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XXXIInd Report on competition policy



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European Commission
Directorate-General for Competition

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FOREWORD BY MARIO MONTI

Member of the Commission in charge
of competition policy



Looking back at the developments of competition policy in 2002, an obvious common denominator comes to mind: modernisation — in the broadest sense of the term. Whether we think of the culmination of our ambitious efforts in the successful adoption of new legislation, as in antitrust, or of the essential intermediate stages passed in reforming EU merger control, or of the further steps taken to streamline State aid control, the modernisation drive is evidence of the Commission's determination to continually adjust its policy and enforcement tools to a fast-changing economic environment, but also of its willingness to ensure that its decision-making process matches the most stringent standards of due process. Modernisation is necessary to warrant a systematic, efficient and legitimate application of competition rules in an enlarged Union, with the ultimate goals to enhance the benefits consumers derive from competitive markets and to maintain this irreplaceable incentive for undertakings to increase their competitiveness.

A condition of our success is that the existing competition rules are systematically and properly enforced. This has been a driver of our action in 2002. This year has seen the adoption of Regulation (EC) No 1/2003, a fundamentally new procedural framework for the application of antitrust rules in the Union. Taking stock of the wealth of enforcement experience gained over the past 40 years, this new instrument creates the conditions for a more effective enforcement in an enlarged Union. The resounding success of our fight against cartels in 2002, highlighting the Commission's increased focus on the prosecution of the most serious infringements, is already a striking illustration of the changes to expect. But our striving for better enforcement concerns also merger control. The thorough review process carried out over the year has touched upon both procedure and substance. It should result soon in another major reform contributing decisively to better enforcement of our competition policy.

Enforcing the rules is one thing. But ensuring that their content is finely tailored to the needs of our economy is another essential requirement of any sound competition policy. The achievements of 2002 also illustrate our commitment to this permanent screening of the substance of our rules. Not only have we kept on adjusting them to the fast evolution of the sectors of the economy to which they apply, but we have striven to simplify them, in order to reduce compliance costs to a minimum.

All this would be somewhat vain, should it be done in splendid isolation from the rest of the world. In today's globalised economic world, intensified international cooperation is key to effectiveness. This implies a sustained effort of dialogue and coordination with all our partners, not least in the context of our global commitment to competition advocacy.

Towards an even more systematic and effective enforcement satisfying the most stringent standards of due process

The achievements of 2002 reflect the determination with which the Commission has pursued its objective to promote a better enforcement of its competition policy.

Antitrust: a new framework for better enforcement

The experience gained so far by businesses as well as by national authorities and courts, led to the conclusion that a vigorous decentralisation of the enforcement of EU antitrust law was not only desirable, but also feasible. Just at the end of 2002, the Council adopted Regulation (EC) No 1/2003 which lays down a new framework for applying Articles 81 and 82 of the EC Treaty, with a view to making more widespread, but nev-

ertheless tighter, enforcement possible after enlargement. As symbolised by its number, this regulation opens a new chapter in the joint application of a single body of rules by the Commission, national competition authorities (NCAs) and national courts throughout Europe. But such decentralising alone is not enough: effective mechanisms, based on precise criteria, for assigning responsibilities to the most appropriate level are also required. The newly created network of European competition authorities (ECN) will have a key role to play in this respect as of 1 May 2004, when the new regulation will come into force.

Decentralising the application of the antitrust rules and abolishing the notification system will enable the Commission to focus on its core task. More than ever, it will be in a position to detect and punish the most serious infringements. The results achieved in 2002 show that the Commission has prepared itself for a reinforcement of this priority. Following the resounding precedent set in 2001, 2002 was another exceptional year for the fight against anti-competitive agreements and practices employed by undertakings, in particular against cartels. Ten prohibition decisions were taken imposing fines totalling more than EUR 1 billion.

But to keep pace with increasingly subtle methods of disguising illegal behaviour, appropriate tools need to be available to enforcement agencies. The new leniency programme adopted in 2002 considerably strengthens the Commission's ability to detect and punish cartels by offering compelling incentives for the companies involved to cooperate with the Commission and to come forward as quickly as possible with information that helps the Commission to uncover and terminate a cartel. This new leniency policy already yields substantial results. Combined with the wider investigative powers foreseen in Regulation (EC) No 1/2003, it will allow the Commission to maintain and step up its enforcement activity in the field of cartels.

Progress in our thorough review of merger control

The concern for optimal allocation of enforcement responsibility inspires the reform process in the merger field, too. Of course, one of the principal positive features of the EU merger control system, namely that it provides for a one-stop shop for scrutiny of mergers with a Community

dimension, needs to be maintained. But that does not prevent some aspects of a case being referred back to the national authorities where they have greater expertise in the field. The year 2002 saw a significant increase in the number of such instances; and for the first time, two cases were also jointly referred by Member States to the Commission, as it had a better overview of the situation in the relevant markets. These developments should shortly be confirmed through simplification of the referral procedures in both directions proposed as part of the review of the merger regulation.

After wide-ranging consultation on the draft, the Commission presented the Council on 11 December with a proposal for a root-and-branch reform of Regulation (EEC) No 4064/89. While the proposal maintains the substantive test so far applied under the merger regulation — which by and large has proven perfectly capable of dealing with the complexity of today's transactions — it recognises a need to spell out some of its aspects more clearly. In addition, a draft notice on the appraisal of horizontal mergers has already been adopted by the Commission, so as to ensure that the reasoning of Commission decisions becomes more transparent; and other notices will follow. A further objective of the proposal is to take greater account of the efficiencies that can result from mergers. These should be taken into consideration in the analysis provided that they are of direct benefit to consumers and that they are substantial, verifiable and directly linked to the transaction.

The calibre of our substantive rules would count for little, however, if we were unable to apply them in a decision-making process that satisfies the most stringent standards of due process and transparency. The annulment by the Court of First Instance of three prohibition decisions last year in the field of mergers has turned the spotlight sharply on the need for the Commission's economic reasoning to be beyond reproach. The measures proposed by the Commission take full account of these requirements. It is suggested to make the deadlines for timing of notifications and for consideration of appropriate remedies more flexible. In addition, early and systematic access for all the parties concerned to the documents in the file and information on the stage reached in our analysis should contribute to ensuring due process. A further strengthening of the role of the hearing officers, the status of interested third par-

ties and consumers is equally envisaged. In order to improve the quality of the investigation and the Competition DG's economic expertise I decided to appoint a chief economist in order to underpin our quest for excellence. Last but not least, internal checks and balances were subject to a thorough rethink and are in the process of being reinforced, for example by putting in place regular peer-review panels in the most complex cases.

Tailoring the content of our rules to the needs of our economy, reducing compliance costs

Modernisation also means reviewing the substance of rules to take account of the way markets currently operate without losing sight of the integration objectives enshrined in the Treaty. This particularly concerns sectors where competitive forces have come to bear only recently. The development of a new regulatory environment by way of a gradual liberalisation process ensures not only that competitive conditions are introduced which provide fresh business opportunities for market entrants and incumbent operators alike, but also that adjustment to the new competitive situation effectively translates into benefits for consumers. But rules also need to be reviewed where competitive forces have not delivered their expected effects, despite the fact that operators have been subject to competition for a long time.

Reacting to economic change, provoking it when needed

The Commission demonstrated again in 2002 its commitment in favour of the competitiveness and development objectives set at the Lisbon Summit. In this respect discussions in the Council and European Parliament on proposed new legislation made good progress. In the energy sector, political agreement was reached in November on the new acceleration directive and a regulation to speed up market liberalisation for electricity and gas. The new legislation will eliminate the distortions of competition resulting from the different speeds at which the Member States have been opening up their markets and improve competition conditions for effective liberalisation. The regulation on cross-border trade in electricity will also be a major step towards a truly internal electricity market. However, this legislative progress

will require increased monitoring activity by the competition authorities to ensure that new market opportunities are not undermined by restrictive and/or abusive behaviour on the part of energy companies and in particular vertically integrated incumbents or by incompatible State aid they receive which allows them to distort competition in the liberalised markets. In another field, the new postal directive adopted in June clears the way for more competition between operators on what is intended to become a genuine single market in postal services. For its part, the new regulatory framework for electronic communications networks and services, adopted in February, assigns a more decisive role to analysis of competitive conditions with a view to rolling back *ex ante* regulations as far as possible. That is why competition instruments must be shown to be effective in sanctioning rapidly any abusive behaviour that may occur as well as to avoid State aid being used to distort competition.

The Commission also needs to play its role as an initiator of change where markets do not function satisfactorily in the light of the Treaty objectives. The adoption in July of the new exemption regulation for motor vehicle distribution can serve as a concrete example. It is high time we had a genuine single market in cars, for the benefit of consumers but also in the interests of the competitiveness of European industry. A review had clearly shown that the market integration pursued by the old regulation applicable to the sector had not been achieved to the extent hoped for, and that consumers were not receiving their share of the benefits deriving from the exempted restrictions. Thus, a new system has been put in place to give a fresh boost to market integration, so that consumers can benefit from better prices, wider choice and improved services. At the same time it widens the scope for business initiative. The Commission's efforts at an even-handed approach was reflected in the extensive consultation of all stakeholders that preceded and enabled the adoption of the new regulation.

Minimising compliance costs: the example of State aid control

Another factor influencing the way markets function is State intervention. In order to fulfil market integration objectives, it is necessary to maintain a strict State aid discipline within the internal market. In 2002 progress was made towards simplification and clarification of applicable State

aid rules. The new multisectoral framework for large regional projects, adopted in March, lays down clearer rules for assessing major investment projects and does away with the prior notification requirement for aid granted under an already approved scheme. A new regulation on aid for employment, adopted in November, facilitates Member State initiatives to promote job creation by eliminating the requirement to notify certain aid measures. This approach facilitates appropriate and timely action of Member States to boost economic growth and job creation. It is also in line with and anticipates a more far-reaching reform package in the State aid field designed to streamline procedures and to allow the Commission to focus on those parts of State aid which are most likely to distort competition.

**Competition advocacy
through international cooperation:
a sustained ambition**

This rapid overview of major EU competition policy developments in 2002 illustrates well the type of challenges competition authorities around the world face on a daily basis. These efforts would be in vain if we lost sight of the fact that globalisation makes it essential for us to discuss competition issues with our trading partners. Our action will bear fruit only if similar action is taken in other countries. That is why I have always endeavoured to develop international cooperation, at both bilateral and multilateral level. Here

too, 2002 saw a good deal of progress. With a view to preparing for enlargement, efforts by the candidate countries to implement the *acquis communautaire*, particularly in the State aid field, continued, and this enabled negotiations with the Czech Republic, Hungary, Malta, Poland and Slovakia to be rounded off before the end of the year. As far as bilateral cooperation is concerned, clear headway was made towards the conclusion of a cooperation agreement with Japan, with the adoption of a proposal for a Council decision to that effect. Finally, at multilateral level, work progressed satisfactorily. The inaugural conference of the international competition network (ICN) was held in Naples in September, and the WTO working group on trade and competition continued its discussions at meetings where we put forward highly concrete proposals.

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* *

What we accomplished in 2002 is considerable and forms part of an overall logic. I am confident that this points at our lasting concern to prepare for future challenges. Let us be under no illusion: those will be substantial. With implementing the new antitrust regulation, reforming merger control, modernising our policy on controlling State aid and running the last lap to enlargement, we will have our hands full in 2003 to ensure that the seeds we have sown in 2002 fulfil their promise.



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INTRODUCTION

1. The virtues of effective competition on the market in delivering efficient allocation of resources and fostering innovation and technical development are widely recognised throughout the world. However, ensuring or creating the conditions which allow markets to function competitively constitutes an ongoing challenge both as regards the behaviour of actors on these markets and in view of obstacles created by State measures. Competition policy then serves a twofold aim: addressing market failures resulting from anticompetitive behaviour by market participants and from certain market structures, on the one hand, and contributing to an overall economic policy framework across economic sectors that is conducive to effective competition, on the other. In a world of continuing globalisation, competition advocacy within an integrated economic area, such as the European Union, necessarily needs to find also its external expression in order to provide for a level playing field in the international arena.

2. EU competition policy rests on three closely related pillars, all of which serve to bring the benefits of effective competition to the consumer and at the same time to enhance the competitiveness of European industry. The first pillar is vigorous enforcement of the antitrust rules which prohibit undertakings from engaging in unjustified restrictive agreements or practices and from abusing dominant positions they hold on the market. This activity focuses increasingly on preventing the most serious forms of anticompetitive behaviour by market players, such as price-fixing or market-sharing cartels, from disrupting effective competition. At the same time, the control of concentrations is necessary to avoid a situation in which dominant positions on a market are created or reinforced through mergers and acquisitions. Secondly, the opening-up of economic sectors in which effective competition is not yet firmly rooted is pursued through a gradual liberalisation policy which accompanies legislative measures to further integrate the single market. Thirdly, EU competition policy covers the control of State aid on a supranational level to ensure that State intervention does not distort the competitive situation on the market through subsidies and tax exemptions.

3. The main challenges which EU competition policy has been facing over the past few years and which have shaped the legislative and enforcement priorities of the Commission are well

known: imminent enlargement of the European Union to 25 members implies a substantial effort both within the Union and by the 10 candidate countries in order to prepare the ground for the Treaty competition rules to be applied effectively upon accession of the new Member States. Globalisation of markets requires increased cooperation between competition policy-makers around the world. Finally, changes in the economic environment, such as the reduced prospects of economic growth or the difficulties facing certain sectors which we have seen in 2002, cannot be ignored, although they are no reason to compromise the fundamental logic of an effective competition policy.

4. Apart from its continuing fight against hardcore horizontal cartels, one of the most serious infringements of competition law, the Commission has proceeded successfully with a number of reform projects in all fields of competition policy to address these challenges. Most prominently in 2002, an ambitious and fundamental overhaul of the antitrust rules implementing Articles 81 and 82 of the Treaty has led to the adoption of a new basic regulation by the Council. It will usher in a new era of antitrust enforcement in the European Union, involving national competition authorities and national courts more directly in the application of the Treaty competition rules within the framework of a European network of competition authorities. The new block exemption regulation applying to the motor vehicle industry represents a major overhaul of competition rules in that sector. The review of the merger regulation has likewise advanced with the adoption by the Commission of a proposal for a new regulation based on an extensive consultation of stakeholders and drawing on the experience gathered in applying the first merger regulation. Last but not least, the recognised importance of a smoothly running State aid control has filtered into a number of important reform projects to simplify State aid procedures with a view to further enhancing the crucial role of this instrument within the EU competition policy framework.

5. In 2002, the total number of new cases was 1 019, comprising 321 antitrust cases (under Articles 81, 82 and 86 of the EC Treaty), 277 merger cases and 421 State aid cases. Comparable figures for 2001 were a total of 1 036 new cases, comprising 284 antitrust cases, 335 merger cases and 417 State aid cases (excluding complaints). The overall development in new cases therefore

shows no uniform tendency across the pillars of competition policy. While a significant increase can be reported in the field of antitrust, the number of merger cases clearly went down and new State aid cases remained stable.

6. In antitrust, the number of new notifications remained at a relatively low level, whereas significantly more new own-initiative cases were opened in 2002 (91) than in 2001 (74). This tendency prepares the ground for the phasing-out of the notification system which modernisation of the antitrust rules will bring about. The number of complaints continued to grow this year (129 in 2002, after 116 in 2001 and 112 in 2000).

7. The total number of cases closed in 2002 was 1 283, comprising 363 antitrust cases, 268 merger cases, and 652 State aid cases (excluding complaints). Comparable figures for 2001 were 1 204 cases closed, comprising 378 antitrust cases, 346 merger cases and 480 State aid cases. While the decrease in closed antitrust cases can be attributed to the continuing priority given to resource-intensive cartel cases, the backlog of pending cases was further reduced, with the number of closed cases exceeding the number of new cases.

8. In 2002, the Commission's input-driven activity of scrutinising mergers and alliances further slowed down significantly after an initial stagnation of the growth trend in 2001, but nevertheless remained at a high level (277 new cases). In terms of output, 275 formal decisions were taken during the year (against 340 in 2001). The number of cases requiring in-depth investigation decreased considerably and was back to the level seen in the mid-1990s (7 initiations of phase II proceedings in 2002 compared with around 20 per year between 1999 and 2001). However, additional resources had to be devoted to the follow-up of previous decisions in court proceedings.

9. In the field of State aid, the number of notifications and new cases of non-notified aid increased compared with 2001, while requests for the review of aid schemes were back to the level of previous years after a surge in 2001. The number of proceedings initiated remained stable (62 in 2002 against 66 in 2001), whereas negative final decisions showed a slight upward trend (37 in 2002 against 31 in 2001). Overall, the number of cases pending in the field of State aid showed a clear reduction in the backlog (from 621 in 2001 to 582 in 2002, of which 255 were complaints).

Box 1: A more meaningful role for consumers

One of the main purposes of European competition policy is to promote the interests of consumers, that is, to ensure that consumers benefit from the wealth generated by the European economy. This objective, which Commissioner Monti has emphasised on various occasions and continues to consider one of his top priorities, is horizontal in nature: the Commission thus takes the interest of consumers into account in all aspects of its competition policy, namely in countering anticompetitive agreements, in particular hardcore cartels, and abuses of dominant positions, but also in the control of concentrations and State aid granted by Member States.

The Commission is well aware that it is usually difficult for individual consumers to appreciate the impact which competition policy has on their daily lives. This is because of the complexity of many individual competition cases and the fact that the Commission's action in this field often impacts indirectly on their interests. While, for example, termination of a cartel relating to consumer goods or the prohibition of excessive prices charged by a dominant telecommunications operator may directly result in a drop in prices which is felt in the budget of every household, an efficient merger control system may not necessarily be perceived as beneficial by the consumers who profit from it. This is indeed because merger control in the EU serves to pre-empt negative effects of concentrations on consumer welfare which may otherwise occur.

The positive results of merger control are therefore often only apparent in the longer term. State aid control also plays a part in efficient resource allocation within the European economy, thus contributing to a sound economic environment for companies and consumers alike. In its State aid decisions, the Commission takes into account aspects related to the proper functioning of services of general interest ⁽¹⁾.

⁽¹⁾ See Chapter IV.

In order to receive essential input from, and raise awareness among, consumers about its work in the competition field, the Commission pursues a number of avenues. Twice a year a 'European Competition Day' is held in the country holding the EU Presidency ⁽¹⁾, with the active participation of the Commission and the European Parliament. These events serve to make competition matters more accessible to consumers and their representatives. The Commission also cooperates intensively with consumer organisations, notably the BEUC ⁽²⁾, the Europe-wide consumer association, and encourages national consumer organisations to become more actively involved in pointing out areas of particular concern to consumers. This report is another channel of communication with consumers.

The reform currently being undertaken in the antitrust field and in relation to the control of concentrations will help to bring the decision-making process closer to consumers. Specifically, the decentralised application of antitrust rules will allow consumers to address their grievances to national competition authorities which will be fully involved in the implementation of European antitrust rules. These rules are directly applicable in all Member States and the reform also strengthens the role of national courts in punishing infringements ⁽³⁾. In the context of the proposed reform of the merger regulation, there are plans to create a consumer liaison function within the Commission ⁽⁴⁾ to enhance the possibility for consumers and their representatives to make their views on specific concentrations known in good time.

Last but not least, this year's revision of the block exemption for the motor vehicle industry will change both the way cars are sold and the after-sales services provided in Europe ⁽⁵⁾. As the purchase of a (new) car is one of the major investment decisions of most consumers, the fundamental changes to the system of car distribution and after-sales service is clearly of great importance to consumers, even if it is, as yet, too early to assess the effects of the reform on car prices in the EU and the quality and availability of after-sales service.

As regards casework in 2002, consumers should refer in particular to the anti-cartel decision in the *Plasterboard* case ⁽⁶⁾, which covered a product familiar to anyone who has ever built or refurbished his home. The *Nintendo* case ⁽⁷⁾, in which anticompetitive agreements between Nintendo and its distributors concerning console game cartridges were brought to an end, is equally deserving of particular mention in this respect.

In conclusion, the attention of consumers is drawn to Part C of this report, 'Sector-based competition developments'. Here they will find information relating to the energy, telecommunications, postal and transport sectors, which are of crucial importance to consumers. Also of particular consumer interest are details of antitrust cases in the media, financial services, liberal professions and information society sectors.

⁽¹⁾ European competition days in 2002: 26.2.2002 (Madrid) and 17.9.2002 (Copenhagen).

⁽²⁾ Press release IP/02/415, 14.3.2002.

⁽³⁾ See Chapter I.A.2, in particular point 17.

⁽⁴⁾ See points 312 and 313.

⁽⁵⁾ See Chapter I.C.6.

⁽⁶⁾ See points 50 *et seq.*

⁽⁷⁾ See points 61 *et seq.*

I — ANTITRUST — ARTICLES 81 AND 82; STATE MONOPOLIES AND MONOPOLY RIGHTS — ARTICLES 31 AND 86

A — Modernisation of the legislative and interpretative rules

1. Expiry of the ECSC Treaty

10. The Treaty establishing the European Coal and Steel Community (ECSC) expired on 23 July. This means that as from 24 July the sectors previously covered by the ECSC Treaty and the procedural rules and other secondary legislation derived from the ECSC Treaty are subject to the rules of the EC Treaty as well as the procedural rules and other secondary legislation derived from the EC Treaty.

11. In order to cover issues related to this transition and specifically arising in the areas of antitrust, mergers and State aid, the competent Commission departments (Competition DG, Energy and Transport DG) prepared a Commission communication on certain aspects of the treatment of competition cases resulting from the expiry of the ECSC Treaty ⁽¹⁾, which was adopted on 21 June. The communication is meant to give guidance to undertakings which are subject to the antitrust and merger rules, as well as to Member States which are subject to the State aid rules, providing information, reassurance and planning security in the context of the expiry of the ECSC Treaty. Without prejudice to the interpretation of the ECSC and EC rules by the Court of First Instance and the Court of Justice, the communication summarises the most important changes with regard to the applicable substantive and procedural law and explains how the Commission intends to deal with specific issues raised by the transition.

12. As a general message, the communication explains that the substantive and procedural changes arising from the expiry of the ECSC Treaty are unlikely to cause major problems thanks to the efforts made for many years now to align practice under the ECSC and EC Treaties.

13. These are the most important differences in substance between the old and the new regimes.

(a) Antitrust

— Under the EC rules, the Commission no longer enjoys exclusive jurisdiction as under the ECSC Treaty.

— An effect on trade between Member States is a prerequisite for applying these rules, contrary to the previous situation under the ECSC Treaty.

(b) Merger control

— The Commission has no exclusive jurisdiction independently of any thresholds, as used to be the case under the ECSC rules.

14. The communication also tackles specific issues raised by the transition, and in particular by cases which from a factual or legal point of view started before, but continue after, the expiry of the ECSC Treaty. The basic principle with regard to procedural law is that the rules applicable are those in force at the time of taking of the procedural step in question.

Antitrust, mergers and State aid

The Commission will apply EC procedural rules in all pending and new cases as from 24 July. Unless otherwise stated in the communication, procedural steps validly taken under the ECSC rules before expiry of the ECSC Treaty will after the expiry be considered to have fulfilled the requirements of the equivalent procedural step under the EC rules.

Furthermore, the communication addresses a variety of issues in the three areas.

(a) Antitrust

— The exemption provisions of Article 65(2) of the ECSC Treaty and Article 81(3) of the EC Treaty are largely similar and — in view of the forthcoming modernisation of the antitrust enforcement rules — the Commission's action in the antitrust field should concentrate on prohibition procedures.

— Therefore, the Commission informs the undertakings of its intention not to initiate Article 81 of the EC Treaty procedures in respect of the future implementation of agreements formerly exempted under the ECSC regime, subject, however, to any substantial new elements of fact or law which may appear afterwards and which may clearly call the exemptability under Article 81(3) of the EC Treaty into question.

(b) Merger control

— The treatment of joint ventures differs in that more joint ventures would be classed as

⁽¹⁾ OJ C 152, 26.6.2002.

concentrations under Article 66 ECSC than is the case under the EC merger regulation, which covers only full function joint ventures. Where notifications of joint ventures lodged under the ECSC Treaty are pending on the expiry of that Treaty, some might not be notifiable as concentrations under the EC merger regulation.

- The communication indicates that such notifications may be converted into notifications of cooperative agreements under Regulation No 17/62 if the requirements of Article 5 of the implementing regulation are met, in particular if the notifying parties request such a conversion.

(c) State aid

- Where after the expiry of the ECSC Treaty the Commission has to take a decision assessing the compatibility of aid put into effect without prior Commission approval before the expiry, the question of the appropriate criteria to be applied arises.
- The Commission will apply the Commission notice on the determination of the applicable rules for the assessment of unlawful State aid⁽¹⁾. According to this notice, the Commission will always assess the compatibility of unlawful State aid on the basis of the substantive criteria set out in any instrument in force at the time the aid was granted.

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

15. On 16 December, the Council adopted Regulation 1/2003⁽²⁾. This new regulation, for which the Commission submitted its proposal in September 2000, enshrines the most comprehensive antitrust reform undertaken since 1962. Indeed, Regulation (EC) No 1/2003 replaces the 40-year-old procedural rules embodied in Regulation No 17, which govern how the Treaty provisions on agreements between undertakings which restrict competition (Article 81 of the EC Treaty) or commit abuses of a dominant position (Article 82 of the EC Treaty) are enforced. The new rules will apply from 1 May 2004, the date of the enlarge-

ment of the European Union to include 10 new Member States.

16. Without altering the substantive content of Articles 81 and 82 of the EC Treaty, the reform will fundamentally simplify the way in which the Treaty's antitrust rules are enforced throughout the European Union. While reducing the compliance burden for undertakings by abolishing the notification system for agreements between undertakings, the new regulation will allow a more vigorous antitrust enforcement by means of a better and more effective sharing of enforcement tasks between the Commission and national competition authorities (NCAs). It will allow both the Commission and NCAs to focus their resources on the fight against those restrictions and abuses that are most harmful to competition and consumers.

17. The core features of the reform are the following.

1. The shift from a system of authorisation under which all agreements have to be notified to the Commission in order to obtain antitrust approval towards a legal exception system

Maintaining the system of notifications after decades of case-law of the Court of Justice and Commission practice on the application of Articles 81 and 82 of the EC Treaty would entail an unjustified prolongation of unnecessary bureaucracy and legal costs for companies. Also, in view of enlargement the notification system no longer seemed workable. The reform thus places greater responsibility on companies, which will need to assess themselves whether their agreements restrict competition and, if so, whether the restrictions qualify for exemption under Article 81(3) of the EC Treaty. Of course, where cases give rise to genuine uncertainty because they present novel or unresolved questions for the application of the EU competition rules, companies may wish to seek informal guidance from the Commission. The latter may then decide to issue a written opinion.

2. The direct applicability of Article 81(3) of the EC Treaty

Ending the exclusive competence of the Commission to grant exemptions under Article 81(3) of the EC Treaty makes it possible for the Commission, NCAs and national courts to jointly enforce the rules governing restrictive practices. All competition authorities involved will closely cooperate in applying the antitrust rules. Since the treat-

⁽¹⁾ OJ C 119, 22.5.2002.

⁽²⁾ Council regulation on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ L 1, 4.1.2003).

ment of a great number of individual cases has contributed to the establishment of case-law of the Court of Justice and Commission practice on the exemption criteria of Article 81(3) of the EC Treaty, NCAs and national courts can have recourse to this case-law to determine the conditions under which the latter provision can be applied. In order to assist NCAs and national courts in this regard, the Commission also intends to issue a notice on the application of Article 81(3) of the EC Treaty which will go over the main points of the relevant *acquis*.

The application of EU competition rules by national courts will furthermore be facilitated by the extended possibility for those courts to ask the Commission for information or for its opinion on questions concerning the application of those rules. It will also be possible both for the Commission and for NCAs to submit *amicus curiae* briefs to national courts applying Articles 81 or 82 of the EC Treaty.

3. The European competition network

The Commission and Member States' competition authorities will put in place a network of competition authorities, called the European competition network (ECN), which will be a key plank in the new enforcement system. It will allow for consultation, cooperation and information exchange between European competition authorities for purposes of applying Articles 81 and 82 of the EC Treaty. These processes are provided for at any stage of decision-making, from the time a case is allocated to a competition authority to the time a final decision is taken. As guardian of the Treaty, the Commission will bear ultimate responsibility within the network for ensuring consistent application of the EU competition rules. The modalities of the cooperation between the Commission and national competition authorities are laid down in a joint statement of the Council and the Commission on the functioning of the network of competition authorities, which is annexed to the new regulation.

4. The relationship between Articles 81 and 82 of the EC Treaty and national competition laws

Although NCAs and national courts can continue to apply national competition rules to agreements, decisions of associations of undertakings or concerted practices which may affect trade between Member States, they are obliged to apply Articles 81 or 82 of the EC Treaty at the same time, and the application of national com-

petition rules may not produce an outcome which deviates from that resulting from the application of Article 81 of the EC Treaty. The resulting convergence of the rules applicable to transactions falling under Article 81 of the EC Treaty, the so-called level playing field, will facilitate doing business in Europe and will be central to completion of the single market and to consistent application of EU competition law once the Commission has given up its monopoly of granting exemptions under Article 81(3) of the EC Treaty.

5. The extended investigation powers of the Commission

In order to keep the Commission's central role as enforcer of the EU competition rules as effective as possible, its investigation powers have been extended. These extended powers include the possibility for the Commission to interview any person who may be in possession of useful information within the framework of a specific investigation and the possibility of affixing seals for the period necessary for an inspection. The Commission will also be able to enter any premises where business records may be kept, including private homes. The Commission may enter private homes only if it has reasonable grounds for suspecting that incriminating information is likely to be found there and only after it has received authorisation from a national judge. Such authorisation will depend among other things on the proportionality of the home search having regard to the seriousness of the suspected infringement and the importance of the evidence sought.

3. Review of the Commission's leniency policy

18. On 13 February, the Commission adopted a new leniency policy which creates greater incentives for companies to 'blow the whistle' on one of the most serious violations of antitrust rules. The new policy not only increases legal certainty for companies wishing to cooperate, but also enhances the overall transparency and predictability of the Commission's practice in this respect. The 2002 Commission notice on immunity from fines and reduction of fines in cartel cases ⁽¹⁾ thus marks another important step towards uncovering and suppressing price-fixing pacts and other

⁽¹⁾ OJ C 45, 19.2.2002; see also <http://europa.eu.int/comm/competition/antitrust/leniency>

hardcore cartels. The new rules update the previous leniency notice of 1996 and apply to classic horizontal cartels ⁽¹⁾.

19. Under the 2002 notice, the Commission will grant immunity from fines to the first company to submit evidence of a cartel unknown to, or unproved by, the Commission. More precisely, complete immunity is granted in the following cases:

- the undertaking is the first to submit evidence which in the Commission’s view may enable it to adopt a decision to carry out an investigation within the meaning of Article 14(3) of Regulation No 17 (or the equivalent procedural regulations for particular sectors) in connection with an alleged cartel affecting the European Union; or
- the undertaking is the first to submit evidence which in the Commission’s view may enable it to find an infringement of Article 81 of the EC Treaty in connection with an alleged cartel affecting the European Union, when the Commission is already in possession of enough information to launch an inspection, but not to establish an infringement. This type of immunity is available only in cases where no other cartel member has been granted ‘conditional immunity’ (see point 21 below) under the conditions set out in the previous indent.

20. To obtain full immunity, a company must also:

- cooperate fully and on a continuous basis with the Commission and provide all evidence in its possession;
- put an end to the infringement immediately; and
- not have taken steps to coerce other undertakings to participate in the cartel.

21. A company fulfilling the conditions summarised in point 19 above will promptly receive a letter from the Commission confirming that full immunity will be granted if the conditions set out in the notice are observed.

22. The 2002 notice provides also for a reduction of fines for companies that do not qualify for immunity but provide evidence that represents

‘significant added value’ to that already in the Commission’s possession and terminate their involvement in the cartel. The first company fulfilling these conditions receives a reduction of 30 to 50 % of the fine which would otherwise have been imposed, the second successful applicant 20 to 30 % and subsequent successful applicants a reduction of up to 20 %. Within each of these bands, the final amount of any reduction will depend on the time of submission of the evidence and the quality of the evidence provided.

23. Successful applicants for reduction of fines will also be given a letter indicating the band to which they will, in principle, be entitled. This letter will be sent no later than the day the statement of objections is notified.

24. The 2002 notice came into force on 14 February and applies to companies which file for leniency in a cartel case after that date, unless another firm is already cooperating with the Commission in an investigation into that same cartel on the basis of the 1996 notice.

4. Review of the car block exemption regulation

25. In July, the Commission adopted Regulation (EC) No 1400/2002 on the application of Article 81(3) to vertical agreements and concerted practices in the motor vehicle sector. While this regulation deals with sector-specific problems, it is nevertheless based on the Commission’s general policy for the assessment of vertical restraints as laid down in Regulation (EC) No 2790/1999 and the Commission’s respective guidelines. The details of the new rules applicable to vertical distribution in the motor vehicle sector are presented in Section C.6.

B — Application of Articles 81, 82 and 86

1. Article 81

1.1. Cartels

1.1.1. Overview of developments in anti-cartel enforcement activity and application of the 2002 leniency notice

26. Hardcore cartels are among the most serious violations of competition rules. What distin-

⁽¹⁾ As opposed to cases in which illegal price-fixing occurs between undertakings in a vertical relationship, that is, between actors on different levels of the production and/or distribution chain, for example a producer and his distributors.

guishes them from all other anticompetitive practices is that they are secret agreements or concerted practices between competitors. It is due to this characteristic that they are considered ‘cardinal sins’. Cartels are particularly harmful to European industry and consumers. They diminish social welfare, create allocative inefficiency and transfer wealth from consumers to the participants in the cartel by modifying output and/or prices in comparison with market-driven levels. Cartels are harmful also over the long run. Engaging in cartels to avoid the rigours of competition can result in the creation of artificial, uneconomic and unstable industry structures, lower productivity gains or fewer technological improvements and sustained higher prices. Furthermore, the weakening of competition leads to a loss of competitiveness and threatens sustainable employment opportunities.

27. For all these reasons, the detection, prosecution and punishment of secret hardcore cartel agreements is one of the central elements of the Commission’s competition policy. To that effect, a panoply of instruments has been put into place.

28. The Commission has devoted resources specifically to the fight against cartels since 1998, when a special anti-cartel unit was created within the Competition DG. The decision to create a special unit was triggered by the fact that cartel members make use of ever more sophisticated tools enabling them to conceal their activities and to cover their tracks.

29. In 2002, this gradual increase in resources culminated in the creation of a second cartel unit. The two new units have benefited from the introduction of a more flexible and efficient management methodology. These units make use of advanced information technologies developed in-house in the realm of inspections and the processing of documents. Officials are specifically trained in investigatory techniques and are also specialised in the complex procedural aspects of large contentious cases.

30. The priority given to the fight against cartels and the handling of cartel cases in 2001 continued apace and even intensified in 2002. The number of cases dealt with increased more than proportionally to the additional resources made available to the activity during this period.

31. After 2001, 2002 was again a record year in terms of cartel decisions. The Commission adopted nine decisions imposing fines totalling

about EUR 1 billion: *Austrian Banks, Methionine, Industrial and medical gases, Fine art auction houses, Plasterboard, Methylglucamine, Concrete reinforcing bars, Specialty graphites and Food flavour enhancers*.

32. The number of unannounced inspections also surged considerably, among them being the biggest inspection the Commission has ever undertaken. This drive stems from the top priority given by the Commission to stopping illegal cartel activity, and to do so swiftly. In this regard it should be noted that, once there is awareness of an illegal cartel, time for reaction is very brief, between four and six weeks. Experience so far shows that, following an inspection, cartels generally collapse and hence stop their illegal activities.

33. The politically most important occurrence was the adoption of the new leniency notice of February 2002 ⁽¹⁾. Since 1996, the Commission’s leniency policy has been one of the cornerstones of the Commission’s anti-cartel policy. The new leniency notice improves on the 1996 leniency notice in several respects. It incorporates a number of changes designed to make it more attractive for companies to come forward, and thereby to make the Commission’s fight against cartels even more effective. Key elements of the new notice are: first, full immunity from fines is available to the first company that comes forward; second, the evidence supplied should be enough for the Commission to order an inspection; third, the Commission allows hypothetical applications, where actual evidence only needs to be supplied in a second stage; fourth, taking decisions granting conditional immunity within a matter of weeks provides up-front legal certainty to the applicant; fifth, even after the Commission has undertaken an inspection, immunity is still available under certain circumstances; sixth, if immunity has already been granted, or the Commission already has enough evidence to find an infringement, reductions of fines of up to 50 % remain possible for companies that provide significant added value to the Commission’s case; last but not least, with a view to introducing more certainty with respect to reductions, the Commission takes a preliminary decision on the band of reduction to be applied as soon as possible following the application.

34. The fact that, in its first 10 months of operation, the new notice led to the uncovering of

⁽¹⁾ OJ C 45, 19.2.2002.

around 10 different cartels in Europe is a clear indication of its effectiveness. This also has a broader effect. The fear that a cartel member might go to the authorities and obtain immunity tends to destabilise cartel activity in general. On this basis, the application of the 2002 notice is likely not only to ensure the detection and punishment of a large number of cartels in the future, but also to significantly undermine the stability of other, already existing cartels.

35. In the course of 2002, the Commission had the opportunity to highlight another aspect deterring companies from engaging in cartel activities, namely the increase applied to any fines in case of repeated infringements of competition rules. The *Plasterboard* decision is an example of this approach. In this case, two companies that had previously been found to have committed a similar infringement, for which they had been fined, incurred higher fines by reason of their repeated infringement. In this context and in connection with the leniency programme, it should be underlined, however, that even companies with recidivistic behaviour can still qualify for leniency if they choose to cooperate with the Commission.

36. Deterrence is also the underlying objective in cases where the Commission imposes higher fines or penalties to counteract companies' practices of obstruction and refusal to cooperate during inspections. As a response to certain obstructionist and uncooperative practices that occurred mainly in 2002, the Commission will take the necessary measures to ensure compliance with the competition rules, in particular as regards inspections.

37. On the other hand, the Commission will in future not consider, pursuant to its guidelines on the method of setting fines, as an aggravating circumstance to be taken into account in determining the amount of a pecuniary penalty to be imposed on a company, the fact that in-house legal advisers had warned the management of the illegality of the conduct forming the subject-matter of the Commission's decision. Such a communication may, however, be used as evidence of the existence of an infringement.

38. Finally, the high level of international cooperation was maintained in 2002. In particular, the coordination of investigations and the exchange of non-confidential information with the US and Canadian anti-cartel authorities was very successful. Moreover, the Commission was involved

in three US civil litigations that raised issues regarding the impact of US discovery proceedings on the Commission's leniency policy.

1.1.2. Individual cases in 2002

Austrian banks ⁽¹⁾

39. On 11 June, the Commission imposed fines totalling EUR 124.26 million on eight Austrian banks for their participation in a wide-ranging price cartel. For details, please refer to the chapter on financial services below ⁽²⁾.

Methionine ⁽³⁾

40. On 2 July, the Commission fined Degussa AG and Nippon Soda Company Ltd EUR 118 million and EUR 9 million respectively for participating in a price-fixing cartel in methionine with Aventis SA (together with its wholly-owned subsidiary Aventis Animal Nutrition SA). Methionine is one of the most important amino acids used in compound animal feeds and premixes for all animal species. Following an investigation which started in 1999, the Commission found that these companies had participated in a worldwide cartel between February 1986 and February 1999.

41. Aventis (formerly Rhône-Poulenc) was granted full immunity from fines under the Commission's leniency notice because it revealed the cartel's existence to the Commission and provided decisive evidence on its operation.

Industrial and medical gases ⁽⁴⁾

42. On 24 July, the Commission fined AGA AB, Air Liquide BV, Air Products Nederland BV, BOC Group plc, Messer Nederland BV, NV Hoek Loos and Westfalen Gassen Nederland NV a total of EUR 25.72 million for participating in a secret cartel in the industrial and medical gases sector in the Netherlands.

