German authorities under Article 93(2) proceedings, that the aid, payable per litre of wine distilled, constituted a breach of Treaty provisions and was in conflict with the common market organization for wine. The Commission also initiated Article 93(2) proceedings in respect of further aid of this nature planned by Rhineland-Palatinate and called upon Germany not to grant the aid.

Although it has been Commission policy systematically to rule out state aid for activities provided for in Community Regulations laying down common market organizations, a particular case arose in Italy concerning aid for producer groups handling nuts where, although aid for such groups is laid down in the relevant common market organization, the Commission raised no objections. The Commission took this position on the grounds that the aid, which involved improved marketing arrangements, was of a structural and not an operational nature and that the provisions of the relevant market organization are not exhaustive with respect to producer groups.

504. With regard to operating aid to state-owned or parastatal enterprises in the agricultural sector, Article 93(2) proceedings were initiated in one instance and a final negative decision taken in another in respect of two Spanish grants of aid to the Merco Group. The policy issue arising from them is whether the state, in providing equity capital or debt relief, is acting in the same way as would a private investor in the market. Only if the

Commission comes to the view that this is the case will the measures in question, in principle, be considered not to constitute state aid. In determining how a private investor would be likely to behave, the Court of Justice has specified that the Commission's assessment must take account inter alia of the situation of the company, the restructuring to be carried out and market prospects.

The Commission decided to initiate Article 93(2) proceedings in respect of aid in the form of a capital injection which was apparently decided upon, and in part granted, by the Spanish authorities to the Merco Group in 1992. On the basis of the information available to the Commission, this measure was considered to be operating aid having no durable effect on the sector in question. A final negative decision - with the requirement to refund the aid - was taken against an earlier injection of capital totalling ECU 44 million awarded by the Spanish authorities to the Merco Group in 1990. Not only had the Spanish authorities failed to notify this aid under Article 93(3) of the EEC Treaty, but the Commission held, as to the substance, that the aid served exclusively to absorb losses which the group had accumulated and thus fulfilled the conditions of Article 92(1) of the EEC Treaty without qualifying for any of the exceptions of Articles 92(2) and (3).

505. In agricultural structures policy, as in market policy, the scope of Commission intervention under Articles 92 to 94 of the EEC Treaty is determined by the Council. In the case of aid at holding level, Council Regulation (EEC) No 2328/91 authorizes such intervention only in specified areas laid down in Article 35 of that Regulation. Those areas include, amongst others, per hectare aid for the introduction or maintenance of farming practices which are compatible with environmental protection.

The Commission decided not to raise objections to a sweeping programme of environmental aid measures in the German region of Baden-Württemberg designed to provide comprehensive protection for the agricultural landscape, the water table and certain endangered species of livestock. In contrast to previously authorized programmes to compensate farmers for pegging agricultural activities at low levels of intensity, this package was not focused on a strictly circumscribed area within the region nor on certain specific farming activities, but was broader in scope and ambition. Individual headings include aid, granted on a per hectare basis, for preserving pastureland and

characteristic, naturally extensive orchards, and aid to compensate for use of certain low-output crop production techniques.

Environmental measures are part and parcel of the CAP reform agreed by the Council in May 1992. Council Regulation (EEC) No 2078/92[1] sets new parameters for Community intervention in this area whilst permitting Member States, as under Regulation (EEC) No 2328/91, to propose alternative conditions of aid under Articles 92 to 94 of the EEC Treaty. In this connection, Commission state aid policy continues to be determined by fundamental criteria governing the award of Community aid. In the event that these criteria were to be modified in relation to those of Regulation (EEC) No 2328/91, due account would be taken in the assessment of state aid. The Commission is also aware of the need to strike a balance between competition policy considerations and environmental constraints and objectives. In this context, the Commission has noted the observations made by Parliament's Committee on Agriculture, Fisheries and Rural Development in its opinion on the Twenty-first Report on Competition Policy.[2]

506. In structures policy for investments at processing and marketing level, Council Regulation (EEC) No 866/90 allows Member States in principle to introduce unilateral measures, under the terms of Articles 92 and 93, in all areas covered by the Regulation.

In practice, this freedom is circumscribed by the Commission policy of excluding from state aid the same investments which are excluded from Community cofinancing under point 2 of the Annex to Commission Decision 90/342/EEC of 7 June 1990.

It should be noted that, for investments where the Commission Decision of 7 June 1990 does not exclude or limit aid (and the rate of aid does not exceed the maximum permitted by the Commission), it is Commission practice not to raise objections even when the scale of investment is large. Thus, the Commission cleared Portuguese aid to Laprovar-Pepsico for the manufacture of snacks falling within Annex II of the EEC Treaty, involving aid of ECU 8 million for the products in question.

(1) OJ L 215, 13.7.1992.
(2) PE 202.500.

507. With regard to parafiscal charges (levies), the Commission took a decision which represents a change in the application of its policy. It decided that French aid financed through parafiscal charges levied also on products imported from other Member States was compatible with the common market subject to strictly defined conditions being observed. In the case in point, the yield from the charge is used to finance marketing controls imposed by Community directives and therefore serves to achieve objectives that are of Community interest and not exclusively national in character.

In the various cases it has examined to date, the Commission has taken the view, in accordance with the Court's case law, that aid financed through parafiscal charges levied also on products imported from other Member States is in principle incompatible with the common market because the charge levied on imported products has a protective effect which goes beyond aid properly so-called. Even if equality of treatment is assured between national and imported products on a legislative level, such aid is more favourable to national operators on a practical level since the measures taken inevitably stem from national specializations, needs and deficiencies. The case referred to above concerned aid for financing controls imposed by Community directives for the marketing of seeds and seedlings, irrespective of their origin. Aid for controls carried out under such conditions pursues a Community objective; its aim is therefore not to benefit national operators alone. For that reason, the Commission accepted that in this case parafiscal charges could be applied also to seeds and seedlings imported from other Member States for the purpose of financing marketing control measures imposed at Community level. The Commission's approach takes account of the Court's judgments which show that Member States cannot be denied scope for levying a charge on products from other Member States for financing controls provided two conditions are met: the controls must be imposed by Community legislation and the amount of the charge levied on products imported from other Member States should not exceed the real cost of such controls. The French aid for 1991 meets these two conditions, and the French authorities have undertaken to ensure that they are met in subsequent years and to provide the Commission each year with a financial report on the preceding year.

The Commission decided to initiate Article 93(2) proceedings in respect of Belgian aid measures financed through parafiscal charges in the cattle, sheep, goat and horse sectors. The aid was granted for promoting the sale of products of the sectors in question (advertising, fairs, exhibitions, etc.). While the Commission had no comment to make on the purpose of the aid, it judged it to be incompatible with the common market because of the method of financing it. That method involved the imposition of compulsory levies on animals imported from other Member States at the slaughtering stage, on the purchase of beef, veal and sheepmeat, on the recording of horses in stud-books, and on semen imported from other Member States for the initial insemination of cattle.

The Commission also initiated Article 93(2) proceedings in respect of Belgian aid for promoting the raising of poultry and small livestock, not because of the purpose of that aid but because of the method of financing it. This involved the imposition of a compulsory levy at the slaughtering stage which was also imposed on live animals imported from other Member States. Furthermore, it involved the imposition of a compulsory levy also on specialist importers of compound feedingstuffs imported from other Member States; "specialist importers" are those whose business activity is restricted to importation and which import compound feedingstuffs only from the Member States. The notification concerned a draft royal decree amending the Royal Decree of 31 July 1989 and designed, on the one hand, to extend the existing arrangements to the products of laying birds and table fowl and, on the other, to prolong the period of application of the Royal Decree indefinitely. The Commission decided to initiate Article 93(2) proceedings with respect to the extension of the aid for an indefinite period in view of its incompatibility with the common market as previously demonstrated by the fact of the charge applying also to products imported from other Member States. The Commission took the view that the extension of the parafiscal charge to laying birds and table fowl did not alter the positive assessment of the aims of the aid provided for in the Royal Decree of 31 July 1989, since the purpose of the aid financed in this way has not changed. Furthermore, the method of levying the charges on these two products does not raise problems as regards imported products since they are levied only on the basis of national productive activity. However, the

charges levied are paid into a common fund which is also fed by compulsory levies imposed on products imported from other Member States. Aid financed through this fund is therefore regarded by the Commission as not being consistent with Community legislation.

With regard to Danish aid and parafiscal charges channelled to business funds in the milk and poultry sectors, the Community decided not to raise any objection regarding aid for insurance covering product liability. This is a collective insurance scheme covering the liability of producers and traders in each of the two sectors. In adopting its position, the Commission took into account the collective nature of this type of insurance and the large number of producers concerned by liability for any harm suffered by final consumers. It also took into account the fact that the aid is funded entirely by the business sector as a whole from the yield from earmarked charges levied exclusively on Danish products.

508. With regard to the aid scheme provided for farmers in Germany since 1984 to compensate for losses sustained as a result of monetary changes in the 1980s, Parliament's Committee on Economic and Monetary Affairs and Industrial Policy, in its report on the Twenty-first Competition Policy Report,(3) requested the Commission to examine whether this aid scheme had caused distortions of competition between farmers in Germany and those elsewhere in the Community. On this point, the Commission would invite the Committee to refer to its reports to the Council and to Parliament regarding application of the aid paid to farmers in Germany through the VAT system. As stated at point 4.2 of the report relating to 1985,(4) it is virtually impossible to assess the effect of the dismantling of German MCAs on 1 January 1985 and of compensation by means of VAT in isolation from other factors affecting the market. Subsequent Commission reports record that examination of agricultural prices and trade indicated that trends in Germany have been in line with those in other Community countries and that the Commission possesses no evidence to suggest that the granting of special aid in Germany has affected the functioning of Community agricultural markets. The Commission is not in a position to give a more comprehensive assessment than that given in these

(3) PE 202.323.
(4) COM(87)292 final.

reports. However, it is clear that the justification for any form of aid to compensate for the effects of monetary events in the 1980s diminishes over time. This factor will be taken into account by the Commission in any subsequent proposals it may make in this area.

509. The same report of the Committee on Economic and Monetary Affairs and Industrial Policy observes that the agricultural sector has been the victim of differential treatment in that, until a few years ago, this sector was not mentioned in the Commission's annual reports on competition policy. A link is also established by the Committee between the erstwhile absence from competition reports of a section relating to agriculture and the vigour with which competition rules are applied in this sector. Whilst the nature of any such link is not clear to the Commission, it should be noted that the Committee itself, in its report on the Commission's Nineteenth Competition Policy Report,(5) called for the exclusion of agriculture from the competition report. In the Commission's view, any such exclusion would be deleterious to the necessary transparency in this area. It will endeavour to respond positively to suggestions which add to this transparency.

(5) PE 144.495.

<T4>

§11. Aid in the fisheries sector

510. In 1992 the Commission registered 33 new aid schemes and one aid scheme notified after its adoption by the Member State in question.

The Commission decided not to oppose the implementation of 28 aid schemes.

During 1992 the Commission initiated Article 93(2) proceedings in relation to ten aid measures (nine in France and one in Italy). During the same period, the Commission decided to terminate Article 93(2) proceedings with regard to nine aid measures introduced by France, the Netherlands 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 compatibility 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.

		Decision by the Commission			
Year	Total	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	-

The new guidelines for the examination of state aid in the fisheries sector were published in Official Journal C 152, 17.6.1992.

(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.

<T3> B. Public enterprises and state monopolies

<T4> §1. Telecommunications

<T5> Community legislation

511. On 21 October the Commission adopted a review of the situation in the telecommunications services sector[1] as provided for in Council Directive 90/387/EEC and Commission Directive 90/388/EEC. This review, which is contained in a communication to the Council and to Parliament, identifies current problems in the sector and examines a number of possible options for future legislation as well as the justification for existing exclusive and special rights.

The options considered are as follows:

(i) maintenance of the present regulatory environment;
(ii) Community regulation of tariffs and investments;
(iii) opening-up to competition of voice telephony services;
(iv) opening-up to competition of voice telephony between Member States.

The review concludes that the last option would seem to be the one most likely to achieve the objectives of the Community.

All interested parties are, however, requested to make known their observations so that the Commission is able to take a final decision and to draw up the necessary regulatory measures.

(1) SEC(92)1048 final.

<T4> §2. Postal services

<T5> Green Paper

512. The Commission adopted the Green Paper on the development of a single market for postal services on 13 May.(2) The Green Paper examines the current situation of the Community's postal services and presents a series of options for their future development.

The Green Paper accepts as an absolute policy fundamental the need to ensure the continuation of the universal service, which must be provided at an affordable price, have good quality of service and be accessible to everyone. In order to preserve the universal service, a set of reserved services may need to be established for which special or exclusive rights may be granted to particular enterprises. However, the scope of the reserved area must not exceed what is strictly necessary to achieve the universal service objective. Outside this reserved area, all services should be provided under conditions of free competition.

The Green Paper proposes a balanced approach comprising both harmonization and liberalization measures. It proposes a free market in express and publications services, parcels services having already been liberalized in all twelve Member States. The liberalization of cross-border mail and *a priori* direct mail is envisaged on the basis of the analysis contained in the Green Paper, which does, however, accept that their liberalization should not undermine the universal service.

The publication of the Green Paper on 11 June launched a period of public consultation during which the Commission invited the comments of all interested parties on its policy options. At the end of this process, it is intended to put forward a plan of action for the Community's postal services.

(2) COM(91) 476 final. See also Twentieth Competition Report, point 61, and Twenty-first Competition Report, point 325.

<T4> §3. Energy

<T5> Gas and electricity

513. The Commission examined the replies to the letters of formal notice concerning exclusive rights to import or export gas and electricity.(3) It decided to continue proceedings under Article 169 of the EEC Treaty and to send reasoned opinions to the six Member States whose legislation allows exclusive rights (Denmark, Spain, France, Ireland, Italy and the Netherlands).

The Commission is convinced that the abolition of exclusive import and export rights in these sectors is an essential step in the process of establishing a genuine single market in energy.

514. At the same time, the Commission continued its efforts to secure adoption of its proposals for harmonization directives based inter alia on Articles 57(2), 66 and 100a of the EEC Treaty.

<T5> Oil

<T8> Greece

515. In January Greece adopted new legislation which resolves the bulk of the problems previously identified.(4)

516. Doubts persist, however, regarding the compulsory storage arrangements provided for in the new legislation. This problem is being examined in the light of Article 30 of the EEC Treaty.

<T8> Spain

On 22 December Spain adopted new regulations abolishing the exclusive legal rights in favour of CAMPSA (the company operating the monopoly) in the monopoly service-station network. Meanwhile, existing exclusive rights, particularly for fuel oil and LPG, have been adjusted in accordance with the

(3) Twenty-first Competition Report, point 328.
(4) Twenty-first Competition Report, point 330.

obligations incumbent on Spain under Article 37 of the Treaty.

These new regulations represent a significant adjustment in the legal Spanish oil monopoly, which has existed since 1927.

However, the Commission is now examining, on the basis of Articles 85 and 86 of the Treaty, the conditions governing access by the various independent operators to the CAMPSA logistical network and the exclusive agreements concluded by Spanish refineries with service-station owners in the old monopoly network.

<T8> Portugal

517. The exclusive rights granted to the public corporation Petrogal for the distribution of diesel fuel for farmers, which had been the subject of a complaint,(5) were finally amended by the Portuguese authorities to allow any distribution company access to this sector of the market.

(5) Twenty-first Competition Report, point 331.

<T4> §4. Transport

<T5> Air transport

518. The Commission continued to examine the various arrangements concerning existing exclusive or special rights in the Member States for the provision of services to assist passengers, aircraft and goods at public airports. In this connection, the Commission considers it vital that - as recommended by IATA - at the very least the right of airlines to organize their own assistance services either individually or jointly (system of self-help) should be respected. Moreover, it is studying the opening-up of this market to effective competition as a means of improving quality and reducing the costs of services while respecting national regulations where these are strictly necessary to guarantee a complete and permanent service, airport security and the protection of users.

519. As a result of a number of complaints, the Commission noted numerous instances of restrictions on competition in connection with the provision of assistance during stopovers at airports in several Member States. The replies by the Member States to the questionnaire sent by the Commission allowed it to make a preliminary examination of the legal position in this field in the Community.

It transpires that there are in a number of Member States restrictions on competition resulting from the granting to certain companies of exclusive or special rights to provide assistance to third parties during stopovers. In some cases, these restrictions also prevent airlines from organizing assistance themselves during stopovers.

These obstacles restrict competition in the provision of assistance during stopovers and, indirectly, in the air transport sector. It is, therefore, essential that the liberalization of air transport should not be impeded by the continued unjustified existence of monopolies in this related sector.

The Commission is examining how far the above-mentioned legal restrictions are compatible with Article 90(1), read in conjunction with a number of other provisions of the EEC Treaty. In the light of the outcome of this process, during which consultations will be held with Member States and with

the operators in question, it might decide to take measures under the powers granted by Article 90(3).

<T8> Germany

520. The airline British Midlands has submitted a complaint against the refusal by the German authorities to allow SAS to provide assistance to the plaintiff during stopovers at Frankfurt Airport.

This ban allegedly results from national provisions stipulating that foreign companies can provide such services only if reciprocal treatment is granted to German carriers in the country of origin. The German authorities point out in this connection that Lufthansa is subject to similar restrictions in Denmark and the other Scandinavian countries. Since such a rule on reciprocal treatment may be incompatible with Article 90(1), read in conjunction with a number of other provisions of the EEC Treaty, the Commission asked the German authorities for an explanation.

<T8> Spain

521. As regards a number of complaints submitted on behalf of various Spanish charter companies and relating to exclusive rights granted to Iberia which allegedly prevented them from organizing their own assistance,(6) the Commission, after being informed by the Spanish authorities that self-assistance is a legal activity subject to prior authorization and that they were not aware of any refusal to grant authorization to the airlines in question and after unsuccessfully requesting the plaintiffs to provide proof of such refusal by the authorities, decided to file the complaints in question because of a lack of evidence.

In spite of a formal undertaking by the Spanish authorities, the reduction of 65% in the charges for assistance at airports granted to Spanish airlines(7)

(6) Twenty-first Competition Report, point 335.
(7) Twenty-first Competition Report, point 336.

was only partly abolished from 1 November. The Commission is studying the measures that need to be taken to do away with this discriminatory reduction completely.

