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II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 21 November 2001

authorising the merger between Arbed SA, Aceralia Corporación Siderúrgica SA and Usinor SA into Newco Steel

(Case COMP/ECSC.1351 – USINOR/ARBED/ACERALIA)

(notified under document number C(2001) 3696)

(Only the English text is authentic)

(2003/215/ECSC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Coal and Steel Community, and in particular Article 66(2) thereof,

Having regard to the Notice concerning the alignment of procedures for processing mergers under the ECSC and EC Treaties ⁽¹⁾,

Having regard to the notification submitted by the parties dated 18 June 2001 and to subsequent information,

Having regard to the Commission letter of 19 July 2001 communicating to the parties the Commission's serious concerns,

Having given the companies concerned the opportunity to reply to the Commission's objections,

Having regard to the final report of the Hearing Officer in this case ⁽²⁾,

Whereas:

(1) On 18 June 2001, the Commission received a notification, under Article 66 of the ECSC Treaty, of a proposed concentration whereby the undertakings

Arbed SA (Arbed), incorporated in Luxembourg, Aceralia Corporación Siderúrgica SA (Aceralia), incorporated in Spain, which is controlled by Arbed ⁽³⁾, and Usinor SA (Usinor), incorporated in France, merge into a new entity, provisionally named Newco Steel (Newco), to be incorporated in Luxembourg, by way of a public offer to exchange the shares of Aceralia, Arbed and Usinor with those of the new entity.

(2) After examining the notification, the Commission has come to the conclusion that the proposed concentration falls within the scope of Article 66 of the ECSC Treaty, read in conjunction with Article 80 thereof. In so far as the proposed concentration concerns products or markets which do not fall within the scope of the ECSC Treaty (namely, tailored blanks, construction profiles, sandwich panels and steel tubes), Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings ⁽⁴⁾, as last amended by Regulation (EC) No 1310/97 ⁽⁵⁾ applies ⁽⁶⁾. This Decision concerns only those parts of the proposed concentration which fall within the scope of the ECSC Treaty.

I. THE PARTIES

(3) Aceralia is a company incorporated as a sociedad anonima under Spanish law. It is controlled by Arbed. It

⁽¹⁾ Commission Notice concerning the alignment of procedures for processing mergers under the ECSC and EC Treaties (OJ C 66, 2.3.1998, p. 36).

⁽²⁾ OJ C 81 of 4.4.2003.

⁽³⁾ Cases No. IV/M.0980 and IV/ECSC.1237 — Arbed/Aceralia.

⁽⁴⁾ OJ L 395, 30.12.1989 p. 1; corrected version in OJ L 257, 21.9.1990, p. 13.

⁽⁵⁾ OJ L 180, 9.7.1997, p. 1.

⁽⁶⁾ Cf. Case No COMP/M.2382 — Usinor/Arbed/Aceralia.

is the largest steel producer in Spain and manufactures and distributes flat steel products, long steel products and processed steel products. These activities fall under the ECSC Treaty. It also produces certain types of small carbon welded tubes and products for the construction industry and it carries out transformation activities. These latter activities fall under the EC Treaty.

- (4) Arbed is a company incorporated as a société anonyme under the laws of Luxembourg. It is a major European steel producer with important operations in Belgium, Germany, Italy, Brazil and the United States of America. In particular, its main activities are the production and distribution of steel products (including heavy and light long products, flat products and stainless steel products), the trade of scrap and the distribution of some raw materials for the steel industry (especially ferro-alloys and non-ferrous metal). Arbed also has certain other activities in the engineering sector. These activities fall in part under the ECSC Treaty and in part under the EC Treaty. Aceralia together with its controlling undertaking Arbed achieved a worldwide turnover of EUR 13 232 million in the year 2000.
- (5) Usinor is a company incorporated as a société anonyme under French law. It is one of the largest steel producers in the Community and has operations in Belgium, Germany, Italy, Spain and the United States of America. It manufactures processes and distributes steel products (in particular, flat carbon steel products, stainless steel and other alloy steel products). These activities fall in part under the ECSC Treaty and in part under the EC Treaty. In 2000, Usinor generated a worldwide turnover of EUR 15 733 million.

II. THE OPERATION

- (6) The proposed concentration is a full legal merger with the complete amalgamation of all of the businesses of Aceralia, Arbed and Usinor. For this purpose, a new single corporate entity called Newco Steel (Newco) will be created, which will be structured as a fully integrated group. Newco, which will be incorporated as a société anonyme under the laws of Luxembourg, has been established with the purpose of making an exchange offer of its shares for the entire issued share capital of each of the parties. It will simultaneously launch three separate conditional exchange offers on all ordinary shares of Aceralia, Arbed and Usinor outstanding at the time of the offers. All three offers will be conditioned upon an acceptance of at least 75 % of the issued shares in Aceralia, Arbed and Usinor. On completion of the offers, Aceralia's shareholders will hold approximately 20,1 % of Newco, Arbed's 23,4 % and Usinor's shareholders will hold the remaining 56,5 %.

III. THE CONCENTRATION

- (7) Because of their activities in the manufacture and sale of steel products, the notifying parties are undertakings within the meaning of Article 80 of the ECSC Treaty. Therefore, the notified transaction constitutes a concentration within the meaning of Article 66(1) of the ECSC Treaty.

IV. PROCEDURE

- (8) On 19 July 2001, the Commission decided to initiate an in-depth investigation into the proposed concentration, as far as the ECSC products are concerned, inasmuch as the operation gives rise to serious concerns of giving the parties the power to hinder effective competition or to evade the rules of competition instituted under the ECSC Treaty. The parties were advised of this further investigation by letter of 19 July.
- (9) On 28 September 2001, the Commission adopted a Statement of Objections, pursuant to Article 66 of the ECSC Treaty and paragraph 4 of the Notice concerning the alignment of procedures for processing mergers under the ECSC and EC Treaties. The Commission arrived at the preliminary conclusion that the proposed concentration would give the parties the power to hinder effective competition or to evade the rules of competition instituted under the ECSC Treaty.
- (10) Regarding the non-ECSC products covered by the proposed concentration, the Commission decided on 19 July 2001 that the transaction does not raise serious doubts as to its compatibility with the common market or with the functioning of the EEA Agreement ⁽⁷⁾.

V. ASSESSMENT UNDER ARTICLE 66(2)

A. BACKGROUND: THE STEEL INDUSTRY

1. PRODUCTION PROCESS

- (11) Before discussing in detail the relevant product markets it will be useful to establish the framework within which the industry operates. Steel is one of the most important materials used in our society. It is present in the buildings in which we live and work, the transport we use and it is essential in the production and

⁽⁷⁾ Case No COMP/M.2382 — Usinor/Arbed/Aceralia.

- distribution of the food and drink we consume. Furthermore it is a raw material that is essential to the vast majority, if not all, other manufacturing industries.
- (12) Steel production is very capital intensive. The minimum economic scale is high, and the investments in this sector are very specific. As a result there are very high entry barriers. Vertical integration is, with few exceptions, the rule. Most producers control an important part of the production chain and many are integrated downstream into steel distribution and first transformation products such as tubes, panels and profiles.
- (13) The first important differentiation in the steel industry is one based essentially on the chemistry of the steel. Three main types of steel can be distinguished, carbon steel, stainless steel and special or alloy steels. For the purposes of this decision there is no need to treat the alloy steels any further as no issues arise in relation to these steels.
- (14) Carbon steel is the most familiar to us and is used in a very wide range of applications including car bodies, beverage cans, beams and reinforcing materials for the construction industry, and so on. Stainless steel contains significant proportions of chrome and nickel and is therefore much more expensive than carbon steel. Therefore it is primarily used in applications which require resistance to corrosion and/or resistance to high temperatures.
- (15) The physical properties of steels can be modified by changes in the chemical analysis or by the treatment they receive during their production or during the subsequent manufacturing processes. For example both beverage cans which require a very ductile material and knives which require a very hard material (to keep their sharpness) are made from different carbon steels.
- (16) Today there are two steel making processes that account for nearly all the world's steel production, the integrated route and the electric arc furnace (EAF) route. The integrated route is the most capital intensive and involves the production of liquid iron from iron ore, coke and limestone. The liquid iron is subsequently transformed into steel in an oxygen convertor. At this stage or in a separate vessel the final chemical composition of the steel is adjusted. The alternative production route is the EAF in which scrap (and sometimes directly reduced iron or pig iron) is melted. Additions are then made to obtain the desired chemical specification. The liquid steel is then continuously cast into semi-finished products which are further processed by rolling into the various steel products.
- (17) Generally the flat carbon steel products that give rise to the competition problems outlined in this Decision are produced by the integrated route as this can produce steel without the tramp elements that are contained in scrap. Lower quality flat products can be produced by the EAF route but for applications where the steel must be free from tramp elements the integrated route is obligatory.
- (18) Whichever route is used, the steel is continuously cast into semi-finished products, billets and blooms for long products and slabs for flat products. The slabs are subsequently hot rolled into quarto plate and strip (on either wide or narrow strip mills). Wide strip may be subsequently slit to produce narrower widths and/or cut to length to produce sheets. Virtually all quarto plate, hot rolled narrow strip and steel sheets are sold in this state and are not further transformed by the steel producer.
- (19) Some of the hot rolled wide strip is sold directly to customers, including steel service centres, who may cut or slit it. A large part of the hot rolled wide strip that is produced is further processed to produce cold rolled strip, which is thinner and has a superior surface finish. Again some of the cold rolled material is sold at this stage but a significant proportion is metallurgically coated, with tin or chrome for the can industry or with zinc. Zinc protects the steel from corrosion and may be applied by passing the steel strip through a bath of molten zinc (hot dip galvanised strip) or electrolytically (electro-galvanised strip). The main outlets for galvanised strip are the automobile and construction industries. With the exception of some, predominantly hot dip, galvanised material which is organically coated, most of the coated material is sold as packaging steel, hot dip or electro-galvanised strip.
- (20) EAF based plants are usually located near sources of scrap. Among the integrated plants a distinction can be made between the generally more modern coastal plants and inland plants. The inland plants were based on the local availability of iron ore and coal. Today in Europe

nearly all the coal and iron ore used in steel making is imported. This gives certain advantages to coastal plants, particularly those with deep water ports.

- (21) Within the production tree, it clearly appears that products do not bring the same levels of value-added. This is then translated into differing profitability levels. In fact, downstream products prove to be more value-added and to have appreciably higher levels of earning before tax, depreciation and amortisation, as is apparent from Graphic 1.

GRAPHIC 1

Indicative price levels (hot-rolled strip = 100)

[GRAPHIC DELETED]* (*)

Source: Parties.

- (22) Community sales of flat products in 2000 are shown in Table 1.

TABLE 1
Community sales of flat products in 2000

(Million tonnes)

Product	Sales
Hot rolled wide strip	23,9
Hot rolled narrow strip	2,9
Hot rolled sheets	2,5
All hot rolled strip products	29,3
Quarto plate	7,8
Cold rolled strip	13,1
Steel for packaging	4,3
Galvanised steel	21,1
Organically coated	4,1
Total	74,6

Source: Parties.

2. STEEL MANUFACTURERS

- (23) The parties claim that the European steel industry is not very concentrated. While this may have been true in the past, the last ten years have seen a significant consolidation. Today there are five large steel companies: Usinor, TKS, Corus, Riva and Arbed/Aceralia. They are followed by a number of producers including Voest-Alpine, Rautaruuki, Salzgitter, Duferco and SSAB which are considerably smaller. Depending on the product market considered, the sales of the five largest producers account for between 50 % and 85 % of total consumption.

- (24) The first group of steel manufacturers is made of large, integrated companies manufacturing steel products at all production levels. All of them produce flat products and TKS, Arbed/Aceralia and Usinor produce stainless (Corus has an interest in the stainless producer Avesta Polarit). In addition Corus and Arbed/Aceralia have very substantial long product operations. All of them are the result of recent concentrations. Usinor acquired Cockerill Sambre which had itself acquired Ekostahl. TKS is the result of successive concentrations in Germany notably Krupp and Hoesch and then the merger with Thyssen. Corus is the result of a merger between British Steel and Hoogovens. Arbed acquired Stahlwerke Bremen and then took a controlling interest in Aceralia which has since acquired Ucin and Aristrain. Riva acquired the privatised ILVA.

- (25) These large producers operate from a number of sites in several different European and third countries. They have integrated sites where steel from coal and iron ore is produced and further processed. They are capable of providing a very wide range of flat products. Most of them produce stainless and long products as well. They are also active in steel distribution and in downstream products. For instance, Riva, the smallest in the group, has 44 production sites of various sizes including the massive Taranto integrated steel works.

- (26) The second group of steel manufacturers concerns smaller European producers, which do not have the same scale nor product range as the leading players, but focus on niche markets (products and/or regions). This group of second ranked players includes the following flat product producers with integrated plants: Voest-Alpine, Rautaruuki, SSAB, and Salzgitter. As stated by one of these companies in one of the Commission's questionnaires 'the Group regards itself not as a bulk producer of steel but rather as a specialist manufacturer and processor of high-quality steel products'. There are also a substantial number of long producers mainly based on the EAF route.

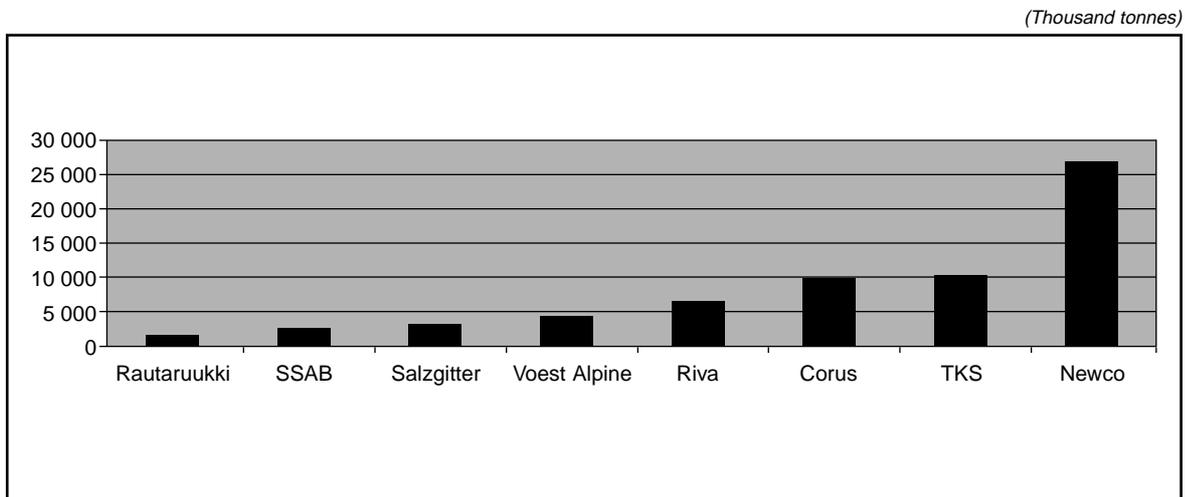
(*) Parts of this text have been edited to ensure that confidential information is not disclosed; those parts are enclosed in square brackets and marked with an asterisk.

(27) The proposed operation would create Europe's and the world's largest steel company. Graphic 2 gives an idea of the relative sizes of the main European steel

producers on the basis of their sales of all carbon steel flat products, which are the subject of the concerns dealt with in this Decision.

GRAPHIC 2

Total sales of carbon steel flat products (year 2000)



Source: Parties.

B. THE RELEVANT PRODUCT MARKETS

market from stainless steel products and highly alloyed steel products.

1. PRELIMINARY REMARKS

(28) The object of the proposed concentration is the production of carbon steel and stainless steel products, the further processing of both into hot-rolled flat products, subsequent processing by way of cold-rolling and the production of metallic and organic coated products, electrical steel sheets and steel for packaging. Furthermore, Newco will also be active in the field of steel distribution, through a network of steel service centres, stockholding centres and oxycutting centres.

(30) Carbon steel products cannot be substituted by highly alloyed steel products because of 1. their different chemical composition, 2. their significantly different prices, and 3. their different fields of application⁽⁹⁾. Furthermore, carbon steel products are produced in plants which are not equipped for the manufacturing of highly alloyed steel products.

2. STEEL PRODUCTS

(a) The distinction between carbon steel products, highly alloyed steel products and stainless steel products

(29) According to previous Commission Decisions⁽⁸⁾, carbon steel products constitute a different product

(31) In turn, carbon steel products are a separate market from stainless steel products, in particular because of the different chemical composition of non-alloy steel, stainless and heat-resistant steel and other alloy steels⁽¹⁰⁾. Stainless steel is an alloy containing 10,5 % or more of chromium, with or without other alloy elements, and less than 1,2 % of carbon⁽¹¹⁾. Production of stainless steel differs from production of carbon steel through the addition of chrome, nickel and other alloying elements to the steel melting process in order to achieve metallurgical differences in the end product as compared to normal steel⁽¹²⁾.

⁽⁸⁾ Case No IV/ECSC.1268 — Usinor/Cockerill Sambre. Case No IV/ECSC.1243 — Krupp Hoesch/Thyssen. Case No COMP/ECSC.1342 — Outokumpu/Avesta Sheffield. Case No IV/M.239 — Avesta/British Steel/NCC/AGA/Axel Johnson. Case No IV/M.484 — Krupp/Thyssen/Riva/Falck/Tadfin/AST.

⁽⁹⁾ Case No IV/ECSC.1268 — Usinor/Cockerill Sambre.

⁽¹⁰⁾ Case No IV/ECSC.1243 — Krupp Hoesch/Thyssen. See also Case No COMP/ECSC.1342 — Outokumpu/Avesta Sheffield.

⁽¹¹⁾ Case No IV/M.239 — Avesta/British Steel/NCC/AGA/Axel Johnson.

⁽¹²⁾ Case No IV/M.484 — Krupp/Thyssen/Riva/Falck/Tadfin/AST.

(b) Flat carbon steel products are a separate product market from long carbon steel products

- (32) The Commission has concluded on a number of occasions that flat steel products form a separate product market from long steel products ⁽¹³⁾.
- (33) Steel produced in a steelworks is cast into shape and further processed by subsequent forming into the products desired by final consumers. Rolled steel products may be subdivided into flat products (hot-rolled wide strips, hot-rolled narrow steel, quarto plates and sheets) and long products (sections and steel beams, permanent way material, merchant bars and wide rods). Flat steel and long steel products are produced on different rolling mills and are bought for different purposes. Most rolling mills are purpose built for a particular end product and are hardly ever converted to other uses ⁽¹⁴⁾. Furthermore, there are significant differences in the applications and prices of flat and long products. The markets for flat steel products can therefore be differentiated from those for long steel products.

(c) Carbon steel flat products: the distinction between hot-rolled and cold-rolled products

- (34) The Commission has found in previous Decisions that hot-rolled carbon steel flat products and cold-rolled carbon steel flat products constitute separate product markets ⁽¹⁵⁾.
- (35) Only a limited proportion of hot-rolled flat products are sold for use as such. More than half is further processed by cold-rolling. Subsequent cold-rolling results in a considerable reduction in thickness, greater dimensional accuracy, a smoother surface and, following work hardening, greater strength ⁽¹⁶⁾. Hot rolled products do not have the same surface characteristics as cold-rolled products ⁽¹⁷⁾. The value added by cold rolling is substantial, in the region of 25 % to 30 %.
- (36) A modern hot-rolled wide strip mill can roll to minimum thicknesses of 1,5 mm. Thinner strips and

sheets, which are used especially by the motor industry and after coating by the packaging and construction industries, require subsequent further processing in cold rolling mills, where minimum thicknesses of 0,12/0,15 mm can be achieved ⁽¹⁸⁾.

- (37) Within the segment of carbon steel flat products, a distinction can therefore be made between hot-rolled and cold-rolled flat products.

(i) Hot-rolled carbon steel flat products

- (38) Within the market for hot-rolled carbon steel flat products, the parties distinguish the following products:
- hot-rolled wide strips, that are first rolled on wide strip mills and then coiled,
 - hot-rolled sheets, of square or rectangular shape, that result from the cutting to length of strip,
 - hot-rolled narrow strip, that have a width less than 600 mm after finishing and which can be produced on specialised mills or by slitting wide strip to the desired width,
 - quarto plates, non-coiled products whose dimensions, in particular their thickness, are very different from those of all other hot-rolled carbon steel flat products.
- (39) The parties submit that there is a single relevant market for all hot-rolled carbon steel flat products, with the exception of quarto plates, which have different physical properties in terms of shape, thickness and width and are produced with different equipment and processes, and therefore constitute a separate market.
- (40) Quarto plate is plate ⁽¹⁹⁾ made on special quarto plate mills with four rolls (four high mills) which, because of its thickness, cannot be rolled up ⁽²⁰⁾. As the parties describe in the Form CO, quarto plates have specific

⁽¹³⁾ Case No IV/ECSC.1269 — Sollac/Aceralia/Solmed. Case No IV/ECSC.1243 — Krupp Hoesch/Thyssen. Case No IV/ECSC.1268 — Usinor/Cockerill Sambre. Case No IV/ECSC.1237 — Arbed/Aceralia. Case No IV/ECSC.1264 — Aceralia/Aristrain.

⁽¹⁴⁾ Case No IV/ECSC.1243 — Krupp Hoesch/Thyssen.

⁽¹⁵⁾ Case No IV/ECSC.1269 — Sollac/Aceralia/Solmed. Case No IV/ECSC.1243 — Krupp Hoesch/Thyssen. Case No IV/ECSC.1268 — Usinor/Cockerill Sambre. Case No IV/ECSC.1237 — Arbed/Aceralia. Case No IV/M.484 — Krupp/Thyssen/Riva/Falck/Tadfin/AST.

⁽¹⁶⁾ Case No IV/ECSC.1269 — Sollac/Aceralia/Solmed.

⁽¹⁷⁾ Case No IV/M.484 — Krupp/Thyssen/Riva/Falck/Tadfin/AST.

⁽¹⁸⁾ Case No IV/ECSC.1269 — Sollac/Aceralia/Solmed.

⁽¹⁹⁾ Plates, known according to their thickness as heavy plates or medium plates, are rolled square or rectangular pieces made by cutting hot-rolled wide strip. Universal plates are hot-rolled flat products cut into pieces between 150 and 1 250 mm wide and more than 4 mm thick.

⁽²⁰⁾ Case No IV/ECSC.1243 — Krupp Hoesch/Thyssen. Case No IV/ECSC.1237 — Arbed/Aceralia.

physical properties: they are not coiled and their dimensions are very different from the dimensions of all other hot-rolled carbon steel flat products: (a) their thickness can reach 400 mm, as opposed to a maximum of 25 mm for hot-rolled coils; (b) their width can reach 5 000 mm, as opposed to a maximum of 2 200 mm for hot-rolled coils. Furthermore, quarto plates are used in applications that differ from those for thin flat steel products, in particular in the industrial equipment, mechanical, energy, nuclear, chemical and petrochemical, gas treatment, shipyard, metalwork, boiler-making and tool making industries. In all these fields, quarto plates dimensions offer significant economical advantage to the steel users (compared with, for instance, narrow flat steel products). On the basis of the aforementioned considerations, the Commission concludes that quarto plates constitute a separate market.

- (41) As far as the other hot-rolled carbon steel flat products are concerned, the question arises whether hot-rolled wide strip constitutes a separate product market. Hot-rolled wide strip is strip more than 600 mm in width produced from slabs in automated hot-rolled strip mills and rolled up into coils ⁽²¹⁾. Wide strip represents approximately 82 % of the sales of all hot-rolled flat carbon steel products (excluding quarto plates). In view of the high degree of supply side substitutability between hot-rolled wide strip, narrow strip and sheets, it is concluded that all hot-rolled flat carbon steel products (excluding quarto plates) form part of the same relevant product market. Hence, unless otherwise specified, any subsequent reference in this Decision to hot-rolled flat carbon steel products is to be understood as comprising all hot-rolled flat carbon steel products excluding quarto plates (i.e., wide strip, narrow strip and sheets).

(ii) **Cold-rolled carbon steel flat products**

- (42) Cold-rolled carbon steel flat products constitute a separate product market from hot-rolled carbon steel flat products. The parties submit that within the market for cold-rolled carbon steel flat products no differentiation should be made between either coils and sheets. This submission is in line with previous Commission's Decisions ⁽²²⁾.
- (43) Further, according to Annex I to the ECSC Treaty, cold-rolled flat products less than 500 mm in width do

not come under the ECSC Treaty, but under the EC Treaty. However, against the background of present-day production processes and supply conditions, this distinction is no longer relevant when it comes to assessing mergers from a competition point of view. Cold-rolled flat products both less and more than 500 mm in width are nowadays produced on the same rolling mills. Sheets of less than 500 mm in width can, moreover, be obtained by slitting wide strip. In accordance with earlier Commission Decisions ⁽²³⁾, there can therefore be assumed to be, for the purpose of assessing the effects of the proposed concentration, uniform product markets irrespective of the products' width, not only for cold-rolled carbon steel flat products, but also for products in downstream markets resulting from further processing, such as the different types of coated flat products.

- (44) Cold-rolled carbon steel flat products are mostly intended for further processing by the producers themselves, in particular into coated products, and thus used internally. For instance, approximately 70 % to 80 % of the cold-rolled carbon steel flat products manufactured by the notifying parties is supplied within the group for further processing. The Commission has found in previous decisions that (uncoated) cold-rolled carbon steel flat products are likewise a separate market from the market for coated products.

(d) **Electrical steel sheets**

- (45) In line with a previous Commission decision ⁽²⁴⁾, the parties submit that electrical steel sheets constitute a separate product market from cold-rolled carbon steel sheets, in view of their electro-magnetic properties (conductivity and electrical resistance) and applications (the construction of transformers, electric motors, series and switching units and power plant generators).
- (46) In addition, the parties distinguish between non-grain oriented electrical steel sheets and grain oriented electrical steel sheets, due to differences both in the demand side and in the supply side. The Commission has concluded in the past that grain-oriented and non grain-oriented electrical sheets constitute separate markets ⁽²⁵⁾. Both products are pickled and cold-rolled; however, they differ in the annealing process, by which the material is set to the required electromagnetic properties. In particular, the installations needed for the manufacturing of these two types of products are very

⁽²¹⁾ Case No IV/ECSC.1243 — Krupp Hoesch/Thyssen. Case No IV/ECSC.1237 — Arbed/Aceralia. In turn, narrow strip (or band steel), including slit strip, is produced either directly in widths of less than 600 mm or by slitting hot-rolled wide strip.

⁽²²⁾ Case No IV/ECSC.1268 — Usinor/Cockerill Sambre.

⁽²³⁾ Case No IV/ECSC.1237 — Arbed/Aceralia. Case No IV/M.239 — Avesta/British Steel/NCC/AGA/Axel Johnson. Case No IV/M.484 — Krupp/Thyssen/Riva/Falck/Tadfin/AST. Case No IV/ECSC.1268 — Usinor/Cockerill Sambre.

⁽²⁴⁾ Case No IV/M.484 — Krupp/Thyssen/Riva/Falck/Tadfin/AST.

⁽²⁵⁾ Ibidem.

different, and therefore there is no supply side substitutability. Furthermore, there are demand side differences: grain oriented is used almost exclusively for large transformers while the principal uses of non-grain oriented are motors, generators and small transformers.

(e) Further processing of flat carbon steel: coated products are a separate market from uncoated products

(47) Coating is a production process that intervenes subsequently to hot-rolling or cold-rolling. In particular, it is applied to more than two thirds of all cold-rolled carbon steel flat products produced in the Community, which are provided with a coating tailored to its end use. The Commission has established that coated and uncoated cold-rolled carbon steel flat products constitute separate product markets, according to the differences that exist between their respective properties, prices and applications ⁽²⁶⁾.

(48) Uncoated cold-rolled strip has quite different characteristics from coated cold-rolled strip as regards surface finish and resistance to corrosion. Moreover, the value added by the coating is very substantial, though it varies for the various coating procedures, from [20 % to 30 %]* (hot dip galvanised sheet) to [75 % to 85 %]* (organically coated sheet), hence approximately 35 % on average ⁽²⁷⁾.

(i) The distinction between metallic coated and organic coated products

(49) As the parties explain in their notification, the corrosion-resistance of flat carbon steel can be increased by coating it with zinc, tin or another metal ⁽²⁸⁾ and/or by applying an organic topcoat ⁽²⁹⁾.

(50) The parties submit that organic coated products constitute a separate market from metallically coated

products, in view of their different characteristics and, in particular, the significantly higher price of organic coating ⁽³⁰⁾. Furthermore, the parties argue that the relevant market may be wider than organic coated steel and include a variety of competing products ⁽³¹⁾, in particular organic coated aluminium.

(51) The proposed delineation of organic and metallic coating as separate markets is in line with previous Commission's decisions ⁽³²⁾. The market investigation has not confirmed, however, the existence of a wider market comprising organic coated steel and organic coated aluminium.

(ii) Tinplate and galvanised products

(52) Metallic coated strip can be divided into two different broad classes: 1. steel for packaging (tinplate and ECCS); and 2. galvanised steel (hot-dip and electro-galvanised, including coatings of zinc alloys).

(53) These groups of products have very different prices and applications. Steel for packaging is used almost entirely for food and beverage cans. On the other hand, galvanised steel strip is widely used in the automobile, construction and engineering industries, where the zinc coating impedes corrosion of the steel substrate and thereby increases its life. These two groups of products can therefore be clearly distinguished.

(iii) Galvanised products: hot-dip galvanised and electro-galvanised

(54) There are two different production processes for galvanising: hot-dip galvanising and electro-galvanising.

(55) Hot-dip-galvanised products are obtained through dipping hot-rolled or cold-rolled steel into a bath of

⁽²⁶⁾ Case No IV/ECSC.1243 — Krupp Hoesch/Thyssen. Case No IV/ECSC.1269 — Sollac/Aceralia/Solmed. Case No IV/ECSC.1237 — Arbed/Aceralia. Case No IV/ECSC.1268 — Usinor/Cockerill Sambre.

⁽²⁷⁾ Case No IV/ECSC.1243 — Krupp Hoesch/Thyssen.

⁽²⁸⁾ Aluminium or zinc alloys (i.e., zinc/aluminium, zinc/nickel, etc).

⁽²⁹⁾ Paint, thin organic coatings (TOC), laminate film.

⁽³⁰⁾ Organic coating entails an added-value of 15 % to 35 % on the raw material used, depending on the exact application.

⁽³¹⁾ Organic coated aluminium, non-coated flat carbon steel products and various other metallic and non-metallic materials.

⁽³²⁾ Case No IV/ECSC.1268 — Usinor/Cockerill Sambre. Case No IV/ECSC.1269 — Sollac/Aceralia/Solmed.

- zinc at 460°C, coating all exposed surfaces with zinc⁽³³⁾. Electro-galvanised products, in turn, result from the application of an electrolytic coating to one or both sides of the strip, with either pure zinc or an alloy of zinc and nickel.
- (56) The parties submit that hot-dip galvanised and electro-galvanised products form part of the same market, namely that of galvanised products (though they claim that the market might be even wider if account were to be taken of products competing with metallic coated steel)⁽³⁴⁾. They argue that from a demand perspective both types of products are substitutable, and that, in particular, substitutability has been improved recently due to improvements in the appearance and performance of hot-dip galvanised products; hence, in all major applications (automotive, domestic appliances and metal furniture) both hot-dip and electro-galvanised can be used interchangeably, subject only to minor process adaptations which do not restrict substitutability. Furthermore, corrosion resistance, surface quality and prices are comparable.
- (57) The Commission has suggested in previous decisions⁽³⁵⁾ that hot-dip galvanised and electro-galvanised may constitute separate product markets, in view of their different product characteristics and prices, but has left open the precise segmentation of galvanised products.
- (58) However, the market investigation in this case has shown that due to recent improvements in hot-dip galvanised products, in particular corrosion resistance, appearance and performance, substantial differences between hot-dip and electro-galvanised characteristics do not appear to exist. Customers have largely confirmed that they regard both product categories as technically interchangeable for the majority of applications. Particularly, the automotive industry, which represents the largest customer group of both hot-dip and electro-galvanised products, uses both products in its production processes, including the manufacturing of external body parts, which in the past were exclusively made of electro-galvanised steel.
- (59) This can be illustrated by the evolution of demand for hot-dip and electro-galvanised products in the Community. For instance, in 1993, 70 % of electro-galvanised steel was sold to the automotive industry, compared to only 27 % of hot dip galvanised strip. However, by 2000, 44 % of hot-dip was used in the automobile industry. In 1999, of the total tonnage of metallic coated products used by the automotive industry, approximately 60 % was hot-dip and 40 % electro-galvanised. Table 2 analyses the evolution of demand for hot-dip and electro-galvanised steel by sectors. According to the forecasts of the industry, the use of hot-dip galvanised steel by the automotive industry will further increase in the coming years.

TABLE 2

Estimated evolution of Community demand for hot-dip and electro-galvanised steel

	Hot-dip galvanised steel				Electro-galvanised steel			
	1999		2005		1999		2005	
	Volume (thousand tonnes)	% of demand						
Automotive	[...]*	41	[...]*	[...]*	[...]*	75	[...]*	[...]*
Construction	[...]*	39	[...]*	[...]*	[...]*	11	[...]*	[...]*
Domestic appliances	[...]*	3	[...]*	[...]*	[...]*	4	[...]*	[...]*
Industrial	[...]*	10	[...]*	[...]*	[...]*	7	[...]*	[...]*
Mechanical	[...]*	7	[...]*	[...]*	[...]*	3	[...]*	[...]*
Total	13 388	100	[...]*	100	4 963	100	[...]*	100

Source: Parties.