Carlsberg and Heineken ⁽⁵⁾

43. On 4 November, the Commission closed its investigation into an alleged market-sharing agreement between Danish brewer Carlsberg and

⁽¹⁾ Case COMP/D-1/36.571; IP/02/844, 11.6.2002.

⁽²⁾ See points 190 *et seq.*

⁽³⁾ Case COMP/37.519; IP/02/976, 2.7.2002.

⁽⁴⁾ Case COMP/36.700; OJ L 84, 1.4.2003.

⁽⁵⁾ Case COMP/F-3/37.851.

Dutch brewer Heineken, having found no evidence to suggest that the suspected infringement had continued after May 1995. Any infringement would therefore have fallen outside the time limit for fines.

44. On 1 March, the Commission issued statements of objections to Carlsberg and Heineken, alleging that the two brewers had reached an informal agreement to limit their activities, in particular their acquisition activities, in each other's 'home market' during the period 1993 to 1996 ⁽¹⁾. The Commission's case was based on documents found during surprise inspections at the two companies in spring 2000.

45. Both parties replied in writing to the statement of objections, rejecting the Commission's allegations and stressing how difficult it was to enter each other's home market. Carlsberg also presented its case at an oral hearing. In the light of the parties' arguments, the Commission decided to complete its fact finding by carrying out further inspections at the two brewers' offices in August. However, these inspections yielded no fresh evidence falling within the five-year limitation period for imposing fines ⁽²⁾. On this basis, the Commission decided to close its case ⁽³⁾.

Fine art auction houses ⁽⁴⁾

46. In a decision adopted on 30 October, the Commission found that Christie's and Sotheby's, the world's two leading fine art auction houses, had breached EU competition rules by colluding to fix commission fees and other trading terms between 1993 and early 2000. The purpose of the cartel agreement was to reduce the competition between the two leading auction houses that had developed during the 1980s and early 1990s. The most important aspect of the agreement consisted in an increase in the commission paid by sellers at auction (the so-called vendor's commission). But the collusive agreement also concerned other trading conditions, such as advances paid to sellers, guarantees given for auction results and payment conditions.

47. In applying the 1996 leniency notice, the Commission considered that Christie's ought to benefit from full immunity because it provided decisive proof of the cartel at a time when the Commission had no investigation open and because it was the first to come forward with such evidence. Sotheby's fine was set at EUR 20.4 million, i.e. 6 % of its worldwide turnover. The amount included a 40 % reduction for its cooperation in the investigation.

Methylglucamine ⁽⁵⁾

48. On 27 November, the Commission fined Aventis Pharma SA and Rhône-Poulenc Biochimie SA (jointly and severally liable) EUR 2.85 million for participating in a price-fixing and market-sharing cartel in methylglucamine together with Merck KGaA. Methylglucamine is a chemical used for the synthesis of X-ray media, pharmaceuticals and colourings. The Commission found that the companies had participated in a worldwide cartel between November 1990 and December 1999.

49. Merck was granted full immunity from fines under the Commission's leniency notice because it revealed the cartel's existence to the Commission and provided decisive evidence on its operation.

Plasterboard ⁽⁶⁾

50. On 27 November, the Commission adopted a decision imposing fines totalling EUR 478 million on Société Lafarge SA, BPB plc, Gebrüder Knauf Westdeutsche Gipswerke KG and Gyproc Benelux SA/NV. The Commission characterised these companies' behaviour as a very serious infringement of European competition law. The Commission's investigation, which it had opened on its own initiative, revealed that the main European plasterboard producers had taken part in a secret cartel covering the four main markets of the European Union (Benelux, Germany, France and the United Kingdom), whereby they had agreed to restrict competition on these markets in line with their interests, exchanged information on their sales volumes and informed one another of price increases on the German and UK markets. The value of the relevant markets is one of the highest encountered in any Commission

⁽¹⁾ IP/02/350, 1.3.2002.

⁽²⁾ Council Regulation (EEC) No 2988/74 of 26 November 1974 concerning limitation periods in proceedings and the enforcement of sanctions under the rules of the EEC relating to transport and competition (OJ L 319, 29.11.1974). In this case, the limitation period ran from May 1995, five years before the date of the Commission's first inspection at Carlsberg's premises.

⁽³⁾ IP/02/1603, 4.11.2002.

⁽⁴⁾ Case COMP/37.784.

⁽⁵⁾ Case COMP/37.978; IP/02/1746, 27.11.2002.

⁽⁶⁾ Case COMP/37.152.

cartel decision over the past decade. BPB, Knauf and Lafarge were involved in the cartel from 1992 to 1998 and were joined by Gyproc in 1996.

51. The amount of the fines was justified by the duration of the infringement and, in the case of Lafarge (EUR 249.6 million) and BPB (EUR 138.6 million), by the fact that for these companies it was a repeat infringement of Article 81, which constituted an aggravating circumstance. Only BPB and Gyproc cooperated with the Commission's services, and they alone benefited from a reduction in their fines on that score.

52. This decision is further proof of the Commission's determination to uncover and punish infringements of competition law, whether on the basis of investigations opened on its own initiative or on that of requests for application of the leniency policy. In its fight against cartels, the Commission gives priority to the important sectors of the European economy and in particular to sectors where its action is directly capable of enhancing consumer welfare. The decision confirms, moreover, the Commission's determination to suitably punish companies which repeat manifestly anticompetitive behaviour by increasing the amount of their fine.

Food flavour enhancers ⁽¹⁾

53. On 17 December, the Commission fined Ajinomoto Co. Inc. (Japan), Cheil Jedang Corporation (South Korea) and Daesang Corporation (South Korea) EUR 15.54 million, EUR 2.74 million and EUR 2.28 million respectively for participating in a price-fixing and customer allocation cartel in nucleotides together with Takeda Chemical Industries Ltd (Japan). Nucleotide, or nucleic acid, is made from glucose and is used in the food industry to add flavour to foods. Following an investigation which started in 1999, the Commission found that these companies had participated in a worldwide cartel between 1988 and 1998.

54. With regard to the leniency notice, it is important to note that Takeda was granted full immunity from fines because it submitted decisive evidence on the operation of the cartel at a time when the Commission had no knowledge of the cartel.

Specialty graphite ⁽²⁾

55. On 17 December, the Commission fined SGL Carbon AG, Le Carbone-Lorraine SA, Ibi-den Co. Ltd, Tokai Carbon Co. Ltd, Toyo Tanso Co. Ltd, NSCC Techno Carbon Co. Ltd, Nippon Steel Chemical Co. Ltd, Intech EDM BV and Intech EDM AG a total of EUR 51.8 million for taking part in a price-fixing cartel on the market in isostatic specialty graphite ⁽³⁾. In addition, SGL Carbon AG was fined EUR 8.81 million for its involvement in another price-fixing collusion affecting the market in extruded specialty graphite. GrafTech International Ltd (formerly UCAR), which was also found liable for both infringements, benefited from a 100 % reduction in its fine because it revealed the cartel's existence to the Commission and provided decisive evidence on its operation.

Concrete reinforcing bars ⁽⁴⁾

56. On 17 December, the Commission adopted a decision imposing fines totalling EUR 85 million on nine undertakings, corresponding to 11 companies (Alfa Acciai SpA, Feralpi Siderurgica SpA, Ferriere Nord SpA, IRO Industrie Riunite Odolesi SpA, Leali SpA and Acciaierie e Ferriere Leali Luigi SpA in liquidation, Lucchini SpA and Siderpotenza SpA, Riva Acciaio SpA, Valsabbia Investimenti SpA and Ferriera Valsabbia SpA) and one trade association (Federacciai) for their involvement in a cartel covering the Italian concrete reinforcing bars market. This constituted a very serious infringement of Article 65(1) of the ECSC Treaty.

57. The single, complex and continuous agreement in question consisted of several elements: the fixing of prices for 'size extras' (a supplement based on the diameter of the concrete reinforcing bar, which is added to the basic price), the fixing of the basic price, the fixing of payment times, and the restricting or controlling of production and/or sales.

58. The companies were fined between EUR 26.9 million and EUR 3.57 million. The Commission took into account the fact that Riva and Lucchini are major groups whose turnover is much bigger than that of the other members of the cartel.

⁽²⁾ Case COMP/37.667; IP/02/1906, 17.12.2002.

⁽³⁾ 'Specialty graphites' is the general term widely used in the industry to describe a group of graphite products for diverse applications.

⁽⁴⁾ Case COMP/37.956.

⁽¹⁾ Case COMP/37.671; IP/02/1907, 17.12.2002.

59. In accordance with the *Eurofer* judgment⁽¹⁾, Federacciai was an addressee of the Commission's decision but no fine was imposed on it. Ferriere Nord was a repeat offender, which constituted an aggravating circumstance; at the same time, it alone cooperated with the Commission's services and it therefore qualified for a reduction in its fine as provided for in the leniency notice.

60. In this case, the Commission applied the provisions of the ECSC Treaty after that Treaty had expired. In so doing, it was acting in accordance with its communication of 26 June 2002 concerning certain aspects of the treatment of competition cases resulting from the expiry of the ECSC Treaty⁽²⁾, in which it stated its intention to follow the general principles of law in relation to the succession of laws. According to the communication: 'If the Commission, when applying the Community competition rules to agreements, identifies an infringement in a field covered by the ECSC Treaty, the substantive law applicable will be, irrespective of when such application takes place, the law in force at the time when the facts constituting the infringement occurred. In any event, as regards procedure, the law applicable after the expiry of the ECSC Treaty will be the EC law'.

1.2. Vertical agreements

Nintendo⁽³⁾

61. On 30 October, the Commission imposed fines totalling EUR 167.9 million on Nintendo Corporation Ltd and Nintendo of Europe GmbH (respectively the ultimate parent company of the Nintendo group and its main European subsidiary); John Menzies plc; Soc. Rep. Concentra L.DA; Linea GIG SpA; Nortec SA; Bergsala AB; Itochu Corporation; and CD-Contact Data GmbH.

62. In the decision, the Commission concluded that the addressees participated in an infringement of Article 81(1) of the EC Treaty and Article 53(1) of the EEA Agreement restricting parallel trade in Nintendo's consoles and game

cartridges throughout the EEA. Apart from formal distribution agreements that restricted parallel exports, the parties collaborated closely to trace the origin of parallel trade and identify parallel traders.

63. The infringement was orchestrated by Nintendo, but the rest of the addressees, Nintendo's independent distributors in different EEA countries, actively and, in most cases, willingly cooperated with Nintendo in the implementation of the infringement and benefited from it. In determining the fines imposed, groupings were made to reflect the real impact on competition of each undertaking's offending conduct, given the large disparities between them. In addition, a multiplying factor was applied to the starting amount of the fine set for Nintendo, John Menzies and Itochu to ensure a sufficiently deterrent effect in view of their size and overall resources.

64. Several aggravating circumstances led to increases in the amounts of fines: acting as the leader and instigator of the infringement (Nintendo), continuation of the infringement after the Commission had started its investigations (Nintendo, John Menzies) and an attempt to mislead the Commission with regard to the real scope of the infringement by providing incorrect information in response to a formal request for information (John Menzies). The Commission also recognised attenuating circumstances in this case: a purely passive role (Soc. Rep. Concentra L.DA) and effective cooperation with the Commission in the course of the administrative procedure (Nintendo, John Menzies).

65. By granting large reductions to Nintendo and John Menzies following their cooperation, the Commission stressed the importance it attaches to such cooperation even where infringements of a vertical nature are concerned, to which the leniency notice does not apply. Finally, account was taken of the fact that Nintendo offered substantial financial compensation to third parties having suffered financial harm as a result of the infringement.

66. As this decision highlights, restrictions of parallel trade constitute a very serious infringement of Article 81 of the EC Treaty and will be prosecuted and punished by the Commission in a way similar to its enforcement action addressing classical horizontal cartels.

⁽¹⁾ Case T-136/94, judgment of 11.3.1999.

⁽²⁾ OJ C 152, 26.6.2002.

⁽³⁾ Cases COMP/C-3/35.587, COMP/C-3/35.706 and COMP/C-3/36.321.

2. Articles 82 and 86

2.1. Article 82

67. While no formal decisions concerning the abuse of dominant positions were adopted in the course of the year, the Commission continued to pay great attention to the disruptive effects which abusive behaviour by dominant firms has on competition on the markets. A number of cases, both triggered by complaints and started on the Commission's own initiative, are currently under investigation, concerning a variety of sectors such as telecommunications, transport and the media ⁽¹⁾.

IMS Health ⁽²⁾

68. During 2002 there were a number of further developments in this case, in which the Commission had decided to impose interim measures ⁽³⁾ on IMS Health on 3 July 2001. This decision was subsequently suspended by the courts pending a final judgment in the proceedings for its annulment ⁽⁴⁾. These latter proceedings are suspended pending the outcome of a reference for a preliminary ruling ⁽⁵⁾ from the Frankfurt *Landgericht* (regional court) on questions related to the Commission decision.

69. While the Commission continued its assessment of IMS' conduct in the main proceedings in 2002, the German courts delivered a number of rulings of relevance to IMS's intellectual property rights in the 1 860 brick structure ⁽⁶⁾. The Commission decision had been based on the premiss that the structure and derivatives thereof were covered by copyright ⁽⁷⁾. The most recent ruling, made by the Frankfurt *Oberlandesgericht* (higher regional court) on 17 September in *IMS v Pharma Intranet (PI)* ⁽⁸⁾, found that IMS did not have standing to sue to assert copyright law claims, either in respect of a copyright or a *sui*

generis right, but that it could assert a cease and desist claim for PI's infringement of the German unfair competition act. However, the court held that this latter right did not allow IMS to monopolise all structures similar to or derived from the 1 860 structure. The Commission will continue to monitor ongoing cases in the German courts in deciding what action to take in the main proceedings in this case.

2.2. Article 86

70. In its *max.mobil* judgment of 30 January 2002 in Case T-54/99, the Court of First Instance had to decide upon an action for annulment brought under Article 230 of the EC Treaty by the second-ranking Austrian mobile phone operator *max.mobil*. The action was directed against a letter in which the Commission had informed *max.mobil* that it would not pursue the complaint by which the applicant had requested the Commission to intervene against Austria on the basis of Article 86(3) of the EC Treaty, given that Austria had allegedly infringed Article 86(1), read in conjunction with Article 82 of the EC Treaty in the context of fixing concession fees.

71. Article 86(3) of the EC Treaty empowers the Commission to ensure the application of Articles 86(1) and 86(2) and, where necessary, to address the appropriate directives or decisions to Member States. For a long time, the position of the Community judicature had been to confirm the Commission's view that it can exercise its discretion as to whether and how to make use of its powers under Article 86(3) without being limited in this exercise by the existence of complaints made by third parties. This meant that where the Commission did not act upon a complaint brought by an individual against a Member State for infringement of Article 86(1), or where the Commission refused to act, that individual had no standing for an application for failure to act or for annulment, as the case may be. In a judgment of 20 February 1997 ⁽⁹⁾, while again rejecting as inadmissible the application for annulment brought at the time by a complainant against the refusal by the Commission to intervene under Article 86(3), the Court of Justice considered that it could not be ruled out that in exceptional cir-

⁽¹⁾ For more details, see the sectoral sections of this report: Section I.C.4.3 on railway transport, point 133; Section I.C.8. on the information society, point 196.

⁽²⁾ Case COMP/38.044: *IMS Health/NDC*.

⁽³⁾ Decision of 3.7.2001 (OJ L 59, 28.2.2002), which ordered IMS to license its '1 860 brick structure', which segments Germany into 1 860 sales zones.

⁽⁴⁾ Orders of 26.10.2001 in Case T-184/01 R and of 11.4.2002 in Case C-481/01 P(R).

⁽⁵⁾ Case C-418/01.

⁽⁶⁾ Segmentation of the national territory into 1 860 geographical areas, or bricks, for the purpose of aggregating sales data for the pharmaceutical industry in Germany.

⁽⁷⁾ Decision, paragraph 36.

⁽⁸⁾ *Pharma Intranet AG* was bought by NDC on 16 October 2000.

⁽⁹⁾ Judgment of the Court of 20.2.1997 in case C-107/95 P: *Bilanzbuchhalter*.

cumstances an individual might have standing to bring such an action ⁽¹⁾.

72. In its abovementioned *max.mobil* judgment, the Court of First Instance substantially deviated from the previous case-law. It held that individual complainants under Article 86(3) had a right to the Commission's examining their complaint in a diligent and impartial way. According to the Court of First Instance, that obligation was amenable to judicial review, which meant that the complainant had standing to bring an action under Article 230 of the EC Treaty for annulment of an act by which the Commission refused to use its powers under Article 86(3). In substance, the judgment held that the role of the Community judicature was limited to scrutinising the Commission's act with regard to three points, i.e. (1) whether it included a statement of reasons which was *prima facie* consistent and reflected due consideration of the relevant aspects of the case; (2) whether the facts relied on were materially accurate; and (3) whether the *prima facie* assessment of those facts was not vitiated by any manifest error.

73. Following those criteria when considering the Commission's letter at issue, the Court of First Instance rejected *max.mobil*'s application as unfounded. Nevertheless, given that this case raised important questions of principle, the Commission has appealed to the Court of Justice, requesting that the Court of First Instance's judgment be set aside and that *max.mobil*'s action be rejected as inadmissible ⁽²⁾.

C — Sector-based competition developments

1. Energy: liberalisation in the electricity and gas sectors

74. The year 2002 was very important for the liberalisation of the European gas and electricity

markets. Significant progress was made towards the adoption of new legislation (a directive for the completion of the internal gas and electricity markets — hereinafter called the 'acceleration directive', a regulation on cross-border electricity trade and a directive on security of supply in the gas sector). At the same time, the Commission concluded a number of very important competition cases relating to the energy sector.

75. The key event of the year was the Council meeting of energy ministers on 25 November. In the course of this meeting, EU Member States reached political agreement on the acceleration directive ⁽³⁾ (revision of Directive 96/92/EC for electricity and Directive 98/930/EC for gas) and on the regulation on cross-border electricity trade. This political agreement is a major step for energy liberalisation and — once formally adopted (expected for summer 2003) — will provide market participants with the required legal certainty to carry on their business activities in the energy sector in the years to come.

76. As regards the acceleration directive, the essential elements of the political compromise reached between EU Member States in November can be summarised as follows: (1) market opening for all non-domestic gas and electricity customers as of 1 July 2004 and for all other customers — i.e. including private households — as of 1 July 2007; (2) reinforced universal service obligations in the electricity sector (guarantee of supply at reasonable prices); (3) legal and functional unbundling for transmission system operators as of 1 July 2004 (for distribution system operators, functional unbundling as of 1 July 2004 and legal unbundling as of 1 July 2007); (4) introduction of a regulated third party access regime for transmission and distribution networks and LNG ⁽⁴⁾ facilities. For storage, EU Member States have a choice between regulated and negotiated third party access regimes; (5) regulatory authorities need to be established, which have at least the authority to fix methodologies underlying the calculation of the network access tariffs, or to approve such methodologies prior to their entry into force; (6) derogations from regulated tariffs might be permitted by the Commission for major new gas infrastructure.

⁽¹⁾ On the basis of the Court of Justice's ruling in *Bilanzbuchhalter*, an action against the Commission for failure to act was for the first time considered admissible by the Court of First Instance in its *TF I* judgment (3.6.1999, Case T-17/96). The Court of First Instance was of the opinion that the complainant was in an exceptional situation. However, since the Commission had taken a position before the date of the judgment, there was no need to adjudicate upon the application for failure to act. On appeal, the Court of Justice (12.7.2001, Joined Cases C-302/99 and C-308/99 P) confirmed that, since the Commission had defined its position and thus deprived the action for failure to act of its object, it had not been necessary for the Court of First Instance to examine the admissibility of that action.

⁽²⁾ OJ C 169, 13.7.2002.

⁽³⁾ Council Document 14867/02 of 27.11.2002 for gas and Council Document 14869/02 of 27.11.2002 for electricity.

⁽⁴⁾ Liquefied natural gas.

77. The regulation on cross-border trade in the electricity sector aims at setting fair rules for cross-border exchange in electricity, thus enhancing competition within the internal electricity market. The essential elements of the political compromise reached between EU Member States can be summarised as follows: (1) establishment of a compensation mechanism in favour of transmission system operators for costs incurred as a result of hosting cross-border flows of electricity, compensation to be paid by the operators of the transmission systems from which cross-border flows originate and the transmission system where those flows end; (2) setting harmonised principles on cross-border transmission charges, in particular, the application of non-discriminatory, transparent, non-distance-related charges for network use, although signals to reflect generation/consumption balance ⁽¹⁾ are allowed; (3) setting rules to maximise availability of transmission capacity; (4) establishment of principles to deal with congestion; (5) setting rules on the use of revenues from congestion management; (6) involvement of regulators in tariff and capacity allocation issues; (7) setting of penalties by Member States for regulation infringements and reporting obligation by Member States to the Commission, which monitors the implementation of the regulation.

78. The political agreement reached by EU Member States is largely in conformity with the Commission's amended proposal for an acceleration directive and for a regulation on cross-border trade in the electricity sector, both adopted in June ⁽²⁾. This proposal incorporated the results of the Barcelona European Council and of the discussions in the Council working groups and took into account a series of amendments adopted by the European Parliament in the course of its first reading of the legislative package. The Commission had, however, proposed an earlier date for full market opening.

79. In addition to the internal market package, the Commission adopted a proposal for a directive on security of supply in the gas sector ⁽³⁾. This proposal is aimed at clarifying and defining the responsibilities of market operators in the liberalised European gas markets as regards security of supply. In this respect, it is an important ele-

ment of the proposal that Member States should introduce certain minimum standards for supplying non-interruptible customers, e.g. capacity and volume available under severe weather conditions or in the event of a major supply disruption. However, these rules will not apply to companies with small market shares.

80. The proposal for a directive also underlines the importance of long-term gas supply contracts for Europe's supply security in the gas sector. Whilst the proposal maintains that the degree to which long-term gas supply contracts are currently used is more than satisfactory at EU level, it also introduces a mechanism that allows for the monitoring of these contracts and for taking appropriate action should the degree to which such long-term contracts are used be considered to be no longer satisfactory. In this respect, it is also important to underline that long-term gas supply contracts are not *ipso facto* incompatible with EU competition law but the Commission will monitor whether such an incompatibility arises in individual cases. To the extent that restrictions in gas supply contracts are necessary to underpin significant investments, e.g. in a new gas field, the Commission will take this into account.

81. The adoption of legislation aimed at liberalising European energy markets must be accompanied by the strict application of European competition law. The contribution of European competition law to the liberalisation process is likely to increase over the next few years, when legislative measures in EU Member States create the appropriate legal framework for the introduction of effective competition in the energy markets. In this respect, it is the role of European and national competition authorities to ensure that State measures which prevent the creation of a common energy market are not replaced by measures taken by market operators.

82. Taking into account the modernisation exercise, which leads to the decentralisation of the application of European competition law, close cooperation between the Commission and national authorities will be required. In order to set the right priorities, this cooperation should not be limited to national competition authorities, but will also be extended as far as possible to national regulators, which have a decisive role to play when it comes to putting liberalisation policy into practice.

⁽¹⁾ 'Locational signals'.

⁽²⁾ COM(2002) 304 final, 7.6.2002.

⁽³⁾ COM(2002) 488 final, 11.9.2002.

83. The Commission considers that the various energy markets are often still dominated by national champions, calling for strict application of the antitrust rules; that the liberalisation process will in all likelihood lead to further merger activity, calling for strict application of the merger control legislation; and that certain energy companies might try to benefit from State aid in order to improve their competitive situation in liberalised energy markets, calling for strict application of the State aid rules.

84. In the antitrust sector, the Commission continues to focus on aspects of supply competition and network issues. The Commission considers that arrangements between suppliers may artificially reduce choices for customers and restrict their ability to switch suppliers. As regards access to networks, the Commission takes the view that, without the introduction of an effective, transparent and non-discriminatory third party access regime, alternative suppliers will be prevented from reaching customers with competing offers.

85. As regards supply competition, the main achievement in 2002 was the settlement of the *GFU* case ⁽¹⁾. This case concerned the joint marketing of Norwegian gas through a gas negotiation committee (GFU). It was this committee, rather than individual companies, that decided who could buy Norwegian gas and at what price. The effect of the GFU scheme was that European customers could not choose between Norwegian gas producers, which together meet 10 % of European demand, but could deal only with GFU. The case was closed by the Commission after the companies undertook to market their gas individually in future and after certain accompanying measures were taken by the two leading operators, Statoil and Norsk Hydro, which favour new customers.

86. *Synergen* is another case relating to the improvement of the supply structure ⁽²⁾. This concerned the construction of a power plant in Dublin, Ireland, by the incumbent Irish electricity producer ESB and the Norwegian gas and oil company Statoil. In order to overcome the relevant competition concerns (due among other things to Statoil's commitment to leave the marketing of the electricity produced by Synergen to ESB), ESB undertook to make electricity avail-

able by means of auctions or direct sales. These volumes can be used by new market entrants to build up a customer base when constructing a new power plant.

87. As regards the improvement of the network access regime, the Commission carried out a number of important investigations, most of which have, however, not yet been concluded. In 2002, the Commission dealt in particular with the operation of the United Kingdom–Belgium gas interconnector ⁽³⁾. It was able to conclude this investigation after it became clear that the companies concerned had taken or would take certain measures in the near future facilitating third party access to this important pipeline linking the United Kingdom and Belgium.

88. Merger activity in the energy sector continued in 2002, at both national and EU level. At the latter level, however, there was a tendency for the number of transactions to decrease slightly compared with previous years. However, there are indications that the liberalisation which is currently taking place in the gas sector may lead to more mergers in this area. The main area of concentration took place in the generation and supply of electricity and in the trading business. No full, in-depth investigation was undertaken into electricity mergers during 2002.

89. In the gas sector, one merger was of particular importance in 2002. The Commission authorised, subject to conditions, the joint acquisition of the Baden-Württemberg regional gas wholesaler Gas Versorgung Süddeutschland (GVS) by the German electricity firm Energie Baden-Württemberg AG (EnBW) and the Italian gas and petroleum company ENI SpA ⁽⁴⁾. The operation, as initially notified to the Commission, would have led to the strengthening of GVS's dominant position on the regional gas wholesale market by securing a substantial part of GVS's customers, currently controlled by EnBW. In order to address these competition concerns, the parties undertook to grant early termination rights to all local gas distributors which entered into long-term supply contracts with GVS or with other subsidiaries currently controlled by EnBW.

90. The year 2002 was also very important for State aid control in the energy sector. The investi-

⁽¹⁾ Case COMP/E-4/36.072; IP 02/1084, 17.7.2002.

⁽²⁾ Case COMP/E-4/37.732; IP 02/792, 31.5.2002.

⁽³⁾ Case COMP/E-4/38.075; IP 02/401, 13.3.2002.

⁽⁴⁾ Case COMP/M.2822; IP 02/1905, 17.12.2002.

gations related most prominently to the question of stranded costs ⁽¹⁾. In this context, the Commission's departments published a first inventory of public aid granted in respect of different energy sources ⁽²⁾. The inventory identifies and records the various national and EU measures taken in the field of energy, where the relevant information is available. The inventory goes beyond the strict legal concept of State aid, and is designed as a tool to monitor the future impact of aid on the various markets.

2. Postal services

2.1. New postal directive

91. On 10 June, the Council and the European Parliament adopted the new postal directive, Directive 2002/39/EC ⁽³⁾. Following a Commission proposal, the Council had reached a common position on a text aimed at amending the existing postal directive on 15 October 2001. The main changes introduced by the Council at that time were as follows:

- a further opening of the market with a progressive reduction of the reserved area as of 1 January 2003 and as of 1 January 2006 ⁽⁴⁾;
- the possibility of completing the internal postal market in 2009 ⁽⁵⁾, by means of a Commission proposal to be approved by the European Parliament and the Council;
- the liberalisation of outgoing cross-border mail except for those Member States where it needs to be part of the reserved services in

order to ensure the provision of the universal service;

- the prohibition of cross-subsidisation of universal services outside the reserved area out of revenues from services in the reserved area, unless this is strictly necessary to fulfil specific universal service obligations imposed in the competitive area;
- the application of the principles of transparency and non-discrimination whenever universal service providers apply special tariffs.

92. The text was subsequently revised and approved by the European Parliament with three further amendments, which, however, do not influence the new elements listed above.

3. Telecommunications

3.1. New regulatory framework for electronic communications networks and services

93. On 14 February, the Council adopted a new regulatory framework for the *ex ante* regulation of electronic communications networks and services, which entered into force on 24 April. This new legislative package made up of five directives ⁽⁶⁾ in all is a major overhaul of the regulatory framework for telecommunications, aimed at bringing more competition into this crucial sector for the European economy. Four of the directives (Framework Directive 2002/21/EC, Access Directive 2002/19/EC, Authorisation Directive 2002/20/EC and Universal Service Directive 2002/22/EC) are to be transposed into national law by 25 July 2003 and applied from that date, while the directive on privacy and electronic communications, Directive 2002/58/EC, is to be implemented by 31 October 2003.

94. The new regulatory package aims to be technology-neutral, treating all transmission networks in an equivalent manner. It ensures that market players are regulated only where necessary and in a consistent manner across the EU, *inter alia* by giving the Commission powers to require national regulatory authorities to withdraw draft decisions in key areas linked to the functioning of the internal market.

⁽¹⁾ See in this respect the section on State aid, points 386 *et seq.*

⁽²⁾ http://europa.eu.int/comm/dgs/energy_transport/home/aids/energy_en.htm

⁽³⁾ Directive 2002/39/EC of the European Parliament and of the Council of 10 June 2002 amending Directive 97/67/EC with regard to the further opening to competition of Community postal services.

⁽⁴⁾ In particular, as of 2003 the non-reserved area will include letters weighing more than 100 g; this weight limit will not apply if the price is equal to or more than three times the public tariff for an item of correspondence in the first weight step of the fastest category. As of 2006, the non-reserved area will include letters weighing more than 50 g; this weight limit will not apply if the price is equal to or more than three times the public tariff for an item of correspondence in the first weight step of the fastest category.

⁽⁵⁾ In 2006, the Commission will complete a study evaluating, for each Member State, the impact on universal service of the completion of the internal postal market in 2009. On the basis of this study the Commission will submit a report to the European Parliament and the Council accompanied by a proposal confirming, if appropriate, the date of 2009 for the full completion of the internal postal market or determining any other step in the light of the study's findings.

⁽⁶⁾ OJ L 108, 24.4.2002 and OJ L 201, 31.7.2002.

95. One of the most important features of the new framework is the new definition of the notion of ‘significant market power’ (SMP), which is now based on the definition of dominance under Article 82 of the EC Treaty (see Article 14 of the framework directive). As a result of this change in definition, as a general rule, an *ex ante* regulatory obligation can only be imposed on undertakings in a single or collective dominant position within the meaning of Article 82. Under the previous regulatory framework, an undertaking was subject to *ex ante* regulation if it had a 25 % market share. The new definition of SMP will thus have the effect of raising the regulatory barrier while at the same time ensuring consistency between *ex ante* regulation and *ex post* enforcement of the competition rules concerning dominant undertakings.

96. Another important aspect of the new framework is the obligation on national regulatory authorities (NRAs) to conduct a proper market analysis before imposing any kind of regulatory obligations on undertakings with SMP. In particular, NRAs will have to define the relevant product and geographic market in order to assess whether an undertaking has SMP. In that respect, the Commission⁽¹⁾ has adopted guidelines for market analysis and the assessment of SMP⁽²⁾, setting out the methodology and competition law principles that NRAs should follow when carrying out their market analysis. In practice, NRAs are expected to focus their market analysis on those markets which justify *ex ante* regulation in view of certain criteria. These markets are listed in a recommendation that the Commission adopted on 11 February 2003⁽³⁾ pursuant to Article 15 of the framework directive. If an NRA decides to regulate a market which is not listed in the recommendation, it will have to seek the Commission’s prior approval and follow the procedure set out in Article 7 of the framework directive.

97. Finally, the new framework provides that NRAs are expected to collaborate with national competition authorities (NCAs) when carrying out their market analysis. The role of NCAs will thus be reinforced since they will have to ensure that market definitions or issues related to dominance will be treated consistently from an *ex ante* and from an *ex post* perspective. Within the

context of this cooperation, NRAs and NCAs will also be entitled to exchange confidential information provided that the receiving authority ensures the same level of confidentiality as the originating authority (Article 3(5) of the framework directive).

98. In its communication on the 1999 communications review⁽⁴⁾ the Commission had envisaged codifying and simplifying Directive 90/388/EEC on competition in the markets for telecommunications services⁽⁵⁾, at the same time as adopting a new regulatory framework for electronic communications networks and services.

99. Following the adoption of a first draft directive on 12 July 2000, which was submitted for public consultation⁽⁶⁾, the Commission proceeded to rework it to ensure consistency and establish a link with the directives of the new regulatory framework. The new directive, Directive 2002/77/EC, which was adopted on 16 September⁽⁷⁾, pursues the same fundamental objectives as Directive 90/388/EEC, namely: (a) the abolition of existing exclusive and special rights and the prohibition of the granting of new exclusive and special rights in the electronic communications sector in the broad sense; (b) the recognition of the right of undertakings to exercise their fundamental freedom of establishment and to provide services within an undistorted competitive framework.

100. More particularly, only those provisions that are still necessary to attain the objectives of the original directives based on Article 86 have been maintained. A number of provisions that have become obsolete have been deleted, as have the provisions of the old ‘competition’ directive which have been reproduced in the new regulatory framework and which concern harmonisation of the conditions of access to networks and services.

3.2. Closure of sector enquiry into leased lines

101. In November, the Commission decided to close the leased line sector enquiry it had launched in 1999, since the concerns relating to high prices and issues of possible discrimination

⁽¹⁾ In accordance with Article 15 of the framework directive.

⁽²⁾ OJ C 165, 11.7.2002.

⁽³⁾ Case C(2003) 497.

⁽⁴⁾ COM(1999) 539.

⁽⁵⁾ As successively amended by Directives 94/46/EC, 95/51/EC, 96/2/EC, 96/19/EC and 1999/64/EC.

⁽⁶⁾ OJ C 96, 27.3.2001.

⁽⁷⁾ OJ L 249, 17.9.2002.

were now being adequately addressed, both at national level through the enforcement of the EU sector-specific regulation by national regulatory authorities (NRAs), and through own-initiative procedures by the Commission relating to specific EU Member States ⁽¹⁾.

102. The conclusions of the first phase of the enquiry had emphasised high prices and diverging pricing policies in the EU that were not justified by cost differences ⁽²⁾. In November 2000, the Competition DG had opened five own-initiative investigations into possible excessive prices and/or discriminatory behaviour in the provision of leased lines in Belgium, Italy, Greece, Portugal and Spain. Two years later, the Commission found a considerable decrease in leased line prices across the EU. For example, since the launch of the sector enquiry in July 1999, 2 Mbps international leased line prices have gone down by 30 to 40 % on average ⁽³⁾. A second important outcome is a proactive stance on the part of NRAs regarding the provision of leased lines and pricing for such lines.

103. The Commission therefore decided to close its own-initiative investigations regarding Belgium and Italy given the evidence of significant improvements in the competitive situation in those Member States. Similarly, subject to a further decrease in prices for international leased lines between neighbouring or nearby EU Member States or further justification of their level, the Spanish case might be closed. The Competition DG will continue to closely monitor the situation in Portugal and Greece.

4. Transport

4.1. Air transport

4.1.1. Renewal of block exemption Regulation (EEC) No 1617/93

104. On 25 June, the Commission adopted Regulation (EC) No 1105/2002 ⁽⁴⁾, renewing the block

exemption for passenger tariff conferences for the purpose of interlining in Regulation (EEC) No 1617/93 until 30 June 2005. The renewal is conditional on air carriers participating in conferences collecting certain data on the relative importance of the consultations for interlining. Interlining occurs when a passenger travels with more than one airline or alliance on the same ticket.

105. The block exemption applies to just one organisation, the International Air Transport Association (IATA). Most EEA airlines (including all flag carriers) are members of IATA and take part in twice-yearly conferences where they agree fares for interline journeys. Having considered the arguments advanced by the various respondents to a consultation paper that the Competition DG issued in 2001, the Commission concluded that the block exemption should be extended for a further three years. The tariff conferences result in a benefit in the form of fully flexible interlining and it is unlikely that such a benefit could currently be completely achieved using other less restrictive means. While prohibiting the tariff conferences would not mean the end of interlining altogether, it would reduce the fare products available for a significant number of consumers and, in the short term at least, could make it harder for small airlines to compete.

106. However, as alliances develop, it might be argued that in the longer term the need for tariff conferences becomes less obvious, in particular on high-traffic routes. In order to enable it to examine in future whether a block exemption is still necessary, the Commission has imposed a further condition on the airlines participating in the conferences, obliging them to collect data providing concrete information on the extent to which tickets issued in the EEA are tickets at IATA tariffs, and the relative importance of such tickets for interlining.

107. The new regulation also extends the current block exemption for slot allocation and airport scheduling until 30 June 2005. This block exemption is closely related to Council Regulation (EEC) No 95/93 of 18 January 1993 on common rules for the allocation of slots at Community airports. Together, the block exemption and the Council regulation set out the conditions under which air carriers can take part in the scheduling conferences at which slots at congested airports are allocated. The Commission has proposed certain amendments to Regulation (EEC) No 95/93

⁽¹⁾ IP/02/1852, 11.12.2002.

⁽²⁾ For more details of the outcome of the sector enquiry, see working document of September 2000 at: http://europa.eu.int/comm/competition/antitrust/others/sector_inquiries/leased_lines/

⁽³⁾ For more details of the outcome of the sector enquiry and the individual own-initiative cases, see explanatory memorandum of November 2002 at: http://europa.eu.int/comm/competition/antitrust/others/sector_inquiries/leased_lines/

⁽⁴⁾ OJ L 167, 26.6.2002.

and the possibilities of further amendments that are more than purely technical are currently being examined. The extension of the block exemption for airport scheduling will also ensure that the two remaining exemptions in Regulation (EEC) No 1617/93 are synchronised and will allow the Commission to reconsider that regulation in its entirety before 30 June 2005.

4.1.2. Competition policy in international aviation

108. In order to ensure that competition is preserved and promoted in the field of international air transport, it is an essential prerequisite that the Commission has effective and efficient enforcement tools. In the past the Commission has submitted several proposals, most recently in 1997, to the Council for extending the scope of Regulations (EEC) No 3975/87 and (EEC) No 3976/87 to transport between the EU and third countries. So far, the Council has not decided on these proposals⁽¹⁾. The Court's judgments in the 'open skies' cases, confirming the need for a coordinated international air transport policy, also imply the need for a review and relaunching of these proposals⁽²⁾. A fully effective competition policy in international aviation can only be achieved by overcoming the Commission's existing investigation and enforcement limitations. The Commission is currently preparing a new proposal, which it envisages submitting to the Council in the course of 2003.

4.1.3. Transatlantic alliances

109. On 21 February, British Airways and American Airlines confirmed that their alliance agreements, which had been investigated by the Commission in close cooperation with the UK Office of Fair Trading, were terminated. As a consequence, the Commission decided to close the procedure it had opened in this case.

110. On 28 October, the Commission decided⁽³⁾ to close the proceedings it had initiated in 1996 with a view to examining the alliance between KLM and its US partner NorthWest under the EU competition rules, as well as that between

Lufthansa, SAS and the US carrier United Airlines. In the case of LH/SAS/UA the Commission came to its conclusion on the basis of a package of commitments proposed by the parties to address the competition concerns on a number of routes from Frankfurt airport to the United States, as well as on the basis of a declaration by the German Government, removing possible regulatory barriers for new entrants on those routes. In the case of KLM/NorthWest no commitments were held necessary.