<T5> Sea transport

<T8> Denmark

522. Following a complaint lodged by a private shipping line concerning the refusal by the Danish Government to grant it access to Rødbyhavn(8) to operate a regular ferry service between that port and the German port of Puttgarden, the Commission sent a letter of formal notice to that Government on the basis of Article 90(3) of the EEC Treaty.

In the Commission's opinion, the effect of this refusal is to protect the monopoly enjoyed by Danish (DSB) and German (DB) railways, which jointly operate a ferry link on this route. Such a refusal would be incompatible with Article 90(1), read in conjunction with Article 86 of the Treaty.

<T8> Spain

523. As regards the complaint against further discrimination on grounds of nationality on the part of Transmediterranea, the public-sector sea transport company,(9) the Commission held that, contrary to the view taken by the Spanish Government, the existence of a 20% reduction in the company's fares for certain trips made by pensioners and people over the age of 60, provided they are of Spanish nationality, is not based on strictly commercial criteria.

In reality, through the conduct of its public company, the State was continuing to pursue the social, but discriminatory objective (fare reductions only for elderly people of Spanish nationality) that it had set itself in the legislation which had already formed the subject of the Commission decision on 22 June 1987.(10)

(8) Twenty-first Competition Report, point 337.
(9) Twenty-first Competition Report, point 334.
(10) Boletin Oficial del Estado No 312, 30.12.1981; Law amended by the Finance Act, No 33/1987; Boletin Oficial del Estado, 24.12.1987. Eighteenth Competition Report, point 309.

This led the Commission to conclude that the Spanish State, which has a 95% holding in Transmediterranea, at the very least failed to act to put an end to a measure within the meaning of Article 90(1) of the EEC Treaty which clearly conflicts with Article 7 of the Treaty.

The Commission therefore felt compelled to initiate infringement proceedings against the Spanish Government under Article 90(3) of the EEC Treaty.

<T4> §5. Other industries

<T8> Italy

524. In its judgment of 10 December 1991 (Case C-179/90, Porto di Genova), the Court of Justice held that the monopoly of port handling operations in Italy was incompatible with Article 90(1) of the Treaty, read in conjunction with Articles 30, 48 and 86.

By letter dated 31 July the Commission, in accordance with Article 90(3), gave the Italian Government notice to communicate within two months the measures it intended to adopt in order to bring the laws and regulations governing the monopoly of port handling operations in Italy into line with Community law. The Commission made specific reference to the major ports where, in its view, the volume of trade was liable to affect trade between Member States.

In the course of the procedure, the Commission was informed that the Italian Council of Ministers had adopted on 15 October new provisions on dock work in the form of a decree-law.(11)

The decree-law abolishes both the last paragraph of Article 110 of the Shipping Code, which had established the dock-work monopoly, and the last paragraph of Article 11 of the Code, which requires the firm holding the concession to use a port company composed exclusively of nationals to carry out dock work.

The new provisions thus immediately abolish the main points condemned by the Court (judgment of 10 December 1991) and challenged by the Commission in its letter of 31 July.

However, certain provisions of the decree-law, which must be converted into law within sixty days, still give cause for concern, in particular as

(11) Decree-Law No 409 of 19 October 1992, Gazetta Ufficiale della Repubblica Italiana, General Series No 246 of 19 October 1992.

regards possible obstacles to freedom of establishment and freedom to provide services. The Commission called on the Italian Government to amend those provisions.

<T8> Portugal

525. The Commission examined whether Portuguese authorities had adopted and published all the measures necessary to ensure that, in accordance with Article 208 of the Act of Accession, no discrimination exists between nationals of the Member States regarding the conditions under which goods subject to the monopoly in alcohol (ethyl alcohol of agricultural origin, ethyl alcohol of non-agricultural origin and wine spirits for use in the making of port wine) are procured and marketed.

The Commmission initiated proceedings against the Republic of Portugal on 10 December 1990, i.e. before the end of the transitional period, seeking to establish that by failing to carry out the gradual adjustment of this monopoly from 1 January 1986, the Portuguese Republic had failed to comply with its obligations pursuant to Article 208(1) of the Act of Accession of the Kingdom of Spain and the Republic of Portugal (case C-361/90); the same monopoly was subsequently the subject of a request for a preliminary ruling from the Portuguese Supremo Tribunal Administrativo.

On January 19, 1993, the Court of Justice has given judgement in these two cases. The Court rejected the application of the Commission on the grounds that the Portuguese Government had effectively begun the process of progressively adjusting the monopoly and that the Commission had not demonstrated that the measures taken by the government were not of such a nature to achieve the objectives set out by Article 208 of the Act of Accession.

Both in the framework of case C-361/91 and in reply to the request for a preliminary ruling in case C-76/91 the Court stated that the opening of quotas for import was not the only way to proceed to the adjustment of the monopoly.

<T4>

§6. Other aspects

526. With a view to the forthcoming entry into force of the Agreement on the European Economic Area, the Commission decided to remind Member States of their obligations concerning monopolies of a commercial character and undertakings granted special or exclusive rights.

All the Member States were therefore asked to inform the Commission whether they had maintained in force, in relation to the EFTA countries, any monopolies of a commercial character and, if so, to specify the products covered by such monopolies, the exclusive rights concerned (in particular exclusive rights to import, export, market or sell) and any adjustment measures already taken or planned.

Without prejudice to the provisions of the Agreement granting temporary derogations to certain EFTA countries, monopolies must in principle be fully adjusted not later than the date of entry into force of the Agreement.

527. At the same time, as regards the "undertakings granted special or exclusive rights" referred to in Article 59 of the Agreement and in Section H of Annex XIV, the Member States were asked to confirm that the measures already taken to comply with the requirements of Commission Directives 88/301/EEC of 16 May 1988 and 90/388/EEC of 28 June 1990 on competition in the market for telecommunications terminal equipment and for telecommunications services did not require the adoption of further measures in order to comply with the obligation arising out of the Agreement (see Chap. XIV).

<T4> §7. Communication concerning public undertakings in the manufacturing sector[12]

<T5> Background

528. Following the adoption of this communication in 1991, the Commission has endeavoured to apply it, firstly, as a general instrument in the identification of aid measures in routine cases and, secondly, as the tool it was designed to be in ascertaining the existence of aid on the basis of the review of undertakings' financial and related statements.

<T5> Appeal to the Court of Justice

529. In December 1991 the French Republic appealed[13] to the Court of Justice against the communication.

The Court is expected to hand down its ruling in 1993.

<T5> Implementation

530. Data were received in respect of 1989 and 1990 for undertakings covered by the communication. For the financial year 1991, information was provided, to a greater or lesser extent, by the Member States concerned.

<T5> Application

531. The principles set out in the communication were applied consistently during the vetting of state aid cases, a leading case being the Bull decision adopted by the Commission in July.[14]

The principles were also applied in a number of cases concerning public-sector undertakings: e.g. the proposed privatizations of ENI and IRI; the liquidation of EFIM;[15] asset acquisitions and disposals by Péchiney and the capital increase in Aerospatiale.

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(12) OJ C 273, 18.10.91.
(13) Case C 325/91 French Republic v Commission.
(14) OJ C 244, 23.9.1992.
(15) The Commission decided to initiate the Article 92(2) procedure in respect of EFIM on 23 December 1992. See points 475 et seq. of this Report.

The Commission analysed much of the data received in respect of 1989 and 1990 and identified a number of cases of aid granted to public undertakings without prior approval. Accordingly, it is anticipated that, in the coming months, the Commission will take formal action under Article 93(2) of the EEC Treaty in respect of those cases.

<T2> Chapter II: Main decision of the Court of Justice

<T4> §1. Admissibility of applications lodged against decisions to initiate proceedings under Article 93(2)

532. In two judgments delivered on the same day(1) the Court of Justice ruled on the admissibility of two applications lodged against Commission decisions to initiate proceedings under Article 93(2) of the EEC Treaty.

The Court rejected the Commission's plea of inadmissibility based on the claim that the letter initiating proceedings in each case was only a measure forming part of the preparatory investigation leading up to the adoption of a final decision, and as such was not an act adversely affecting the applicant capable of being contested under Article 173 of the EEC Treaty.

The decision to initiate proceedings implied a choice on the part of the Commission, which had to classify the aid and determine the procedure appropriate to it, as such a decision had different effects according to whether the aid was considered new aid within the meaning of Article 93(3) or existing aid subject to Article 93(1).

The Court stated, however, that when it came to consider the substance of the two cases it would confine itself to establishing whether aid granted in the circumstances constituted new aid in respect of which the Commission could have initiated the Article 93(2) procedure.

(1) . Judgment of 30 June 1992, Case C 47/91 Italy v Commission (Italgrani), not yet reported.
. Judgment of 30 June 1992, Case C 312/90 Spain v Commission (Cenemesa and Others), not yet reported.

<T4> §2. Failure to comply with a decision under Article 93(3)

533. In the Rover Case(2) the Court had to consider the relationship between two successive Decisions.

The second Decision, which had been adopted without first initiating the procedure provided for in Article 93(2) and which was challenged by the applicants, found that an additional UKL 44.4 million of aid had been paid to Rover and British Aerospace in breach of the earlier Decision of 13 July 1988, and called upon the United Kingdom authorities to recover it from the recipients.

The Court accepted the applicants' main contention, namely that the only two options open to the Commission were:

- the adoption of a new decision to initiate Article 93(2) proceedings on the ground that the UKL 44.4 million of financial concessions constituted new aid; and
- the institution of proceedings directly before the Court, by virtue of the second subparagraph of Article 93(2), for the failure of the United Kingdom authorities to comply with the Decision of 13 July 1988.

(2) . Judgment of 4 February 1992, Case C 294/90 British Aerospace and Rover Group v Commission, not yet reported.

<T1> PART FOUR: CONTACTS WITH COMMUNITY AND OTHER INSTITUTIONS

<T2> Chapter I: The contribution from socio-economic and political circles

<T4> §1. European Parliament

534. During the year Parliament continued to pay lively attention to competition matters. Its support and constructive remarks are greatly appreciated by the Commission, which effectively seeks to maintain a regular dialogue with, and to inform, Parliament on important competition policy issues.

535. It adopted its resolution on the Twenty-first Competition Report on 17 December 1991. This resolution and the Commission's response are annexed to the present Report.(1)

536. On 17 December Parliament also adopted an own-initiative resolution on the Commission's proposal for a block exemption in the insurance sector.(2) In this resolution, Parliament welcomes the presentation of the proposal, which is generally considered to be on the right lines.

However, it also raised a number of specific questions relating to individual provisions of the block exemption and asked for clearer definitions of certain terms. In its revised final version of the Regulation, the Commission has taken account of a large number of these observations.

537. In the air transport sector, Parliament adopted on 8 April a resolution on the Commission's proposal amending Regulation (EEC) No 3975/87(3) and on 10 July a resolution on the amendments to Regulation (EEC) No 3976/87.

538. Several other resolutions were adopted which have a bearing on competition.

On 9 July Parliament adopted a resolution on the proposed changes to the Seventh Shipbuilding Directive.(4) It adopted on 29 October a resolution on

(1) See Annex I.A to this Report.
(2) OJ C 207, 14.8.1992, p. 2.
(3) OJ C 225, 30.8.1991, p. 9.
(4) OJ C 155, 20.6.1992, p. 20.

the situation of the steel industry in Europe and on 19 November a resolution on the situation of coal-mines in the United Kingdom. At committee level, several important meetings were held, including a discussion on 13 April with the then President of the Bundeskartellamt within the Economic and Monetary Affairs Committee and a conference in Dresden on 18-20 May on the work of the Treuhandanstalt.

539. In the field of international relations, Parliament gave its assent on 12 March to the Agreement on Civil Aviation concluded between the Community, on the one hand, and Norway and Sweden,(5) on the other, and on 28 October to the Agreement on the European Economic Area, which also includes substantive rules on competition.(6) It further gave its assent to the Europe Agreements concluded by the Community with Poland and Hungary on 16 September.(7)

540. During the year Members of Parliament submitted 141 written questions on competition to the Commission (169 in 1991); a further 66 questions were submitted for oral reply (75 in 1991).

(5) See point 100 of this Report.
(6) See point 85 of this Report.
(7) See point 101 of this Report.

<T4> §2. Economic and Social Committee

541. On 25 November the Economic and Social Committee delivered its opinion on the Twenty-first Report on Competition Policy. The opinion and the Commission's response are reproduced in the annex.

The Commission will take these observations into account.

542. Also on 25 November the Committee delivered an additional opinion on the Commission's proposed block exemption in the insurance sector.(1) While endorsing the Commission's initiative, it raised a number of more specific questions. The Commission took these comments into account in the final version of the block exemption proposal.

543. The Committee took a position on a number of other competition-related issues. On 29 April it adopted an opinion on the proposed amendment(2) to Regulations (EEC) Nos 3975/87 and 3976/86 in the field of air transport. On 1 July, it delivered an opinion on the proposal(3) for a Council Directive providing for changes to the Seventh Council Directive on aid to shipbuilding and on 19 November on the proposal(4) for new Commission block exemptions in the field of air transport.

544. The Commission welcomes the constructive remarks made by the Economic and Social Committee and looks forward to continued good working relations with the Committee.

(1) OJ C 207, 14.8.1992, p. 2.
(2) OJ C 225, 30.8.1991, p. 2.
(3) OJ C 155, 20.6.1992, p. 20.
(4) OJ C 253, 30.9.1992, p. 5.

<T4> §3. Advisory Committee on Restrictive Practices and Dominant Positions

545. The Advisory Committee met nineteen times to examine preliminary draft Commission decisions in individual cases involving the application of Articles 85 and 86 of the EEC Treaty, of which three were preliminary draft decisions granting interim measures. The meetings included one meeting of the committee specializing in land transport, four meetings of the committee specializing in sea transport and one meeting of the committee specializing in air transport.

In its various compositions, the Committee delivered a total of twenty-six opinions. It was also consulted in eight cases where the Commission was considering sending comfort letters to enterprises 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 addition, one meeting was devoted to questions of procedure.

The Committee held six meetings on matters concerning legislation. Two of them (17 July and 13 November) dealt with preliminary draft Commission regulations amending, as regards joint ventures of a cooperative nature, four block exemption regulations relating to patent licensing and know-how agreements and to specialization and R&D agreements. On the same dates, the Committee also studied the draft Commission regulation on a block exemption in the insurance sector. Also on 13 November the three specialized advisory committees on transport gave their views on the draft Commission regulation amending inter alia the regulations on land, sea and air transport, the purpose being to modify the application forms for negative clearance and notification so as to reflect the new situation created by the entry into force of the Agreement on the European Economic Area. On 31 August the appropriate specialized committee examined the draft block exemption regulations in the field of air transport.

<T4> §4. Report on the Advisory Committee on Concentrations

546. The work of this Committee represents the culmination of the close and constant liaison with Member States as regards the application of the Merger Control Regulation. The Committee met six times to discuss four cases(1) and twice to discuss general policy issues. In all the cases in which a decision was taken, the Committee requested that its opinion be published together with the final decision, and the Commission acceded to its requests.

For the first time, the Committee was recalled at very short notice in two cases, Nestlé/Perrier and Du Pont/ICI, to consider revised final decisions that were proposed following offers by the companies concerned to modify their proposed merger in order to remove anti-competitive elements which the Commission had analysed. These offers were made at a late stage in the procedures after proposed final draft decisions had been examined by the Advisory Committee. As these changes substantially altered the original draft decisions, further consultation with the Advisory Committee was considered desirable.

The formal consultation of the Advisory Committee on Concentrations is in addition to the ongoing contact and exchange of information between the members of the Merger Task Force and the relevant officials in the Member States.

Lastly, the Committee examined on 13 November the draft Commission regulation amending inter alia its 1990 Regulation on the notification of concentrations and aimed at adapting the annexed form (form CO) to the new situation created by the entry into force of the Agreement on the European Economic Area.

(1) Accor/Wagons-Lits, Nestlé/Perrier, Du Pont/ICI, Mannesmann/Hoesch.

<T4> §5. Conference of National Government Experts

547. During the year, the Commission called five meetings of the national government experts in competition. The first, held on 29 September, was the annual meeting of the Directors-General for Competition of the Member States, which dealt with the activities of the Commission relating to mergers in 1991-92, the international dimension of Community competition policy, the European Economic Area (enterprises and state aid), and agreements with certain central European countries.

On 20 January, at a more technical level, the government experts gave their opinion on the draft Commission notice modifying the notice on its 1983 block exemption regulations on exclusive distribution and exclusive purchasing in connection with brewery agreements of minor importance.

They also discussed cooperative joint ventures on two occasions. On 6 and 7 February their deliberations were based on a Commission paper on the future treatment of such enterprises; on 20 November they exchanged views on a draft Commission communication on the treatment of such enterprises pursuant to Article 85 of the Treaty.

On 19 November the experts examined a draft Commission regulation amending inter alia Regulation No 27/62 and aimed at adapting form A/B, used for applications for negative clearance and notifications, to the new situation created by the entry into force of the Agreement on the European Economic Area.

<T4>

§6. Other forms of cooperation with the authorities of the Member States

548. Having been informed by the Danish competition authorities that, in their view, Danish prices for audiovisual products were high because of restrictive practices on the European market, the Commission carried out a survey of prices of audiovisual products on the EC market.

In the autumn of 1989, the Danish Monopoly Supervision Authority published a report on the market in audiovisual products. The report referred to an investigation carried out by the EBCU, which showed that Denmark was by far the dearest country in the EC for audiovisual products. The investigation took account of the rates of VAT and tax in the various countries. The Authority followed this up with an examination of import prices in four European countries, which tended to indicate that Danish import prices were generally higher than import prices in the United Kingdom or West Germany for instance.

Informed by the Danish authorities, the Commission carried out a survey in the course of which it examined data from a number of major producers relating to prices of selected audiovisual products in five Member States (Denmark, Belgium, Germany, the United Kingdom and Italy) for the years 1989, 1990 and 1991. The examination encountered difficulties in that the models on the various markets were different and were marketed at different times, but the Commission did not discover any evidence of a consistently higher level of prices for imports to Denmark.