⁽³³⁾ In some cases, the metal is then given a further treatment which converts the coating to a zinc/iron alloy (8 % to 12 % iron), facilitating welding at the customer's premises (galvannealed).

⁽³⁴⁾ Such as aluminium, plastic, composite materials, glass and even other steel products (stainless steel, cold rolled steel, organic coated).

⁽³⁵⁾ Case No IV/ECSC.1237 — Arbed/Aceralia. Case No IV/ECSC.1243 — Krupp Hoesch/Thyssen. Case No IV/ECSC.1268 — Usinor/Cockerill Sambre.

- (60) With regard to prices of hot-dip galvanised steel and electro-galvanised steel, the market investigation shows that prices largely depend on the particular specifications (in particular the thickness and chemical composition of the coating, and thickness, width, chemical specification rigidity etc., of the steel support) and applications of either product. Therefore, it is difficult to determine comparable average or standard prices representative of the whole range of either hot-dip and electro-galvanised products.
- (61) In any event, according to official price-lists of the main producers of galvanised sheet (see Table 3) the average price differentials in the Community between these products are below 5 %. The market investigation has confirmed that the range of price differentials between hot-dip and electro-galvanised are not substantial.

TABLE 3

Price differences between hot dip and electro-galvanised by Member States

	Germany	Belgium	France	Spain	Italy	UK	Austria	Average
Hot-dip	525	600	600	550	550	877	575	611
Electro	500	600	600	550	525	794	550	588
Difference	25	0	0	0	25	83	25	23
	5 %	0 %	0 %	0 %	5 %	10 %	5 %	4 %

Source: Official price lists of producers located in the countries mentioned.

- (62) Accordingly, the Commission has concluded that the relevant product market encompasses all galvanised products, namely hot-dip galvanised steel and electro-galvanised steel.
- (f) **Steel for packaging: the distinction between steel for beverage packaging and steel for non-beverage packaging**
- (63) Steel for packaging consists of very thin (0,13 to 0,49 mm) flat carbon steel coils or sheets which are electrolytically coated with a fine layer of tin (in the case of tinplate) or chromium (in the case of electrolytic chromium coated steel (ECCS) or tin-free steel (TFS)). Two distinct types of steel for packaging can be distinguished according to their applications: steel for beverage packaging and steel for non-beverage packaging. This distinction is based on the following factors: 1. the quality standards for beverage cans are much higher than those for non-beverage packaging (tolerance to stresses during processing, quality of metal in relation to porosity, etc.); 2. the tinning lines have to be wider to allow for the optimisation of can production lines (1,2 m instead of a maximum 1,0 m), and 3. steel intended for beverage must be de-gassed under vacuum in order to produce ultra-low carbon steel. While production routes for the manufacture of steel packaging for beverage cans could theoretically be used for the manufacture of steel cans for non-beverage packaging, it would be uneconomic to do so.
- (64) The parties submit that the relevant product market for metal for beverage cans should include not only steel but also aluminium, since both materials are used to produce beverage cans. According to the parties, European customers have a free choice as to whether to use steel or aluminium for cans since, while aluminium is more expensive as a raw material, less processing is required to bring it to beverage-can grade. Prices of aluminium and steel for packaging would therefore interact. Moreover, while traditional can-making production-lines are configured to using either aluminium or steel for packaging, they can be converted to use the other material (the parties calculate a cost of EUR [...] million from steel to aluminium and of EUR [...] million from aluminium to steel); furthermore, modern installations consist of swing-lines which enable steel for packaging and aluminium to be used interchangeably. Likewise, the parties submit that the customers, being large concentrated beverage can producers, have sufficient numbers of steel and aluminium dedicated lines to quickly adapt to changes in demand and switch between the two materials.
- (65) The Commission has concluded in the past that steel for packaging is a separate product market⁽³⁶⁾. However, the Commission has not determined yet whether the market should be segmented more narrowly, namely whether steel (or metal) for beverage packaging and for non beverage packaging constitute separate markets. The exact delineation may also be left open for the purposes of the assessment of the notified operation, since it does not affect substantially the competitive assessment.

⁽³⁶⁾ Case No IV/ECSC.1268 — Usinor/Cockerill Sambre.

(66) As regards the submission of the parties that steel and aluminium would constitute part of the same relevant market for beverage packaging, the Commission concluded recently that steel and aluminium for packaging in general constitute separate relevant markets⁽³⁷⁾. While the end products are similar in both cases, there are significant differences in the both the prices of the two materials and the price developments. The Commission's market investigation in this case does not confirm a combined aluminium and steel for beverage cans market.

(67) Finally, the parties submit that in addition to aluminium and steel the market for beverage packaging could be even wider, including competing materials, such as plastic and glass. These competing materials do not constitute part of the same market as either steel or aluminium on the basis of the totally different characteristics of the materials, the very different equipment needed to fill glass or plastic bottles and their different prices.

(g) *Stainless steel flat products: the distinction between hot-rolled and cold-rolled products*

(68) Stainless steel can be distinguished from carbon steel and from alloy steels by its physical and chemical characteristics, particularly by its resistance to corrosion and high temperatures. This makes it uniquely suitable for certain applications in process engineering, automobile engineering, hygiene products and cutlery, among others⁽³⁸⁾.

(69) In previous Decisions, the Commission has identified separate relevant product markets for hot-rolled stainless flat products and cold-rolled stainless flat products⁽³⁹⁾. The parties point out that the differences between hot-rolled and cold-rolled stainless steel products tend to fade due to technical evolutions undertaken by the overall stainless steel business, but they recognise that the zone of overlap between hot-rolled and cold-rolled stainless steel still remains limited to date.

(i) *Hot-rolled stainless steel flat products*

(70) As in the case of hot-rolled flat carbon steel products, the Commission has concluded that, in view of the high degree of supply side substitutability between hot-rolled

wide strip, narrow strip and sheets, all hot-rolled flat stainless steel products (excluding quarto plates) form part of the same relevant product market.

(ii) *Cold-rolled stainless steel flat products*

(71) Cold-rolled stainless flat products (strip and sheet) are made by cold-rolling hot-rolled strip. They constitute a separate relevant product market because they differ from hot-rolled flat products in terms of product characteristics (particularly the surface finish), uses and prices⁽⁴⁰⁾. Cold-rolled stainless flat products are used in a large variety of industries with the following requirements⁽⁴¹⁾: 1. resistance to heat, rust and acids (corrosion); 2. the basic structural quality of steel such as deep drawing suitability/weldability; and 3. a surface which is highly developed in order to provide for smoothness and good appearance.

(72) In addition, cold rolled strip below 500 mm falls under the EC Treaty, while cold rolled strip above 500 mm. falls under the ECSC Treaty⁽⁴²⁾. This distinction is however no longer meaningful as modern cold-rolling mills are capable of producing a wide range of widths both above and below 500 mm, and narrower widths can likewise be obtained by slitting wider material. The Commission therefore considers that the distinction is artificial and that all cold-rolled stainless steel strip belongs to a single market⁽⁴³⁾.

(h) *Conclusions*

(73) The Commission therefore concludes that the following categories constitute the relevant product markets which will have to be taken into account for the competitive assessment of the notified operation:

- (1) hot-rolled flat carbon steel products;
- (2) quarto plates;
- (3) cold-rolled carbon steel flat products;
- (4) non grain-oriented electrical steel sheets;
- (5) galvanised steel;

⁽³⁷⁾ Case No COMP/M.1663 — Alcan/Alussuisse.

⁽³⁸⁾ Case No COMP/ECSC.1342 — Outokumpu/Avesta Sheffield.

⁽³⁹⁾ Case No IV/M.239 — Avesta I. Case No IV/M.484 — Krupp/Thyssen/Riva/Falck/Tadfin/AST. Case No COMP/ECSC.1342 — Outokumpu/Avesta Sheffield.

⁽⁴⁰⁾ Case No COMP/ECSC.1342 — Outokumpu/Avesta Sheffield. Case No IV/M.239 — Avesta/British Steel/NCC/AGA/Axel Johnson.

⁽⁴¹⁾ Case No IV/M.484 — Krupp/Thyssen/Riva/Falck/Tadfin/AST.

⁽⁴²⁾ Annex I of the ECSC Treaty.

⁽⁴³⁾ Case No COMP/ECSC.1342 — Outokumpu/Avesta Sheffield. Case No IV/M.239 — Avesta/British Steel/NCC/AGA/Axel Johnson. Case No IV/M.484 — Krupp/Thyssen/Riva/Falck/Tadfin/AST. Case No IV/M.1203 — Usinor/Finaverdi.

- (6) organic coated carbon steel;
- (7) steel for packaging or, alternatively, separate markets for either (a) steel for beverage packaging or (b) steel for non-beverage packaging;
- (8) hot-rolled stainless steel flat products;
- (9) cold-rolled stainless steel flat products.

3. STEEL DISTRIBUTION

(a) *The distinction between steel distribution and production and direct sales of steel*

- (74) The parties consider that steel distribution is a separate market from production of steel and from direct sales by steel producers to consumers. The Commission has held in previous cases that steel distribution activities constitute a distinct product market⁽⁴⁴⁾. Steel products' distribution can be differentiated from the production and direct sales of steel products by a number of factors⁽⁴⁵⁾:
- (1) the diversity of its customers: customers for steel products through distribution channels are normally different customers, with different needs, when compared to the types of customers for direct sales;
 - (2) the smaller size of orders: while sales from mills are typically measured in tens of tonnes, steel service centres' sales are measured in tonnes and stockholder sales are typically measured in hundreds of kilograms;
 - (3) the ability of distributors to respond rapidly to customer requirements: delivery times from steel mills are usually measured in weeks if not months, while stockholders work in hours or days; steel service centres offer normally on-time deliveries, with commitment on a day or even sometimes a time slot;

- (4) the local nature of its business: distribution outlets generally serve customers within a limited distance from their location; and
- (5) the large number of companies involved in the business: from integrated distributors owned by steel companies to small independent firms.

- (75) Furthermore, the Commission has concluded that distribution operations have full function characteristics and are not sales agencies⁽⁴⁶⁾, which is also evidenced by the fact that there is a large number of independent (non-integrated) steel distributors operating in the Community. In effect, although many steel producers have wholly or partially owned steel distribution operations, there is an independent sector consisting of a large number of companies of varying size and financial strength ranging from small family companies to subsidiaries of large industrial companies⁽⁴⁷⁾.

(b) *The distinction among different steel distribution channels*

- (76) The parties submit that steel distribution shall be further subdivided in three different markets: 1. steel service centres; 2. stockholding centres; and 3. oxycutting centres. These market definitions are in line with previous Commission decisions⁽⁴⁸⁾ and have been largely confirmed by the market investigation. These distributions channels will be further subdivided according to the groups of products sold.

(i) **Steel service centres**

- (77) Steel service centres purchase strip mill products from the steel producers and afterwards slit and cut the material to customers' requirements⁽⁴⁹⁾. Their customers include major consumers, such as the automobile and white goods manufacturers, stockholders and customers of all sizes.
- (78) Steel service centres are only active in the sector of flat steel products, both carbon and stainless. In line with previous Commission Decisions⁽⁵⁰⁾, this Decision will differentiate between the markets for the distribution of

⁽⁴⁴⁾ Case No IV/ECSC.1268 — Usinor/Cockerill Sambre. Case No IV/ECSC.1264 — Aceralia/Aristrain. Case No IV/ECSC.1243 — Krupp Hoesch/Thyssen. Case No IV/ECSC.1237 — Arbed/Aceralia. Case No COMP/ECSC.1342 — Outokumpu/Avesta Sheffield. Case No IV/M.73 — Usinor/ASD. Case No IV/M.239 — Avesta/British Steel/NCC/AGA/Axel Johnson. Case No IV/M.0503 — British Steel/Svensk Stal/NSD. Case No IV/M.578 — Hoogovens/Klöckner & Co. Case No IV/M.971 — Klöckner/Comercial de Laminados. Case No IV/M.918 — Klöckner/ODS. Case No IV/M.484 — Krupp/Thyssen/Riva/Falck/Tadfin/AST. Case No IV/M.1329 — Usinor/Cockerill Sambre. Case No IV/M.504 — Avesta (III).

⁽⁴⁵⁾ Case No IV/M.971 — Klöckner/Comercial de Laminados. Case No IV/M.918 — Klöckner/ODS.

⁽⁴⁶⁾ Case No IV/M.578 — Hoogovens/Klöckner & Co.

⁽⁴⁷⁾ Case No IV/M.971 — Klöckner/Comercial de Laminados. Case No IV/M.918 — Klöckner/ODS.

⁽⁴⁸⁾ Case No IV/M.918 — Klöckner/ODS. Case No IV/M.1329 — Usinor/Cockerill Sambre. Case No IV/M.0971 — Klöckner/Comercial de Laminados.

⁽⁴⁹⁾ Case No IV/M.971 — Klöckner/Comercial de Laminados.

⁽⁵⁰⁾ Case No IV/ECSC.1268 — Usinor/Cockerill Sambre. The distribution of stainless steel products has been analysed by the Commission, *inter alia*, in the following Decisions: Case No COMP/ECSC.1342 — Outokumpu/Avesta Sheffield; Case IV/M.504 — Avesta (III); Case No. IV/M.484 — Krupp/Thyssen/Riva/Falck/Tadfin/AST; Case No IV/M.239 — Avesta/British Steel/NCC/AGA/Axel Johnson.

carbon steel and stainless steel products. This distinction has been confirmed by the notifying parties, which have submitted that the distribution channels for carbon and stainless flat steel products are different. The parties' activities overlap only with regards to carbon steel products and not for stainless products (except in Germany, where their combined market share is [$< 15\%$]*).

(ii) Stockholding centres

(79) Stockholders perform the traditional wholesaling function of buying in bulk from the manufacturers and reselling in smaller quantities⁽⁵¹⁾. In particular, stockholding activity consists of holding a wide variety of steel products at convenient locations to supply the needs mainly, but not exclusively, of small and medium sized clients, with quantities of steel that are not large enough to warrant dealing directly with the steel producers or with steel service centres⁽⁵²⁾. Furthermore, stockists have steel available for direct delivery and can therefore provide a service not available from steel producers. Stockholders have also developed their in-house processing facilities in order to add value and improve their service to customers⁽⁵³⁾. Such processing includes cutting to length, slitting, shearing and polishing.

(80) Stockholding activities cover almost the full range of steel products⁽⁵⁴⁾. As in the case of steel service centres, a segmentation will be made between the distribution of carbon steel and stainless steel products, the parties' overlapping operations relating only to carbon steel products. Furthermore, for the purposes of the assessment, this Decision will distinguish between the two product categories of carbon steel products, namely, (a) flat products and (b) long products. This distinction by types of products distributed is in line with a previous Commission Decision⁽⁵⁵⁾.

(81) In their reply to the Statement of Objections, the parties contest the segmentation of the relevant product market into the stockholding of flat carbon products and long carbon products. The parties submit that the relevant market is the overall market for stockholding, without distinction between flat and long products, on the basis of the following arguments: 1. stockholding is a customer-oriented service, characterised by a very

fragmented customer base, and therefore, in order to answer the demand of their customers, many steel stockholders would have to carry most steel product groups; and 2. there is a high level of supply-side substitutability and no barriers preventing a stockholder involved in flat products from supplying long products and vice-versa.

(82) Notwithstanding the parties' submission, in particular the fact that a number of stockholders are active both in the market for flat carbon products and in the market for long carbon products, the delineation of the relevant product markets must take into account the different characteristics of demand for every type of product and the differences between their average prices. In particular, flat carbon products have different customers from those of long carbon products, and also have particular characteristics regarding their distribution channels (steel service centres only deal with flat products and not with long products).

(83) Accordingly, the Commission considers as relevant the following product markets: 1. distribution of flat carbon steel products through stockholding activities; 2. distribution of long carbon steel products through stockholding activities; and 3. distribution of stainless steel products through stockholding activities.

(iii) Oxycutting centres

(84) Oxycutting centres handle a particular product, quarto plates with a thickness of 8 mm to 600 mm, which requires a specific finishing tool (oxyhydrogen blowtorch) that is very precise and powerful⁽⁵⁶⁾. Oxycutting centres work in close relation with their clients and deal with small quantities of steel which are cut to the customers' requirements.

(85) The Commission has concluded in the past that oxycutting activities constitute a separate market⁽⁵⁷⁾. Moreover, the market investigation has largely confirmed this conclusion.

(c) Conclusion

(86) The Commission therefore concludes that the following categories constitute the relevant product markets which will have to be taken into account for the competitive assessment of the notified operation:

(1) distribution of carbon steel flat products through steel service centres;

⁽⁵¹⁾ Case No IV/M.503 — British Steel/Svensk Stal/NSD.

⁽⁵²⁾ Case No IV/M.971 — Klöckner/Comercial de Laminados. Case No IV/M.918 — Klöckner/ODS.

⁽⁵³⁾ Case No IV/M.239 — Avesta/British Steel/NCC/AGA/Axel Johnson.

⁽⁵⁴⁾ Case No IV/M.73 — Usinor/ASD.

⁽⁵⁵⁾ Case No IV/ECSC.1268 — Usinor/Cockerill Sambre.

⁽⁵⁶⁾ Case No IV/M.1329 — Usinor/Cockerill Sambre.

⁽⁵⁷⁾ Case No IV/M.1329 — Usinor/Cockerill Sambre.

- (2) distribution of stainless steel flat products through steel service centres,
- (3) distribution of flat carbon steel products through stockholding activities,
- (4) distribution of long carbon steel products through stockholding activities,
- (5) distribution of stainless steel products through stockholding activities,
- (6) distribution of quarto plates through oxycutting centres.

C. THE RELEVANT GEOGRAPHIC MARKETS

1. STEEL PRODUCTS

(a) *Hot-rolled carbon steel flat products*

- (87) The parties submit that the relevant geographic market for all hot-rolled carbon steel flat products (including quarto plates) is at least a Community-wide market, but they suggest that it might even be wider.
- (88) In previous decisions the Commission found that the relevant market for hot-rolled carbon steel flat products comprises at least the territory of the Community⁽⁵⁸⁾. Though in the past the production capacities for hot-rolled steel products belonged in most Member States to one (national) steel undertaking, which accounted as a rule for the highest shares of supply in its home market, steel producers have long penetrated their competitors' home markets, achieving sizeable market shares⁽⁵⁹⁾. Nowadays, the big steel producers are active in almost every Member State both through direct supplies to final customers and through affiliated distribution centres. Furthermore, transport costs within the Community are not significant, custom or other barriers to entry do not exist and customer preferences are not an important factor since the majority of the products are homogeneous (commodities).
- (89) The exact market delineation can be left open for the purposes of this Decision, since even on the basis of the narrowest geographic market definition the proposed concentration does not raise serious competition concerns in this market.

⁽⁵⁸⁾ Case No IV/ECSC.1264 — Aceralia/Arstrain. Case No IV/M.1329 — Usinor/Cockerill Sambre. Case No IV/ECSC.1243 — Krupp Hoesch/Thyssen.

⁽⁵⁹⁾ Case No IV/ECSC.1243 — Krupp Hoesch/Thyssen.

(b) *Cold-rolled carbon steel flat products*

- (90) The parties claim that the relevant geographic market for the production of cold-rolled carbon steel flat products is at least Western Europe, that is the Community and EFTA, again suggesting that it could even be wider. The parties point to the level of imports of cold-rolled carbon steel flat products in 2000 (almost 18 % according to the parties) and to the findings of a report provided by the parties' economic consultants, which purports to show, using econometric analysis, that the relative price of imports significantly affects the import penetration in the Community.
- (91) In previous cases, the Commission has determined that the relevant geographical market for cold-rolled carbon steel flat products was at least Western Europe, that is the Community and EFTA⁽⁶⁰⁾. The enquiries in the present case tend to indicate that the dimension of the market is not wider than Western Europe. In any event, the precise delineation of the market can be left open, since the proposed concentration will not give the merging entity the power to hinder effective competition or to evade the rules of competition instituted under the ECSC Treaty irrespective of the exact definition of the geographic market.

(c) *Non grain-oriented electrical steel sheets*

- (92) The parties submit that the relevant geographic market for non-grain oriented electrical steel sheets is Western Europe. The proposed delineation is in line with previous Commission's Decisions⁽⁶¹⁾ and has been largely confirmed by the market investigation.

(d) *Coated carbon steel products*

- (93) The parties submit that the relevant geographic market for galvanised and organic coated steel is at least Community-wide, if not broader. The Commission has concluded in the past that the markets for hot-dip galvanised steel and other coated products are Community-wide⁽⁶²⁾. Transport costs within the Community are not significant (for instance, they represent less than 5 % of the end value of organic

⁽⁶⁰⁾ Due to the lack of figures about Western Europe, the analysis has been conducted using EU data. This would not anyway change the result of the investigation, given the low impact of EFTA countries on the total Western European market.

⁽⁶¹⁾ Case No IV/M.484 — Krupp/Thyssen/Riva/Falck/Tadfin/AST.

⁽⁶²⁾ Case No IV/ECSC.1269 — Sollac/Aceralia/Solmed. Case No IV/CECA.1268 — Usinor/Cockerill Sambre. Case No IV/ECSC.1237 — Arbed/Aceralia.

coated steel), and a substantial part of galvanised coated steel (40 % to 50 %) and organic coated steel (over 30 %) is traded cross-border within the EU.

- (94) The relevant geographic market does not however extend beyond the Community. The parties have stated that imports from third countries have increased during recent years. Nevertheless, third countries' imports still represent relatively low volumes and vary substantially between the different products: 6 % to 9 % for galvanised steel and 6 % for organic coated steel in 1999-2000. Further, the market investigation has indicated that a number of customers believe that steel producers outside the Community are not currently in a position to meet the requirements of customers in the Community in terms of quality, reliability and service. The Commission therefore concludes, in line with its previous decisions, that the markets for coated carbon steel products comprise the territory of the Community.

(e) *Steel for packaging*

- (95) The parties submit that the relevant geographic market for steel for packaging is at least Community-wide. The Commission has concluded in the past that the market has a Community dimension⁽⁶³⁾. Intra-Community trade flows are important (around 40 %) and transport cost are not particularly high (3 % to 4 %).
- (96) The market investigation has confirmed likewise that the relevant market is the Community. Imports in 2000 represented around 10 % for all steel for packaging, the vast majority of which consisted of steel for non-beverage packaging (there were virtually no imports of steel for beverage packaging).

(f) *Stainless steel flat products*

- (97) The parties submit that the relevant geographic market for hot-rolled and cold-rolled stainless steel flat products is at least Western Europe, i.e., that comprises the Community and EFTA. However, they claim that the market is developing into a world-wide market, due to the importance of transcontinental flows of trade, the levelling of trade and competition conditions world-wide, the existence of a global trend with respect to prices and the absence of significant transport costs.
- (98) The Commission has defined as relevant in the past the market comprising Western Europe⁽⁶⁴⁾. While imports from third countries have increased in recent years, they

still represent less than 8 % for hot-rolled stainless steel flat products and 6 % for cold-rolled stainless steel flat products. In any event, the question may be left open, since the operation does not give rise to serious competition concerns even on the basis of the narrower possible market definition.

2. STEEL DISTRIBUTION

- (99) The parties submit that the geographic markets for steel distribution are national or regional, and that they have to be determined on a case by case basis, taking into account, *inter alia*, the following factors: 1. value of the material handled; 2. value added by the relevant service; 3. location of competitors; 4. delivery time; and 5. relevant transportation costs.

- (100) In particular, the parties consider as relevant markets for the purposes of this operation:

- (1) France;
- (2) Benelux and the neighbouring north-western part of Germany (North Rhineland-Westphalia);
- (3) Spain and Portugal; and
- (4) the United Kingdom and Ireland.

- (101) In previous decisions⁽⁶⁵⁾, the Commission has concluded that the geographic area serviced by an individual stockholding depot is determined by transport costs and delivery times. The value added by steel distribution operations is comparatively low, so transport costs are an important constraint on the ability of a distribution operation to compete over long distances⁽⁶⁶⁾. In particular, the market investigation shows that distribution outlets generally serve customers within a radius of approximately 200 to 250 kms. Distribution is therefore essentially a regional business. Whether this region includes one or more Member States depends upon a number of factors, including the size of the Member State, the type and value of the products sold and the location of competitors⁽⁶⁷⁾.

- (102) Hence, the Commission has established in previous decisions that the activities of steel distributors are normally confined to an individual member State and

⁽⁶³⁾ Case No IV/CECA.1268 — Usinor/Cockerill Sambre.

⁽⁶⁴⁾ Case No IV/M.484 — Krupp/Thyssen/Riva/Falck/Tadfin/AST. Case No IV/M.239 — Avesta/British Steel/NCC/AGA/Axel Johnson.

⁽⁶⁵⁾ Case IV/M.503 — British Steel/Svensk Stal/NSD.

⁽⁶⁶⁾ Case No IV/M.760 — Klöckner/ARUS.

⁽⁶⁷⁾ Case No IV/M.0918 — Klöckner/ODS.

cross-border transactions by stockholders, steel service centres and oxycutting centres are limited⁽⁶⁸⁾. The Commission's investigation in this case shows that there exist some cross-border flows between neighbouring areas, but a large number of sales are made in the country of location of both the distribution centre and the customer.

(103) As the parties set out in the Form CO, France has already been considered the relevant geographic market for steel distribution by steel service centres and stockholding centres⁽⁶⁹⁾ and oxycutting centres⁽⁷⁰⁾. The market investigation has confirmed that there exist only limited cross-border sales between France and its neighbouring countries.

(104) The parties consider as a relevant geographic market the area comprising the Benelux and the neighbouring north western part of Germany (North Rhineland-Westphalia), on the basis of 1. the absence of trade barriers; 2. the similarity of prices charged within the region, and 3. the existence of significant cross-border flows of products. In the past, the Commission has identified as relevant the market comprising the Netherlands, Belgium and the north-western area of Germany⁽⁷¹⁾. The market investigation has confirmed the existence of important cross border trade flows in the considered area. In particular, the different distribution networks supply to customers in the area on the basis of the location of their distribution outlets. For instance, the parties have concentrated their principal steel service centres in this area in Belgium, and from there they can effectively and economically supply to customers in Luxembourg, the Netherlands and the relevant part of Germany. In effect, a significant proportion of sales made by the parties' Belgian steel service centres was made to customers located in the aforementioned countries. Furthermore, with regards to stockholding activities, [20 % to 30 %]* of the parties' sales to Belgian customers were made by their Dutch stockholders, while [30 % to 40 %]* of stockholding sales to Dutch customers were made by the parties' Belgian stockholders; on the other hand, [40 % to 50 %]* of the parties' stockholding sales to North Rhineland-Westphalia were made by Benelux stockholders. Finally, the market investigation confirms that prices charged throughout this region are very similar.

(105) In turn, the parties submit that Spain and Portugal together constitute a relevant geographic market. The market investigation, has confirmed the existence of cross border sales, normally from Spain into Portugal.

The relevant geographic market appears therefore to be the Iberian Peninsula. In any event, the exact delineation of the relevant geographic market (i.e., the existence either of a single market for these two countries or rather of separate markets) can be left open, since the competitive concerns raised by the assessment of the notified operation would remain irrespective of the existing alternative geographic definitions.

(106) Finally, the parties submit that the United Kingdom and Ireland constitute a single relevant geographic market. Transportation costs, which are an important constraint for steel service centres, would substantially limit imports from outside this area. The exact delineation of the relevant geographic market can, however, also be left open since under any alternative definition (i.e., separate national markets for the United Kingdom and Ireland) the operation does not raise competitive concerns.

(107) The Commission therefore concludes that the relevant geographic markets for the assessment of the notified operation are:

- (1) France;
- (2) Benelux and the neighbouring north-western part of Germany (North Rhineland-Westphalia);
- (3) the area comprising Spain and Portugal or, alternatively each country as separate relevant markets; and
- (4) the area comprising the United Kingdom and Ireland or, alternatively, each country as separate relevant markets.

D. COMPETITIVE ASSESSMENT

1. STEEL PRODUCTS

1. *Hot-rolled carbon steel flat products*

(108) As mentioned in the section on product market definition, only a limited part of the hot-rolled flat carbon steel produced is sold for use as such: more than half of the production of hot-rolled carbon steel is further processed by cold-rolling. As is shown by Table 4, the production of hot-rolled in the Community amounts approximately to 75 million tonnes of which only 29 million tonnes is sold in the form of hot-rolled wide strip, hot-rolled sheets or hot-rolled narrow strip (quarto plates will be dealt with separately).

⁽⁶⁸⁾ Case No IV/M.760 — Klöckner/ARUS. Case No IV/M.1329 — Usinor/Cockerill Sambre.

⁽⁶⁹⁾ Case No IV/CECA.1268 — Usinor/Cockerill Sambre. Case No IV/M.1329 — Usinor/Cockerill Sambre.

⁽⁷⁰⁾ Case No IV/M.1329 — Usinor/Cockerill Sambre.

⁽⁷¹⁾ Case IV/M.578 — Hoogovens/Klockner.

TABLE 4
Production and sales of hot-rolled flat carbon in the
Community

(1 000 tonnes)

Year	Total production	Total sales
2000	NA	29 269
1999	74 934	29 064
1998	73 751	28 457
1997	74 746	27 105

Source: Parties.

- (109) Newco will have an important share of the production capacity of hot-rolled in the Community ([35 % to 40 %]* in 1997-1999). However, due to its integrated nature, a substantial part of this production is used in-house in downstream production.

Market structure

- (110) On the basis of the narrowest possible definition of the relevant market for hot-rolled carbon steel flat products, namely a Community-wide market, the parties combined market share both in terms of total sales and merchant sales (sales to third parties) have accounted for between [25 % to 35 %]* during the years 1997-2000 (see Table 5).

TABLE 5
Parties' combined sales of hot-rolled carbon steel flat
products

	Total sales		Merchant sales	
	Thou- sand tonnes	%	Thou- sand tonnes	%
2000	[...]*	[25—30]*	[...]*	NA
1999	[...]*	[30—35]*	[...]*	[25—30]*
1998	[...]*	[25—30]*	[...]*	[25—30]*
1997	[...]*	[25—30]*	[...]*	[25—30]*

Source: Parties

- (111) In particular, the Community market for hot-rolled flat products totalled 29,2 million tonnes in 2000, with Usinor's total sales amounting to [...]* million tonnes ([15 % to 20 %]* of the market) and Arbed/Aceralia's to [...]* million ([10 % to 15 %]*). The combined figure ([...]* million tonnes) represents [25 % to 30 %]* of total sales in the Community in 2000. In 1999, the parties' combined share of the Community market in terms of total sales amounted to [30 % to 35 %]*.

- (112) As far as merchant sales are concerned, Usinor totalled [...]* million in 2000 while Arbed/Aceralia accounted for [...]* million. As is clear from Table 6, in 1999, the notifying parties' merchant sales totalled [...]* and [...]* million tonnes respectively, which represents a combined market share of [25 % to 30 %]* ([10 % to 15 %]* + [10 % to 15 %]*).

TABLE 6
Share of Community sales of hot-rolled carbon steel flat
products in 1999

Company	Total sales		Merchant sales	
	Thou- sand tonnes	%	Thou- sand tonnes	%
Usinor	[...]*	[15—20]*	[...]*	[10—15]*
Arbed/Aceralia	[...]*	[10—15]*	[...]*	[10—15]*
Newco	[...]*	[30—35]*	[...]*	[25—30]*
Corus	[...]*	[10—15]*	[...]*	[10—15]*
TKS	[...]*	[10—15]*	[...]*	[15—20]*
Riva	[...]*	[< 10]*	[...]*	[< 10]*
Voest-Alpine	[...]*	[< 5]*	[...]*	[< 40]*
Salzgitter	[...]*	[< 5]*		
SSAB	[...]*	[< 5]*		
Rautaruukki	[...]*	[< 5]*		
Others	[...]*	[< 5]*		
Third country imports	4 009	13,8		
Total	29 064	100	[...]*	100

Source: Parties.

- (113) The three main competitors of Newco in the market for hot-rolled carbon steel flat products are Corus (market share of [10 % to 15 %]* in total sales in 1999 and [10 % to 15 %]* in merchant sales in the said year), TKS ([10 % to 15 %]* and [15 % to 20 %]* respectively) and Riva (< 10 % and < 10 %). The second-tier European producers are active as well in this market: Voest-Alpine (< 5 % in total sales), Salzgitter (< 5 %), SSAB (< 5 %) and Rautaruukki (< 5 %). Imports from third countries have increased during the last years, representing around [15 % to 20 %]* in 2000.

- (114) This market structure does not give rise to serious competition concerns after the merger either of 1. Newco unilaterally hindering effective competition or evading competition rules or 2. parallel anticompetitive behaviour by the main producers. In particular, Newco is not likely to be in a position to raise prices unilaterally across the whole range of hot-rolled flat products.