111. In November, the Commission also closed its investigation in the bmi British Midland/United Airlines case. In this case the Commission had not launched formal proceedings but had cooperated actively with the UK Office of Fair Trading (OFT)⁽⁴⁾. The OFT adopted a formal decision on 1 November granting the alliance an individual exemption under Article 81(3) of the Treaty. Both authorities have come to the conclusion that the alliance agreement between bmi and United Airlines fulfils the necessary requirements to merit such an exemption.

112. The Commission is continuing to investigate the Skyteam Alliance, between Air France, Alitalia, Delta, CSA, Korean Air and AerMexico, which was officially launched in July 2000. To that end a notice was published in the *Official Journal of the European Communities* in March, inviting third parties to comment⁽⁵⁾. The Commission is currently examining the comments submitted by third parties and other information received in the meantime.

4.1.4. Intra-European alliances and mergers

113. On 1 July, the Commission sent a letter of serious doubts to Air France and to Alitalia concerning their cooperation on certain routes between France and Italy. The Commission believes that their cooperation agreement cannot be approved in its current form, since it would eliminate competition on a large number of routes

(1) COM(97) 218 final.

(2) Cases C-466/98, C-467/98, C-468/98, C-469/98, C-471/98, C-472/98, C-475/98 and C-476/98 against the United Kingdom, Denmark, Sweden, Finland, Belgium, Luxembourg, Austria and Germany.

(3) OJ C 264, 30.10.2002.

(4) For procedural reasons the OFT took the lead in this case, using its powers under the EC competition law enforcement regulations 2001. It should be recalled that Council Regulation (EEC) No 3975/87, which lays down detailed rules for the application of Articles 81 and 82, relates only to air transport between EU airports. However, the OFT has powers under the enforcement regulations to make a decision on the application of Articles 81 and 82 in relation to (*inter alia*) air transport between Member States and third countries. In the absence of such powers, the Commission would have had to investigate the alliance using its powers under Article 85, under which it would only have been able to propose measures to be taken to bring infringements to an end.

(5) OJ C 76, 27.03.02 p. 12.

between Italy and France. Sending a letter of serious doubts is the first formal step in the Commission's investigation. It could lead to a prohibition decision unless the companies address the Commission's concern.

114. On 5 July, subject to substantive undertakings from the parties, the Commission approved the partnership between Lufthansa and Austrian Airlines ⁽¹⁾. The conditions imposed in the decision aim to reduce entry barriers and to encourage inter-modal competition. Given the serious effects of the alliance on competition, the Commission imposed a number of remedies on the parties that had not been required in previous decisions, in particular a price reduction mechanism and the obligation to enter into special prorate agreements and inter-modal agreements.

115. During 2002 the Commission also started to investigate alliance agreements between British Airways, Iberia and GB Airways and between British Airways and SN Brussels Airlines. In the latter case a notice summarising the cooperation agreements was published in the *Official Journal of the European Communities* ⁽²⁾.

116. The Commission also examined the SAS/ Spanair merger and took a decision clearing the merger in March ⁽³⁾. Furthermore, the Commission did not oppose a global freight exchange distribution channel set up by Lufthansa, British Airways and Air France.

4.2. Maritime transport

4.2.1. Case-law developments

117. On 28 February, the Court of First Instance delivered three judgments of great significance for EU maritime competition policy ⁽⁴⁾.

118. All three cases concern the application of Council Regulation (EEC) No 4056/86, the main maritime competition regulation. The regulation provides for a block exemption for various activities of liner shipping conferences. Article 3 of Regulation (EEC) No 4056/86 thus permits a

liner shipping conference not only to fix a common freight rate but also, *inter alia*, to regulate the capacity offered by each member of the conference ⁽⁵⁾.

119. In the *TAA* case, the Court of First Instance found that the TAA (Trans-Atlantic Agreement) was not a liner conference, because it failed to meet the basic criterion of operating under common or uniform freight rates. Not being a conference, it obviously could not enjoy the benefit of the liner conference block exemption. Nor did its activities — consisting not only in maritime and inland price fixing but also in the collective limitation of available vessel capacity — qualify for individual exemption, as they variously failed to satisfy the conditions of Article 81(3) relating to improvement of production, indispensability, and non-elimination of competition.

120. The *FEFC* case concerned the dividing line between Council Regulation (EEC) No 1017/68 (inland transport) and Regulation (EEC) No 4056/86 (maritime transport). The FEFC (Far Eastern Freight Conference) parties argued that when inland transportation was provided as part of an intermodal (land and sea) transport operation, the applicable regulation for both transport legs was Regulation (EEC) No 4056/86. It followed, in the FEFC's view, that the liner conference block exemption applied not only to the maritime leg of the intermodal operation but also to the inland leg, and that a conference was therefore entitled to fix rates for both legs. The Court of First Instance rejected this interpretation, finding that inland transport, even when provided as part of an intermodal operation, was a service distinct from maritime transport and was therefore governed by Regulation (EEC) No 1017/68 rather than Regulation (EEC) No 4056/86.

121. The liner conference block exemption could not therefore cover inland price fixing by a conference.

122. Nor had the FEFC parties shown that their price-fixing arrangements were necessary in order to achieve the stated objective of stability and that they were therefore eligible for individual exemption.

⁽¹⁾ OJ L 242, 10.9.2002 p. 25.

⁽²⁾ OJ C 306, 10.12.2002.

⁽³⁾ OJ C 93, 18.4.2002.

⁽⁴⁾ Cases: T-18/97 *Atlantic Container Line and others v Commission* (TACA) (2002) ECR II-1125; T-395/94 *Atlantic Container Line v Commission* (TAA) (2002) ECR II-875; and T-86/95 *Compagnie générale maritime and others v Commission* (FEFC) (2002) ECR II-1011.

⁽⁵⁾ The Commission has interpreted this provision as allowing capacity regulation only under certain strict conditions (see further below).

123. In its judgment in the *TACA* (Trans-Atlantic Conference Agreement) *immunity* case, the Court of First Instance found that as inland price fixing falls within the scope of the inland transport regulation ⁽¹⁾, Regulation (EEC) No 1017/68, and as the latter does not contain any provision granting immunity from fines, the Commission's decision ⁽²⁾ purportedly withdrawing immunity from fines did not alter the TAA parties' legal position. The parties' appeal was therefore inadmissible.

124. In reaching the above conclusion, the Court of First Instance rejected the argument that, even if Regulation (EEC) No 1017/68 does not expressly provide for immunity from fines, it must be regarded as a general principle of EU competition law that formal notification has that consequence.

4.2.2. Review of Regulation (EEC) No 4056/86

125. In April, the OECD Secretariat published its final report on competition policy in liner shipping ⁽³⁾. The report, which differed little from a draft version discussed by competition and maritime transport experts at an OECD workshop in December 2001 ⁽⁴⁾, concluded that antitrust immunity or exemption for price fixing or rate discussions was unjustified.

126. The liner conference block exemption contained in Article 3 of Regulation 4056/86 is predicated on the assumption that collective rate setting by members of a liner conference is an indispensable prerequisite for reliable liner shipping services. No review of this economically very important exemption has been undertaken in the fifteen years since it entered into force, contrary to normal Commission practice. For that reason, and taking into account changes that have occurred on the market, the Commission has decided to undertake a review of the block exemption and of the other substantive provisions of Regulation (EEC) No 4056/86.

127. The Commission has now launched a review process, the first stage of which consists of

a consultation paper, to be published in January 2003. The consultation paper will invite comments and evidence from governments and industry on certain key issues relevant to an assessment of the justification for a continued block exemption for liner conferences. It will also invite comments on the need to simplify and modernise Regulation (EEC) No 4056/86 in other substantive respects.

4.2.3. Individual cases

128. On 14 November, the Commission adopted a decision granting the TACA an exemption from the EU competition rules; TACA is a grouping of shipping companies which provide regular container transport for freight between ports in northern Europe and the United States ⁽⁵⁾. The decision came after a lengthy investigation in the course of which the TACA members agreed to make substantial concessions.

129. The agreement granted clearance is the direct successor to the TACA agreement ruled illegal by the Commission in a 1998 decision imposing fines totalling EUR 273 million on the TACA members — a record at the time. The new agreement — commonly known as the 'revised TACA' — brings the activities of the TACA conference into line with the main guidelines for conference behaviour laid down by the TACA decision.

130. As a consequence of the 1998 TACA decision and pro-competitive amendments to US shipping legislation, the members of TACA now face a substantial increase in the extent and intensity of competition. This factor played a crucial role in the Commission's decision to grant exemption to the revised TACA.

4.3. Rail transport

131. In January, the Commission tabled a second package of legislative proposals for the integration of national rail networks into a single European railway area. The package includes opening the domestic and cabotage freight markets, establishing a European approach to rail safety (including measures to ensure fair and non-discriminatory access to train crew training facilities), furthering interoperability of rail sys-

⁽¹⁾ The Court of First Instance referred to the *FEFC* judgment.

⁽²⁾ The decision was taken as a precautionary measure only, to take account of the possibility that the Court of First Instance or Court of Justice might consider that the inland part of an intermodal transport operation fell within the scope of Regulation (EEC) No 4056/86, which does provide for immunity from fines if an agreement is formally notified.

⁽³⁾ OECD document DSTI/DOT/(2002)2 'Competition policy in liner shipping — Final report', Paris, 16 April 2002.

⁽⁴⁾ See XXXIst Report on competition policy, point 159.

⁽⁵⁾ OJ L 26, 31.1.2001.

tems and the creation of a European Railway Agency. The Commission meanwhile continued work in a comitology committee in order to assist Member States in the transposition of the first package ⁽¹⁾ into national law.

132. In May, Commissioner Monti set out the Commission's approach to competition policy in the rail transport market. He identified three structural defects which continue to hamper market integration and effective competition: a lack of proper separation between those who manage railway infrastructure and those who operate train services over it; a lack of transparency in the arrangements for the allocation of international train paths; a lack of effective supply-side competition.

133. The Commission continued with proceedings against Ferrovie dello Stato (FS) ⁽²⁾ and Deutsche Bahn (DB) ⁽³⁾. Both cases concern discriminatory and exclusionary behaviour by the incumbents towards a new entrant. The Commission opened formal proceedings in 2001. In the first case, a small German private railway company lodged a complaint against FS arguing that the latter has prevented it from entering the market to provide an international passenger railway service from Basle to Milan. In the second case, the complainant argued that DB applied discriminatory treatment in the provision of traction and prevented the new entrant from maintaining an international passenger service from Germany to Sweden. In both cases a hearing has taken place. This triggered detailed fact-finding exercises, which have continued.

5. Media

134. The media sector is undergoing substantial restructuring due to a stagnating advertising market, spiralling costs of premium content, and a difficult transition to digital platforms. As a result, horizontal and vertical concentration, particularly

in premium sports TV rights, and consolidation of platforms ⁽⁴⁾ led to a number of complex cases during the year and provided the Commission with an opportunity to set out principles guiding the handling of future cases in this field.

5.1. Access to premium content

135. UEFA and most national football associations jointly sell the TV rights to football events on behalf of football clubs. The Commission has identified these joint-selling arrangements combined with a practice of selling the rights in a bundle and on an exclusive basis as having a significant effect on the structure of TV broadcasting markets. Generally, all the TV rights in a whole tournament are sold in one exclusive package to a single broadcaster for a long period. Because a single broadcaster wins all rights, there is fierce competition for rights when they are offered, and in the end they can be won only by the largest broadcasters. This is likely to increase concentration in the media sector and hamper competition between broadcasters.

136. The Commission considers that joint selling restricts competition within the meaning of Article 81(1) of the EC Treaty because the clubs participating in the league are prevented from individually selling any of the media rights in competition with one another.

137. However, an appropriately modified joint-selling arrangement may be an efficient way to organise the selling of the media rights to sport events, and may benefit from an exemption under Article 81(3) of the EC Treaty. First of all, the arrangement may enhance the production of a league product (covering the key matches of the league) which is distinct from other football broadcasts. In addition, a single point of sale of the media rights may be an efficient trading method for the parties involved. Joint selling may also be an efficient way to promote the branding of a league.

UEFA Champions League

138. In a major case which concerned the joint selling of the TV rights for the UEFA Champions

⁽¹⁾ Directive 2001/12/EC of the European Parliament and of the Council of 26 February 2001 amending Council Directive 91/440/EEC on the development of the Community's railways. Directive 2001/13/EC of the European Parliament and of the Council of 26 February 2001 amending Council Directive 95/18/EC on the licensing of railway undertakings. Directive 2001/14/EC of the European Parliament and of the Council of 26 February 2001 on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure and safety certification (OJ L 75, 15.3.2001).

⁽²⁾ Case COMP/37.685.

⁽³⁾ Case COMP/37.985.

⁽⁴⁾ Compare the merger between the two Spanish pay-TV platforms Canal Satélite Digital and Via Digital, Case COMP/M.2645 *Sogecable/Canalsatélite Digital/Via Digital*, subject to a referral to the Spanish authorities, and the merger between the two Italian pay-TV platforms Stream and Telepiù, Case COMP/M.2876 *News-corp/Telepiù*.

League⁽¹⁾ a settlement was reached in June and an Article 19(3) notice was published in August⁽²⁾. The settlement resulted in a commitment by UEFA to sell the rights in question in accordance with fair, open and non-discriminatory tendering procedures for a duration of not more than three years; to break up the rights into a number of packages to allow more market participants access to rights; and to open access also for the new media (Internet, UMTS)⁽³⁾.

139. The Commission will scrutinise similar national and Europe-wide agreements according to the same principles.

5.2. Access to new media rights

140. During 2002, new media became an important focus of the Commission in the context of several cases in the media field. While most of the recent cases relating to football rights concerned only pay-TV or free-to-air TV, new cases now also deal with new media platforms, such as the Internet and UMTS mobile networks.

141. For the rollout of new services over these two platforms, premium content is necessary. Potential content providers in these new markets contacted the Commission about the availability of premium content, in particular sports rights. There are essentially two kinds of sport content owner: owners of rights, such as sport federations and clubs, and agents acting as aggregators who package and structure content from different sources for delivery. The information currently available to the Commission shows that content owners refrain from making such content available to the new platforms.

142. Football can be a driving content for the rollout of services over new media platforms. However, this potential does not appear to be currently exploited, and there are indications that sports rights are held back by their owners in order to safeguard the value of the respective TV rights.

143. One potential competition concern is that the content owners' refusal to supply may infringe Article 82 of the EC Treaty. Holding

back rights from use for the new media for the sole purpose of protecting market positions in traditional TV markets can be considered an output restriction limiting provision of services to consumers.

144. Agreements on the selling of TV rights that prohibit or hinder the marketing of new media rights may restrict competition by limiting production and technological development in the market within the meaning of Article 81 of the EC Treaty. Other restrictions, such as limitations on the timing of transmission, may have the same effect. Finally, exclusivity may also restrict competition if it forecloses the market to a significant extent, particularly where the exclusivity is excessive in duration or scope.

145. The Commission will continue to scrutinise the new media field with particular attention, and will launch enquiries where required.

5.3. Collective copyright management and licensing agreements

146. The collective management and licensing of copyright in Europe has been giving rise to significant competition concerns for a number of years⁽⁴⁾. At present, the Commission is handling a number of cases concerning changes in the way that copyright has traditionally been administered (TV, radio, discotheques, etc.) to reflect the new technological environment resulting from the commercial development of the Internet and satellite broadcasting.

147. A major exemption decision with conditions and obligations attached concerning the licensing conditions imposed by collecting societies on copyright users was adopted on 8 October⁽⁵⁾ following notification of a standard agreement between collecting societies acting on behalf of producer companies. This agreement is aimed at facilitating the grant of 'one-stop shop' international licences for the relevant related rights (broadcasting and public performance rights) to radio and TV broadcasters who wish to

(1) Case COMP/37.398; UEFA notified its joint-selling arrangement on 1 February 1999 and received a statement of objections on 19 July 2001. UEFA replied on 16 November 2001 and shortly after settlement negotiations were initiated.

(2) OJ C 196, 17.8.2002.

(3) IP/02/806, 3.6.2001.

(4) See, for example, the Commission decisions in Case IV/26.760 *GEMA*, decision of 2.6.1971 (OJ L 134, 20.6.1971) and decision of 6.7.1972 (OJ L 166, 24.7.1972); Case IV/29.971 *GEMA Statutes*, decision of 4.12.1981 (OJ L 94, 8.4.1982); Case 29.839 *GVL*, decision of 29.10.1981 (OJ L 370, 28.12.1981); or the Court judgments in *Phil Collins* (1993) ECR I-5145; *Musik-Vertrieb membran* (1981) ECR 147; *Tournier* (1989) ECR 2521; *Lucazeau* (1989) ECR 2811.

(5) Case COMP/C-2/38.014 IFPI (International Federation of the Phonographic Industry) 'Simulcasting'.

engage in simulcasting⁽¹⁾ and thereby make musical works available to the public via the Internet.

148. This is the first Commission decision to deal with collective management and copyright licensing for the purpose of commercial exploitation of musical works on the Internet. In order to obtain an exemption, the parties agreed to eliminate the (originally provided for) territorial restrictions from their cross-licensing agreements, allowing competition to emerge between them in respect of copyright licensing in Europe for Internet-based services. Competition now becomes possible both as regards the service to be provided and in respect of administration fees to be paid by licensees. EEA-based broadcasters will consequently be able to choose from which EEA-based collecting society they wish to obtain their 'one-stop shop' simulcasting licence.

149. As the parties also agreed to distinguish the copyright royalty proper from their own administrative fee, which is meant to cover the administrative costs of the licensing society, and to charge the two separately, there is an increase in transparency in terms of costs incurred by collecting societies. More cost transparency means that EEA-based broadcasters can choose the most efficient among the EEA-based collecting societies for their simulcasting licence. In this context, efficiency is understood both in terms of price (royalty) and level of administration fees.

150. Since the costs of collecting societies are regularly passed on to end-users by broadcasters, pressure on both price and fees will make management of rights and access by broadcasters to these rights for the provision of services via the Internet more efficient and thereby increase consumer benefits. The creation of a legitimate market place for simulcasting will not only ensure that consumers enjoy access to a wider range of audio and video music programmes via the Internet, but at the same time that rightholders and artists are properly remunerated.

5.4. Print media

151. In the print media sector, in particular in relation to books, the Commission has long been dealing with cross-border price-fixing agreements. It does not object to truly national resale

price maintenance agreements for printed products as long as they do not appreciably affect trade between Member States. The major cases, in particular those pertaining to Germany, were settled and closed during the year⁽²⁾.

152. Following the introduction of the euro on 1 January, enhanced price transparency in the print sector, in particular regarding periodicals, triggered a considerable flow of informal complaints by Union citizens about allegedly unjustified cross-border price differentials for identical periodicals. In the field of academic and professional publishing, the Commission is observing continuous price increases by big international publishers, in particular, for scientific, technical and medical (STM) journals.

153. Both issues will be kept under review, and enquiries will be carried out where required.

6. Motor vehicle distribution

154. In the course of the year, the Commission's work focused mainly on the adoption of a new exemption regulation for the motor vehicle sector, on an explanatory brochure to accompany the regulation, and on the twice-yearly report on prices in the European Union.

6.1. Adoption of the new exemption regulation for the motor vehicle sector

6.1.1. Context

155. Until it expired on 30 September 2002, Regulation (EC) No 1475/95 exempted a category of selective and exclusive distribution agreements from the prohibition in Article 81(1). By the exempted agreements, which involved the distribution of motor vehicles having three or more road wheels, manufacturers set up dealerships in exclusive territories; these dealerships could sell vehicles to final consumers or their intermediaries, and to other dealers authorised by the manufacturer⁽³⁾.

156. After a long and fruitful process of consultation and evaluation begun in 1999, the Com-

⁽¹⁾ Simulcasting is the transmission by radio and TV stations of their signal simultaneously and unaltered by traditional means and via the Internet.

⁽²⁾ Cases COMP/C-2/34.657 *Sammelrevers*; COMP/C-2/37.906 *Internetbuchhandel*; COMP/C-2/38.019 *Proxis/KNO et al.*; IP/02/461, 22.3.2002.

⁽³⁾ Commission Regulation (EC) No 1475/95 of 28 June 1995 on the application of Article 81(3) of the Treaty to certain categories of motor vehicle distribution and servicing agreements (OJ L 145, 29.6.1995); press release IP/02/1073 and Commission document MEMO/02/174, 17.7.2002.

mission adopted a new regulation applying Article 81(3) to certain categories of vertical agreements and concerted practices in the motor vehicle sector, namely Commission Regulation (EC) No 1400/2002 of 31 July 2002 ⁽¹⁾. The regulation entered into force on 1 October and will expire on 31 May 2010. It provides for a general transition period of one year, during which Article 81(1) will not apply to existing vertical agreements that fulfil the exemption requirements of Regulation (EC) No 1475/95.

157. The new block exemption regulation represents a major advance over the old one in two respects. First, although it is a sector-specific regulation, it is based on the philosophy behind Regulation (EC) No 2790/1999 as regards the economic analysis of vertical restraints and the abandonment of authorised ('white') clauses in favour of an approach consisting in excluding hardcore restrictions of competition from exemption. Secondly, while it no longer prescribes a single exempted system of distribution, preferring instead to give greater flexibility of choice to economic operators themselves, the new regulation lays down stricter rules both for sales of new vehicles and their spare parts and for after-sales servicing.

158. This stricter approach was necessary in the light of the findings of the Commission's report on the evaluation of Regulation (EC) No 1475/95, which concluded that the premisses underlying that regulation were no longer entirely up to date and that the regulation's objectives had not all been attained, notably as regards intra-brand competition, market integration and benefits for consumers ⁽²⁾. The Commission concluded that Regulation (EC) No 2790/1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices ⁽³⁾ did not help remedy the problems identified ⁽⁴⁾,

especially as a cumulative effect existed in the motor vehicle sector owing to the degree of similarity between the distribution agreements in force and to the restrictions of competition they involved, which justified a stricter regime. The adoption of a regulation specific to the motor vehicle sector was the only means of providing appropriate solutions to the problems identified.

6.1.2. Significant stages in the adoption of the regulation

159. The adoption of this new regulation took place in the context of a very wide consultation of all economic operators both actually and potentially concerned, and of consumers.

160. The report on the evaluation of Regulation (EC) No 1475/95 was based on information gathered from vehicle manufacturers, parts manufacturers, authorised dealers responsible for sales and after-sales servicing, independent resellers of vehicles, intermediaries, independent repairers, independent spare-part wholesalers and retailers, potential new entrants, consumers and certain categories of customer such as leasing companies. As soon as the report was adopted, the Commission invited all interested parties to submit remarks and comments, and organised a hearing, which was attended not only by the categories of operator already described but also by consumers' associations, national competition authorities, and representatives of the European Parliament and of national parliaments ⁽⁵⁾.

161. The Commission also sponsored four independent studies, all of which were of a consultative nature and contained no recommendations as to the nature of the forthcoming regime. In 2000, two studies covered firstly, the link between the sale of new vehicles and after-sales services and, secondly, price differentials in the European Union ⁽⁶⁾. In 2001, the Commission launched a study to identify and measure the economic

⁽¹⁾ OJ L 203, 1.8.2002.

⁽²⁾ Report on the evaluation of Regulation (EC) No 1475/95 on the application of Article 85(3) (now 81(3)) of the Treaty to certain categories of motor vehicle distribution and servicing agreements, 15.11.2000, COM(2000) 743 final; see also 2000 Competition report, points 112 to 115.

⁽³⁾ OJ L 336, 29.12.1999.

⁽⁴⁾ For example, in regard to access by independent repairers to technical information, tools, equipment — including diagnostic equipment — and training, or in regard to access to the market in spare parts produced by original-equipment manufacturers. Moreover, the application of this regulation would not take account of the cumulative effect of virtually identical agreements in motor vehicle distribution. In regard to vehicle sales, this regulation would, on the contrary, not bring any progress towards market integration or towards, say, multi-branding.

⁽⁵⁾ The hearing was held on 13 and 14 February 2000 and brought together more than 350 participants. Participants' contributions may be consulted via the 'Car sector' section of the Competition DG's web site: http://europa.eu.int/comm/competition/car_sector/, under 'Hearings and speeches'.

⁽⁶⁾ These two studies may be consulted on the Competition DG's web site: http://europa.eu.int/comm/competition/car_sector/. 'The natural link between sales and service' (Autopolis), 'Car price differentials in the European Union: An economic analysis' (Hans Degryse and Frank Verboven — KU Leuven and CEPR). See also 2000 Competition report, point 113.

impact of possible future legislative scenarios on all parties concerned ⁽¹⁾. At the same time, a study into consumers' expectations was commissioned to determine their position with regard to the current motor vehicle distribution system and possible alternatives for the future ⁽²⁾. The Commission also took into account all other sources of information, such as other available studies ⁽³⁾.

162. Following this wide-ranging consultation exercise and in the light of its own experience, notably as regards the handling of some of its cases involving serious infringements of Article 81 ⁽⁴⁾, the Commission adopted a draft regulation on 5 February, which it discussed with the Member States at a first Advisory Committee meeting on 7 March ⁽⁵⁾. After the draft was published, the Commission received some 350 written submissions from manufacturers, dealers, consumers, resellers, intermediaries, repairers, spare-part suppliers and numerous legal advisers. Once it had examined these submissions and the comments and suggestions of the Member States made at the first Advisory Committee meeting, the Commission submitted an amended draft to the Member States on 6 May with a view to a second Advisory Committee meeting on 6 June.

163. In parallel, as soon as the first draft of the regulation was adopted in February, the Commission took the initiative of consulting the European Parliament and the European Economic and Social Committee, which delivered their opinions on 29 May ⁽⁶⁾ and 30 May ⁽⁷⁾ respectively. Parliament and the European Economic and Social Committee agreed both with the Commission's views on the need for substantial amendment of the content of Regulation (EC) No 1475/

95 and with the draft's general thrust. Parliament made a number of recommendations, which the Commission largely took on board, concerning, among other things, the transitional period after which the prohibition on location clauses would take effect. In accordance with Parliament's wishes, the Commission extended this period — which under the draft regulation as published was originally to have lasted one year — until 30 September 2005.

6.1.3. Salient features of Regulation (EC) No 1400/2002

General remarks

164. Unlike Regulation (EC) No 1475/95, the new regulation does not exempt, irrespective of the market power of the undertakings party to the agreement, a single, predetermined format compulsorily linking new vehicle distribution and after-sales service provision.

165. Where vertical agreements concluded in the motor vehicle sector are caught by the prohibition in Article 81(1) of the Treaty, Regulation (EC) No 1400/2002 exempts those agreements under certain conditions. The vertical agreements which fall within the scope of the exemption are those which relate to the terms of purchase, sale or resale of new motor vehicles ⁽⁸⁾, spare parts for motor vehicles, and the provision of repair and maintenance services for motor vehicles. The scope of the new regulation therefore includes various categories of vertical agreement and is broader and more diverse than that of Regulation (EC) No 1475/95.

166. As under the general rules applicable to vertical restraints, exemption is henceforth linked to market share thresholds (generally 30 %, but 40 % as regards quantitative selective distribution for the sale of motor vehicles). The Commission thus retains the option of individually verifying compliance with the exemption conditions laid down in Article 81(3) where the parties to the vertical agreement hold a market share in excess of the thresholds, even where vertical agreements fulfil the specific conditions of Article 5 of the regulation and contain none of the hardcore restrictions of competition listed in Article 4.

⁽¹⁾ The terms of reference of this study, and the study itself, may be consulted on the Competition DG's web site: http://europa.eu.int/comm/competition/car_sector/. This study was carried out by Arthur Andersen.

⁽²⁾ 'Customer preferences for existing and potential sales and servicing alternatives in automotive distribution', Dr Lademan & Partner (http://europa.eu.int/comm/competition/car_sector/).

⁽³⁾ Among these sources, mention may be made of the study commissioned by the Association of European Carmakers (ACEA), which deals *inter alia* with the economic effects of alternative distribution systems.

⁽⁴⁾ See the cases *Volkswagen I* (Commission decision of 28.1.1998, OJ L 124, 25.4.1999), *Volkswagen II* (Commission decision of 29.6.2001, OJ L 262, 2.10.2001), *Opel* (Commission decision of 20.9.2000, OJ L 59, 28.2.2001) and *DaimlerChrysler* (Commission decision of 10.10.2001, OJ L 257, 25.9.2002).

⁽⁵⁾ Draft published in OJ C 67, 16.3.2002.

⁽⁶⁾ Report by Dr Konrad — A5-0144/2002, published on the European Parliament's web site in the section entitled 'Activities — Committees — Committee on Economic and Monetary Affairs' (www.europarl.eu.int).

⁽⁷⁾ OJ C 221, 17.9.2002.

⁽⁸⁾ In Article 1(n), motor vehicles are defined as being self-propelled vehicles intended for use on public roads and having three or more road wheels (i.e., passenger cars, light commercial vehicles, trucks, buses and coaches).

167. The new regulation is accordingly based on an economic analysis of vertical restraints, taking a similar approach to that followed when Regulation (EC) No 2790/1999 was adopted. This approach produces an exemption regulation which, rather than prescribing the sole admissible method of distributing products in the manner of Regulation (EC) No 1475/95, excludes from the benefit of exemption a series of restrictions whose negative effects in terms of serious distortion of competition in the motor vehicle sector are as a rule not outweighed by any beneficial effects, even below the market share thresholds up to which exemption is automatically granted.

168. The adoption of stricter rules on quantitative selective distribution for the sale of cars and light commercial vehicles justifies the adoption of a market share threshold of 40 %, rather than the 30 % laid down in the general rules applicable to vertical restraints.

Sale of new vehicles

169. In relation to the distribution of new vehicles, the main conditions for exemption under the new regulation are as follows.

- Henceforth, manufacturers must in practice choose between a system of distribution which is either selective (qualitative or quantitative) or exclusive. A combination of exclusive and selective distribution is no longer allowed because both the studies carried out and experience gained show that combining territorial protection with a prohibition on selling to unauthorised members in the motor vehicle sector curtails effective competition between members of the network and undermines the objective of integrating the internal market.
- Exemption is not granted to any restriction of passive sales nor to restrictions of active sales in a selective distribution system, nor to any restriction preventing distributors of passenger cars or light commercial vehicles within a selective distribution system from opening additional sales outlets or delivery points in other areas of the internal market where selective distribution is used ⁽¹⁾. These provisions are intended to strengthen intra-brand

competition between distributors and to increase market integration by facilitating arbitrage between markets with substantial price differentials.

- The obligatory link between the activities of selling and after-sales servicing is no longer exempted. The same goes for the ban on dealers subcontracting the provision of after-sales services to repairers authorised by the manufacturer. The reorganisation of the link between selling and after-sales servicing is intended to permit the market entry of operators interested in only one of the two activities and to promote a better allocation of specific investments by existing operators, who will be free to concentrate such resources on their chosen field.
- The prohibition on multi-branding ⁽²⁾ within the same showroom is not exempted by the new regulation. On the other hand, the manufacturer may require the various brands to be displayed in brand-specific areas within the showroom.
- Vertical agreements limiting a distributor's right to sell motor vehicles with different specifications from those of equivalent models in the range covered by the agreement are not exempted. Any consumer may thus procure a vehicle in another Member State whose specifications match those of vehicles normally sold in his country (commonly known as the 'availability clause') ⁽³⁾.
- The activities of intermediaries acting on behalf of a consumer are no longer subject to any conditions. Such intermediaries are a powerful instrument for the development of cross-border trade.
- Lastly, the independence of vehicle distributors from their supplier is increased by enabling them to freely represent more than one brand of vehicle and by strengthening minimum standards of contractual protection (including as regards the minimum duration of contracts and the period of notice and grounds for termination). Their independence is also substantially increased by allowing them the freedom to sell their businesses

⁽¹⁾ This non-exemption of location clauses will be effective as from 1 October 2005. See Articles 5(2)(b) and 12(2) of Regulation (EC) No 1400/2002.

⁽²⁾ 'Multi-branding' means the ability to represent more than one competing brand belonging to different groups of undertakings.

⁽³⁾ The availability clause enables British and Irish consumers, say, to purchase right-hand-drive vehicles on the Continent.

to other authorised members of the network to which they belong. Moreover, a vertical agreement is granted exemption only if the contracting parties can refer contractual disputes to an independent third party or arbitrator.

After-sales servicing and the sale of spare parts

170. After-sales servicing (repair and maintenance) accounts for the same proportion of the cost of ownership of a vehicle as the purchase price (about 40 %). It was therefore essential that the conditions of competition be improved here too, all the more so as, while a consumer may decide to purchase his vehicle in a Member State where it is cheaper, he does not have this option as regards after-sales servicing, for obvious reasons of proximity.

171. The new regulation accordingly seeks to increase competition between authorised members of after-sales networks, as well as between authorised members and independent repairers⁽¹⁾, and to improve access to spare parts, while preserving, in the interests of quality and safety, the right of manufacturers to set the selection criteria for members of their authorised networks.

172. Competition between authorised repairers will be enhanced as, from now on, where the vehicle manufacturer sets purely qualitative selection criteria, any operators who fulfil these criteria will be entitled to join the authorised repair network, establishing themselves wherever they like⁽²⁾. Moreover, in the light of the restructuring of vehicle sales networks, dealers whose contracts have been terminated will readily be able to become authorised members of after-sales networks, thereby helping to maintain servicing outlets near to consumers. Those independent repairers who so wish will also be able to become authorised members by fulfilling the criteria laid down.

173. Competition between authorised members and independent repairers will likewise be enhanced because the conditions governing

access by the latter to technical information are eased, and such operators are now given access to the same training as authorised repairers, as well as to diagnostic equipment. Technical skills, which are becoming increasingly complex, are thus accessible to independent repairers under the same conditions as to authorised repairers. In this way, not only will these independent operators continue to compete on better terms with official repairers, but they will also contribute to the upholding of safety standards in matters of vehicle repair and maintenance in general. Other operators such as automobile clubs and roadside assistance providers will also contribute, which is why this type of operator has also been given the same wider access to technical information⁽³⁾.

174. Lastly, manufacturers of automotive components and spare parts will enjoy easier access to parts distribution channels and authorised repairers. They will be free to supply original spare parts or parts of matching quality both to authorised repairers and to independent repairers. By the same token, distributors and authorised repairers will be free to source original spare parts and parts of matching quality from the supplier of their choice. A vehicle manufacturer will therefore no longer be able to secure exclusivity of supply of components or spare parts which it does not itself produce. This is an important development as nowadays parts manufacturers account for 80 % of spare parts and component supply, and vehicle manufacturers for 20 %. Moreover, the term 'original spare part' will henceforth be deemed to cover not only parts supplied by the vehicle manufacturer but also those produced by the parts manufacturer for the initial assembly of the motor vehicle and those produced by the same parts manufacturer according to the specifications and standards provided by the vehicle manufacturer for the production of components or original spare parts intended for the motor vehicle in question.

Conclusion

175. The objective of Regulation (EC) No 1400/2002 as regards increasing competition for the sale of new vehicles and their spare parts and the provision of after-sales services goes hand in hand with the objectives of improving the way

(1) The latter include various categories of operator, from independent garage owners to specialist service centres (e.g. body shops, electronics fitters), through chains active especially in standardised repairs and servicing.

(2) Manufacturers' market shares in after-sales servicing are in principle higher than the 30 % threshold laid down in Regulation (EC) No 1400/2002 for the sale of spare parts and the provision of after-sales services. Consequently, servicing will be governed by a qualitative selective system.

(3) See the non-exhaustive list of these independent operators in Article 4(2) of Regulation (EC) No 1400/2002.

that the internal market functions, and securing substantial advantages for consumers. However, the fixing of these objectives in no way affects the quality control exercised by the manufacturers concerned over their distribution networks or over the safety and reliability of their products. This new regulation affords the operators concerned a whole series of commercial opportunities, and the attainment of the above objectives will depend entirely on the commercial decisions taken by each category of those operators, at their level, with a view to benefiting from those opportunities.

176. The introduction of parameters for differentiating distribution systems should enable the operators concerned to adapt more easily and efficiently to market conditions and consumer needs, which are, moreover, likely to evolve over time.

6.1.4. Explanatory brochure

177. The explanatory brochure of 30 September 2002 on Regulation (EC) No 1400/2002 adopts the same pragmatic approach as the brochure explaining the practical implications of the old regulation. The brochure was desirable in view of the substantial changes brought about by the new exemption regime, and was asked for both by consumers and by all the economic operators concerned. The European Parliament also recommended that it be drawn up. The brochure was published at the same time as the new regulation came into force, i.e. on 1 October 2002 ⁽¹⁾.

178. The explanatory brochure serves as a practical guide for consumers and for all operators involved in vertical agreements in the motor vehicle sector. It is also intended to contribute to undertakings' own analysis of the compatibility of their vertical agreements with the competition rules.

179. The brochure explains the philosophy behind and objectives of the regulation, as well as its structure and certain legal aspects, and above all provides answers to practical questions which consumers and the economic operators involved might raise concerning the sale of vehicles and

spare parts and the provision of after-sales services. A section with examples is devoted to the principles underlying the market definition in the motor vehicle sector and to the calculation of market shares ⁽²⁾. This section is all the more important as the new regulation is based on the application of market share thresholds.

6.2. General assessment of the application of exemption Regulation (EC) No 1475/95 in respect of new car prices

180. As required by Regulation (EC) No 1475/95, the Commission compared pre-tax prices for new cars in the European Union. This comparison is carried out twice yearly, in May and November, on the basis of the sales prices recommended by manufacturers for each EU member country ⁽³⁾.

181. The comparisons carried out for prices on 1 November 2001 and 1 May 2002 both show that no significant price convergence has taken place despite the introduction of the euro on 1 January 2002.

182. As at the time of the last car price reports, Spain, Greece, Finland and Denmark — a non-member of the euro zone — continue to be the markets where pre-tax car prices are generally the lowest. Germany — the biggest market in volume terms — and Austria remain the countries with the highest prices in the euro zone. The United Kingdom generally remains the most expensive market.

183. As in the price report of 1 May 2001 ⁽⁴⁾, in the first four car segments (A to D), where the large number of models from competing manufacturers would normally lead one to suppose that competition should be strong, the average price differential within the euro zone is much wider (well above 20 %) than in segments E, F and G ⁽⁵⁾. This finding is valid for prices both on 1 November 2001 and on 1 May 2002.

⁽¹⁾ The Competition DG's explanatory brochure is available in the 11 official languages both on paper and on the Competition DG's web site (http://europa.eu.int/comm/competition/car_sector/). It is not legally binding. See also Commission press release IP/02/1392, 30.9.2002.

⁽²⁾ To this end the Commission asked Professor Verboven of Katholieke Universiteit van Leuven to carry out a 'Quantitative study to define the relevant market in the passenger car sector'. The study may be consulted in the 'Car sector' section of the Competition DG web site, under 'Studies'. It is of a purely consultative nature and does not prejudge the outcome of the Commission's market analysis in individual cases.

⁽³⁾ See press releases IP/02/305, 25.2.2002 and IP/02/1109, 22.7.2002.

⁽⁴⁾ See press release IP/01/1051, 23.7.2001.

⁽⁵⁾ Segments A and B (small cars), C (medium-sized cars), D (upper-medium cars), E (executive cars), F (luxury cars) and G (multi-purpose vehicles, sports cars).

184. In absolute terms, these price differentials represent considerable sums of money (for example, between EUR 4 000 and EUR 7 000 for some models in segment D). Such considerable price differentials explain why many consumers continue to buy their cars in other EU countries, not without some difficulty, as attested by the steady stream of consumer complaints reaching the Commission, concerning, for example, excessively long delivery periods or other obstacles such as bans on exports to other Member States ⁽¹⁾.

185. These persistent problems encountered by purchasers in recent years indicate that there is still substantial room for improvement in the way the internal market operates in the motor vehicle sector. Bringing about such an improvement in the interests of consumers and economic operators is one of the aims of the Commission's new exemption regulation. It is for this reason that when it adopted Regulation (EC) No 1400/2002 the Commission announced that it would continue monitoring price developments and publishing price reports twice a year.