The Commission concluded that the reason for the high level of prices in Denmark is to be sought in the conditions prevailing on the Danish market and that subsequent surveys of differences in price levels between Denmark and other countries should focus on Danish factors.

This case provides an illustration of the possibilities of cooperation between the Commission and national authorities in the enforcement of competition rules. The Commission expects its cooperation with national

authorities, as well as its assistance to national courts, to intensify considerably in the wake of both the Automec II case[1] and its notice on the application of Community competition law by national courts.[2] This trend should enhance the effectiveness of the implementation of the Community competition rules.

(1) Judgment of 18 September 1992, in Case T-24/90, Automec v Commission. Not yet reported.
(2) See point 299 of this Report.

<T4> §7. Other contacts

549. In connection in particular with the preparation of its legislative work, the Commission continued in 1992 to have close contact, in addition to the institutionalized contacts described above, with the organizations representing consumers, employers and other relevant groups. Such contacts were about the Commission's preliminary drafts of new Council regulations and new interpretative notices, and general competition policy.

<T5> EBCU

550. On 4 June a meeting was held between Commission officials and members of the European Bureau of Consumers' Unions (EBCU). The meeting allowed the EBCU to put across the point of view of consumers on subjects of particular importance to them, including the state of competition in the motor vehicle industry, air transport, insurance and telephone and postal services, competition and intellectual property, and the international dimension of competition policy.

<T5> UNICE

551. Written and oral contacts took place with the Union of Industrial and Employers' Confederations of Europe (UNICE) on the Commission's main legislative projects, including insurance, cooperative joint ventures (regulations and notice) and the draft notice on cooperation between national courts and the Commission in implementing Articles 85 and 86.

<T5> ICC

552. Written and oral consultations took place with the International Chamber of Commerce on the drafts relating to joint ventures and cooperation with national courts.

<T5> National representative organizations

553. For the first time, the Commission officials met a delegation from the "Conseil national du patronat français" (CNPF). The matters discussed included the drafts on cooperative joint ventures, the Commission's policy on merger control and its practice in implementing the various regulations in force.

A meeting was also held with the "Bundesverband der Deutschen Industrie" (BDI). It covered the same subjects as those discussed with UNICE.

Meetings were also held with the United Kingdom and Spanish employers' organizations.

<T2> Chapter II : International contacts

<T4> § 1. Implementation of the EC/US Agreement on the application of their competition laws

554. The second semestrial meeting under the Agreement took place on 23 September 1992 in Washington, between the Commission's Directorate-General for Competition, the US Federal Trade Commission and the Antitrust Division of the US Department of Justice. The parties discussed the operation of the agreement and in particular joint studies which could be carried out, for example to explore how cooperation between competition authorities might be enhanced.

In this context, the meeting also reviewed progress with a study co-financed by the Community, the United States, Canada and the OECD, into the scope for cooperation in merger control. Information on recent cases and policy initiatives of the parties was exchanged as well as views on present and future initiatives to promote the strong enforcement of competition rules internationally.

The heads of the three authorities (FTC and Antitrust Division on the US side) also met informally in January in Washington and in December in Paris.

<T4> § 2. Countries of Central and Eastern Europe

555. A growing number of steps were taken in the competition area both in the context of the entry into force of the Europe Agreements (Interim Agreements) and in connection with the assistance which the Community provides for the countries of Central and Eastern Europe.(1)

As part of the technical assistance in this field, the Commission's Directorate-General for Competition (DG IV) welcomed trainees from various antitrust offices in the Central and Eastern European countries, DG IV experts took part in an international seminar in Warsaw on the control of state aid and programmes were drawn up, using external consultants, to help various countries with economies in transition adopt legislation and administrative structures to ensure the proper functioning of competition.

(1) See point 101 of this Report.

<T4>

§ 3. Contacts with other countries

556. Formal bilateral meetings were organized with the Canadian Bureau of Competition (Ottawa, 27 January) and with the Japanese Fair Trade Commission (Brussels, 6 October and Paris 2 December). In addition a number of informal contacts took place with these and other countries, including Indonesia and Mexico.

557. The talks with Canada covered a range of issues including discussions on current enforcement practices, on strategies towards the creation of an international framework for competition policy enforcement and on the relationship between trade and competition policies. The main topic of discussion with the Canadian authorities was, however, on ways and means of strengthening cooperation and coordination between the two authorities; agreement was virtually reached on an administrative arrangement between the Commission and the Canadian Government along the lines of the Agreement concluded with the US authorities on 23 September 1991.(2)

558. During the meeting with the Japanese Fair Trade Commission exchanges were held on current enforcement activities and priorities, changes in the legal frameworks on both sides, structural issues and responses to developments in the competition policies of third countries.

559. The increase in the number of contacts with other countries shows the growing interest in the principles of competition and more generally of market economy around the world. The Commission is fully aware of its responsibility in helping these countries, a responsibility which flows from its status as one of the main competition policy authorities in the world. However, its capacity to provide technical assistance in such cases is restricted by its limited personnel resources.

(2) Twenty-first Competition Report, point 64.

<T4> § 4. Multilateral

<T5> - OECD

560. The Committee on Competition Law and Policy met in May and December 1992. Additional sessions at working party level also took place in February and September. The work of the Committee can mainly be placed under the headings of convergence and cooperation and of interlinkages between competition and trade policies. Under the former, the Committee in particular launched a study into process convergence in merger control. This is looking at a number of mergers or acquisitions which were considered by the competition authorities of several countries, with a view to ascertaining to what extent they cooperated or could have done so. In connection with interlinkages, the OECD commissioned an empirical study on the extent to which anti-dumping action in a number of countries and sectors may be regarded as having protected competition. The Committee also undertook work with the OECD's Trade Committee, at working party level. Joint meetings considered specific instances of interaction between trade and competition policies, as well as a general framework document on the subject.

The Committee also adopted a report on competition policy and broadcasting, considered legislative initiatives in several countries and held seminars on the objectives of competition policy and on strategic alliances.

561. The General Working Party of the Industry Committee continued its work on subsidies and structural adjustment. The Commission contributed to this work in furnishing all necessary information on the Community's financial support to industry and in making available, in the meetings held by the Experts Group on Subsidies, its expertise in questions of defining and calculating subsidies.

<T5> - UNCTAD

562. The work of UNCTAD VIII (February 1992 - Cartagena de las Indias, Colombia) resulted in new tasks being set for UNCTAD and in corresponding institutional changes.

However, it was agreed to maintain the status quo for the International Group of Experts on Restrictive Business Practices as regards both its terms of reference and status.

It was also decided to set up a working group on comparative experience with privatization.

At its first meeting following the conference in Cartagena de las Indias (Geneva, 23 to 27 November), the work of the Intergovernmental Group of Experts on Restrictive Business Practices took on new impetus. This was due in large part to two factors, namely the abandonment of the system of regional groups and the increased interest of several countries, notably from the former group of 77, in developing a serious and active competition policy.

The Commission welcomes these developments, which will allow greater liberalization of trade, notably between the developing countries and between such countries and the countries of the industrialized world. This will allow fuller application of the approach advocated in the "Set of multilateral agreed principles and rules for the control of restrictive business practices", namely the elimination of restrictive business practices impeding or cancelling out the advantages created by the liberalization of tariff and non-tariff barriers.

ANNEXES

<T2> ANNEX III: Decisions, notices and judgments relating to individual cases

<T3> A. Competition policy towards enterprises

<T4> 1. Case summaries

<T5> - Restrictive agreements

<T6> * Horizontal agreements

<T7> a) UTC (Pratt & Whitney)/MTU

562. On 28 October the Commission published a notice pursuant to Article 19(3) of Council Regulation No 17 concerning a collaboration agreement between United Technologies Corporation (Pratt & Whitney Group) (P&W) and MTU Motoren- und Turbinen-Union, which, through Deutsche Aerospace (DASA), forms part of the Daimler-Benz group, in the area of commercial aircraft engines.

P&W is one of the world's three largest full-range aircraft engine manufacturers, while MTU is mainly a manufacturer of aircraft engine parts and components.

Under the agreement, the parties undertake to coordinate and extend their cooperation agreements in respect of specific engine programmes, providing in particular for risk and revenue sharing.

The Commission considers that the collaboration between the two manufacturers is beneficial to competition because of the degree of technology transfer involved. However, it made it clear that it intends to exempt only specific cooperation projects and not general, non-specific collaboration schemes. This is the first time the Commission has given an assessment of cooperation in this sector. The situation with regard to the agreement in question will accordingly be reviewed after ten years.

<T7> b) GEC Alsthom - Fiat Ferroviaria

563. The agreement in question is a framework agreement between GEC Alsthom and Fiat Ferroviaria relating to broad cooperation on railway rolling stock and covering technical, industrial and commercial matters.

A joint standing committee is responsible for taking any operational decision, thus committing not the joint subsidiary which it is planned to set up, but which does not yet exist, but the parties to the agreement directly.

The Commission refused to take a decision on the grounds that the notification covers only the framework agreement, which is so vague that the Commission cannot tell what the companies are going to do; it therefore asked them to notify individually any agreement taken or decision or concerted practice adopted by the committee.

<T7> c) Quantel International-Continuum/Quantel[1]

564. On 27 July the Commission decided to refuse to exempt agreements ancillary to a demerger between two companies supplying lasers for scientific research.

The agreements, which contained market-sharing provisions, prevented the US company Continuum over a long period from having access to the Community market, which Quantel SA, its former parent company, had reserved for itself. Altough some protection of their respective markets might have been justified for a limited time after the sale, to prevent the unfair contracting away of each other's customers for example, the Commission considered that the length of the protection (eight to nine years depending on the products) was unjustified. The agreement on the sale of the company and the protocol attached to it therefore constituted a barrier to entry to the common market for a company outside the Community, which would isolate the Community technologically and commercially, as far as laser products were concerned, from a non-Community country.

(1) OJ L 235, 18.8.1992; Bull. EC 7/8-1992, point 1.3.38.

<T7> d) The National British Cattle and Sheep Breeders' Associations

565. The Commission achieved identical undertakings from the British National Sheep and the British National Cattle Breeders' Association to ensure non-discriminatory access to the economic activities of their 200 affiliated Breeders Societies.

566. The Commission, acting on a complaint by a French sheep breeder of the Bleu du Maine variety, came to the conclusion that the relevant UK Sheep Breeders' Society had sought to restrict the import of such pure-bred breeding sheep. The Society, being the recognized holder of that breed's flock-book in the UK, forbade the resale of imported pure-bred breeding sheep which it had registered, for a period of 18 months after such registration. Moreover, it rejected, without explanation, the French breeder's request to become a member of the British Society. This was significant, since all functions fulfilled and economic activities organized by the Society were open only to its members. Therefore, a membership bar effectively meant that those rejected could not register their sheep in the UK(2) as being pure-bred, nor sell them at the special pure-bred auctions, which were organized by the Society.

567. Following the intervention of the Commission the 18 months' rule was repealed by the Society. In addition, the two Associations agreed to impose on their affiliated Breeders' Societies the obligation to establish objective membership criteria; to ensure that reasons for a rejection of any application would be given, and that such rejections could furthermore be subject to appeal. The Associations confirmed that such appeal would cover the application of the principle of non-discrimination.

(2) This issue was resolved by Commission Decision 90/255/EEC which laid down the criteria governing entry in flock-books for pure-bred breeding sheep and goats, OJ L 145, 8.6.1990.

<T7>

e) Infonet(3)

In the Infonet case, the Commission terminated proceedings by sending a comfort letter stating that the agreement satisfied the conditions for individual exemption. However, the agreement, a summary of which was published pursuant to Article 19(3) of Regulation No 17, could not be deemed compatible with Article 85(3) until Infonet's shareholders, which include Community telecommunications organizations enjoying exclusive and special rights on certain markets, had undertaken not to grant it any cross-subsidies or any terms and conditions that would discriminate against possible competitors. In general, the Commission will watch closely to see whether the various forms of technical and commercial cooperation in the telecommunications sector are compatible with the competition rules, notably in the case of agreements concluded between telecommunications organizations enjoying exclusive and special rights.

(3) OJ C 7, 11.1.1992.

<T7> f) Closure of examination of the situation regarding interest rates

568. In its decisions adopted in 1986(4) and 1989(5) on agreements concluded within various national banking associations, the Commission reserved its position on interest rates.

However, at the end of 1989,(6) it took the view that interest rate agreements between banks restricted competition in the same way as agreements on prices and should therefore be avoided or abandoned.

In this context, the Commission began in June 1991(7) an examination of the situation in each Member State, sending the national banking associations and, in certain cases, other credit institution associations formal requests for information so as to update its information in this matter.

In the spring of 1992, the Commission completed examination of the sometimes lengthy replies to its letter and drew the following conclusions(8):

- all the organizations questioned confirmed that no agreements or recommendations on interest rates existed among them;
- some associations (for example, the Belgian and Italian banking associations) took advantage of the opportunity provided by the Commission's requests for information to end legally, of their own accord, agreements which were virtually no longer applied, but still existed on paper;
- lastly, at the Commission's request, another association (the Luxembourg banking association) abandoned a system of recommended debtor and creditor interest rates.

(4) Concerning Irish, Belgian and Italian banks.
(5) Concerning Dutch banks.
(6) IP (89) 689, 16.11.1989.
(7) IP (91) 520, 5.6.1991.
(8) IP (92) 625, 24.7.1992.

Examination of the answers also revealed, in the case of the Belgian banking association, the dangers that may be involved in the standardized presentation of banking terms and conditions, even if such presentation may in general help the customers of banks to choose between comparable services.

In the case in point, the association had sent its members a standardized list of charges in which the amounts had been left blank, except for Eurocheques drawn abroad, with the result that, in the case of such Eurocheques, the indication of the charge could be regarded as a recommendation amounting to a price agreement.

As soon as it had received the statement of objections sent to it, the association in question sent a corrigendum to its members and assured the Commission that what was involved was an error on its part, and the matter was accordingly considered closed.

<T7> g) UK Agricultural Tractor Registration Exchange(9)

569. On 17 February the Commission adopted a decision prohibiting a system for exchanging information on retail sales and market shares in respect of agricultural tractors sold in the United Kingdom. The Community's main tractor manufacturers participated in the information exchange, which was set up in 1975.

The Commission took the view that exchanges of information identifying the sales of each competitor in a highly concentrated market in which there was no significant competition from outside the Community, restricted competition.

The prohibited information exchange system posed two major risks to the maintenance of effective competition:

- the elimination of any hidden competition through the creation of an artificial and undesirable degree of transparency in a highly concentrated market;

- an increase in barriers to market entry for non-members, since the exchange allowed its members effectively to keep out new entrants and check any expansion by suppliers who were not members of the exchange.

The decision follows the guidelines on information exchanges published in the Commission's Seventh Competition Report and provides an illustration of the application of those guidelines.

It should be emphasized that the oligopolistic structure of the United Kingdom tractor market cannot be compared with the motor vehicle market, where imports from non-Community countries are an important source of competitive pressure and the heterogeneity of products is appreciably greater.

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

(9) OJ L 68, 13.3.1992; Bull. EC 1/2-1992, point 1.3.62.

<T7> h) DSB-SFL and DSB-SJ agreements

570. The agreements, notified in accordance with the opposition procedure provided for in Article 12 of Regulation No 4056/86, concern the joint operation of a ferry service between the Danish port of Helsingor and the Swedish port of Helsingborg. They provide that Scandinavian Ferry Lines (SFL), owned by the Statens Järnvager (SJ) group, and Danske Statsbaner (DSB) will set up a joint venture, owned in equal part by them, to operate the route. This involves joint operation of the ferry services previously provided on the route, separately by SFL on the one hand and jointly by DSB and SJ on the other.

571. The Commission took the view that, although the joint operation of the ferry service under the agreements imposed restrictions of competition on the parties, it would help to improve the services provided and promote technical and economic progress while allowing consumers a fair share of the resulting benefit. Passengers would be offered more frequent sailings on new, larger vessels, thus allowing an improvement in the quality of service compared with that currently provided. The arrangements would also allow capacity to be better matched to demand, leading to a reduction in costs and in prices charged.

The Commission further considered that the agreements did not afford the parties the possibility of eliminating competition in respect of a substantial part of the products in question, since the parties remained subject to sufficient competition on the relevant market. Though noting that the parties held a very strong position in the northern Øresund, the Commission considered that the relevant geographic market for the purpose of assessing the real effect on competition of the notified agreement was wider. A large proportion of the traffic between Sweden and Denmark was through-traffic going to Germany, so that the position of the parties had also to be assessed in the light of both the ferry links between Sweden and Denmark, i.e. in the Kattegat and the southern Øresund, and the direct ferry links between Sweden and Germany.

At the request of the Commission, which was anxious to prevent any further increase in their cooperation, the parties deleted from their agreements a clause requiring them to cooperate if one of them set up or operated a new ferry service between Sweden and Denmark.

572. The Commission therefore decided to allow the ninety-day period in which the agreement could be opposed to expire. The agreements notified were thus exempted under Article 85(3) of the EEC Treaty for a maximum period of six years. The Commission reserved the right, however, to review the situation after two years and to require the parties to notify it annually of the fares charged on the link so as to enable it to monitor the effect of the agreements on such fares.

This is the first time Community competition law and Regulation No 4056/86 have been applied to ferry services.

<T7> i) Procter & Gamble / Finaf

573. The Commission examined the joint venture agreements between Procter & Gamble and Finaf S.p.A notified in December 1990. They concerned the creation of joint ventures in Italy, Spain and Portugal in the sector of sanitary protection products as well as the acquisition by P&G of a Finaf company producing baby nappies in the UK. Following complaints from another manufacturer, the Commission took initially a cautious attitude and requested the parties to suspend implementation of the agreements.

574. The Commission found that the agreements, as notified, contained clauses that could allow the parties involved to coordinate their competitive behaviour and could lead to market-sharing liable to restrict competition and affect trade between EC countries. The Commission made its doubts known to the parties and requested them to modify the agreements. After taking into account the amendments to the initial agreements and the undertakings offered by the parties, the operation in question could qualify for exemption under Article 85(3). A notice pursuant to Article 19(3) of Regulation No 17/(10) invited interested third parties to comment on this.