Imports

- (115) The market for hot-rolled carbon steel is characterised by a high level of imports: 16,3 % in 2000, 13,8 % in 1999 and 17,5 % in 1998. The vast majority of hot-rolled carbon steel consumed in the EEA is commodity-grade steel; therefore, imports from third countries do not appear to suffer from quality disadvantages.

Conclusion

- (116) In view of those considerations, the Commission has concluded that the notified operation will not give the parties the power to hinder effective competition or to evade the rules of competition instituted under the ECSC Treaty with regard to the market for hot-rolled carbon steel flat products.

2. Quarto plates

Market structure

- (117) In 2000 the total market for quarto plates totalled 7.8 million tonnes. Usinor's share in terms of total sales (including captive sales) amounted to [...] million tonnes ([15 % to 20 %]*) in 2000. In the same year, Arbed/Aceralia's share was [...] million tonnes ([5 % to 10 %]*) giving a combined market share of [20 % to 25 %]*. This represents a slight increase on the combined market share from [20 % to 25 %]* in 1999. As is clear from Table 7, the parties' share of the merchant market (sales to third parties) amounted to [20 % to 25 %]* in 1999 (Usinor: [15 % to 20 %]*; Arbed/Aceralia: [5 % to 10 %]*), which approximately corresponds to the market share in total sales of that year ([20 % to 25 %]*).

TABLE 7

Parties' combined sales of quarto plates

	Total sales		Merchant sales	
	Thou-sand tonnes	%	Thou-sand tonnes	%
2000	[...]*	[20—25]*	[...]*	NA
1999	[...]*	[20—25]*	[...]*	[20—25]*
1998	[...]*	[15—20]*	[...]*	[20—25]*
1997	[...]*	[20—25]*	[...]*	[20—25]*

Source: Parties.

- (118) Corus held a market share of [5 % to 10 %]* in terms of total sales in 1999, Rautaruuki [5 % to 10 %]*, Riva [5 % to 10 %]*, Salzgitter [5 % to 10 %]* and TKS [5 % to 10 %]*. Although there is a considerable distance between Newco and its competitors, the total amount of Newcòs market share is still moderate covering only about one-fifth of the market.

Capacity utilisation

- (119) The Community capacity utilisation rate in 1999 was 68 %. This suggests that competitors would also have enough spare capacity to increase their production and sales should Newco decide to raise prices unilaterally. They can therefore act as credible alternative suppliers thus constraining Newcòs market behaviour.

Market entries

- (120) The parties have identified three new entrants to the market in the last five years: (a) Vitkovice, a Czech hot-roller, as an importer; (b) Dufenco, with a planned capacity of 950 000 tonnes; and (c) Marcegaglia.

Imports

- (121) Import levels in this market represented 14,6 % of sales in 2000 and 19,5 % in 1999. These comparatively high penetration rates further decreases the scope for Newco to act independently of its competitors.

Conclusion

- (122) On the basis of that analysis, the Commission concludes that the notified operation will not give the parties the power to hinder effective competition or to evade the rules of competition instituted under the ECSC Treaty in the market for quarto plates.

3. Cold-rolled carbon steel flat products

- (123) In a previous section (recitals 90 and 91), the exact geographic market definition for cold-rolled carbon steel flat products was left open, indicating that the narrowest possible definition was Western Europe. For the purposes of the assessment, figures for the Community will be used, since exhaustive data regarding an overall Western European market is not available. In any event, the global assessment would not change if the figures for Western Europe were considered, since the weight of the other countries (Norway, Switzerland, Liechtenstein, Iceland) is so small in relative terms that the overall Western European situation would not be substantially different from that of the Community.

- (124) In 2000, the Community market for cold-rolled flat products totalled 13,1 million tonnes. Usinor's total sales amounted to [...] million tonnes ([15 % to 20 %]* of the market) and Arbed/Aceralia's to [...] million ([15 % to 20 %]*). The combined figure ([...]* million tonnes) represented [35 % to 40 %]* of total sales in the Community in 2000. In 1999, the parties' combined

share of the Community market in terms of total sales amounted to 40 % (see Table 8).

TABLE 8

Parties' combined sales of cold-rolled carbon steel flat products

	Total sales		Merchant sales	
	Thou- sand tonnes	%	Thou- sand tonnes	%
2000	[...]*	[35—40]*	[...]*	[...]*
1999	[...]*	[35—40]*	[...]*	[35—40]*
1998	[...]*	[35—40]*	[...]*	[35—40]*
1997	[...]*	[40—45]*	[...]*	[40—45]*

Source: Parties.

(125) Approximately [...]* tonnes of the referred [...]* million of total sales were sold to other companies within the Usinor and Arbed's groups. Newco's market share in terms of merchant sales (sales to third parties) was [35 % to 40 %]* in 1999. Table 9 illustrates the parties' and competitors' sales and market shares regarding either total sales and the merchant market in 1999.

TABLE 9

Share of Community sales of cold-rolled carbon steel flat products in 1999

Company	Total sales		Merchant sales	
	Thou- sand tonnes	%	Thou- sand tonnes	%
Usinor	[...]*	[15—20]*	[...]*	[15—20]*
Arbed/Aceralia	[...]*	[20—25]*	[...]*	[20—25]*
Newco	[...]*	[35—40]*	[...]*	[35—40]*
Corus	[...]*	[10—15]*	[...]*	[10—15]*
TKS	[...]*	[10—15]*	[...]*	[10—15]*
Riva	[...]*	[10—15]*	[...]*	[10—15]*
Voest-Alpine	[...]*	< 5	[...]*	[20—25]*
SSAB	[...]*	< 5		
Salzgitter	[...]*	< 5		
Others	[...]*	[5—10]*		
Third country imports	1 304	10,7		
Total	12 170	100	[...]*	100

Source: Parties.

(126) With regard to the likely evolution of the market, the forecast made by an independent consultant giving advice to the parties on the effects of the merger outlined that Newco's share of the total market for cold-rolled carbon steel flat products would be about [35 % to 40 %]* in 2006.

(127) In the Statement of Objections, the Commission took the preliminary view that the notified operation would give the parties the power to unilaterally raise prices. The Commission came to this conclusion on the basis of (a) the particularly high combined market shares of the parties to the transaction and the great distance to their closest competitors; (b) the limited extent of planned new capacity in the forthcoming years; (c) the unlikelihood of new entries; (d) the absence of competitive pressure by alternative materials; (e) insufficient competitive constraints stemming from imports; (f) the inability of especially the automotive industry to change suppliers in the short and medium term; and (g) the strong position of Newco in up- and downstream markets.

(128) In their response, the parties contest the findings of the Commission. In essence, the parties argue as follows:

- the parties have lost substantial market share in the last few years and have arrived at [30 % to 35 %]* in terms of total sales in the year 2000 (starting form [40 % to 45 %]* in 1997),
- there is substantial spare capacity in the market, spare capacity which is expected to grow in the future. In addition, based on the results of a report provided by the parties' economic consultants, the parties claim, that — due to the high fixed costs — steel producers are under high pressure to sell the 'marginal' tonne. Because of this, the threat of customers switching even small volumes away from suppliers is sufficient to exert considerable price pressure,
- the market for cold rolled flat products faces substantial imports, the bulk of which (68 %) stems from central and eastern Europe, Turkey and the CIS. Spare capacity in these countries will not be absorbed by domestic demand in the short or medium term,
- imports from the countries mentioned do not suffer from quality disadvantages, as the vast majority of the cold rolled flat products consumed in the EEA is commodity-grade steel,
- imports exercise a real, lasting competitive restraint on the behaviour of domestic producers, even

without long-term sales commitments or distribution networks,

- the customers — being highly concentrated — are in a position to exert substantial buyer power,
- vertical integration does not privilege Newco as competitors are equally integrated and customer bases differ in the distinct markets.

In sum, the parties' argue that market conditions in the market for cold rolled flat products are such as to assure effective competition also post-merger.

- (129) The Commission has carefully examined the arguments raised by the parties, considering in particular several decisive elements for the maintenance of competition such as (a) a high rate of imports and (b) spare capacity in the market under consideration.

- (130) In the first place, as set out in Table 10, imports amounted to almost 18 % in the year 2000 starting from 9,8 % in 1997. This represents the highest import-and import growth rate of all steel markets which have been under close consideration in the current proceedings. The increase of market shares appears to have occurred at the expense of parties, whose combined market share decreased from [40 % to 45 %]* in 1997 to [30 % to 35 %]* in terms of total sales. The market shares of the other players in the market have remained stable.

TABLE 10

Import rates in the market for cold rolled products

2000	1999	1998	1997
17,9 %	10,7 %	14,4 %	9,8 %

Source: Form CO.

- (131) As the parties point out, these imports originate mainly from Eastern European countries, so transport costs are unlikely to differ substantially from transport costs within the Community. In any event, the high level of imports as well as their high growth during the past years appears to suggest that cold rolled flat steel products from third country-suppliers are not hampered by competitive disadvantages regarding quality, price or logistics which would prevent them from entering the Western European market.

- (132) Moreover, as can be seen from Tables 11 and 12, the market for cold rolled flat products has one of the highest rates of spare capacity amongst the markets which have been under close examination in the current proceedings.

TABLE 11
Capacity utilisation in 1999 (%)

	Usinor	Arbed Aceralia	Industry-wide
Hot rolled	[> 90]*	[> 90]*	90
Quarto plates	[70—80]*	[70—80]*	68
Cold rolled	[80—90]*	[80—90]*	76
Galvanised steel	[> 90]*	[80—90]*	86
Organic coated	[80—90]*	[80—90]*	75
Hot rolled stainless	[> 90]*	[> 90]*	94
Cold rolled stainless	[> 90]*	[80—90]*	89

Source: Parties' notification.

TABLE 12
Evolution of capacity utilisation rates in cold-rolled products

Company	1999	1998	1997
Usinor	[80—90]*	[80—90]*	[80—90]*
Arbed/Aceralia	[80—90]*	[70—80]*	[80—90]*
Newco	[80—90]*	[80—90]*	[80—90]*
Industry-wide	79	79	78

Source: Parties and EU-Data.

- (133) The spare capacity in the market is not expected to be absorbed by additional demand in the forthcoming years. In fact, the market for total sales of cold rolled products has grown only modestly during the past four years (less than 4 % between 1997 and 2000). The market for merchant sales has even decreased as customers have shifted their demand to hot dip galvanised sheet. In consequence, the current capacity utilisation rate gives competitors in the Community sufficient scope to react on price increases by Newco by an extension of production thus exercising competitive pressure on Newco. This is all the more true, as the industry-wide capacity utilisation rate is lower than Newco's. Additional spare-capacity also exists in Eastern Europe, the main source of imports of cold rolled flat products.

(134) In sum, the Commission concludes that although the market structure post-merger suggests that Newco could have the power to act independently of its competitors, Newco will face the competitive pressure exerted by the high level of imports into the Community and will also have to take into account the existence of a substantial spare capacity in the industry when planning its strategic decisions. The remaining competitors (including importers) will be in a position to effectively constrain Newco's market behaviour.

Conclusion

(135) Those considerations have led the Commission to the conclusion that the proposed concentration will not give the parties the power to hinder effective competition or to evade the rules of competition instituted under ECSC-Treaty with regard to the market for cold-rolled carbon steel flat products.

4. Non grain-oriented electrical steel sheets

Market structure

(136) In 2000, total sales in the market for non grain-oriented electrical steel sheets were 1,4 million tonnes in Western Europe (the available data correspond to the Community, Norway and Switzerland). Parties' sales totalled [...] million tonnes, comprising Usinor with [...] million tonnes and Arbed/Aceralia with [...] million (including captive sales). This represents a share of the market of [15 % to 20 %]* (Usinor [10 % to 15 %]*; Arbed/Aceralia [5 % to 10 %]*), down from [20 % to 25 %]* in 1999.

TABLE 13

Parties' combined share of non grain-oriented electrical steel sheets in the Community + Norway and Switzerland

	Total sales		Merchant sales	
	Thousand tonnes	%	Thousand tonnes	%
2000	[...]*	[15—20]*	[...]*	NA
1999	[...]*	[20—25]*	[...]*	NA
1998	[...]*	[20—25]*	[...]*	NA
1997	[...]*	[20—25]*	[...]*	NA

Source: Parties.

(137) TKS will remain the market leader with a market share of [35 % to 40 %]* in 1999. Corus ([15 % to 20 %]* market share) and Voest-Alpine ([10 % to 15 %]* market share) also hold strong positions in the market. Due to

the strong position of the competitors, the risk of Newco unilaterally hindering effective competition or evading competition rules can be excluded.

(138) Moreover, the Commission has concluded that the proposed concentration does not create or strengthen the risk of parallel anticompetitive behaviour in this market. Market shares are not symmetric but spread in a range of more than 20 percentage points thus suggesting a lack of common economic interest. TKS is the clear leader of the market, well above its competitors. Voest-Alpine has been very active and its market shares increased by almost 30 % in the last years (from [10 % to 15 %]* in 1997 to [10 % to 15 %]* 1999). Imports represented a market share of about 10 %. The parties have suggested that this figure is likely to increase in the future as transport costs fall relative to the total product price.

Conclusion

(139) On that basis, the Commission believes that the proposed concentration will not give rise to competition concerns in the market for non grain-oriented electrical steel sheets.

5. Galvanised steel

(140) In 2000, the Community market for galvanised steel totalled 21,1 million tonnes. The market has grown significantly during the last years: the average annual growth rate since 1997 has been 9 % to 10 % (see Table 14).

TABLE 14

Sales of galvanised steel in the Community

Year	Total sales in Thousand tonnes	Merchant sales in Thousand tonnes
2000	21 136	NA
1999	18 492	[...]*
1998	17 840	[...]*
1997	15 850	[...]*

Source: Parties.

(141) In 2000 the parties sold [...] million tonnes (Usinor [...] million tonnes, Arbed/Aceralia [...] million tonnes) or approximately [40 % to 45 %]* of the total market. However some [...] million tonnes of this total was sold to other companies within the Usinor and Arbed groups. The parties' share of the merchant

market (sales to third parties) in 1999 (figures are not available for 2000) was around [40 % to 45 %]* (Usinor [25 % to 30 %]* and Arbed/Aceralia [10 % to 15 %]*).

Market leader

- (142) As a result of the proposed concentration, Newco will become the undisputed leader of the Community market for metallic coated products. In this position it will be able to unilaterally raise prices. Other producers will not have an incentive to compete strongly nor will they be able to do so.
- (143) In effect, the structure of the market will allow Newco to act unilaterally. As can be seen from Table 15, the parties will be more than double the size of their largest competitor, TKS, and will be very much larger than any of the other players (four times larger than Corus and five times larger than Riva). In fact, Newco will be bigger than its four main competitors combined.

TABLE 15
Share of Community sales of galvanised steel in 1999

Company	Total sales		Merchant sales	
	Thousand tonnes	%	Thousand tonnes	%
Usinor	[...]*	[30—35]*	[...]*	[25—30]*
Arbed/Aceralia	[...]*	[10—15]*	[...]*	[10—15]*
Newco	[...]*	[40—45]*	[...]*	[35—40]*
TKS	[...]*	[15—20]*	[...]*	[55—60]*
Corus	[...]*	[10—15]*		
Riva	[...]*	[< 10]*		
Voest-Alpine	[...]*	[< 5]*		
Salzgitter	[...]*	[< 5]*		
Others	[...]*	[< 10]*		
Third country imports	1 152	6,2		
Total	18 492	100	[...]*	100

Source: Parties.

- (144) This large difference between the market share of Newco and the market shares of its competitors makes it more difficult for the other players to respond to Newco's price increases and/or output reductions in such a way as to make the unilateral action of the merged firm unprofitable. The merger will provide Newco with a larger base of sales on which to enjoy the resulting price rise while eliminating a competitor (Arbed/Aceralia) to which customers otherwise might

have diverted their purchases. It should be noted that Arbed/Aceralia, is currently Usinor's second largest competitor (after TKS). In sum, customers are not likely to be able to find economical alternative sources of supply, as explained below.

Constraint of existing capacity

- (145) In general capacity utilisation rates are high (86 % average Community capacity utilisation rate in 1999) in particular in the segment of hot-dip galvanised (90 % average in 1999) so the competing producers will have only limited spare capacity for the supply of Newco's customers.

Planned new capacity

- (146) The parties, in their response to the Commission's Statement of Objections, argue that in the future there will be significant spare capacity in galvanised steel in the Community, because of capacity increases in hot-dip galvanised steel between 2001 and 2004 (hot dip galvanised steel represented 76 % of the total market in 2000 and is foreseen to represent over 80 % in 2003). To support the argument, they have produced data about new hot-dip capacities under construction or formally announced in Europe and the European periphery, as well as forecasts of growth in the demand, as estimated by Eurofer for the 2000-2005 period. They conclude that in 2004 cumulated demand will have grown by [$> 2\,000$]* thousand tonnes against [$> 5\,000$]* thousand tonnes for the cumulative capacity ⁽⁷²⁾.
- (147) During the investigation, the Commission has been confronted with different figures –from different sources– regarding the evolution of capacity and demand for the next years. On the basis of these different figures, it is difficult to predict the future development of capacity. According to the Commission's investment survey, third parties plan an additional 1,6 million tonnes of capacity between now and 2004. This is lower than the [...]* million identified by the parties in the Form CO ⁽⁷³⁾ and than the 2,6 million tonnes forecast for 2001 to 2004 in the Eurofer survey. In turn, the latest forecast of the parties in their response to the Statement of Objections predicted an increase of [...]* million tonnes.

- (148) There are also different estimates of demand growth during this period. The growth rate was estimated at [...]* % per year in the form CO. This figure is low

⁽⁷²⁾ Reply to the Commission's Statement of Objections p. 21.

⁽⁷³⁾ Volume II, Annex 4(1)(4) p. 26.

compared to previous growth during the last years (over 10 % per year between 1997 and 2000). The last forecast of the parties in their response to the Statement of Objections result in an average annual growth rate of [...] % only, as illustrated in Table 16.

TABLE 16

Evolution of Community demand for hot-dip galvanised

	Community demand (kt)	Annual growth rate (%)
2000	[...]*	[...]*
2001	[...]*	[...]*
2002	[...]*	[...]*
2003	[...]*	[...]*
2004	[...]*	[...]*
	Average	[...]*

Source: Reply to the Commission's Statement of Objections, p. 21.

- (149) In any event, the parties have calculated the increase of capacity on a wider basis (including Eastern Europe and Turkey) than the relevant geographic market. Moreover, the parties have not taken into account the growth of demand in those countries. This suggests that the foreseen spare capacity may be lower than the parties' prediction. Table 17 summarises the data provided by the parties, in terms of capacity increase.

TABLE 17

Forecast of capacity increases in hot-dip galvanised

Community	2001/2004	Community periphery	2001/2004
TKS (Bochum)	400	Erdemir (Turkey)	400
Riva (Taranto)	400	Teczan Izmir (Turkey) with Corus	300
Salzgitter	400	US Steel Kosice	250
Voest (Linz)	300	Eko Stahl (Poland)	210
Duferco (La Louvière)	300	Galvex (Estonia)	400
Wupperman (Mperdjick/JV with Corus and Voest)	500	Novolipesk with TKS	300
Marcegaglia (Ravenna)	400	Ispat Karmet	400

Community	2001/2004	Community periphery	2001/2004
Arvedi (Newco)	250	Severstal	400
Gonvarri (Barcelona)	165		
Bancolor (Bilbao)	200		
Total	3 315		2 660
Total Community + Community periphery	3 315 + 2 660 = 5 975		

Source: Reply to the Commission's Statement of Objections, p. 20.

- (150) On the basis of the forecast of the respective evolution of Community capacity and demand submitted by the parties, it is possible to predict that the capacity utilisation rate is likely to remain relatively high. Furthermore, according again to the parties' own estimates, Newco will account for a high share of the installed Community production capacity ([40 % to 45 %]* for all galvanised steel and [40 % to 45 %]* for hot-dip galvanised steel by 2004) and therefore the combined amount of spare capacity controlled by Newco's competitors will be relatively small with regards to Newco's capacity and production figures.
- (151) As to the increase of capacity in the periphery of the Community, and even without taking into account the eventual increase in demand in these countries, this additional capacity will not substantially affect the competitive situation in the Community in the short to medium term, since deliveries from these countries do not appear to meet the necessary quality requirements of the automotive industry, which constitutes the main customer group of hot-dip galvanised steel.

New entry

- (152) New entry is also unlikely to provide competitive constraints. Even though capital cost and technology licences may not be significant barriers to entry, there are some supplementary constraints due to the specificity of the galvanised steel product market. First of all, galvanised steel being a down-stream product, any company willing to enter the market needs to be able to secure its supply of cold-rolled carbon steel. And the steel quality required tends to be speciality grades (high or ultra-high resistance, to meet customers' requirements) which are not commodity products. Secondly, access to customers, and in particular automobile ones, is a difficult process whereby, as will be explained later, the company has to go through some homologation process. As underlined in a report provided by the parties in response the Commission's

Statement of Objection, 'it is evident that the homologation process implies high time costs and quite considerable administrative expenses for the steel suppliers' ⁽⁷⁴⁾.

(153) Moreover, new entries in a growing market are not likely to produce a major competitive impact. There have been three examples of new entry into the hot dip galvanised segment recently. Marcegaglia in 1999 (700 000 tonnes a year capacity), Bancolor in 2001 (200 000 tonnes a year) and a planned line for Duferco in 2002 (350 000 tonnes a year). The scale of these new entries is such that even taken together they would result only in an increase in capacity of less than 5 %.

(154) Furthermore all of these increases were planned before the Newco project was announced and have been dealt with in the discussion above (recitals 146 to 151). The situation for potential market entrants will become less favourable with the creation of Newco. This undertaking will have the power to selectively target the (potential) clients of any newcomer, since it is the largest supplier of the automotive and construction sectors.

(155) As far as electro-galvanised steel is concerned, new entries are unlikely to occur either, given the decline in demand for electro-galvanised strip.

Alternative materials

(156) In general, alternative materials will not be able to replace galvanised steel. Once the choice of material has been made, be it in an industrial building components or a car or white goods parts, the die is cast. In the case of cars and white goods it is extremely difficult if not impossible to change from one material to another during the life of the product. Automobile manufacturers set up their production equipment, welding/assembly and painting in particular for specified material for each part. They cannot in nearly all cases credibly threaten to use an alternative material as this would involve major changes to the production processes.

(157) The parties, in their reply to the Commission's Statement of Objections, argue that competition would exist in the long-term, in particular between steel and aluminium, and at the moment of the conception of a new car. However, even after taking into consideration the points raised by the parties, it appears that steel and aluminium are not used in competition as substitutes.

The parties explain that 'aluminium usage was traditionally focused on a specific niche market for cars with a price premium' ⁽⁷⁵⁾ and do not contradict that it is still the case today: car makers using aluminium to substantial levels are all in the upper segment (Audi, Jaguar). In practice aluminium and plastic cost between two and four times as much as steel for a given part and could not be used to counter price increases for steel. Consequently, threatening to use aluminium or plastics is not an option either.

Imports

(158) Imports have represented between 3 % and 9 % of total sales of galvanised products in the Community during the last four years. Imports do not appear to represent a serious competitive constraint for Community producers in this market. In particular, imports, largely being commodity-grade steel, are not an alternative for the qualities of metallically coated material required by the automobile industry, the largest customer group representing 51 % of galvanised steel demand in 1999. Few non-Community producers can actually provide these qualities. Only the Far Eastern suppliers, Japan and Korea can supply to the necessary quality standards. However, prices are higher than those in Europe and this additional cost together with the costs of transport and the special packaging result in a delivered price nearly double than that of material produced in Europe. These market conditions being such despite the difficult situation of the steel industry in the Far East.

(159) The existing price differences have not substantially been disputed by the parties. In their reply to the Statement of objections, they have, however, expressed the view that prices in the Community and the Far East move very closely together (notwithstanding the existing price differentials) and that there is a clear cross-sensitiveness between Community -prices and third country imports. Again it must be noted that imports concern mainly commodity-grade steel. Imports of high-quality steel, as requested by the automotive industry, appear to be very limited. According to the parties FIAT recently purchased 200 000 tonnes of hot dip steel from Baosteel and PSA bought 50 000 tonnes of hot dip steel purchased by PSA from Posco. As can be seen from these figures, imports do not amount to a level which could exercise considerable constraining effects on the important high-end of the product market [...]*.

(160) Consequently, imports do not represent a credible threat against the possibility for Newco to unilaterally increase price or reduce output.

⁽⁷⁴⁾ The parties' economic consultants' report 'Steel products for the automotive sector', 10 October 2001, p. 9.

⁽⁷⁵⁾ The parties' economic consultants' report 'Steel products for the automotive sector', 10 October 2001, p. 29.

Buying power

- (161) Outside the automobile industry no customer will account for more than [0 % to 5 %]* % of Newco's sales and most of them will be very much smaller than 1 %. None of these customers will be able to exercise any pressure on Usinor as the importance of their individual requirements will form only an insignificant part of Newco's sales.
- (162) About 50 % of the current demand for galvanised strip originates from the automobile industry. In the automobile industry the largest customer would account for about [5 % to 15 %]* of the combined companies' sales. However this automobile manufacturer currently sources a large majority of its requirements from either Usinor or Arbed. The second largest company accounts for less than 10 % of Newco's sales but it is likewise dependent on either Usinor or Arbed for a large part of its requirements. Given the long time scale necessary to introduce new suppliers, the limited number of alternative suppliers and the limited available capacity at these suppliers it appears unlikely that either of these companies would be able to exercise any form of buyer power in the short term. Other automobile customers are less dependent on Usinor and Arbed but account for even smaller proportion of these companies' sales.
- (163) Furthermore, the automobile industry has special requirements, including just-in-time delivery, quality control for safety-critical parts right through the production process (including an audit trail) and specific physical and chemical characteristics set out in detail in the product specifications which may be unique to a given customer. Thus to service the automobile industry a steel producer must make a considerable investment in establishing quality control systems acceptable to the potential client and in providing the infrastructure necessary for just-in-time delivery. Stocks of steel at the automobile manufacturers plants are minimal: one major manufacturer holds an average of three days' supply. Each car part is specified in a particular material and then allocated to a specific supplier. The choice of supplier is very limited and the manufacturer must be certain that the steel maker will be able to consistently meet the specification. There is therefore a long process of testing and trials before a new supplier is accredited. In one case this took five years before the supplier was fully accepted. Other automobile manufacturers have indicated that the periods last from three months to one year and that the process involves quite considerable expenses.
- (164) Therefore automobile companies cannot easily switch suppliers and in any case there is a limited number of potential candidates. For these potential suppliers there are considerable risks and costs involved in supplying test materials, setting up the necessary technical support teams and the infrastructure necessary to supply just in time. Considerable time and effort must be expended with no guarantee that sufficient orders will be forthcoming to offset the initial and on-going costs.
- (165) This difficulty for customers to find economical alternatives of supply reinforces the likelihood of unilateral action by the merged firm, whether by raising prices or suppressing output.
- (166) In their reply to the Commission's Statement of Objections the parties contested those findings of the Commission. They pointed to the following elements: 1. the automotive industry has considerable buying power given that it is highly concentrated, with the top five manufacturers having a combined market share of 77 % in the Community; 2. vehicle manufacturers can and do switch volumes in the short-term, since they 'homologate' more suppliers than they purchase from; 3. given that even a loss of small volumes has a disproportionate impact on the parties' profitability, the threat of car manufacturers to switch even smaller volumes to competitors within homologated firms would constrain the parties in their ability to increase prices. The parties have used a report prepared by their economic consultant to argue that, due to the high fixed costs, there are strong incentives in the steel industry to sell the last tonne, even for downstream products such as metallic coated carbon steel. The idea is that selling larger amounts of downstream products increases capacity utilisation upstream and in particular at the level of the blast furnace; this subsequently reduces the cost of production per tonne, due to economies of scale. For instance, increasing capacity utilisation from 90 % to 100 % in an integrated blast furnace -would result in a cost saving of 35 % on the cost per tonne of producing electro-galvanised steel.
- (167) After carefully considering these arguments, the Commission maintains its view that buyer power will not be sufficient to prevent Newco from acting unilaterally in the market for metallic coated products. As regards point 1. the concentration level of the automotive industry, the first five galvanised steel suppliers will have a combined market share of [> 80 %]* post-merger, thus reaching a higher level of concentration than the automotive industry (which is not their only customer-group). Some individual automotive manufacturers source a very substantial part of their demand ([> 50 %]*) from the merging parties

whereas Newco's biggest customer would only account for [5 % to 15 %]* of its galvanised steel sales. It is therefore doubtful that their degree of concentration will be sufficient to balance Newco's market power.

(168) Regarding point 2. even a highly concentrated customer-group can exercise considerable buying power only if there are credible alternatives to shift their demand to. This, however, is not the case. The threat to shift larger volumes is not appropriate to discipline Newco's market behaviour. As stated, capacity utilisation in the industry is high and will remain at a high level in the foreseeable future so that alternative suppliers would not be able to serve considerable additional demand.

(169) As far as point 3. is concerned, the threat to shift small volumes (the last tonne) of demand in the short term is not a sufficient means to control Newco's bargaining power. Blast furnaces in Europe generally already operate at high levels of capacity utilisation (significantly over 90 %). The shift of small amounts of a customers' demand would not considerably impact the cost curve of Newco. This can be illustrated as follows: the parties produced 40 million tonnes of crude steel and about [5-10]* million tonnes of galvanised steel in 1999. Newco's biggest customer ([5-15]* % of the parties combined galvanised production) accounted for about [...]* million tonnes of galvanised steel. Even if this customer shifted its total demand of galvanised steel, that would only represent about [< 5 %]* of Newco's crude steel production. This proportion show that customers shifting only small amounts of their demand are not able to effectively constrain Newco's market behaviour.

Conclusion

(170) On that basis, the Commission has concluded that the proposed concentration will give the parties the power to hinder effective competition or to evade the rules of competition under the ECSC Treaty with regard to the market for galvanised products, including hot-dip galvanised steel and electro-galvanised steel.

6. Organic coated carbon steel

No risk of unilaterally hindering effective competition or evading competition rules

(171) The total value of the market for organic coated carbon steel in 2000 was 4,13 million tonnes. Usinor's share

amounted to [30 % to 35 %]* with [...]* million tonnes and Arbed/Aceralia's share was [5 % to 10 %]* with [...]* million tonnes, giving a combined market share of [35 % to 40 %]*. In terms of merchant sales the parties aggregate market share in 1999 was [25 % to 30 %]* (Usinor [15 % to 20 %]*; Arbed/Aceralia: [5 % to 10 %]*).

(172) Newco's closest competitors will be Corus, which held a market share in 1999 of [20 % to 25 %]* of total sales ([20 % to 25 %]* of merchant sales), and TKS with a market share of [10 % to 15 %]* in terms of total sales (< 10 %)* of merchant sales) in 1999 (see Table 18).

TABLE 18

Parties' combined market shares of organic coated carbon steel

	Total sales		Merchant sales	
	Thousand tonnes	%	Thousand tonnes	%
2000	[...]*	[35—40]*	[...]*	NA
1999	[...]*	[35—40]*	[...]*	[25—30]*
1998	[...]*	[35—40]*	[...]*	[20—25]*
1997	[...]*	[35—40]*	[...]*	[20—25]*

Source: Parties.

(173) After the merger, Newco will be the clear market leader in terms of total sales with a market share amounting to [35 % to 40 %]*. The high combined market share figures may give rise to concerns as to whether Newco would be in a position to act independently of its competitors. However, the combined market share of the parties in the merchant market (sales to third parties) is only [25 % to 30 %]*. The difference is due to the high degree of vertical integration in this sector, with both Usinor and Arbed/Aceralia using a large part of their production in further processing activities carried out by companies owned or controlled by their respective groups. The Commission has not identified any competition concerns in these downstream markets. Furthermore, Newco will face competition from important producers such as Corus and TKS, both with substantial spare capacity in this market.

No risk of parallel anticompetitive behaviour

(174) Equally, market characteristics are not conducive to parallel anticompetitive behaviour. The combined share of the three main players in terms of merchant sales

represents less than 60 % of the total market. Further, capacity utilisation rates are not symmetric. Usinor and Arbed/Aceralia utilisation is comparatively high at [$> 80\%$]*, while the average Community capacity utilisation rate for the total sector is 75 %. Finally, a number of second-tier producers are very active in this market, such as SSAB, Rautaruukki, Voest-Alpine and Salzgitter.

Market growth

- (175) The market has been characterised by significant growth with supply increasing by 41 % in the last three years (which can be partly explained by substitution of standard cold-rolled flat carbon steel and galvanised steel by organic coated steel products). This trend may continue in the future.

Conclusion

- (176) For those reasons, the Commission does not find that the merged entity will be in a position to hinder effective competition or to evade the rules of competition under the ECSC Treaty in the market for organic coated carbon steel.

7. Steel for packaging

- (177) The exact product market definition has been left open between either (a) an overall market for steel for packaging or (b) narrower separate markets for (i) steel for beverage packaging and (ii) steel for non-beverage packaging. In each of the different possible market segmentation, the market share allocation are as set out in Table 19.