7. Financial services

186. The year 2002 saw significant developments in the application of competition law to the financial services sector. As far as individual cases are concerned, the Commission adopted two decisions, the first on Visa International's multilateral interchange fee and the second fining eight Austrian banks for their participation in a wide-ranging price cartel. On the regulatory side, the Commission published a draft revised block exemption regulation in the insurance sector, with the aim of seeking comments and allowing it to adopt the new regulation early in 2003.

Visa International (*multilateral interchange fee*) ⁽²⁾

187. On 24 July, the Commission adopted a decision in the *Visa International* case, concerning multilateral interchange fees (MIFs). An MIF is

an interbank payment made for each transaction carried out with a payment card. In the Visa system, it is paid to the cardholder's bank by the retailer's bank and constitutes a cost for the latter which is normally passed on to retailers as part of the fee they pay to their bank for each Visa card payment. The default level of the Visa MIF — which applies unless two banks agree otherwise — is set by the Visa Board and laid down in the Visa International payment card rules, which had been notified to the Commission.

188. The decision grants a conditional exemption to certain of Visa's MIFs, namely those for cross-border payment transactions with Visa consumer cards within the European Economic Area. The decision thus does not apply to MIFs for domestic Visa payments within Member States, nor to MIFs for corporate Visa cards. The exemption is valid until 31 December 2007.

189. In September 2000, the Commission had issued a statement of objections concerning Visa's previous system of MIFs. However, it was possible to grant an exemption after Visa proposed substantial reforms to its MIF system.

Austrian banks ⁽³⁾

190. On 11 June, the Commission imposed fines totalling EUR 124.26 million on eight Austrian banks for their participation in a price cartel. Following reports in the Austrian press, the Commission conducted in June 1998 surprise inspections at a number of Austrian banks. The documents found unearthed a highly institutionalised price-fixing scheme which covered the whole of Austria and all banking products and services as well as advertising, or rather the lack of it. The CEOs of the banks met every month, except August, as the 'Lombard Club'. In addition, for every banking product there was a separate committee on which the employee responsible for these matters at the second or third level of management sat.

191. The cartel started well before the accession of Austria to the European Economic Area in 1994. However, in this case, the Commission levied fines only for the period starting with EU membership (1995) until June 1998, when the surprise inspections put an end to the cartel behaviour.

⁽¹⁾ In this connection, Volkswagen has lodged an application for annulment of the judgment of the Court of First Instance of 6 July 2000 (Case T-62/98 (2000) ECR II-2707) largely upholding the Commission's infringement decision of 28 January 1998 imposing a fine (OJ L 124, 25.4.1998). Mr Advocate-General Ruiz-Jarabo Colomer proposes in his opinion of 17 October 2002 in Case C-338/00/P that the Court of Justice dismiss the application.

⁽²⁾ Case COMP/D-1/29.373 (OJ L 318, 22.11.2002).

⁽³⁾ Case COMP/D-1/36.571, not yet published in the Official Journal.

192. The Commission considered the Austrian banks' behaviour to amount to a very serious infringement of the competition rules laid down in Article 81 of the EC Treaty.

*Draft block exemption regulation
in the insurance sector* ⁽¹⁾

193. On 9 July, the Commission published, for the comments of interested parties, a draft revised block exemption regulation in the insurance sector, intended as a possible replacement for the existing Commission Regulation (EEC) No 3932/92 on its expiry on 30 March 2003. The deadline for comments was 30 September. Twenty-three contributions were received from third parties, including insurance sector bodies, associations of insurance customers and public authorities. The Commission then considered possible further changes to its draft in the light of the comments received, with a view to adopting a new regulation early in 2003.

8. Information society

194. The Commission continued to work towards an open and competitive environment for the development of the Internet and e-commerce. The 'eEurope 2005' action plan endorsed by the Seville European Council in June is to further promote the spread and use of the Internet in Europe, in particular to stimulate secure services, applications and content based on a widely available broadband infrastructure. The eEurope initiative is part of the Lisbon strategy to make the European Union the most competitive and dynamic knowledge-based economy with improved employment and social cohesion by 2010.

195. Competition policy concerns remain in respect of telecommunications infrastructure used for Internet traffic. Such concerns relate in particular to Internet access markets, both broadband (high capacity) and narrowband (low capacity).

196. Again, competition concerns became apparent in the area of Internet governance. The Commission continues to deal with complaints against registry operators of top-level domain names under Article 82. The Commission has no doubts that the EU competition rules apply to the

domain name system. In the same way as other more traditional products, domain names are traded on markets. Customers pay for the right to exploit domain names for their own purposes, and profits result from this for registries and registrars.

9. Liberal professions

9.1. The application of EU competition law to the liberal professions

197. Liberal professions are occupations requiring special training in the liberal arts or sciences, for example lawyers, notaries, engineers, architects, doctors and accountants. The sector is usually characterised by a high level of regulation, either imposed by national governments or self-regulation by the professional bodies. This regulation can affect, *inter alia*, the numbers of entrants into the profession; the prices professionals may charge and the permitted charging arrangements (e.g. contingency fees); the organisational structure of professional services undertakings; the exclusive rights they enjoy; and their ability to advertise. Such regulation clearly has the potential to affect competition and when it is decided by associations of undertakings it may therefore come within the scope of Article 81(1) of the EC Treaty.

198. The Commission's policy with respect to the liberal professions is to fully apply the competition rules to this sector, whilst recognising its specificities, such as the asymmetry of information between customer and service provider. The policy does not question the existence of professional bodies as such, but it requires, for example, that professional bodies must use their self-regulatory powers to benefit consumers, and not merely the interests of their own members. The overall goal is to improve the welfare of consumers of professional services.

9.1.1. Consequences of Court of Justice judgments

199. In 1998, the Court of Justice made it clear that professional services are subject to the application of the competition rules of the EC Treaty. It ruled in the *CNSD* case ⁽²⁾ that the law requiring Italian customs agents to adopt a decision

⁽¹⁾ OJ C 163, 9.7.2002.

⁽²⁾ Case C-35/96 *Commission v Italy* (1998) ECR I-3851.

setting a fixed tariff for all customs agents was contrary to Article 81 (ex-Article 85) read in conjunction with Article 10 (ex-Article 5). The Commission had already found that the participation of the professional body in fixing this tariff also breached Article 81, and this was later confirmed by the Court of First Instance ⁽¹⁾. In 2001, the Court of First Instance also largely upheld a Commission decision finding that the Institute of Professional Representatives before the European Patent Office ⁽²⁾ had breached Article 81 in particular through its rule prohibiting members from carrying out comparative advertising.

200. In February, two new rulings by the Court of Justice helped clarify the scope of action under competition rules in the field of liberal professions. The Court had been asked to rule on lawyers' price fixing in Italy and on a self-regulatory ban on lawyer-auditor partnerships in the Netherlands. It ruled, in the *Arduino* case ⁽³⁾, that a Member State can fix a fee scale if this is necessary in the public interest and if it has the last word and control over the proposal put before it by a professional body. In *Wouters* ⁽⁴⁾, the Court of Justice held that a professional body entrusted with a duty to protect the public interest can prohibit multi-disciplinary partnerships where they would lead to serious conflicts of interest. It laid down an arguably general rule according to which it must be examined whether or not the effects restrictive of competition resulting for members of the professional body from a self-regulatory measure go beyond what is reasonably necessary in order to ensure the proper practice of the profession in the Member State concerned.

201. As regards fixed fee scales, the Commission believes that intervention is possible where a common tariff is not fixed by the State. More precisely, the following could be challenged:

- 'rubberstamp approvals', including simple validations and tacit approvals, granted by Member States for agreements or decisions where the legislative procedures in force do not provide for checks and balances and/or for the authority to carry out consultations;

- practices whereby the authorities of a Member State are only entitled to reject or endorse the proposals of professional bodies without being able to alter their content or substitute their own decisions for these proposals;
- proposals put forward by economic operators on their own initiative and not explicitly envisaged by legislation and for which no specific procedure is laid down with a view to active revision, possible amendment or rejection and explicit adoption;
- proposals having binding or coordinating effects for professionals before their adoption by the competent State authority.

202. As regards multi-disciplinary partnerships (MDPs), the conclusions are less obvious. Member States may prohibit MDPs between certain professions, depending on the respective legal regimes under which those professions operate and the necessity of the prohibition to ensure the public interest the Member State believes to be at stake. Essentially, every case must be examined on its merits.

203. The *Wouters* judgment does, however, also give some guidance on examining purely 'deontological' (professional ethics) rules. Any examination of such rules in competition terms will have to take account of the Court's finding that deontological rules are not called into question in so far as they are reasonably necessary to guarantee the proper exercise of the profession, and to this extent are not caught by Article 81(1). For rules which are not reasonably necessary to guarantee this objective, they must be assessed to see if they qualify for an exemption under Article 81(3). In this way *Wouters* will affect the Commission's approach to other types of restrictive rules and practices in this area, such as restrictions on advertising, soliciting clients and access to the profession.

9.1.2. Study on the economic impact of regulation

204. Consumers and businesses still encounter considerable difficulties in deriving benefits from the internal market in liberal professions' services. This is likely to result to some extent from State regulation and self-regulation of professions having effects on conditions of competition. While the primary goal of such regulation is presumably to guarantee quality of service, the

⁽¹⁾ Case T-513/93 *Consiglio Nazionale degli Spedizionieri Doganali v Commission* (2000) ECR II-1807.

⁽²⁾ Case T-144/99. Known as the *IMA* case (in French) or *EPI* (in English), (2001) ECR II-1087.

⁽³⁾ Case C-35/99 (2002) ECR I-1529.

⁽⁴⁾ Case C-309/99 (2002) ECR I-1577.

hypothesis is that some current regulations may well produce more costs than benefits. At the very least, some allegedly deontological rules are maintained in place without any clear justification of how they benefit consumers. If unjustified restrictions were identified and removed, consumers would benefit from better choice and value for money, and service providers would have more room for creativity and innovation and for adapting their business to demand.

205. With this in mind, the Competition DG launched a study in April into the regulations applicable to liberal professions, which should produce results in the first half of 2003 ⁽¹⁾. The study is expected to provide the Competition DG with, first, relevant and up-to-date facts on the regulations concerning lawyers and notaries, architects and engineers, auditors and accountants, medical practitioners and pharmacists. For each area, the factual comparison will cover all Member States. It is already clear at this stage that the extent of regulation varies greatly across the EU, suggesting that the public interest objectives which are considered to require specific laws in some Member States are seen differently elsewhere.

206. Second, the consultants are expected to carry out a cost–benefit analysis of the regulation of some professions in a sufficiently representative subset of Member States. This is intended to illustrate the economic effects of the various regulatory choices. Ideally, the results of the study would help the Commission to benchmark Member States according to the ‘quality’ of their regulations in this area, and provide sufficient economic evidence to at least suggest that some liberalisation, yet to be determined, would be beneficial to the whole European economy and in particular to consumers. A priori the potential benefits in business-to-business exchange (B2B) are expected to be greater than those to private consumers, mainly because businesses’ demand for new types of services and for more flexibility

appears greater, and because B2B service provision is more important in volume terms.

9.1.3. Coordinated actions with national competition authorities

207. It is against this background that the Competition DG is seeking to initiate a discussion on the competition issues relating to liberal professions. The Competition DG has been in contact with national competition authorities (NCAs) to learn of their past and current cases in this sector, first at a meeting of NCA Directors-General on 26 June, and then amongst Member State experts on 28 October.

208. The meeting of Directors-General was based on the replies to a number of questions sent previously to the NCAs concerning their experience of applying competition law to this sector. The replies received made clear that, although national competition laws cover the liberal professions sector in almost all Member States, the application of competition law in practice is limited by national legislation which imposes restrictions on competition. NCAs are not generally empowered to act where such legislation exists. In this area, therefore, NCAs are limited to giving opinions on draft legislation. The most common cases have been against price fixing by professional associations, discriminatory conditions of access to the profession and advertising restrictions. Some NCAs have taken or are taking a general programme of action to liberalise the sector.

209. On 28 October, an ad hoc advisory committee of Member State experts met in Brussels to discuss the interpretation of the *Arduino* and *Wouters* judgments and what kind of competition intervention these rulings permit. Member State experts welcomed the opportunity to discuss together and exchange experience in this sector. They agreed with the Commission’s interpretation of the two judgments as outlined above. Another conclusion of the meeting was that, since many of the restrictions appeared to result from national legislation, dialogue with the Member State bodies responsible for such legislation (e.g. justice ministries), as well as with economic affairs ministries, could be beneficial.

⁽¹⁾ The contractor, chosen after an open tender competition, is the Institute for Advanced Studies, a non-profit-making organisation based in Vienna.

D — Statistics

Figure 1
New cases

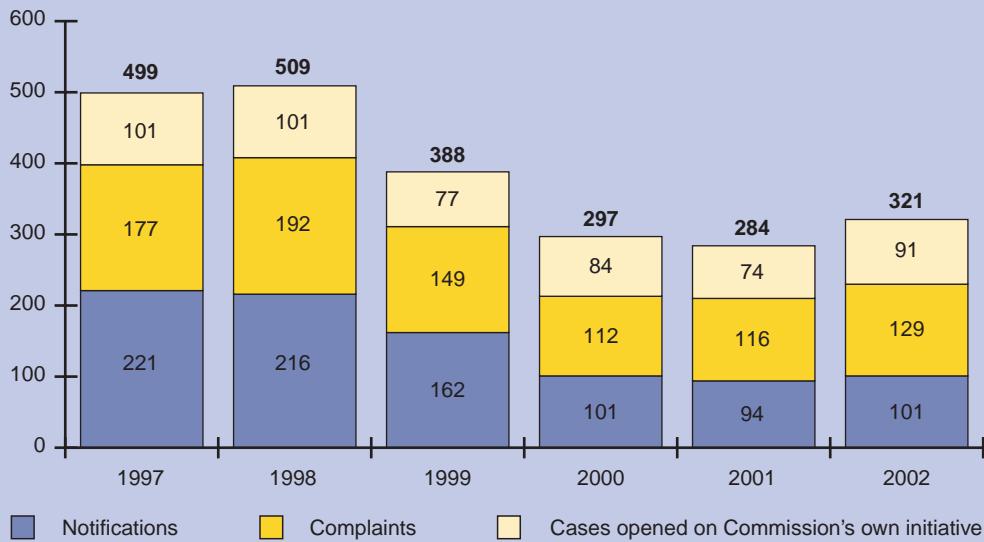


Figure 2
Cases closed

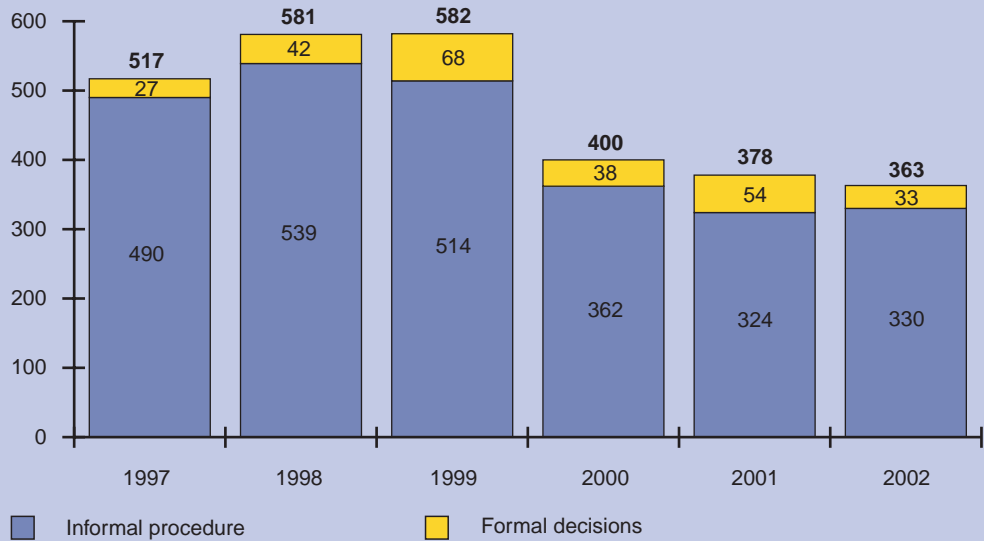
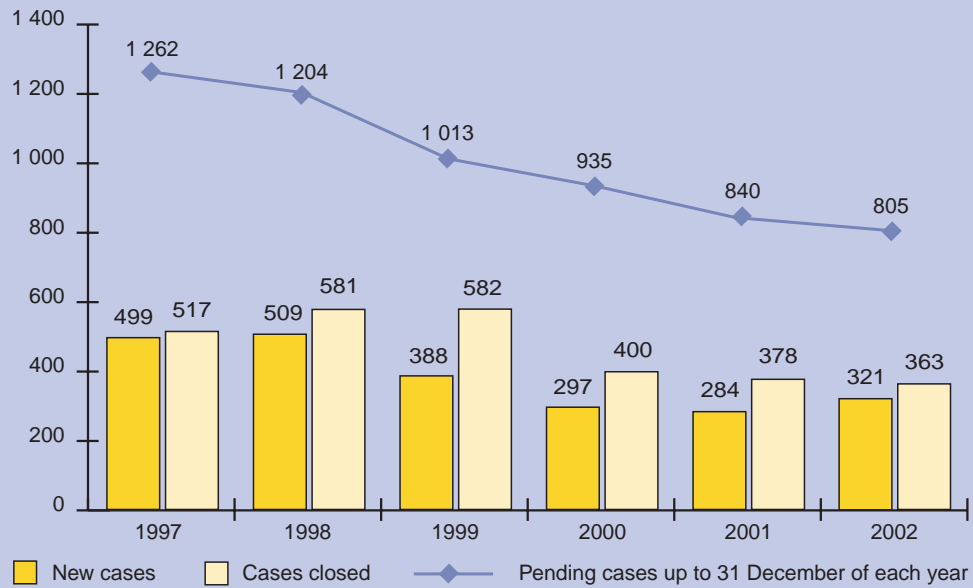


Figure 3
Changes in the number of pending cases at the year end



II — MERGER CONTROL

A — General policy and new developments

1. Introduction

210. In line with the decline in world stock markets, the number of mergers and acquisitions

| Year | 1990 | 1991 | 1992 | 1993 | 1994 | 1995 | 1996 | 1997 | 1998 | 1999 | 2000 | 2001 | 2002 | Total |
|--------------------------|------|------|------|------|------|------|------|------|------|------|------|------|------|-------|
| Number of notified cases | 12 | 63 | 60 | 58 | 95 | 110 | 131 | 172 | 235 | 292 | 345 | 335 | 277 | 2 185 |

211. Apart from the decline in quantity, the percentage of mergers that gave rise to competition problems and hence required an in-depth (phase II) investigation leading to a decision pursuant to Article 8 of the EC merger regulation (ECMR) declined by more than two thirds, from 20 cases in 2001 to 7 in 2002. All seven transactions were finally approved, either because the companies involved submitted undertakings that removed the original competition problems (five cases) or initial competition concerns were not confirmed by the in-depth investigation (two cases). In addition, the Commission issued two decisions pursuant to Article 8(4) relating to transactions that had been subject to a prohibition decision in 2001. In both *Tetra Laval/Sidel*⁽¹⁾ and *Schneider/Legrand*⁽²⁾, the parties had made unconditional bids in accordance with French stock exchange rules and had already acquired more than 90 % of their respective target's shares at the time of the prohibition decision. Exceptionally in the case of public bids, the ECMR allows such acquisitions prior to the Commission's final decision. Under Article 8(4) of the ECMR, the Commission had to order the companies to separate in accordance with a timetable and arrangements that would restore conditions of effective competition while affording the best protection to the interests of the two companies.

212. There were no prohibition decisions in 2002, while there were five in the previous year. The fluctuation in the number of prohibitions highlights the small percentage of notified mergers that is actually prohibited. Even the 'record' number of five prohibitions in 2001 amounted to only 1.7 % of those mergers that were large enough to meet the thresholds of the EC merger regulation in that year. At these levels, random

notified to the Commission fell back in 2002 to levels seen in the late 1990s. While 335 concentrations of Community dimension were notified in 2001, which already marked a slight decline from 2000 (345), there were only 277 notifications in 2002 (see chart).

effects easily outweigh any systematic trend one may try to read into the figures.

213. In total, the Commission took 275 final decisions in 2002, 7 of which followed in-depth investigations (0 prohibition, 2 clearances without conditions and 5 conditional clearance decisions) and 10 of which were conditional clearances at the end of an initial investigation ('phase I'). The Commission cleared 252 cases in phase I. Of these, 111 (44 %) of the first-phase clearance decisions were taken in accordance with the simplified procedures introduced in September 2000. The Commission adopted one decision under Article 66 of the ECSC Treaty. In addition, the Commission took 13 referral decisions pursuant to Article 9 of the merger regulation and opened in-depth investigations in 7 cases.

214. On 17 April, the Commission decided to clear, subject to commitments, the acquisition by Bayer of Aventis Crop Science (ACS)⁽³⁾. Bayer's animal health business group produces a wide range of veterinary medicines and vaccines to maintain the health of livestock and companion animals as well as a variety of grooming products. Aventis Crop Science was formed in 1999 as the combination of AgrEvo (the former Hoechst/Schering joint venture) and the Rhône-Poulenc agriculture division. After an initial investigation lasting one month, the Commission decided on 4 December 2001 that it needed to further investigate the impact of the transaction on competition conditions in several crop protection and animal health markets. The in-depth investigation, which was conducted in close cooperation with the US Federal Trade Commission, revealed that the transaction as notified would have led to many competition problems in agricultural insecticides, herbicides, fungicides as well as in seed treatment,

⁽¹⁾ COMP/M.2416 *Tetra Laval/Sidel*, 30.1.2002.

⁽²⁾ COMP/M.2283 *Schneider/Legrand*, 30.1.2002.

⁽³⁾ M.2547.

molluscicides, professional pest control products and certain animal health products (anti-flea preparations for cats and dogs). The Commission decided to clear the case, subject to substantial divestitures. As initially notified, the operation would have led to the creation or strengthening of dominant positions on about 130 markets for crop protection, professional pest control and animal health products. But Bayer offered a comprehensive set of commitments, including the sale, in a single package, of best-selling insecticide Fipronil and a number of fungicides, which together constitute ACS's entire European seed treatment business. The commitments fully resolve the Commission's competition concerns, enabling it to issue an Article 8(2) clearance decision.

215. The Commission cleared three cases involving Haniel Baustoff-Industrie Zuschlagstoffe GmbH (Haniel), a German company active in the building materials sector. *Haniel/Fels*⁽¹⁾, *Haniel/Ytong*⁽²⁾ and *Haniel/Cementbouw/JV (CVK)*⁽³⁾ were all cleared after in-depth investigation and, in two cases, after substantial undertakings had been submitted.

216. The first was the acquisition of Fels-Werke GmbH (Fels), also a German company active in the building materials sector. The Commission examined carefully the deal's impact in the Dutch market for wall building materials. In this market, Haniel's activities consisted of an indirect 50 % stake in CVK, a cooperative comprising all existing production facilities of sand-lime products in that country. The other 50 % of CVK is indirectly owned by Cementbouw, a Dutch building materials group. The Commission concluded that Haniel, through CVK, already held a dominant position in the market for wall building materials for load-bearing walls, with a market share in excess of 50 %. However, it was concluded that the acquisition of Fels would not further strengthen this position of dominance as Haniel's share of the market would increase only to a very small extent. This acquisition was therefore granted regulatory approval⁽⁴⁾.

217. The second operation considered by the Commission involved the proposed acquisition by Haniel of Ytong Holding AG (Ytong), another German company active in the building materials sector. The acquisition of Ytong would have strengthened Haniel's dominant position in the market for wall building materials. Haniel was already the only supplier of sand-lime products in the Netherlands and, by acquiring Ytong, Haniel would also become the leading supplier of cellular concrete. Therefore, building materials traders and construction companies likewise would have been even more dependent on the products offered by Haniel, thereby giving Haniel additional power to raise prices above competitive levels to the detriment of its customers. As the proposed divestiture of Ytong's business in the Netherlands would eliminate the overlap in the Netherlands, the Commission was able to approve the operation.

218. The third case was, in fact, a retroactive clearance of the 1999 acquisition of the Dutch sand-lime joint venture CVK by the Haniel group of Germany and Dutch firm Cementbouw. The agreement only came to the Commission's knowledge during the course of its investigations into Haniel's acquisition of Fels and of Ytong. Haniel and Cementbouw took control of CVK and, indirectly, its members in 1999 through a series of agreements, but did not notify them to the Commission. After a careful analysis of the 1999 CVK deal, notified in January 2002, the Commission came to the conclusion that the concentration would have led to a dominant position on the part of the combined entity on the Dutch market for wall building materials for load-bearing walls, with a market share substantially in excess of 50 %. CVK would have been, together with one of its parent companies (Cementbouw), the only suppliers of sand-lime products, the wall building materials most in demand by construction companies in the Netherlands. This would have made Dutch building materials traders and construction companies, an important sector for the economy, dependent on CVK.

219. In order to meet the Commission's competition concerns, Haniel and Cementbouw undertook to terminate their joint control over CVK and its members. Furthermore, joint sales and marketing activities through CVK will be terminated. As a result of this undertaking, two groups of sand-lime companies will compete in the Dutch building materials sector, and the

⁽¹⁾ COMP/M.2495 *Haniel/Fels*, 21.2.2002.

⁽²⁾ COMP/M.2568 *Haniel/Ytong*, 9.4.2002.

⁽³⁾ COMP/M.2650 *Haniel/Cementbouw/JV (CVK)*, 26.6.2002.

⁽⁴⁾ In October 2001, at the same time that the Commission had started its in-depth investigation into the Dutch building materials market, it had referred the review of the transaction's impact in the relevant German markets to the German Federal Cartel Office. Subsequently the Commission also referred the German aspects of Haniel's acquisition of Ytong to the Federal Cartel Office. Both deals were subsequently cleared subject to commitments.

concentration will not create (or strengthen) a dominant position in the relevant market.

220. In May, the bid by Carnival Corporation to take over P&O Cruises ⁽¹⁾ was cleared unconditionally after an in-depth investigation. On 16 December 2001, Carnival Corporation, a cruise company active worldwide, launched a bid to acquire all the shares in P&O Princess plc, a UK-based cruise company also active worldwide. The UK competition authorities requested referral of the case pursuant to Article 9 of the ECMR. The Commission did not refer the case as it initially also raised concerns in other Member States, particularly in Germany.

221. Carnival and P&O Princess accounted in 2000 for around a third of cruise passengers in the EEA, with the main overlap being in the United Kingdom and Germany. Market shares were also high in Italy and Spain, but in these countries the addition of P&O's cruise operations was minimal. An in-depth investigation was opened owing to initial concerns about the parties' strong position in the cruise market in the United Kingdom and in Germany. But after an in-depth analysis it was concluded that the strong growth enjoyed in the market, the absence of substantial barriers to entry and the ability for rivals in the market to shift capacity, for example from the United States to the United Kingdom, would exert a sufficient competitive pressure on Carnival. The deal was subsequently cleared. In the course of its investigation, the Commission had contact with the United Kingdom's Competition Commission, which assessed and cleared a rival bid for P&O Princess by Royal Caribbean, and with the Federal Trade Commission of the United States, which examined and cleared both deals.

222. In December, the Commission authorised, subject to conditions, the joint acquisition of German regional gas wholesaler Gas Versorgung Süddeutschland (GVS) by German electricity firm Energie Baden-Württemberg AG (EnBW, controlled by Electricité de France) and Italian gas and petroleum firm ENI SpA ⁽²⁾. The operation, as initially notified to the Commission, would have strengthened GVS's dominant position on the wholesale gas market in Baden-Württemberg, in south-west Germany, by securing GVS's hold on EnBW's local distributors. In

order to address these competition concerns, the parties proposed, at an early stage of the in-depth investigation, to grant early termination rights to all local gas distributors which had entered into long-term supply contracts with either GVS or EnBW's existing subsidiaries Neckarwerke Stuttgart AG (NWS) and EnBW Gas GmbH. The undertakings given by the parties will potentially free up substantial demand as local distribution companies can switch to other gas wholesale suppliers. The timing of the commitments matches the arrival of increased competition in Baden-Württemberg with the completion of a new Wingas pipeline, which is expected for the end of 2004. Wingas operates its own gas pipeline system in Germany, and the new pipeline will cross Baden-Württemberg from east to west giving access to the high-consumption Stuttgart area.

2. Judicial review of merger decisions in 2002

223. During the course of 2002 the European Court of First Instance handed down three judgments in three merger prohibition cases. The speed with which two of these judgments were issued was made possible by the application of a new expedited ('fast-track') procedure introduced in 2000, which has greatly enhanced the effectiveness of the judicial review of the Commission's merger control procedure. There were 16 appeals against Commission decisions pending before the Court of First Instance and the Court of Justice at the end of 2002. Some decisions have generated more than one appeal.

2.1. *Airtours v Commission* ⁽³⁾

224. On 6 June, the Court of First Instance annulled the Commission's decision to prohibit a merger between Airtours and First Choice, two UK-based holiday tour operators. The Commission had received the notification of Airtours bid to take over First Choice on 29 April 1999. After an in-depth phase II investigation, the Commission decided on 22 September 1999 to prohibit the merger because the merger would have created a situation of collective dominance in the market for short-haul foreign package holidays in the United Kingdom ⁽⁴⁾.

⁽¹⁾ COMP/M.2706 *Carnival Corporation/P&O Cruises*, 24.7.2002.
⁽²⁾ COMP/M.2822 *ENBW/ENI/GVS*, 17.12.2002.

⁽³⁾ Judgment of the Court of First Instance in Case T-342/99 *Airtours plc v Commission of the European Communities*.

⁽⁴⁾ Case No IV/M.1524 *Airtours/First Choice*.

225. After the merger there would have been three major tour operators left in the market: the merged entity (with $19.4 + 15.0 = 34.4$ % market share), Thomas Cook (20.4 %) and Thomson (30.7 %). All other players would have had less than 3 %. The Commission's view was that the three remaining large operators would be able to coordinate behaviour by restricting the capacity put on sale, thereby raising prices for British consumers.

226. The applicant had argued that the Commission had used a new and incorrect definition of collective dominance. The Commission had stated in the decision that it is not a necessary condition for the finding of collective dominance that the oligopolists will behave tacitly as if they were a cartel. Collective dominance in the context of the merger regulation could also occur in a situation where a 'merger makes it rational for the oligopolists, in adapting themselves to market conditions, to act — individually — in ways which will substantially reduce competition between them, and as a result of which they may act, to an appreciable extent, independently of competitors, customers and consumers' ⁽¹⁾. This statement was not of immediate relevance for this particular merger since the Commission had indeed found that the conditions for tacit coordination were present and the Court of First Instance thus abstained from giving its opinion as to whether the concept of collective dominance could include other situations than tacit coordination. The Court of First Instance concluded that 'since the decision is a measure applying Article 2 of Regulation No 4064/89 to a specific concentration, the Court must, in its review of the legality of the decision, confine itself to the position adopted by the Commission in relation to the transaction as notified' ⁽²⁾.

227. A number of features in the market had led the Commission to conclude that there was an incentive for the big operators to coordinate tacitly. The investigation had shown that operators were interdependent, that the financial markets were hostile to aggressive strategies based on organic growth and that institutional investors owned significant shares in several of the operators.

228. The Court of First Instance found, however, that the Commission had not mustered enough evidence for its claim. In 1997, the UK Monop-

lies and Mergers Commission (MMC) published a detailed study of the foreign package holiday business. This report concluded that in 1997 the market was broadly competitive. The Court of First Instance placed great emphasis on some of the findings in this report and was in the end not convinced that the situation at the time of the merger differed sufficiently from that analysed in the MMC report to justify the Commission's concerns.

229. The Court of First Instance found that the Commission made an error of assessment when it concluded that, if the transaction were to proceed, the three main operators would have an incentive to cease competing with one another. It found that the Commission had not provided adequate evidence in support of its claim that there was already a tendency in the industry towards collective dominance and that it had not appropriately taken the volatility of market shares into account ⁽³⁾. It also found that the Commission had misinterpreted the data available to it concerning demand growth ⁽⁴⁾.

230. With respect to the general analysis of tacit coordination, the Court of First Instance specified three necessary conditions for a collective dominant position as defined in this case to exist: transparency, deterrent mechanisms and the unlikelihood of a response from competitors and consumers ⁽⁵⁾.

Transparency

231. For tacit coordination to be credible, each member of the oligopoly must have the ability to know how the other members are behaving in order to monitor whether or not they are adopting the common collusive policy. The Commission had concluded in its assessment that the market was sufficiently transparent, partly due to the frequent interaction of the oligopolists, partly due to the publication of brochures that allowed each operator to closely monitor the capacity of the others. The Court of First Instance disagreed with this assessment ⁽⁶⁾.

Deterrents

232. For tacit coordination to be sustainable there must exist punishment or retaliation mech-

⁽¹⁾ Decision, paragraph 54.

⁽²⁾ Judgment, paragraph 53.

⁽³⁾ Judgment, paragraph 120.

⁽⁴⁾ Judgment, paragraph 133.

⁽⁵⁾ Judgment, paragraph 62.

⁽⁶⁾ Judgment, paragraph 180.

anisms that deter the oligopolists from departing from the common policy. The Commission had found that several punishment mechanisms existed. An increase in capacity of one operator could severely hurt the others and since each operator sold the products of the other operators in its retail chain, it could de-rack a deviator's products. The Court of First Instance rejected these deterrent mechanisms since they were either not credible, or costly to implement ⁽¹⁾.

Reaction from competitors and customers

233. Tacit coordination is only stable if current and future competitors as well as consumers are not able to jeopardise the results expected from the common policy. The Commission did not believe that the fringe could constrain the oligopolists because the vertical integration of the big operators had brought the fringe into a situation of dependence vis-à-vis the members of the oligopoly. The Court of First Instance concluded that the Commission's assessment was incorrect and that it underestimated their ability to react as a countervailing force capable of counteracting the creation of a collective dominant position ⁽²⁾.

234. Despite its negative finding, the judgment should be welcomed as a significant step forward in that it brings clarity as to what are the necessary standards of proof in cases of creation of collective dominance.

2.2. *Schneider v Commission*

235. On 22 October, the Court of First Instance, adjudicating for the first time under an expedited procedure in a merger case, annulled the Commission decision of 10 October 2001 declaring the merger between the French electrical equipment manufacturers Schneider and Legrand incompatible with the common market ⁽³⁾.

236. The annulment of the Commission decision was based on two sets of considerations: first, errors of analysis and assessment and, second, infringement of the rights of the defence.

237. With regard to the Commission's economic analysis of the impact of the merger operation, the Court of First Instance considered that it was

vitiated by errors of analysis and assessment which deprived it of probative value.

238. First, the Court of First Instance noted that the Commission had relied on evidence such as the range of products and the combination of brands which it would have been able to offer throughout the EEA in assessing the economic power which the new entity resulting from the merger would enjoy in each of the different national markets affected by the operation. Without ruling out in principle the possibility of taking into account, on a supplementary basis, transnational factors in the analysis of the effects of a merger on national markets, the Court of First Instance held that, in the present case, the Commission had not shown that such effects existed in each of the national markets affected.

239. Secondly, the Court of First Instance held that the Commission had been wrong not to take account of the internal sales of certain vertically integrated competitors, leading it to overestimate the strength of the entity resulting from the merger. The Court considered that the prices of non-integrated manufacturers such as Schneider and Legrand were subject to direct competitive pressure from integrated manufacturers when it came to carrying out large construction projects following an invitation to tender.

240. The Court of First Instance then laid down the important principle that, whatever the scale of the defects affecting a Commission decision declaring a merger incompatible with the common market, those defects cannot lead to its annulment if it follows from the other elements of the decision that implementation of the operation will create or strengthen a dominant position as a result of which effective competition will be significantly impeded. The Court found that the merger between Schneider and Legrand did have such an effect on the French markets.

241. However, with regard to those markets, the Court of First Instance held that the Commission had infringed Schneider's rights of defence as it had included in its decision an objection that did not feature in the statement of objections. The objection in question concerned the position of strength of the entity resulting from the merger enjoyed vis-à-vis wholesalers. The Court of First Instance took the view that this infringement of Schneider's rights of defence had affected the outcome of the proceedings in two respects. First, Schneider had not been given a proper

⁽¹⁾ Judgment, paragraph 207.

⁽²⁾ Judgment, paragraph 277.

⁽³⁾ Judgment of the Court of First Instance in Case T-310/01 *Schneider Electric SA v Commission of the European Communities*.

opportunity to comment on the objection, either in its reply to the statement of objections or at the hearing. Secondly, Schneider had not been given an opportunity to submit in good time proposals for divestiture capable of resolving the competition problems identified by the Commission on the French markets.

242. The Court of First Instance considered that, in view of the requirement for speed which characterises the overall scheme of Regulation (EEC) No 4064/89, the period of 12 days, corresponding to five working days, set by the Commission to allow the parties to respond to a request for information under Article 11(5) of the regulation was reasonable despite the large number of questions put (322).

243. In a separate judgment⁽¹⁾ delivered the same day, the Court of First Instance, again acting under the expedited procedure, annulled the Commission decision of 30 January 2002 ordering Schneider to demerge from Legrand. The Court held that, since the decision finding that the merger operation was incompatible with the common market had been annulled, the demerger decision had no basis in law.

244. In both these cases, the Court of First Instance delivered its judgment approximately 10 months after the application was lodged and approximately 12 months after the incompatibility decision was adopted. It did so, moreover, before the deadline imposed on Schneider and Legrand to demerge had expired.

245. After careful consideration, the Commission decided not to appeal against the judgment in this case.

2.3. *Tetra Laval v Commission* ⁽²⁾

246. On 25 October, the Court of First Instance annulled the Commission's decision of 30 October 2001 declaring the merger between Tetra Laval, a Swiss packaging company active mainly in carton packaging, and Sidel, a French packaging company active mainly in plastic PET packaging equipment, incompatible with the common market.

247. The case is of wide significance. It is the first case in which the Court of First Instance has expressly considered a merger involving conglomerate issues and creates new, potentially controversial case-law in this field by directly addressing issues such as the assessment of conglomerate mergers under the ECMR, the relationship between Article 82 and the ECMR, and the role of behavioural remedies. The case was dealt with under the Court of First Instance's expedited procedure.

The Commission's decision

248. The Commission's decision focused mainly on the likely anticompetitive conglomerate effects of the merger. The Commission concluded that the two companies were active in distinct product markets, carton packaging and PET packaging equipment respectively, which were, however, closely neighbouring markets. PET is a technical substitute for the so-called sensitive products that traditionally have been packaged in carton (liquid dairy products, juices, fruit-flavoured still drinks, and tea/coffee drinks) and PET is expected to grow significantly in those segments in the near future in competition with carton. The merger would create a market structure allowing the merged entity to leverage its dominant position in carton to turn its leading position in PET packaging equipment into a dominant one. The merger would also strengthen Tetra's existing dominance in carton by eliminating the actual and potential competition represented by Sidel as the leading company in a neighbouring, rival market. The Commission rejected remedies offered by Tetra consisting mainly of promises not to engage in abusive practices, to hold Sidel as a separate company and to offer a licence for Sidel's SBM machinery to an independent third party. The Commission found that the remedies were not viable, impossible to monitor and insufficient to address the serious anticompetitive effects of the merger.

The Court of First Instance judgment

249. The Court of First Instance was asked to annul the Commission's decision on the basis of procedural and substantive arguments. Regarding procedure, the applicant claimed that it had been unlawfully denied access to the file in respect of an expert report and the responses to a market survey on its offer of commitments. On the substance, Tetra claimed that the Commission had

⁽¹⁾ Case T-77/02.

⁽²⁾ Judgment of the Court of First Instance in Case T-05/02 *Tetra Laval v Commission of the European Communities*.

not shown that the merger would lead to the creation or strengthening of a dominant position as leveraging was not possible, foreclosure could not take place and elimination of potential competition would not change Tetra's incentives to innovate and lower prices in the carton market.