575. In response to the notice the Commission received a significant number of observations emanating from national authorities of certain Member States, a European consumer association and several competitors of the parties. Fears were expressed that due to P&G's steady growth in this market over the last three years and the continuing positive trend in its favour, the operation with Finaf would create serious competition problems. The Commission, whose figures corroborated that view, made public its intention to proceed accordingly unless the parties came up with satisfactory proposals.

576. After negotiations the parties announced their intention to withdraw Finaf's baby nappies from the operation in question and to proceed to the sale of its activities in this sector as soon as possible and in any case within a reasonable period of time taking into account the specificity of the divestiture. To this effect a deadline has been agreed with the Commission. In case it would not be possible to complete the divestiture of Finaf's baby nappies activities in the EC within the agreed period of time, the parties to

(10) OJ C 3, 7.1.1992.

the agreements, P&G and Finaf Spa, undertook to exclude baby nappies completely from the transaction within the same period of time.

577. During the transitional period before the divestiture of Finaf's baby nappies activities, from 1 June 1992 and up to the above-mentioned deadline agreed with the Commission, the parties undertook to submit a detailed time schedule for the total separation of the baby nappies activities of Finaf from those of the joint ventures. They gave further undertakings designed to ensure that competition would not be jeopardized on the babies nappies market. The Commission will monitor implementation of the undertakings and of the separation and divestiture measures by the parties.

578. Following this solution the complaint against the operation was withdrawn. As it has been modified, the operation between P&G and Finaf can benefit the consumer without restricting competition in the relevant market . Given the parties' commitment to the above changes, the Commission confirmed its favourable attitude regarding the restructured operation. Nevertheless, the Commission reserves its final position, which will depend on the outcome of the divestiture and the definitive form the P&G/Finaf transaction will take at the end of the transitional period.

<T7> J) Lloyd's Underwriters' Assocation and the Institute of London Underwriters[11]

579. On 4 December the Commission adopted a decision approving certain arrangements entered into and notified by Lloyd's Underwriters' Association (LUA) and the Institute of London Underwriters (ILU). These agreements are known as the Joint Hull Understandings (JHU) and the Respect of Lead Agreement (RLA). They both relate to marine hull and machinery insurance.

ILU and LUA represent the majority of underwriters active in marine insurance in London accounting for approximately 90% of the UK's total marine insurance capacity.

The JHU as notified consisted for the most part of a series of guidelines on the technical detail of policy renewals. Three clauses were found to be unacceptable because they limited the freedom of the members of ILU and LUA to determine their own prices. At the request of the Commission these clauses were deleted. A fourth clause required that, unless specifically agreed, reinsured business should be restricted to vessels whose country of registration, ownership, and management was the same as that of the reinsured. This clause was satisfactorily amended at the request of the Commission.

The RLA provided essentially that the same leaders who first underwrote hull business should be allowed to continue as leaders when the policy came up for renewal. In other words other underwriters could not compete for renewal business. This agreement was also abandoned by LUA and ILU at the Commission's request and has been replaced by a new text which allows for a competing team to bid for renewal business.

(11) OJ L 4, 8.1.1993.

<T7> k) ASTRA[12]

580. This decision taken on 23 December concerns joint venture agreements between British Telecommunications plc (BT) and Société Européenne des Satellites S.A. of Luxembourg (SES) for the sale of capacity on SES's Astra 1A satellite to UK television programme providers.

Until December 1988, the satellite sector in Europe was the sole domain of the telecommunications organizations (TOs). The advent of the privately-owned Astra 1A meant that television programme providers would for the first time have had an alternative source of supply to the TO-run satellites. However, with respect to the UK market, SES did not offer its new product directly to customers, but in 1987 entered into arrangements with BT whereby BT would conclude contracts with UK television programme providers comprising both the uplink to and the capacity on the Astra 1A satellite. These arrangements were notified to the Commission, which found that SES and BT were direct competitors in the markets for both satellite capacity and uplinking services. The arrangements with BT denied UK customers the possibility of having direct contracts with SES covering the satellite capacity only and furthermore contained provisions which served to align the pricing policies of the two competitors, and restricted their commercial freedom with respect to other, future satellites. For these reasons, Article 85(1) was applicable. The conditions for exemption under Article 85(3) were not fulfilled, in particular as SES could have entered the UK market independently of its competitor, BT. With regard to SES's concern that its customers would not be assured of the necessary uplinking services by BT, then the only de facto uplink provider in the UK, the general principle expressed in the "Guidelines on the application of the EEC competition rules in the telecommunications sector" applies: any satellite owner whose satellite fulfils technical requirements should be assured that customers will get the necessary uplinking service from the licensed operator which enjoys a monopoly for that service.

During the course of the procedure in this case, BT and SES terminated the joint venture agreements between themselves. The Commission's decision is thus declarative for the past and furthermore indicates that customers who

(12) OJ L 20,28.01.1993, p. 23.

concluded still existing contracts with BT for the transmission of their television programmes via the Astra 1A satellite during the period the joint venture arrangements were intact may if they wish readjust their position to take account of this decision. This decision has been appealed by BT.

<T6> * Distribution

<T7> I) Agreements between tour operators and travel agents (Center Parcs)

581. Following the Commission's intervention, the tour operator Center Parcs has agreed to change its contracts with travel agents.

If they wish to do so, holiday-makers can now book a vacation in one of Center Parcs' villages through a travel agent or through a Center Parcs reservation office in another Member State than their own at the prices which are applicable in that other Member State. A booking cannot be refused on the grounds that the customer should go to his local travel agent or reservations office. This will enable holiday-makers to shop for lower prices than those which are charged in their own Member State.

The Commission has also ensured that travel agents who wish to do so can pass on part of their commission to customers.

These changes bring Center Parcs' contracts in line with Community competition law.(13) Under these rules, tour operators are not allowed to stop travel agents from selling to customers in other Member States. Travel agents must also be authorized to discount holidays or travel by splitting commission with customers.

(13) Case 311/85 Vereniging van Vlaamse Reisbureaus v Sociale Dienst voor de Plaatselijke en Gewestelijke Overheidsdiensten, 1987 [ECR] 3801.

<T7> m) Magneti Marelli/STEA

582. STEA, which is an independent distributor of carburettors, mainly Weber and Solex carburettors manufactured by subsidiaries of the Magneti Marelli group, lodged a complaint against the group on the grounds that it was pursuing a discriminatory pricing policy. Magneti Marelli, which is Europe's leading carburettor manufacturer, had organized its distribution system in France by separating sales to motor vehicle manufacturers, which were direct sales at preferential prices, from sales to distributors, which were handled by another of its subsidiaries specializing in distribution and charging higher prices. While the Commission was examining the system, Magneti Marelli reorganized its distribution so as to include STEA, and STEA accordingly withdraw its complaint.

<T7> n) Halifax/Standard Life[14]

On 22 May the Commission published an Article 19(3) notice regarding a "tied agency" agreement between Halifax Building Society and the Standard Life Assurance Company. By virtue of the agreement Halifax becomes an agent of Standard Life and agrees to deal exclusively in the latter's products.

Under the Financial Services Act (FSA) 1986 anyone wishing to sell insurance policies was (and is) required to obtain authorization. This requirement did (and does) not apply to those who opted to become the appointed representative of a person or company which is already authorized under the Act. This was the option chosen by Halifax and by many other banks and building societies in the UK. An appointed representative may act exclusively for one principal only. This exclusivity produces anti-competitive effects in that this exclusive agent will not endeavour to find the best insurance product for his client from among the range available among all insurance companies.
By contrast the independent agent who does make such a selection from across a range of insurance companies helps to promote competition between insurance companies. The decision by Halifax to become tied had therefore an anti-competitive effect on the insurance market in the UK. This decision, taken by the largest building society in the UK, was but one example of some 100 such decisions taken by other banks and building societies in the few years after the adoption of the FSA. The decision as manifested in the agreement between Halifax and Standard Life, therefore fell within Article 85(1). However, an exemption was considered to be merited in view of the efficiency benefits involved in becoming "tied" to a single insurance company, which benefits could be passed on to the consumer in the form of lower costs.

The notified agreement contained two clauses which the Commission considered to be restrictive of competition within the meaning of Article 85 and to be unjustifiable under Article 85(3). The first was a clause which prohibited Standard Life from appointing other building societies as its agent. The second clause contained a prohibition against rebating its commissions. At the request of the Commission these restrictive clauses were deleted.

Consequently the Commission was able to inform Halifax by administrative letter that the agreement did not run counter to Article 85.

(14) OJ C 131, 22.5.1992, p.2.

<T7> o) Parker Pen II

583. In the Viho/Parker Pen II case, the Commission adopted a formal decision rejecting a complaint.

In its Decision of 15 July 1992 in the Viho/Parker Pen I case,(15) following a complaint for refusal to sell lodged by Viho (Netherlands), the Commission found that Parker Pen and Herlitz AG (its distributor in Germany) had infringed Article 85(1) of the EEC Treaty by including an export ban in an agreement they had concluded, and it imposed fines on the two companies.

However, the complainant claimed that the requirement imposed on Parker subsidiaries that, in distributing Parker products, they must confine themselves to the territory allocated to them was caught by the ban laid down in Article 85(1). It thus raised the problem of the application of the ban on restrictive agreements to internal agreements within a group.

The Commission took the view that Parker's various European subsidiaries were strictly controlled by their parent company and were bound to comply with its instructions. This meant that the subsidiaries formed, with the parent company, a single economic unit within which they could not determine independently their conduct on the market. The conduct of the subsidiaries was therefore the responsibility of the parent company.

The Commission considered that the integrated distribution system for the sale of such products in Spain, France, Germany, Belgium and the Netherlands through the wholly-owned subsidiaries established in those countries satisfied the conditions laid down by the Court of Justice for the non-application of Article 85 (see Centrafarm v Sterling Drug 1974 [ECR] 1147, Hydrotherm v Compact 1984 [ECR] 2998 and Bodson v Pompes funèbres des régions libérées 1988 [ECR] 2479).

(15) OJ L 233, 15.8.1992, p.27.

Subsidiaries are particularly dependent where, as in this case, the parent company gives them specific business policy instructions which they then apply through their actions. The fact that all of Parker's subsidiaries are wholly and not partially controlled by the parent company reinforces this argument. For the rest, it is sufficient for the parent company to have the right to give instructions to its subsidiary or for it to have other equally effective means at it disposal (for example, control or decisive influence over the staffing policy of subsidiaries) to be able to impose its will.

<T7> p) British Gypsum

584. Four notices pursuant to Article 19(3) of Regulation No 17 were published in the Official Journal(16) in cases concerning rebate schemes operated by British Gypsum and, in the case of two of them, by Gypsum Industries. The notices reflect the result of negotiations with the parties concerned that made it possible, at least in one of the cases, to avoid adopting a formal decision banning the scheme.

In the case relating to the "Super Stockist Scheme", a statement of objections had been sent to British Gypsum. The Commission's objections related essentially to the fact that the rebate scheme as notified by British Gypsum in October 1988 was discriminatory, hybrid in character (covering quantities purchased and quantities stocked) and tended to make for a captive clientele. Following the hearing which took place on the case in February, three new rebate schemes having also been notified, the Commission thought it appropriate to conduct negotiations with the parties jointly on the four cases.

Certain practices engaged in by British Gypsum and its parent company BPB Industries had earlier been prohibited under a Decision of 5 December 1988(17) which imposed fines of ECU 3 million on British Gypsum and ECU 150 000 on BPB for infringements of Article 86 of the EEC Treaty. The Commission took the view that it was necessary in the four new cases to get British Gypsum and Gypsum Industries to bring their rebate schemes into line with Community competition law rather than to adopt immediately a formal decision prohibiting them.

The Commission was particularly aware of the economic backcloth to the four cases. While BPB's market share in plasterboard in 1985 and 1986 fluctuated between 98% and 96% in Great Britain and between 100% and 92% in the Republic of Ireland and Northern Ireland, the situation has changed in recent years. In particular, in its 1990 report on plasterboard supplies in Great Britain, the Monopolies and Mergers Commission stated that BPB's market

(16) OJ C 321, 8.12.1992.
(17) OJ L 10, 13.1.1989.

share in the United Kingdom had fallen from 96% to 65% in two years and found that there was now competition on the market with the entry of two new competitors, Knauf and Lafarge.

Substantial amendments having been made to the schemes as a result of the negotiations, the Commission expressed its intention of taking a favourable view of the four rebate schemes as amended and invited third parties to submit their comments by 8 January 1993.

<T5> - Abuse of a dominant position

<T7> q) BEMIM and others/SACEM(18)

585. In line with the principle of decentralization in monitoring compliance with the competition rules, the Commission dismissed and referred back to the French courts and administrative authorities a number of complaints lodged several years ago by discotheque proprietors against SACEM (Société des Auteurs, Compositeurs et Editeurs de Musique), the performing rights society for the French music business. In their complaints, the discotheque proprietors alleged that SACEM was abusing its dominant position by charging excessive fees for the public performance of music on their premises. In 1989 the Court of Justice of the European Communities, which had been requested to give a preliminary ruling on the matter, stated that, in order to determine whether there was any abuse, a comparison had to be made with the fees collected by performing rights societies in other Member States. The Commission carried out such a comparison, but since the effects of any abuse by SACEM would be felt chiefly in France, it decided, in the interests of cooperation and burden-sharing with the national courts and authorities, to refer the complaint back to them together with its report comparing the fees charged. Under Council Regulation No 17, national authorities are competent to deal with abuses of dominant positions as long as the Commission has not initiated any proceedings. In the grounds of its decision, the Commission stressed that it had considerable discretion, as confirmed by the Court of First Instance of the European Communities in the "Automec II" case,(19) in deciding on the priority to be attached to matters brought to its attention, in the light of their importance for the Community.
The Commission also stressed that it mattered little whether the national courts, rather than itself, carried out the comparison of fees and drew the appropriate conclusions as to whether or not the rules had been breached, since the national courts were not in any case bound by the Commission's opinion.

Lastly, it underlined the fact that it had no powers under Community law to award damages where an infringement of the competition rules had been established; only the national courts had such powers.

(18) IP(92) 977, 27.11.1992.
(19) See point 323 of this Report.

<T7> r) Howden/MT Group

586. The case is about a contract obtained by MT Group for construction of a road/rail link in Denmark - The "Storebælt Project" - which involves, in particular, boring a tunnel of some 14 km. MT awarded a contract to Howden for supply of four tunnel boring machines (TBM) and the two groups are now in dispute over the delivery and performance of those TBMs. MT wishes to call two performance guarantee bonds lodged by Howden and claims damages of some ECU 100 million.

MT Group consists of four of the largest European construction companies (Denmark, France and Germany) together with one US company. Some thirty companies worldwide are capable of this type of work.

Howden is a UK-based engineering group with a turnover of some UKL 300 million UKL, which has tunnelling machinery subsidiaries in Scotland and Germany.

Howden lodged a complaint under Article 86 and a request for interim measures.

Howden alleges that MT Group is using its (supposedly) dominant position to ensure that Howden obtain no further contracts worldwide for TBMs, and that MT seeks to call the bonds in order to destroy Howden. The bonds account for some 4% of Howden's turnover, or a little over half last year's profits. The Commission has still to take a definitive position on the complaint.

In view of the relatively small percentage of turnover represented by the bonds and doubts as to the situation on the market in question, the application for interim measures was rejected.

<T5> - Decisions relating to investigations

<T7> s) The United Kingdom West Africa Lines Joint Service (UKWAL)

587. On 6 April, the Commission adopted a decision imposing a fine of ECU 5 000 on the shipping liner conference United Kingdom West Africa Lines Joint Service (UKWAL) for having refused to submit to an investigation pursuant to Article 18(3) of Council Regulation (EEC) No 4056/86 of 22 December 1986 laying down detailed rules for the application of Articles 85 and 86 of the Treaty to maritime transport.

The decision was adopted following a number of complaints concerning the activities of UKWAL in the liner trade between ports situated in the United Kingdom and the Republic of Ireland on the one hand and West Africa on the other. A preliminary examination of the complaints and the serious nature of the alleged infringements (behaviour incompatible with Article 85(1), not covered by the block exemption and not exemptable under Article 85(3); a breach of the provisions of Article 86) led the Commission to consider an investigation without prior notice.

On 28 June 1989 the Commission proceeded to carry out the investigation but was unable to go ahead owing to UKWAL's refusal to allow the investigation to take place. The national authorities were requested to assist the Commission officials and an order was obtained from the High Court in London. The investigation was carried out on 29 June at the offices of UKWAL.

The Commission considered that the above facts constituted a serious infringement of Article 18 of Regulation No 4056, obstructing the effectiveness of the investigation, which could not be carried out on UKWAL's premises on the day envisaged. The level of the fine, the maximum permissible (ECU 5 000) reflects the intentional nature of the infringement and the behaviour of UKWAL during the investigation.

<T7> t) The Mediterranean Europe West Africa Conference (MEWAC)

The Commission imposed a fine of ECU 4 000 on the shipping liner conference Mediterranean Europe West Africa Conference (MEWAC) in a decision which found that MEWAC had refused to submit to an investigation in accordance with Regulation (EEC) No 4056/86, which applies the EC competition rules to maritime transport.

In 1987, the Commission received a number of complaints concerning the activities of MEWAC in the liner trade between Europe and West and Central Africa. A preliminary examination of the complaints and the serious nature of the alleged infringements led the Commission to organize an investigation without prior notice.

On 28 June 1989 the Commission proceeded to carry out the investigation. Having produced the necessary decision and documents, explaining the rights and duties of MEWAC, the Commission officials were not allowed to go ahead with the investigation. MEWAC said the investigation could not take place until its Secretary General returned from Paris to Marseille, the location of the conference's secretariat. MEWAC was informed that this amounted to a refusal to comply with the Commission decision, thereby obstructing the effectiveness of the investigation, which could not be carried out on MEWAC's premises on the day envisaged.

With the assistance of the French authorities, appropriate steps were taken to seal the premises of MEWAC and the investigation started the next day in the presence of the Secretary General.

MEWAC is an association of undertakings within the meaning of Article 18 of Regulation No 4056. It is therefore obliged to submit to an investigation ordered by decision of the Commission pursuant to Article 18(3) and to comply with the date and time fixed therein.