TABLE 19
Market shares of steel for packaging in 1999

(in %)

Company	Steel for beverage packaging	Steel for non-beverage packaging	Steel for packaging (overall)
Usinor	[30—35]*	[20—25]*	[20—25]*
Arbed/Aceralia	[5—10]*	[10—15]*	[10—15]*
Newco	[35—40]*	[35—40]*	[35—40]*
Corus	[30—35]*	[25—30]*	[25—30]*
TKS	[25—30]*	[10—15]*	[10—15]*

Source: Parties.

- (a) Steel for beverage-packaging

Market structure

- (178) The market size amounted to 0,6 million tonnes in 2000 and in 1999. In 2000 the parties' combined market share amounted to [40 % to 45 %]* (Usinor [35 % to 40 %]*; Arbed/Aceralia [5 % to 10 %]*). Corus's market share in 1999 was [30 % to 35 %]* and TKS held [25 % to 30 %]* in the same year.

No risk of unilaterally hindering effective competition or evading competition rules

- (179) Due to the strong position of the competitors in the market, it is possible to rule out the creation or strengthening of a position where Newco could act independently of the other producers.

No risk of parallel anticompetitive behaviour

- (180) The Commission has also examined whether the proposed transaction would lead to parallel anti-competitive behaviour by the main European producers. First, the transaction increases the asymmetry between the producers. More importantly, the three players will be faced with only few multinational customers from the packaging manufacture industry. In the sector of steel for beverage packaging, Usinor generates its turnover with only [...] customers ([...]*). Arbed/Aceralia has only [...] customers ([...]*). These undertakings are, in turn, under intense pressure from the international bottlers (such as Coca Cola, Pepsi Cola and the concentrating beer industry) In addition, although the Commission still considers that steel and aluminium (as well as other materials) for beverage cans are separate markets, it is nonetheless true that steel is under competitive pressure from aluminium and PET.

- (181) This situation does not leave much scope for the three steel producers to raise prices in a parallel action. Moreover, the capacity utilisation rate in the market is rather low (75 % on average in the overall Community market (steel for beverage and non-beverage packaging). This significant spare capacity provides incentives to 'cheat' on agreed prices, thus further destabilising tacit collusion.

- (182) Therefore, the Commission has concluded that the proposed concentration will not lead to parallel anti-competitive behaviour of the main European producers.

(b) Steel for non-beverage packaging

(183) The market size amounted to 3,8 million tonnes in the year 2000 and 3,5 million tonnes in the year 1999. In a possible market for steel for non-beverage packing the parties' combined market share amounted to [35 % to 40 %]* (Usinor [20 % to 25 %]*, Arbed/Aceralia [10 % to 15 %]*) in the year 2000. In 1999, Corus's market share was [25 % to 30 %]*, and TKS and Riva held [10 % to 15 %]* and [10 % to 15 %]* respectively, with others producers accounting for [15 % to 20 %]*.

No risk of unilaterally hindering effective competition or evading competition rules

(184) In view of the strong position of the competitors in the market, it is possible to rule out the creation or strengthening of a position where Newco could act independently of the other producers.

No risk of parallel anticompetitive behaviour

(185) The Commission has also examined whether the proposed transaction would lead to parallel anti-competitive behaviour by the main European producers in the market for steel for non-beverage cans. The proposed transaction will also in this market increase the asymmetry between the market shares of the main players. The demand side is very concentrated and represents a strong countervailing element. Three undertakings ([...]*) account for 50 % of Community-consumption. [...]* is Usinor's largest customer and accounts for [20 % to 25 %]* of its sales and [15 % to 20 %]* of Arbed/Aceralia's sales. Arbed/Aceralia's biggest client [...]* represents [20 % to 25 %]* of Arbed/Aceralia's turnover in the relevant market.

(186) As in the case of steel for beverage packaging, further competitive pressure stems from alternative materials for packaging (plastic, composite materials, aluminium, glass). For instance, in the field of foodstuff packaging, the new conservation methods, such as freezing, vacuum packing and controlled atmosphere cooking, tend to favour plastic and composite materials. Therefore, it is not in the interest of the steel manufacturers to raise prices and thus put at risk the competitiveness of their product.

(187) Another hurdle for tacit collusion is imports from third countries which represent [15 % to 20 %]* of total sales. As steel for non-beverage use appears to be a standardised commodity product, this rate could be increased in the case of unreasonable pricing of the European suppliers.

(188) Finally the significant spare capacity in the market, as mentioned in recital 181, is also an incentive for the competitors to undercut a supracompetitive price level for steel for non-beverage cans.

(189) Therefore, the Commission has concluded that the proposed transaction will not lead to parallel anti-competitive behaviour of the main European producers.

(c) Overall market: steel for packaging

(190) The market size amounted to 4,3 million tonnes in the year 2000 and 4,1 million in the year 1999. Newco's market share was [35 % to 40 %]* (Usinor [25 % to 30 %]*; Arbed/Aceralia [10 % to 15 %]*) in the year 1999. Competitors' market shares amounted to [25 % to 30 %]* for Corus, [10 % to 15 %]* for TKS, [< 10 %]* for Riva and [10 % to 15 %]* for other producers. The figures do not differ very much from those observed in the steel for non-beverage packaging segment. This stems from the fact that steel for non-beverage packaging accounted for almost 90 % of the overall market. Therefore, the results of the investigation of that market also apply here. In addition, the Commission did not identify competition problems in the smaller alternative market for steel for beverage packaging. In sum, also in a hypothetical overall market, the proposed transaction does not give rise to competition concerns.

Conclusion

(191) For those reasons, the Commission concludes that the proposed concentration would not hinder effective competition or allow the parties to evade the competition rules under the ECSC Treaty in the market or markets for steel for packaging.

8. Stainless steel flat products

(192) Stainless steel flat products include hot-rolled stainless and cold-rolled stainless products. As in a previous Commission decision in these markets ⁽⁷⁶⁾, the effect of the proposed merger must be examined on two levels, to see whether 1. after the operation Newco would be able to determine prices or prevent competition on its own, and 2. the operation would create conditions which would make tacit collusion between the limited number of European stainless steel producers possible and effective.

⁽⁷⁶⁾ See Decision of 4 December 2000 in Case COMP/ECSC.1342 – Outokumpu/Avesta Sheffield.

No risk of unilaterally hindering effective competition or evading competition rules

(i) Hot rolled stainless steel products

- (193) Regarding hot rolled stainless steel products, Table 20 gives the shares for hot rolled stainless steel products in terms of total sales in the Community + Norway and Switzerland. On this basis the parties' combined market share was [25 % to 30 %]* in 2000 and [25 % to 30 %]* in 1999. They would face competition from AvestaPolarit ([30 % to 35 %]* in 1999), TKS ([20 % to 25 %]*) and Acerinox ([10 % to 15 %]*).

TABLE 20

Market shares in 1999 in the Community + Norway and Switzerland (total sales)

Company	Total sales (thousand tonnes)	Market share (%)
Usinor	[...]*	[10—15]*
Arbed/Aceralia	[...]*	[15—20]*
Usinor/Arbed/Aceralia	[...]*	[25—30]*
Avesta Polarit	[...]*	[30—35]*
TKS	[...]*	[20—25]*
Acerinox	[...]*	[10—15]*
Boehler	[...]*	[< 5]*
Imports	[...]*	[< 10]*

Source: Parties.

- (194) In the market for stainless steel hot-rolled flat products, the merged entity would therefore not be the European leader. Moreover, Newco would not be able to benefit from its size and degree of integration, since, according to the parties, its competitors also belong to vertically integrated groups: AvestaPolarit is a joint-venture between Outokumpu Steel and Avesta Sheffield; Krupp Thyssen Stainless belongs to TKS, Acerinox controls the American undertaking North American Stainless, and one of its main shareholders is Nisshin Steel, Japan's largest stainless steel producer. In this situation the possibility that the proposed merger would enable the parties to unilaterally determine prices or prevent effective competition can be ruled out.

(ii) Cold rolled stainless steel products

- (195) The parties' and their competitors' shares of the market for cold rolled stainless steel products are given in Table

21. The parties' combined share in terms of total sales (including captive sales) would be about [20 % to 25 %]* in 2000 and [20 % to 25 %]* in 1999 (well behind TKS which has a share of about [35 % to 40 %]* in 1999). In terms of merchant sales, the parties' combined market share would amount to [15 % to 20 %]*. Newco would also face competition from AvestaPolarit and Acerinox ([20 % to 25 %]* and [10 % to 15 %]* in terms of total sales respectively). Similarly the market shares and the existence of strong competitors rule out the possibility that Usinor/Arbed/Aceralia would be able to unilaterally determine prices or prevent effective competition.

TABLE 21

Market shares in 1999 in the Community + Norway and Switzerland (total sales)

Company	Total sales (thousand tonnes)	Market share (%)
Usinor	[...]*	[15—20]*
Arbed/Aceralia	[...]*	[5—10]*
Usinor/Arbed/Aceralia	[...]*	[20—25]*
TKS	[...]*	[35—40]*
Avesta Polarit	[...]*	[20—25]*
Acerinox	[...]*	[10—15]*
Imports	[...]*	[< 5]*

Source: Parties.

No risk of parallel anticompetitive behaviour

(i) Hot rolled stainless steel products

- (196) After completion of the proposed concentration, there will only be five suppliers of stainless steel hot rolled products. The top three players will have > 80 % of the market for hot rolled stainless steel respectively (see Table 22).

TABLE 22

Market shares in 1999 in the Community + Norway and Switzerland (total sales)

(in %)

	Usinor/Arbed/Aceralia	Avesta Polarit	TKS	Three largest competitors	Acerinox
Hot rolled stainless steel	[25—30]*	[30—35]*	[20—25]*	[> 80]*	[10—15]*

Source: Parties.

- (197) The Commission examined whether the merger may lead to parallel anticompetitive behaviour. The Commission concluded that, for the following reasons, the operation is not likely to lead the stainless steel producers collectively to raise prices and/or restrict production or distribution or otherwise evade the ECSC competition rules.

Market growth

- (198) In contrast to almost all other sectors in the steel industry, stainless steel products enjoy a growth rate of at least 6 % per annum. This rate of increase is expected to continue for at least the next four years. There are therefore incentives for existing players to compete for market shares by investing continuously. Significant capacity extensions have been announced recently by Avesta-Polarit (700 000 tonnes in Tornio) and ALZ (600 000 tonnes by 2003).

Increase in capacity

- (199) While it is possible to increase capacity by eliminating bottlenecks, these possibilities are becoming rarer and investments in new plants are required to meet demand. The optimum scale of these investments is very large in proportion to the size of the Community market. Avesta Polarit's (the result of the merger of Avesta Sheffels and Outokumpu) new steel plant in Finland has a capacity of 1 million tonnes a year (700 000 tonnes a year of hot rolled and 300 000 tonnes a year of cold rolled) and AST's new capacity is for 600 000 tonnes a year. This is to be compared with the total capacity of hot-rolled stainless steel (6,7 million in 2000). As new capacity comes on stream, the owner has to compete vigorously to load the new plant.

Cost structures

- (200) The competitors present on the market have very different cost structures, as a result of a number of factors, including differences in terms of access to raw materials. Evidence supporting this conclusion has already been given in the Outokumpu/Avesta Sheffield Commission decision of December 2000 (recitals 31 to 35), where differences of up to 40 % in the conversion costs of Community producers were noticed. The parties also explained that alloying elements such as nickel and chrome account on average for some 30 % of the price of hot-rolled stainless steel. Some competitors are vertically integrated into mining activities, such as for instance Outokumpu Steel, Columbus (a large part of its shareholders are chromium producers), or a number of Japanese competitors that have financial links with

nickel and chromium producers. By contrast, Arbed/Aceralia and Usinor have no mining activities relevant to this sector. Differences of costs structures also result from differences in terms of location of production facilities that result in different transportation costs. Transportation costs are low in absolute terms, but can make the difference between loss and profitability. Internal transportation costs are very limited for some competitors (e.g. Acerinox and Outokumpu) and very significant for other competitors (AvestaSheffield). The parties' transportation costs range between these extremes.

(ii) Cold rolled stainless steel products

- (201) After completion of the proposed concentration, there will only be five suppliers of stainless steel cold rolled products. The top three players will have [$> 80\%$]* of the market for cold rolled stainless steel, as shown in Table 23. However, even after the merger, TKS will have a notably larger market share than the merged entity.

TABLE 23

Market shares in 1999 in the Community + Norway and Switzerland (total sales)

(in %)

	Usinor/ Arbed/ Aceralia	Avesta Polarit	TKS	Three largest competi- tors	Acerinox
Cold rolled stainless steel	[20—25]*	[20—25]*	[35—40]*	[> 80]*	[10—15]*

Source: Parties.

- (202) The Commission examined whether the proposed concentration may lead to parallel anticompetitive behaviour. The Commission concluded that, for the same reasons as in hot-rolled stainless steel, the operation is not likely to lead the stainless steel producers collectively to raise prices and/or restrict production or distribution or otherwise evade the ECSC competition rules.

Conclusion

- (203) In conclusion, the Commission's investigation concluded that the proposed merger would not give rise to any competitive concerns as regards either stainless steel hot-rolled or cold-rolled flat products.

2. STEEL DISTRIBUTION

1. *Vertically integrated distributors/independent distributors*

- (204) Steel distribution constitutes a very important part of the global commercial policy of the vertically integrated steel producers. Arbed/Aceralia submit that roughly 40 % of the steel consumption in Europe goes through the different distribution channels.
- (205) The main European steel producers all have their own networks of distribution centres, covering generally a substantial part of the European territory, in particular, the major industrial areas. These networks of distribution centres normally share a common commercial policy or sales strategy, are coordinated centrally or operate under one business management structure or a central sales department, though each centre has a certain degree of independence.
- (206) In addition to these integrated distributors, there is an independent sector consisting of a large number of companies of varying size and financial strength. In 1999 the proportion of sales by the independent sector through steel service centres was as set out in Table 24.

TABLE 24

Share sales through steel service centres of independent distributors in 1999

(in %)

Germany (except North Rhineland Westphalia)	60
Italy	49
United Kingdom	45
Spain and Portugal	40
Benelux and North Rhineland Westphalia	31
France	26

Source: Parties.

- (207) Independent distributors can in theory supply the same services as integrated distributors, provided that they have invested in the necessary equipment. Nevertheless, a large part of their supplies come necessarily from the mills of the European steel producers, whose integrated distributors are their competitors in the distribution sector. In particular, the possibility of securing all the necessary supplies or the extended validity of prices will depend entirely on the individual relationships between independent distributors and producers. It should be noted that, with regard to the steel service centre's activities, the price of wide coils supplied by the mills determines in a high degree the slit coil price, as the parties have outlined.

(208) Moreover, in its reply to one of the Commission's questionnaires, one independent distributor pointed out that in difficult times integrated distributors fix prices for end customers that are substantially the same as those that the producers charge for the same products to independent distributors. Likewise, another independent distributor, after affirming that large steel producers show clear preference for their integrated distributors, claimed that some of the pricing positions adopted by integrated steel service centres are not based on the need to achieve full cost recovery of the processing and logistics concerned.

(209) Further to their integration upstream in the manufacturing of the relevant products, distributors owned by steel producers have several other advantages with respect to independent distributors. In particular, the geographical location of the different centres of integrated distributors, spread throughout Europe, allows them to conclude global contracts with large customers, those with different production sites in Europe and who have one decision centre for purchasing. In effect, while individual negotiations take place between small customers and the sales organisation of each steel service centre, for large customers global supply contracts are negotiated, normally on a European basis, and afterwards the products and services are delivered through the most convenient distribution centre on the basis of the location of the customers' sites. This practice is particularly common in the automotive sector and in the domestic appliance industry.

(210) The market investigation confirms that a number of independent competitors have serious concerns about the operation. In particular, even if a small number of competitors believe that the proposed merger will bring about more efficiency for the merging parties and therefore more stable markets, others fear that steel distribution will be further dominated by producers, to the detriment of small independent distributors. This could result in a reduction in the number of suppliers to the distributors and an increase in prices. Some independent distributors submitted that the proposed concentration could bring about the disappearance of their supply sources, particularly taking into account that in the past they have faced serious uncertainties of continuity of supply from manufacturers outside the Community.

(211) Therefore, in line with previous Commission Decisions ⁽⁷⁷⁾, it should be concluded that, though steel distribution is a regional or national service, in evaluating the impact of the merger in the distribution sector account should be taken of the implication of the vertical integration of steel manufacturers on the

⁽⁷⁷⁾ Case No IV/M.484 — Krupp/Thyssen/Riva/Falck/Tadfin/AST.

competition between distributors, in particular the supply of steel products to distributors at a European level.

2. Assessment of the different distribution markets

(212) The proposed operation will bring about particularly high market shares in the following markets:

- (a) steel service centres in France;
- (b) steel service centres in Spain/Portugal;
- (c) stockholding activity in France; and
- (d) oxycutting centres in France.

(213) Other affected markets for the purposes of this Decision are:

- (a) steel service centres in Benelux and North Rhineland-Westphalia;
- (b) steel service centres in the United Kingdom and Ireland; and
- (c) stockholding activity in Benelux and North Rhineland-Westphalia.

(a) Steel service centres in France

(214) The total quantities of carbon flat products sold in France in 2000 by steel service centres amounted to 3.9 million tonnes (which represented about 41 % of the total supplies of flat carbon products), of which approximately [...] million tonnes were sold by Usinor and [...] million tonnes by Arbed/Aceralia. The parties' combined market share was [40 % to 45 %]* in 2000 ([40 % to 45 %]* in 1999), the proposed concentration bringing about an aggregation of [5 % to 10 %]* ([5 % to 10 %]* in 1999). Their main competitors' market shares in 1999 were [5 % to 10 %]* (Corus), [5 % to 10 %]* (Riva) and [5 % to 10 %]* (TKS).

(215) After the merger, Newco's market share will be almost five times bigger than that of its principal competitor in the French market, and will almost double the combined market share of its three main competitors. Furthermore, the market share of independent steel service centres in France is quite low if compared with other neighbouring countries. Independent steel service centres only account for [< 30 %]* of the market in France, while they account for [> 50 %]* in Germany (excluding North Rhineland Westphalia), [> 40 %]* in Italy and [> 40 %]* in the United Kingdom. Moreover, this independent sector is highly fragmented into a large number of small suppliers.

(216) Account should also be taken of the parties' vertical integration and, in particular, of Newco's strong share in

the upstream market for the production and direct sales of carbon steel flat products, both at the EEA level and in France. The parties' production of hot-rolled carbon steel in 1999 represented [40 % to 45 %]* of Community production, while their production of cold-rolled carbon steel flat products represented [45 % to 50 %]* of Community production. Moreover, the market investigation outlines that some independent distributors competing with Usinor's distribution network in France rely strongly from Arbed/Aceralia's supplies; the operation will bring about the disappearance of this alternative source of supply. In sum, the new entity will be in a position, after the merger, to determine prices, to control or reduce distribution or to hinder effective competition.

(217) In view of those considerations, the Commission has arrived at the conclusion that the notified operation will give the parties the power to hinder effective competition or to evade the rules of competition under the ECSC Treaty with regard to the market for the distribution of carbon steel flat products through steel service centres in France.

(b) Steel service centres in Spain/Portugal

(218) In the Iberian Peninsula, steel service centres account for about 44 % of the total supplies of flat carbon products, whilst stockholding and oxycutting centres supply approximately 10 %. In particular, the total quantities of carbon flat products sold in Spain and Portugal in 2000 by steel service centres amounted to 4,2 million tonnes, of which approximately [...] million tonnes were sold by Usinor and [...] million tonnes by Arbed/Aceralia. The parties' combined market share was [45 % to 50 %]* in 2000 ([50 % to 55 %]* in 1999), the proposed concentration bringing about an aggregation of [10 % to 15 %]* ([10 % to 15 %]* as well in 1999). Their main competitors' market shares in 1999 were [10 % to 15 %]* (Grupo Ros), [5 % to 10 %]* (Gutser) and [5 % to 10 %]* (A. Gallardo).

(219) Further, if Spain and Portugal were considered to constitute separate geographic markets, serious competition concerns would arise in both countries. Newco's share would have represented [40 % to 45 %]* ([30 % to 35 %]* + [10 % to 15 %]*) in Spain in 1999, and [65 % to 70 %]* ([65 % to 70 %]* + [< 5 %]*) in Portugal.

(220) Again, the difference post-merger between Newco and its main competitors will be very substantial. Newco will be more than four times bigger than its nearest competitor. Newco's main competitors, moreover, will be independent distributors (rather than integrated distributors of other steel producers), which will depend to a large extent on the notifying parties for their supplies of steel products. Further, Newco will enjoy a particularly strong position in the distribution of carbon

steel flat products through both steel service centres and stockholding centres in France, the closest market to the Iberian Peninsula, reducing the possibilities for alternative suppliers for Spanish and Portuguese customers.

- (221) In their reply to the Statement of Objections, the parties submit however that, on the basis of national markets, there would be no material overlap in Portugal, since Arbed/Aceralia's market share is [$< 5\%$]*. Nonetheless, given the particular high market share of Usinor in Portugal ([65% to 70%]*) and the level of cross-border sales between Portugal and Spain, Arbed/Aceralia represent, through their operations in Spain, the main source of potential competition in the Portuguese market. In particular, given the different size of the Portuguese and Spanish markets, Arbed/Aceralia's sales of carbon flat products through steel service centres in Spain ([...]* kilotonnes in 1999) while representing only [10% to 15%]* of the Spanish market are substantially higher than the overall Portuguese market for the sales of carbon flat products through steel service centres (399 000 tonnes in 1999).
- (222) In view of those considerations, the Commission has arrived at the conclusion that the notified operation will give the parties the power to hinder effective competition or to evade the rules of competition under the ECSC Treaty with regard to the market for the distribution of carbon steel flat products through steel service centres in Spain and Portugal.

(c) Stockholding activities in France

- (223) The parties' combined market share for the distribution of all carbon steel products was [25% to 30%]* in 2000 ([20% to 25%]* + [5% to 10%]*) and in 1999 ([15% to 20%]* + [5% to 10%]*). Their main competitors were KDI, whose market share in 1999 was [25% to 30%]* , and Descours et Cabaud, with [15% to 20%]* .
- (224) However, Newco would have a substantially higher market share regarding the distribution of carbon steel flat products ([35% to 40%]* in 1999). Newco would be much bigger than its main competitors in the sector of the distribution of flat products, namely KDI (10% to 15%) and Descours et Cabaud (5% to 10%). The remainder stockholding market is extremely fragmented, with over 500 small independent suppliers. The customer base is fragmented as well, with the main customers being small and medium-sized enterprises.
- (225) In addition, it should be noted that Newco would not only have a substantial share of the distribution of

carbon steel flat products in France through stockholding centres, but a dominant position also on the distribution of carbon steel flat products in France through steel service centres (with a market share above 40%). Moreover, Newco, being vertically integrated, would also enjoy a strong position in the upstream market for the production of carbon steel flat products in Europe (for instance, [45% to 50%]* of production of cold-rolled carbon steel flat products in the Community in 1999).

- (226) In their reply to the Statement of Objections, the parties contest the Commission assessment, on the basis that the relevant market should include the stockholding of all carbon steel products, where the parties' combined market share represents [25% to 30%]* of the overall market, as mentioned in recital 223. However, this issue has been dealt with in the section on product market definition.
- (227) In view of those considerations, the Commission has arrived at the conclusion that the notified operation will give the parties the power to hinder effective competition or to evade the rules of competition under the ECSC Treaty with regard to the market for the distribution of carbon steel flat products through stockholding centres in France.

(d) Oxycutting centres in France

- (228) The total quantities sold in France in 2000 by oxycutting centres amounted to 200 000 tonnes, of which approximately [...]* were sold by Usinor and [...]* by Arbed/Aceralia. The parties' combined market share was [35% to 40%]* in 2000 ([30% to 35%]* in 1999), the proposed concentration bringing about an aggregation of [5% to 10%]* ([5% to 10%]* as well in 1999). Their main competitors' market shares in 1999 were [5% to 10%]* (Oxymetal), [5% to 10%]* (Devillers) and [5% to 10%]* (Oxycentre).
- (229) Newco's market share will be considerably bigger than that of its main competitors: Newco will be five times larger than its closest rival. An important part of the market (34%) is highly fragmented, with more than a hundred players active. The customer base is quite fragmented as well: most of the actors are small and medium enterprises with a low plate consumption and little or no buying power. Imports from outside the EEA are insignificant and represent no competitive constraint. Further, oxycutting is a market in decline, due to the arrival of new technologies such as laser cutting and water jet, which renders unlikely the possibility of substantial new entrants in the market, as

is evidenced by the fact that no significant entries have taken place during the last five years.

- (230) In their reply to the Statement of Objections, the parties disagree with the Commission's conclusions, on the basis of the following arguments: 1. Arbed's sales are small; and 2. Usinor's position includes 100 % of Eurodecoupe's output whereas Eurodecoupe is in fact a DHS subsidiary over which Usinor does not have sole control.
- (231) As far as the first argument is concerned, Arbed's sales account for [5 % to 10 %]* of the market for oxycutting centres in France, Arbed being currently the second main competitor of Usinor on the basis of the volume of sales, slightly behind the first one (Oxymetal with [5 % to 10 %]* market share in 1999) and above the other market players (Devillers, Oxycentre, Savoy Decoupe, Bretagne Oxy and UF Acier). With regard to the second argument, the parties themselves have confirmed that Usinor does have joint control over Eurodecoupe, and therefore all of the sales of Eurodecoupe must be taken into account for the purposes of the assessment of the proposed concentration.
- (232) In view of those considerations, the Commission has arrived at the conclusion that the notified operation will give the parties the power to hinder effective competition or to evade the rules of competition under the ECSC Treaty with regard to the market for the distribution of quarto plates through oxycutting service centres in France.

(e) **Other affected markets**

- (233) For the purposes of the assessment of the proposed concentration, other affected markets in the distribution sector are the following:

- (1) Steel service centres in Benelux and North Rhineland-Westphalia, where the parties' combined share in the market for the distribution of carbon flat products in 2000 was [20 % to 25 %]* ([10 % to 15 %]* + [10 % to 15 %]*). Their main competitors are Corus, whose market share is [20 % to 25 %]*, and TKS, which also has a [20 % to 25 %]* market share.

If that regional market were to be further subdivided, Newco's market shares in 1999 would have been [20 % to 25 %]* in the area comprising Belgium and Luxembourg, [25 % to 30 %]* in the Netherlands and [15 % to 20 %]* in a global German market (including North Rhineland-Westphalia). In all three markets Newco would face competitors of comparable or even bigger size: Corus in Belgium and Luxembourg ([25 % to 30 %]*) and in the Netherlands ([25 % to 30 %]*) and TKS in Germany ([15 % to 20 %]*).

- (2) Steel service centres in the United Kingdom and Ireland, where the parties' combined market share in 2000 was [15 % to 20 %]* ([5 % to 10 %]* + [10 % to 15 %]*). If national markets were to be considered, Newco's market share would be [20 % to 25 %]* in the United Kingdom ([5 % to 10 %]* + [10 % to 15 %]*) and < 5 % ([< 5 %]* + [< 5 %]*) in Ireland. In any event, in the market for the distribution of carbon flat products in the United Kingdom and Ireland, the parties' market share is clearly smaller than that of Corus ([30 % to 35 %]*).
- (3) Stockholding activities in the Benelux and North Rhineland-Westphalia, where the parties' combined market share for carbon steel products in 2000 was [15 % to 20 %]* ([10 % to 15 %]* + [5 % to 10 %]*). In none of the alternative further subdivisions, whether by product markets (flat/long products) or by geographic markets (national markets), would the parties' combined market shares, taking into account those of the other market operators, raise serious competition concerns.
- (234) The operation, therefore, does not raise serious competition concerns in the affected markets described in this section.

VI. UNDERTAKINGS SUBMITTED BY THE PARTIES

1. SUMMARY OF THE COMMITMENTS

1. *Proposed divestitures*

- (235) In order to remedy the competition concerns identified by the Commission, the parties have offered to divest a number of undertakings and businesses in the sectors of steel production and steel distribution.

(a) **Steel production markets**

- (236) The parties will divest their shares in the following undertakings:
- (1) Finarvedi: Usinor agrees to divest, or procure to divest, its interest in the hot-dip production line of ISP Arvedi.
- (2) Galmed: Aeralia and Usinor agree to divest, or procure to divest, their shares in Galvanizaciones del Mediterraneo, SA (51 % and 24,5 % of Galmed's capital, respectively). Galmed produces hot dip galvanised steel.

- (3) Lusosider: Usinor agrees to divest, or procure to divest, its shares in Lusosider Projectos Siderurgicos SA (50 % of the capital). Lusosider produces cold rolled steel, hot dip galvanised steel and tinplate.
- (4) Segal: Arbed's Sidmar and Usinor's Cockerill Sambre agree to divest, or procure to divest, their shares (each 33,33 % of the capital) in Société Européenne de Galvanisation SA Segal produces hot dip galvanised steel.
- (237) Further, the parties will divest, or procure to divest, the following businesses:
- (1) Beautor: Usinor agrees to divest, or procure to divest, its Beautor at La Fere, France. Beautor houses a cold rolling mill and an electro-galvanised steel line.
- (2) Dudelange: Arbed agrees to divest, or procure to divest, the hot-dip steel plant at Dudelange, Luxembourg.
- (3) Straßburg: Usinor agrees to divest, or procure to divest, its site at Strasbourg, France (hot-dip steel and organically coated steel).
- (238) The divestiture of the latter businesses will include all tangible and intangible tangible assets and the transfer of personnel currently employed at the plants.
- (239) Where the production lines referred to in recitals 236 and 237 are not integrated with cold-rolling lines, the parties will offer, at the request of the purchaser, corresponding cold-rolling feedstock capacity or, alternatively, offer toll-rolling, in accordance with normal market conditions. At the request of the purchaser, transitional services/supply agreements will be offered. The units Galmed, Beautor and Strasbourg will be offered as a package, subject to the existing pre-emption right with regard to Galmed.

(b) **Distribution markets**

- (240) In the field of steel distribution, the parties have submitted the following undertakings:
- (1) Cofrafer: Arbed agrees to divest, or procure to divest, Cofrafer SA, a wholly-owned subsidiary, including its subsidiaries Flaberga Découpe, situated at Barberey St. Sulpice, France, Orn'oxycoupage,

situated at Chaillou, France, and Surfaçage de Normandie, situated also at Chaillou.

2. Bamesa: Usinor agrees to divest, or procure to divest, all its shares in Bamesa Aceros, SL, or alternatively to transfer the remaining minority stake, if any, to an independent trustee, until such time as the shares can be sold (currently, Usinor owns directly and indirectly 49 % of Bamesa's capital, over which it has joint control).

2. Related commitments and procedure

- (241) The parties have committed to comply with a number of related obligations designed to ensure the preservation of the full economic viability and competitiveness of the divested businesses, which include the appointment of a trustee responsible for the monitoring of the implementation of the commitments. Moreover, the commitments set out in detail the divestment procedure. The full text of the commitments is set out in the Annex to this Decision.

2. ASSESSMENT OF THE UNDERTAKINGS

1. Galvanised products

- (242) In terms of market shares, the divestments offered would bring Newco appreciably closer to the level of Usinor in the pre-merger situation. In 1999 and in terms of total sales, Usinor had a market share of [30 % to 35 %]* in galvanised steel, against [10 % to 15 %]* for Arbed/Aceralia. After divestments, the combined market share of Usinor, Arbed and Aceralia would fall from [40 % to 45 %]* before divestment to [35 % to 40 %]*. More than [5 % to 10 %]* market share would be divested by the parties, which would correct their position in the market. The figures for 2000 are quite similar, as shown in Table 25.

TABLE 25

Newco's sales and proposed divestments

(Thousand tonnes)

Galvanised steel	1999	2000
Newco's sales	[...]*	[...]*
	[40—45]* %	[40—45]* %
Proposed divestments	[...]*	[...]*
Sales after divestments	[...]*	[...]*
Total sales	[...]*	[...]*
Newco after divestitures	[35—40]* %	[35—40]* %

- (243) As far as capacity is concerned, the proposed divestments would also substantially bring down Newco's market share, from [40 % to 45 %]* to [35 % to 40 %]* in 2002-2003, as Table 26 illustrates.

TABLE 26
Newco's capacities and proposed divestments

(Thousand tonnes)

Galvanised steel	2002	2003
Newco's capacity	[...]*	[...]*
	[40—45]* %	[40—45]* %
Proposed divestments	[...]*	[...]*
Capacity after divestments	[...]*	[...]*
Market capacity	[...]*	[...]*
Newco after divestitures	[35—40]* %	[35—40]* %

- (244) With such market shares, the proposition that Newco could unilaterally increase prices and reduce output would become less realistic, especially due to the potential improvement in the competitive position of its direct competitors after the divestments.

- (245) The proposed divestments will improve the market structure in two ways. If larger competitors like TKS or Corus were to buy some of the plants, this would reduce the gap in terms of size between themselves and Newco. If smaller competitors (like Salzgitter or Voest-Alpine) were to buy some of the plants, that would create a new competitive force with around [5 % to 10 %]* market shares. This would create a competitor of the same order of magnitude as Arbed/Aceralia.