250. The Court dismissed the applicant's procedural arguments. It found that the applicant had had sufficient access to the expert report and had been able to understand and to comment on this report. As regards the market test of the commitments, the Court found that the Commission was entitled to provide access in the form of summaries in order to protect the identity of certain respondents, who feared retaliation. The Court also dismissed claims made by Tetra that the questionnaires were inaccurate or misleading and concluded that it was not apparent that respondents were misled or confused. The rights of defence were therefore not infringed by the use of summaries.

251. As regards the substantive issues, the Court confirmed that the Commission was entitled to assess the possible anticompetitive conglomerate effects of the merger, even though, in the Court's view, mergers between undertakings active on distinct markets do not usually give rise to competition concerns (paragraph 150). The Court observed that, in certain circumstances, the means and capacities brought together by a conglomerate merger may immediately create conditions allowing the merged entity to acquire, in the relatively near future, a dominant position on a neighbouring market by leverage (paragraph 151). Indeed, the Court acknowledged that, in this case, the Commission had shown, on the basis of well-established and objective evidence, that the two markets in question were closely related and that the merged entity would have the ability to engage in leveraging practices (paragraph 199).

Leveraging

252. However, noting that, while the Commission enjoys a certain margin of discretion, the lapse of time before the emergence of the anticipated dominant position requires the Commission's analysis of the future position to be 'particularly plausible' (paragraph 162), the Court held that, in the circumstances of the case, the merged entity would be unlikely to engage in leveraging practices with significant, anticompetitive foreclosure effects.

253. The Court based its reasoning on three elements. First, the Commission should have considered the extent to which the incentives of the merged entity to leverage would be reduced, or even eliminated, by the illegality of the conduct in question, the likelihood of its detection, action taken by the competent authorities, both at EU and national level, and the financial penalties which could ensue (paragraph 159). Furthermore, the Commission should have taken into account the behavioural commitments offered by the applicant in assessing the likelihood of the merged entity engaging in unlawful leveraging activity (paragraph 161). In the absence of such an assessment, the Court based its analysis of leveraging exclusively on conduct 'which would, at least probably, not be illegal' (paragraph 162). Second, the Court disagreed with the Commission's assessment of the growth prospects of PET in respect of milk and fruit juice, considering that it was not based on convincing evidence (paragraphs 203 to 214). Third, the Court of First Instance held that the decision did not provide sufficient evidence to justify the definition of sub-markets among SBM machines with reference to their end-use (paragraph 269) and that there was no distinct market for SBM machines for sensitive products. Finally, the Court of First Instance found that the Commission underestimated the importance of the merged entity's competitors on the carton and the PET side and the interaction of PET and carton with other packaging materials such as glass, cans and HDPE where the merged entity would not be present or would have a modest position. On this basis, the Court thus found that the Commission committed a manifest error of assessment in concluding that a dominant position would be created on PET equipment markets, and particularly on those for low- and high-capacity SBMs (paragraph 308).

Reduction of potential competition in the carton market

254. Again, the Court acknowledged that the Commission was entitled to examine potential anticompetitive conglomerate effects, namely the significance for the carton markets of a reduction of potential competition from the neighbouring PET equipment markets (paragraph 323). However, the Court held that Tetra's behaviour as regards pricing and innovation in the carton market would not change after the merger as there was a sufficient level of competition to ensure that Tetra would have to continue to fight and

innovate. Therefore, the Court concluded that it had not been demonstrated that the merged entity's position would be strengthened vis-à-vis its competitors on the carton markets.

255. The Commission has lodged an appeal against the judgment in this case.

3. Remedies

256. Ten cases in 2002 were cleared after an extended (six-week) phase I investigation and after undertakings had been submitted by the merging parties that provided a clear-cut solution to identified competition problems (resulting in a decision pursuant to Article 6(2) of the merger regulation). Many of the cases outlined below were preceded by extensive discussions between the Commission and the merging parties prior to notification, during which potential competition problems were identified. This can be an effective way for companies to obtain clearance of a notified merger, in particular where they are aware of the likely competitive issues and have already considered potential divestitures.

SEB/Moulinex ⁽¹⁾

257. *SEB/Moulinex* was the first such decision in 2002. It involved SEB, a French manufacturer of small electrical household appliances (e.g. deep-fryers, toasters, coffee machines, kettles, food processors, irons) under brands such as Tefal, Rowenta Calor and SEB. Moulinex, also French, is a direct competitor of SEB, and owns global brands such as Moulinex and Krups and Swan in the United Kingdom. SEB's acquisition of Moulinex was expected to have significant effects on competition in France, where SEB is the market leader for some products and Moulinex for others. These aspects were referred under Article 9(2)(a) to the French authorities, following their request received on 7 December 2001. The acquisition would also have raised competition concerns in Portugal, Greece, Belgium and the Netherlands, where one or other of the two companies had large market shares before this transaction. In Germany, Austria, Denmark, Sweden and Norway the transaction would have appreciably altered the terms of competition on several product markets, especially for deep-fryers. The non-French aspects of the transaction were authorised

after SEB proposed granting exclusive licences to use the Moulinex brand for a period of five years for the sale of small electric household appliances in nine countries (Portugal, Greece, Belgium, the Netherlands, Germany, Austria, Denmark, Sweden and Norway). SEB will not reintroduce the Moulinex brand in those countries for a further period of three years from the expiry of the exclusive licence, so as to allow the licensee time for the gradual introduction of a brand name of its own.

Masterfoods/Royal Canin ⁽²⁾

258. Masterfoods, a French subsidiary of the American company Mars Inc., notified its proposed acquisition of the French pet food company Royal Canin SA in January. Mars manufactures snack foods, ice cream, pet foods, including Pedigree, Advance, Cesar, Whiskas and Sheba brands, which are sold worldwide, and national/regional brands such as Canigou and Brekkies. Royal Canin is a leading supplier of dry prepared pet food products and has developed its branded business primarily through sales in specialist outlets throughout the European Union. The six-week examination of the transaction identified competition concerns in the dry prepared pet foods markets in France and Germany. To address these concerns, Mars undertook to divest for the whole of Europe its businesses connected to five of the merged group's pet food brands, i.e. Advance, Premium, Royal Chien, Playdog and Brekkies, together with two major manufacturing plants and all other assets relating to the divested business. The merger cannot be implemented before the conditions have been fulfilled. The Commission examined the impact of the acquisition only for the European Union, as pet food products are excluded from the application of the EEA Agreement between the EU, Norway, Iceland and Liechtenstein.

Solvay/Montedison/Ausimont ⁽³⁾

259. In February, Solvay, a Belgian chemicals and pharmaceuticals group, notified to the Commission its planned purchase of Ausimont, an Italian chemicals company with operations in Italy, Germany, Japan and the United States. The operation led to serious concerns in two markets:

⁽¹⁾ COMP/M.2621 *SEB/Moulinex*, 8.1.2002.

⁽²⁾ COMP/M.2544 *Masterfoods/Royal Canin*, 15.2.2002.

⁽³⁾ COMP/M.2690 *Solvay/Montedison — Ausimont*, 9.4.2002.

persalts, a raw material with a bleaching agent used in the production of detergents; and non-coatings polyvinylidene difluoride (PVDF), a high-performance fluoropolymer. In the persalts markets, the deal would have created a direct link between Solvay — the leading producer in Europe — and Degussa, its largest competitor, through MedAvox, a joint venture set up by Degussa and Ausimont. Solvay, Degussa and MedAvox hold over 75 % of the EEA persalts market. To resolve this, Solvay offered to divest Ausimont's 50 % stake in MedAvox, effectively severing the links between Solvay and Degussa. The non-coatings PVDF market was already highly concentrated with only four players: Solvay, Ausimont, Atofina and Kureha. Solvay and Atofina are by far the largest players with over 90 % of the market. The Commission's investigation raised concerns that, in the light of the characteristics of the market, the operation could have brought about a situation of joint dominance for Solvay and Atofina. To address these concerns, Solvay committed itself to divesting its non-coatings PVDF plant based at Decatur in the United States. This is one of six production facilities for non-coatings PVDF and represents around 20 % of worldwide capacity. This divestment also included Solvay's shares in Alventia, a production-only joint venture company which produces vinylidene difluoride (VF2) at Decatur. VF2 is the key raw material for PVDF. The Commission and the US Federal Trade Commission cooperated in their analysis of Solvay's acquisition of Ausimont.

*Imperial Tobacco/Reemtsma
Cigarettenfabriken* ⁽¹⁾

260. This case involved two of the world's biggest cigarette manufacturers. Imperial Tobacco manufactures and sells a range of tobacco products, including Superkings, Lambert and Butler, Embassy, John Player Special, Regal and Richmond cigarette brands, Drum 'roll-your-own' tobacco and Rizla cigarette papers. Reemtsma, the target, is the world's fifth largest cigarette manufacturer, supplying the West and Davidoff cigarette brands. The activities of the parties are mostly complementary and the investigation revealed substantial competition concerns only in the UK cigarette market. Imperial Tobacco and

Gallaher are the clear leaders in this market. Gallaher's strength is in the premium brand segment whereas Imperial Tobacco's is more in the low-priced sector. While Reemtsma's market share is relatively small, it has a unique position in the supply of own-label cigarettes, for which it has been the only significant supplier. Unusually, Reemtsma owns many of the own-label cigarette trademarks such as Red Band in the United Kingdom, even though exclusivity is granted to distributors. The acquisition of Reemtsma would therefore give Imperial Tobacco not only a strong position in the low-priced cigarette sector but would also establish it as the only supplier of own-label cigarettes. As own-label cigarettes are a significant source of competition in the UK market, particularly in the low-priced sector, this situation gave rise to serious competition concerns.

261. To alleviate these concerns, Imperial Tobacco undertook not to develop the trademarks for its own account and to maintain the exclusivity distributors currently enjoy. It also undertook that, if own-label distributors were to find other suppliers in the future, they would retain the trademarks at stake. These undertakings should remove any dependency of distributors on Imperial Tobacco, thereby ensuring that own-label cigarettes continue to be an effective source of competition in the UK market.

Barilla/BPL/Kamps ⁽²⁾

262. Barilla and the Italian bank Banca Popolare di Lodi Scarl (BPL) launched a public bid for all of Kamps's listed shares which would have given Barilla and BPL joint control over Kamps. Barilla produces and sells pasta and pasta sauce products, bakery products (bread, bread substitutes and cakes) and ice cream. While most of the company's bakery operations are centred in Italy, Barilla's Wasa subsidiary is a leading crispbread manufacturer in several European countries, notably Germany. Kamps produces and sells bakery products across Europe. Among the brands it owns are Lieken Urkorn and Golden Toast. The deal would have reinforced Barilla's leading position in Germany for crispbread. Barilla already owned the Wasa brand, by far the market leader in Germany, and the addition of Kamps's Lieken Urkorn would have strengthened this position. To address these concerns,

⁽¹⁾ COMP/M.2779 *Imperial Tobacco/Reemtsma Cigarettenfabriken*, 8.5.2002.

⁽²⁾ COMP/M.2817 *Barilla/BPL/Kamps*, 25.6.2002.

Barilla undertook to divest Lieken Urkorn's crispbread business to a viable competitor with experience in the food sector.

BP/Veba Oel ⁽¹⁾

263. This case involved BP plc acquiring control of the whole of Veba Oel, a joint venture between BP and E.ON which had been approved by the Commission in December 2001 ⁽²⁾ and by the German Federal Cartel Office. The creation of the Veba Oel joint venture had been cleared with conditions addressing competition concerns which resulted from the combination of BP's and Veba Oel's petroleum activities. The acquisition by BP of full control of Veba Oel did not give rise to new competition problems. However, in view of the fact that some of the conditions imposed in the BP/E.ON joint venture by both the Commission and the Federal Cartel Office had not yet been met, the original concerns had not been fully eliminated. To address these concerns, BP committed itself to complying fully with the undertakings previously submitted to the Commission and to the Federal Cartel Office in the BP/E.ON case. The Commission was therefore able to clear the transaction, subject to full compliance with this commitment.

Telia/Sonera ⁽³⁾

264. The acquisition of the Finnish telecommunications group Sonera Corp. by Sweden's Telia AB was also cleared following a phase I investigation. Telia and Sonera are the leading telecommunications operators in their respective countries. The transaction would have led to direct overlaps in the parties' activities in Finland for mobile communications services to retail customers, wholesale international roaming and wireless local area network (WLAN) services. The concerns raised by these overlaps were remedied by the parties' commitment to divest Telia's mobile communications business in Finland, including its WLAN business. Competition concerns also arose from the parties' strong market positions in a number of vertically related markets, in particular certain retail markets, wholesale call termination on Telia/Sonera's fixed and mobile telephony networks (where they enjoy a monopoly position) and the provision of whole-

sale international roaming in Sweden and Finland. Vertical integration in this context would have given the merged entity the incentive and ability to foreclose competitors from the retail services markets in both countries, resulting in the strengthening of already strong positions for mobile communications services and bundled voice and data communications solutions. These foreclosure concerns were remedied by the companies' offer to create a legal separation between their fixed and mobile networks as well as services in Finland and in Sweden. They also undertook to grant non-discriminatory access to their networks. Finally, the parties offered to divest Telia's cable TV business in Sweden. Cable TV networks are considered to be the most credible substitute for the infrastructure of incumbent telecommunications firms.

RAG/Degussa ⁽⁴⁾

265. The acquisition of the German specialty chemicals company Degussa AG by the German mining and technology group RAG initially raised competition concerns in the construction materials sector. RAG Aktiengesellschaft is an international mining and technology group based in Germany. Its business activities comprise coal mining, power generation, environmental technology, chemicals and plastics. Degussa AG is an international company based in Germany which makes specialty chemicals. Its activities range from food additives to construction chemicals, coatings and specialty polymers. Degussa is currently 64 %-owned by the German utility group E.ON. The Commission's investigation of the transaction showed that the combination of RAG's and Degussa's activities could have led to the creation of a dominant position in the field of input products for concrete admixtures. These products are designed to influence the viscosity and water content of concrete to make it more workable. In order to remove these competition concerns, RAG offered to divest its Naphtalene Sulfonate (NSF) business in the EU, an important concrete admixture input product, including production plants in Italy, Spain and Germany. These commitments eliminated the overlap of RAG's and Degussa's activities and enabled a viable new competitor to be created in order to remedy the removal of Degussa as an independent supplier.

⁽¹⁾ COMP/M.2761 *BP/Veba Oel*, 1.7.2002.

⁽²⁾ COMP/M.2533 *BP/E.ON*, 20.12.2001.

⁽³⁾ COMP/M.2803 *Telia/Sonera*, 10.7.2002.

⁽⁴⁾ COMP/M.2854 *RAG/Degussa*, 18.11.2002.

4. Article 9 and Article 22 referral cases — new developments

4.1. Introduction

266. The year 2002 was marked by a significant increase in referral cases on the basis of Article 9 of the ECMR (7 in 2001, 11 in 2002) ⁽¹⁾ and for the first time since the entry into force of the merger regulation on 21 September 1990 Member States in two instances made a joint referral to the Commission pursuant to Article 22(3) of the ECMR ⁽²⁾. Remarkably, half of the Article 9 cases were referred to the relevant national authorities in January and February of this year. One of these cases ⁽³⁾ concerned a referral to the Norwegian Government pursuant to Article 6 of Protocol 24 to the EEA Agreement. In *Leroy Merlin/Brico* for the first time a case has been referred to three different Member States. The Commission welcomes this development, because it fits well into the context of the merger review process, which, as stated below, has as one of its main objectives the optimisation of the allocation of cases between the Commission and Member States. Furthermore, the use of Article 22(3) of the ECMR by Member States demonstrates the successful cooperation between the Commission and national competition authorities (NCAs) to the benefit of European companies.

267. Another striking development this year was the number of appeals against Article 9 decisions. Such appeals were lodged both by competitors and by parties to a transaction. The first such decision appealed against was taken in *SEB/Moulinex*. The referral decision in *BAM NBM/Hollandsche Beton Groep* was appealed against in September. However, following a clearance decision by the Dutch competition authorities, that appeal was withdrawn. In *Sogecable/Canalsatélite/Via Digital*, two appeals have recently been lodged against the referral decision.

⁽¹⁾ M.2621, *SEB/Moulinex*, 8.1.2002; M.2502, *Cargill/Cerestar*, 18.1.2002; M.2683, *Aker Maritime/Kvaerner (II)*, 23.1.2002; M.2662, *Danish Crown/Steff-Houlberg*, 14.2.2002; M.2639, *Compass/Restorama/Rail Gourmet*, 26.2.2002; M.2730, *Connex/DNVBVG/JV*, 24.4.2002; M.2760, *Nehlsen/Rethmann/SWB/Bremerhaven*, 30.5.2002; M.2845, *Sogecable/Canalsatélite/Via Digital*, 14.8.2002; M. 2881, *Koninklijke BAM NBM/HBG*, 3.9.2002; M.2898, *Leroy Merlin/Brico*, 13.12.2002; and M.2857, *Electrabel Customer Solutions/Intercommunale d'Electricité du Hainaut*, 23.12.2002.

⁽²⁾ M.2698, *Promatech/Sulzer*, 17.4.2002; M.2738, *GEES/Unison*, 17.4.2002.

⁽³⁾ *Aker Maritime/Kvaerner II*.

268. More detailed information on the above-mentioned Article 9 and Article 22 referral cases is set out below.

4.2. Referral cases under Article 9 of the ECMR

SEB/Moulinex

269. On 8 January, the Commission authorised SEB to acquire sole control of Moulinex, subject to compliance with commitments. On the same day, the Commission referred the question of the impact of the merger in France. Both SEB and Moulinex ⁽⁴⁾ are French companies manufacturing small electrical household appliances, such as deep-fryers, toasters, coffee makers and espresso machines, kettles, tabletop ovens, sandwich, waffle and snack toasters, barbecues and grills, food processors and irons. Extensive market investigation evidenced the national dimension of the markets for small electrical household appliances. As far as the French market was concerned, market investigation further demonstrated that there was a risk that the transaction might lead to the substantial strengthening of the current market leader and to the elimination of a competitor.

270. On 15 July, the French Minister for Finance, Economic Affairs and Industry cleared the transaction for its domestic part, on the grounds of the failing company defence. This argument was not taken up by the Commission in its assessment of the other EU national markets. The referral decision, as well as the first-phase clearance decision, have been appealed against before the Court of First Instance by competitors Babiliss and Philips.

Cargill/Cerestar ⁽⁵⁾

271. This case concerned the acquisition of the French undertaking Cerestar by US company Cargill Inc. Cargill is a leading international player in a variety of agricultural businesses, such as commodities trading and the processing of grains. Cerestar is Europe's leading producer of starch and starch derivatives. The United Kingdom requested referral of the proposed concentration as far as the impact in the UK market for glucose syrups and blends was concerned. The

⁽⁴⁾ See above.

⁽⁵⁾ COMP/M.2502 *Cargill/Cerestar*, 18.1.2002.

Commission cleared the operation for the whole of the European Economic Area with the exception of the UK glucose syrups and blends market; the examination of these latter aspects was referred to the United Kingdom's Office of Fair Trading on 21 January. After an in-depth investigation the case was cleared by the UK authorities.

Aker Maritime/Kvaerner (II) ⁽¹⁾

272. In January, the Commission referred the examination of the impact on the oil and gas installations markets of the proposed acquisition of the Anglo-Norwegian firm Kvaerner by Aker Maritime of Norway to the Norwegian competition authority. This was the first time the Commission had referred a case to an EFTA State. As regards the shipbuilding sector, the Commission granted a clearance. The Norwegian Government had requested the Commission to refer the case as it considered that the planned combination of the parties' oil and gas activities would mainly raise competition issues relating to the Norwegian market, in particular the market for new oil and gas installations (EPC contracts) and the market for maintenance and modifications of platforms (MMO). Article 6 of Protocol 24 to the EEA Agreement allows the Commission to refer a case to the competent authorities of an EFTA State if a transaction has its main impact in an EFTA State. Being of the opinion that the Norwegian national authorities were best placed to assess the impact of the deal on the oil and gas markets on the Norwegian continental shelf, the Commission granted the request for referral. The Norwegian authorities subsequently cleared the transaction without commitments.

Danish Crown/Steff-Houlberg ⁽²⁾

273. In *Danish Crown/Steff-Houlberg*, the merger of Denmark's two largest slaughterhouses, the competition concerns were limited to the Danish market. On 28 December 2001, the Danish authorities submitted a request for referral of the case on the grounds that the merger threatened to give rise to severe competition concerns on five markets: the market for the purchase of live pigs, the sale of fresh pork for direct human consumption, the supply of fresh pork for further processing, the supply of processed pork

products and the collection of abattoir by-products in Denmark. On 14 February, the Commission decided to accept the Danish request and to refer the examination of the effect of the transaction on the Danish market to the Danish competition authorities. This was the first occasion on which Denmark had submitted a referral request. Denmark introduced its own merger control law in October 2000. The Danish competition authorities subsequently cleared the case, subject to commitments, in second-phase proceedings.

Compass/Restorama/Rail Gourmet/ Gourmet Nova ⁽³⁾

274. This transaction concerned the proposed acquisition from SAirLines of Switzerland by Compass Group plc, one of the United Kingdom's largest foodservice companies, of Rail Gourmet, Restorama and Gourmet Nova, three food catering businesses. The Commission's review of the case had revealed that the competition concerns were limited to the UK on-train catering market, where after the operation the parties' combined share would be 85 to 95 %. Following a request by the UK authorities, the Commission referred the proposed acquisition by Compass of Rail Gourmet UK to the United Kingdom's Office of Fair Trading. The Commission cleared the rest of the acquisition from SAirLines, comprising Rail Gourmet outside the United Kingdom, part of the Gourmet Nova business and Restorama. The case was subsequently cleared by the UK authorities following an in-depth investigation.

Connex/DNVBVG/JV ⁽⁴⁾

275. On 19 March, the Commission referred to the German Federal Cartel Office a joint venture between Connex Verkehr GmbH, a subsidiary of the French Vivendi group, and Deutsche Nahverkehrsgesellschaft mbH for the provision of local public transport services in the Riesa area (Saxony, Germany). The case was referred as the competitive impact of the transaction was limited to local markets within Germany. In particular, the joint venture would create structural links between the operator of public transport in Hannover and Connex, which, from its established base in the adjacent Schaumburg market, would

⁽¹⁾ COMP/M.2683 *Aker Maritime/Kvaerner (II)*, 23.1.2002.

⁽²⁾ COMP/M.2662 *Danish Crown/Steff-Houlberg*, 14.2.2002.

⁽³⁾ COMP/M.2639 *Compass/Restorama/Rail Gourmet/Gourmet Nova*, 26.2.2002.

⁽⁴⁾ COMP/M.2730 *Connex/DNVBVG/JV*, 24.4.2002.

be best placed to act as a competitor in Hannover. The proposed concentration would link some of the main players in a market that has only recently been opened to competition by private operators. Although, theoretically, operators from anywhere in Europe can bid for licences to operate local public transport in Germany, only competitors who are already active in geographic proximity have so far been successful in breaking into former monopoly markets. The Federal Cartel Office subsequently cleared the case after a phase II investigation.

Nehlsen/Rethmann/SWB/Bremerhavener Entsorgungsgesellschaft ⁽¹⁾

276. By decision of 24 April, the Commission referred the proposed acquisition of joint control of Bremerhavener Entsorgungsgesellschaft mbH by Karl Nehlsen GmbH & Co KG, Rethmann Entsorgungswirtschaft GmbH & Co KG and swb AG to the German Federal Cartel Office. The Federal Cartel Office had requested this referral as the merger threatened to create dominant positions on the regional markets for the incineration of municipal and commercial wastes in Lower Saxony, Bremen and Hamburg. On 17 December, the Federal Cartel Office prohibited the operation on the ground that the operation would lead to the creation or strengthening of a dominant position in certain markets concerning the collection, transport and disposal of household and industrial waste.

Sogecable/Canalsatélite Digital/Vía Digital ⁽²⁾

277. On 3 July, the Commission received a notification under the merger regulation requesting clearance of a proposed acquisition by Sogecable, the dominant pay TV operator in Spain, of DTS Distribuidora de Televisión Digital (Vía Digital), the second-largest pay TV operator in Spain. DTS is controlled by the Spanish undertaking Grupo Admira Media, which belongs to the Telefónica group. Sogecable is controlled jointly by the Spanish media group Promotora de Informaciones (Prisa) and Groupe Canal +, which is owned by Vivendi Universal. The Spanish Government requested the Commission to refer the case on the ground that the merger

threatened to create a dominant position impeding competition in certain distinct markets within Spain. The Commission decided to grant the referral, as its review of the case had confirmed that the concentration would threaten to create or strengthen a dominant position in the following markets geographically limited to Spain: pay TV; acquisition of exclusive rights for premium films and acquisition and exploitation of football and other sports; the sale of TV channels. Furthermore, the Commission investigated the effects of the transaction on several telecommunication markets. The investigation showed that the creation of a link between the dominant operators in pay TV and telecommunications in Spain carried a risk that Telefónica's dominant position would be strengthened in a number of telecommunication markets. On 29 November, the Spanish authorities approved the case, subject to conditions. Two groups of competitors active as cable pay TV service providers have lodged appeals against this referral decision before the Court of First Instance.

Hollandsche Beton Groep/Koninklijke BAM NBM ⁽³⁾

278. This operation concerned the acquisition of Dutch construction company Hollandsche Beton Groep by its rival Koninklijke BAM NBM. The Dutch competition authority (Nederlandse Mededingingsautoriteit) requested a referral of those aspects of the proposed acquisition which concerned the Netherlands, being of the opinion that the proposed concentration threatened to create or strengthen a dominant position on a number of markets in the building sector as well as on a number of markets for the production of asphalt in the Netherlands. The Commission's findings in its first-phase investigation had revealed that such a threat might exist in relation to a possible market for large building projects, in which BAM and HBG were particularly strong, as well as on several regional asphalt markets. Given that the competition concerns were confined to the Dutch market, the Commission considered the Dutch competition authority to be best placed to assess the competitive impact of this case. The case was referred to the Dutch competition authority by decision of 3 September. On the same date the Commission cleared the operation in respect of

⁽¹⁾ COMP/M.2760 *Nehlsen/Rethmann/SWB/Bremerhavener Entsorgungsgesellschaft*, 30.5.2002.

⁽²⁾ COMP/M.2845 *Sogecable/Canalsatélite Digital/Vía Digital*, 14.8.2002.

⁽³⁾ COMP/M.2881 *Hollandsche Beton Groep/Koninklijke BAM NBM*, 3.9.2002.

the Belgian market. On 27 September, the referral decision was appealed against by the parties. However, after further investigation and a clearance decision by the Dutch competition authority on 24 October, the appeal was dropped.

Leroy Merlin/Brico ⁽¹⁾

279. This operation concerned the acquisition of outlets located in France, Spain and Portugal belonging to the Belgian group Brico by the French company Leroy Merlin. Both Brico and Leroy Merlin are specialised in the distribution of DIY ('do-it-yourself') products through large surface area outlets. The transaction would have brought about significant horizontal overlaps in a number of local markets in those three countries. In view of this, the French, Spanish and Portuguese competition authorities requested a referral of the case with respect to the distribution market, being of the opinion that the proposed concentration threatened to create or strengthen a dominant position at the distribution level. The Commission's findings in its first-phase investigation had revealed that such a threat might exist in relation to a possible market definition for large superstores of DIY products, the so-called GSB (*grande surface de bricolage*). Given that a competition analysis had to be carried out in relation to every local market where competition concerns could arise, the Commission considered the national authorities to be best placed to assess the competitive impact of this case. The case was referred to the three Member States on 13 December. In respect of the DIY procurement market, the Commission cleared the operation on the same date as no competition concerns were identified.

Electrabel Customer Solutions/ Intercommunale d'Electricité du Hainaut ⁽²⁾

280. The Commission referred to the Belgian authorities the proposed operation by which Electrabel Customer Solutions (ECS) was to acquire from Intercommunale d'Electricité du Hainaut (IEH) activities concerning the supply of electricity to eligible customers. A referral had been requested as the operation threatened to create or strengthen a dominant position in the market for electricity supply to eligible customers in Belgium. Furthermore, the Belgian author-

ities indicated that a referral of the case would add to consistent decision-making, as it had earlier in the year dealt with five similar concentrations in this market. According to the Belgian liberalisation legislation regulating the electricity market, public utilities (*intercommunales*) are not allowed to engage in the supply of electricity to eligible customers while at the same time managing the distribution network. The relevant legislation prescribes that a default supplier must be appointed by the *intercommunales* in order to separate these two functions and to warrant the continued supply of electricity to eligible customers who have not chosen a supplier. All of the *intercommunales* in which Electrabel participates (*intercommunales mixtes*), including IEH, have appointed ECS as the default supplier. As a result, the transaction would result in a transfer of customers from IEH to ECS. To compensate the *intercommunales* for the loss of revenue from these customers, the parties have re-balanced their financial interests. Hence the case was notifiable under the ECMR. Following an extensive market investigation which confirmed that the transaction threatened to reinforce Electrabel's dominant position in the market for electricity supply to eligible customers in Belgium, and after having concluded that the undertakings offered by the parties were insufficient to remedy the competition concerns identified, the Commission decided to refer the case to the Belgian authorities on 23 December. This referral decision was motivated mainly by the objectives of administrative efficiency and consistency in decision-making.

Referral cases under Article 22(3) of the ECMR

Promatech/Sulzer Textil ⁽³⁾

281. Following the joint referral of the case by the competition authorities of Austria, France, Germany, Italy, Portugal, Spain and the United Kingdom under Article 22(3) of the ECMR, the Commission cleared the acquisition of Sulzer Textil, the textile machinery division of Swiss company Sulzer Ltd, by Italy's Promatech SpA, another producer of weaving machinery. An in-depth investigation showed that the deal would have led to a dominant position on the western European market for rapier weaving machines.

⁽¹⁾ COMP/M.2898.

⁽²⁾ COMP/M.2857 *ECS/IEH*, 23.12.2002.

⁽³⁾ COMP/M.2698 *Promatech/Sulzer Textil*, 16.4.2002.

To address the Commission's concerns, Promatech offered to divest Sulzer Textil's rapier weaving machine businesses in Schio, near Verona (Italy), and Zuchwil, near Solothurn (Switzerland). These commitments eliminated the overlap created by the acquisition and fully removed the Commission's objections to the operation.

GEES/Unison ⁽¹⁾

282. *GEES/Unison* concerned the proposed acquisition of Unison Industries, a leading US supplier of aircraft engine accessories and controls, by GE Engine Services Inc., a wholly owned subsidiary of General Electric Company. The transaction was originally notified to several EU Member States (United Kingdom, Germany, France, Italy, Spain, Austria and Greece) as it did not meet the turnover threshold requirements laid down in Article 1 of the ECMR. Following a joint referral of the case by these Member States under Article 22(3) of the ECMR, the Commission's examination of the deal showed that there were no horizontal overlaps between the activities of GEES and Unison. The assessment was therefore limited to the vertical integration of GE's businesses and those of Unison. The Commission concluded, however, that there would be no risk of foreclosure in the markets for engine accessories produced by Unison or in the markets for aero engines. A clearance was granted on 17 April.

5. Reform of merger control

283. On 11 December, the Commission adopted comprehensive proposals for reform of the EU merger control system. These proposals followed a year of consultation and debate on the consultation document, the *Green Paper on the review of Council Regulation (EEC) No 4064/89* ⁽²⁾ (the merger regulation) ⁽³⁾. The Green Paper called for views on how the effectiveness of the legal framework for EU merger control might be improved, adapting it better to the realities of a globalising economy, against the backdrop of an enlarging and increasingly integrated European Union. The merger regulation provides for a regular review of certain of its provisions, notably those concerning the scope of the Commis-

sion's competence in merger control ⁽⁴⁾. Since its adoption in 1989, the merger regulation has been substantially amended once, in 1997 ⁽⁵⁾. The current review, however, contains proposals which go beyond jurisdictional matters, and includes a more comprehensive and forward-looking examination of the functioning of the merger regulation as a whole. These reforms comprise: a proposal for amendments to the current merger regulation; a draft Commission notice on the appraisal of horizontal mergers, which is open for public consultation until the end of March 2003; certain best practice recommendations and other administrative measures designed to enhance transparency as well as the current internal procedures and systems within the Competition DG.

5.1. Objectives of the reform

284. The revision proposals build on the Commission's experience in applying the merger regulation for more than 12 years. They are designed to improve the regulation's effectiveness, and to take account of changes which have occurred in that period both in terms of the increase in the number of cases, their greater economic complexity and the higher levels of industrial concentration which have necessitated greater sophistication in the economic analysis contained in the Commission's reasoned decisions. The proposed reform also seeks to respond to perceived shortcomings that have emerged over the years. In this regard, particular account has been taken of the three recent judgments of the European Court of First Instance overturning on appeal the prohibition decisions the Commission had taken in *Airtours/First Choice*, *Schneider/Legrand* and *Tetra Laval/Sidel*.

285. The reform pursues the twofold objective of, on the one hand, consolidating the successful features of the EU merger control system, and, on the other, seeking to ensure the continuing effectiveness of the merger regulation as an instrument of merger control in meeting the new challenges

⁽¹⁾ COMP/M.2738 *GEES/Unison*, 17.4.2002.

⁽²⁾ COM(2001) 745 final.

⁽³⁾ OJ L 395, 30.12.1989; corrected version, OJ L 257, 21.9.1990.

⁽⁴⁾ In its report of 28 June 2000 to the Council on the application of the merger regulation thresholds, the Commission concluded that there were strong indications that the existing thresholds should be revised, so as to better cover all concentrations with a Community interest. It set out, moreover, a number of other jurisdictional, substantive and procedural issues that would merit a more in-depth discussion (see COM(2000) 399 final, 28.6.2000).

⁽⁵⁾ Council Regulation (EC) No 1310/97 (OJ L 180, 9.7.1997); corrigendum in OJ L 40, 13.2.1998.

faced by the economy of the European Union, notably including its pending enlargement.

Responses to the Green Paper

286. The Green Paper launched a wide public consultation on a number of concrete ideas for reform of the EU merger control regime. The consultation was focused on issues of jurisdiction, substantive review, and merger control procedures. However, the Green Paper also included a discussion of systemic issues, seeking views on the effectiveness of the administrative system generally, including the due process guarantees and ‘checks and balances’ built into the system. Views were also sought on the effectiveness of judicial review, while making it clear that changes in this area fall outside of the scope of what the Commission can propose.

287. The Commission received considerable feedback on the Green Paper, with the submission of over 120 replies. Close to half of the submissions were from industry (industry associations and individual companies), and more than a quarter from law firms. In addition, submissions were received from trade unions, consumer organisations and academics. Several Member States also submitted written comments, as have a couple of the accession candidate countries. Most respondents expressed satisfaction with the Commission’s open-minded approach regarding possible reform of the merger regulation, and the broad objectives being pursued by the Green Paper enjoy the support of the vast bulk of those who expressed views. A comprehensive summary of the Green Paper feedback can be found on the Competition DG’s web site ⁽¹⁾.

288. Where systemic issues are concerned, most respondents to the Commission’s Green Paper lauded the merits of the EU merger control system, and notably the short, fixed deadlines and reasoned, published decisions. Few respondents advocated an abandonment or a radical overhaul of the current system, or suggested, for example, a move to a US-style prosecutorial system. At the same time, certain respondents had misgivings about the effectiveness of the system’s due process guarantees and concerning the possibilities for effective judicial review of the Commission’s decisions in merger cases.

5.2. The proposed reform

5.2.1. Substantive issues

Amendment of the substantive test in the merger regulation

289. The Commission’s Green Paper launched a reflection on the merits of the substantive test enshrined in Article 2 of the merger regulation (the dominance test). In particular, it invited comment on how the effectiveness of the test compares with the ‘substantial lessening of competition’ (SLC) test used in several other jurisdictions (and notably in the United States). The consultation spawned a wide range of commentary pleading both for and against change. The main thrust of the arguments of those pleading for a change to SLC is that such a test would be inherently better suited to dealing with the full range and complexity of competition problems that mergers can give rise to, and in particular that there may be a ‘gap’ or gaps in the scope of the current test.

290. The Commission concluded, however, based on its experience to date, that these potential drawbacks to retention of the dominance test were over-emphasised and that in practice the dominance and SLC standards have produced broadly convergent outcomes, especially in the EU and United States in recent years. Retaining the dominance test would also better preserve the body of case-law developed by the Courts over the years in interpreting its meaning, thereby guaranteeing a high degree of legal certainty. With a view, however, to ensuring legal certainty and enhancing transparency regarding the scope of the current test, the Commission proposed a clarification of the notion of dominance contained in the current substantive test to be added to the text of Article 2 (by the addition of a paragraph in Article 2 and of further recitals to the regulation), so as to make it clear that the test also applies where a merger results in so-called ‘unilateral effects’ in situations of oligopoly, a potential ‘gap’ to which some commentators have pointed. The clarification proposed is consistent with how the Court of Justice has defined dominance in merger cases ⁽²⁾, but is intended to more closely focus on the economic impact of concentrations.

⁽¹⁾ <http://europa.eu.int/comm/competition/mergers/review/comments.html>

⁽²⁾ Case T-102/96 *Gencor v Commission* (1999) ECR II-753, paragraph 200.

Draft notice on the appraisal of horizontal mergers

291. In addition to this clarification of the scope of Article 2 of the merger regulation the Commission also adopted a draft notice on the appraisal of ‘horizontal’ mergers, thereby providing transparency and predictability regarding the Commission’s merger analysis, and consequently greater legal certainty for all concerned. The Commission also announced that it intends to adopt, at a later stage, further guidance on its approach to the assessment of ‘vertical’ and ‘conglomerate’ mergers.

292. The first set of draft guidelines have been drafted with a view to setting out a sound economic framework for the assessment of concentrations where the undertakings concerned are active sellers on the same relevant market or potential competitors on that market (horizontal mergers). In doing so, it will deal with how the effect of a merger on competition in a market should be analysed, providing clarity, among other issues, about how the Commission will apply the notion of collective dominance. The draft guidelines also deal with particular factors that could mitigate an initial finding of likely harm to competition — factors such as buyer power, ease of market entry, the fact that the merger may be the only alternative to the demise of the firm being acquired, and efficiencies.

The treatment of efficiencies

293. As regards the treatment of efficiencies the draft Commission notice states that the Commission intends to carefully consider any efficiency claim in the context of the overall assessment of a merger, and may ultimately decide that, as a consequence of the efficiencies the merger brings about, the merger does not create or strengthen a dominant position as a result of which effective competition would be significantly impeded.

294. This is in line with the responses to the Green Paper which pointed out that recognition of merger-specific efficiencies is possible without changing the present wording of the substantive test in the merger regulation. Article 2(1)(b) of the merger regulation provides a clear legal basis in that respect by stating that the Commission shall take account, *inter alia*, of ‘the development of technical and economic progress provided it is to consumers’ advantage and does not form an obstacle to competition’.

295. The draft notice indicates that efficiency claims would only be accepted when the Commission is in a position to conclude with sufficient confidence that the efficiencies generated by the merger will enhance the incentive of the merged entity to act pro-competitively for the benefit of consumers, because the efficiencies generated by the merger will either counteract any adverse effects on consumers or make these effects unlikely. For the Commission to reach such a conclusion, the efficiencies would have to be of direct benefit to consumers, as well as being merger-specific, substantial, timely, and verifiable. The burden of proof would rest on the parties, including the burden of demonstrating that the efficiencies are of such a magnitude as to counteract anticompetitive effects the merger might otherwise have. The draft notice also indicates that it is unlikely that efficiencies could be accepted as sufficient to permit a merger leading to monopoly or quasi-monopoly to be cleared.

5.3. Reform of the merger control process

296. As indicated above, the reform will in part require changes to the merger regulation itself but also non-legislative measures. These measures are designed to ensure that the Commission’s merger investigations are conducted in a manner which is more thorough, more focused, and more firmly grounded in sound economic reasoning. As a result, the soundness of the Commission’s decisions in merger cases should be enhanced.