In determining the amount of the fine to be imposed, the Commission took account of the fact that while MEWAC objected to the investigation being carried out without the presence of the Secretary General, it did consent to the investigation the following day. Therefore, its refusal was not outright and the maximum amount of fine (ECU 5000) was not imposed. MEWAC was fined ECU 4 000.

<T7> u) CSM

588. During an investigation ordered by the Commission under Article 14(3) of Regulation No 17, the Dutch company CSM prevented the Commission's inspectors from making copies of documents on the first day, and allowed copies to be made of only some of the documents on the following day. It was not until after it had imposed periodic penalty payments (Article 16(1) of No 17) that the Commission was allowed to copy the remaining documents.

589. The reason given by CSM for its refusal was that the documents had no bearing on the investigation. In its decision of 7 October the Commission drew attention to the powers conferred on it by the rules governing investigations and the obligation on undertakings to submit to investigations ordered by decision.

590. A company which is being investigated is in no position to judge whether a document should or should not be handed over and may not therefore obstruct Commission officials in the performance of their duties as they alone know which documents they need to see straight away. Companies that are subject to investigations can appeal to the Court of First Instance of the European Communities, which monitors the Commission's conduct.

591. The Commission imposed a fine on CSM under Article 15(1) of Regulation No 17 for infringement of Article 14 of that Regulation.

<T5> - Decisions relating to interim measures

<T7> v) EBU-Eurovision System

592. On 31 July the Commission rejected a request for interim measures submitted by the television channel TESN (The European Sports Network) concerning access to broadcasting rights for the summer Olympic games acquired by members of the EBU (European Broadcasting Union). Within the Eurovision system, EBU members purchase jointly exclusive broadcasting rights for major sporting events such as the Olympic games. The Eurosport channel, which is a joint subsidiary owned by a consortium of EBU members and by the French channel TF 1 (which is also an EBU member), participates in this system and has direct access to all the rights acquired.

TESN, which is not a member of the EBU and is in direct competition with Eurosport, requested access to the relevant broadcasting rights on an equal footing with Eurosport. Although the Commission took the view that the EBU rules on the joint purchasing of broadcasting rights infringed Article 85(1) of the Treaty, it nevertheless rejected the request for interim measures on the grounds that there was insufficient evidence of serious and irreparable damage.

T7> w) Phoenix/IBM

593. Phoenix International (Computers) Ltd lodged a complaint, together with a request for interim measures, against IBM for infringement of Article 86, alleging that IBM had abused its dominant position on the market for the maintenance of its 3090 series computers.

According to the complainant, IBM had unlawfully suddenly refused to cover, under the standard maintenance contract concluded with its customers, "reworked" memory cards marketed by Phoenix, on the pretext that they infringed the IBM trade mark.

The 3090 memory cards which Phoenix sold as original IBM products had been modified by third parties so as to increase their memory capacity, without IBM's prior agreement. This practice involves major re-assembly of the cards produced by IBM, a process which is liable to damage them and over which IBM has no control. However, the request for interim measures was based in part on the allegation that IBM had for years been aware of the existence of the reworked cards in general and of the 3090 series cards in particular and that IBM had knowingly maintained them under its standard maintenance contract. IBM had thus, it was alleged, given its tacit acquiescence to the reworked cards.

Without entering into the question of whether such a refusal of maintenance might have constituted an abuse of a dominant position, the Commission rejected the request for interim measures due to a lack of any "prima facie" evidence of infringement of Article 86.

<T7> x) TESN/Football authorities

594. On 2 December the Commission rejected a request for interim measures submitted by the television channel TESN (The European Sports Network) concerning the application of Article 14 of the UEFA statutes, which seeks to protect attendance at football matches by allowing the national football associations (UEFA members) to prohibit the televising of foreign matches on their territory. The Commission examined the substance of the case but rejected the request for interim measures on the grounds that there was insufficient evidence of serious and irreparable harm suffered by the complainant.

<T3> B. Competition policy and government assistance to enterprises

<T4> §1. Case summaries

<T5> - Aid cases in which the Commission raised no objection

<T6> a) Aid to the service sector - Tourism

<T8> Spain

605. The Commission approved two central government programmes introducing aid for investment projects and promotion campaigns by SMEs in tourism. Totalling ECU 25 million for 1992, the planned assistance forms part of an overall plan to boost the competitiveness of the Spanish tourism industry.

<T6> b) Horizontal aid - Aid to small and medium-sized enterprises

<T8> Denmark

606. The Industrial Development Fund which the Commission authorized in October(1) also provides conditionally repayable loans for SMEs seeking to build up a capability for exporting to new markets in or outside the EC. As the aid was limited to preliminary planning and training, it was deemed to qualify for "soft aid" treatment under the SME aid guidelines.

<T8> Spain

607. The Commission authorized a programme to improve industrial design in SMEs. Under the programme, which is to run for four years (1992-95) and which had a budget of ECU 17.9 million in 1992, grants will be made towards investments and towards training and advisory services with a view to introducing and improving design technologies in Spanish SMEs.

608. The Commission approved a scheme with a budget of ECU 155.5 million under which guarantees are available for ailing industrial enterprises (SMEs with a maximum of 250 employees and a turnover of ECU 20 million or, by way of exception, enterprises with up to 500 employees the closure of which would

(1) Point 357 of this Report.

have a damaging social impact in the areas in which they are located) to enable them to raise the funds they need to devise a detailed rescue and/or restructuring plan.

<T8> Italy

609. In keeping with its favourable attitude towards measures to improve the environment in which SMEs operate, the Commission authorized several schemes provided for under Italian regional legislation, including two in Marche and Liguria designed to encourage joint initiatives by cooperatives and associations of SMEs to improve their efficiency and marketing.

<T6> c) Horizontal aid - Employment aid

<T8> France

610. In March the Commission approved a scheme to encourage businesses to relocate away from the Paris area into the provinces. It offers grants of ECU 3 600 per employee recruited at the new location. A separate scheme subsidizes the removal costs of employees moving with the firm. In assisted areas, the regional planning grant ("PAT") ceilings would be applicable. For 1992 the relocation scheme had a budget of ECU 14.5 million.

<T5> - Aid cases in which the Commission decided to close the Article 93(2) EEC procedure

<T6> a) Horizontal aid - Investment aid

<T8> Italy

611. The Commission opened Article 93(2) proceedings against low-interest loans under Italian laws which had lapsed and which had not been notified to the Commission under Article 93(3). It found, however, that the aid intensity was not sufficient to affect market conditions and accordingly considered that the schemes qualified for exemption under Article 92(3)(c) and closed the procedure.

<T6> b) Horizontal aid - Aid to small and medium-sized enterprises

<T8> Italy

612. Various Sicilian provisions introducing aid for SMEs enagaged in retailing and the advertising of typical products of the region were approved following their scrutiny under Article 93(2), the Commission having received an assurance that they would be applied in a manner consistent with the Treaty and the relevant guidelines.

<T6> c) Regional aid

<T8> Spain

613. In July the Commission decided to close the procedure it had opened in October 1991 in respect of aid granted by the autonomous government of Catalonia.(2) The aid, totalling ECU 15.8 million, was granted between 1988 and 1990 on the basis of the following regional provisions: Order of15 April 1988, Law 9/1989, Order of 27 July 1989 and Order of 19 June 1990. The Commission took the decision after checking, in the light of information furnished by the Spanish authorities, that the aid qualified for exemption under Article 92(3)(c).

<T5> - Aid cases in which the Commission decided to open the Article 93(2) EEC procedure

<T6> a) Horizontal aid - General investment aid

<T8> Italy

614. A decision was taken to open the Article 93(2) EEC procedure in respect of a number of special measures to assist Sicilian industry, the opacity of the legal provisions notified to the Commission having given rise to doubts as to the measures' compatibility with the Treaty.

(2) Twenty-first Competition Report, point 293.

<T2> Annex IV: The development of concentration, competition and competitiveness

<T3> A. Mergers and acquisitions involving Community-scale firms in 1991/92

615. Annual reports on competition policy have traditionally included this section presenting statistical information on mergers, acquisitions of majority and minority holdings and joint ventures. The raw information for the compiling of these statistics has been provided by an internal database of the European Commission called DOME. This will be the last year in which this section will be based on DOME data as this database has been stopped. Next year's edition of the annual report on competition policy will maintain this section, but its structure and the source of statistical information will be different. The DOME database was started in 1971 and its basic methodology was last modified in 1981. The main objective of the database was to provide realistic information about the changes in the pattern of competition. The database was drawn from information on mergers, takeovers, acquisitions of minority holdings and joint ventures published in the specialist economic press. For each entry, information regarding the combined turnover and nationality of the firms involved, relevant industrial sector, type of operation and publicized reasons for the operation was collected. The tables presented in this section of the Annual Report were drawn up using the data corresponding to those operations involving the 1 000 leading industrial firms of the Community (ranked according to their turnover) and the 500 largest industrial firms worldwide and the largest firms in the distribution, banking and insurance sector. The annual data presented in each report included all the operations which had taken place in the twelve-month period ending on 1 June of each year.

<T4> §1. Overview (Tables 1 and 2)

616. Following the trend started after 1990, the total number of financial operations fell from 1009 in 1990/91 to 871 in 1991/92. However, this downward trend has slowed down with respect to the previous year. The decrease in the number of operations between 1990/91 and 1991/92 was just 14%, while one year before, between 1989/90 and 1990/91, the number of operations fell by 27% with respect to 1989/90 figures. The recent trend in the total number of operations shows a cycle with a peak in 1990/91 and relatively similar figures in 1986/87 (708) and in 1991/92 (871). It is

important to notice that the maximum reached in 1989/90 almost doubled the number of operations for 1986/87. Several reasons have been put forward to explain this remarkable upsurge in the number of financial operations. The wave of corporate acquisitions that these figures show is not exclusive to Europe. However, there are some reasons that can help to explain the specific features of the European case. As stated in the Twenty-first Competition Report, the 1992 programme must be considered as an important factor stimulating the external growth of corporations, both internal and external to the EC. Internal firms were compelled to expand their Community basis to enable them to compete in the European market opening up to them on 1 January 1993. Foreign firms were also interested in reinforcing their European presence before that date. In both cases the booming markets of the second half of the 1980s provided the necessary liquidity which enticed firms to opt for external growth as a fast way of achieving the goals created by 1993 and the single market.

The entry into force of the Merger Regulation in September 1990 could have had an influence on the peak figure attained in 1989/90, as one could argue that firms might have been prompted to consummate the operations before the date of entry into force of the Regulation so as to avoid being caught by it. However, the data that we have for the two years since the Merger Regulation entered into force do not seem to confirm that hypothesis. The number of large mergers, acquisitions and joint ventures falling under the scope of the Regulation (i.e. those involving firms with a turnover greater than ECU 5 000 million) has decreased by less than the number of smaller operations.

It is important to notice that the trend of large operations after 1989/90 is not the same for national, Community and international operations. The number of Community-scale operations fell quite sharply after 1989/90 to around two thirds of the figure reached in that year. The number of national operations kept on growing after 1989/90, decreasing slightly in the last year. However, international deals grew considerably after 1990/91 compared with the previous year and then dropped drastically in 1991/92 to barely 50% of the 1990/91 level.

TABLE 1: National, Community and international mergers, acquisitions of minority holdings and joint ventures in the Community in 1991/92

	NATIONAL[1]			COMMUNITY[2]			International[3]			Total			Total number of Operations
	Mergers	Minor Acquisit.	Joint Ventures	Mergers	Minor Acquisit.	joint Ventures	Mergers	Minor Acquisit.	Joint Ventures	Mergers	Minor Acquisit.	Joint Ventures	
Industry	175	60	29	119	34	33	49	27	41	343	121	103	567
Distribution	31	8	2	4	0	4	1	0	1	36	8	7	51
Banking	73	36	6	17	22	10	7	8	3	97	66	19	182
Insurance	9	8	8	19	13	7	3	3	1	31	24	16	71
Total	288	112	45	159	69	54	60	38	46	507	219	145	871

Source : Data gathered by the Commission from the specialist press

1) Operations of firms from the same Member States.
2) Operations of firms from different Member States.
3) Operations of firms from Member States and third countries with effect on the Community market.

Table 2 : Breakdown of national, Community and international majority acquisitions (including mergers), in industry, distribution, banking and insurance (combined turnover greater than ECU 1, 2, 5 and 10 billion)

	National[1]				Community[2]				International[3]				Total			
	>1	>2	>5	>10	>1	>2	>5	>10	>1	>2	>5	>10	>1	>2	>5	>10
Industry																
86/87	111	73	42	18	52	42	24	13	8	3	2	0	171	118	68	31
87/88	135	84	48	24	86	61	34	22	47	40	28	15	268	185	110	61
88/89	163	118	60	29	148	110	72	53	62	60	38	24	373	288	170	106
89/90	183	117	66	44	212	158	102	70	118	109	56	26	513	384	224	140
90/91	158	118	75	42	145	107	65	37	94	89	60	37	397	314	200	116
91/92	155	114	72	36	102	86	57	37	48	45	30	16	305	245	159	89
Distribution																
86/87	19	12	6	1	2	2	2	0	0	0	0	0	21	14	8	1
87/88	15	11	6	2	5	3	1	0	2	2	2	0	22	16	9	2
88/89	21	17	8	0	1	1	1	0	1	1	1	0	23	19	10	0
89/90	13	11	3	2	6	3	3	1	2	2	2	1	21	16	8	4
90/91	14	11	6	1	4	4	3	1	1	1	1	0	19	16	10	2
91/92	17	14	12	5	1	1	0	0	0	0	0	0	18	15	12	5
Banking																
86/87	9	6	5	3	2	2	1	1	9	7	5	3	20	15	11	7
87/88	19	14	7	4	10	10	8	4	7	5	4	2	36	29	19	10
88/89	22	15	3	1	11	9	4	2	8	8	5	4	41	32	12	7
89/90	22	19	14	10	10	9	7	2	5	4	1	0	37	32	22	12
90/91	15	12	9	3	12	12	10	8	4	4	2	1	31	28	21	12
91/92	15	13	8	4	12	10	9	5	0	0	0	0	27	23	17	9
Insurance																
86/87	5	3	2	2	1	0	0	0	2	1	0	0	8	4	2	2
87/88	1	1	0	0	7	6	1	0	8	3	1	0	16	10	2	0
88/89	5	5	3	0	3	3	2	0	4	3	2	0	12	11	7	0
89/90	1	0	0	0	9	6	3	1	2	1	0	0	12	7	3	1
90/91	5	4	2	1	4	4	1	1	2	1	1	1	11	9	4	3
91/92	1	1	1	1	7	6	4	1	1	1	1	1	9	8	6	3
Total																
86/87	144	94	55	24	57	46	27	14	19	11	7	3	220	151	89	41
87/88	170	110	61	30	108	80	44	26	64	50	35	17	342	240	140	73
88/89	211	155	74	30	163	123	79	55	75	72	46	28	449	350	199	113
89/90	219	147	83	56	237	176	115	74	127	116	59	27	583	439	257	157
90/91	192	145	92	47	165	127	79	47	101	95	64	39	458	367	235	133
91/92	188	142	93	46	122	103	70	43	49	46	31	17	359	291	194	106

Source : Data gathered by the Commission from the specialist press.
1) Operations of firms from the same Member States.
2) Operations of firms from different Member States.
3) Operations of firms from Member States and third countries with effect on the Community market.

<T4> §2. Takeovers (including mergers and majority acquisitions), minority acquisitions and joint ventures in industry

Tables 1 and 2 show that the impact of the 1992 programme on merger and takeover activities has been important from a structural point of view. Now that 1991/92 figures show levels similar to the period previous to the Single European Act, we can see that the present structure of mergers, acquisitions and joint ventures according to their national, Community or international dimensions resembles more closely the 1989/90 structure than that of 1986/87. International and, in particular, Community-wide operations have increased their importance considerably while national operations have lost ground. In 1986/87, over 63% of operations took place within national borders. In 1991/92 that percentage fell to 51%. Operations of Community dimensions went from 20% to 32% in the same time interval. Although the percentages for extra-national operations were even higher in 1989/90, it seems that the changes introduced by the 1992 programme will persist somewhat over time.

<T4>

TABLE 3: National, Community and international acquisitions of majority holdings (including mergers) in the Community (Breakdown by industrial sector)

Sector (1)	National					Community					International					Total				
	1987/ 1988	1988/ 1989	1989/ 1990	1990/ 1991	1991/ 1992	1987/ 1988	1988/ 1989	1989/ 1990	1990/ 1991	1991/ 1992	1987/ 1988	1988/ 1989	1989/ 1990	1990/ 1991	1991/ 1992	1987/ 1988	1988/ 1989	1989/ 1990	1990/ 1991	1991/ 1992
1. Food	25	35	41	29	32	18	27	44	26	23	8	14	17	16	6	51	76	102	71	61
2. Chem.	32	37	38	25	17	38	56	75	53	23	15	14	35	22	18	85	107	148	100	58
3. Elec.	25	23	20	25	9	4	18	16	14	6	7	8	10	9	12	36	49	46	48	27
4. Mech.	24	31	25	14	11	5	17	13	2	5	9	7	14	9	4	38	55	52	25	20
5. Comput.	2	3	1	4	1	1	0	1	0	1	0	1	0	3	0	3	4	2	7	2
6. Metal.	28	16	29	22	30	9	13	28	16	14	3	6	7	9	0	40	35	64	47	44
7. Transp.	3	7	11	10	7	9	6	13	9	5	3	1	8	2	2	15	14	32	21	14
8. Paper	24	32	28	21	23	6	26	30	11	11	4	7	21	17	3	34	61	79	49	37
9. Extrac.	9	11	10	5	5	2	5	8	5	4	1	3	1	3	1	12	19	19	13	10
10. Textile	11	11	4	8	7	2	7	8	3	4	1	2	1	1	1	14	20	13	12	12
11. Constr.	21	20	19	19	27	12	19	17	27	21	0	0	3	1	0	33	39	39	47	48
12. Other	10	7	15	4	6	5	3	4	4	2	7	3	7	7	2	22	13	26	15	10
TOTAL	214	233	241	186	175	111	197	257	170	119	58	66	124	99	49	383	496	622	455	343

Source: Data gathered by the Commission from the specialist press.