- (246) Moreover, the proposed divestments would resolve the problems identified in the Statement of Objections with regard to the automobile industry. More than 65 % of the divestments relate to this industry. The investigation showed that the accreditation process operates at the plant level. Potential buyers would therefore also gain access to some automobile customers, by buying the plants supplying these customers. As the parties explained in their reply, the supply of steel to the automobile sector is effectively a competitive bidding process. With the divestments proposed, automobile customers will be in a position to find alternative sources of supply to Newco, because new competitors or stronger competitors will be able to take part in the bidding process.

- (247) Furthermore, following the divestments, joint ownership by the largest Community steel manufacturers would largely disappear in the market for galvanised steel products. This would diminish the incentives and

possibilities for competitors to potentially co-ordinate their behaviour.

- (248) Finally, since the divestments take place in the 'home territory' of the merging firms (the area comprising France, Spain and Portugal and Benelux), it would also reduce incentives to develop subcontinental geographic markets for these products.

- (249) Those considerations have been borne out by the market test of the proposed remedies undertaken by the Commission.

2. Steel distribution

- (250) The proposed divestments would eliminate the competition concerns identified by the Commission with regard to several distribution markets in France and Spain/Portugal.

- (251) In France, the divestment of Cofrafer would bring the total market share of Newco down from around [40 % to 45 %]* to around [35 % to 40 %]* in the market for steel service centres in 2000. As far as the markets for stockholding of flat carbon steel products and oxycutting are concerned, Newco's market shares after divestments will amount to around [30 % to 35 %]*. More importantly, the divestment will eliminate the overlaps in the markets for steel service centres, stockholding and oxycutting in France, since it includes all Arbed/Aceralia's steel distribution operations in these markets.

- (252) In addition, the divestment of Bamesa would appreciably reduce the market shares of Newco in the market for steel service centres in Spain/Portugal. On the basis of market shares in 2000, Newco's share in Bamesa represents around [15 % to 20 %]* of the market. After divestment, Newco would go from having [45 % to 50 %]* share of the market to [25 % to 30 %]*. This compares to [10 % to 15 %]* for Grupo Ros, [5 % to 10 %]* for Gutser and [5 % to 10 %]* for A. Gallardo. If national markets were to be considered, Newco's market share in Spain would be reduced from [40 % to 45 %]* to [25 % to 30 %]*, and from [65 % to 70 %]* to [30 % to 35 %]* in Portugal. The divestment will therefore enable a competitor to appreciably increase its market share, outweighing the imbalance created by the merger between Usinor Arbed and Aceralia.

- (253) Those considerations have been borne out by the market test of the proposed remedies undertaken by the Commission.

3. Conclusion

- (254) The Commission therefore considers that the undertakings satisfactorily address the competition concerns identified by the Commission both in the markets for galvanised steel and steel distribution.

VII. CONCLUSION

(255) In the light of all those considerations, the Commission has reached the conclusion that, provided that the undertakings set out in the Annex to this Decision are fully respected, the proposed concentration would not give rise to competition problems and that in particular it would not give Newco Steel the power:

- to determine prices, to control or restrict production or distribution or to hinder effective competition in a substantial part of the market for the relevant products; or
- to evade the rules of competition under the ECSC Treaty, in particular by establishing an artificially privileged position involving a substantial advantage in access to supplies or markets.

(256) Since the requirements of Article 66(2) of the ECSC Treaty are thus met, the proposed merger should be authorised, on condition that the parties fully comply with the following commitments (subject to any change pursuant to the review clause set out in the Annex and):

[...]* (See non-confidential version of commitments in Annex).

(257) Those aspects of the commitments constitute conditions, since only by fulfilling them (subject to any change pursuant to the review clause), can the structural change on the relevant markets be achieved. The remaining aspects of the commitments, concerning the implementing steps which are necessary to achieve the

structural change that is sought, constitute obligations within the meaning of the fifth subparagraph of Article 66(5) of the ECSC Treaty.

HAS ADOPTED THIS DECISION:

Article 1

The operation whereby the undertakings Arbed SA, Aceralia Corporación Siderúrgica SA and Usinor SA merge into the company Newco Steel is hereby authorised under Article 66(2) of the ECSC Treaty, subject to full compliance with the commitments set out in the Annex and in particular with the following conditions:

[...]* (See non-confidential version of commitments in Annex).

Article 2

This Decision is addressed to the notifying parties.

Done at Brussels, 21 November 2001.

For the Commission

Mario MONTI

Member of the Commission

ANNEX

The full original text of the conditions and obligations referred to in Article 1 may be consulted on the following Commission website:

http://europa.eu.int/comm/competition/index_en.html

COMMISSION DECISION

of 15 January 2002

on State aid granted by France to Crédit Mutuel

(notified under document number C(2001) 3956)

(Only the French text is authentic)

(Text with EEA relevance)

(2003/216/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular the first subparagraph of Article 88(2), thereof,

Having regard to the Agreement on the European Economic Area, and in particular Article 62(1)(a) thereof,

Having called on interested parties to submit their comments pursuant to the provisions cited above ⁽¹⁾ and having regard to their comments,

Whereas:

(3) The Commission decision to initiate proceedings was published in the *Official Journal of the European Communities* ⁽²⁾. The Commission invited interested parties to submit their comments on the aid.

(4) Crédit Mutuel sent a letter to the Commission on 18 June 1998 setting out arguments to reject the description of the measures covered by the proceedings as state aid, together with an analytical account file concerning the *Livret bleu*. A number of interested parties also submitted their comments to the Commission (see Section III).

(5) The complainants sent four additional written statements to the Commission by letters dated 29 October 1999, 16 May 2000, 16 October 2000 and 19 January 2001.

I. PROCEDURE

(1) By letter dated 6 February 1998, the Commission informed the French authorities that it had decided to initiate the procedure laid down in Article 88(2) of the Treaty in respect of the advantages granted by the State to Crédit Mutuel through the *Livret bleu* savings system. The French authorities granted Crédit Mutuel exclusive rights in 1975 to distribute the *Livret bleu*. This decision to initiate proceedings followed the lodging of a complaint on 25 January 1991 by the Association française des banques (AFB), the Chambre syndicale des banques populaires (CSBP) and Crédit Agricole concerning the aid granted by the French State to Crédit Mutuel. The Commission had requested the first information concerning the *Livret bleu* in a letter dated 27 May 1991.

(2) In response to the questions raised in the letter initiating proceedings, the French authorities submitted a file to the Commission, by letter dated 8 April 1998.

(6) Given the file submitted by Crédit Mutuel, and in particular the analytical accounts relating to the *Livret bleu* which concluded that not only did the *Livret bleu* system not result in excess compensation of the costs paid by Crédit Mutuel, but in fact involved a net cost for the latter, the Commission decided to conduct an audit of the *Livret bleu* analytical accounts. For this purpose, on the basis of an invitation to tender, it recruited a British consultant, Littlejohn Frazer (hereafter referred to as 'the consultant'), specialised in accountancy and auditing, together with two French accounting consultancies, Auditec and Scacchi. The audit started in November 1998 and continued up until 13 December 1999. Crédit Mutuel sent a memo to the Commission on 21 July 1999 contesting the provisional conclusions produced by the consultant. The consultant's final report was submitted to the French authorities and to Crédit Mutuel for examination on 10

⁽¹⁾ OJ C 146, 12.5.1998, p. 6.

⁽²⁾ See footnote 1.

January 2000. A technical meeting was organised on 7 February 2000 for the Commission, assisted by its consultant, the French authorities and Crédit Mutuel, to discuss the audit report.

- (7) The Commission also received a joint letter on 7 December 1998 from the Banque Nationale de Paris, Crédit Commercial de France and Société Générale submitting a copy of the memorandum of application which these three banks had lodged before the Conseil d'Etat in France, disputing the sale of Crédit Industriel et Commercial (CIC) to Crédit Mutuel by the public insurance group, GAN. In the letter, the three banks called for these proceedings to be extended to the use made by Crédit Mutuel of the aid it had received in connection with the *Livret bleu*, which had for instance enabled it to acquire CIC in April 1998. The Commission noted that the facts set down in the memorandum did not provide any new information to enable it to determine whether the *Livret bleu* system involved aid to Crédit Mutuel or, if so, to assess whether such aid was compatible with the Treaty. The Commission had not therefore acceded to the request to extend these proceedings.
- (8) By letter dated 14 September 1999, the Commission asked the French authorities to explain the general interest tasks entrusted to Crédit Mutuel. In three letters dated 21 February 2000, 3 November 2000 and 5 February 2001, the Commission forwarded to the French authorities for comment various items submitted on the case by the complainants concerning the loss-leader effect of the *Livret bleu*, in particular two statistical studies produced by Cabinet Glais, and asked them about the modification of the tax arrangements applicable to the *Livret bleu* following the decision by the Conseil d'Etat on 5 January 2000 concerning the illegal nature of the *Livret bleu* tax arrangements. The French authorities replied by letter dated 1 February 2001.
- (9) In April 2000, thus after the initiation of the proceedings, the European Banking Federation lodged a complaint against the aid granted by the French State to Crédit Mutuel in the form of exclusive rights to distribute the tax-free *Livret bleu*. The complaint was underpinned by an additional written statement of 22 January 2001 comprising most of the documents already entered in the file by the AFB, and explaining the tax status of interest on the *Livret bleu* in the light of the decision by the Conseil d'Etat on 5 January 2000.
- (10) In May 2000, the Confédération nationale du Crédit Mutuel gave a mandate to the Arthur Andersen firm to review the methodology used in the Crédit Mutuel analytical accounts and to draw up profit and loss accounts relating to the *Livret bleu*. This task was completed in September 2000 with the submission of a detailed report on the *Livret bleu* profit and loss accounts, which assessed the result of the *Livret bleu* analytical accounts at a pre-tax loss of FRF 498 million. The final evaluation of the loss was reached taking into account certain disputable corrective factors. A meeting to discuss the results of the report was held on 2 February 2001. Following observations by the Commission, Crédit Mutuel asked Arthur Andersen to forward a memo dated 8 February 2001 justifying the method used, namely 'correction of the excess weighting granted to the IARD insurance activity' which had in particular been criticised by the Commission.
- (11) The Commission extended the consultant's contract in April 2001 to allow him to identify the discrepancies between the two accounting reports and to determine which modifications of figures or methodology could legitimately be accepted and integrated into his previous evaluation. The final report was handed over on 23 July 2001. It evaluates the result of the *Livret bleu* analytical accounts at a cumulated non-capitalised profit of FRF 1 074 million. The report was sent to the French authorities on the same day. On 26 July 2001, a meeting was held between Crédit Mutuel and Arthur Andersen. Crédit Mutuel and Arthur Andersen announced that they disagreed with the final conclusions of the Commission's consultant. Arthur Andersen defended its earlier conclusions in a document dated 13 September 2000, forwarded as an annex to a memo by the French authorities on 15 September 2001. The French authorities sent the Commission a new memo on 26 October 2001 containing a legal analysis of the *Livret bleu* from the point of Community competition law, as well as a memo of 7 January 2002 concerning the cost of the public service mission, reiterating the figures presented by Crédit Mutuel without providing any new information.
- (12) Because of the various items of information submitted by the complainants testifying to the loss-leader effects that gave Crédit Mutuel a considerable advantage in terms of attracting clients, the Commission extended its consultant's mission in September 2000 and again in April 2001 to include the evaluation of the loss-leader effects of the *Livret bleu*. The consultant mentioned the major problems it had encountered in obtaining from Crédit Mutuel the data necessary for such a technically

delicate study. It had not therefore been able to apply the methodology devised at the outset. The Commission was unable to obtain any conclusive results from this procedure.

allowing for a normal profit margin, this would constitute excess compensation that is regarded as State aid.

- (13) Three of the complainants, the AFB, Crédit Agricole and the CSBP, urged the Commission to take action by letter dated 25 September 2001. A previous letter dated 10 April 2001 had denied allegations in the French press that the complainants no longer wished to continue with their complaint.

2. Crédit Mutuel

- (15) Crédit Mutuel is a decentralised banking group consisting of a national network of Crédit Mutuel branches with the status of cooperative companies. The 1 850 local banks must belong to a regional federation, while each federation belongs to the Confédération nationale du Crédit Mutuel, the 'central body' of the network according to the Banking Act of 24 January 1984. The Crédit Mutuel branches are owned by 5,7 million members. The Federal Branches are members of the Caisse Centrale du Crédit Mutuel, which is the national financial body that ensures the financial liquid assets of the regional groups. The group has the same characteristics as a single undertaking with consolidated accounts. The State is represented in the governing bodies by a Government Commissioner who sits on the Board of Directors and attends the General Meetings of the Confédération Nationale du Crédit Mutuel.

II. DESCRIPTION OF THE LIVRET BLEU SYSTEM

1. Introduction

- (14) Crédit Mutuel was entrusted with the task of distributing the *Livret bleu*, a task subject to strict prerogatives and constraints. The prerogatives consist of the exclusive distribution to the general public of a tax-free savings product, the *Livret bleu* (see Section II.3) and the payment of a collection commission by the Caisse des Dépôts et Consignations (CDC). The obligations concern the use of the resources obtained through the *Livret bleu*. These obligations have evolved over time: initially Crédit Mutuel was obliged to allocate 50 % (this was later increased to 65 %) of the resources to general interest assets (for instance the financing of local authorities and other public bodies), with the balance being freely available to the bank. As of 1991, a growing part of the total savings was allocated to the financing of public housing, with the resources being channelled through CDC. The total amount of savings is now channelled through CDC. The latter pays Crédit Mutuel a fee corresponding to the gross interest rate set by the authorities, passed on to savers, as well as a brokerage commission equal to 1,3 %.

The Commission will examine the situation to see to what extent the distribution of the *Livret bleu* may have given economic advantages to Crédit Mutuel as a result of the savings commission it received from CDC. If the commission exceeds the system's net costs, in other words the difference between the income from other assets (general interest and non-general interest assets) and the real collection and management costs, and

- (16) Crédit Mutuel is the fifth biggest French bank in terms of savings and the third biggest in terms of its network of approximately 3 300 branches (end of 1999). Following the merger with CIC, Crédit Mutuel had a workforce numbering 27 500 employees at the end of 1999, a consolidated balance sheet of FRF 941 billion and had produced a net result for the group of FRF 4,1 billion in the 1999 financial year. The group's high financial margins can be explained in particular by a relatively low operating coefficient (the ratio between overheads and net banking income) – 66,7 % in 1996 – which places Crédit Mutuel among the French banks with the lowest expenses. This level is, however, considerably higher than that of the most profitable European banks. The amount of its capital and shares within the Group virtually trebled in the 1990s, amounting to FRF 61 billion in 1999. Its solvency coefficient (the 'Cooke' ratio) was 15,8 % in 1997, hence much higher than the regulation minimum ⁽³⁾ of 8 %, and higher than that of its main competitors.

- (17) The CIC banking group was privatised in April 1998, and the Government chose Crédit Mutuel from among several banking groups who had applied to take over the group. Following the takeover, the Group consisting of Crédit Mutuel and CIC became one of the biggest French banking groups which, with 4 880 branches, was the second biggest network of bank branches in France, with a total balance sheet of almost FRF 1 300 billion.

⁽³⁾ The regulation level was established in Directive 89/647/EEC of 18 December 1989 concerning the solvency ratio for credit institutions (OJ L 386, 30.12.1989, p. 14).

(18) Crédit Mutuel is a bank with a network that has the characteristic of being structurally collection-oriented: its deposits (FRF 408 billion in 1998) are higher than the loans it grants (FRF 345 billion in 1998). This surplus of resources over applications in its banking activity makes this establishment a lending establishment on the market in structural terms. This can be explained by its mutual-interest status and the number of individual customers, whose net savings are positive. Crédit Mutuel plays an important role in financing professionals, craftsmen and retailers, as well as farmers, local authorities and voluntary organisations. Apart from its activities as a credit institution, it is also very active in the field of insurance, where it achieved a net profit of FRF 23 billion in 1998 (life and non-life insurance) which contributes significantly to its results. It also has recognised know-how, which is exported, in electronic payments and in electronic financial transactions (issuing of payment cards and handling of card payments by retailers).

3. The Livret bleu

(19) The *Livret bleu* is a regulated savings product, aimed at the general public, for which Crédit Mutuel was granted distribution rights by the authorities pursuant to Law No 75-1242 of 27 December 1975. The interest rates granted by Crédit Mutuel on *Livret bleu* deposits are fixed by the Government. The commercial interest rate applied to savers after tax is identical to its main rival savings product, also for the general public, the *Livret A* (distributed by the Caisses d'épargne and the Post Office). The amount of savings cannot exceed the ceiling which is also set for the *Livret A* ⁽⁴⁾. The *Livret bleu* has played an important role for Crédit Mutuel, forming a key product for its private customers for almost two decades in terms of competition with its rivals. Its relative importance in quantitative terms has, however, been declining in recent years. The share accounted for by the *Livret bleu* in Crédit Mutuel's deposits, which was 70 % in 1975 and almost 60 % in 1985, has fallen to under 25 % since 1997.

(20) Until the end of 1999, the taxation of the *Livret bleu* system derogated from the taxation rules normally applied to savings. In fact, Crédit Mutuel officially paid the State one third of the taxation normally owed on the basis of levies in discharge from savings revenue and

social charges, regardless of the tax situation of the savers ⁽⁵⁾. The amount of this tax was not in any case passed on to savers. On 5 January 2000, the AFB referred the matter to the Conseil d'Etat, which declared that *Livret bleu's* system of partial tax exemption was illegal under national tax rules on levies in discharge. The French authorities decided on 13 January 2000 to raise the pre-tax rate for the *Livret bleu* so that the net amount paid to savers would remain unchanged. It seems that before the entry into force of the Decree of 27 September 1991, Crédit Mutuel benefited from a 'cancellation' mechanism for tax deductions paid under the system described above. In other words, either the State or the Caisse des Dépôts et Consignations (CDC) paid Crédit Mutuel a sum corresponding to the deductions in question, so that the *Livret bleu* was a completely tax-free product from that year on, both for consumers and for Crédit Mutuel, at least with respect to the total amounts transferred through the CDC.

(21) The funds collected via the *Livret bleu*, the amount of which fluctuated during the 1990s from FRF 80 billion to FRF 100 billion, have been allocated in different ways from the outset.

(22) An increasing and compulsory fraction of these funds has been allocated to public housing, with the funds being 'channelled' through the CDC, in other words paid into a deposit account at CDC, or allocated by Crédit Mutuel itself to the same applications as those of CDC. CDC pays Crédit Mutuel a fixed collection commission of 1,3 % for the funds channelled to it (added to the net interest rate paid to savers). The level of the commission has not changed since the start of these channelling operations, i.e. since 1991. CDC uses the funds allocated to finance public housing and to grant loans to public housing bodies, in the same way as the funds collected from the Caisses d'épargne and Post Office's *Livret A*.

⁽⁴⁾ At the date of this Decision, the interest rate was 3 % net of income tax or of the levy in discharge. The ceiling is FRF 100 000 for private individuals.

⁽⁵⁾ Since the levy in discharge has a fixed rate and savers have the option of not paying the levy in discharge and including the income from investments in their income taxable under the personal income tax system (IRPP), they may find themselves in four different situations: not liable for tax on this financial income (if they are not taxable under the personal income tax system), taxed on this income in the personal taxation system at a lower rate or rate equal to the levy in discharge, or liable to pay the levy in discharge. In the event of an error of calculation by them, they may also be taxed on this income under the personal income tax system at a higher rate than the compulsory deduction.

Since the Decree of 27 September 1991, all new funds collected by the *Livret bleu* were used to finance public housing, and the total amount at 31 December 1990 was to be gradually transferred to CDC in annual instalments of 10 %, up to 2000.

- (23) Another fraction of these funds was to be used for applications defined by a Decree of 1 March 1976, called 'general interest assets'. Half must go to financing local authorities, and the other half to subscribing to State and other public securities, and to loans to complement low-interest loans for public housing. Loans could not be granted to commercial companies.

Under the Law of 27 December 1975, the share of the funds allocated to these tasks was to be 50 % of total funds. This proportion was raised to 65 % (and to 80 % of new funds collected) from the entry into force of two Decrees of 31 October 1983 (until 1991) ⁽⁶⁾.

- (24) Lastly, the remainder of the total amount collected, initially half, but from 1983 to 1991 ⁽⁷⁾ 35 %, and subsequently less and less in the 1990s, could be freely used by *Crédit Mutuel* for its own account, thus it was able to shore up its competitive banking activities using part of the funds collected via the *Livret bleu*.

(25)

Table 1

Assets corresponding to the funds collected via the *Livret bleu*

(In FRF billion and as a %)

	1991	1992	1993	1994	1995	1996	1997	1998
Average total annual funds	[...] (*)	[...]	[...]	[...]	[...]	[...]	[...]	[...]
Funds channelled via CDC	1 %	6 %	11 %	22 %	34 %	41 %	45 %	61 %
Other general interest assets	50 %	40 %	34 %	26 %	20 %	15 %	11 %	8 %
Legal reserves/cash flow	26 %	29 %	24 %	22 %	20 %	19 %	18 %	16 %
Total regulated assets	77 %	75 %	69 %	69 %	74 %	75 %	74 %	85 %
Total free funds	23 %	25 %	31 %	31 %	26 %	25 %	26 %	15 %

Source: *Crédit Mutuel* and Arthur Andersen.

- (26) As the authorities stated, this system was designed at a particular time with a view to promoting the development of *Crédit Mutuel* by allowing it access to cheap resources, so that it could develop its own banking activities which were shored up to a large extent by the funds collected via the *Livret bleu*.

(*) Business secret.

⁽⁶⁾ Under the Amending Finance Law of 1982 dated 30 December 1982, the share to be used to directly finance the State budget or specific needs was increased, with a consequent reduction in loans to local authorities. *Crédit Mutuel* contributed on an *ad hoc* basis for the first time in 1987-1988 in the financing of public housing (up to FRF 1,8 billion) during an operation organised by CDC to subscribe to securities.

⁽⁷⁾ Before taking into account compulsory reserves and liquidity on these total amounts.

- (27) The system was radically changed in 1991 to bring it gradually into line with the *Livret A* system, as the French authorities were obviously aware of the distortions of competition it caused. Technically, all resources are now deemed to be allocated to general interest assets, with the financing of public housing increasingly receiving a greater share ⁽⁸⁾. In practice, all new deposits collected via the *Livret bleu* seem to have been allocated to finance public housing. The existing funds were to be re-allocated over 10 years, between 1991 and 2000, in order to allow Crédit Mutuel to restructure its assets concerning [...] of its balance sheet (end of 1990). In return, all administrative controls on the opening and closing of branches were completely abolished in 1991. Moreover, payment of the fixed amount of levies in discharge on interest paid to savers with *Livret bleu* accounts was officially 'cancelled' ⁽⁹⁾, in other words refunded to Crédit Mutuel by CDC or by the State.
- (28) When the Commission decided to initiate these proceedings, the prevailing situation was undergoing a transition: the funds recently collected via the *Livret bleu* appeared to have been allocated to public housing, but the total funds collected in the past were being allocated to this purpose very late compared with the initial Agreement concluded between Crédit Mutuel and the State (which provided for a transfer of 10 % of the total funds each year). The non-general interest assets were quite substantial in the last decade (approximately [...]) as can be seen from Table 1 above. The channelling of funds to CDC was, however, speeded up in 1997. In fact a new element had accelerated and modified the reform of the assets relating to the *Livret bleu*. Following the initiation of these proceedings by the Commission in December 1997 and the sale of CIC to Crédit Mutuel in April 1998, the State renegotiated the 1991 Agreement with Crédit Mutuel. It was then decided to channel the entire funds collected via the *Livret bleu* to CDC at the end of 1998. This measure was completed in the second half of 1999.
- (29) In the notice on the initiation of these proceedings, the Commission noted that State aid might have been granted to Crédit Mutuel under the *Livret bleu* system for the following reasons.
- (30) Firstly, the resources of CDC, which is a public institution, are State resources ⁽¹⁰⁾ within the meaning of Article 87 of the Treaty. The 1,3 % intermediation commission therefore had to be justified to verify the absence of excess compensation of Crédit Mutuel for collection and management charges relating to the *Livret bleu*.
- (31) Secondly, under Community case-law the component relating to the tax exemption of the savings scheme may, like the granting by the State of tax concessions, constitute a State resource within the meaning of Article 87(1) of the Treaty ⁽¹¹⁾. In the notice on the initiation of these proceedings, the Commission indicated that the beneficiaries of the tax aid were the savers and not the Crédit Mutuel. However, it did point out that it was necessary to determine whether Crédit Mutuel did not benefit from this tax advantage itself through the savings scheme in question.
- (32) The third component of the advantage identified (the net intermediation margin achieved by Crédit Mutuel on the non-transferred *Livret bleu* funds, after deducting management costs) might also involve State resources in relation to the general interest assets. Most of the general-interest-task products derive from compulsory loans to public administrations (the State and local authorities) and to public enterprises under interest rate conditions regulated by the State, which are not necessarily the same as market conditions. The State is therefore in a position to control completely the return it chooses to grant Crédit Mutuel for these assets. Because it is compulsory, this aspect forms an integral part of the balance sheet of *Livret bleu* expenditure and income. The result is that Crédit Mutuel was able to derive income exceeding the real management and collection costs of deposits from the funds not transferred to CDC.
- (33) Fourthly, when initiating the proceedings, the Commission had mentioned, without taking up a position because of a lack of sufficiently precise information in the file, the complainants' argument
- ⁽⁸⁾ 'All the sums registered in special savings accounts opened for depositors by Crédit Mutuel banks (...) shall be allocated to general interest tasks' (Art. 1 of the Decree of 27 September 1991). The general interest tasks mentioned under Article 1 include: 1. For a fraction determined by Crédit Mutuel, loans covered by (...) the Code on Construction and Housing [public housing]; 2. For the balance, an allocation to the account of CDC' (Art. 2 of the Decree of 27 September 1991).
- ⁽⁹⁾ 'The following costs for Crédit Mutuel shall be cancelled: 1. Compulsory deductions paid by Crédit Mutuel on the income from amounts entered in the special accounts mentioned under Article 1 and used under the conditions provided for under Article 2' (Article 3 of the Decree of 27 September 1991).
- ⁽¹⁰⁾ Case T-358/94 *Air France v Commission* [1996] ECR II-2109, paragraphs 55 to 69.
- ⁽¹¹⁾ Case C-387/92 *Banco exterior de España* [1994] ECRI-902, paragraph 14.

pointing to the beneficial effects of the *Livret bleu* as regards attracting customers, a system which can be described, for the sake of simplification, as a 'loss-leader'. According to the complainants, the exclusive right to distribute a savings product that is attractive because it is tax-free might allow Crédit Mutuel to attract and keep customers to whom its network can then sell other banking products or services (loans, investments, insurance and management of payment means). The same reasoning used for the third component could be applied here: the State might take account of the benefits, where appropriate, arising from these loss-leader effects by reducing the amount of the commission it pays for the collection of funds.

and subsequently non-permanent, branches of Crédit Mutuel dropped in the regions in which Crédit Mutuel was traditionally very strong (Pays de Loire, Brittany and Alsace), while the number of branches in other regions grew. It is therefore likely that Crédit Mutuel reduced its establishments in rural areas in order to concentrate on urban areas. These figures appear to refute Crédit Mutuel's allegations that it was obliged to maintain a large number of branches in rural areas in the 1990s. They also show that Crédit Mutuel is capable of maintaining an exceptionally dense network of branches even after the removal of all controls by the authorities.

III. COMMENTS FROM INTERESTED PARTIES

1. The arguments of the complainants

(34) The complainants' arguments were presented by the Commission in its notice on the initiation of the proceedings pursuant to Article 88(2) of the Treaty. The additional written statements submitted since then contain the following new arguments.

(35) A paper (updated at the end of February 1999) and communicated in October 1999 on the loss-leader effect of the *Livret bleu* assesses the financial advantage obtained by this at FRF 17 billion, assuming that the increase in Crédit Mutuel's market shares in every segment over the period 1986 to 1997 was exclusively the result of distributing the *Livret bleu*.

(36) Another paper dated May 1998 and communicated in October 1999 assesses the loss of tax earnings for the State at FRF 2,9 billion over the same period. In other words this is the cost that the Crédit Mutuel would have had to pay if it had wished to distribute this product without the tax exemption by offering savers the same return after tax.

(37) A study conducted by the Caisse Nationale du Crédit Agricole submitted in May 2000 analyses developments regarding the number of Crédit Mutuel branches. It emerges that the overall number of permanent branches fell between 1991 and 1994, and then increased gradually to reach, in 1998, the same level as 1990. This trend differs according to the regions: the number of branches fell mainly in the Pays de Loire region (-21 %), in Normandy (-8 %) and to a lesser extent in Nord-Pas-de-Calais (-3 %). This situation was accentuated by the slowdown between 1994 and 1998 in the number of non-permanent branches in the Pays de Loire region and in Brittany, and to a lesser extent in Alsace. The study concluded that the number of permanent,

(38) A memorandum produced by the Glais consultancy dated August 2000 contains statistics concerning the competitive advantage enjoyed by Crédit Mutuel as a result of the exclusive rights relating to the *Livret bleu*. An examination of time series shows the total amount of *Livret bleu* deposits and the total amounts of other deposits increased considerably up until a turning point in 1985 to 1987. The growth in loans to households continues after that date and remains stronger for Crédit Mutuel than for its main competitors. The Glais consultancy expert deduces that 'the *Livret bleu* effect therefore seems to have worked by attracting customers [...] and from the 1980s, the positive effect seems to have continued without an increase in deposits. Thus the customers who remained loyal appear to have been the ones who financed Crédit Mutuel's expansionist strategy from that period on'. The expert goes on to point out that Crédit Mutuel's activities (essentially credit activities) appear to be unrelated to average developments on the banking market, notably by establishing an indicator for the persistence of random economic crises based on activity variables and by creating a model based on a simple equation relating to credit demand. In the expert's view, this might be logically explained by the fact that Crédit Mutuel's customers remain much more loyal than those of other banking networks, for example because of the *Livret bleu*.

(39) The second memorandum by the Glais consultancy (dated December 2000) proposed a new econometric analysis of the degree of loyalty of each set of customers with each banking network. The building of a model based on real interest rates permits the establishment of an indicator of sensitivity of credit demand to rates. The auto-regression vector model enables account to be taken of adjustment periods and multiple causal links that may exist between the variables. Based on a very high threshold of statistical confidence, the demand for credit from Crédit Mutuel is not, in absolute terms, very sensitive to the level of interest rates (0,26), and is not at all sensitive (0,01) to the level of rates charged by the competition (in this case the interest rate chosen was that of Crédit Agricole). The levels of sensitivity

obtained for the other banking networks range from 0,86 to 2,93 and from 0,66 to 3,74, with the notable exception of the Caisses d'épargne (0,37 and 0,47), which offer the *Livret A*, a savings account with more or less the same features as the *Livret bleu*. According to the expert, these figures corroborate the hypothesis that the two networks have much better means of retaining their customers' loyalty than other networks do. But it is impossible to determine whether the offer of a tax-free savings account or the use of a dense network of branches in different regions (two instruments shared by these networks) is the reason for the greater customer loyalty.

2. Comments from interested third parties

- (40) In response to the publication in the Official Journal of the Commission notice on the initiation of these proceedings, the Commission received comments from a number of interested parties.
- (41) Crédit Mutuel's competitors unanimously underlined the harm they considered they were suffering because of the monopoly over the *Livret bleu* given to Crédit Mutuel. Most banks considered that the loss-leader effect of this tax-free product was causing them harm by losing them customers attracted by the *Livret bleu*, and they wanted to see an end to this monopoly. The following establishments sent comments to this effect to the Commission:

Banque Dupuy, de Parseval

Banque Natexis

Banque de Picardie

Banque Populaire de Bourgogne

Banque Populaire Bretagne Atlantique

Banque Populaire du Centre

Banque Populaire Centre-Atlantique

Banque Populaire de Champagne

Banque Populaire de la Côte d'Azur

Banque Populaire du Dauphiné et des Alpes du Sud

Banque Populaire de Franche-Comté, du Maconnais et de l'Ain

Banque Populaire du Haut-Rhin

Banque Populaire de La Loire

Banque Populaire de Lorraine

Banque Populaire de Lyon

Banque Populaire du Midi

Banque Populaire du Massif Central

Banque Populaire de l'Ouest

Banque Populaire Provençale et Corse

Banque Populaire des Pyrénées Orientales, de l'Aude et de l'Ariège

Banque Populaire du Quercy et de l'Agenais

Banque Populaire Savoisiennne

Banque Populaire de la Région Economique de Strasbourg

Banque Populaire du Sud-Ouest

Banque Populaire du Tarn et de l'Aveyron

B.P.ROP Banque Populaire

Banque de Savoie

Crédit Commercial de France

Crédit Commercial du Sud-Ouest

Crédit Lyonnais

Société Générale

Union des Banques à Paris.