5.3.1. Legislative measures*Time limits*

297. The Commission proposes a number of significant amendments to the timing provisions in the regulation. First, the period during which merging parties may offer commitments in phase I would be extended from three to four weeks ⁽¹⁾. This amendment will thus provide an additional week in which to address competition concerns. Second, the submission of a remedy offer in phase II will, unless it is made early in the procedure (before the 55th working day), lead to an additional three weeks being added, thereby

⁽¹⁾ The calculation of the time limits laid down in the merger regulation and in the implementing regulation will be simplified and rendered more transparent by expressing all deadlines in terms of working days (WD), with one week generally having five working days, except if it includes official Commission holidays.

allowing more time for the proper consideration of remedies, including the consultation of Member States. Thirdly, the draft regulation proposes that up to four weeks could be added to phase II for the purpose of ensuring a thorough investigation in complex cases. The parties would have an initial right to add such extra time. It could, however, also be added at request of the Commission (but with the agreement of the merging parties), where the Commission is convinced that additional investigation time is warranted. Finally, the draft regulation provides for the introduction, by means of a Commission notice, of generalised exemptions for non-problematic cases from the prohibition to implement a transaction pending clearance.

Timing of notifications

298. A further proposal relates to the need for more flexibility as regards the timing of notifications to the Commission. The proposed amendment would make it possible to notify prior to the conclusion of a binding agreement. It is also proposed that the current deadline for notification of one week after the conclusion of such an agreement be removed, provided no steps are taken towards its implementation. The more flexible rules should allow companies to better organise their transactions without having to fit their planning around unnecessary regulatory rigidities, and would at the same time facilitate international cooperation on merger cases, particularly when it comes to synchronising the timing of investigations by different agencies.

Enhanced fact-finding powers

299. With regard to the merger regulation's fact-finding provisions, the Commission proposes, with some exceptions, to align its fact-finding powers, including the fining provisions, with those proposed in the new implementing regulation for Articles 81 and 82 of the EC Treaty. This will enable the Commission to obtain information more easily for the purposes of an investigation and includes the possibility of imposing higher fines for failure to comply with requests to supply such information.

300. These measures are important, not least with regard to the high evidentiary burden incumbent upon the Commission, which becomes apparent particularly in cases where it proposes to intervene. Nonetheless, certain powers pro-

vided for in the context of Articles 81 and 82, mainly home searches and sector enquiries, are not proposed to be included in the merger regulation.

Simpler and more flexible allocation of cases

301. Another of the main objectives of the reform was to optimise the allocation of cases between the Commission and national competition authorities in the light of the principle of subsidiarity, while at the same time tackling the persistent phenomenon of 'multiple filing' (i.e. parallel notification to various competition authorities within the EU).

302. In the Green Paper, the Commission put forward for discussion the possibility of granting it exclusive jurisdiction over all merger cases that were notifiable in at least three Member States (the '3 + proposal'). This was seen as a simple and efficient means of reducing the number of concentrations that would require multiple filing. The aim of strengthening the application of the principle of subsidiarity in case allocation was widely supported in feedback to the Green Paper. However, the results of the public consultation have revealed a series of potential drawbacks associated with the initial proposal, in particular the legal uncertainties it might bring about.

303. In the light of this feedback, the Commission decided not to pursue the 3 + proposal but instead proposed to simplify the referral mechanism while at the same time rendering it more flexible. The Commission proposes first to simplify the criteria for such referral, including a closer alignment of the criteria for referral in both directions, and secondly to allow referrals to be made at the pre-notification stage. Notifying parties would be given the exclusive right of initiative at this early stage, and could, in cases where they consider that a referral would increase the efficiency of the merger control procedure, make a reasoned request for a pre-notification referral of the case in either direction. The request would have to be acceded to by both the Commission and the national competition authorities concerned within short deadlines, thereby excluding situations of deadlock. Thirdly, the Commission proposes that, if at least three Member States agree to a case being referred to the Commission, the case should be deemed to fall under exclusive EU jurisdiction. These amendments to the merger regulation would be complemented by a set of guiding principles regarding the criteria

upon which referral decisions should be based, and which would in due course be submitted for the approval of the Commission.

5.3.2. Non-legislative measures

Enhancing the Competition DG's economic capabilities

304. The Commission envisages that a new position of Chief Competition Economist will be created within the Competition DG, with the staff necessary to provide an independent economic viewpoint to decision makers at all levels, as well as guidance throughout the investigative process. He or she would be an eminent economist, on temporary secondment to the Commission, thus ensuring that the holder of this post is someone who is very much in touch with the latest thinking in the field of industrial economics. The role of the chief economist would not be limited to his or her involvement in merger control, but would also extend to competition law enforcement generally, including the control of State aid.

305. It is also intended to accelerate the Competition DG's recruitment of industrial economists and that greater use be made of outside economic expertise. In particular, it is envisaged that independent econometric studies would more frequently be commissioned in phase II merger investigations.

Enhancing peer review

306. A further change is an enhanced and more systematic use of a peer review 'panel' system in phase II merger cases. A panel composed of experienced officials would be appointed for all in-depth investigations, and would have the task of scrutinising the case team's conclusions with a 'fresh pair of eyes' at key points of the enquiry. Those serving on the panel would be chosen from throughout the directorate-general. Officials from other relevant departments of the Commission would be invited to contribute to the discussions. To this end, it is intended to create a new unit to provide the necessary support and structure to allow these panels to become a real and effective internal check on the soundness of the investigators' preliminary conclusions. It is intended, moreover, that this panel system would be deployed throughout the directorate-general, to the equal benefit of the Commission's decision-making in the antitrust and State aid areas.

New best practice guidelines — enhancing due process generally

307. The Commission has also announced that it intends to amend its internal rules so as to allow earlier access to the Commission's file than is currently possible. First, the merging parties would be granted full access to the file shortly after the opening of an in-depth investigation (i.e. following the issuance of a decision pursuant to Article 6(1)(c) of the regulation). Secondly, the intention is that merging parties should be given ad hoc access throughout the investigation to the main third party submissions running counter to the merging parties' views — respecting, of course, legitimate claims to the protection of confidential information. This will enhance even further the transparency of procedures and allow the parties to contest these submissions at early stages of the investigation and not, as presently, only once a statement of objections is issued.

308. An opportunity should, it is proposed, furthermore, be provided for the merging parties to confront 'complaining' third parties at a meeting which should ideally be held prior to the issuing of a statement of objections. This would enable an earlier confrontation of opposing arguments relating to the likely effects of the proposed merger and would therefore assist in the preparation of a more focused statement of objections.

309. It is also intended to introduce some further discipline and transparency into the conduct of investigations by offering merging companies the possibility of attending 'state-of-play' meetings with the Commission at decisive points in the procedure. This should ensure that the merging parties are kept constantly updated on progress in the investigation, and that they are given an ongoing opportunity to discuss the case with senior Commission management.

310. Some of these non-legislative measures are contained in a draft set of best practices on the conduct of merger investigations, which will be discussed with the legal and business community before they are finalised. These best practices should deal with the day-to-day handling of merger cases by the Competition DG, as well as the Commission's relationship with merging parties and interested third parties, and would in particular concern the timing of meetings, transparency, pre-notification contacts, and due process in merger proceedings. The draft best

practices are published for comments on the Competition DG's web site.

Reinforcement of the hearing officers

311. A further strengthening of the hearing officers' role is also a part of the envisaged reforms. It is intended that the hearing officers should be equipped with resources, including A grade officials, sufficient to enable them to fully discharge their responsibilities. A strengthening of the hearing officers' role was widely called for in feedback to the Green Paper.

Participation of consumers and other interested third parties

312. Other reforms include the creation of a Consumer Liaison function, to encourage and facilitate the involvement of consumer associations, which are often poorly resourced bodies. The purpose here is to enhance consumer involvement in competition proceedings. Despite the fact that the ultimate goal of merger control is the protection of consumer welfare, consumers and their organisations rarely express views to the Commission about the likely impact of specific mergers.

313. The Commission also intends to amend the merger notification form so as to include a reminder to companies of the need to respect their obligations under national and EU law with regard to the consultation of worker representatives.

Strengthening of the Advisory Committee

314. Furthermore, it is envisaged that the involvement of the Advisory Committee on Concentrations (composed of Member State competition experts) should be enhanced. This body plays a key role in providing external scrutiny of the Commission's investigations, particularly towards the conclusion of an in-depth investigation. While any changes are ultimately a matter for the internal organisation of the advisory committee itself, the Commission has proposed that the Member State 'rapporteur' could become more closely involved in tracking merger investigations from the opening of a phase II investigation. The advisory committee might also consider appointing 'discussants' to support the 'rapporteur' in his or her functions by, for example, exploring particular aspects of the investigation more deeply. The Commission could facilitate such a development by opening lines of communication with the rapporteur and

discussants at an early stage in the investigation, and by ensuring that relevant information is promptly transmitted to them. The additional time which it is proposed to add to phase II investigations for the proper consideration of remedy proposals (see above) should also facilitate this enhanced role for the advisory committee.

Improving case management and investigation

315. Finally, the Commission also intends to take practical measures to improve the manner in which investigations are conducted particularly in view of the high evidentiary burden incumbent upon the Commission in all cases. Where it proposes to intervene, it will, in particular, be necessary to ensure that there are sufficient management resources available to deal with the Commission's full merger caseload, that case teams are sufficiently large, and that they are equipped with the expertise necessary to cope with in-depth investigations. It must also be ensured that due attention is paid to the quality of evidence on which decisions are based.

Judicial review

316. The Commission has also announced that it intends to continue to press for speedy review of its decisions by the Courts. The introduction by the Court of First Instance of a fast-track procedure represents an important step forward, demonstrating that judicial review can be delivered with relative speed: the efficiency with which the Court of First Instance disposed of the appeals in *Schneider/Legrand* and *Tetra Laval/Sidel* represents real progress.

317. The Commission, in parallel with the discussions in the Council of Ministers on the revision of the merger regulation, has announced its intention to explore with the Member States the various options available which would ensure speedier judicial review in merger cases. The Commission will also pursue contacts with the Court of Justice and the Court of First Instance on this matter.

6. International cooperation

6.1. International competition network (ICN)

318. The Commission has been actively participating in the ICN's working group on multi-juris-

dictional merger control since it was set up at the end of 2001. The working group's activities have been organised into three different sub-groups: one on investigative techniques in merger investigations; one on the analytical framework underlying merger control; one on notification and procedures in merger control regimes. A number of private sector organisations and individuals are contributing to the work of the sub-groups. The Commission is an active participant in all three sub-groups.

The notification and procedures sub-group

319. The purpose of the sub-group is threefold: to enhance each jurisdiction's effectiveness; to facilitate convergence; to reduce the public and private burden of multi-jurisdictional merger control. To that end, the sub-group in cooperation with private sector advisors has compiled an inventory of merger control laws and is collecting information on the costs and burdens of merger control. The sub-group has, moreover, developed a set of guiding principles for merger notification and review procedures, which were approved by the wider ICN membership at the ICN's first annual conference, held in Naples in October.

320. It is further intended that the guiding principles will be expanded into a comprehensive set of best practice recommendations ('Recommended practices'). Work has already begun, and recommended practices focusing on three topics ((1) sufficient nexus between the transaction's effects and the reviewing jurisdiction; (2) clear and objective notification thresholds; and (3) the timing of merger notification) were approved by the wider ICN membership. Further recommended practices are being prepared with a view to the second annual ICN conference (in 2003).

The investigative techniques sub-group

321. This subgroup is focusing on the development of best practices for investigating mergers, including in particular (i) methods for gathering reliable evidence; (ii) effective planning of a merger investigation; and (iii) use of economists/the evaluation of economic evidence. The work programme for next year includes the development of an 'Investigative techniques compendium', which would contain a collection of investigation tool examples from various jurisdictions.

322. The sub-group organised a two-day international merger conference in Washington DC on

21 and 22 November for staff lawyers and economists. The conference consisted of several panels/workshops on the investigative tools used in different jurisdictions, agencies' experience with these tools, as well as on the role of economists in merger investigations and possibilities of enhancing international cooperation in merger cases.

The analytical framework sub-group

323. This sub-group focuses on the general analytical framework for merger review, including the substantive standards for analysing mergers and the criteria for applying those standards. Information is being compiled on the substantive standard applied in each member jurisdiction, including information on enforcement guidelines or other interpretative material. A more in-depth study has been made of the impact of different standards in four different jurisdictions (Australia, South Africa, Germany and the United States).

324. To date, the sub-group has prepared a comprehensive 'issues' paper which seeks to set out the main policy objectives underlying merger control. In addition, the subgroup is pursuing a detailed work plan for the year following the first annual conference. The work plan consists of four projects: (1) an analysis of merger guidelines around the world; (2) an analysis of the approach taken to merger efficiencies worldwide; (3) a comparison of dominance and SLC-type tests; (4) an analysis of non-competition issues in merger evaluation. Priority is being given to the first two projects.

6.2. EU-US mergers working group

325. Following agreement between US Assistant Attorney-General for Antitrust Charles James, FTC Chairman Timothy Muris and Commissioner Monti at the EU-US bilateral meeting (Commission/DoJ/FTC) in Washington on 24 September 2001 that the activities of the existing EU-US mergers working group should be expanded and intensified, the Competition DG agreed with the US agencies that the working group should consist of a number of sub-groups⁽¹⁾. One sub-group has been dealing with procedural issues and two other sub-groups

⁽¹⁾ The EU-US mergers working group was originally set up in 1999, and its principal activity before September 2001 consisted in discussions on the respective EU and US approaches to remedies in merger cases. This proved to be a highly productive experience for all three agencies.

with substantive issues (one with conglomerate aspects of mergers, and another with the role of efficiencies in merger control analysis).

326. To date, work has been completed in the sub-groups on procedural issues and on conglomerate aspects of mergers. In each of these sub-groups, a series of videoconferences was conducted, involving presentations and discussions of each other's policy approach and of the lessons learned from the review of mergers. The officials involved also made a visit to each other's agencies, in April (meetings in Brussels for the procedural sub-group) and in May (meetings in Washington for the conglomerates sub-group). In July, the conglomerates sub-group reported its findings to the EU–US bilateral meeting between US Assistant Attorney-General James, FTC Chairman Muris and Commissioner Monti in Brussels. Though there remain some differences in view and emphasis on the point of conglomerate mergers, it is clear that the discussions have helped obtain a much better mutual understanding of each other's approach in this field. Work in the sub-group dealing with efficiencies in merger control is still in progress.

Best practices on EU–US cooperation in merger cases

327. On 30 October, Commissioner Monti with his US counterparts, Timothy Muris, Chairman of the US Federal Trade Commission, and Charles James, US Assistant Attorney-General for Antitrust, issued a set of best practices on cooperation in reviewing mergers that require approval on both sides of the Atlantic, with a view

to minimising the risk of divergent outcomes and to enhancing the good relationship developed over the past decade⁽¹⁾. They result from the deliberations of the procedures sub-group of the EU–US merger working group, which brought together experienced officials from the three agencies, and which had been closely studying how the effectiveness of EU–US cooperation in merger cases might be further improved.

328. The best practices put in place a more structured basis for cooperation in reviews of individual merger cases. The best practices recognise that cooperation is most effective when the investigation timetables of the reviewing agencies run more or less in parallel. Merging companies will therefore be offered the possibility of meeting at an early stage with the agencies to discuss timing issues. Companies are also encouraged to permit the agencies to exchange information which they have submitted during the course of an investigation and, where appropriate, to allow joint EU–US interviews of the companies concerned. The practices, moreover, designate key points in the respective EU and US merger investigations when it may be appropriate for direct contacts to occur between senior officials on both sides.

⁽¹⁾ The Commission has been cooperating closely with its US counterparts, the US Department of Justice's Antitrust Division and the US Federal Trade Commission, since the entry into force of the EU's merger regulation in 1990. That cooperation was put on a firm footing with the conclusion of the EU–US Agreement on the application of their competition laws in 1991. EU–US cooperation has been particularly close in investigations of many of the large cross-border mergers which fall to be scrutinised in both jurisdictions. Inter-agency contacts have served to minimise the risk of divergent outcomes and have underpinned a process of substantive convergence in their analytical approaches.

B — Statistics

Figure 4

Number of final decisions adopted each year since 1996 and number of notifications

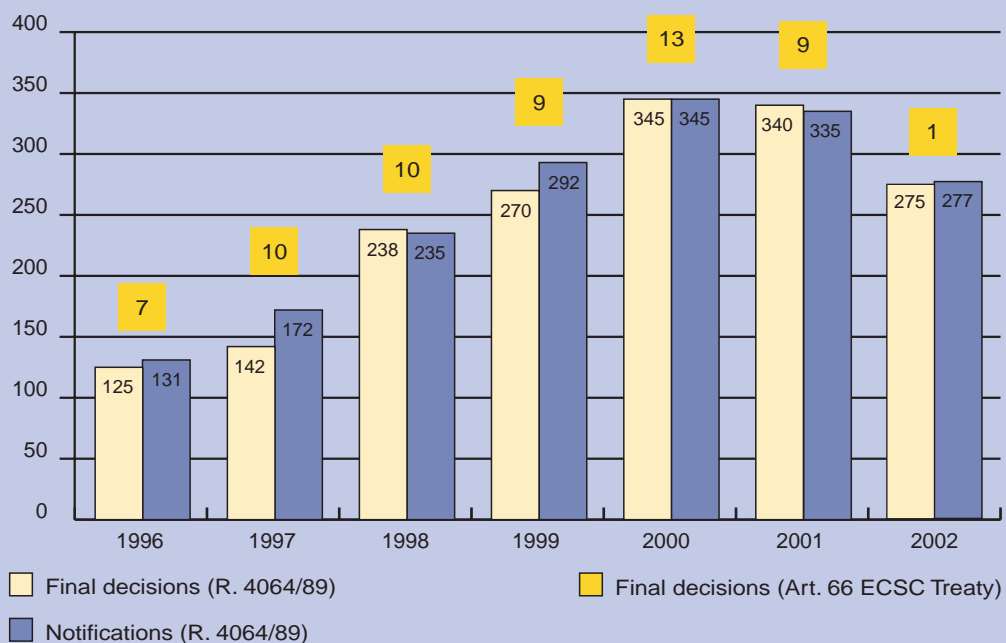
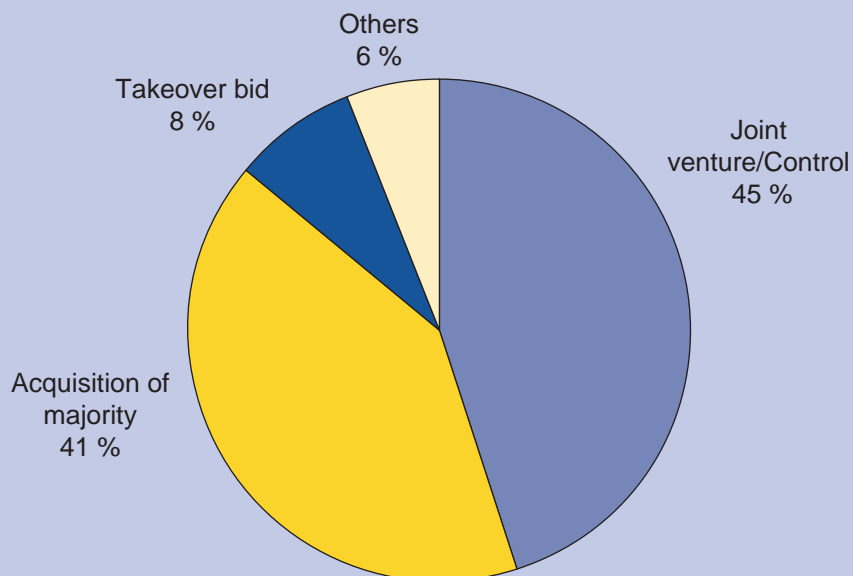


Figure 5

Breakdown by type of operation (1993–2002)



III — STATE AID

A — General policy

329. The control of State aid focuses on the effects on competition of aid granted by Member States to undertakings. The objective is to ensure that government support does not interfere with the smooth functioning of the internal market or harm the competitiveness of EU undertakings, as well as to enhance structural reform. Particular attention is given to ensuring that the beneficial effects of liberalisation are not undermined by State aid measures. In line with the policy objectives of the European Council the Member States have to continue their efforts to reduce aid levels, in GDP percentage terms, while redirecting aid towards horizontal objectives of Community interest, such as the strengthening of economic and social cohesion, employment, environmental protection, promotion of R & D and development of SMEs. The amount of aid awarded should remain in proportion to its objectives.

330. State aid control is exercised through the implementation of regulatory instruments. These may take the form of legal instruments that are binding on both the Commission and the Member States as well as soft law texts that are binding only on the Commission such as guidelines, frameworks or communications. Regulations define the procedures for the notification and assessment of aid and exempt certain non-problematic types of aid from notification. Certain specific texts also define the State aid rules applicable to particular sectors (e.g. shipbuilding). Soft law texts seek to clarify the legal situation relating to State aid and explain the criteria by which the Commission assesses specific cases.

331. The Commission moreover monitors recovery of unlawful aid by Member States as well as aid which is exempted from notification. Such monitoring will gradually be extended to all State aid decisions containing conditions the Member States have to comply with.

1. Modernising State aid control

1.1. General approach

332. A substantial project to reform both the procedural and the substantive aspects of the State aid rules has progressed considerably and should be finalised before enlargement takes place so that the new rules can be applied in all 25 countries not later than the date of the first enlargement.

333. One of the main purposes of the reform package is to streamline procedures and free the process of examining State aid from unnecessary procedural burden, thereby facilitating speedy decisions in most cases and reserving major resources for the most contentious questions in the area of State aid. The reform also aims to achieve major improvements in cooperation with Member States by raising the awareness of State aid issues among regional, local and national authorities and the national judiciary.

334. At the same time efforts will be undertaken to put State aid control in the broader context of contributing to the further development of a genuine internal market and to the modernisation of European industry in order to increase its long-term competitiveness. Light, predictable and transparent procedures as well as sound economic criteria for the implementation of State aid measures should be the result of the reform process.

1.2. Transparency

335. In an interrelated market like the internal market it is obvious that the commonly agreed objective of modernising the economy can only be achieved by concerted action and exchange of information on best practices; the basic tools for such an exchange of information are the State aid register and the State aid scoreboard. Both instruments have been further developed since their creation in 2001.

1.3. Development of statistical tools

336. Member States currently provide detailed information on State aid through a series of annual reports and statistics on State aid schemes. The rules governing this obligation (Commission letter to Member States) are currently under review. A simplified revised reporting format will be adopted after consultation with the Member States.

337. Member States should be encouraged to comply fully with this reporting obligation in order to make State aid more transparent and give a better view of where improvement in State aid control is necessary or desirable.

1.4. State aid scoreboard

338. One of the main aims of the State aid scoreboard is to monitor Member States' progress in implementing the commitments undertaken at the Stockholm and Barcelona European

Councils, that is to reduce total State aid and redirect aid towards horizontal objectives of common interest such as research and development and small and medium-sized enterprises.

339. The quality of the State aid scoreboard again relies to a great extent on the information the Commission departments receive from the Member States. Member States should feel encouraged to use the scoreboard also as a forum for discussing different approaches to State aid in order to analyse best practices. The Commission sees its role in this process as a facilitator rather than a controller. In this context it might be worth noting that about 80 % of the cases of notified aid are approved without opening the formal investigation procedure, some 5 % are subject to a formal investigation and around 15 % are withdrawn by Member States. More extensive information by the Member States could help improve this score even more.

340. Much of the material in the previously published State aid survey has now been integrated into the scoreboard, which is now published in the spring and autumn, the spring version compiling the figures received for the previous year from Member States, the autumn version analysing the information received more thoroughly with regard to the objectives derived from the European Council conclusions on State aid. A special edition of the scoreboard, published on the Commission's web site on 28 November, analysed the situation in the candidate countries in preparation for their accession to the EU.

1.5. Revision of existing frameworks and guidelines

1.5.1. Multisectoral framework

341. Following completion of consultations with Member States, a new multisectoral framework for large regional aid projects⁽¹⁾ was adopted. However, the entry into force of the main part of the framework has been postponed until 1 January 2004. The new framework sets out a much clearer set of rules for the evaluation of State aid for large regional investment projects and at the same time eliminates the need for prior notification of many aid projects provided the aid is

granted under an approved regional aid scheme. At the same time the framework brings together and consolidates in a single text the different sectoral rules which applied previously in the steel, synthetic fibres and automobile sectors. As announced in the framework, work has begun to identify the sectors suffering from structural difficulties which should be subject to stricter State aid rules.

1.5.2. R & D

342. The Commission has also recently undertaken a review of the Community guidelines for State aid for research and development⁽²⁾. To that end, it published an open invitation to Member States and interested parties to submit their observations on their experience with the current framework and the need for change. After considering these comments, the Commission concluded that the current rules were no obstacle to the achievement of the target set by the Barcelona European Council that overall spending on R & D and innovation in the Union should be increased with the aim of approaching 3 % of GDP by 2010, with two thirds of this investment coming from the private sector. The Commission therefore decided to extend the current framework until the end of 2005 and will review it then in the light of the progress achieved towards the Barcelona target, as well as on the basis of ongoing analysis of the effectiveness of different types of public R & D support measures and the exercise of benchmarking national R & D policies.

1.5.3. Employment aid

343. On 6 November, the Commission adopted a regulation on employment aid⁽³⁾ designed to facilitate Member States' job-creation initiatives. The new regulation offers Member States the possibility of granting aid for the creation of new jobs and the recruitment of disadvantaged and disabled workers without having to seek the Commission's prior clearance. For long-term unemployed and other disadvantaged workers, Member States may take over up to 50 % of one year's wage costs and compulsory social security contributions. In the case of disabled persons Member States may even defray 60 % of these costs.

⁽¹⁾ Communication from the Commission on multisectoral framework on regional aid for large investment projects (OJ C 70, 19.3.2002).

⁽²⁾ OJ C 111, 8.5.2002.
⁽³⁾ OJ L 337, 13.12.2002.

344. The regulation is meant to speed up the implementation of job-creation measures taken by the Member States through removing the need to notify the Commission of all measures taken which comply with the terms and conditions of the regulation. It covers two of the most frequent types of employment aid, i.e. aid to create new jobs and aid to promote recruitment of disadvantaged and disabled workers. Other types of aid are not prohibited, but must be notified.

345. The initiative is in line with the conclusions of various European Councils, which call for a shift in emphasis from supporting individual companies or sectors towards tackling horizontal objectives of common interest. It allows Member States greater flexibility to design and implement measures for supporting employment, and thus facilitates the achievement of the employment targets set at the Lisbon European Council in 2000.

346. The rules on aid for employment are aligned to a great extent on those for SME/regional aid⁽¹⁾, except for the period during which maintenance of the jobs is required. The rules limit that requirement to three years and two years in the case of SMEs. The regulation differs in that respect from the one on SME/regional aid, since it became evident that the requirement that jobs be maintained for five years was too strict, especially for SMEs, where greater flexibility of the labour market is needed.

1.5.4. Coal and steel (ECSC Treaty)

347. As regards coal and steel, the Commission adopted a communication clarifying certain aspects of the treatment of competition cases, including the application of State aid procedures, following the expiry of the ECSC Treaty on 23 July⁽²⁾.

348. On steel, the Commission decided to continue the strict approach towards aid to this sector by maintaining the ban on regional investment aid⁽³⁾ and rescue and restructuring aid⁽⁴⁾.

⁽¹⁾ OJ L 10, 13.1.2001.

⁽²⁾ Communication from the Commission concerning certain aspects of the treatment of competition cases resulting from the expiry of the ECSC Treaty, points 18–21 (OJ C 152, 26.6.2002).

⁽³⁾ Communication from the Commission on multisectoral framework on regional aid for large investment projects, point 27 (OJ C 70, 19.3.2002).

⁽⁴⁾ Communication from the Commission on rescue and restructuring aid and closure aid for the steel sector (OJ C 70, 19.3.2002).

349. The Council adopted, on 23 July, Regulation (EC) No 1407/2002⁽⁵⁾ concerning the treatment of State aid to the coal industry after expiry of the ECSC Treaty while at the same time encouraging continued efforts to restructure and modernise European coal production with the aim of guaranteeing a basic supply of energy in the European Union.

1.5.5. SMEs

350. After completion of the review of the definition of small and medium-sized enterprises⁽⁶⁾, which it uses for a variety of purposes, the Commission will propose an amendment of the current block exemptions for SMEs and for training aid in order to incorporate the new definition. At the same time the Commission will consider whether to extend the scope of the block exemption for SMEs in order to include aid for R & D. The review will be on the agenda for 2003.

1.5.6. State aid and tax policy

351. Following the adoption by the Ecofin Council of the code of conduct for business taxation, particular attention was paid this year to cases relating to State aid granted through different tax measures. The Commission applied its notice on the application of State aid rules to measures relating to direct business taxation⁽⁷⁾ and on 11 July 2001 started a wide-ranging investigation into different tax measures taken by the Member States⁽⁸⁾. A number of cases were finalised by the end of 2002 and the measures have to be either modified or abolished by the Member States. In the context of the discussions on the proposed energy directive, the Commission also clarified the way the State aid rules are applied to tax measures relating to energy products and electricity.

1.5.7. Deprived urban areas

352. The Commission guidelines on State aid for undertakings in deprived urban areas have been abolished. Cases of aid of this nature and aid linked to regeneration problems in other areas are now examined on their own merits, with a view to possible approval under Article 87(3)(c) of the

⁽⁵⁾ OJ L 205, 2.8.2002.

⁽⁶⁾ OJ L 107, 30.4.1996.

⁽⁷⁾ OJ C 384, 10.12.1998.

⁽⁸⁾ IP/01/982.

Treaty, without prejudice to other State aid rules, such as the rules on regional aid. This should allow the Commission to develop the necessary experience to check whether new rules are needed.

2. Enlargement ⁽¹⁾

353. Negotiations have been successfully concluded and the chapters on competition have been closed with 10 candidate countries. They continue with the remaining two candidate countries. With Turkey the analytical examination of Turkish competition legislation has been started.

354. As regards State aid, it should be pointed out that the candidate countries had under the old economic system a rather generous attitude towards it. Under the Europe agreements they were already urged to adapt their legislation to the existing EU rules. Although a number of legislative efforts have been undertaken by most candidate countries, they have at the same time tried to attract foreign investment through a number of incentives which would clearly be classed as State aid under Articles 86 and 87 of the Treaty.

355. One of the main objectives of the negotiations has been to render those incentives compatible with the existing rules on State aid from the moment of membership onwards in order to avoid major distortions of competition.

B — Concept of aid

1. Origin of resources

356. In the *Stardust* judgment, the Court of Justice ⁽²⁾ confirmed once more that in order to constitute State aid, financial support must derive from public funds. The mere fact that the company giving out the funds is a public company does not suffice. The decisive element will be whether the State has control and actually exercises that control over the undertaking paying out the funds. Unless this can be proven the financial support cannot be imputed to the State and therefore does not constitute State aid.

357. Following complaints, the Commission examined certain aspects of the scheme introduced by the German Government for encouraging operators to produce electricity from renewable energy sources ⁽³⁾. Under the scheme, electricity distributors were required to connect green electricity generating plants to their networks and to purchase the electricity at a minimum price which exceeded the market price.

358. The Commission dismissed the complainants' claims and found that the scheme did not involve aid. Although it offered an economic advantage to firms producing electricity from renewable sources, that advantage was not financed by State resources. It was of no consequence that some of the distributors on which the obligation to buy electricity at regulated prices was imposed were public enterprises, since all distributors, irrespective of their legal status, were subject to the same constraints. This was the first instance in which the *Preussen Elektra* ⁽⁴⁾ case-law was applied to a group of public operators.

359. In the case of a competitive transition charge ⁽⁵⁾, the British Government imposed a tax on the final consumer of electricity. This tax was paid directly to the electricity provider, thus without the intermediary of a body collecting the taxes centrally and redistributing them. The taxes should compensate for the additional costs resulting from long-term delivery contracts at prices actually or potentially higher than market prices. The Commission here again following the *Preussen Elektra* ⁽⁴⁾ case-law considered that these taxes were not public resources and therefore concluded that no State aid was involved.

2. Advantage to a firm or firms

360. During the year, the Commission initiated the formal investigation procedure in six cases of capital and asset transfers to *Landesbanken* in Germany (Landesbank Berlin, Landesbank Schleswig-Holstein, Hamburgische Landesbank, Norddeutsche Landesbank, Landesbank Hessen-Thüringen and Bayerische Landesbank). Owing to the possible impact of the Landesbank Berlin proceedings on the investigation of restructuring

⁽¹⁾ See separate chapter below.

⁽²⁾ Case C-482/99 *France v Commission* (2002) ECR I-4397.

⁽³⁾ Case NN 27/2000, decision of 22.5.2002.

⁽⁴⁾ Case C-379/98 *Preussen Elektra AG v Schleswig AG* (2001) ECR I-2099.

⁽⁵⁾ Case N 661/99, decision of 1.3.2002.

aid for Bankgesellschaft Berlin, to which Landesbank Berlin belongs, this procedure was brought forward to July. The other five cases were opened in November.

361. In the course of the 1990s the *Landesbanken* had received from their shareholders, the respective German *Länder*, capital by means of transfers of *Land* assets such as mortgage credit bodies. These transfers increased the own funds of the *Landesbanken*, the level of which crucially determines lending capacity, and therefore allowed them to expand their business substantially. Private banks had complained that the *Länder* concerned made available capital on favourable terms, thereby conferring a significant competitive advantage on the *Landesbanken* in question. On the basis of a preliminary assessment the Commission expressed doubts as to whether the *Länder* received appropriate remuneration for the capital transferred, i.e. the market rate of return to be regarded as 'normal' for the type of capital concerned at the relevant points in time. If the remuneration was indeed lower than the normal market rates, the difference has to be regarded as aid.

362. The cases are similar to that involving the transfer of Wohnungsbauförderanstalt to WestLB, in which the Commission decided in 1999 that aid amounting at the time to some EUR 800 million had to be recovered. The Commission had announced that it would be looking into other cases of transfers to *Land* banks in the light of the WestLB decision still pending before the Court of First Instance. The decisions to open the formal investigation procedure do not pre-judge the results of the investigations. Naturally, the Court's findings in the WestLB case will be taken into account in each of the investigations.

363. Following the understanding of 17 July 2001 on State guarantees in favour of German *Landesbanken* and savings banks, there were intensive discussions between the Commission and the German authorities on the incorporation of the understanding into German law. Two issues could not be solved until the end of 2001: firstly, the precise elements to be put in the legal texts, recitals or separate commitments by the German authorities to ensure the effective replacement of *Anstaltslast* and, secondly, the exact content of the grandfathering of *Gewährträgerhaftung* concerning liabilities entered into during the transitional period (from 19 July 2001 to 18 July 2005).

364. On 28 February, Commissioner Mario Monti, representatives of the Federal State, the *Länder* and the savings banks reached conclusions on the above two issues and another two new issues, which were discovered after the conclusion of the understanding of 17 July 2001. These two new issues concern, firstly, a subsidiary obligation (*Nachschusspflicht*) in some *Länder* for owners of savings banks to provide institutional security funds (*Institutssicherungsfonds*) with financial means, and, secondly, State guarantees to so-called free savings banks. The conclusions constitute an agreement on the elements of the legal texts, the recitals and separate commitments to be made by the German authorities.

365. The understanding of 17 July 2001 and conclusions of 28 February 2002 on *Landesbanken* and savings banks, as well as the understanding of 1 March 2002 on special credit institutions, were transformed on 27 March into a Commission decision which amended the Commission recommendation of 8 May 2001 with effect from 31 March. This amendment was accepted by the German Government on 11 April. Following further discussions, all necessary changes to the laws on *Landesbanken* and savings banks were then adopted by the German authorities in due time and manner by the end of the year.

366. The Commission ruled on 22 August that certain Italian tax measures introduced in 1998 and 1999 in favour of banking foundations were not subject to the EU State aid rules⁽¹⁾. This is because the Commission considers that the activity of managing own assets and using the proceeds to award grants to non-profit-making entities is not an economic activity. Banking foundations are therefore not to be considered undertakings within the meaning of the relevant EU rules.

367. The tax measures which were the subject of the Commission decision were introduced by Law No 461 of 23 December 1998 and the related Legislative Decree No 153 of 17 May 1999 and concerned the attribution to banking foundations of the legal status of 'non-commercial entities'. This legal status carries a 50 % reduction in the standard corporation tax in Italy (IRPEG). Other advantages concern exemption from tax on the

⁽¹⁾ Case C 54/2000.

sale by foundations of the holdings they have in banks or on the acquisition of instrumental goods.

368. The Commission took the view that since the donation of funds does not represent an economic activity, foundations that do not perform other tasks cannot derive from the legislative measures any competitive advantage in any specific 'market'. Accordingly, the measures do not constitute State aid. The Commission was able to reach this decision only after the Italian Government strengthened the separation between banks and foundations in Article 11 of Law No 448 of 28 December 2001. The new legislation prevents joint control of banking institutions by more than one foundation and introduces stricter rules on incompatibility between managing positions. This rules out the exercise of banking activity by the foundations (through controlled banks).

369. The decision, however, indicates that in the event foundations were to carry on economic activities and in so far as these activities affected trade between Member States, any tax advantage could represent State aid and would have to be notified to the Commission.

370. After a second investigation, the Commission confirmed on 30 October its original approval of EUR 647 million in aid for the construction of the Leuna 2000 refinery in Saxony-Anhalt, Germany ⁽¹⁾. The Commission re-examined the costs of the project and concluded that allegations it had received that the investment costs had been inflated to receive more subsidies were unfounded.

371. The recipient of the aid is Mitteldeutsche Erdöl Raffinerie GmbH (MIDER), owner of the Leuna refinery in Leuna/Spargau, Saxony-Anhalt and itself a subsidiary of TotalFina Elf SA. In 1993 and 1994, the Commission authorised a package of aid to be paid by Treuhandanstalt, the former East German privatisation agency, towards the construction of a new refinery on the old Leuna chemical site. Most of the aid measures were granted on the basis of regional programmes authorised by the Commission.

372. In 1996 the Commission received information suggesting that the costs indicated by Elf, since then merged with TotalFina, were well above the normal building costs for a comparable plant. The Commission's decisions of 1993 and

1994 were based on Elf's cost estimate. After a preliminary examination of the allegations, the Commission started a formal investigation in July 1997 as it had doubts as to the implementation of its original decisions and as to the costs estimate on which its decisions were based. An inflated presentation of the investment costs eligible for aid could have resulted in an aid amount higher than the amount strictly needed for carrying out the project and could have led to an aid intensity higher than the maximum allowed for the region.

373. However, the investigation showed no evidence of overstatement of costs or misuse of aid and confirmed the eligible costs for the overall investment project at EUR 2 403.1 million. The Commission also verified that payments for the construction of the refinery had been made and properly accounted for. Moreover, the gross aid intensity for the eligible investment costs concerned amounted to 26.9 %, which was well within the aid ceiling allowed for Saxony-Anhalt of 35 %. Consequently, the aid was legal and the investigation procedure could be closed. The aid that had been paid out up to October 2002 amounted to EUR 585.7 million. The final amount of aid will total EUR 647 million and includes a remaining sum of EUR 61.4 million blocked on an escrow account. The Commission withdrew its opposition to the payment of this sum.

374. The Commission received a number of complaints concerning the financing of the construction in Mainz-Lerchenfeld, Germany, of a leisure park ⁽²⁾ at which the attractions were to be provided by the German public television channel ZDF. To determine whether the financing at issue was to be classed as State aid within the meaning of the Treaty, the Commission examined whether the park operator would derive any advantage from the use of programme content provided by ZDF. Since the park operator had to purchase the broadcasting rights from ZDF's commercial subsidiary at market prices and therefore had no advantage over its competitors, the financing at issue did not constitute aid.