(1) Key:

Food : Food and drink.
Chem. : Chemicals, fibres, glass, ceramic wares, rubber.
Elec. : Electrical and electronic engineering, office machinery.
Mech. : Mechanical and instrument engineering, machine tools.
Comput. : Computers and data-processing equipment.
Metal. : Production and preliminary processing of metals, metal goods.
Transp. : Vehicles and transport equipment.
Paper : Wood, furniture and paper (including printing and publishing).
Extrac. : Extractive industries.
Textile : Textiles, clothing, leather and footwear.
Constr. : Construction.
Other : Other manufacturing industry.

TABLE 4: Breakdown of national, Community and international acquisitions of majority holdings by industrial sector in 1991/1992 and by combined turnover of firms involved (ECU >1, >2, >5, >10 billion)

Sector (1)	National (2)				Community (3)				International (4)				Total			
	>1	>2	>5	>10	>1	>2	>5	>10	>1	>2	>5	>10	>1	>2	>5	>10
1. Food	30	20	12	7	22	19	18	15	5	5	3	1	57	44	33	23
2. Chem.	18	15	10	3	20	15	8	3	18	17	11	6	56	47	29	12
3. Elec.	8	8	7	5	7	7	6	5	12	12	9	5	27	27	22	15
4. Mech.	9	9	7	3	3	3	3	2	4	3	2	1	16	15	12	6
5. Comput.	1	1	1	1	1	1	1	1	0	0	0	0	2	2	2	2
6. Metal.	25	20	13	4	13	12	8	6	0	0	0	0	38	32	21	10
7. Transp.	7	7	5	3	4	3	3	1	2	2	1	1	13	12	9	5
8. Paper	18	6	5	0	5	2	1	0	3	3	2	2	26	11	8	2
9. Extrac.	6	5	3	3	3	3	0	0	1	1	0	0	10	9	3	3
10. Textile	4	0	0	0	1	1	1	1	1	1	1	0	6	2	2	1
11. Constr.	23	17	4	2	21	19	8	2	0	0	0	0	44	36	12	4
12. Other	6	6	5	5	2	1	1	1	2	1	1	0	10	8	7	6
TOTAL	155	114	72	36	102	86	58	37	48	45	30	16	305	245	160	89

Source: Data gathered by the Commission from the specialist press.

(1) Key: See Table 3, note 1.
(2) Mergers of firms from the same Member State.
(3) Mergers of firms from different Member States.
(4) Mergers of firms from Member States and third countries with effects on the Community market.

<T6> a) Takeovers (see tables 3 and 4)

<T7> General

Mergers and acquisitions of majority holdings remained the main type of operation in 1991/92. However, the number of mergers and takeovers has fallen more sharply than the total number of operations and consequently, their relative importance has been reduced in the last year. Mergers accounted for 45% of the total number of operations in 1989/90 and in 1990/91, while in 1991/92 they accounted for 39,4% of the operations carried out in that year.

The total number of mergers and acquisitions of majority holdings in industry decreased in 1991/92 at a slightly lower rate than in 1990/91. However, national, Community and international operations did not behave in the same way. Community operations continued falling at a rate similar to the 1990/91 rate (over 30%). On the other hand, international operations decreased more sharply in 1991/92 (50%) than in 1990/91 (20%). However, the reduction in the number of national operations was very small compared to the previous year (23% in 1990/91 and 6% in 1991/92).

This trend seems to indicate that cross-border operations are more sensitive to variations in the level of takeover activity than national operations. It is worthwhile mentioning, though, that the moderate fall in the number of national deals reflects an important increase in takeover activity in the five new German Länder which we will see below.

For the first time since 1987/88, the number of operations involving firms from different countries was smaller than the number of national operations. However, extra-Community takeover activity seems to be more volatile than intra-Community cross-border activity.

<T7> Big operations

The distribution of takeovers and mergers by size has remained remarkably stable with respect to last year. As one should have expected, cross-border operations tend to involve firms of larger size than national operations. The only thing to notice in this respect is a small relative increase in the proportion of Community-wide operations involving firms with a combined

turnover greater than ECU 5 000 million. The opposite occurs in the case of operations involving firms from third countries. As in previous years, large operations tend to concentrate in a few sectors only. The food, electrical engineering, chemical and metal sectors account for almost two thirds of the operations with a combined turnover above ECU 5 000 million. It is important to notice that this concentration is more acute in Community and international than in national deals. For instance, the food and drink sector accounted for 40,5% of the Community deals involving firms with a combined turnover above the ECU 10 000 million threshold. A similar phenomenon occurs with international deals, where the chemical group accounts for 37,5% of transactions in the same size bracket. In the national category concentration ratios were below 20% in all size groups.

<T7> Sectors

For the first time in many years the food and drink sector has replaced the chemical group as the leading sector in takeover activity. The relative importance of the food sector has been increasing steadily since 1987/88 while the number of operations in the chemical sector has been decreasing at a high rate during the last three years. Takeover and mergers in the food sector have a more domestic profile than in the chemical sector. Over 50% of the operations in the food sector were of a national nature while Community and international deals were a majority in the chemical group.

Construction has become the third sector in terms of total number of deals. While takeover activity declined in all the other sectors in the last two years, it continued increasing in the construction sector in 1990/91, accounting for a total of 48 operations in 1991/92. Those deals are predominantly national and Community-wide. Electrical and electronic engineering and computers and data-processing equipment showed the sharpest reduction in takeover and merger activity in 1991/92. These sectors were particularly active during 1990/91 but the number of operations was reduced to one half last year. This reduction was concentrated in trans-national operations.

In textiles, clothing, footwear and leather and in the metal sector, takeover activity remained more or less the same. All the other groups followed the general downward trend in the number of mergers and acquisitions of majority holdings.

<T7> Activities in Member States (see Table 5)

In 1991/92 Germany and France continued to be the two countries where most of the mergers, takeovers and acquisitions of majority holdings took place. The level of geographic concentration has increased considerably and in 1991/92 63% of the operations took place in those two countries. However, while the number of operations of this kind fell sharply in France, it increased considerably in Germany, which in fact increased the degree of geographic concentration. The number of firms acquired in France fell from 115 to 64 between 1990/91 and 1991/92. In the same period, the number of firms acquired in Germany grew from 111 to 155 i.e. three times more than in 1987/88. German firms also replaced French companies as the most active in acquiring firms elsewhere, going from 88 operations in 1990/91 to 181 in 1991/92.

This upsurge in takeover activity by German firms is mainly due to the process of acquisition by German firms of companies privatized in the five new German Länder. This process was already started last year and increased considerably in 1991/92, taking the total number of internal operations in Germany from 60 to 93 in just one year. It is important to notice too that the number of German firms acquired by non-German firms has also increased with respect to last year, but on a smaller scale. In this regard, the increase in takeover activity by French companies in Germany is remarkable, reaching a total of 19 operations in 1991/92. Two thirds of these were acquisitions and 6 out of those 19 took place in Eastern Germany.

The process of privatization of firms located in the former GDR has had an important influence on the profile of takeovers and acquisitions carried out by German firms. While in 1990/91 37% of the German operations had their target company beyond German borders, this percentage was drastically reduced to 15% in 1991/92.

The UK has had an important decrease in takeover and acquisition activities, cutting down by half the number of operations with origin or target in the UK. This reduction of activity has been quite balanced across the board affecting domestic and external operations in similar proportions.

Other countries which were important as targets for these types of operations in the recent past such as Spain and Italy have also experienced important reductions in takeover activity. The decline has been more remarkable in the case of Spain where the number of acquired firms went from 74 in 1989/90 to

just 18 last year. This number is equivalent to the 1986/87 figure. A similar trend is seen in Italy where the 1986/87 level has been re-established. However, that level remains higher in absolute terms in the case of Italy with 38 operations as against only 18 in Spain. Another important difference between these two countries is the relatively high number of domestic operations taking place in Italy, which is not the case in Spain.

<T7> International operations (see Table 5)

The acquisition of majority holdings and takeovers in which the purchasing firm was of non-EC origin also fell by half during last year. The United States maintained its leading position with 25 operations in which EC firms were targeted. This represents an important reduction with respect to 1990/91 figures. Japanese firms have cut down drastically their activity, going from 13 operations last year to 2 operations only in 1991/92. Countries integrated in the EFTA group have maintained their EC takeover activities, which were already noticeable last year.(1)

It is also worthwhile mentioning that there has been a substantial modification in the nationality of the companies targeted by these non-EC firms. The UK was the preferred destination in 1990/91 with 27 operations. Last year, only 7 UK firms were bought by non-EC firms. This was not the case with France and, even less, Germany, which are now second and first choice respectively. By industrial sector, chemicals and electrical and electronic engineering were the favourite targets for operations of non-EC origin. Those two sectors accounted for 33 of the total 52 operations.

(1) It should be noticed that these figures exclude establishment of new subsidiaries in the EC by non-EC companies.

TABLE 5 : Breakdown of majority acquisitions (incl. mergers) by Member State and for 1991/92 by nationality of acquiring firm in industry

acquired/ acquiring firm	TOTAL	B	DK	D	E	F	GR	I	IRL	L	NL	P	UK
1986/87	303	3	1	69	20	63	0	35	2	1	19	0	90
1987/88	383	11	2	51	27	122	0	40	6	0	16	2	106
1988/89	492	18	2	90	65	112	0	49	8	4	23	10	111
1989/90	622	21	16	124	74	101	3	73	3	3	28	8	168
1990/91	455	9	14	111	35	115	8	51	2	0	21	7	82
1991/92	347	5	3	155	18	64	3	38	5	0	11	1	44
B	4	0	0	1	0	3	0	0	0	0	0	0	0
DK	4	0	0	0	1	0	0	0	0	0	0	1	2
D	109	2	0	93	1	4	0	3	0	0	1	0	5
E	2	0	0	0	2	0	0	0	0	0	0	0	0
F	71	0	0	19	9	33	0	4	0	0	2	0	4
GR	0	0	0	0	0	0	0	0	0	0	0	0	0
I	30	0	1	2	1	3	2	19	0	0	2	0	0
IRL	2	0	0	0	0	1	0	0	1	0	0	0	0
L	0	0	0	0	0	0	0	0	0	0	0	0	0
NL	24	1	2	9	3	2	0	0	0	0	4	0	3
P	0	0	0	0	0	0	0	0	0	0	0	0	0
UK	48	2	0	9	1	5	1	3	3	0	1	0	23
Total	294*	5	3	133	18	51	3	29	4	0	10	1	37
AUSTRIA	1	0	0	0	0	1	0	0	0	0	0	0	0
FINLAND	2	0	0	0	0	1	0	0	0	0	1	0	0
JAPAN	2	0	0	1	0	0	0	0	0	0	0	0	1
S. AFRICA	1	0	0	1	0	0	0	0	0	0	0	0	0
SWEDEN	8	0	0	2	0	1	0	5	0	0	0	0	0
SWIT.	14	0	0	9	0	4	0	0	0	0	0	0	1
USA	25	0	0	9	0	6	0	4	1	0	0	0	5
Total	53*	0	0	22	0	13	0	9	1	0	1	1	7
Total	347*	5	3	155	18*	64	3*	38	5	0	11	1	44*

Source : Data gathered by the Commission from the specialist press.

* Difference to above due to take-overs by joint ventures jointly owned by firms from different countries.

<T6> b) Detailed analysis of two industrial sectors

As in the previous year, the chemical and food sectors have been chosen for this analysis due to their high level of activity in mergers, takeovers and acquisitions of majority holdings.

<T7> Food

In 1991/92 the food and drink sector registered the highest figure of takeovers, mergers and acquisitions of majority holdings, replacing the chemical sector which traditionally has held that top position. Mergers and takeovers accounted for the large majority of operations of this kind with 52 out of a total of 61 deals.

Compared with the previous year, the most important development was the sharp decline in the number of operations in which the purchasing company was of non-EC origin. The drop in the number of international operations was in itself sufficient to explain the fall in the level of activity, since national and Community-wide deals remained practically unchanged. Switzerland remains the main non-Community country of origin of mergers and takeovers in this sector.

One of the unusual characteristics of merger and takeover activities in this sector is the homogeneous geographic distribution that they show across the board. With the sole exception of Luxembourg, there was at least one operation in each Member State during 1991/92. Furthermore, there is not a high level of concentration of operations in just one country and the three largest countries of the Community, Germany, France and the United Kingdom have similar levels of activity (between 18 and 12 operations).

Nevertheless, there are substantial differences in the nature of operations carried out in the three largest Member States. In Germany, most of the takeover activity that took place in the food and drink sector during last year was related with the former GDR. Eight out of the thirteen cases registered in Germany during that period had as their target a company located in the five new Länder. It is interesting to note that the purchasing company was often a German subsidiary of another company of non-German origin. Nestlé and Unilever are examples of this. In the case of France, two thirds of the deals were domestic operations. The domestic character of the transactions in this sector was even more clear in the case of the United Kingdom. Only one of the 12 mergers and takeovers which

targeted UK-based companies had an international dimension. It is also worthwhile mentioning here the great activity deployed by British holding companies in the food and drink sector. Three British companies, Grand Metropolitan, Hillsdown Holdings and Northern Foods, accounted for 14 of the 52 takeovers and mergers registered in the EC in 1991/92. Grand Metropolitan by itself was the acquiring company in 7 out of the 19 takeovers and mergers of Community dimension which took place last year. Hillsdown Holdings and Northern Foods accounted for almost two thirds of the domestic operations registered in the United Kingdom.

As regards the size of the operations in this sector, the high number of operations registered in which the combined turnover of the companies involved was above the ECU 10 000 million mark is noteworthy.

<T7> Chemicals

The general reduction in the level of takeover activity affected the chemical sector in a very significant way. We have to go back to 1985/86 to find a figure comparable to the number of operations which took place last year. This is equivalent to one third of the activity which was registered in 1989/90.

However, this reduction did not take place evenly across the board. For instance, the number of operations in Germany remained virtually unchanged in the last two years with 21 operations in 1990/91 and 20 in 1991/92. Something similar occurred in Italy with 13 and 11 operations and in Spain where no operations were registered last year, while in 1990/91, 2 operations took place. The United Kingdom and the Netherlands also experienced important reductions in activity. As a result of this, takeover activity was highly concentrated in the four largest countries of the Community with less than 5% of the operations taking place elsewhere.

International activity remained quite important during 1991/92 with the United States maintaining its leading position as an investor in chemicals in Europe. As a matter of fact the number of international takeovers and mergers fell less than national and Community operations. It is this latter group which experienced the most important reduction.

The relatively lesser importance of national operations was more remarkable in France, Italy and the United Kingdom than in Germany where one half of the 20 operations registered took place within German borders. None the less, we

have to point out that the five new Länder were once more the primary target of those operations.

The average size of takeovers and mergers in the chemicals sector as measured by the combined turnover of the companies involved was smaller than in the food and drink sector. Only 12 operations were above the ECU 10 000 million threshold.

<T6> c) Acquisitions of minority holdings (see Table 6)

The decrease in the total figure of operations compared with last year was relatively smaller for acquisitions of minority holdings than for joint ventures and majority acquisitions. The relative weight of this particular type of operations has remained quite stable over the last five years (between 21 and 23% with the exception of 1987/88 when it reached almost 27% of the total of industrial operations).

The food and drink sector more than doubled the number of minority acquisitions in 1991/92 compared with the previous year's figures, which could be considered atypically low if we look at the time series for this sector. The construction and metal sectors rated second and third respectively. The biggest fall took place in chemicals with only one third of the previous year's figure.

The country where the acquisition of minority holdings was most frequent was France with a total of 44 operations, which accounts for 35% of the European total. Approximately half of these operations were of a domestic nature, but a significant 32% of the total were of non-Community origin, the United States being the main country in this type of operation. France was also the main protagonist acquiring minority holdings in 17 firms located in other Member States, which represented 50% of the total. Germany, Italy, the United Kingdom and Spain were also important as target countries for acquisitions of minority holdings in 1991/92.

In all these countries minority acquisition activity was widespread over many sectors. In France, food and drink and construction were the most active sectors. In the other four countries there was a wide dispersion of acquisition activity by sector. The same applies to the distribution by sector of the deals in which the acquiring company was of non-EC origin.

TABLE 6: National, Community and international acquisitions of minority holdings in the Community in industry by sector

Sector (1)	National					Community					International					Total				
	1987/ 1988	1988/ 1989	1989/ 1990	1990/ 1991	1991/ 1992	1987/ 1988	1988/ 1989	1989/ 1990	1990/ 1991	1991/ 1992	1987/ 1988	1988/ 1989	1989/ 1990	1990/ 1991	1991/ 1992	1987/ 1988	1988/ 1989	1989/ 1990	1990/ 1991	1991/ 1992
1. Food	17	15	13	8	12	9	4	9	2	6	9	2	4	-	4	31	21	26	10	22
2. Chem.	9	10	7	5	4	6	5	5	4	4	2	2	11	5	6	17	18	23	14	14
3. Elec.	8	18	7	11	5	4	5	8	15	3	3	2	9	4	2	15	25	24	30	10
4. Mech.	10	7	4	-	2	-	1	3	1	2	3	-	3	4	3	13	8	10	5	7
5. Comput.	1	-	1	-	-	-	1	-	-	-	-	1	2	-	2	1	2	3	-	2
6. Metal.	11	6	9	10	7	2	7	3	6	4	2	3	1	4	4	15	16	13	20	15
7. Transp.	8	4	3	2	3	1	1	3	8	2	-	3	6	4	3	9	8	12	14	8
8. Paper	19	15	8	7	9	7	9	5	10	1	3	1	5	4	-	29	25	18	21	10
9. Extrac.	5	11	8	1	2	2	2	4	1	4	5	1	1	-	2	12	14	13	2	8
10. Textile	5	5	4	1	2	1	-	2	3	5	-	1	1	4	_	6	6	7	8	7
11. Constr.	15	6	8	13	13	5	2	20	5	3	1	2	2	1	_	21	10	30	19	16
12. Other	7	5	1	2	1	-	-	-	-	-	1	1	-	1	1	8	6	1	3	2
Total	115	102	73	60	60	37	37	62	55	34	29	20	45	31	27	181	159	180	146	121

Source : Data gathered by the Commission from the specialist press.

(1) Key : see Table 3, note 1.