- (42) One of the complainants, the AFB, sent the Commission a letter on 4 June 1998 stating that the 1,3 % charge paid by CDC for funds transferred to it was excessive and that there was no justification for the difference between this and the 1,2 % commission paid to the Caisses d'épargne on the funds collected through the *Livret A*. The AFB points out in this letter that it proposed to the French authorities at the beginning of 1997 that it would ensure the collection of *Livret bleu* funds under the same conditions of channelling funds to CDC for a charge of only 1 %, but that the Government had not replied to this offer. The AFB underlined in particular that the April 1998 report by Mr Douyère, a member of parliament, on the modernisation of the Caisses d'épargne indicated that the cost for an average Caisse d'épargne like that of Burgundy to collect savings was 0,96 % of its total funds, and that there was no

reason why Crédit Mutuel's management costs should be higher. Crédit Mutuel did not suffer from the technical constraints facing the Caisses d'épargne which made account management more expensive (the management of the *Livret A* was not yet completely electronic in the 1990s, while management of the *Livret bleu* was fully electronic).

(43) On a matter incidental to these proceedings, the Commission also received an additional statement from the complainants which stated that the purchase by Crédit Mutuel in April 1997 of Crédit Industriel et Commercial (CIC), when the latter was being privatised (it had previously been owned by the public insurance group, GAN), had been possible because of the aid it had received for the *Livret bleu*, enabling it to increase its market share of savings from 2% in 1969 to approximately 6,9% in 1997. According to the complainants, the undertaking's own funds had increased rapidly because of the aid in question, rising from FRF 650 million in 1974 to FRF 47,3 billion in 1997.

(44) In addition to the comments made by Crédit Mutuel in its own defence, presented under Section III.3, the Commission received comments from the following third parties which were in favour of the *Livret bleu* system:

Mr Bertholet, MP (Drôme)

Mr Blondel, Member of the General Council of the Nord Region

Mr Cabot, Director of the Youth Information Regional Centre of Toulouse

Mr Cormorèche, Mayor of Montuel

Mr Cornelis, Member of the General Council of the Nord Region

Mr Chavannes, Mayor of Angoulême

Mr Crépeau, MP (Charente Maritime)

Mr Debavelaere, Senator (Pas-de-Calais)

Mr Decool, Mayor of Brouckerque

Mr Delevoeye, Senator (Pas-de-Calais)

Mr Delnatte, MP (Nord Region)

Mr Dolez, MP (Nord Region)

Mr Ewald, Regional Delegate of the Association pour le Droit à l'Initiative Economique

Mr Fronton, Union Départementale des Associations Familiales de Haute-Garonne

Mr Foy, Senator (Nord Region)

Mr Galiègue, President of the Caisse de Crédit Mutuel de Solesmes

Ms Gournay, Mayor of Caestre

Ms Armelle Guinebertière, Member of the European Parliament

Mr Hervé, Mayor of Rennes

Mr Humez, President of the Comité départemental de lutte contre la mucoviscidose du Pas-de-Calais

Ms Ingelaere, President of Flandr'action

Mr Juppé, Deputy Mayor of Bordeaux

Mr Lapalu, President of the Association Animation et Gestion d'Organismes Privés

Mr Lazaro, MP (Nord Region)

Mr Lebreton, President of the Conseil Général des Côtes d'Armor

Mr Ledieu, Mayor of Cateau-Cambrésis

Mr Leleu, Director of Crédit Mutuel Nord

Mr Maille, President of the Communauté Urbaine de Brest

Mr Masclet, Member of the Regional Council of Nord-Pas-de-Calais

- Mr Méhaignerie, President of the Conseil Général d'Ille et Villaine
- Mr Mio, Member of the Regional Council of Nord-Pas-de-Calais
- Ms Novak, President of the Association pour le Droit à l'Initiative Economique
- Ms Permuy, Member of the Regional Council of Nord-Pas-de-Calais
- Mr Albert Rivaux, Member of the Regional Council of Pas-de-Calais
- Mr de Rohan, President of the Regional Council of Brittany
- Mr Valla, Member of the General Council of the Ardèche Region
- Mr Vanlerenberghe, Mayor of Arras
- Mr Villain, Mayor of Cambrai
- Mr de Villiers, MP (Vendée).
- (45) The vast majority of third parties underlined the role played by Crédit Mutuel, particularly at regional level, in financing the social economy, especially non-profit-making organisations. They also stressed the supporting role it plays with respect to working class people, the section of society from which most of its customers come. Several local elected representatives emphasised Crédit Mutuel's role in setting up undertakings and creating jobs, and in developing local initiatives in conjunction with the local authorities. Others considered that because of its decentralised structures, Crédit Mutuel was able to meet local needs better than centralised institutions and to respond better to the requirement of balanced regional development.
- (46) Crédit Mutuel sent a letter to the Commission on 11 June 1997 containing its comments in response to the opening of the proceedings. It considers, primarily, that the conditions under which *Livret bleu* funds are collected and managed do not constitute State aid. It adds, alternatively, that even if it does constitute State aid within the meaning of Article 87 of the Treaty, this could be eligible for the exemption provided under Article 86(2) of the Treaty. Only local Crédit Mutuel
- branches would have, where appropriate, benefited legally from such aid.
- (47) Crédit Mutuel reiterated and expanded on these arguments in a detailed file dated 18 June 1998.
- (48) Crédit Mutuel justified the freedom of allocation from which it had benefited in the past in relation to one third of the *Livret bleu* resources ⁽¹²⁾ by the fact that it had paid one third of the taxation on the interest paid to savers. It deduced from this that this justified excluding one third of the total amount of *Livret bleu* savings from the scope of these proceedings. Crédit Mutuel explained that the rule for allocating two thirds of the total amount of savings to general interest assets should be looked at from the point of view of the exemption from tax of two thirds of the *Livret bleu* savings. Crédit Mutuel also stated that it took into account the risk of lack of liquidity, for instance in the case of negative net collections (withdrawals).
- (49) Crédit Mutuel considered that the savings scheme in question did not involve State resources and could not therefore give rise to State aid within the meaning of Article 87(1) of the Treaty. In particular it underlined the fact that the tax advantage in question did not affect the State budget because of its special features, mentioned earlier. It disputed the calculations in the Annexes to the Finance Law entitled 'Ways and Means', evaluating the tax cost of the partial exemption inherent to this system and presenting an exhaustive account of the cost for the State of the *Livret bleu* system. In return for the exemption from tax of part of the group of savers, it stated that taxation of a group not normally liable for tax or taxed at a low level generated revenue for the State which should be taken into account in the net tax assessment of the mechanism, mindful of the fact that Crédit Mutuel had paid tax equivalent to one third of the levy in discharge. Crédit Mutuel stressed the fact that, according to its estimates, the *Livret bleu* tax regime for the period 1975 to 1996 had generated net resources of [...] for the State.
- (50) Crédit Mutuel disputed the fact that it could have benefited from the tax advantage of the savers since each year it paid back to the State the deduction at source of one third of the tax normally applicable, so that the real rate of the *Livret bleu* before tax was in fact the nominal interest rate received by savers plus the tax deducted at source by Crédit Mutuel. Crédit Mutuel stated that it had paid back some [...] to the State in this way between 1975 and 1996.

3. Comments from Crédit Mutuel

⁽¹²⁾ From 1983; this proportion was slowly reduced as of 1991.

- (51) In the event that the Commission decided that aid existed, Crédit Mutuel would also dispute the fact that trade between Member States had been affected. According to Crédit Mutuel, this was a product which accounted for only 5,8 % of savings collected in France and 0,72 % in Europe. Crédit Mutuel was an operator whose size was very relative. Given the absence of a European cooperative company statute, local branches were unable to operate outside France. The opening of *Livret bleu* accounts for non-residents represented only a small number of accounts in 1997, roughly 8 600, or 0,16 % of total *Livret bleu* savings. In any case, Crédit Mutuel stated, before the implementation of the second Banking Directive⁽¹³⁾ in 1993, the fact that the internal banking market was not completed was a barrier to trade.
- (52) Crédit Mutuel disputed the earnings lost by the State because of the absence of invitations to tender which had resulted in it being granted exclusive rights to distribute this product (compared with the situation in which an invitation to tender would have allowed the State to select an institution providing the same service at a lower cost). It emphasised that, once the State had decided to have resources collected by means of the system in question for use in a general interest task, it was free to appoint Crédit Mutuel for this purpose since its network corresponded to the conditions of collection required in order to exploit savings by the general public.
- (53) Crédit Mutuel considered that the difference between the commission of 1,2 % paid by CDC to the *Livret A* savings banks and the 1,3 % commission paid to Crédit Mutuel for the *Livret bleu* (this was also paid by CDC) could be explained by economy of scale, given the total amount of *Livret A* savings⁽¹⁴⁾. Based on the analytic accounting figures it had presented to the Commission, it could be concluded that the average cost of managing *Livret bleu* deposits had dropped by [...] in 1993 to [...] in 1997, and that before 1997, it had remained permanently higher than the commission margin of 1,3 % which CDC paid it for the transferred funds.
- (54) Crédit Mutuel considered that the argument by the AFB banks that the *Livret bleu* savings could be collected at a lower cost, for an intermediation commission of only 1 %, should be assessed in the light of the choice made by banks depending on the amount of the deposits in these accounts. This refusal of cost equalisation by AFB banks would undermine the overall management balance of the system.
- (55) Crédit Mutuel sent a report to the Commission containing an analysis of the analytical accounts of the *Livret bleu* system. This analysis concluded, for the period 1991 to 1997, that the collection and management of the *Livret bleu* savings had generated higher costs than the income received, and that the system was in balance only in certain years. Crédit Mutuel concluded that, apart from 1991 to 1992, the margin on the *Livret bleu* was lower than the margin it achieved on its other activities. It also sent the Commission an auditor's certificate concerning this analysis issued by a French auditing firm, Mazars et Guérard.
- (56) Crédit Mutuel disputed the fact that it could benefit from a commercial advantage through the *Livret bleu* since:
- the gains in Crédit Mutuel's market shares during the period concerned could be explained by its performance, notably its high level of productivity, and not by the attractiveness of the *Livret bleu*, whose share of the bank's resources had been dropping over time. Crédit Mutuel stated that the average number of customers managed per employee was 364 at the Crédit Mutuel in 1996 compared with 150 in other French credit institutions. From 1991 to 1997, Crédit Mutuel increased its share of the savings market by 1,1 %, while the other banks lost a market share of 0,6 %. Crédit Mutuel emphasised the fact that the Caisses d'épargne, which had a comparable product in the *Livret A*, had, like the other banks, experienced a drop in their share of the savings market during the period under review. This refuted the causal link established by the complainants between the *Livret bleu* and the increase in Crédit Mutuel's market share,
 - other regulated savings products such as the Codevi (industrial development accounts) introduced by the authorities in 1983, the Plan d'Épargne Populaire and the *Livret Jeune*, were distributed by the banks and represented a real alternative to the *Livret bleu*, to such an extent that the various possibilities

⁽¹³⁾ Council Directive 89/646/EEC (OJ L 386, 30.12.1989, p. 1).

⁽¹⁴⁾ The total *Livret A* funds collected by the Caisses d'épargne are approximately seven times greater than those of the *Livret bleu*.

offered by these products permitted, in 1997, a single person of over 25 years of age to accumulate tax-free savings of FRF 1 130 000 (compared with the ceiling of FRF 100 000 on the *Livret bleu*).

(57) Crédit Mutuel stated that the attraction of the *Livret bleu* had had the effect of reducing considerably the amount of deposits on current accounts on which the bank did not pay interest, and which in 1997 represented 15,8 % of its deposits compared with 36,6 % to 40,8 % for its main competitors. This substitution had, it stated, had a negative effect on its profitability and margins, so that the average cost of deposits with Crédit Mutuel was significantly higher than with the AFB banks.

(58) Crédit Mutuel also disputed the fact that the entire Crédit Mutuel group had benefited from aid, in the event that it was decided that aid had been granted. It stressed that it was only the local branches, which were legally independent, which distributed the *Livret bleu* and which might therefore have benefited from aid.

(59) Crédit Mutuel considered that by adopting the legislative measures ⁽¹⁵⁾ introducing the *Livret bleu* in 1975, the Government had established a general interest system for collecting savings from the general public for allocation to general interest financial assets. Crédit Mutuel's network in rural areas and the extent of its modest-income customers had, in its view, played an important role in this choice. In 1998, 58 % of Crédit Mutuel's customers lived in municipalities of under 20 000 inhabitants and 77 % declared a net monthly income of under FRF 10 000.

(60) Crédit Mutuel underlined the constraints to which it had been subjected:

— the State had, it argued, obliged Crédit Mutuel to maintain [...] branches in municipalities with under 2 000 inhabitants, the cost of which was estimated at FRF [...] million per year,

— it had to maintain 'special *Livret bleu* accounts', whose management costs were higher than the 1,3 % commission paid by CDC. If these accounts, which contained an average low amount, had been closed, [...] of the *Livret bleu* accounts representing only [...] of the total savings might disappear.

Therefore Crédit Mutuel would make savings estimated at FRF [...] million per year. Crédit Mutuel estimated that managing small accounts resulted in a surcharge of [...] of the total amount contained in them, given their features, and mindful of the fact that the lower the balance, the greater the number of book entries,

— until 1991, the opening of branches was regulated, so that Crédit Mutuel could not develop in the most attractive areas, outside its own traditional areas of establishment (the East, the North and Brittany),

— Crédit Mutuel also pointed out, rather vaguely and without using figures to support this thesis, that other surcharges relating to *Livret bleu* general interest assets should be taken into account,

— lastly, Crédit Mutuel said that there was a risk of transformation to be borne by it because of the risk of a variation of the margin between the short-term rate (which is regulated) applied to *Livret bleu* resources and the medium and long-term rates applied to the assets.

(61) Based on this information, Crédit Mutuel felt that, without the *Livret bleu*, it would have been unable to perform the general interest tasks required of it. It stated that the share of the *Livret bleu* funds which it could use freely had enabled it to balance the system, given the insufficient margins achieved on general interest assets.

(62) Crédit Mutuel also expressed its legitimate confidence in a system that dated back to 1975. It considered that the length of the investigation of a complaint, going back to 1991, was likely to violate this legitimate confidence.

(63) In a note dated 13 December 2000, Crédit Mutuel criticised the method followed in the first memorandum issued by the Glais firm. It stressed that other reasons could explain the statistical phenomena observed, such as the fact that Crédit Mutuel had a denser network than its competitors at the beginning of the period under review (in terms of NBP per branch). It pointed out that between 1987 and 1998 Crédit Mutuel had

⁽¹⁵⁾ Law No 75-1242 of 27 December 1975, 1975 Amending Finance Law, Article 9.

won a smaller market share than *Crédit Agricole* (whose balance sheet was smaller), and that *Crédit Mutuel* had gained two points on the lending market compared with four points for all the AFB banks (which in fact confirmed *Crédit Mutuel's* spectacular expansion).

- (64) A note dated March 2000 issued by *Crédit Mutuel Midi Atlantique* emphasised the arbitrary nature of the analytical account figures put forward by the Commission's consultant: the quantitative data were assessed in a contradictory way, and the qualitative data (cost of maintaining the network in rural areas and loss-leader effect) were difficult to gauge. *Crédit Mutuel* confirmed that it agreed with the general introduction of the *Livret bleu*, in other words its distribution by the other banking networks, but it was against the idea of any refund of aid, which it deemed would penalise over five million members.

IV. COMMENTS FROM THE FRENCH AUTHORITIES

- (65) In their letter of 8 April 1998, the French authorities considered, in the first instance, that the *Livret bleu* system did not involve any substantial tax cost for the State, as the latter had opted for uniform taxation of the depositors of one third of the levy in discharge on savings revenue, thereby waiving the remaining two thirds of the levy in discharge but collecting, on the other hand, this one third from a group that is normally not liable for tax. On this basis they disputed that Article 87(1) of the Treaty could be applied in any way because of the absence of State resources allocated to the system in question.
- (66) The French authorities also stressed the fact that the intermediation commission paid by CDC to *Crédit Mutuel* on the total *Livret bleu* funds channelled to it did not constitute aid, but rather remuneration for a service rendered by the bank, the price of which had been set in 1991 at 1,3 %. They underlined the extent of the management costs for the *Livret bleu* because of the number of accounts whose totals were under FRF 5 000. They referred to the analytical account analysis produced by *Crédit Mutuel*, concluding that this amount was fully justified.
- (67) The French authorities disputed that trade could have been affected before the completion of the single market in banking and financial activities following the adoption of the second Banking Directive on 15 December 1989 and its incorporation into French law on 1 January 1993. The French authorities considered that, after that date, given the absence of a European cooperative company statute and the constraints that this situation produced in terms of the crossborder expansion of cooperative companies such as *Crédit Mutuel*, *Crédit Mutuel's* branches did not operate across national borders. Moreover, the *Livret bleu* accounts opened for non-residents represented less than 0,1 % of the total savings. The authorities also stated that foreign banks in France were targeting a very different market to that of *Crédit Mutuel*. They therefore disputed any possibility of intra-Community trade being affected by a measure contrary to the common interest.
- (68) The French authorities emphasised that the advantages which *Crédit Mutuel* received from the *Livret bleu* should be examined in the light of the costs connected with a general economic interest task. They pointed in particular to the increasing allocation of the *Livret bleu* funds to general financial interest assets: the fraction rose successively from 50 % of *Livret bleu* funds between 1975 and 1983 to 65 % between 1983 and 1991. They pointed out that following the allocation of funds agreed with *Crédit Mutuel* in 1991, 100 % of these funds would be allocated to general financial interest assets from 2000. They stated that they intended to speed up the implementation of the 1991 Agreement so that the *Livret bleu* funds could be allocated for this purpose earlier than envisaged, from the end of 1998.
- (69) The French authorities also stressed that while the opening of bank branches had been liberalised in the rest of the banking sector on 24 November 1986, *Crédit Mutuel* had remained subject to a system of administrative authorisation up until 1991 because of the decision by CNC (*Conseil national du crédit*) on 10 January 1967. It was not until 1 July 1991 that the obligation for *Crédit Mutuel* to obtain authorisation from the *Comité des établissements de crédit* prior to opening, modifying, transferring or closing any branches had been abolished. The French authorities considered that until 1991, the constraints relating to the geographical distribution of *Crédit Mutuel* outside the major cities was based on a political decision by the authorities and had resulted in delayed development in urban areas.
- (70) Based on these elements, the French authorities concluded that *Crédit Mutuel* did not receive any State aid for the *Livret bleu*, and, alternatively, in any case such aid, where appropriate, should be declared compatible with the Treaty pursuant to Article 86(2) because of the general interest tasks assigned to *Crédit Mutuel*. They

underlined the legitimate confidence shown in *Crédit Mutuel* until the lodging of the complaint with the Commission in 1991.

- (71) In a note sent on 1 February 2001, the French authorities unambiguously stated, with regard to the regulatory amendment introduced following the Decision by the Conseil d'Etat on 5 January 2000, that alignment with this Decision did not result in any change in the *Livret bleu* taxation system. Savers continued to receive the same net interest rate as for the *Livret A*. *Crédit Mutuel* continued to pay the levy in discharge to the public revenue department.
- (72) Lastly, the French authorities explained that transfer to CDC of all the funds collected via the *Livret bleu* had been made official in a Protocol dated 31 December 1998 between the Minister of Finance and the President of the Confédération nationale du *Crédit Mutuel*, and had been fully implemented by 31 March 1999.
- (73) Finally, in a note dated 26 October 2001, the French authorities rejected the description of State funds in relation to general interest assets, considering that the condition of trade being affected was not fulfilled before the incorporation into French law of the Second Banking Directive, and that aid introduced in a market originally closed to competition should be regarded as existing aid. They also reiterated the figures produced by *Crédit Mutuel* and by Arthur Andersen.

V. ASSESSMENT OF THE COMPENSATION MEASURES

- (74) The Commission would point out that, under established case-law of the Court of Justice, aid must be appraised on the basis of its effects. Before drawing conclusions as to the nature of the aid in the measures examined, the effects of the system on the results of *Crédit Mutuel* must be studied.
- (75) Several conditions must be met if a measure is to be defined as State aid: the aid must be granted by the State or using State resources; it must confer a competitive advantage on the beneficiary undertaking; and it must have an effect on intra-Community trade. The last point will be examined first before going on to analyse the other points. Lastly, the aid will be evaluated.

1. The distortion of competition and the effect on trade between Member States

1.1. The effect on trade since 1975

- (76) In 1979, the market share of foreign banks was 8 % for credit activities (4 % for branches without legal status, and 4 % for subsidiaries incorporated under French law), and 4,5 % for deposit activities (2 % and 2,5 % respectively). The share of non-French European banks compared with all foreign banks was 50 % for credit and 70 % for savings deposits. These shares changed very little between 1975 and 1979⁽¹⁶⁾. *Crédit Mutuel* therefore faced competition from foreign networks in France from the 1970s. The number of banks in Paris under foreign control has increased rapidly since 1968, rising from 47 banks to 86 in 1975 and to 111 in 1979.
- (77) According to established case-law, the effect on trade is regarded as sufficient if the position of the undertaking has been strengthened compared with its competitors in the context of intra-Community trade⁽¹⁷⁾. It is not necessary for the beneficiary to have an exporting operation: aid to the national undertaking is likely to reduce the export opportunities for undertakings in other Member States⁽¹⁸⁾. Several indicators show that the effect on trade is present in this case.
- (a) The need to take account of all the activities of *Crédit Mutuel*, particularly credit activities

- (78) Until 1999 *Crédit Mutuel* had the possibility of using part of the *Livret bleu* deposits for very diverse banking activities. The distortion of competition is not, therefore, confined to the deposits market, but also concerns at least the credit market. The information which the

⁽¹⁶⁾ The 1979 figures of the French Commission de contrôle des banques (Banking Supervisory Committee) are used as this was the first year for which detailed figures on foreign banks are available.

⁽¹⁷⁾ Case 730/79 *Philip Morris v Commission*, [1980] ECR p. 2671.

⁽¹⁸⁾ Joined cases C-278/92, C-279/92 and C-280/92 *Spain v Commission* [1994] ECRI-4103. Moreover, this statement is not affected by the fact that the aid is relatively low, by the small size of the beneficiary or by the latter's small Community market share, or even by the absence of exporting activity by the beneficiary or the fact that the undertaking exports almost all of its products outside the Community.

Commission obtained essentially relates to the end of the 1980s and the 1990s. In 1975, operations involving Crédit Mutuel's assets seem to be essentially loans and purchases of State securities. The funds collected via the *Livret bleu* played an important role in the development of Crédit Mutuel's credit operations. The *Livret bleu* funds enabled Crédit Mutuel to grant loans of an identical volume to that of the funds collected. As the growth in the funds collected was very rapid in the second half of the 1970s, the *Livret bleu* accounted for 60 % of total deposits until the mid-1980s. The *Livret bleu* enabled the bank to expand its offer on the credit market once competition with foreign banks had been introduced.

refers to 'full liberalisation' (recital 7). Case-law shows that the liberalisation of capital movements and payments was from the outset closely linked to freedom of movement of persons, goods and services and freedom of establishment ⁽²³⁾.

(c) The effect on trade between Member States in the absence of liberalisation

(b) The criterion of partial liberalisation of capital movements

(79) With regard to the deposits market, it is worthwhile pointing out that payment transfers and capital movements were possible and in fact even standard practice (for instance for immigrant workers) before the incorporation into French law of Council Directive 88/361/EEC (OJ L 178, 8.7.1998, p. 5), which fully liberalised capital movements. According to the Commission's information, the control of capital movements was liberalised in France as of 1968 ⁽¹⁹⁾. From 1975, French residents could, and did, lodge funds abroad. The rules apparently provided for a system of *ex ante* administrative declarations to the Bank of France, which was temporarily tightened up as of 1981 because of the flight of capital. It was more or less abolished in 1986 ⁽²⁰⁾. Residents of other Member States could deposit funds in France, notably in *Livret bleu* accounts ⁽²¹⁾.

(80) Community law concerns the liberalisation of certain capital movements and payments. The first Council Directive applying Article 67 of the Treaty refers to the liberalisation of capital movements as soon as possible. This Directive, and the following ones amending it ⁽²²⁾, have gradually liberalised these movements unconditionally to the extent that Directive 88/361/EEC

⁽¹⁹⁾ With the Decree of 4 September 1968 on freedom of financial relations with other countries.

⁽²⁰⁾ With regard to currency outflows shown as capital transactions on the balance of payments.

⁽²¹⁾ This concerns a very small group of savers, since the main advantage of the product is the tax exemption, and non-residents will have their financial centres in France in exceptional cases only, and are therefore taxed in France in exceptional cases only.

⁽²²⁾ Council Directive 63/21/EEC (OJ 9, 22.1.1963, p. 62/63), 85/583/EEC (OJ L 372, 31.12.1985, p. 39) and 86/566/EEC (OJ L 322, 26.11.1986, p. 22).

(81) The effect on trade between Member States was recognised by the Court even in the absence of liberalisation of the market, as can be seen from the judgment in the *Van Eycke* ⁽²⁴⁾ case concerning a national regulation dating from 1983 and 1986 which in practice set the level of interest rates for certain categories of savings deposits entitling the holder to tax benefits. The Court did not rule out the possibility of an infringement of Article 85, based implicitly on the fact that the measure was likely to have an effect on intra-Community trade within the meaning of Article 85 of the Treaty. The Community system applicable was that of the first Council Directive of 11 May 1960, and not Directive 88/361/EEC. This interpretation is confirmed in the conclusions of Advocate General Mancini: in reply to the complainant who invoked the absence of effects on trade, the Advocate General pointed out that 'there is no doubt that the banking sector is subject to the rules of competition' (paragraph 3).

(82) Mention might also be made of a prior case, *Züchner* ⁽²⁵⁾, in which a national court wanted to know whether bank charges on a cheque drawn on 17 July 1979 on a German bank in favour of a beneficiary living in Italy might be contrary to Article 85 of the Treaty. The Court refused to rule out the application of the rules of competition because of Article 90(2) and Article 104 *et seq.* of the Treaty, thus taking the view that this practice was liable to have an effect on trade.

⁽²³⁾ For instance, see Case 15/78 *Koestler* [1978] ECR 1971, Case 203/80, *Casati* [1981] ECR 2595, Joined Cases 286/82 and 26/83 *Luisi et Carbone* [1984] ECR 377, Case C-484/93 *Svensson and Gustavsson* [1995] ECR I 3955, and Case C-222/95 *Parodi* [1997] ECR I-3899.

⁽²⁴⁾ Case C -267/86 *Van Eycke* [1988] ECR 4769.

⁽²⁵⁾ Case 172/82 *Züchner* [1981] ECR 2021.

- (83) As long ago as the second report on Competition Policy published in 1972 (paragraphs 50 to 53), the Commission confirmed that the rules of competition applied in principle to the banking sector. The report stated that the Commission had already examined a case involving banking in the light of Article 85 and that it was in the process of examining European cooperation agreements between banks in different Member States ⁽²⁶⁾.
- (84) If all of these cases involved an effect on trade within the meaning of Article 85, it may be deduced that there was also an effect on trade pursuant to the rules on State aid.
- 1.2. *The completion of liberalisation of the banking sector in the European Union since the end of the 1970s and the strengthening of competition*
- (85) While the completion of the internal market dates from the Second Banking Directive of 1989, it should be noted that the market began to be gradually liberalised and competition gradually strengthened as of the 1970s.
- (86) The complete liberalisation of the single banking market in the European Union was achieved over a period of more than 30 years. The First Banking Council Directive 77/780/EEC (OJ L 322, 17.12.1977, p. 30) established the first rules on the coordination of national laws and regulations relating to the taking-up and pursuit of the business of credit institutions in other Member States. It must be pointed out that freedom of establishment of subsidiaries already existed in the European Community countries, and most large banks had subsidiaries abroad, as well as branches without legal status (even in the absence of uniform regulation at EU level). The subsidiaries and branches in France of other European Union countries were thus in a position to suffer from unfair competition from *Crédit Mutuel* before the date of the entry into force of the first and second Banking Directives.
- (87) A decisive stage in the completion of the single banking market was taken with the liberalisation of capital movements in Directive 88/361/EEC, to be incorporated into national law by the Member States by 1 July 1990 at the latest. In practice, this measure considerably increased the cross-border flows of deposits and investments. In the past these capital flows were controlled by the authorities, if only by means of exchange controls. France incorporated into national law the Directive on the liberalisation of capital movements in Decrees 89-938 and 90-58, which came into force on 30 December 1989 and 16 January 1990 respectively. The exchange control introduced in 1981 was abolished in 1986.
- (88) Freedom of establishment in the banking sector was completed in France in July 1992 with the incorporation of the second Banking Directive 89/646/EEC ⁽²⁷⁾. Article 6(2) of the said Directive states that 'host Member States may not, as a condition of the authorisation of branches of credit institutions, authorised in other Member States, require initial endowment capital exceeding 50 % of the initial capital required by national rules for the authorisation of credit institutions of the same nature' ⁽²⁸⁾. This measure was to be incorporated by 1 January 1990 at the latest. The Council thereby intended to prevent any attempt by a Member State from restricting freedom of establishment of a branch by unfair regulations after 1990.
- (89) The result is that gradually, and in particular from 1990 on, the effect on trade of aid granted to a banking establishment became extremely serious ⁽²⁹⁾, since any bank could perform banking activities in the other Member States through the establishment of branches (no longer subject to authorisation) or by providing services freely across borders.
- 1.3. *The position of *Crédit Mutuel* on the French banking market*
- (90) The Commission examined the arguments put forward by *Crédit Mutuel* on limited local competence of the local *Crédit Mutuel* branches and the absence of an impact on trade arising from this system. It points out,

⁽²⁶⁾ The Eighth Report, published in 1978, (paragraphs 32 to 37) states that the rules of competition had already been applied in cases relating to traveller's cheques in Belgium, Eurocheques in France and in the *Sarabex* case (concerning the Foreign Exchange and Current Deposit Brokers' Association). The European cooperation agreements mentioned in 1972 are referred to once again. In a table on page 36 of the report, 40 banks are listed, including five French banks (Banque Nationale de Paris; Société Générale; *Crédit Lyonnais*; *Crédit Commercial de France* and *Crédit Agricole*).

⁽²⁷⁾ This Directive was incorporated into French law by Law 92-665 of 16 July 1992 (JORF (French National Gazette) of 17.7.1992, p. 9576) and Regulations 92/11-12-13-14 of 23 December (JORF of 9.1.1993, p. 512).

⁽²⁸⁾ This was even before the actual abolition of authorisation by the host country of bank branches authorised in other Member States provided for under Article 6(1) of the Directive (to be incorporated by 1 January 1993 at the latest).

⁽²⁹⁾ See, among others, the Commission Decisions concerning *Crédit Lyonnais*, *Banco di Napoli*, *Banco di Sicilia*, *Société Marseillaise de Crédit* and *Westdeutsche Landesbank*.

however, that *Crédit Mutuel* is a group with legal status and consolidated accounts, which also enjoys internal financial solidarity in the form of the confederation, which ensures the liquidity of the regional federations. It points out that the group has considerable own funds which facilitates its access to capital markets and that the rating agencies give it an overall group rating. It states that each local branch did not reply, in the context of these proceedings, but that *Crédit Mutuel* sent it a single reply. Neither the Commission nor the main financial partners of *Crédit Mutuel* nor the financial markets had any doubt that *Crédit Mutuel* was an undertaking that could reallocate within its structure any aid paid to a particular internal group entity. It noted that, given its size — it being one of the biggest French credit institutions — *Crédit Mutuel* was in a position to finance itself or to invest its funds on the financial markets.

- (91) *Crédit Mutuel* is a going concern that has made considerable profit in recent years. Any excess compensation for the net cost of collecting and managing general economic interest tasks would enable it to increase its profit and to accumulate additional own funds. The constraint of solvency (in the financial market economy) laid down in the European banking rules⁽³⁰⁾ introduces an obligation which limits the growth capacity of credit institutions. Any operating aid represents a considerable lever in overcoming these constraints, in that it increases own funds. Because of these constraints on solvency, it is easier to ascertain that a distortion of competition has taken place in the case of aid granted to credit institutions. If the direct or indirect effect of the aid is to increase own funds, then a distortion of competition can be reflected in the increased activity of the bank.

1.4. Conclusion

- (92) Given the nature of the potential aid granted to *Crédit Mutuel* as operating aid as well as the economic situation in the European banking sector and the solvency constraints specific to the banking sector, this aid has had an effect on trade from the entry into force

of the *Livret bleu* and has had an increasing effect of distorting competition in the financial sector. Consequently it must be considered that the potential aid was new aid when introduced in 1975.

2. Definition of State resources

- (93) It is settled case-law that the concept of State aid means any advantages serving from State resources granted by the authorities to an undertaking, provided that this advantage is fully or partly granted without any financial consideration in return, in other words granted without any remuneration or subject to a remuneration that does not reflect the price at which the said advantage might be assessed. This definition therefore covers the allocation of resources to an undertaking, the reduction of charges that it should normally have to pay or any other advantage that enables the undertaking to make savings that influence its production costs⁽³¹⁾.
- (94) Under EU case-law, only advantages granted directly or indirectly from State resources are to be regarded as aid within the meaning of Article 87(1). The Commission must check first to see from which State resources *Crédit Mutuel* may have benefited: (1) the tax advantage accorded to savers, (2) the fund collection commission paid by CDC, (3) the revenue from the general interest assets, and (4) the possible advantages and costs indirectly linked to the *Livret bleu* system.