375. The Belgian authorities having refused to adopt the proposed appropriate measures, the Commission decided to initiate proceedings against the tax arrangements for coordination

⁽¹⁾ Case C 47/1997.

⁽²⁾ Case NN 2/2002, decision of 4.6.2002.

centres in Belgium. It takes the view that those arrangements should be adjusted in line with changes in the EU rules, and in particular in the light of its notice on the application of the State aid rules to measures relating to direct business taxation ⁽¹⁾.

376. The selectivity of the scheme is beyond dispute given the eligibility criteria for administrative authorisation. The doubts raised by the Commission relate, on the other hand, to the exemption from property tax and registration duty on contributions made to coordination centres and capital increases and the exclusion of financial costs from the basis for calculating the taxable income of coordination centres. The Commission takes the view that the cost-plus taxation method applicable in this case is in principle acceptable provided that it does not confer an economic advantage on the companies authorised to use it.

377. The possibility cannot therefore be ruled out at this stage that the reduction in financial charges granted to Belgian coordination centres may constitute operating aid, which is normally incompatible with the Treaty, whereas companies that are unable to set up coordination centres bear the full weight of all the taxes in Belgium ⁽²⁾.

378. In its final decision on exemption from the UK climate change levy ⁽³⁾ the Commission classed as a general measure rather than as State aid the dual-use exemption (for energy products used as fuel and as raw materials) introduced by the UK Government programme for reducing CO₂ emissions.

379. The Commission first stressed the long-standing principle that a tax on the consumption of energy products does not in itself constitute State aid. But that principle did not apply where the exemptions established by a scheme had the effect of favouring certain undertakings or the production of certain goods, except in so far as the exemptions were justified by the nature or general logic of the scheme. In the case in point, the Commission found that the dual-use exemption could benefit only businesses using certain energy production processes that were exhaustively listed in the UK regulations. The criterion of selectivity of the aid was thus established.

380. However, since apportionment of the levy between the fuel/non-fuel use of a product was according to the experts not a viable alternative to the exemption of dual-use products, the Commission found the measure justified by the logic and nature of the climate change levy.

381. The Commission terminated the investigation opened in 2001 into the public support which a complainant alleged had been received by the Terra Mitica theme park in Alicante ⁽⁴⁾. The Commission's clearance is based partly on the classification of the financing for the infrastructure necessary for the park's operation.

382. Terra Mitica covered the costs of connection to the general infrastructure, which is available to the community as a whole, and the fact that it was financed by the authorities does not mean that aid was involved. When assessing aid, the Commission takes no account of the reasons for public funding; the specificity of the planned measure is sufficient. In this case, the specificity test was not met.

383. The Commission decided to open formal proceedings in respect of the tax treatment of US foreign sales corporations (FSCs) established in Belgium ⁽⁵⁾. The scheme was based on a ruling, i.e. prior approval given by the tax administration of the favourable treatment to be granted to certain commercial transactions between affiliated companies, which are excluded from the tax base of FSCs. The Commission's decision does not challenge the Member States' right to use a flat-rate method for calculating companies' taxable income, but places the tax administration under the obligation to aim to ensure that transactions of this type incur a tax liability comparable to that applied to transactions between two independent operators under the conventional method.

384. The grounds given by the Commission for adopting a negative final decision in this case were broadly based on the advantage derived by German coordination centres from a similar scheme ⁽⁶⁾. This introduced the cost-plus method of calculating taxable profit together with the possibility for the coordination centre to opt for a rate of taxation of its profit margin of less than 10 % even in individual cases where the German

⁽¹⁾ OJ C 384, 10.12.1998.

⁽²⁾ Case E 1/2000.

⁽³⁾ Case C 18/2001 (ex N 123/2000), decision of 3.4.2002.

⁽⁴⁾ Case N 42/2001 (ex NN 14/2001), decision of 22.6.2002.

⁽⁵⁾ Case C 30/2002 (ex NN 36/2002).

⁽⁶⁾ Case C 47/2001 (ex NN 42/2000).

tax administration would be entitled to demand a higher rate. This led the Commission to find that the scheme in question reduced the amount of corporation tax payable by coordination centres and conferred an advantage on them.

385. The formal investigation also having revealed that, in view of the de facto exclusion of German companies from the arrangement, its selective nature could not be disputed, the Commission found the aid scheme in question incompatible with the Treaty.

2.1. Stranded costs

386. A specific issue raised in connection with liberalisation of the single market in electricity under Directive 96/92/EC ⁽¹⁾ prompted the Commission to identify a set of costs specific to the sector that were not written off before liberalisation. These are referred to as stranded costs.

387. The authorities are likely to introduce arrangements aimed at restoring in each territory a level playing field between established operators and new entrants in the sector. The Commission then has to examine such arrangements in order to determine the conditions in which any State aid they may involve can be authorised in order to offset undertakings' stranded costs.

388. In a UK case ⁽²⁾, the stranded costs imputable to the private company Northern Ireland Electricity derived from obligations which it had entered into under existing long-term supply contracts at prices that were actually or potentially higher than those prevailing on the market. To compensate for the resulting extra costs borne by the undertaking, the government introduced a charge payable by electricity end-users, which was collected by the distributors without the involvement of an agency centralising and redistributing the levy.

389. The Commission found, in accordance with the principles established in *Preussen Elektra*, that the resources involved were of private origin and therefore that the scheme did not involve State aid.

390. A Belgian case prompted the Commission to spell out, in the light of the methodology for analysing State aid linked to stranded costs which

it adopted on 26 July 2001 ⁽³⁾, the criteria it intends to apply in determining the conditions in which the derogation in Article 87(3)(c) of the Treaty can be applied to stranded costs constituting aid. The Commission thus divided the Belgian scheme into three parts.

391. The first concerns the dismantling of experimental nuclear sites for which the electricity generators have, with the Federal Government, been jointly responsible since 1990, six years before the adoption of the directive. Having noted that its decision was without prejudice to the provisions of the Euratom Treaty, the Commission found that the compensation granted to Electrabel and SPE fulfilled the criteria set out in points 4.1 to 4.3 of the methodology.

392. As regards the part of the scheme concerning pensions for employees in the electricity industry, on the other hand, the Commission raised doubts *inter alia* on the grounds of the non-specific nature of the commitments given in this area by Electrabel and SPE to their employees: all companies covered by the collective agreement for the electricity and gas industry, including new entrants, were subject to the same obligations. Other aspects reinforced the Commission's doubts: the arrangement did not appear to be limited in time, neither was the compensation to be modulated according to trends in market prices for electricity and the foreseeable productivity gains of the undertakings concerned, as indicated in points 3.12, 4.1 and 4.5 of the methodology.

393. The third part of the scheme concerned the promotion of renewable energy sources and rational energy use, which was financed by setting a price for electricity end-users higher than the market price. Since the details were similar to those of the UK case referred to above, the Commission followed the same line of reasoning and found, in accordance with the *Preussen Elektra* case-law, that this part of the scheme did not involve any aid.

3. Selectivity

394. In a case similar to the one reported in point 375 above, the Commission closed by means of a negative final decision the investigation it opened on 11 July 2001 into a Spanish scheme granting

⁽¹⁾ OJ L 27, 30.1.1997.

⁽²⁾ Case N 661/1999.

⁽³⁾ Commission letter SG (2001) D/290869, 6.8.2001.

favourable treatment to coordination centres, although without requiring the reimbursement of aid already paid.

395. On the question of recovery, it acknowledged that, given the similarities between the legislation applicable to coordination centres in Vizcaya and that applicable to Belgian coordination centres, the Spanish authorities could legitimately regard the Basque scheme as not involving any aid. The Commission had adopted a decision in 1984 finding that no aid was involved in the Belgian scheme.

396. The Commission's analysis of the substance of the case revealed that the rules on coordination centres in Vizcaya conferred on the businesses eligible under the scheme a tax advantage by excluding the financial costs of their transactions from the calculation of their tax base. Since one of the eligibility conditions was furthermore that the firms concerned had to generate 25 % of their turnover through exports, the Commission took the view that the effect on trade strengthened the selectivity of the scheme.

397. The Commission closed a formal investigation into tax concessions granted to Åland Islands captive insurance companies ⁽¹⁾ by means of a decision finding that the scheme, based on the location of the companies concerned in that region of Finland, constituted State aid.

398. The Commission took the view that the only purpose of companies of this type was to insure the risks incurred by the companies to which they belonged; the scheme therefore established *de facto* selectivity between undertakings. Any business, irrespective of its size and the sector in which it operated, was of course legally entitled to set up its own reinsurance company; however, only a few large firms were able to achieve economies of scale by using the scheme. The selectivity criterion is thus assessed by the Commission on the basis of the actual situation.

399. In May, the Commission took a negative decision on aid to porcelain manufacturer GEA, closing an investigation procedure which had been initiated in September 2001 ⁽²⁾. Back in 1997, the Commission authorised aid for Grupo de Empresas Álvarez (GEA) on condition that no further aid be provided to that group during the

implementation of its restructuring plan. However, in 2001 the Commission received several complaints indicating that the company had benefited, at least since January 1997, from favourable treatment with regard to its debts towards social security and the tax authorities. The Commission considered that the persistent and systematic non-payment of social security contributions constituted a transfer of public resources to GEA and Vanosa. Such a transfer gave them a competitive advantage, since — unlike their competitors — they were not obliged to defray these costs as would ordinarily be the case. This situation therefore constituted aid within the meaning of Article 87(1) of the Treaty.

400. The mere fact that the national legislative provisions relied on by Spain were applicable to any enterprise subject to a court-supervised recovery scheme, or which had contracted debts towards social security and the Treasury, was not sufficient to enable the measures taken by Spain automatically to escape being categorised as aid within the meaning of Article 87 of the Treaty. The advantage resulting from the persistent and systematic non-payment of social security contributions at least between January 1997 and January 2001 arose from Spain's failure to take measures available under Spanish law (bankruptcy proceedings, separate forced collection procedures) to avoid companies continuing to operate endlessly without complying with their tax and social obligations. Nothing in the State's behaviour suggested that it acted as a private creditor trying to recover at least a marginal amount of unpaid taxes and social contributions.

401. On 17 July, the Commission decided not to raise any objections to the privatisation of Société Française de Production (SFP). SFP is a public undertaking and operates in the audiovisual production sector. As part of the privatisation, France intends to finance social measures in favour of the laid-off workers. To the extent that these social measures do not relieve the undertaking of costs that it normally has to bear in accordance with its legal and contractual obligations, the Commission considered that the social plan financed by the State did not involve State aid to SFP.

4. Distortion of competition

402. The Court of Justice confirmed its broad interpretation of the effect on trade: it is sufficient for the aid to strengthen the competitive position of the beneficiary in relation to its competitors

⁽¹⁾ Case C 55/2001.

⁽²⁾ Case C 71/2001.

and thereby distort competition⁽¹⁾. The distortion does not need to be substantial or significant. The fact that the amount of aid is small does not by itself rule out the distortion of competition, except in cases falling under the *de minimis* rule.

5. Effect on trade between Member States

403. In July, the Commission proposed, as part of its review of tax aid measures in force in the Member States, that Italy adopt appropriate measures to bring a tax aid scheme into line with its recently adopted notice on the application of the State aid rules to measures relating to direct business taxation⁽²⁾. Since the Italian authorities did not adopt the proposed measures by the deadline set, the Commission opened a formal investigation in February and then adopted in December a negative final decision on this existing scheme, which, however, had never entered into force⁽³⁾.

404. The scheme granted tax concessions to financial institutions, insurers and credit companies established in the centre and working with the countries of central and eastern Europe. The Commission approved it in 1995 on the grounds that it facilitated the raising of private capital for developing financial markets in that region.

405. It now took the view, in the light of its notice on the application of the State aid rules to measures relating to direct business taxation, that the scheme constituted operating aid which did not fulfil the conditions for exemption laid down in the notice. Given the agreements concluded between the EU and the applicant countries, implementation of the scheme would furthermore henceforth affect trade on the financial services market⁽⁴⁾.

C — Assessing the compatibility of aid with the common market

1. Horizontal aid

1.1. Rescue aid

406. On 13 November, the Commission decided to give conditional approval to the rescue aid

granted by France to Bull⁽⁵⁾. The decision concludes proceedings that were launched on 9 April. The French Government, a shareholder in Bull, granted a rescue loan of EUR 450 million in December 2001 and during the first half of 2002. As the Commission had doubts whether this rescue aid complied with the Community guidelines on State aid for rescuing and restructuring firms in difficulty, it decided to open formal proceedings. The Commission was mainly concerned about the fact that the aid appeared to be part of a long-term restructuring process, whereas the guidelines provide that a rescue operation must be exceptional and must be designed solely to keep the firm afloat for a limited period while its future can be assessed. Furthermore, the Commission suspected that Bull could have used the rescue aid to cover restructuring costs. As Bull already received restructuring aid in 1993–94, further restructuring aid could not normally be accepted in view of the ‘one time, last time’ principle laid down in the rescue and restructuring guidelines.

407. During the investigation procedure, the French authorities gave sufficient evidence that the rescue and restructuring guidelines were respected: the rescue loan was warranted on the grounds of serious social difficulties, the loan had been made available at an interest rate at least comparable to the interest a wealthy firm needs to pay under normal market conditions, and it was limited to the amount needed to keep the firm in business for a six-month period. The French authorities argued that the rescue loan constituted short-term rescue aid and that the restructuring costs had been financed by the sale of assets, not by the rescue loan.

408. In accordance with the rescue and restructuring aid guidelines⁽⁶⁾, the rescue aid has to be reimbursed within 12 months after the last instalment of the loan paid to Bull. The Commission therefore decided to make its approval subject to the explicit condition that the French authorities give evidence of the reimbursement of the loan by Bull before the end of the period of 12 months after disbursement of the last instalment. In addition, the Commission carefully assessed whether the aid was restricted to the amount needed to keep the firm in business for a period of six months and, in particular, that the aid received

⁽¹⁾ See for instance its judgments of 12 December 2002 in Case C-5/2001 *Belgium v Commission* and 23 October 2002 in Joined Cases T-269/99, T-271/99 and T-272/99 and T-346/99, T-347/99 and T-348/99 *Diputación Foral de Guipúzcoa and others v Commission*, not yet reported.

⁽²⁾ OJ C 384, 10.12.1998.

⁽³⁾ Case C 16/2002 (ex E 5/2000).

⁽⁴⁾ Case C 48/2001 (ex NN 43/2000).

⁽⁵⁾ Case C 29/2002.

⁽⁶⁾ OJ C 288, 9.10.1999.

was not used to undertake new investments. Finally, the Commission's decision made it clear that no additional support in the form of restructuring aid could be granted before 31 December 2004. Neither may any further rescue aid be granted to Bull, as rescue aid, by definition, is a one-off operation designed to keep an undertaking in business for a limited period.

409. The Commission approved on 27 November rescue aid granted by the UK Government to British Energy plc ⁽¹⁾. British Energy plc is one of the largest players on the UK electricity market. It operates primarily nuclear stations. The fall in electricity wholesale prices which followed the introduction of a new electricity trading system in England and Wales severely reduced the cash flow generated by the group's nuclear stations. On 9 September, the UK Government took the decision to award British Energy plc two credit facilities. The principal purposes of these are to enable the company to meet its operating costs and to prevent it defaulting on its trading contracts and regulatory requirements for a period of six months. The credit facilities may at some point be replaced by State guarantees on loans granted by private banks to British Energy plc.

410. After stating that the decision was without prejudice to compliance with the Euratom Treaty rules and obligations, notably with respect to the measures to be taken in the context of a restructuring or liquidation plan, the Commission found that the aid amount was limited to the amount necessary to keep the group afloat. In this respect, the UK Government had put in place a very rigorous mechanism aimed at ensuring that money could be drawn only when and to the amount strictly necessary. The need for each payment requested by the beneficiary will be established in advance by independent auditing experts. In any event, aid is capped at a maximum amount of UKL 899 million, plus where appropriate UKL 276 million for specifically identified contingencies, to be used solely for the dedicated purposes. The Commission concluded that the credit facilities at issue fulfilled the conditions set out in the Community guidelines on State aid for rescuing and restructuring firms in difficulty. They were justified by serious social difficulties, were granted in the form of loans at market rates which had to be repaid or in the form of State

guarantees for such loans, were restricted to the minimum necessary and had no unduly adverse spillover effect on other Member States.

411. The Commission therefore decided to approve the aid for six months. Approval is based on the UK Government's undertaking to present to the Commission within six months a comprehensive restructuring plan for British Energy plc. Furthermore the United Kingdom undertook to report monthly to the Commission on the payments made to British Energy plc and to inform the Commission of any substantial change in the situation of the group. Any future aid to British Energy plc within the context of the restructuring plan will have to be notified to the Commission and will be assessed on its own merits.

1.2. Restructuring aid

412. On 9 April, the Commission opened proceedings with regard to Bankgesellschaft Berlin AG in order to carry out a detailed investigation of restructuring aid granted to the bank by the *Land* of Berlin ⁽²⁾. Bankgesellschaft Berlin, which is controlled by the *Land* of Berlin, is the 10th largest bank in Germany and the leading credit institution in Berlin. As a result of high-risk real estate transactions such as rent guarantees given to fund investors during the 1990s, the bank went into a serious crisis in 2001. In summer 2001, a capital increase of EUR 2 billion was needed in order to avoid action by the banking supervisory authorities. The *Land* provided a capital injection of EUR 1.8 billion, which the Commission authorised as rescue aid on a provisional basis, pending the submission and approval of a restructuring plan. Due to the discovery of further risks, the *Land* in December 2001 had to intervene again and provided the bank with a so-called 'risk shield' comprising credit and book value guarantees with a theoretical nominal maximum value of roughly EUR 21 billion. Although this amount is a theoretical one which will not materialise under realistic scenarios, the guarantees over the next 25 to 30 years will probably amount to several billion euro.

413. The capital increase and the guarantees of the risk shield form the basis of the restructuring plan submitted to the Commission at the end of January. Following a preliminary assessment the Commission had doubts as to the compatibility of

⁽¹⁾ Case NN 161/2002.

⁽²⁾ Case NN 5/2002.

the restructuring aid with the common market. These doubts mainly concerned the bank's future viability and the sufficiency of the measures planned in order to cut back the bank's market presence. Following the publication in June of the decision opening proceedings, the Commission received comments from third parties and several further factual submissions from the German authorities. Due to the complexity of some of the issues in question — among others, the impact of another procedure opened in July with respect to a former capital and asset transfer to the subsidiary of Bankgesellschaft Berlin, Landesbank Berlin — the investigation was still continuing at the end of the year.

1.3. Environmental aid

414. The Commission took three decisions concerning excise duty rates on biofuels. Similar measures were notified by the United Kingdom ⁽¹⁾, Italy ⁽²⁾ and France ⁽³⁾. The three decisions were adopted on the basis of Council decisions taken on 25 March and 27 June pursuant to Article 8(4) of Council Directive 92/81/EEC on the harmonisation of the structures of excise duties on mineral oils. The Italian measure consisted in the extension of a tax scheme in favour of the production of biodiesel. Under the UK measure biodiesel produced from either rape methyl ester or recovered vegetable oil should qualify for the new excise duty reduction. As far as France is concerned, the decision was taken following a judgment handed down by the Court of First Instance on 27 September 2000 partly annulling the Commission decision of 9 April 1997 whereby the Commission declared the aid in favour of esters of vegetable oil and ETBE compatible with the common market.

415. In the three cases, the aid was approved on the grounds of compatibility with the environmental guidelines, and more particularly Section E.3.3. According to this section, operating aid in favour of the production of renewable energy can usually be approved. In order to assess whether the temporary tax exemption could be justified, the Commission examined whether the operating aid was limited to covering the difference between the cost of producing energy from renewable energy sources and the market price of

energy. The Commission concluded in the three cases that overcompensation within the meaning of the environmental guidelines was ruled out, and that the aid was restricted to covering the difference in production cost from a renewable energy source in relation to the market price of energy. In the French case, however, the aid was also approved on the ground that it did not adversely affect trading conditions to an extent contrary to the common interest. It therefore qualified for exemption under Article 87(3)(c) of the EC Treaty.

416. The Commission approved on 3 April the so-called 'dual-use exemption' under the United Kingdom's climate change levy (CCL) ⁽⁴⁾. The CCL is an environmental tax levied on the non-domestic use of energy for fuel purposes. It is a central part of the UK Government's strategy to achieve a 12.5 % reduction in greenhouse gas emissions, agreed under the Kyoto Protocol. The 'dual-use exemption' applies to energy products used for both fuel and non-fuel purposes. The Commission opened a formal investigation into this exemption in March 2001 because of doubts about its distortive effect on competition. However, these doubts were allayed and the Commission decided that the dual-use exemption did not constitute State aid. Furthermore, the Commission also approved as compatible aid a further exemption covering a limited range of production processes that directly compete with those processes benefiting from the dual-use exemption.

417. On 24 April, the Commission decided to raise no objections to the aggregates levy, an environmental tax levied on the commercial exploitation of rock, sand and gravel when used as aggregate for construction purposes ⁽⁵⁾. On the basis of the Community guidelines on State aid for environmental protection, the Commission approved a phased introduction of the levy in Northern Ireland, in the form of a degressive exemption from the levy for a period of five years.

418. The Commission found that the general logic of the scheme justified the introduction by the Dutch authorities of an overall system for assessing the change in the price of land after decontamination ⁽⁶⁾. Use of the system should

⁽¹⁾ Case N 804/2001 (OJ C 238, 3.10.2002).

⁽²⁾ Case N 461/2001 (OJ C 146, 19.6.2002).

⁽³⁾ Case C 64/2000, not yet published.

⁽⁴⁾ Cases C 18 and C 19/2001.

⁽⁵⁾ Case N 863/2001.

⁽⁶⁾ Case N 520/2001 (OJ C 146, 19.6.2002).

limit the intensity of aid financed by the scheme to 70 % of eligible costs.

419. A planned German scheme for aiding the construction of a solar power station ⁽¹⁾ was the first individual case of aid for investment in renewable energy sources examined by the Commission. The scheme was approved in the light of the relevant provisions of the guidelines on State aid for environmental protection ⁽²⁾, and in particular point 37, which determines investment costs that are eligible for aid.

420. In the case of solar energy, these are limited to the additional costs incurred by a business which has decided not to install a traditional energy production plant. To determine the additional costs of the aided investment, the German authorities adopted a calculation method which the Commission found convincing and the different aspects of which are described in its favourable decision.

1.4. R & D aid

421. France notified an individual grant of R & D aid under an approved scheme ⁽³⁾ which exceeded the notification thresholds for aided Eureka projects. The general objective of Medea+ is to develop, through cooperation between public or university laboratories and industrial research centres in different Member States, the necessary building blocks for designing the network architecture for electrical and electronic components. The Commission found that the quantitative and qualitative importance of the cooperation in question justified its approval under Article 87(3)(b) of the Treaty as an ‘important project of common European interest’.

422. The Commission authorised funding for the programme established by the KLICT foundation ⁽⁴⁾, a Dutch NGO, with the aim of encouraging research on removing bottlenecks, particularly in the fields of traffic flow, pollution and land use by both individuals and businesses. The foundation is the primary recipient of the aid but does not carry out any research itself. It establishes the research topics, chooses on the basis of pre-established criteria the subcontractors who

will be the final aid beneficiaries and requires them to set up research groups.

423. The KLICT scheme meets the conditions laid down in points 5.3, 5.4 and Annex 1 of the framework for State aid for research and development as regards both the definition of and the maximum aid intensities for industrial research and fundamental research.

424. Scrutiny of the BSIK scheme ⁽⁵⁾ provided the Commission with an opportunity to spell out the nature of the obligation to notify individual grants of aid under an R & D aid scheme that it has previously authorised.

425. Point 4.7 of the R & D framework ⁽⁶⁾ provides that in such cases the notification requirement is normally limited to research projects costing more than EUR 25 million and for which it is proposed to provide aid with a gross grant equivalent of more than EUR 5 million.

426. The BSIK scheme is intended to benefit consortia bringing together public research centres and businesses with an interest in the fundamental or industrial research project conducted by each of them. Only the public centres will be able to exploit the intellectual property rights deriving from the research results. The businesses taking part in the project will gain an indirect advantage from joining the consortium. The intensity of the aid granted to each will be assessed according to a methodology established by the Dutch authorities with the aim of identifying individual research projects costing over EUR 12 million conducted by firms receiving total aid in excess of EUR 3.5 million.

427. The Commission found that the notification thresholds for individual grants of aid under the BSIK scheme were in line with point 4.7 of the R & D framework and accordingly authorised the scheme.

2. Regional aid

428. On 17 July, the Commission approved the application of a reduced rate of excise duty on traditional rum produced in the French overseas departments ⁽⁷⁾. By its decision of 18 February, the Council had already authorised this reduction

⁽¹⁾ Case N 345/2002, decision of 14.11.2002.

⁽²⁾ Case C 71/2001.

⁽³⁾ Case N 702/B/2001, decision of 3.8.2002.

⁽⁴⁾ Case N 652/2001, decision of 1.2.2002.

⁽⁵⁾ Case N 291/2002, decision of 8.8.2002.

⁽⁶⁾ Case C 71/2001.

⁽⁷⁾ Case N 179/2002.

from a taxation standpoint (Article 3 of Directive 92/84/EEC). The budgetary cost (forgone revenue) amounts to around EUR 46 million per annum. The Commission can authorise operating aid of this type in the outermost regions under point 4.16 of the guidelines on national regional aid, as amended in 2000. Economic dependence on the sugar cane/sugar/rum sector in the overseas departments was a major factor in the Commission's assessment of the measure.

429. Acting under the powers conferred on it by the Portuguese constitution, the region of the Azores introduced favourable tax arrangements for economic operators based in its territory ⁽¹⁾. The Commission examined the scheme in the light of the guidelines on national regional aid ⁽²⁾ and found that the reductions in tax rates constituted operating aid. Since the aid was granted in an outermost region, it could qualify for exemption under Article 87(3)(a) or (b) provided that it helped to compensate for the additional costs of carrying on an economic activity there.

430. Since this condition did not appear to be met, with special reference to location of service activities that were largely independent of any regional handicaps, the Commission decided in April to initiate a formal investigation into the scheme.

431. It was thus prompted, among other things in the light of the comments submitted by the Portuguese authorities, to state its position on the selective nature of tax measures adopted by regional entities for the benefit of businesses established within their jurisdiction. In the tax field, the existence of a selective advantage benefiting a business is determined in relation to a reference rate of taxation. In the case in point, in view of the powers conferred on the region to reduce by way of exception the rate of tax applicable throughout Portugal, the national tax system constituted the appropriate reference framework.

432. The Commission consequently found, in view of the geographical selectivity on which it was based, that the exceptional tax treatment of businesses in the Azores constituted a regional aid scheme rather than a general measure. Since its compatibility with the Treaty was not estab-

lished, it decided in April to open formal proceedings in order to ascertain whether the level of aid was proportional to the additional costs it was intended to offset.

433. It wound up its investigation in December by means of a decision approving the scheme under Article 87(3)(a) subject to the exclusion therefrom of firms in the financial sector or providing intra-group services. Since tax benefits had unlawfully been granted to businesses of that type, Portugal was required to recover the aid involved.

434. The Commission authorised a new tax aid scheme intended to encourage job-creating economic activities to locate in the Madeira free zone ⁽³⁾. Given their aim, which is to overcome the permanent structural handicaps from which Madeira suffers as a result of its distance from the mainland economic centres, the measures in question constitute operating aid.

435. It took the view in this case that the restrictive conditions imposed by the guidelines on national regional aid were counterbalanced by the fact that Madeira qualified for the derogation in Article 87(3)(a) of the Treaty. As in the case of the Canary Islands Special Zone (ZEC) scheme, the tax concessions were granted in proportion to the impact of the activities concerned on local development. The Commission found the planned aid proportionate and targeted at the objective pursued in accordance with its notice on the application of State aid rules to measures relating to direct business taxation and accordingly approved the scheme. This favourable decision is subject to qualifications excluding from its scope businesses carrying on activities that have no real impact on regional development, such as financial and intra-group service activities (coordination, treasury or distribution centres, etc.).

2.1. Multisectoral cases

436. On 9 April, the Commission decided not to raise objections with regard to a new large semiconductor investment by StMicroelectronics in Catania, Sicily ⁽⁴⁾. The investment project was one of the largest individual investment projects ever assessed by the Commission. The proposed aid amounted to EUR 542.3 million, out of a total

⁽¹⁾ Case C 35/2002 (ex NN 10/2000).

⁽²⁾ Communication from the Commission on multisectoral framework on regional aid for large investment projects (OJ C 70, 19.3.2002).

⁽³⁾ Case N 222/A/2002.

⁽⁴⁾ Case N 844/2001.

of EUR 2 066 million eligible costs. The project consisted in the construction of a new plant designed to use 12-inch silicon wafers for producing mainly flash memories of the NOR new technological generation. The Commission concluded that the proposed intensity of 26.25 % net grant equivalent was equal to the maximum aid intensity allowable under the multisectoral framework for this particular project. In assessing the compatibility of the aid, the Commission took into account the market situation and the fact that the project created 1 150 direct jobs, as well as the beneficial effects of the investment on the economies of the assisted regions, resulting in the creation of between 650 and 800 indirect jobs.

437. On the same date, the Commission approved EUR 219 million in investment aid for Infineon Technologies SC 300 for the construction of a new plant in Dresden, Saxony, producing DRAMs (dynamic random-access memory — semiconductors that store binary data) with a storage capability of 512 megabits and beyond⁽¹⁾. The aid represented 19.8 % of the total investment costs of EUR 1 106 million. The Commission had opened the formal investigation procedure in October 2001 as it doubted that the intended aid intensity of 19.8 % was in conformity with the maximum allowable aid intensity calculated on the basis of the multisectoral framework. The Commission's in-depth investigation came to the conclusion that the market is not in absolute decline and that the project will have a positive impact on the economies of the region. The aid amount was thus considered compatible with the multisectoral framework.

438. On 9 April, the Commission finally approved three quarters of the proposed aid in favour of paper company Hamburger AG⁽²⁾. Germany may subsidise the project up to 26.25 % of the eligible investment costs of EUR 153 million, i.e. to the amount of roughly EUR 40 million, instead of the initially notified 35 %, corresponding to EUR 54 million. The project concerns the construction of a new plant for the production of corrugated base paper in Brandenburg. The Commission had opened the formal investigation procedure in October 2001 among other things because it questioned whether the sector concerned could be regarded as not being in relative decline and whether the whole number

of indirect jobs claimed by Germany could be taken into account for the assessment of the compatibility of the aid. After the investigation the Commission came to the conclusion that the sector was indeed in relative decline and that not all the jobs allegedly to be created could be taken into account.

439. On 19 June, the Commission approved State aid of around EUR 250 million to help Zellstoff Stendal GmbH build a new pulp mill in Saxony-Anhalt, Germany⁽³⁾. The investment, costing a total of some EUR 800 million, will result in the creation of 580 direct jobs at the pulp mill, which will produce bleached softwood kraft pulp used as an input for all kinds of paper. Moreover, roughly 1 000 indirect jobs will be created in the region itself or in neighbouring assisted areas. Given the positive impact on employment as well as the fact that the sector concerned is not characterised by structural overcapacity, the notified aid intensity of roughly 31 % could be accepted for this large project. The normal aid intensity for large companies in the region in question is 35 %.

440. On 16 October, the Commission decided not to raise objections with regard to a new large investment project by Schott Lithotec in Hermsdorf, Thuringia⁽⁴⁾, an assisted area in Germany. The proposed aid amounted to EUR 80.5 million, out of a total of EUR 230 million in eligible costs. The project concerns the construction of a new plant for the production of calcium fluoride crystals for optic lithography used to produce wafer steppers. The Commission concluded that the proposed intensity of 35 % gross grant equivalent was equal to the maximum aid intensity allowable under the multisectoral framework for this particular project. In assessing the compatibility of the aid, the Commission took into account in particular the fact that the project will create 350 direct jobs as well as the beneficial effects of the investment on the economies of the assisted regions, resulting in the creation of 190 indirect jobs.

441. On 30 October, the Commission authorised Germany to grant proposed aid amounting to EUR 371 million in investment grants, investment tax refunds and a loan guarantee in favour of Communicant Semiconductor Technologies

⁽¹⁾ Case C 86/2001.

⁽²⁾ Case C 72/2001.

⁽³⁾ Case N 240/2002.

⁽⁴⁾ Case N 319/2002.

AG for the construction of a new semiconductor plant located in Frankfurt/Oder, in the eastern region of Brandenburg. The total proposed aid intensity amounted to 23.9 % based on the eligible investment costs of EUR 1 553 million. According to Germany, the project would lead to the creation of 1 318 direct jobs. Around 725 indirect jobs were expected to be created in the region. The Commission came to the conclusion that the market for application-specific integrated circuits, to which the products of Communicant Semiconductor Technologies AG belonged, was not in decline and in fact had grown faster than the overall manufacturing industry in recent years. Taking into account the market situation as well as the direct and indirect job creation linked to the project the Commission considered that, following the provisions of the multisectoral framework, aid up to 26 % of the investment cost would, in this case, be compatible with the EU rules.

442. The Commission decided on 13 November that part of the aid Germany proposed to grant to Capro Schwedt GmbH for the construction of a new caprolactam complex exceeded the maximum amount allowable under the multisectoral framework ⁽¹⁾. Germany had in August 2001 notified aid

amounting to EUR 92.7 million to Capro Schwedt GmbH for a large investment in a newly created chemical industrial park in Schwedt (Brandenburg). The production complex, which also includes three supplying companies, will produce caprolactam, the main input material for the production of synthetic fibres. The eligible investment cost was EUR 331 million. The total proposed aid intensity was 28 %, which is the regional ceiling for large undertakings in the assisted area. During the investigation procedure, which the Commission opened in January, two competitors and an agricultural industry association expressed their reservations about the project, supporting the Commission's doubts. The Commission concluded the investigation procedure finding that the caprolactam market was in relative decline (compared to the average for manufacturing industry). Consequently, the level of allowable aid was reduced to 21 % of the investment costs, i.e. to roughly EUR 69.5 million. In addition, the last aid instalment may be paid out only after the Commission has verified that all 528 announced jobs have in fact been created.

⁽¹⁾ Communication from the Commission on multisectoral framework on regional aid for large investment projects (OJ C 70, 19.3.2002).

Box 2: New multisectoral framework for regional investment aid, including new rules on automobile and synthetic fibres sectors

On 13 February, the Commission adopted a major reform to establish a faster, simpler and more accountable control system for government support to large investments in the EU. The new multisectoral framework on regional aid for large investment projects will enter into force on 1 January 2004 and replace the current framework that has been in force since September 1998. It includes a limited notification requirement for large projects balanced by a significant reduction in allowable aid levels. The new rules will also apply to the synthetic fibres industry and the motor vehicles sector, for which separate rules existed.

The need for a restrictive approach to regional aid for large-scale mobile investment projects (i.e. projects which the company concerned could carry out in various locations) is widely acknowledged.

- The distorting effect of such aid is magnified as other government-induced distortions of competition are eliminated and markets become more open and integrated.
- Large investments can effectively contribute to regional development although they are less affected by region-specific problems in disadvantaged areas.
- Companies making large investments usually wield considerable bargaining power vis-à-vis the authorities granting aid, which may lead to a spiral of increasingly generous promises of aid, possibly to a level much higher than is necessary to compensate for the respective regional handicaps.

According to the new framework, the actual aid intensity that a large project can receive corresponds to the aid ceiling laid down in the regional aid maps, which is then automatically reduced in accordance with the following scale:

| Size of the project | Adjusted aid ceiling |
|---|---|
| Up to EUR 50 million | No reduction. 100 % of regional State aid ceiling |
| For the part between EUR 50 million and EUR 100 million | 50 % of regional State aid ceiling |
| For the part exceeding EUR 100 million | 34 % of regional State aid ceiling |

Example: In an area with a regional aid ceiling of 20 %, a project with an eligible investment cost of EUR 80 million can obtain up to EUR 13 million in aid; i.e. EUR 10 million for the first EUR 50 million of investment, plus EUR 3 million for the remaining EUR 30 million of investment.

A ‘cohesion bonus’ can be granted to large projects co-financed by the EU Structural Funds. For such projects, the allowable aid intensity calculated under the above scale will be multiplied by a factor of 1.15. In so doing, the new system will take into consideration the added value of these large co-financed projects for the economic and social cohesion of the EU.

Projects are still to be notified and assessed individually if the intended aid is higher than what a EUR 100 million project could get. If such a project reinforces a high market share (> 25 %), or increases capacity in a non-growing sector by more than 5 %, no aid will be authorised.

The framework also provides for a list of sectors suffering from structural problems to be drawn up. No regional aid will be authorised for investment projects in these sectors, unless the Member State demonstrates that, although the sector is deemed to be in decline, the market for the product concerned is fast growing (typically the production of a certain product is only one of the activities carried out in a sector). The Commission will establish this list by 31 December 2003.

The new framework will apply from 1 January 2004 until 31 December 2009. There are some transitional rules. For the year 2003, projects in the synthetic fibres sector will not be eligible for investment aid. Projects in the motor vehicle sector will be allowed up to 30 % of the respective regional ceiling for the year 2003. While the rate of 30 % of the regional ceiling might seem rather low, it should be remembered that, in comparison with the current rules, a larger number of projects in the motor vehicle sector will be eligible for aid, and for some individual projects the eligible costs may be higher than currently. The 30 % transitional rule is expected to achieve, in a simpler and less time-consuming setting, a result that is, on average, comparable to the working of the current motor vehicle framework. As from 2004, the synthetic fibres sector and the motor vehicle sector may or may not figure on the list of sectors. This is still to be assessed and hinges on the question as to whether or not these sectors should be regarded as suffering from serious structural problems.

2.2. Aid for developing businesses’ international activities

443. The Commission decided to open a formal investigation into aid which Portugal planned to grant in the services sector under a previously approved scheme for promoting business strategies ⁽¹⁾. The project involved the type of expenditure covered by the scheme, namely investment in the internationalisation of businesses. The Commission has to decide here whether a Portuguese company operating in the tourism industry can obtain, for its Brazilian subsidiary, a grant for converting a building awaiting renovation into a luxury hotel.

444. Although it was not opposed to the principle of financing a project of this nature, the Commission raised doubts as to whether the Portuguese authorities had complied with the criterion of the necessity of the aid: it had not so far been demonstrated that the political and economic risks incurred by an EU investor in Brazil needed to be compensated by means of aid.

445. The Commission initiated formal proceedings in respect of aid to promote the internationalisation of the Sicilian economy ⁽²⁾. Two types of activity can be financed under the scheme: lasting investments on foreign markets (exhibition

⁽¹⁾ Case C 47/2002 (ex N 137/2002), decision of 2.7.2002.

⁽²⁾ Case N 285/2001.

centres, representation offices) and international promotion campaigns conducted by consortia of SMEs set up for the purpose.

446. The possibility that the aid towards lasting investments might be found incompatible with the common market cannot be ruled out at this stage.

447. The aid to consortia appears a priori to constitute operating aid, and the incomplete information in the Commission's possession does not enable it to assess the proportionality of the aid to the regional handicaps it is intended to alleviate.

2.3. Social aid

448. The Commission approved under Article 87(3)(c) an aid scheme financed by the region of Veneto in Italy⁽¹⁾ for providing accommodation for non-EU workers in the region. The firms employing them will receive the grants but will benefit only marginally from the aid.

449. It took the view that the scheme was devised chiefly in the interests of the workers and that the grants awarded to firms would serve mainly to cover the costs they incurred in seeking and providing appropriate accommodation; however, the advantages received by the workers concerned were not without effects on their choice of employer and thus favoured businesses in Veneto. The provision of proper accommodation is recognised by the Council as one of the means of integrating third-country nationals residing legally in the Union. The Commission therefore took a favourable view of the scheme since it pursued an objective in the interest of the EU as a whole, namely combating social exclusion, and involved only small amounts of aid to the firms concerned.