<T6> d) Joint ventures (see Table 7)

The number of industrial joint ventures has declined more slowly than takeovers and mergers in the last year. The sectoral distribution of new joint ventures created during 1991/92 did not show many substantial variations compared with the previous year's distribution. The most remarkable change took place in the electrical and electronic engineering sector where there was a substantial decline after the high figures attained in 1988/89 and 1990/91. This decline was to some extent offset by the sharp increase in the number of joint ventures registered in the metal sector after an abnormally low level reached in 1990/91.

As already indicated in previous reports, joint ventures have a predominantly cross-border character. Community and international operations still accounted for 72% of the total in 1991/92. France is the country in which most operations of this type took place last year. Out of the 32 operations concluded in that country only 12 were national. Germany was the country with the second-highest number of joint ventures (29) followed by the United Kingdom and Italy each with 16.

The United States was the non-Member State having the most active role in the field of joint ventures with European firms. It should also be noted that Japan rated second in this group with 13 agreements. This seems to be the type of deal clearly preferred by Japanese firms to increase their presence in Europe by external growth. In both cases, the chemicals sector was preferred by United States and Japanese firms to enter into joint venture agreements with European firms. The electronics sector rated second in the group of international joint ventures. It is also worthwhile mentioning that the small reduction in the number of international deals is not due to a slowdown in joint venture activity having its origin in Japan and the United States. On the contrary, the number of deals originating in those two countries increased slightly compared with the previous year's figures.

In Community joint ventures, the chemicals sector was still the field of preference for this type of operations between Community firms.

TABLE 7: Joint ventures in the Community in industry by sector

Sector (1)	National					Community					International					Total				
	1987/ 1988	1988/ 1989	1989/ 1990	1990/ 1991	1991/ 1992	1987/ 1988	1988/ 1989	1989/ 1990	1990/ 1991	1991/ 1992	1987/ 1988	1988/ 1989	1989/ 1990	1990/ 1991	1991/ 1992	1987/ 1988	1988/ 1989	1989/ 1990	1990/ 1991	1991/ 1992
1. Food	6	4	5	5	3	3	2	2	5	4	1	3	4	0	3	10	9	11	10	10
2. Chem.	7	8	12	4	0	5	9	9	11	12	12	11	16	13	9	24	28	37	28	21
3. Elec.	8	8	2	3	3	5	7	8	12	2	7	14	13	12	9	20	29	23	27	14
4. Mech.	4	6	5	1	2	0	2	3	1	1	3	2	4	2	6	7	10	12	4	9
5. Comput.	2	0	0	1	0	1	2	0	1	0	2	3	0	2	0	5	5	0	4	0
6. Metal.	2	9	6	4	8	6	3	6	4	2	2	3	4	2	4	10	15	16	10	14
7. Transp.	1	4	5	4	2	4	2	12	6	6	1	1	5	7	4	6	7	22	17	12
8. Paper	7	4	3	3	2	1	5	6	5	2	1	0	5	2	4	9	9	14	10	8
9. Extrac.	3	2	1	1	2	1	0	0	0	3	1	0	0	2	0	5	2	1	3	5
10. Textile	0	3	0	0	1	2	0	2	0	0	1	0	2	1	1	3	3	4	1	2
11. Constr.	1	4	2	4	4	2	3	2	2	1	3	0	1	1	0	6	7	5	7	5
12. Other	4	4	0	3	2	1	1	5	2	0	1	0	6	1	1	6	5	11	6	3
Total	45	56	41	33	29	31	36	55	49	33	35	37	60	45	41	111	129	156	127	103

Source : Data gathered by the Commission from the specialist press.

(1) Key : see Table 3, note 1.

<T6> e) Main motives for mergers and joint ventures

(see Graph 1 and Table 8)

The information presented in Table 8 and Graph 1 has been gathered from the publicized motives given by the companies or by the specialist press. In some cases, the real motive of the operation may not be revealed by the companies. Moreover, the aggregate data presented here could in fact include under the same category quite different motives. Finally, several reasons are given in many operations and it is not possible for us to assess their relative importance. For all these reasons, it is necessary to interpret these data with some caution.

<T7> Mergers

The main structure for the motives leading to mergers, takeovers and acquisitions of majority holdings which is reflected in Table 8 is basically similar to last year's. The strengthening of market positions, expansion of commercial activities and synergy are the three main motives behind these types of operations. This seems to confirm the existence of some regularity underlying the declining trend started after 1989/90. However, there has been a relatively important increase in the frequency of motives such as rationalization. Although this is still taking place on a small scale, if this tendency is confirmed in the future, rationalization and restructuring could take on a more important role among the motives for takeovers, mergers and acquisitions of majority holdings.

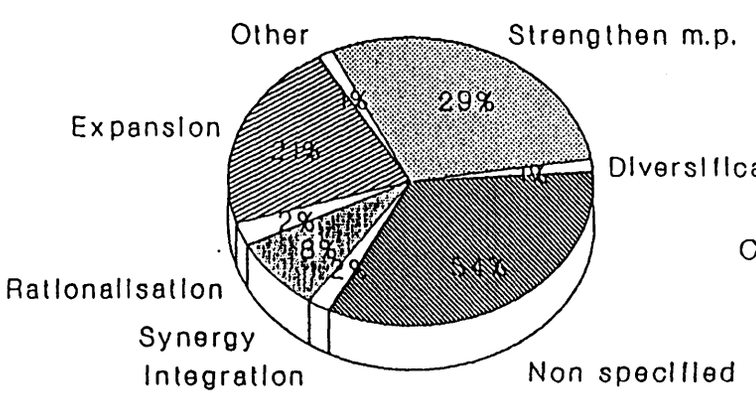
<T7> Joint ventures

The ambiguity of the concept of joint venture makes even more difficult the task of trying to determine the motives behind them. As in the case of mergers and takeovers, Table 8 and Graph 1 show a profile quite similar to last year's. However, there are some significant differences between the motives for these two groups of operations.

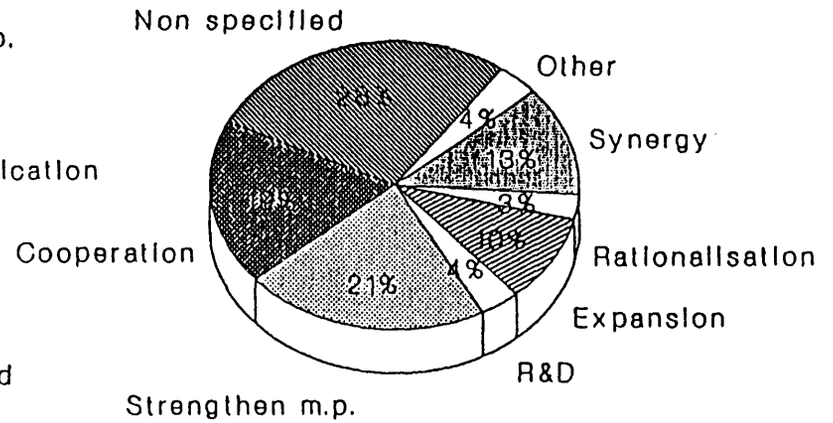
Cooperation between firms, synergy and the sourcing of new technology are very important reasons for the creation of joint ventures, while their importance for the creation of more permanent links such as those resulting from takeovers or mergers is smaller.

Graph 1

Acquisitions of Majority Holdings



Joint Ventures



Source: Data gathered by the Commission

Table 8: Main motives for mergers and joint ventures in industry in 1991/92

Motive	Acquisitions of majority holdings including mergers (in % of replies)	Joint ventures
Strengthening of of market position	107	24
Expansion	78	11
Diversification	5	1
Integration	7	0
Research and Development	0	4
Cooperation	3	21
Rationalization	9	3
Synergy	30	14
Other	2	3
Not specified	123	31
Total*)	364	112

*) In some cases, more than one motive was given.

<T4> §3. Mergers, acquisitions and joint ventures in services

Contrary to what happened in the industrial sector, there was an upsurge in takeover and acquisition activities in the service sector compared with the previous year's figures. This is in sharp contrast with the change that took place between 1989/90 and 1990/91 when there was an important fall in the number of financial operations registered in the service sector.

As Table 1 shows, the banking sector was responsible for most of this increase, which did not take place in the distribution sector. It is worthwhile mentioning that the insurance sector maintained the level of activity of 1990/91. Although the banking sector is still below the all time peak of 239 operations registered in 1989/90, the 182 financial operations registered in 1991/92 are comparable to the already high figure attained in 1987/88 (189) and double the 1986/87 figure.

It is clear from these figures that the industrial and distribution sectors showed a similar trend in the period under consideration, while the sectors providing financial services, i.e. banking and insurance, followed a separate trend of their own.

Looking back at Table 1 we can see that national and, in particular Community-wide operations increased in importance considerably compared with the previous year. The importance of international operations has been steadily decreasing since 1989/90, but this decline has been more than offset by national and Community operations. Despite the high proportional increase in Community operations, national deals account for most of the operations in the service sector.

<T6> a) Takeovers (including acquisitions of majority holdings and mergers) in services (see Table 9)

With the exception of the distribution sector, takeover activity increased considerably in the service sector in 1991/92. The number of financial operations involving a firm of non-EC origin declined considerably, but there were very significant increases in mergers and takeovers at Community level. It is worthwhile mentioning the variations that took place in insurance at Community level and in banking at national level.

In the banking sector, there was very intense domestic activity in France and Italy in 1991/92. Italy alone accounted for more than one third of the total number of national deals that took place in the banking sector in that period of time. France and Italy together accounted for 60% of that total. However, there was a basic difference with regard to the type of operation most frequently used in each of these two countries. In Italy mergers were the preferred type of operation while in France two out of three of the deals were acquisitions of majority holdings.

Another country with significant activity in this area in 1991/92 was Spain with 9 national transactions (mergers and takeovers). Spain was also the country with the highest number of Community-wide transactions in that year. However, these types of operations were evenly distributed across all the Member States.

In the insurance sector, there was a fall in the number of national operations. In this sector, Community-wide operations are more than twice as numerous as national deals. There is quite a lot of geographical dispersion of Community deals, although Spain had quite a high level of activity in this area in 1991/92.

As was pointed out above, the distribution sector experienced a generalized drop in takeover activity in 1990/91, and this continued in 1991/92. Although the number of deals remained practically unchanged last year, cross-border operations were reduced to a minimum (one out of seven).

TABLE 9: National, Community and international acquisitions of majority holdings (including mergers) in the Community in services

Sector	National					Community					International					Total				
	1987/ 1988	1988/ 1989	1989/ 1990	1990/ 1991	1991/ 1992	1987/ 1988	1988/ 1989	1989/ 1990	1990/ 1991	1991/ 1992	1987/ 1988	1988/ 1989	1989/ 1990	1990/ 1991	1991/ 1992	1987/ 1988	1988/ 1989	1989/ 1990	1990/ 1991	1991/ 1992
1. Distribution	40	53	31	28	31	8	4	17	8	4	9	1	4	2	1	57	58	52	38	36
2. Banking	53	51	65	51	73	12	16	23	13	17	13	16	25	11	7	78	83	113	75	97
3. Insurance	14	15	16	15	9	14	8	18	7	19	12	10	12	6	3	40	33	46	28	31
TOTAL	107	119	112	94	113	34	28	58	28	40	34	27	41	19	11	175	174	211	141	164

Source : Data gathered by the Commission from the specialist press

TABLE 10: National, Community and international acquisitions of minority holdings in the Community in services

Sector	National					Community					International					Total				
	1987/ 1988	1988/ 1989	1989/ 1990	1990/ 1991	1991/ 1992	1987/ 1988	1988/ 1989	1989/ 1990	1990/ 1991	1991/ 1992	1987/ 1988	1988/ 1989	1989/ 1990	1990/ 1991	1991/ 1992	1987/ 1988	1988/ 1989	1989/ 1990	1990/ 1991	1991/ 1992
1. Distribution	13	8	15	10	8	4	6	2	3	0	5	8	4	1	0	22	22	21	14	8
2. Banking	38	32	40	28	36	15	19	33	21	22	28	11	23	8	8	81	62	96	57	66
3. Insurance	8	9	13	10	8	4	13	24	12	13	7	7(*)	7	8	3	19	29(*)	44	30	24
TOTAL	59	49	68	48	52	23	38	59	36	35	40(*)	26	34	17	11	122(*)	113	161	101	98

(*) Figures in the Eighteenth Competition Report amended.
Source : Data gathered by the Commission from the specialist press.

<T6> b) Acquisitions of minority holdings in services (see Table 10)

Acquisitions of minority holdings in services remained almost constant in total number compared with the 1990/91 figures. However, the behaviour of the three service sectors was not the same. There was a sharp decline in the number of deals in distribution, in which no cross-border operation was registered. Banking showed an increase from 57 to 66 operations between 1990/91 and 1991/92. While there was no major change in cross-border deals, national acquisitions of minority holdings increased considerably. In insurance, there was a drop in the figure of national and international operations, with Community-wide operations remaining practically unchanged.

<T6> c) Joint ventures in services (see Table 11)

The total number of joint ventures in the service sector is relatively small and has not shown any substantial change in the last few years. In 1991/92 there was a slight increase compared with the previous year. Community-wide operations accounted for 50% of the total, and 1991/92 registered the highest frequency in this type of operations for the last five years.

By sector, banking accounted for the greatest number of deals closely followed by insurance.

TABLE 11: Joint ventures in the Community in services

Sector	National					Community					International					Total				
	1987/ 1988	1988/ 1989	1989/ 1990	1990/ 1991	1991/ 1992	1987/ 1988	1988/ 1989	1989/ 1990	1990/ 1991	1991/ 1992	1987/ 1988	1988/ 1989	1989/ 1990	1990/ 1991	1991/ 1992	1987/ 1988	1988/ 1989	1989/ 1990	1990/ 1991	1991/ 1992
1. Distribution	4	7	4	5	2	3	4	6	3	4	0	3	3	1	1	7	14	13	9	7
2. Banking	16	11	10	7	6	7	6	12	7	10	7	7	8	2	3	30	24	30	16	19
3. Insurance	10	8	6	5	8	3	5	2	6	7	3	3	3	3	1	16	16	11	14	16
TOTAL	30	26	20	17	16	13	15	20	16	21	10	13	14	6	5	53	54	54	39	42

Source : Data gathered by the Commission from the specialist press.

<T4>

§4. Conclusions

617. On the basis of the information provided by the DOME database and presented above, the following main conclusions can be drawn:

i) The downward trend which began after 1989/91 continued this year with a significant fall in the total number of operations. This seems to complete a cycle which started in 1986/87 and which was very probably influenced by the Internal Market project.

ii) The upsurge in financial activity as measured by the total number of operations seems to have had an important impact on the structural profile of mergers, takeovers, joint ventures and other forms of external growth. At the present stage in the cycle, national operations have decreased their relative weight in the total while Community-wide operations have become more important.

iii) In 1991/92, financial operations having as targets companies located in the five new German Länder increased considerably, thus confirming a trend initiated last year. Most of these operations were domestic, with Western German companies acquiring facilities in the East. However, there were also cases in which the company making the investment came from another Member State, France in particular, or from a non-Community country. There were also cases in which non-EC companies carried out the investment through a subsidiary based in Western Germany or another Member State.

iv) The takeover and merger behaviour of companies providing financial services was quite distinct from industry and distribution. 1991/92 saw an important upsurge in takeover and acquisition activities. This was in contrast with the downturn suffered the previous year. This activity was heavily concentrated in France, Italy and Spain. From this evidence it seems apparent that the reasons motivating takeover activity in these sectors differ from those underlying the trend in the manufacturing sector.

v) It is very difficult to assess the impact of these trends on competition. One might be tempted to think that the smaller the number, the smaller the impact on competition. However, we must bear in mind that, as these figures show, the process of external growth which has taken place in Europe during the last few years has been heavily influenced by the 1992 programme. As a result, an important number of operations may have been motivated by efficiency considerations. In the last two years, when the economic boom of the late 1980's gave way to the present recession, rationalization may have been the explanation for a good number of operations. Finally, the significant acquisition activity which is taking place in Eastern Germany is just part of a process of economic normalization of the economic situation in the new Länder, and it will be possible to assess the impact of these deals on competition only when the process is completed.

<T3> B. The programme of studies and its results

<T4> §1. The 1992 programme of studies

618. Every year, the Directorate-General for Competition commissions a limited number of studies from external and independent consultants. The main purpose of these studies is to provide technical support for the implementation of competition policy. In most cases, the studies are necessary to provide technical and economic information required to take decisions concerning antitrust or state aid cases. This is for instance the case with the studies carried out to assess the viability of the restructuring of the Spanish steel companies CSI and Sidenor commented on below. None the less, in other cases, the studies are needed to facilitate the internal management and decision-taking process of the Directorate-General. Two studies of this nature were completed in 1992: the Guide to procedures in State aid cases and the study on the Steel Databases.

619. Two of the studies completed in 1992 will be published. The rest of the studies carried out last year are not intended for publication, either because of the confidentiality of the information they contain or because of their instrumental nature.

<T4> §2. Studies published or intended for publication

<T5> - New entrant airlines - a case study

620. This study relied on interviews with the managers of a number of existing and failed new entrants in the airline industry, backed up by interviews with industry organizations and regulatory authorities.

621. The purpose of the study was to identify the various obstacles encountered by small and medium-sized airlines opening up new services.

* In practical terms regulatory and financial fitness requirements remain a difficult obstacle to new entry. The timescale and costs associated with the licensing process can be significant. Gaining and maintaining investor confidence is viewed as a key factor in the early stages of development of a new entrant airline and it is important that it is seen an integral and critical part of the process.

* New entry in air transport will remain virtually impossible for those entrants that want to establish scheduled services on dense routes between major European capital cities. Some form of intervention will be necessary for the provision of slots and suitable ground handling facilities if new entry at major hub airports is to take place.

* Although there are notable exceptions many new entrants do not seek competitive confrontation with national carriers. They are seeking to develop niche markets either independently or in conjunction with a major carrier. Many are also trying to identify partners and would not be averse to this being a national or foreign airline. This type of consolidation appears to be a process gathering momentum.

* The dominance of the national carriers, particularly where they remain state owned, and their influence on the market-place should not be underestimated in any way. Their abilitity to swamp with capacity and sandwich with frequency the new entrant is considerable, as is their ability to develop commercial arrangements with the travel trade that disadvantage the new entrant.