2.1. Tax exemption

- (95) The system in force until the end of 1999 contained a derogation from the general system of taxation on savings. Normally this allowed savers to choose between a gross interest rate with the financial revenue being included in their taxable income, or an interest rate net of the levy in discharge (deducted at source). In this particular case, since no levy was applied to *Crédit Mutuel*, it theoretically assumed responsibility for paying a tax equal to one third of the levy in discharge.

⁽³⁰⁾ The basic level of own funds is set at a minimum of 4 % of weighted assets, while that of own funds in the broad meaning of the term is a minimum of 8 %. Cf. Council Directive 89/647/EEC of 18 December 1989 concerning a solvency ratio for credit institutions (OJ L 336, 3.12.1989, p. 14).

⁽³¹⁾ Case 30/59 *De Gezamenlijke Steenkolenmijnen in Limburg v High Authority* [1961] ECR 3; English special edition 1961, p. 1, Case 61/79 *Denkavit italiana* [1980] ECR 1205 and Case 387/92 *Banco exterior de Espana* [1994] ECRI-902.

(96) The reduction of the tax to one third of the normal levy in discharge means that the system involved the use of State resources and the adoption of a more favourable regime for savers compared with the norm. The system involves an expense for the State since the latter could perhaps have obtained more tax resources had it chosen to apply the general rule and not to limit the compulsory levy to one third. This aid appears to benefit individual consumers directly and not the bank, therefore it cannot be said that Crédit Mutuel is the direct beneficiary of the tax aid. However, this tax aid, having a social character, is associated with a product distributed by only one player, Crédit Mutuel. Therefore the aid does not satisfy the condition of compatibility laid down in Article 87(2)(a) of the Treaty, which states that aid is granted 'without discrimination related to the origin of the products concerned' ⁽³²⁾.

(97) With respect to the payment by Crédit Mutuel of a tax set at one third of the normal levy in discharge, it might be considered legitimate for Crédit Mutuel to record the amount of this in the costs linked to the *Livret bleu* system. However, the conclusions in the Council of State judgment of 5 January 2000 stating that the tax system in force is illegal explicitly confirm the fact that Crédit Mutuel in practice benefited as of 1991 from the 'cancellation' of the taxes to which interest received on *Livret bleu* accounts is subject, in other words the State or CDC refunded the levies in discharge paid by Crédit Mutuel. This means that all the interest on *Livret bleu* accounts, and not just two thirds of it, was exempt, at least dating from the decree of 27 September 1991 concerning the transferred funds.

2.2. The general interest service entrusted to Crédit Mutuel

(98) Crédit Mutuel was entrusted with the task of distributing the *Livret bleu*, a task to which strict prerogatives and constraints pertained. The prerogatives consisted of the exclusive distribution of the *Livret bleu* and the payment of a fund collection commission by CDC. The obligations concerned the use of the funds collected through the *Livret bleu*. These obligations changed over time: initially Crédit Mutuel had the obligation of

allocating 50 % of resources (this proportion was later increased to 65 %) to general interest assets (notably the financing of local authorities and other public bodies), with the balance being left to the bank to dispose of it freely. It is worthwhile noting that Crédit Mutuel had no obligation relating to financing conditions involving the funds at its disposal, for instance as regard interest rates. As of 1991, a growing part of the funds was allocated to the financing of public housing by channelling the funds to the Caisse des Dépôts et Consignations (CDC). All the savings funds are now transferred to CDC. The latter pays Crédit Mutuel a commission corresponding to the gross interest rate fixed by the authorities passed on to savers, plus an intermediation commission of 1,3 %. Since CDC is a public enterprise that receives State resources to perform general interest tasks, the fund collection commission must be regarded as a State resource. The interest is paid to the savers, hence Crédit Mutuel receives this commission only. This commission forms an integral part of the public service entrusted to Crédit Mutuel, and is therefore attributable to the State.

2.3. The income from the general interest assets

(99) The general interest assets listed exhaustively in the Decree of 1 March 1976 consisted mainly of loans to local authorities and subscriptions of securities issued or guaranteed by the State (for instance government bonds) and loans to public housing management bodies. Based on the information received, the compulsory nature of these assets combined with the fact that the rates had been regulated by the State and were not freely determined by the market, means that there are grounds for considering that the general interest assets form an integral part of the *Livret bleu* system. It will be demonstrated below that these compulsory conditions enabled Crédit Mutuel to achieve very considerable profits on these funds. The definition of general interest task was amended in the Decree of 27 September 1991: the assets covered are now exclusively loans to finance social housing and the allocation to the CDC (see the transfer of deposits mentioned above). But it was only very slowly during the 1990s that these new tasks

⁽³²⁾ In this case, tax aid to consumers is granted only to savers with a *Livret bleu* account at Crédit Mutuel (or with *Livret A* accounts at the Caisses d'Épargne et de la Poste).

replaced the old ones: only the new funds collected were immediately fully allocated to these new tasks as of 1991.

3. The competitive advantage

- (100) If the compensation received by Crédit Mutuel for the public service, taking the form of a fund collection commission paid by CDC, exceeds the net costs arising from the public service (mindful of all the costs and benefits relating to the provision of the service), Crédit Mutuel benefits from a competitive advantage over other banks since it receives additional resources that are not granted to other banks.

4. Assessment of the amount of State aid

- (101) Since the French authorities have invoked the existence of a general economic interest task linked to the *Livret bleu* system, the Commission must focus on obtaining a balance of the income and expenditure linked to the performance of this service in order to determine a justifiable level of compensation paid by the State.
- (102) Firstly, the procedures for taking into account all the income and expenditure relating specifically to the *Livret bleu* are explained. Secondly, the principles underlying the Crédit Mutuel analytical accounts system are described. Thirdly, the remaining points of disagreement between the experts are decided by the Commission while, fourthly, the results of the accounts relating to the *Livret bleu* system are given, after taking into account the abovementioned expenditure and income.

4.1. Procedures for taking into account all income and expenditure linked to the total *Livret bleu* funds

(a) The balance of income and expenditure linked to the total *Livret bleu* funds

- (103) The financial mechanism relating to the Crédit Mutuel *Livret bleu* system must be assessed from the point of view of the overall economy of this savings system, in other words account must be taken of all the costs and benefits arising from the system, in particular the benefits drawn directly from the use of the funds collected from the distribution of a tax-free savings product of this kind.

- (104) To make it easier to analyse the direct effects, it is useful to recall some of the Crédit Mutuel accounting elements of the *Livret bleu* system. Three types of assets stand back to back to the total amount of *Livret bleu* savings (featured on the liabilities side):

- the funds transferred to CDC (in line with the provision on channelling funds to CDC),
- the general interest assets,
- the assets left to Crédit Mutuel.

With regard to the liabilities side of the balance sheet, the system is characterised by State regulated interest charges (revisable fixed rates, hence not very volatile), while on the assets side the main features are variable interest rate income on general interest assets and on the assets left to Crédit Mutuel, and the fixed fund collection commission paid by CDC. Table 2 summarises briefly the main elements in the *Livret bleu* profit and loss account.

(105)

Table 2

Outline of the *Livret bleu* profit and loss account

Livret bleu profit and loss account	
Expenditure	Income
Net interest on <i>Livret bleu</i> (3 % ^(a))	CDC commission (3 % ^(a) + 1,3 %)
	Margin on general interest assets (var.)
	Margin on CM assets (var.)

^(a) In July 2001.

- (106) The Commission analysed the system as a whole to assess the general economic advantages obtained by Crédit Mutuel through the *Livret bleu*. First the State grants a fund collection commission to Crédit Mutuel via CDC for the provision of the collection service. Account must also be taken of the economic advantages other than the CDC commission that Crédit Mutuel obtains from the *Livret bleu*.
- (107) Should the amount of the financial advantages which it is possible to evaluate in accounting terms (collection commission plus income from management) exceed, where appropriate, the costs incurred (including a normal commercial margin) by Crédit Mutuel in collecting and managing the deposits, the State would authorise excess compensation of the cost of distributing the *Livret bleu* through an excessively high collection commission. To arrive at this evaluation, it is essential to take into account all the financial advantages of distributing the *Livret bleu*, as well as all the income and expenditure linked to this system and to the assets and matching liabilities, for two main reasons.
- (108) — Firstly, the Court has ruled that aid must be assessed on the basis of its effects. It must be pointed out that the *Livret bleu* generates income which is not limited to the revenue from the general interest assets or the funds transferred to CDC. The *Livret bleu* deposits have enabled Crédit Mutuel to obtain resources under more advantageous conditions than would have been possible if it had simply obtained refinancing on the financial markets, and to obtain profits by using this resource for compulsory general interest assets or for assets freely chosen by it⁽³³⁾. The State has a duty to reduce the amount of the resources it pays for the performance of this service if Crédit Mutuel draws benefit from it in other ways.
- (109) The income from the general interest assets must be taken into account in any case since it forms an integral
- part of the obligations imposed by the State in the context of the *Livret bleu* system. It should also be noted that excluding some assets that are profitable would be absurd: the State would have to compensate for losses made by some assets, even though sufficient profit was being made from other assets within the *Livret bleu* system, which is not taken into account.
- (110) The situation is less clear in relation to the assets freely undertaken by Crédit Mutuel, which recorded a loss of approximately FRF 1 billion over the period under review. These losses affect the State budget since, if they did not exist, it would be balanced, thus requiring the collection commission to be lowered accordingly. The Commission considered, however, that the net cost of the assets freely chosen by Crédit Mutuel should be included.
- (111) The independent consultant's task concerned the evaluation of the *Livret bleu* analytical accounts system (expenditure and also income from the assets to which the resources relate) and an analysis of the coherence of the data provided by Crédit Mutuel. Given this, the consultant was asked to identify all the advantages linked to the income obtained from the *Livret bleu* assets and the costs of the resources (different from normal market costs). Following the deduction of the normal profitability margin known as 'own funds cost'⁽³⁴⁾ by experts, the residual profit (from the commission paid by the State) may consist of incompatible State aid, for the State should have paid Crédit Mutuel a lower commission for the collection service that corresponded to the net costs, rather than excess compensation.
- (112) — Secondly, Crédit Mutuel mentioned, during the proceedings, a large number of constraints and special features relating to the management of the *Livret bleu* (see part III on the arguments put forward by Crédit Mutuel). The approach adopted by the Commission allows these problems to be dealt with by reference to the accounts, hence on the basis of practice. It permits a correct evaluation of the real financial weight of these constraints based on past figures from the *Livret bleu* account management.

⁽³³⁾ In other words, if Crédit Mutuel had had to obtain similar resources in terms of stability on the interbank market, it would have had to pay higher refinancing charges. The monopoly over the *Livret bleu* has therefore had the effect of reducing the bank's normal expenses. It is therefore necessary to take account of all the charges linked to deposits (increased charges due to collection, but also reduction in normal charges because of the lower cost of this resource), and all the income from assets and matching liabilities, including the funds freely available to the bank.

⁽³⁴⁾ If the cost of own funds measuring the profitability of activities is taken into account, this enables one to distinguish in the *Livret bleu* results the share corresponding to a normal return on own funds (hence the members' capital) from the share which exceeds the average profitability of a bank. See section 4.4. concerning the analysis of the cost of own funds.

(b) Some technical explanations

(113) The collection of savings through the *Livret bleu* also has certain specific economic features that differentiate it from the normal collection of savings by a bank.

(114) The nature and special taxation system relating to the *Livret bleu* cushion the impact of interest rate variations on savings reallocation movements, and this form of saving is less volatile than investments at market rates. The behaviour of savers is, first and foremost, influenced by the net rates of the *Livret bleu*, compared with alternative investments with the same degree of risk and liquidity: the net rate of the *Livret bleu* is higher than that of the *Livret B* (taxed). All things being equal, as investments at market rates are taxed, they must have a considerably higher gross return in order to be chosen instead of savings accounts.

(115) Secondly, the behaviour of savers is also tied to certain sociological and psychological parameters that are quite specific in the case of tax-free accounts. Since the return on the *Livret bleu* is set by the State, savers have more confidence in it. By selecting this type of saver, a relatively paradoxical situation results: although this is the most liquid 'placement with return', it is also one of the least volatile.

(116) This confidence shown by savers has traditionally allowed the authorities to set low rates of return net of inflation. Even in a context of much higher returns on market placements, withdrawals of savings were very limited in the 1990s ⁽³⁵⁾.

(117) In any case, the special features associated with this way of collecting funds compared with obtaining financing on the interbank market or the financial markets requires a specific evaluation of the benefits which Cr dit Mutuel obtained from the management of these funds, and this can only be done through the network's analytical accounts.

⁽³⁵⁾ During the 1990s, there was a single year during which there was a significant drop in collections for the *Livret bleu*: 1993 (-4%). The drop in collections for the *Livret A* was higher: in 1996 (-10%) and in 1999 (-8%). Collections should be positive again in 2001.

(118) The Commission's consultant takes into account the income and expenditure arising from the system for Cr dit Mutuel by separating the analysis into three parts depending on how the funds collected are allocated: funds transferred to CDC, funds allocated to general interest assets and assets freely selected by Cr dit Mutuel. The Consultant's method permits a response to Cr dit Mutuel's argument that the system involves a cost ⁽³⁶⁾ for it since it must pay tax on revenue to the State ⁽³⁷⁾. This method also allows a normal return on own funds to be taken into consideration.

(c) The question of the loss-leader effect

(119) In order to determine the net cost and appropriate level of resources paid by the State in compensation, the analysis of the effects of the *Livret bleu* system must, in addition to the abovementioned direct advantages, cover any advantages and costs derived from the system if these effects have a significant impact.

(120) The exclusive right to distribute a savings product that is attractive because of tax exemption is likely, according to the complainants, to allow Cr dit Mutuel to attract and to maintain the loyalty of customers, to whom its network can then sell other banking products and services (loans, financial investments, insurance, etc.). The increasing sale of financial investments and insurance products by branches would demonstrate the advantages inherent in this. If, moreover, the market of the product in question was characterised by an unequal situation between the seller and the buyer, as regards information, as is the case in particular for financial products, an institution's reputation for distributing quality products or products that are advantageous for customers would become a decisive factor. In this case,

⁽³⁶⁾ Cr dit Mutuel states that it contributed an amount of [...] to the State budget between 1975 and 1996 by way of payment on behalf of savers of the partial taxes on the *Livret bleu*. As we know, this cost was 'cancelled', in any case from 1991 on, by CDC.

⁽³⁷⁾ It is worthwhile noting that other banks have to pay indirectly a cost of the same kind which, with regard to the setting of (gross) interest rates on deposits, must take account of the returns on other comparable products and the fact that the saver compares net tax rates, which has the effect of forcing banks to raise their gross rates in order to compete with tax-free products. In the new system of transfer of all funds to CDC, the resources collected through the *Livret bleu* are entirely tax-free.

the fact of distributing an advantageous product like the *Livret bleu* to attract customers could constitute an advantage for the institution, as this would enable it to target customers more ⁽³⁸⁾. In other words, this would give rise to the same effects as costly marketing campaigns or the distribution of a product at a loss in a bid to attract customers.

(121) In the documents provided by the complainants, it is assumed that a loss-leader effect exists, but there is nothing to demonstrate formally the existence of this effect and the financial impact of this effect is not evaluated precisely.

(122) With regard to the research conducted by the Glais firm, the Commission points out that Crédit Mutuel may quite rightly state that these statistical analyses do not provide certain proof of a quantifiable loss-leader effect.

(123) Three subjective evaluations were put forward in the complainants' observations. First, given the fact that other banks offered to distribute the *Livret bleu* on the basis of a 1 % commission, the complainants proposed an approximate figure for this advantage for the present and the future ⁽³⁹⁾ by calculating the differential with the level of commission received by Crédit Mutuel, hence 0,3 %, which corresponds to roughly FRF 300 million per year. However, there is nothing to prove that Crédit Mutuel's competitors could perform this service under the same conditions with this level of commission.

(124) Under the second method used by the complainants, the advantage gained by Crédit Mutuel in the past can be measured by reference to the rise in its market shares. This method of assessing aid cannot be accepted as it is based on the hypothesis that gains in market shares are solely due to the *Livret bleu*, a claim that is not supported by any objective proof.

(125) The third evaluation of the exclusive right of distribution is based on the loss of tax earnings caused

by the tax exemption allowed under the *Livret bleu*. If Crédit Mutuel had wished to distribute a savings account without tax exemption by offering the same net return as the *Livret bleu* regardless of the tax situation of savers, it would in fact have had to pay a cost equal to the amount of the (potential) notional tax paid by the savers. According to the complainants, the cumulated tax advantage over the period 1991 to 1997 of approximately FRF 4,5 billion must be regarded as having provided Crédit Mutuel with advantages equal to this amount. This reasoning cannot be accepted, because Crédit Mutuel would quite probably not have distributed the *Livret bleu* under the same conditions if it had had to pay the full cost of the tax exemption, which, moreover, directly benefited the members.

(126) The possible advantages in question are difficult to prove and to quantify. The direct financial advantage of operating the *Livret bleu* is directly measurable from the *Livret bleu*'s accounts. However, the financial advantage arising from the sale of other products or services to customers who remained loyal because of the *Livret bleu* could be observed in the analytical accounts of these other products if it were possible to distinguish immediately between what was sold to customers who remained because of or were attracted by the *Livret bleu*, and what was sold to customers who came to Crédit Mutuel for other reasons. The Commission Consultant was therefore unable to assess the loss-leader effects following the accounting method applied to evaluate the overall direct financial advantages of the *Livret bleu*.

(127) Attempts by the Commission Consultant to conduct a more sophisticated evaluation did not prove successful. The Commission was unable to obtain a reasonable evaluation of the theoretical financial impact of these effects. This decision is therefore based exclusively on the conclusions obtained in the context of evaluating the analytical accounts of the *Livret bleu*.

4.2. Structure of analytical accounts of the *Livret bleu*

(128) Before presenting the results of the analysis conducted by the Commission consultant, it is necessary to make a comment concerning methodology. When producing his estimates, the consultant had to cope with the fact that there was no real analytical accounts system for the *Livret bleu* and no homogenous treatment of the

⁽³⁸⁾ The opinion by the Competition Council, No 96-A-12 of 17 September 1996, reiterates the argument whereby a tax-free account 'places the institutions distributing it in a privileged situation to offer other products'.

⁽³⁹⁾ In the context of the complete transfer of all *Livret bleu* funds to CDC. This subjective reasoning cannot be applied to the past since the total funds were not fully transferred then.

accounts of each Crédit Mutuel federation. Moreover, the entire accounting structure is based on the accounts for one year (1996), with the other years having been extrapolated from this structure. Secondly, it is also based on a sampling of federations, whose management ratios are then extrapolated from the net banking revenue of the confederation. This is the best estimate the Commission was able to obtain following four contradictory expert assessments (see the description of the procedure under section I).

(129) The experts encountered considerable problems in reconstructing the analytical accounts system of the *Livret bleu* as can be seen from the significant differences in the estimates produced by the first assessments. The accounting figures for the different federations, which are fully independent in legal and accounting terms, turned out to be not at all homogenous. The role of the confederation has concerned policy coordination more than management, at least until the beginning of the 1990s. In 1991 the *Livret bleu* system was radically changed and, from that year on, the parameters characterising the activity and the scope of Crédit Mutuel remained sufficiently stable to apply the same accounting analysis method to the entire period 1991 to 2000.

(130) It emerged from the legal analysis of the nature of the aid granted in the context of the *Livret bleu* that there was new aid since the end of 1975. Therefore the question of calculating the aid for the period 1976 to 1990 arose. Two factors were taken into account to produce this evaluation in practice:

— it may be considered that the method used for the years 1991 to 2000 was, despite its weaknesses, sufficiently sound to provide a reasonable assessment of the aid, but it is impossible to extrapolate figures for the period prior to the 1990s because this period was based on the structure of federations and activities for 1996. In the 1970s and 1980s, the federations witnessed a change in their fields of activity, with some even merging. The structure that resulted from the 1996 sampling is not, therefore, applicable. The further we move back in time from 1996, the more approximate the results become,

— the only alternative would be to organise one or more samples for the distant past. This appears to be unreasonable in practice: the accounting figures for such a long time ago would be difficult to obtain and to process, since the memory of the

accounting departments has to a large extent disappeared by now. Material verification of accounting documents has become very difficult. The sampling technique can only produce good results if the sample data are not at all questionable.

In conclusion, the absence of analytical accounts within the confederation has meant that the accounting reconstruction has had to be confined to the period starting with the 1991 financial year. It emerged that there was no satisfactory method for calculating the accounting result of the *Livret bleu* during the oldest period (1976 to 1990). The Commission therefore limited the calculation of the aid to the period 1991 to 2000.

(131) The Commission's consultant takes account of expenditures and incomes for Crédit Mutuel from the *Livret bleu* system by separating the analysis into three parts, depending on how the resources collected were allocated: the resources transferred to CDC, those assigned to general interest assets and those used freely by Crédit Mutuel. The method used by the consultant also provides a response to the argument by Crédit Mutuel whereby the system involved an expense⁽⁴⁰⁾ for it since it had to pay levies to the State. The method also takes into account, at last, a normal commission for own funds.

(132) It is important, in the first instance, to describe concisely the methodological framework used to construct the Crédit Mutuel analytical accounts system. All the activities performed by Crédit Mutuel were divided into five sectors:

— savings (comprising three activities: collection of deposits through the *Livret bleu*, the collection of other deposits and other forms of savings),

— credit,

— insurance (IARD),

— payments management,

⁽⁴⁰⁾ Crédit Mutuel states that it contributed an amount of [...] to the State budget between 1975 and 1996 by way of payment on behalf of savers of the partial taxes on the *Livret bleu*. As we know, this cost was 'cancelled', in any event from 1991 on, by CDC.

- management of cash flow and securities operations,
 - operating capital.
- (133) The construction of the analytical accounts system involves an evaluation of the share of the income and, what is even more complicated, of the overheads that can be allocated to each sector. The entire construction is, of course, very easily affected by hypotheses based on the way the bank chose to allocate results and costs. In this context, the consultant's role, and hence that of the Commission, is confined to a large extent to verifying the internal inconsistencies of the proposed construction and the corrections added subsequent to the construction.
- (134) Following the first evaluation of the results of the *Livret bleu* analytical accounts provided by Crédit Mutuel (and 'certified' by the auditors, Mazars et Guérard), a new estimate was produced by the Commission consultant. Crédit Mutuel called in the firm Arthur Andersen to perform a full review of the methodology and accounting figures to permit the drawing up of the *Livret bleu* profit and loss account. Arthur Andersen used the same structure for the profit and loss account. However, two changes were made concerning the processing and data used compared with the previous studies, and three ad hoc corrections were made:
- (i) the original sample used by Crédit Mutuel was extended to two new federations [...] and [...];
 - (ii) the formulae for allocating the overheads for customer service relations were refined;
 - (iii) the ad hoc corrections relate to the method of adjustment of the excess weighting given to the IARD (insurance) activity in the sample, the method of calculating the cost of own funds and the introduction of a charge for coverage of shareholder liability.
- (135) For his evaluation the Commission consultant had already used a sample extended to include [...]. As a result he checked the procedures used to incorporate new data for [...] and validated the use of the data in the enlarged sample. While the sample originally set up by Crédit Mutuel represented [...] of the group's overheads, it now accounts for [...] of the group's overheads following the inclusion of the two biggest Crédit Mutuel regional federations.
- (136) One point on which there was disagreement between the initial evaluation by Crédit Mutuel and the one by the consultant concerned the imputation of overheads to the after-sales service. After a few improvements made by Arthur Andersen, Crédit Mutuel and the consultant agreed on a joint method for imputing overheads.
- (137) When the sample was being set up, the accounting data was being chosen and the treatment of these data in the *Livret bleu* profit and loss account was being decided, the evaluations by Arthur Andersen and the Commission consultant coincided. The only points of disagreement concerned the ad hoc corrections mentioned above that were adopted by Arthur Andersen. The Commission will, initially, decide on the final points of disagreement persisting between the Commission consultant and Crédit Mutuel. Then it will present different evaluations of the *Livret bleu* results for each application to which the funds collected were assigned.
- #### 4.3. *The points of disagreement between the consultant and Crédit Mutuel*
- (138) As the task given to the Commission consultant to examine the analyses by Arthur Andersen did not result in an agreement between the consultant and Crédit Mutuel, the Commission must decide between the proposals by the independent consultant and those by the Arthur Andersen auditors mandated by Crédit Mutuel.
- (a) The method of correcting the excess weighting given to the IARD activity in the sample
- (139) When it came to describing the final sample, Arthur Andersen proposed two statistics aimed at assessing the 'representativeness' of the sample in terms of proportion of overheads allocated to the various sectors. In other words, the aim is to check whether the allocation of overheads to the different sectors in the sample complies with that of the total group (all the federations in the Crédit Mutuel group). The basic postulate is that

the sectors should be represented in the same proportions (measured in terms of overheads) as in the total population in order to have a perfectly 'representative' sample.

- (140) The statistic created consists of comparing the share of total overheads in the sample [...] with the share of overheads in the savings sector in the sample [...]. The difference between the two percentages may seem to be sufficiently low for this difference to be regarded as statistically admissible because of the inherent fluctuation of the samples in the sampling technique ⁽⁴¹⁾, and Arthur Andersen may have grounds for regarding this difference as 'coherent'. Although the text ⁽⁴²⁾ by Arthur Andersen is not very explicit, the statistic means that out of the total overheads allocated to the savings sector, [...] are allocated to (included in) the reference sample ⁽⁴³⁾. Let us recall the conclusion drawn by Arthur Andersen at this juncture: the construction of the sample has an acceptable structure as far as the savings sector is concerned, and hence a fortiori the *Livret bleu* activity. Consequently, the statistics created for the *Livret bleu* cannot be influenced by problems relating to the structure of the sample.
- (141) A similar statistic is created for the IARD sector. 'The sample [...] which represents [...] of the total overheads, represents [...] of the IARD commission collected' ⁽⁴⁴⁾. We agree with the first part of Arthur Andersen's statement: the IARD sector appears to be over-represented in the sample, hence some statistics relating to the IARD sector drawn from the sample may be biased.
- (142) Arthur Andersen deduces from this ⁽⁴⁵⁾ that this over-representation of the IARD sector implies an excessively high allocation of management costs to the IARD sector in the sample ⁽⁴⁶⁾, and that these costs must be reduced by reallocating them to other sectors. The second deduction seems to be incorrect: it is quite likely that the management costs allocated to the IARD in the sample are in the right proportion compared with the income from the sector ⁽⁴⁷⁾. Yet Arthur Andersen has in fact pointed out that the income (IARD commission) is over-represented in the sample (see recital 141). To reduce the IARD expenses without adjusting the IARD income would have the immediate consequence of distorting the IARD profit and loss account in the sample (not enough expenses for the same volume of income) ⁽⁴⁸⁾, but would also distort the savings profit and loss account if part of the IARD expenses is transferred to savings (too high a level of IARD and savings expenses for the same volume of savings income).
- (143) Postulating that too large an amount of management costs was assigned to the IARD sector and not enough to other sectors, Arthur Andersen next proposed correcting this over-representation with an ad hoc measure. A fictitious sample excluding the IARD was set up based on the previous one but completely excluding the IARD activity. The consultant pointed out (and this was not refuted) that the management costs relating to IARD had in practice been mainly broken down among the other sectors. A 'theoretical' sector was set up

⁽⁴¹⁾ Although it is not a 'real' random sample.

⁽⁴²⁾ 'With regard to the share of the overheads allocated to the savings sector, we note that the reference sample represents approximately [...] of the total overheads, and approximately [...] of the overheads allocated to Savings, which in our view is consistent' (our emphasis), extract from the report by Arthur Andersen, *Mission Livret bleu*, p. 29.

⁽⁴³⁾ The additional information presented by Arthur Andersen in a note on 8 February 2001 states, in this respect: 'For example, in 1996, the respective weights [of the sample] are the following: share of savings (total funds): [...]'. This percentage, which we interpret to be the share of total savings featured in the sample, is identical to the share of overheads, which would suggest a perfect match in the sample between the volume of savings and the volume of overheads allocated to the savings. We would add, moreover, that the method of construction of the sample uses allocation formulae mainly established in 1996 (p. 4, *ibid.*). There are therefore grounds for considering that this proportion is very close if not the same for the other years.

⁽⁴⁴⁾ P. 32, *ibid.*

⁽⁴⁵⁾ '... [...] of the IARD commission received. Hence a certain distortion which, if not corrected, would mean that the IARD sector would be allocated too high a share of overheads compared with the other sectors' (p. 32, *ibid.*) Note the vague wording.

⁽⁴⁶⁾ In reality, this first deduction is not at all logical. It is logical to doubt the fact that the over-representation of the insurance sector would have the direct effect of distorting the calculation of the result of the analytical accounts system of the insurance sector. An allocation to the insurance sector of higher overheads in the sample is the counterpart of income that is also higher (noted by Arthur Andersen in the form of the IARD commission or the IARD turnover). It is true that one could conceive of the result being 'amplified' (increased by a given multiplying factor) since the extrapolation of the sample would result in *Crédit Mutuel* being regarded as having a more important activity in this sector than is in fact the case. But there is not necessarily a directional bias (in the statistical sense), in other words an error in the result in a specific direction (systematic increase or reduction), since if the management costs are increased, the income in the sector in question may also be increased (for instance more insurance premiums collected).

⁽⁴⁷⁾ Otherwise if the costs allocated are too high compared with the income, this would mean that the analytical accounts are wrong and have been poorly constructed.

⁽⁴⁸⁾ The methodology note of 13 September 2001 does not touch on this key issue at all. The experts attempt to estimate the balance of the profit and loss account (income - costs), not the costs taken alone.

combining the real sample and the sample excluding IARD, with a variable weighting according to the year, in order to obtain an IARD/non IARD structure identical to the one observed for the total population (entire group).

(b) The Commission cannot accept the proposed correction for three reasons

(i) The fact that the IARD sector is over-represented in the sample does not at all mean that the management costs assigned to the savings sector are insufficient.

(144) In fact, the interest-rate variable in the construction of the *Livret bleu* analytical accounts system is the distribution of management costs to the savings sector, not to the IARD⁽⁴⁹⁾. Arthur Andersen concludes that the statistic it chose as a reference suggested that there was no bias in the distribution of management costs to the savings sector in the sample. In other words, it is illogical to conclude that the bias of over-representation of the IARD sector must result in the reallocation of management costs to the savings sector, whereas the first argument concluded that there was no bias of over-representation of the savings sector.

(145) In fact, it must be understood that while there is a stronger representation of the IARD sector in the sample, the other sectors (loans, management of payment means, management of securities) are represented less in the sample than in the total population. But the first statistic showed that this was not the case for the savings sector.

⁽⁴⁹⁾ Crédit Mutuel sent a document by Arthur Andersen to the Commission on 13 September 2001 which discusses this problem. The paper does not specify that what is concerned is the drafting of a profit and loss account (the question of allocating income corresponding to the costs in the form of overheads is not considered at all) or that the interest rate variable is the assigning of overheads to savings. The two experts concerned were therefore unable to give a view on the suitability of the statistical method chosen compared with the variable they were attempting to estimate. It must be pointed out that an acceptable adjustment method to improve an estimator is likely to undermine the quality of another estimator.

(ii) The methodology used is not valid from the statistical point of view.

(146) It may be conceivable from a statistical point of view to improve the quality of the statistics drawn from the sample (reducing the variation of the estimators) by fitting the sample to the structure in terms of sector of total population, both in relation to the structure of net banking products and in relation to that of management costs. The method proposed by Crédit Mutuel and adopted by Arthur Andersen⁽⁵⁰⁾ does not, however, have any statistical basis and introduces a number of biases. Professor Tillé, consulted only about the structure of the sample for the IARD sector (whereas what interests us is the structure of the savings sample), warned prudently of the consequences of the proposed method: 'a modification of the estimation procedure modifies the proportions of all the sectors', and hence the proportion of the savings sector. It is clear that while initially there was no excess weighting (bias) in the costs for savings (as proved apparently by the statistic proposed by Arthur Andersen), the correction introduces such a bias, hence influencing in the statistical sense the statistic of our interest-rate variable.

(iii) The methodology used has the result of arbitrarily reallocating the management costs to the savings sector.

(147) As pointed out by the consultant, the IARD management costs in the theoretical sample excluding the IARD were artificially allocated to the other sectors, whereas the purpose of the analytical accounts exercise is precisely to identify the costs relating to each sector. Even when combined in variable proportion with the real sample⁽⁵¹⁾, the result achieved (and sought) is to arbitrarily allocate management costs from the IARD sector to the other sectors. Moreover, there is absolutely no doubt that artificially reducing the costs assigned to this sector without adjusting in the same proportion the income corresponding to the same sample of federations has the effect of distorting the accounting balance of income and expenditure.

(148) It must be stressed that if the proposed methodology were valid, it should also have been applied to the

⁽⁵⁰⁾ Not without some precautionary words: 'this methodology could be criticised from a theoretical point of view. However, we consider that if no correction is made, this would be even more disputable'. We will not comment on the second part of the sentence in the light of earlier comments.