* Most airlines feel that they are vulnerable to hostile takeovers, particularly from national carriers. They believe that in the absence of a clear EC airline merger policy this adds to the general feeling of uncertainty.

* As the market differentiation between scheduled and charter is reduced, the charter airlines are seeking to develop scheduled services in conjunction with their leisure traffic. Changes in consumer behaviour and new aircraft types with longhaul capability are providing a new market opportunity that the charter airlines believe the EC should support in order to promote real competition.

<T5> - The geographical dimension of market dominance in the European single market

622. One of the main problems in the assessment of market competition in one antitrust case is the proper delimitation and definition of the relevant market, both from the point of view of the product and its geographical dimension. The importance of geographical market definition is enhanced by the process of economic integration of European markets which was started by the Single European Act in 1987 and which has reached its maximum momentum after 1 January of 1993. The objectives of this study are to examine the geographical dimension of market dominance as interpreted in European Community competition policy, and to design a framework for analysis of the geographical dimension in applications of this policy. Therefore, this study aims at the definition of criteria to be used in practice for the analysis of cases arising from the application of Articles 85 and 86 of the Treaty as well as the Merger Control Regulation.

623. The study suggests a different approach for the analysis of:

a) cases of abuse of dominance (Article 86) and Article 85 cases relating to concentration or collective restriction of competition in the past;

b) cases of re-notified agreements (Article 85);

c) the application of the Merger Control Regulation.

624. The study defines and discusses the relevance for the geographical definition of markets of a series of factors which must be analysed in each case. Based on this analysis, the study proposes a checklist of factors to be considered at each stage. These include (in correlative order):

1. the definition of the market in terms of current demand substitution;

2. price tests as direct measurement of market interdependence;

3. the consideration of potential competition;

4. the effects of single-market legislation on obstacles to trade and barriers to entry in geographically segmented markets;

5. barriers not directly affected by single-market legislation.

<T4> §3. Summaries of studies not intended for publication

<T5> - Guide to procedures in State aid cases

625. The Guide sets out the procedural law governing the control of State aid by the EC Commission in a simple, easily digestible form for the use of governments, businesses and legal practitioners. The sources of this law, judgments of the European Court of Justice and notices issued by the EC Commission, are fully referenced. This study will be the basis of a new section on procedures in the new edition of Competition Law of the European Communities, Volume II the State aid rules which is to be published in 1993.

The chapters of the Guide deal with :

1. Notification : scope of the notification requirement, the prohibition against granting aid without authorization by the Commission, the time limit for the Commission to make its determination on a case, and the requirements of decisions to authorize the aid without opening the procedure under Article 93(2) of the EEC Treaty;

2. Formal investigations under Article 93(2) : procedure, "due process" rights of Member States and interested parties, and final decisions closing Article 93(2) proceedings;

3. Unnotified aid : definition of "unnotified aid", powers of the Commission, including injunctions, recovery orders and the charging of interest;

4. "Existing aid" : definition of "existing aid", proposal of "appropriate measures", subsequent use of the Article 93(2) procedure;

5. Finally, the Guide contains a chapter on complaints, the practice of the Commission in publishing its decisions, judicial review of Commission decisions by the Court of Justice (types of decisions appealable, standing, time limits), and the reporting obligations of Member States following the Commission's approval of an aid scheme.

The Commission believes that the Guide will help clarify the law and practice in what is becoming an increasingly important and litigious area of Community law.

<T5> - Study on the Steel Data Base (SDB)

626. The Commission examines mergers in the steel industry in terms both of production and of distribution.

627. The Commission's information on ECSC undertakings derives from the ECSC questionnaires received by Eurostat and the Directorate-General for Credit and Investments with figures on production, supply, capacity and investment; in addition, the Directorate-General for Competition has information on the holdings of financial groups in steel companies.

628. In the context of the SDB project, the aim of which is to assemble complete and coherent information in a Steel Data Base, it was necessary to analyse the functions of the base in order to meet the specific needs of application of the competition rules laid down in the ECSC Treaty.

629. The information contained in the SDB of relevance to the application of the competition rules is as follows:

- the SDB's information unit is the steelworks. The management of the direct or indirect links between groups, companies and steelworks with their holdings and the definition of control parameters are two functions that can be included into the base;

- the figures in the ECSC questionnaires, recorded by individual steelworks, are available at company, group, country or European level through permanent or dynamic aggregation of the base data;

- the real or hypothetical market share of the various groups involved in a merger can be quantified through new search table options.

Following analysis, the SDB has been modified to include new functions allowing the structure of steel groups to be displayed, the tonnage produced by a group to be calculated (for example, in order to establish whether the merger is exempt from the prior authorization requirement) and the percentage which such tonnage represents in respect of a country, a group of countries or the Community to be determined.

<T5> - Study of the shipbuilding market in 1992

630. The objective of this study is to compare the cost structures of the most competitive Community yards and world market prices (with particular regard to the market segments in which the Community yards remain relatively most competitive). The study findings are used to inform the Commission of the prevailing cost/price gap for the purposes of setting the maximum ceiling of aid to shipbuilding under the Seventh Council Directive, which must be reviewed at least every 12 months.

631. As in previous years, the study, which was conducted with full collaboration from the EC industry, concentrates on ship types which are most commonly constructed within the Community and for which EC yards are in most direct competition with international producers. 11 ship types were covered in this year's study and 22 EC shipyards participated in the cost quotations. World market prices were established on the basis of data collected from various sources.

632. The conclusion of the study is that there has been a general widening of the cost/price difference compared with last year. However, according to the consultant, the effects of differences in world inflation rates and currency fluctuations have been significant factors in the apparent decline in competitiveness of EC shipbuilders.

<T5> - Monitoring study of the restructuring plan for the shipbuilding industry in Spain

633. As provided by Article 9 of the Seventh Council Directive on aid to shipbuilding, an independent consultant has been jointly commissioned by the Commission and the Spanish Government to submit six-monthly monitoring reports on implementation of the restructuring plan for the Spanish shipbuilding industry during the period 1991-92.

634. In October a report was submitted covering the first six months of 1992 which raises doubts whether the industry will attain the planned level of competitiveness. Article 9 provides that in such circumstances the Spanish

Government will take measures to reinforce the restructuring of the sector which are accepted by the Commission as capable of rectifying the situation. The Spanish Government is expected to submit its proposals shortly.

<T5> Studies of Restructuring Plan for Spanish Integrated Steel Company CSI and Sidenor

635. Three studies related to restructuring plans for the Spanish steel industry, as follows:

- a study conducted by an independent consultant jointly appointed by the Spanish Government and the Commission to assess the viability of the proposed restructuring plan for the Spanish integrated steel company CSI, incorporating Altos Hornos de Vizcaya and Ensidesa;

- a study conducted by an independent consultant jointly appointed by the Spanish Government and the Commission to assess the viability of the proposal restructuring plan for the Spanish special steels company Sidenor, incorporating Acenor and Foarsa; and

- a study carried out on the Commission's behalf by an independent consultant to examine possible alternatives to the CSI plan.

The purpose of the studies was to provide information to the Commission to help it decide whether to recommend to the Council that it should give its assent for the aids involved in the restructuring plans to be authorized under Article 95 of the ECSC Treaty.

On the basis of the consultants' findings, the Commission concluded that the CSI plan was viable but that the relation between the aid intensity and the extent of the restructuring needed to be improved. The Commission also concluded that the Sidenor plan was viable and decided to propose that the aids should be authorised subject to certain conditions.

The Commission's views were presented to the Industry Council at its meeting on 24 November. The Council was not prepared to agree to the Spanish proposals and further discussion was deferred pending bilateral contacts.

<T3> C. Statistical note on concentration operations notified under Council Regulation (EEC) No 4064/89

<T4> §1. Introduction

636. Council Regulation (EEC) No 4064/89 on the control of concentrations entered into force in September 1990. The Twenty-first Competition Report included a short statistical notice of the cases analysed during 1991. This section has the objective of presenting a more detailed statistical analysis of all the cases dealt with in the application of the Regulation to September 1992.

637. Under the Regulation only large concentrations have to be notified to the Commission. Only those cases in which the combined aggregate worldwide turnover of all the companies involved is above ECU 5 000 million, the aggregate Community-wide turnover of each one of them is more than ECU 250 million and no more than two thirds of this aggregate Community turnover come from just one Member State, have to be notified. These strict criteria have limited the number of cases handled by the Commission to approximately fifty per year.

638. The tables presented below give a statistical description of the cases dealt with under the Regulation and the decision taken until now. The cases have been classified by the type of concentration, their geographic dimension, the economic sectors involved and the nationality of the firms concerned.

639. Cases officially notified to the Commission but not falling within the scope of the Regulation have been excluded from the sample. Cancelled or withdrawn notifications have also been excluded.

640. Cases have been grouped in two periods of time (1990-91 and 1991-92). Each group covers notifications (or decisions) made (or taken) from September to September. 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.

<T4> §2. Type of operation and geographic dimension of the concentrations (Table 1)

641. Table 1 shows the breakdown of the operations that took place in 1990-91 and 1991-92 by type of operation and by the geographic dimension of the deal. With respect to this latter criterion, four groups have been defined: national deals, which are those involving two or more companies from the same country (not necessarily a Member State), deals of Community dimension are those involving companies from at least two different Member States; the third category includes deals between at least one company from one Member State and at least one company from a non-EC country; finally, extra-Community deals are those involving companies from at least two different non-EC countries and without any participation of companies from any Member State.

642. In Table 1, cases have been grouped under six different types of concentrations. The heading "Joint ventures" includes joint ventures of a concentrative nature, i.e. those which do not give rise to coordination of the competitive behaviour of the parties involved. The heading "Mergers" includes just "pure" merger cases in which at least two independent companies merge into a new one leaving no residual entities from the merging companies. "Majority acquisitions" includes cases in which one or more undertakings purchase securities or assets by contract or by any 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. Those public-bid cases have been further divided into those in which the bid has been contested by the acquired firm and those cases in which the bid was commonly agreed. The group "Others" includes a cross-shareholding deal in 1990/91 and one demerger case in 1991/92.

643. In the first year of enforcement of the Regulation, Community-wide agreements were the most frequent ones (38% of total), but closely followed by mixed agreements between EC and non-EC firms (34%). This order was inverted last year however (33% and 35% respectively). Notified deals between firms of the same nationality and concentrations between firms from different non-EC countries were less important and accounted for a constant but not insignificant proportion of the total number of operations notified in both years (17% and 14% respectively in 1991/92).

644. Acquisitions of majority holdings and concentrative joint ventures were by far the most frequent types of operations in 1990/91 and 1991/92. In fact, the number of concentrative joint ventures notified during 1991/92 was particularly high. Meanwhile, the number of notified acquisitions of majority holdings dropped during the second year of the implementation of the Regulation. Pure merger cases were reduced to a minimum level. It is remarkable though that two out of the three cases of this type examined in the two years concerned foreign firms only.

<T4> §3. Economic sectors of the operations (Table 2)

645. Notified cases are classified by the NACE code of the main economic activity of the concentration resulting from the operation. This sectoral breakdown is further analysed by the geographic dimension of the concentration.

646. As Table 2 shows, although most of the notified cases of concentrations took place in the manufacturing sectors (61%), there were significant numbers of cases notified in areas such as transportation, commerce and financial services (with 11% each).(1)

647. In 1990/91, the broad categories 2 and 3 of the NACE classification accounted for about 50% of the cases. The two-digit level of the NACE, sector 34 - Manufacturing of motor vehicles - had the highest frequency with four cases in 1990/91 (8%). Three out of these four cases involved firms from inside and outside the EC. The nationalities of the companies involved in those cases were France, Japan, Germany and Sweden.

648. There were several two-digit subsectors with 3 operations involved in 1990/91. Those could be found in refining, machinery and equipment, office machinery and computers, electrical machinery and computer-related activities.

649. In 1991/92, manufacturing activities still maintained their leading position (57%), but followed very closely by financial services (21%). There were six operations in the chemical sector and five in motor vehicles. Four operations were registered in the manufacture of food and beverages. However, four operations were also registered in insurance and pension funds and three in financial intermediation.

(1) All percentages for 1990/91.

T4> §4. Operations by nationality of the companies involved

650. 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. In Table 3 we present the frequencies of the different "couples" or combinations of nationalities. The upper right-hand side of the matrix shows the data corresponding to 1990/91 and the lower left-hand side gives the information for 1991/92. The main diagonal of the matrix shows the frequencies of cases in which two firms of the same nationality took part in a certain deal (either alone or with other companies), separating with a "\" the 1990/91 figure (right-hand side) from the (left-hand side) 1991/92 figure.

651. The last column in the table gives the frequency with which a firm of a certain nationality was involved in one deal in 1990/91. For instance if two firms of the same nationality merged in that year, and there were no more operations involving firms of the same nationality, the frequency for that country would be two. The last row in the matrix gives the same total for the 1991/92 period.

652. This table shows that French companies were by far the most active during the 1990/91 period with 32 operations with at least one French company involved. These concentrations were not concentrated geographically. They took place in four EC countries other than France as well as in four other non-Member States. Behind France, three countries show approximately the same frequency in the number of deals involving firms from that national origin and it is interesting to note that there is one non-EC country among them: Germany (18), USA (17) and the United Kingdom (16).

653. This seems to indicate that the Regulation has had an important impact not just on European firms but also on large companies operating worldwide and with a non-European origin.

654. This high level of internationalization of the activities falling under the scope of the Regulation was continued in 1991/92, although there was less concentration by nationality in that year. For instance, in this second year, there were more cases involving Swedish firms than cases affecting Italian firms. It is also interesting to point out the high diversity of the countries included in the group of those affected by the enforcement of the regulation.

655. It is also interesting to note that in 1991/92, the frequency of cases involving French companies is similar to those of the other large Member States. Finally, in 1991/92, there were no cases involving Japanese firms. This fact, together with the very low frequency of 1990/91 (5 cases) seems to reflect a strategy of Japanese firms quite different from that shown by USA or Swedish firms for instance.

656. In terms of "pairs" or binary combinations, it is important to mention the high frequency of cases in which a French and a Germany company were involved (six in 1990/91 and five in 1991/92). In 1991/92 it is also worthwhile mentioning the number of times in which two firms of the same nationality took part in the same deal, particularly for the cases of Germany and the UK.

T4> §5. Statistical analysis of the decisions

657. Most of the notified cases falling under the scope of the Regulation did not reach the second stage of the procedure. In 1990/91, 43 out of the 47 cases notified falling under the scope of the Regulation were declared compatible with the common market after the first stage of the investigation. In 1991/92 that figure rose to 54 out of 57 cases.

658. The four cases reaching the second stage of the investigation in 1990/91 were later on cleared as it was found that they did not significantly impede effective competition in the common market. However, in three of these cases conditions were imposed by the Commission on the undertakings to ensure that the agreement was not going to imply restrictions of competition in the common market or in a significant part of it. The three cases cleared subject to conditions did not involve any company from any Member State while in the case cleared without conditions all the companies were from non-EC countries (Sweden and Switzerland). The sectors concerned were machinery, electrical machinery and radio, television and communications equipment.

659. In 1991/92 a smaller percentage of notified cases reached the second stage of the procedure, but only in one case did the Commission declare the concentration incompatible with the common market. This was the proposed acquisition of the Canadian aircraft manufacturer De Havilland by the French Aerospatiale and the Italian Alenia.

That year there were two clearances of concentrations subject to conditions. Contrary to the previous year, these operations were acquisitions, not joint ventures, with one agreed and one contested bid.

The legal analysis of all these decisions can be found in the Twenty-first Competition Report and in Chapter I.C. of Part II of this Report.

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

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
1. Food, textiles and clothing	2	1	2	0	5	0	2	1	1	4
2. Wood, paper, refining chemicals, metal & machinery	3	6	1	1	11	3	5	7	3	18
3. Elect. and transport equipment & furniture	2	3	6	2	13	2	2	5	2	11
4. Public utilities and construction	0	1	0	0	1	1	0	0	0	1
5. Wholesale, trade hotels & restaurants	0	4	1	0	5	2	5	1	0	8
6. Transport, commun. & financial services	0	3	0	2	5	1	4	5	2	12
7. Real estate, computer services and prof. services	0	0	5	0	5	1	1	1	0	3
8. Education and public health	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
Total	7	18	16	6	47	10	19	20	8	57

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 in upper right-hand side of the main diagonal and in 1991/92 lower left-hand side)

91-2\90-1

	B	DK	D	E	F	Gr	Irl	I	L	Nl	P	UK	Can	Fin	Jap	Swe	USA	Swi	Aul	Aus	SAf	Hok	Vir	Kuw	Total 90/91
B	\									1															1
DK		\																							0
D		1	6\3		6							2					2	2							18
E				2\1	3							1													6
F	2		5	1	2\4			3				4	1		1	2	4								32
Gr						\																			0
Irl							\																		0
I			1	1	2			1\1			1			1											7
L					1				\																0
Nl			2		1					\							1								3
P				1						1	\														0
UK	1		2	2	2			2				5\2		1			4								16
Can			1		2					1			\												2
Fin														\											1
Jap															0\1		2								5
Swe			2		1					1		3	1			3\0		1							3
USA			2		2			2				4					3\2								17
Swi					1							1				1		1\1							5
Aul			1		1					1			1			1			\						0
Aus																				\					0
SAf					1							1									\				0
Hok												1									1	\			0
Vir								1									1						\		0
Kuw				1																				\	0
Total 91/92	3	1	29	10	26	0	0	11	1	7	2	29	6	0	0	16	17	5	5	1	3	1	2	1	

Source: MTF Database.

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 cond.	Without cond.		With cond.	Without cond.	
No of cases	3	1	0	2	0	1
Type of operation	Acq. maj. (2) JV/control (1)	Acq. maj.	-	Agreed bid Contest. bid	-	Acq. maj.
Geographical Dimension	Nat. (1) Comm. (2)	Extra-EC	-	Community (1) Comm/non-EC (1)	-	Comm/non-EC (1)
NACE code	31 (2) 32 (1)	29	-	15 55	-	35
Nationality of firms involved	F/I (2) D/D	Swe/Swi	-	B/F F/Swi	-	Can/F/It

NACE codes

15 Manufacturing of food products and beverages
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

Source: MTF Database.

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