⁽⁵¹⁾ According to the proportions calculated in line with the IARD structure of the total population.

savings sector (which is also over-represented). The result would then have been a significant reduction of the management costs assigned to the savings sector, and consequently an increase in the *Livret bleu* result. It is not surprising, therefore, that Crédit Mutuel preferred to apply arbitrarily the correction to the IARD sector. It must also be pointed out that the original statistic used by Arthur Andersen would show, after the adjustment, an even higher proportion of management costs allocated to the savings sector in the sample (using the amounts of the management costs resulting from the combination of the real sample and the sample without IARD, mentioned above), hence an over-representation of the savings management costs in the sample, this time certainly greater than the over-representation of income in the savings sector. This adjustment thus leads to the emergence of a bias, this time perfectly clear, in the calculation of the analytical accounts result for all the components in the savings sector.

(149) In conclusion, the Commission must agree with the consultant in rejecting the proposed adjustment since there are no grounds for it and it therefore distorts the *Livret bleu* profit and loss account.

(c) The method of calculating the profitability of own funds

(150) The structure of the analytical accounts system allows the achievement of a normal margin in the various activities to be taken into account. In the case of the banking sector where the margins compared with the net banking income do not have the same significance as in other activities, the result is evaluated in this case using the concept of the cost of own funds. The term 'cost' may give rise to confusion: it is not an accounting charge but the cost of (economic) opportunity⁽⁵²⁾ which measures the profitability of a given activity. To calculate the profit made from the *Livret bleu* activity that exceeds the result corresponding to normal profitability for such an activity, it is therefore necessary to subtract from the profit a 'cost of own funds' which

represents the achievement of a normal margin from the activity⁽⁵³⁾.

(151) The Commission considers that the level of profitability of [...] as shown in Crédit Mutuel's internal analytical accounts⁽⁵⁴⁾ is the most objective in this case. It accepted the rate of profitability that Crédit Mutuel uses internally to calculate the cost and prices of its products. This means that the State guaranteed to Crédit Mutuel the same margin of profitability on the *Livret bleu* activity for the public service mission as the profitability used by Crédit Mutuel for its other competitive risk activities. This rate of profitability does not include the corporate tax paid subsequently and, where appropriate, the tax on profits, for in analytical accounts only the taxes recorded on charges (for instance on operating charges) are taken into account, not the tax on profits.

(152) Deposit activity involves less risk than credit or investment activities. The internal rate of profitability of a deposit activity is by necessity lower. Yet the Commission accepted the same rate of profitability for the deposit activity and other more risky activities, namely [...]. The acceptance of the same rate of profitability for collecting deposits and for other

⁽⁵³⁾ In its report of September 2000, Arthur Andersen proposed a new method of calculating the cost of own funds which has the effect of increasing by [...] the cost of own funds compared with the initial evaluation by Crédit Mutuel. Arthur Andersen in fact suggested using a rate calculated on the basis of the ratio between the pre-tax result (after withdrawal of provisions and FGFR) and own funds. This rate, in its view, reflects better the overall profitability of the bank, whereas Crédit Mutuel had adopted as the cost of own funds the amount of dividends actually distributed.

It is essential to take into account the fact that setting this rate of profitability is of a political nature for the bank management since a particular activity will be profitable depending on the level of the cost of own funds chosen. Arthur Andersen explains in this respect that '[the method of calculating the cost of own funds depends] not only on the way banks are organised, but also on the management targets set by the General Management'. Arthur Andersen does not criticise in principle the initial evaluation by Crédit Mutuel, which it regards as 'globally consistent'. The second method proposed by the auditor is unambiguously an alternative method which is 'recommended' in so far as Crédit Mutuel's method 'does not appear to be fully suitable'. In its note of 13 September 2001 Arthur Andersen completely drops these reservations. Crédit Mutuel sent this note to the Commission following a meeting at which the Commission officials and the consultant explained the reasons why their evaluation was based on the initial evaluation by Crédit Mutuel.

⁽⁵⁴⁾ Memorandum of 12 June 1998.

⁽⁵²⁾ Suppose that the result after deducting the cost of own funds is negative, this means that the bank would be better to drop the activity in order to shore up its own funds with its other activities which are profit-making after taking into account the cost of own funds. The problem is, of course, to calculate what is the level of remuneration of a benchmark shareholder.

activities has the effect of increasing the internal profitability rate accepted for the deposit activity in a disproportionate manner compared with the risks inherent in this activity. Consequently it is impossible to accept Crédit Mutuel's argument that this profitability rate would be too low in the case of the *Livret bleu* activity.

- (153) It must be pointed out that Crédit Mutuel is not incorporated as a limited liability company: it has the status of a mutual benefit company. Members in fact draw direct benefits in the form of rates or services for customers that reduce the apparent profitability rate of the bank. As the members are also the customers, they have an obvious interest, in the context of such a mutual interest structure, in drawing benefit from Crédit Mutuel by availing themselves of more interesting rates rather than by receiving profits that are taxable. This management strategy is not one that is followed by banks incorporated as limited liability companies. As Crédit Mutuel has a special organisation, it may therefore choose a specific own funds remuneration policy. The Commission therefore agrees with the consultant and with Crédit Mutuel's original position that the real financial cost of Crédit Mutuel's own funds must be taken into account.
- (154) The Commission therefore considers that the independent consultant has grounds to accept the own funds cost initially proposed by Crédit Mutuel.

(d) Coverage of member liability

- (155) The consultant considered that the cost of providing Crédit Mutuel members with a guarantee on total assets, charged by Crédit Mutuel (in its memorandum of June 1998), which reduced its *Livret bleu* result, was not justified because this was not an analytical accounts operational figure and the risk in question was completely dissociated from the *Livret bleu* system. This correction resulted in an increase in the *Livret bleu* operating result of [...] over the period 1991 to 1998.
- (156) The report by Arthur Andersen proposes a more sophisticated model to evaluate this cost, resulting in a reduction of the 'cost' of this coverage of around 80 %

of the cost evaluated by Crédit Mutuel ([...] compared with [...] over the period 1991 to 1998). The Commission also took note of the reservation expressed by the auditors regarding the relevance of these costs ⁽⁵⁵⁾.

- (157) In a note sent on 21 July 1999, Crédit Mutuel acknowledged that this coverage of liability was not reflected in the accounts. But the network confirmed that it accumulated own funds in a sufficient amount to prevent any members from being held liable. The Commission considered that a high level of own funds, as demonstrated by Crédit Mutuel, could be maintained for all kind of reasons and that there was no information in the accounts that identified the share of these own funds that was effectively allocated to such coverage.
- (158) The Commission points out that in the account certification forwarded to it, Arthur Andersen considered that this cost should be given the same treatment as the operating costs because Crédit Mutuel did not intend to make its members bear this risk should it occur. The legal obligation simply states that such a cost shall be paid by its members. In other words the Commission recognises that the risk of members being held liable exists, but that it arises from the articles of association and must be accepted as such by any person wishing to become a member in return for the benefits accruing from membership.

- (159) Therefore paying this liability cost for members was based on a discretionary decision by Crédit Mutuel. The legal obligation is borne by the members, hence Crédit Mutuel itself is under no obligation to guarantee its members. It is in fact not in the spirit of its articles of association that such liability should be looked after by the mutual interest body, since this mechanism of liability is in fact a specific feature of such a structure ⁽⁵⁶⁾.

⁽⁵⁵⁾ Arthur Andersen considers that it 'is unable to provide a decisive argument to support either side in [the] debate [on the relevance of such a cost]' (p. 45, *ibid.*). Arthur Andersen's assessment of this point has also changed considerably in its note of 13 September: 'we consider it wrong to consider that this is a purely theoretical cost'.

⁽⁵⁶⁾ If the same reasoning were applied to limited liability companies, it would be obviously absurd: a limited liability company has no 'moral' duty to cover the risk of loss of funds committed by the shareholders up to the amount of the capital subscribed.

(160) Crédit Mutuel has invoked the Banking Act of 24 January 1984, but this concerns the mechanisms of offsetting losses between federations in the mutual interest establishment: it does not concern the coverage of personal liability of members ⁽⁵⁷⁾. These obligations bear no relationship to the constraints of profitability and own funds mentioned in this respect by the French authorities in their memorandum of 26 October 2001. In its memorandum of 13 September 2001, Arthur Andersen justifies the solidarity mechanisms for shareholder liability by the fact that Crédit Mutuel had apparently paid to the banks that were in deficit an amount of almost [...] over the period in question. These transfers between profit centres, which are not peculiar to Crédit Mutuel but are engaged in by all large national and multinational companies, do not at all demonstrate that members are being held liable, but rather that a realignment has taken place between federations that replaces shareholder liability. The implementation of this realignment between federations would be quite insufficient to guarantee members against major risks, which proves yet again the difference in nature between realignment mechanisms and the model of liability coverage presented. The Commission points out that, in any case, the operating results of any federations in deficit benefiting from this realignment mechanism are already taken into account in the *Livret bleu* analytical accounts. As a result, entering an additional charge for the mutualisation of losses would result in any operating losses by these federations being entered twice.

(161) In conclusion, the Commission considers, like its consultant, that Crédit Mutuel has no legal obligation to cover the risks borne by its members by means of operations other than those resulting from the mutualisation of losses between federations ⁽⁵⁸⁾, that no information in the accounts proves that such coverage was introduced and that therefore the alleged costs for covering member liability are purely fictitious and cannot be accepted.

(e) Conclusion

(162) Having examined these three points of disagreement between the consultant and Crédit Mutuel, the Commission considers that the evaluation produced by the independent consultant recruited to perform the evaluation of the *Livret bleu* analytical accounts should be accepted.

(f) Further explanations

(163) In accordance with the policy generally pursued by the Commission, corporate tax is not included in the calculation of the final amount of State aid.

(164) The rate used for the capitalisation of results each year will be the Commission reference rate for France at 1 January of the year.

(165)

Table 3

Commission annual reference rate for France

1992	1993	1994	1995	1996	1997	1998	1999	2000	2001
10,61	11,00	8,93	7,94	8,22	7,01	5,83	4,77	4,76	5,70

⁽⁵⁷⁾ The central bodies 'shall take all necessary measures to guarantee the liquidity and solvency of each of these establishments and of the network as a whole' (Article 21). They may decide to introduce or to limit the distribution of a dividend to members or of remuneration of company shares to shareholders of credit institutions or of investment companies affiliated to them.

⁽⁵⁸⁾ The accounting effect of which is already taken into consideration by the experts.

4.4. Results of the Livret bleu profit and loss account

(166) It is worthwhile indicating, for the record, the results of the various intermediary expert evaluations⁽⁵⁹⁾ conducted before the final evaluation of the consultant, which was accepted by the Commission.

(a) Funds transferred to CDC

(167) According to Crédit Mutuel, the intermediation commission of 1,3 % had become necessary because the transfer of funds to CDC left the bank with management charges for the *Livret bleu* whereas the income from the same resources no longer existed. The grounds given for the commission paid by the State is the fact that profits from other activities should not be used to cover the costs of the *Livret bleu* system. According to calculations recently produced by Crédit Mutuel, the overall management cost for the *Livret bleu* was between [...] and [...] of total funds between 1990 and 1993, and then gradually fell to [...] in 1997. This commission does not seem excessive, according to Crédit Mutuel, given higher commission paid by the State to banks managing the Codevi and to the Post Office for the management of the *Livret A* (1,5 %). While it is true that the savings banks themselves manage the *Livret A* for a lower commission (1,2 %), this could be justified by the economy of scale from which the Caisses d'épargne benefit, the total *Livret A* savings managed being almost four times higher than that of the *Livret bleu*.

(168) In this respect it should be pointed out that the State did not assign this service to the most suitable bidder in a tendering procedure, but entrusted it directly through negotiations with Crédit Mutuel, which does not allow for any guarantee, by deduction, as to whether or not the commission is appropriate. The lower rate of commission granted to the Caisses d'épargne might be justified by the greater amount of savings accrued by the *Livret A*, but, on the other hand, the automation of the *Livret bleu*, unlike the *Livret A*, could result in lower management costs. Moreover, it is not proven that the State is paying the Caisses d'épargne the right commission for the collection service they are performing. In any case, the purpose of this decision concerns the question whether Crédit Mutuel received State aid, and not the other savings collection systems of other banks.

(169) The work of the Commission's consultant shows that over the period 1991 to 1998, this part of the total savings generated gross income of over [...]. Following the deduction of the related costs, the consultant concluded that the balance for this activity had become profitable again in 1998 (by FRF 26 million) after losses throughout the 1990s. It may be deduced from these results that the consultant's evaluation was, to say the least, 'conservative', as it is not conceivable that Crédit Mutuel would have accepted in 1991 to continue in the long term collecting savings through the *Livret bleu* solely with a view to transferring the funds to CDC if it had not considered the collection commission to be sufficient. On the contrary, the coherence of the estimates by Crédit Mutuel and, to a lesser extent, by Arthur Andersen, is clearly questionable in relation to this type of activity.

⁽⁵⁹⁾ The second approach by Crédit Mutuel is presented 'which likens the *Livret bleu* fully to the *Livret A*, omitting the partial taxation aspect' certified by Mazars and Guérard (the information in the file in fact allow us to conclude that Crédit Mutuel was compensated by the authorities for having fully offset the effects of partial taxation), which is the basic hypothesis of the two scenarios drawn up by Arthur Andersen (this hypothesis is the most favourable one for Crédit Mutuel, mindful of the fact that in any case the difference between the two scenarios is only slight).

(170)

Table 4

Net results of the *Livret bleu* on the funds transferred to CDC for the period 1991 to 1998 (net margin in FRF million and as a percentage)

(in FRF million)

Margin	1991	1992	1993	1994	1995	1996	1997	1998	Total
Initial estimate by Crédit Mutuel	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
Initial estimate by consultant	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
Second assessment by AA	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
Commission estimate	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
Margin (as a %)	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]

Source: Arthur Andersen, Littlejohn Frazer.

(171) While the 1,3 % commission might have been relatively insufficiently in itself during the 1990s, after 1998 it more than compensated Crédit Mutuel for the management costs of this part of the *Livret bleu* funds. Given that the consultant's work stops in 1998 and that Crédit Mutuel could benefit in future from productivity gains on the management of the *Livret bleu*, there are grounds for raising the possibility that this commission is excessive in the context of the transfer of all the funds. It should be noted that the margin increased regularly since 1996, in other words with the speeding up of the transfer of *Livret bleu* funds to CDC. Transfer

of all funds to CDC may have improved the profitability of this activity for Crédit Mutuel because of the economy of scale.

(b) General interest assets

(172) General interest assets produced gross income of almost [...] over the period 1991 to 1998. Following the deduction of related costs, the residual margin for Crédit Mutuel was approximately [...]. It must be noted that Crédit Mutuel's initial evaluation proposed a much higher estimate.

(173)

Table 5

Net *Livret bleu* results on general interest assets for the period 1991 to 1998 (net margin in FRF million and as a percentage)

(in FRF million)

Margin	1991	1992	1993	1994	1995	1996	1997	1998	Total
Initial estimate by Crédit Mutuel	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
Initial estimate by consultant	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
Second assessment by AA	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
Commission estimate	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
Margin (as a %)	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]

Source: Arthur Andersen, Littlejohn Frazer.

(174) This level can be explained by the fact that these are long-term assets granted at high nominal fixed rates which later enjoyed a drop in interest rate plus a State guarantee. A second factor which explains this, and which is not insignificant, is that these assets have no risk since they are government-guaranteed, therefore the profitability of these assets is not affected by any need for funds arising from the insolvency of the beneficiaries. Crédit Mutuel is opposed to the taking into account of these profits since they arise from income on loans granted or bonds purchased before 1991. We should point out that the Commission considers that, given the considerable profits achieved after 1991 on these assets, the State should have adjusted the amount of the State resources it chose to grant Crédit Mutuel through CDC ⁽⁶⁰⁾.

(c) Assets chosen by Crédit Mutuel

(175) Crédit Mutuel and the French authorities considered that these assets, being freely chosen by the bank, do not generate for it income that has the character of State resources, therefore the Commission could not use them in the context of these proceedings. However, in analytical accounts, these tasks are back-to-back to a

specific resource, the deposits collected thanks to the monopoly over distributing the *Livret bleu*. In competitive conditions, it is likely that Crédit Mutuel would not have been able to obtain this resource at the same price, therefore these assets and the corresponding resources must be taken into account in the overall economy of the *Livret bleu* system. In any case, as the rate of collecting funds for assets freely chosen by the bank is set by the State, it is logical to take this cost into account.

(176) It may seem paradoxical that the assets freely chosen by the bank generated negative margins for Crédit Mutuel. The consultant obtained the same result, although it was lower in absolute terms than the one declared by Crédit Mutuel. This situation is in principle due to the fact that the assets generated insufficient profitability compared with the rate of commission and management rates of the *Livret bleu*. The Commission considers that these figures illustrate once again the extremely conservative nature of the consultant's estimate, which having incorporated some corrections proposed by Arthur Andersen, arrived at an estimate of a higher loss than that initially evaluated by Crédit Mutuel.

(177)

Table 6

Livret bleu profit and loss account for freely chosen assets during the period 1991 to 1998 (net margin in FRF million and as a percentage)

(in FRF million)

Margin	1991	1992	1993	1994	1995	1996	1997	1998	Total
Initial estimate by Crédit Mutuel	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
Initial estimate by consultant	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
Second assessment by AA	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
Commission estimate	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
Margin (as a %)	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]

Source: Arthur Andersen, Littlejohn Frazer.

⁽⁶⁰⁾ Conversely, in the event that the general economic interest asset had shown a deficit, the payment of the liability by the State would have been regarded as aid compatible with the Treaty by virtue of the general economic interest service.

(d) Summary: the overall result of the profit and loss account

account. This Commission decision evaluates the amount of aid accumulated over the period 1991 to 1998 at FRF 1 074 million.

(178) The summary of the evaluations for each sector gives the final evaluation of the *Livret bleu* profit and loss

(179)

Table 7

Livret bleu profit and loss account for each sector over the period 1991 to 1998 (net margin in FRF million and as a percentage)

(in FRF million)

Margin	1991	1992	1993	1994	1995	1996	1997	1998	Total
Funds transferred to CDC	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	-399
General interest assets	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	2 592
Freely chosen assets	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	-1 119
Total pre-tax margin	1 096	505	301	-471	-135	-87	-156	20	1 074

Source: Arthur Andersen, Littlejohn Frazer.

(180) Insofar as the sum of the financial benefits entered in the accounts that were generated by the *Livret bleu* (collection commission, profit from management of general interest assets, profit from management of funds on its own account, in other words using them for assets chosen by the bank) exceeds the costs incurred by Crédit Mutuel in managing the collection process and funds, there is a transfer of public resources that constitutes State aid. This amount does not take into account:

- the results of the profit and loss accounts for 1999 and 2000, which can be obtained easily by applying the accounting methodology defined by the experts for the years 1991 to 1998,
- the capitalisation of the results at the Commission reference rates on the exact date of recovery of aid by the French authorities.

(181) To obtain the amount of the excess compensation relating to the period 1991 to 2000, the French authorities must add to this amount the account balance for the years 1999 and 2000 using the method validated by Arthur Andersen and the Commission consultant, and capitalise this amount year by year at the Commission reference rate until the date of recovery of the incompatible aid.

5. Verification of compatibility with the Treaty of aid granted to Crédit Mutuel

5.1. Verification of compatibility with Article 87 of the Treaty

(182) While the system of collecting and allocating partially tax-exempt savings comprises a support mechanism having a social character granted to the beneficiaries of the *Livret bleu* general interest assets, the measures in question do not, in this case, consist of aid having a social character granted to individual consumers, or of aid to promote the execution of an important project of common European interest. Neither is the aid intended to remedy a serious economic disturbance.

(183) As this is not aid intended to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment, or to facilitate the development of certain areas in France, the derogations provided for under Article 87(3)(a) and the first part of (c) of the Treaty cannot be taken into account.

- (184) Since *Crédit Mutuel* is a profitable institution that does not benefit from any restructuring or rescue plan, the derogation provided for under the first part of the first phrase in Article 87(3)(c), cannot be taken into account.
- (185) At the end of these proceedings, the Commission concludes that the aid in question is operating aid. It must be pointed out that operating aid is particularly distortive and that there is no derogation under Article 87 of the Treaty that would permit the present case to be declared compatible with the common market. The French authorities have not, in any case, provided any information to the Commission during these proceedings that would allow this aid to come within the scope of one of the derogations under Article 87.
- 5.2. *Verification of compatibility with Article 86(2) of the Treaty*
- (186) As mentioned by the Commission when it initiated these proceedings, if there is no possible derogation under Article 87 of the Treaty, the only possibility that the aid is compatible with the common market lies in a potential derogation from the prohibition on aid under Article 86(2) of the Treaty, relating to a general economic interest service entrusted to *Crédit Mutuel* through the *Livret bleu* system.
- (187) If the derogation provided for under Article 86(2) of the Treaty is to be applied, the State support must be in proportion to the objective: Article 86(2) states that undertakings entrusted with the operation of services of general economic interest (...) shall be subject to the rules contained in this Treaty, in particular to the rules on competition, insofar as the application of these rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. In its 1996 Communication on general interest services in Europe, the Commission pointed out that, where appropriate, exceptions to the rules in the Treaty under Article 86(2) were subject to the observance of the principle of proportionality, which consisted of checking that the means used are in proportion to the general interest objectives being pursued ⁽⁶¹⁾.
- (a) Existence of services of general economic interest relating to the *Livret bleu* system
- (188) First of all the various services of general interest performed by *Crédit Mutuel* must be identified. Emphasising the character of a service of general economic interest, *Crédit Mutuel* and the French authorities referred to three separate services: (i) collection of deposits destined to finance general interest assets, (ii) maintaining branches in certain areas for regional development purposes, and (iii) encouraging savings by the general public. The Commission will not give its opinion on the task of encouraging savings ⁽⁶²⁾, which would not change the decision one way or another.
- (i) The collection of deposits through the *Livret bleu* destined for financing general interest assets
- (189) The Commission may accept ⁽⁶³⁾ that the task of collecting deposits through the *Livret bleu* (and in particular the allocation of all or part of these funds to general interest assets or the transfer of these deposits to CDC) may, when looked at on the whole, constitute a general interest service assigned by the State ⁽⁶⁴⁾.
- (ii) Maintaining branches in rural areas
- (190) The Commission notes that *Crédit Mutuel* stated, in response to the initiation of these proceedings, that because of the obligation to maintain a local presence in

⁽⁶¹⁾ General Interest Services in Europe, Commission Communication (OJ C 281, 26.9.1996, point 21, retained in the updated version of 20.9.2000).

⁽⁶²⁾ This is traditionally the first objective pursued by the authorities. The Minister of Finance had stated in debates preceding the vote on the 1975 law that 'Based on the principle of mutual interest, and with many branches operated by voluntary staff, [*Crédit Mutuel*] is a way of attracting saving by the general public which must be encouraged'.

⁽⁶³⁾ On the question of the general economic interest service, the French authorities wrote on 8 April 1998 that 'if the Commission were to consider [...] that there was an element of State aid in the *Livret bleu* system, it should regard it as compatible with the Treaty in the light of the objectives pursued by this regime and of Article [which became] 86(2)', reserving 'the right to develop the necessary arguments'.

⁽⁶⁴⁾ The operation of freely chosen assets is not in itself a general interest service, but as the resources underpinning these assets were obtained as a result of such a service, it shows that there are grounds for considering the overall structure of the *Livret bleu* system as a whole, with all its components.

rural districts, it had had to deal with costs ranging from [...] to [...] per branch, in other words an annual cost which it estimates at [...]. Crédit Mutuel considers that collecting savings through a network of branches in rural areas forms part of the general economic interest service entrusted to it. This argument put forward by Crédit Mutuel is looked at in three stages: verification of the legal reality of the alleged public service constraint, examination of the evaluation of the costs produced by Crédit Mutuel, and examination of the development of the Crédit Mutuel network since 1991 following the abolition of all State Controls (at 1 July 1991).

(191) The Commission points out that the Crédit Mutuel network of rural agencies already existed when the *Livret bleu* was created in 1975. The French authorities, which maintain that the Crédit Mutuel network structure is a result of the constraints they imposed, refer only to the law concerning the opening and closure of bank branches, which was repealed in 1987. Between 1987 and 1991, a system of control was, however, maintained for Crédit Mutuel. The rules provide for an authorisation system, not a formal prohibition on the closure of branches or on restructuring, in particular from 1987 onwards. This system of control was abolished on 1 July 1991 in the more general context of the renegotiation of contractual relations between the State and Crédit Mutuel.

(192) The existence of a State control does not prove the existence of specific constraints. The French authorities have not produced any legal document (specifications, note mentioning obligations regarding geographic coverage) proving the public service constraints relating to the geographic distribution of the Crédit Mutuel network with respect to a general economic interest service. By the same token, Crédit Mutuel has not produced any document proving that this system of regulatory control undermined its restructuring plans or redeployment of the network (for instance in the form of a refusal by the Comité des Etablissements de Crédit to shut down a branch). In conclusion, no proof has been produced of the existence of a public service constraint on the non-closure of branches in rural areas before July 1991. This argument is therefore not admissible. No legal measure governed the management of the Crédit Mutuel network after 1 July 1991. The French authorities therefore have no grounds in invoking the existence of public service constraints after 1991.

(193) With regard to the evaluation of the 'surcharges' relating to the rural network, the report by Arthur Andersen does not mention these costs in its evaluation of the *Livret bleu* analytical accounts. The evaluation produced by Crédit Mutuel takes into account costs for maintaining the rural network over the period 1991 to 1997 amounting to approximately [...]. In this evaluation, all the fixed expenses of the rural branches were allocated to the *Livret bleu*, without any justification⁽⁶⁵⁾.

(194) Following the criticism by the Commission consultant, Crédit Mutuel presented another evaluation orally at the meeting of 7 February 2000 showing an amount that was three times lower. This time Crédit Mutuel assumes that the rural branches have a *Livret bleu* activity that is as important as that of the other branches, in relative terms compared with their other activities. In fact, only a marginal part of the activity of these agencies relates to the *Livret bleu*, and this method involves allocating to the *Livret bleu* the same share of fixed costs as that adopted for branches that dedicate a greater part of their activity to the *Livret bleu*. This approach runs counter to the construction of analytical accounts. That is why Arthur Andersen did not use it. Similarly, the Commission bases itself on the analytical accounts system and, in accordance with the request made by the French authorities on 7 January 2002, it accepted exactly 'the share of costs corresponding to that of the *Livret bleu* activity in branches', and not the arbitrarily higher costs as in the Crédit Mutuel evaluation.

(195) Crédit Mutuel also mentions, for the period 1991 to 1998, 'a considerable loss of earnings caused by quotas placed on branches up to 1991'. The Commission observes that the legal system referred to does not concern quotas but a control and that no proof of quotas has been produced. Mindful of the fact that Crédit Mutuel had plenty of time to restructure its network after 1991, it is paradoxical, to say the least, to blame the State for a delay of seven years in the restructuring of the network. If Crédit Mutuel recorded a loss of earnings as a result of the late restructuring of its network (not proven), this was clearly due to an independent management decision since it was not subject to any control whatsoever.

⁽⁶⁵⁾ As has been noted, no legal obligation was established to maintain branches in rural areas. Moreover, the *Livret bleu* activities were marginal in relation to the total activities of these branches. Only about [...] of these costs were apparently already entered in the *Livret bleu* analytical accounts system, which means that the Crédit Mutuel analytical accounts in rural areas wrongly affect the *Livret bleu* [...] costs arising from other activities.

(196) Lastly, it is not clear from the evolution of the Crédit Mutuel network that it underwent major restructuring after July 1991, in other words after the removal of all controls. Crédit Mutuel kept a rural network of an equivalent size even though it was not obliged to do so. The comparison in the note of 7 January 2002 shows, moreover, that the importance of the Crédit Mutuel rural network is quite relative. Compared with the Crédit Agricole (Crédit Mutuel's main competitor in terms of private banking market position), Crédit Mutuel has a smaller share of branches in rural areas ([...] compared with [...]), and in semi-rural areas ([...] compared with [...]). Crédit Mutuel enjoys a good position on the private banking market, notably in rural areas. The rural network is not a public service constraint, but forms part of a corporate strategy.

(197) Crédit Mutuel also invoked the fact that the quota of total Codevi funds (industrial development accounts) transferred up to 1994 was higher for Crédit Mutuel than for other banks. While this is another tax-exempt savings account, the Codevi accounts are distributed separately from the *Livret bleu*. No proof has been produced to show that the nature of the contractual arrangements between Crédit Mutuel and the State regarding the Codevi is linked precisely to the *Livret bleu*.

(b) Proportionality of aid to costs associated with the services entrusted to Crédit Mutuel

(198) The above developments have enabled us to reach the conclusion that Crédit Mutuel obtained from the *Livret bleu* system a cumulated non-capitalised profit of FRF 1 074 million, which exceeded the costs (including a normal profit margin) of the task of distributing the *Livret bleu* entrusted to it by the State, even before the results from the *Livret bleu* for 1999 and 2000 are taken into account.

(199) The Commission underlines the fact that the derogation provided by the Treaty under Article 86(2) must be applied rigorously and on an exceptional basis. That is in fact the interpretation of the Court which states that this provision lays down the conditions in which undertakings entrusted with the operation of services of general economic interest may exceptionally not be subject to the rules of the Treaty⁽⁶⁶⁾. This strict

application appears in all circumstances to be incompatible with a situation in which there is over-compensation of costs that arise from a service of general economic interest for which there is no justification.

(200) It may therefore be concluded that the derogation provided by Article 86(2) is not applicable in a case of excess compensation, as in this case, and that the net profit drawn from operating the *Livret bleu* has the character of State aid that is incompatible with the Treaty.

5.3. The question of legitimate confidence

(201) The Commission considers that invoking legitimate confidence would not in this case allow Crédit Mutuel and the French authorities to be regarded as exempt from the normal rules of competition. The continuous exchanges of correspondence during the investigation from 1991 on and the many evaluations conducted from the time the proceedings were opened rule out the recognition of legitimate confidence in this case based on the complaint lodged. These exchanges clearly show that the French authorities and Crédit Mutuel were fully informed of the existence of a problem of compatibility with the rules of competition at least as from 1991.

VI. CONCLUSION

(202) The granting to Crédit Mutuel of the right of distribution of the *Livret bleu* contains State aid within the meaning of Article 87(1) of the Treaty. This aid is not eligible for any of the derogations provided for in Article 87(2) and (3) of the Treaty.

(203) The derogation provided for in Article 86(2) of the Treaty can be only partly applied since, as demonstrated by the audit conducted on behalf of the Commission, the compensation granted during the period is not strictly limited to the excess costs relating to the general economic interest service which may be taken into account. As this was the only possible derogation permitting the exemption of the measures in question from the obligations laid down in the rules of competition, notably the prohibition under Article 87(1), the result is that the fraction of State resources granted to Crédit Mutuel which exceeds the net costs of managing and collecting the *Livret bleu*, mindful of a

⁽⁶⁶⁾ Case C-159/94 *Commission v France* [1997] ECRI-5815, paragraph 48.

normal profitability margin, constitutes excess compensation of the costs of the public service and therefore constitutes State aid that is incompatible with the common market,

HAS ADOPTED THIS DECISION:

Article 1

1. The measures taken by France for Crédit Mutuel involving the collection and management of regulated savings under the *Livret bleu* system comprise State aid that is incompatible with the common market.

2. The aid is not eligible for any derogation under Articles 87(2) and (3) of the Treaty. It may be partly eligible for the derogation provided for in Article 86(2) of the Treaty, insofar as it is essential for the performance of the general economic interest task entrusted to Crédit Mutuel by the State. The aid exceeding the cost of collecting and managing the *Livret bleu* cannot be regarded as compatible with the general interest.

Article 2

1. France shall recover from Crédit Mutuel the aid incompatible with the common market granted to it since 1 January 1991. The amount of the incompatible aid over the period 1991 to 1998 is determined by capitalising at the Commission reference rate the following annual flows:

(in FRF million)

	1991	1992	1993	1994	1995	1996	1997	1998
Flows	1 096	505	301	-471	-135	-87	-156	20

The result of the *Livret bleu* analytical accounts for the years 1999 and 2000, which the French authorities are required to evaluate according to the method adopted by Arthur Andersen, and given the corrections made by the Commission consultant, must be added to this amount. The French

authorities must then capitalise these amounts at the Commission reference rate up to the date of recovery of the incompatible aid.

2. France shall modify the rate of commission for the *Livret bleu* savings paid by the Caisse des Dépôts et Consignations to Crédit Mutuel with a view to eliminating in future all aid that exceeds the management and collection costs that may be taken into account.

3. The French authorities shall ask Crédit Mutuel to introduce and publish separate accounts for the *Livret bleu*.

4. The French authorities shall send to the Commission the bank's annual report and a three-year report on the *Livret bleu* accounts.

5. The Commission shall conduct any checks it deems appropriate to verify that the aid to Crédit Mutuel is strictly in proportion with the general economic interest task entrusted to it. It shall, if it deems necessary, mandate consultants to audit the *Livret bleu's* analytical accounts.

Article 3

France shall inform the Commission, within two months of notification of this Decision, of the measures it has taken to comply with it.

Article 4

This Decision is addressed to the French Republic.

Done at Brussels, 15 January 2002.

For the Commission

Mario MONTI

Member of the Commission