450. On 2 October, the Commission adopted a decision classing as a general measure the French scheme introduced by the law of 1 August to promote employment. The scheme is targeted at people aged between 16 and 22 who have left school without a general, technological or vocational upper secondary education qualification. The Commission's assessment was based on the non-selective and non-discretionary nature of the scheme, which met all the other cumulative criteria for classing a measure as aid.

451. It assessed the scheme in the light of its notice on monitoring of State aid and reduction of labour costs⁽²⁾, which states that 'a general, automatic and non-discretionary reduction of non-wage labour costs is clearly not covered by the competition rules relating to State aid' and adds that 'this remains the case even if the measures are targeted at certain categories of workers ... provided they apply automatically without discrimination between firms'.

452. The Commission decision also found that this youth employment promotion scheme met the conditions laid down in the guidelines on aid to employment⁽³⁾.

2.4. Sectoral aid

2.4.1. Cableways

453. The Commission adopted on 27 February two decisions on State aid to cableway installations in Italy⁽⁴⁾ and Austria⁽⁵⁾, thereby clarifying the application of State aid rules to the sector. The Commission distinguished between installations addressing general transport needs and installations for the practice of sports. It is also recalled that State aid exists only when the public support measures affect trade between Member States: thus State support to installations for purely local use does not constitute State aid. On the other hand, aid to installations in resorts that are in competition with installations in other Member States must be gradually reduced to the intensity accepted under the existing legislation and guidelines over a transitional period of five years.

454. In assessing State support to cableway installations, the Commission considered that funding of an installation supporting an activity capable of attracting non-local users will generally be seen as having an effect on trade between Member States. This might not, however, be the case for sport-related installations in areas with few facilities and limited tourism capability. Installations mainly serving the general mobility needs of the population would have an effect on

⁽²⁾ OJ C 1, 3.1.1997.

⁽³⁾ OJ C 334, 12.12.1995. Following the decision reported here, on 12 December 2002 the Commission adopted Regulation (EC) No 2204/2002 (OJ L 337, 13.12.2002), which sets out the criteria it will henceforth apply in similar cases. This does not affect the Commission's analysis in the case in point.

⁽⁴⁾ Case N 376/2001.

⁽⁵⁾ Case N 860/2001.

⁽¹⁾ Case N 599/A/2001.

trade between Member States only if there was cross-border competition in the supply of the transport service.

455. Accordingly, the Commission found that out of 82 installations that were to benefit from State financing as part of the first application of the Italian scheme, State aid was involved in only 40 cases. In those cases, a distinction was made between installations for general transport purposes, all of which were assessed and exempted under Article 73, and installations for sport purposes, all of which were exempted under Article 87(3)(c).

456. Similarly, in the case of the Mutterer Alm project in Tyrol, Austria, the Commission regarded the public support to investment in ski lifts and snow cannons, aimed at revitalising the ski resort, as aid compatible under Article 87(3)(c).

457. The Commission considered that the provision of services for winter sports has become subject to increasing cross-border competition. The growing competition is changing the nature of the problems and increases the distortive effects of aid to the cableway sector. For these reasons the view was taken that in the future the Commission's policy in the sector needed to be more clearly defined, strictly interpreted and uniformly applied. The Commission recognised that enterprises in the sector have largely benefited in the past from several forms of economic support from the national, regional and local authorities. Some of these were considered to be compatible aid under Article 87(3)(c). A change in policy setting stricter limits to compatibility could not, therefore, be too abrupt and a gradual application of the standard rules was necessary.

458. The Commission will assess aid projects in the sector by referring to the normal set of rules as clarified, *inter alia*, in the Commission regulation on State aid to small and medium-sized enterprises and the guidelines on national regional aid. However, for a transitional period of five years — from 1 January 2002 to 31 December 2006 — it will accept a temporary but degressive top-up of the aid levels otherwise justified under the existing legislation and guidelines as set out below:

- 25 additional percentage points for aid granted in 2002;
- 20 additional percentage points for aid granted in 2003;

- 15 additional percentage points for aid granted in 2004;
- 10 additional percentage points for aid granted in 2005;
- 5 additional percentage points for aid granted in 2006.

459. This approach appears to balance the needs of, on the one hand, allowing beneficiaries to adjust to the new approach, while, on the other hand, bringing the treatment of cableways into line with that of other sectors within a reasonable period.

2.4.2. Shipbuilding

460. The Council approved the Commission's twin-track strategy for combating unfair Korean practices in the shipbuilding sector by adopting the temporary defensive mechanism (TDM)⁽¹⁾, on the one hand, and agreeing to take Korea to the WTO on the other hand. The TDM is an exceptional and limited measure that is designed to support the EU's WTO action (it will be activated only once the WTO action has been initiated). This role of the TDM as a support mechanism to WTO action is clearly reflected in its substance.

461. Operating aid up to a maximum of 6 % of contract value may be authorised only for the two ship types in which the EU industry is suffering material injury as a result of unfair Korean practices, namely container ships and product/chemical tankers; LNGs will also be eligible for aid, should the Commission's further investigations conclude that EU industry is also suffering material injury in this segment.

462. Aid may only be authorised in relation to contracts for which there has been competition from a Korean shipyard offering a lower price than that offered by the EU yard. The TDM will expire on 31 March 2004, to coincide with the approximate conclusion of the WTO proceedings. Should the WTO proceedings be resolved or suspended before that date, no further aid will be authorised. As for procedural questions, any aid that a Member State proposes to grant under the TDM must receive Commission approval, either in the form of a scheme or as ad hoc aid.

⁽¹⁾ Council Regulation (EC) No 1177/2002 of 27.6.2002.

463. The Commission decided on 5 June to approve EUR 29.5 million in State aid to the Greek company Hellenic Shipyards⁽¹⁾ to cover costs linked to the early retirement of around 200 employees working in civil shipbuilding. The Commission also decided to initiate a detailed investigation concerning other aid earmarked for the same company as it had not been able to establish that all the aid to be given to the company met the criteria of the shipbuilding regulation.

464. On the same date, the Commission approved EUR 51.1 million out of a total of EUR 55.1 million in aid granted by the Dutch authorities to support the restructuring of Koninklijke Schelde Groep (KSG) in the context of its sale to Damen Shipyards Group (Damen)⁽²⁾. The Commission found that Damen's restructuring plan for KSG provided a firm basis for viability and that the aid was limited to the minimum. However, since there was no capacity reduction for civil shipbuilding as required by the regulation on shipbuilding aid, the Commission found EUR 4.0 million of the total aid incompatible with the common market. The Dutch authorities have recovered this part of the aid from the beneficiary. The Dutch authorities claimed that all the measures fell within the scope of Article 296 of the EC Treaty, concerning measures necessary for the protection of essential security interests. The Commission was not able to accept this since the measures clearly affected competitive conditions in the common market regarding products which are not intended specifically for military purposes.

2.4.3. Motor vehicles

465. The existing Community framework for State aid to the motor vehicle industry expired in December. The framework required the Commission to ensure that any aid granted in this sector was both necessary and proportional. As for necessity, the aid recipient had clearly to prove that it had an economically viable alternative location for its project. In other words, the project had to be mobile and the aid necessary for its implementation at the location for which it was planned. To assess the proportionality of the aid, a cost-benefit analysis was carried out. This compared the costs which an investor would bear in

order to carry out the project in the region in question with the costs for an identical project at the alternative location. It was thus possible to determine the specific regional handicaps of the project. The aid could exceed neither the regional aid ceiling applicable to new investments in the assisted area nor the regional handicap calculated in the cost-benefit analysis.

466. From 2004 onwards, the motor vehicle sector will be fully integrated into the new multi-sectoral framework on regional aid for large investment projects⁽³⁾. The rules in the new multisectoral framework become progressively stricter with the size of the investment. Very big projects will still be eligible for State aid, but the maximum allowable amount will be lower than it is today. In the meantime, in 2003, very simple transitional rules will apply to the sector. Under these rules, projects in the motor vehicle sector will be eligible for aid up to 30 % of the maximum allowable for each region (compared to up to 100 % under the existing rules).

467. The year 2002, the last year of validity of the motor vehicle framework, saw an increase in the number of notified cases.

468. On 22 May, the Commission decided to initiate a detailed investigation into aid amounting to EUR 61 million earmarked for the Volkswagen plant in Pamplona⁽⁴⁾. The regional aid project concerns production of the new Polo model. In its decision opening the procedure, the Commission expressed its doubts as to whether the Volkswagen plant in Bratislava was actually considered as a viable alternative for the project. Additionally, the Commission doubted that the cost disadvantage of Pamplona compared to Bratislava was correctly reported in the notification.

469. On 2 October, the Commission approved regional investment aid to Opel Portugal (GM group) for its Azambuja plant in the Lisbon region, following an in-depth investigation⁽⁵⁾. The aid went to a EUR 124 million investment for the installation of the production lines for a new small passenger and commercial vehicle, the Corsa Combo. The in-depth investigation was started in March and led to the approval of EUR 35 million in regional aid. With the same

⁽¹⁾ Case N 513/2001.

⁽²⁾ Case C 64/2001.

⁽³⁾ Communication from the Commission on multisectoral framework on regional aid for large investment projects (OJ C 70, 19.3.2002).

⁽⁴⁾ Case N 121/2001.

⁽⁵⁾ Case C 23/2002.

decision, the Commission authorised a grant of EUR 3 million towards Opel Portugal's EUR 7 million internal training costs for the investment project. The authorised grant was lower than what had been proposed by the Portuguese authorities (EUR 3.4 million), because the Commission found that a number of training actions provided skills only partly transferable to other firms or fields of work.

470. The Commission also approved on 2 October, following an in-depth investigation, regional investment aid to Iveco ⁽¹⁾ (Fiat group) for its Foggia plant (Italy). The aid went to a EUR 323 million investment for the production of a new engine called the F1, which is to power light commercial vehicles. The in-depth investigation was started in December 2001, and led to the approval of EUR 121 million in regional aid. The project is located in the Apulia region, which is recognised by the Commission as eligible for regional aid up to 35 % of eligible investment costs.

471. Lastly, the Commission decided on 2 October to initiate a detailed investigation into aid for BMW's engine plant at Steyr ⁽²⁾ in Upper Austria. In April, Austria had notified plans to grant aid for regional development as well as training, research and development, innovation and environmental protection. The proposed aid amounts to approximately EUR 40.25 million and would help various investments at the plant, which produces four- and six-cylinder petrol/diesel engines and develops diesel engine technology.

472. On 27 November, the Commission decided to start an in-depth investigation into proposed aid amounting to EUR 30 million in connection with investments costing EUR 440 million carried out by Opel in its car plant at Zaragoza ⁽³⁾, Spain. The project concerns the production of the Opel Meriva, a new, small, multi-purpose vehicle based on the Opel Corsa platform. In the decision opening proceedings, the Commission expressed doubts as to the mobility of the project as well as the regional handicap facing the Zaragoza region as calculated in the cost-benefit analysis.

473. The Commission decided on 11 December that Germany had to reduce planned regional aid to BMW for the construction of a new car plant in Leipzig (Saxony) ⁽⁴⁾. The eligible investments

amount to a total of EUR 1 204.9 million. The aim of the planned aid of EUR 418.6 million was to attract the company to invest in Leipzig, a regionally assisted area within the meaning of Article 87(3)(a). As the Commission had doubts as to the compatibility of the aid with the specific State aid rules for the motor vehicle sector, it decided to open a formal investigation on 3 April 2001. The Commission considered that the project was mobile and that Kolin in the Czech Republic had been a viable alternative location. The aid was therefore necessary for carrying out the project in the assisted region of Leipzig. The Commission's doubts concerned the proportionality of the aid. After examining the cost-benefit analysis, the Commission concluded that the regional handicap of carrying out the project in Leipzig (compared to Kolin) was 31.14 %, which was lower than initially indicated by Germany. The cost disadvantage of Leipzig had consequently been overestimated. Owing to the significant increase in production capacity, the allowable aid ratio was further reduced by one percentage point to 30.14 %. Consequently, the Commission authorised aid amounting to 30.14 % of the eligible investment of EUR 1 204.9 million. This corresponds to EUR 363.16 million. The remaining EUR 55.4 million in notified aid was considered incompatible with the common market.

2.4.4. Coal

474. Four Member States currently produce coal. Owing to unfavourable geological conditions most EU mines are not competitive in comparison with imported coal. Until the expiry of the ECSC Treaty on 23 July, State aid was governed by Decision No 3632/93/ECSC ⁽⁵⁾, which sets out the terms and conditions under which such aid may be granted. The Council adopted on 23 July a regulation on State aid to the coal industry to deal with State aid granted as from 24 July 2002 ⁽⁶⁾. The new regime is based on a minimum production of coal, which will help to maintain a proportion of indigenous primary energy sources in order to strengthen the EU's security of energy supply.

475. State aid to the coal industry will also support the restructuring of this sector, taking into

⁽¹⁾ Case C 92/2002.

⁽²⁾ Case N 316/2002.

⁽³⁾ Case C 75/2002.

⁽⁴⁾ Case C 26/2002.

⁽⁵⁾ OJ L 329, 30.12.1993.

⁽⁶⁾ OJ L 205, 2.8.2002.

account the social and regional repercussions of the reduction in activity. Member States therefore notify State aid on an annual basis. The Commission authorised State aid schemes allowing Germany ⁽¹⁾, France ⁽²⁾, Spain ⁽³⁾ and the United Kingdom ⁽⁴⁾ to grant the necessary public funding to the coal industry for 2002. This aid covers the difference between production costs and the price of internationally traded coal and also provides compensation for the payment of social security contributions.

476. Regarding the acquisition in 1998 of the German coal producers Saarbergwerke AG and Preussag Anthrazit GmbH by RAG Aktiengesellschaft (RAG), the Commission found ⁽⁵⁾ that no aid was involved in RAG's purchase of Saarbergwerke from the Federal State and the Saarland.

2.4.5. Steel

477. The Commission initiated proceedings against planned aid for environmental purposes to be granted to Ilva SpA, Acciaierie di Sicilia SpA, Duferdofin SpA and Acciaierie Valbruna SpA, Italy. The Commission closed the procedure by noting the withdrawal of the notification in the cases of Duferdofin SpA ⁽⁶⁾ and Acciaierie Valbruna SpA ⁽⁷⁾ and approving the aid in the cases of Ilva SpA ⁽⁸⁾ and Acciaierie di Sicilia SpA ⁽⁹⁾.

478. The Commission closed the proceedings initiated in 2001 against R & D aid illegally granted to several steel undertakings in the Basque Country by adopting a partly negative decision ⁽¹⁰⁾. The Commission also decided to extend the procedure initiated in 2001 against certain measures adopted by the Galician Government in favour of a newly created undertaking, Siderúrgica Añón ⁽¹¹⁾.

479. In a case concerning Belgium, the Commission initiated proceedings against the participation of the Walloon region in a newly created undertaking, called Carsid ⁽¹²⁾.

480. The Commission also initiated proceedings against planned aid for environmental purposes to be granted to Sollac SA in France. Later on, the Commission closed the procedure by noting that the notification had been withdrawn ⁽¹³⁾.

3. Transport

3.1. Rail

481. Revitalising the railway sector is a key element in the EU's common transport policy, which seeks to develop a sustainable transport system by shifting the balance between different modes of transport. Indeed, as stated in the Commission's White Paper on European transport policy ⁽¹⁴⁾, rail is the strategic sector on which the success of the efforts to shift the modal balance will depend. The Commission therefore takes a favourable view of public funding that promotes rail as a means of transport, in particular investments in railway infrastructure. It accordingly authorised several State measures that seek to develop the rail sector.

482. Two Commission decisions related to the infrastructure management of the main national railway network in the United Kingdom. The UK authorities notified a financial rescue package to ensure the continued provision of rail infrastructure services, without which the UK rail sector risked imminent collapse. The rescue aid was authorised by the Commission on 13 February for a period of 12 months during which a more sustainable solution was to be found ⁽¹⁵⁾. Subsequently, on 17 July, the Commission approved a financial package to allow a newly established company, Network Rail, to take over responsibility for operating and managing the UK rail network on a not-for-profit basis and which put an end to the uncertainty regarding the future of the network ⁽¹⁶⁾. On 24 April and 18 September, the Commission also authorised modifications and amendments to the financial mechanisms that the

⁽¹⁾ Commission decision of 2.10.2001 (OJ L 56, 27.2.2002) (aid covering 2002); Commission decision of 2.10.2002 (aid covering costs from 24 July 2002).

⁽²⁾ Commission decision of 2.10.2002.

⁽³⁾ Commission decision of 2.7.2002 (aid covering costs until 23 July 2002); Commission decision of 12.6.2002 (aid covering costs from 24 July 2002).

⁽⁴⁾ Commission decision of 20.3.2002; Commission decision of 5.6.2002; Commission decision of 17.7.2002.

⁽⁵⁾ Commission decision of 7.5.2002.

⁽⁶⁾ Case C 9/2002.

⁽⁷⁾ Case C 12/2002.

⁽⁸⁾ Case C 10/2002.

⁽⁹⁾ Case C 8/2002.

⁽¹⁰⁾ Case C 20/2001.

⁽¹¹⁾ Case C 95/2001.

⁽¹²⁾ Case C 25/2002.

⁽¹³⁾ Case C 27/2002.

⁽¹⁴⁾ European transport policy 2010: time to decide.

⁽¹⁵⁾ Case NN 170/2001, decision of 13.2.2002 (OJ C 98, 23.4.2002).

⁽¹⁶⁾ Case N 356/2002 *Network Rail*, decision of 17.7.2002 (OJ C 232, 28.9.2002).

UK authorities had put in place for the construction of the Channel Tunnel Rail Link (CTRL) ⁽¹⁾.

483. Concerning other Member States, the Commission authorised, on 27 February, a scheme set up in Denmark for cancelling old public loans issued almost free of reimbursement and interest to 13 local railways ⁽²⁾. On 19 June, it also allowed an Austrian aid scheme to provide public support for the construction, extension and modernisation of private railway sidings alongside the main national rail network ⁽³⁾. Moreover, on 18 September, it authorised the *Land* of Saxony-Anhalt (Germany) to grant aid to promote the transfer of freight traffic flows from road to rail. The scheme intends to safeguard and develop the system of freight traffic centres, as well as handling and loading areas ⁽⁴⁾. Finally, on 11 December, the Commission authorised the extension for four years of a Danish scheme which offsets the effect of railway infrastructure charges by introducing an environmental subsidy for the transport of goods by rail ⁽⁵⁾.

3.2. Combined transport

484. The European Union has for some time pursued a policy of achieving a balanced intermodal transport system, and the fostering of the competitiveness of combined transport vis-à-vis road is part and parcel of this policy. The central aim of the EU combined transport policy is a modal shift from road to other modes. In this sense, the Commission takes a favourable view of aid schemes which aim to promote this mode of transport through the acquisition of equipment designed for combined transport and the construction of specific infrastructure ⁽⁶⁾.

485. On 13 February, the Commission approved a combined transport aid scheme for the Autonomous Province of Bolzano-Alto Adige (Italy) ⁽⁷⁾. The scheme awards subsidies to the

logistics companies which provide rail services for combined transport departing from or ending in its territory and particularly on the Bolzano–Brenner route. The subsidies will facilitate the reduction of the price paid by the users of the combined transport infrastructures and competition with road transport on similar market conditions. In order to avoid any possible distortion of competition, a tender procedure for the provision of rail services is established and the scheme will be limited in time.

486. The Commission approved, on 27 February, start-up aid for a new private pilot service between Germany and Italy ⁽⁸⁾ with the aim of shifting traffic from road to rail on the Munich to Verona route via the Brenner. The one-year pilot service, which already received support from the European PACT programme ⁽⁹⁾, will contribute to relieve traffic on the much-used motorway on this very important corridor.

487. On 14 May, after conducting a formal investigation, the Commission found that no State aid within the meaning of Article 87(1) was involved in the relationship between the State-owned company Deutsche Bahn AG (Germany) and its subsidiary, the freight forwarding company BahnTrans ⁽¹⁰⁾.

488. On 17 July, the Commission decided to initiate a formal investigation into Dutch aid for the construction of a container terminal at Alkmaar in favour of Huisvuilcentrale Noord-Holland (HVC) ⁽¹¹⁾. Based at Alkmaar, in the immediate vicinity of a waste incineration plant operated by HVC, the container terminal would encourage household waste transport by inland waterways instead of road transport. The Commission considered it necessary to analyse the proportionality of the aid, possible distortion of competition between inland waterway terminals and the impact of the subsidy on the waste management market.

489. On 24 July, the Commission approved the main part of the special provisions for the transport sector of the Autonomous Province of Trento to encourage the transfer of goods traffic from road to alternative modes of transport ⁽¹²⁾. Never-

⁽¹⁾ Case N 706/2002 (OJ C 130, 1.6.2002) and Case N 523/2002 (OJ C 262, 29.10.2002).

⁽²⁾ Case N 784/2001 *Aid for Danish private railways*, decision of 27.2.2002 (OJ C 88, 12.4.2002).

⁽³⁾ Case N 643/2001 *Austria — Programme of aid for the development of railway sidings*, decision of 19.6.2002 (OJ C 178, 26.7.2002).

⁽⁴⁾ Case N 308/2002 *Promotion of investments for railway infrastructure*, decision of 18.9.2002 (OJ C 277, 14.11.2002).

⁽⁵⁾ Case N 287/02, not yet published.

⁽⁶⁾ Case N 644/2001 *Austrian State Fund ERP*, decision of 27.2.2002 (OJ C 88, 12.4.2002); Case N 406/2002 *Support of transshipment facilities in combined transport*, decision of 2.10.2002 (OJ C 292, 27.11.2002).

⁽⁷⁾ Case N 638/2001 (OJ C 88, 12.4.2002).

⁽⁸⁾ Case NN 134/2002 (ex N 841/01) *New private pilot combined transport service linking Munich to Verona* (OJ C 88, 12.4.2002).

⁽⁹⁾ Pilot actions for combined transport programme, decision of 25.7.2001.

⁽¹⁰⁾ Case C 63/2000 (ex NN 102/00) (OJ L 211, 7.8.2002).

⁽¹¹⁾ Case C 51/2002 (ex N 840/2001) (OJ C 212, 6.9.2002).

⁽¹²⁾ Case N 833/2001 (OJ C 242, 8.10.2002).

theless, the Commission decided to initiate the procedure laid down in Article 88(2) of the Treaty with respect to the investment aid for railway wagons and new or reconditioned rolling stock, since there were doubts as to its compatibility with Commission Regulation (EC) No 70/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to small and medium-sized enterprises ⁽¹⁾.

3.3. Road transport

490. On 27 February, in the context of the increase in oil prices in 2000, the Commission decided to initiate the formal investigation procedure with regard to two schemes granting aid to a specific type of vehicles through the reduction of tolls ⁽²⁾. When assessing the cases the Commission had doubts as to the appropriateness of the measures for the protection of the environment and their compatibility with the common transport policy.

491. Several decisions were adopted concerning transport investment aid ⁽³⁾. However, the Commission stresses the fact that in sectors with over-

capacity such as road transport, no aid can in principle be granted for the purchase of transport vehicles. Nevertheless, it is possible to grant aid in connection with the purchase of new vehicles, if such an incentive is aimed at environmental protection or safety objectives and actually represents compensation for the costs of higher technical standards than those laid down by national or EU legislation.

492. Accordingly, the Commission authorised a Spanish aid scheme for the purchase of electric or hybrid motorcycles within the territory of the Autonomous Community of Castile-Leon ⁽⁴⁾ and a scheme which seeks to bring into service vehicles adapted to persons with reduced mobility ⁽⁵⁾. Other decisions related to a Danish aid scheme to encourage the use of less polluting trucks ⁽⁶⁾ and a series of employment schemes put in place in Asturias (Spain) ⁽⁷⁾ for 2001 and 2002 in the transport sector with a view to creating and preserving jobs in this area.

3.4. Passenger transport

493. On 2 October, the Commission decided not to raise any objections to the various arrangements which the UK Government is to set up for the renovation and enhancement of the London

⁽¹⁾ OJ L 10, 13.1.2001.

⁽²⁾ Case C 11/2002 (ex N 382/01) *Italy (Piedmont) — Reduction of tolls for certain heavy goods vehicles in order to divert them from the Lake Maggiore State road 33 to the A/26 motorway* (OJ C 87, 11.4.2002); Case C 14/2002 (ex NN 72/01) *Portugal — Reduction of tolls for certain heavy goods vehicles, coaches and buses adopted following the rise in oil prices in summer/autumn 2000* (OJ C 88, 12.4.2002).

⁽³⁾ Case N 762/2001 *Investment aid scheme of the autonomous region of Madeira*, decision of 27.2.2002; Case N 646/00 *Italy — decision of 7.5.2002*; Case N 507/2001 *Portugal — Sirtiart*, decision of 7.5.2002 (OJ C 146, 19.6.2002).

⁽⁴⁾ Case N 203/2002, decision of 18.9.2002 (OJ C 9, 15.1.2003).

⁽⁵⁾ Case N 337/02 *Spain (Community of Madrid) — Aid for the acquisition of public transport vehicles adapted to persons with reduced mobility*, decision of 27.11.2002, not yet published.

⁽⁶⁾ Case N 100/01 *Subsidies for certain environment friendly lorries*, decision of 22.5.2002 (OJ C 154, 28.6.2002).

⁽⁷⁾ N 600/B/2001, decision of 16.10.2002.

Box 3: Road transport undertakings

In May, the Council unanimously adopted three decisions on the granting of national aid by the Netherlands, Italy and France ⁽¹⁾ in favour of road transport undertakings. These decisions ensure that the derogation measures adopted by the Council (2001/224/EC) on 12 March 2001 authorising the Netherlands, Italy and France to apply reduced rates of excise duty for certain mineral oils in favour of road hauliers are considered compatible with the common market. It is recalled that in 2001 the Council decided to allow the Netherlands until 1 October 2002 and Italy and France until 31 December 2002 to apply reduced rates of excise duty on diesel fuel for road hauliers. However, against the background of the Commission's decision to launch proceedings against these three countries under Article 88(2) of the Treaty ⁽²⁾, the three States in question sought and obtained an acknowledgement from the Council that exceptional circumstances within the meaning of Article 88(2)(b) existed, making it possible to consider such aid compatible with the common market.

⁽¹⁾ Netherlands (Doc. 8032/02 + COR1); Italy (Doc. 8033/02 + COR1); France (Doc. 8034/02 + COR1).

⁽²⁾ Case C 24/2001 *Italy*; Case C 25/2001 *France*; Case C 26/2001 *Netherlands*.

Underground by a public–private partnership ⁽¹⁾. The objective of the measures is to develop a better Underground in London through an efficient public sector operator working with an enhanced infrastructure managed by the private sector. The Commission is of the opinion that these arrangements, notably the compensation to be paid to the infrastructure companies, do not constitute State aid. They are indeed the result of competitive procurement processes eliminating any possible advantage.

3.5. Waterways

3.5.1. Inland waterway transport

494. The White Paper on European transport policy for 2010 ⁽²⁾ calls for the promotion of modes of transport that are less harmful to the environment and have unused capacity available, such as inland waterway transport. Switching the transport of goods from road to inland waterways is therefore in the common interest within the meaning of Article 87(3)(c). On 27 November ⁽³⁾, the Commission found that the sale of substantial parts of Erste Donau-Dampfschiffahrt-Gesellschaft mbH, wholly owned by Austria, to the City of Vienna could not be regarded as State aid.

3.5.2. Maritime transport

495. On 30 January, the Commission authorised a French scheme intended to cover for a period of three years up to 30 % of the operating costs of new short sea shipping services ⁽⁴⁾. The French authorities will add national aid to the European support measures for short sea shipping by financing projects that would not qualify for EU funding on the grounds that only national operators are involved.

496. The Commission approved several tonnage tax schemes ⁽⁵⁾ allowing companies to pay taxes according to the capacity of their fleet rather than on the basis of profits made. These schemes add to a series of tonnage taxes that were previously

approved by the Commission for the Netherlands, Germany and the United Kingdom. Such measures appear to be already proving successful in reversing the decline of EU shipping.

497. On 19 June, the Commission took a negative decision on the grant of maritime transport aid to Dutch towage operations carried out inside and around EU ports ⁽⁶⁾. As port towage is considered a port service, which does not constitute a maritime transport activity, the grant of maritime transport aid for such port services was considered to be incompatible with the common market. Since the aid had already been granted, the Commission decided that the Netherlands should recover it as from 12 September 1990.

498. The Commission decided on 20 December 2001 to initiate the formal investigation procedure in respect of an Italian aid scheme ⁽⁷⁾ granting an incentive to shipowners for the elimination of single hull tankers over 20 years of age. However, on 17 July, the Commission came to the conclusion that the aid scheme would provide an important contribution to the protection of the environment and to safer seas.

499. On 2 July, the Commission approved aid for public service obligations (PSOs) in respect of maritime services in Corsica ⁽⁸⁾. On 17 July it authorised aid in the form of a EUR 22.5 million loan to rescue Société nationale maritime Corse-Méditerranée (SNCM) ⁽⁹⁾. The aid is to be granted by the French State via the 100 % State-owned Compagnie générale maritime et financière (CGMF). In addition, the formal investigation procedure was initiated on 19 August with regard to planned restructuring aid to SNCM ⁽¹⁰⁾.

500. The Commission did not raise any objections to the extension for 2002 of an Italian aid scheme which reduces social security contributions for maritime shipping companies in the cabotage sector ⁽¹¹⁾. This scheme was already approved by the Commission for the period 1999–2001.

⁽¹⁾ Case N 264/2002 (OJ C 309, 12.12.2002).

⁽²⁾ COM(2001) 370.

⁽³⁾ Case N 471/2002 *Austria*.

⁽⁴⁾ Case C 65/2000 (ex N 679/2000) (OJ L 196, 25.7.2002).

⁽⁵⁾ Case N 736/2001 *Spain*, decision of 27.2.2002; Case N 563/2001 *Denmark*, decision of 12.3.2002 (OJ C 146, 19.6.2002); Case N 195/2002 *Finland*, decision of 16.10.2002; Case N504/2002 *Ireland*, decision of 15.12.2002.

⁽⁶⁾ Case C 56/2001 (OJ L 314, 18.11.2002).

⁽⁷⁾ Case C 97/2001 (ex N 93/2001) *Maritime transport safety*, decision of 20.12.2001.

⁽⁸⁾ Case N 781/2001 *Maritime services in Corsica* (OJ C 186, 6.8.2002).

⁽⁹⁾ Case NN 27/2002, not yet published.

⁽¹⁰⁾ Case C 58/2002 (ex N 118/2002). OJ C 308, 11.12.2002.

⁽¹¹⁾ Case N 519/2002 *Extension of a scheme to reduce social charges in the maritime cabotage sector*, decision of 6.9.2002 (OJ C 262, 29.10.2002).

501. On 2 October, the Commission decided to initiate a formal investigation into a planned UK investment subsidy in favour of Clydeboyd Ltd⁽¹⁾ for the provision of a larger berth and enhanced freight handling facilities. The Commission had doubts as to the proportionality of the State contribution and as to the possible harmful impact on existing infrastructures.

502. The Commission also gave the go-ahead to German maritime training aid for 2002⁽²⁾, as it had in the past already approved similar German schemes for 1998, 1999, 2000 and 2001. The aid regime will help preserve maritime know-how and expertise on board German merchant ships. It also decided not to object to public subsidies from the Flemish Region to finance the harbour-masters' offices at Belgian seaports⁽³⁾.

503. On 13 November, the Commission approved Danish income tax reduction measures⁽⁴⁾ for seafarers on board Danish vessels registered either in the ordinary register (DAS) or in the second register (DIS). On 2 December it decided to raise no objections to a small amendment to a scheme that reduces local tax for maritime companies⁽⁵⁾. Moreover, the Commission considered that the reduction from 169 to 161 days in the minimum duration of time spent at sea for being eligible for the Irish seafarers' income tax allowance scheme⁽⁶⁾ would not undermine the conclusions of its 2 March 1999 decision and held that the amended scheme would remain compatible with the common market.

3.6. Air transport

504. In the wake of the 11 September 2001 terrorist attacks, which prompted the insurance industry to review its risk exposure and withdraw practically all war and terrorism cover at short notice, the Commission continued to apply the policy which it set out in its 10 October 2001 communication⁽⁷⁾. It stated in that document that if the situation of inadequate insurance cover were to drag on, the Member States could decide

to continue to offer an additional insurance guarantee or to assume the risk directly themselves. The authorisation for action at national level was thus extended three times, until 31 March, 30 June and finally 31 October 2002⁽⁸⁾. The Commission also spelled out in its communication the conditions in which it would deem measures taken by governments in the insurance field to be compatible with Article 87(2)(b) of the Treaty, under which Member States may grant aid 'to make good the damage caused by natural disasters or exceptional occurrences'. The Commission consequently examined in the light of that article the measures notified to it at each renewal of the aid⁽⁹⁾.

505. The Commission also authorised the schemes set up by several Member States to compensate airlines for the losses caused by the closure of certain parts of the airspace between 11 and 14 September 2001. It nevertheless considered that a number of criteria, set out in the communication, had to be fulfilled if such aid was to be allowed.

506. It accordingly approved the schemes introduced by France, the United Kingdom and Germany, by decisions taken respectively on 30 January, 12 March and 2 July⁽¹⁰⁾. Conversely, it decided on 5 June to initiate a formal investigation into the extension, notified by France, of the French aid scheme in order to cover costs incurred after 14 September 2001⁽¹¹⁾; a negative final decision was taken in this case on 11 December⁽¹²⁾. On 16 October the Commission decided partly to approve the scheme introduced by Austria but to open a formal investigation into the compensation granted by that country for costs incurred after 14 September 2001⁽¹³⁾. It is continuing its examination of similar emergency aid schemes notified by other Member States.

507. The Commission decided on 6 March⁽¹⁴⁾ to launch a formal investigation under Article 88(2)

⁽¹⁾ Case C 62/02 (ex N 221/02) (OJ C 269, 5.11.2002).

⁽²⁾ Case NN 94/2002 *Germany*, decision of 30.10.2002, not yet published.

⁽³⁾ Case N 438/2002 *Belgium*, decision of 16.10.2002 (OJ C 284, 21.11.2002).

⁽⁴⁾ Case NN 116/1998 *Denmark*, decision of 13.11.2002.

⁽⁵⁾ Case N 662/2002 *France*, decision of 2.12.2002.

⁽⁶⁾ Case N 661/2002 *Ireland*, decision of 2.12.2002 (OJ C 15, 22.1.2003).

⁽⁷⁾ Communication on the repercussions of the terrorist attacks in the United States on the air transport industry, COM(2001) 574.

⁽⁸⁾ Communication of 2.7.2002, COM(2002) 320 final.

⁽⁹⁾ Ireland: Case NN 34/2002 *Aviation Insurance scheme*, decision of 27.02.2002; Netherlands: Case NN 35/2002 *State-guaranteed scheme for covering aviation risks*, decision of 27.2.2002; United Kingdom: Case NN 43/2002 *Extension of airline insurance*, decision of 27.2.2002; Finland: Case NN 45/2002, decision of 6.3.2002.

⁽¹⁰⁾ France: Case N 806/2001 (OJ C 59, 6.3.2002); United Kingdom: Case N 854/2001 (OJ C 98, 23.4.2002); Germany: Case N 269/2002, not yet published.

⁽¹¹⁾ Case C 42/2002 (ex N 286/2002) (OJ C 170, 16.7.2002).

⁽¹²⁾ Case C 42/2002 (ex N 286/2002), not yet published.

⁽¹³⁾ Case C 65/2002 (ex N 262/2002) (OJ C 309, 12.12.2002).

⁽¹⁴⁾ Case C 19/2002 (ex NN 133/2000) (OJ C 98, 23.4.2002).

of the Treaty into possible misuse of aid granted by Greece and authorised in 1994 and 1998 ⁽¹⁾ and the grant of further aid to Olympic Airways (OA) and its subsidiaries. On 11 December it ruled that some of the aid previously granted by Greece ⁽²⁾ and further aid that was illegal because it had not been notified were incompatible with the Treaty. It therefore called on Greece to recover aid paid after 14 August 1998.

508. On 9 April, the Commission decided not to raise any objections to refinancing measures planned by TAP ⁽³⁾. It took the view that the Portuguese carrier's plan to discharge several securities and use the assets released to guarantee additional financial facilities did not constitute State aid.

509. It also authorised, on 19 June ⁽⁴⁾, two financial measures in favour of the Italian carrier Alitalia. It found that payment of the third instalment of restructuring aid approved in 1997, amounting to EUR 129 million, was compatible with the Treaty and that the future capital injection of not more than EUR 1.4 billion, to be submitted to the airline's shareholders, satisfied the market economy investor principle and did not constitute State aid.

510. Lastly, on 11 December, the Commission decided to open a formal investigation into advantages received by Ryanair when it located its first hub in continental Europe at Charleroi in 2001. The advantages were granted by the Walloon Region (non-transparent and discriminatory reduction in airport fees) and the airport operator, which is a public enterprise controlled by the Region (grants towards the costs of opening new routes, hotel expenses for staff, payment of advertising/marketing costs, etc.).

511. It also decided on the same date to launch proceedings in respect of aid granted to Intermediación Aérea (Intermed) for its scheduled service between Gerona and Madrid. It voiced doubts as to whether the specific conditions allowing a Member State to impose public service obligations had been met.

4. Agriculture

4.1. Policy developments and legislative initiatives in 2002

4.1.1. New guidelines for State aid concerning TSE tests, fallen stock and slaughterhouse waste

512. On 27 November, the Commission adopted new guidelines for State aid concerning tests for transmissible spongiform encephalopathy (TSE), fallen stock and slaughterhouse waste ⁽⁵⁾. The new rules clarify and modify State aid policy in these areas; this was necessary because the different policies followed by the Member States were creating a serious risk of distortion of competition.

513. BSE legislation has significantly altered the economics of slaughterhouse waste. What was a valuable product in the past is now waste, to be disposed of at high cost.

514. In order to allow the sector to adapt, the Commission has authorised very high amounts of State aid. However, this could lead to serious distortions of competition. Some Member States grant a lot of aid, others do not. Therefore, a review of the policy was necessary. The new rules respect the need to protect human health and the environment, which can justify the granting of aid, without creating undue distortions of competition.

515. These new guidelines do not in any way affect the possibility of granting State aid or the legal obligations under specific Council regulations to compensate farmers for losses where their animals are actually found to be infected by BSE or comparable diseases. Rather, they are aimed at reducing the permanent cost burden stemming from the general obligation to test and separate risk material from healthy animals.

516. In the future, no more State aid may be granted towards the costs of the disposal of slaughterhouse waste of any kind. Exceptionally, Member States may grant 50 % aid for the disposal of specified risk material and meat and bone meal with no further commercial use produced in 2003.

⁽¹⁾ OJ L 128, 21.5.1999; OJ L 273, 25.10.1994.

⁽²⁾ In the light of Article 87(1) of the Treaty.

⁽³⁾ Case N 132/2002.

⁽⁴⁾ Cases C 54/96 and N 318/02, not yet published.

⁽⁵⁾ OJ C 324, 24.12.2002

517. As to TSE tests, Member States will have to respect an upper limit of EUR 40 of total public support towards the cost of BSE testing of bovine animals slaughtered for human consumption from 1 January 2003 onwards. No such upper limit existed previously. This amount refers to the total costs of testing, i.e. test kit, taking, transporting, testing, storing and destruction of the sample. It should be remembered that currently EUR 15 out of the EUR 40 is paid by the EU (EUR 10.5 in 2003). The limit of EUR 40 was found to be sufficient to cover the price of the most competitive test-kit suppliers in the EU. This limitation should avoid undue distortions of competition and encourage more expensive test-kit suppliers to lower their prices. For other TSE tests (e.g. on fallen cattle or sheep) the Commission has decided that it will continue to authorise State aid of up to 100 %.

518. For fallen stock at farm level, and only for such fallen stock, Member States may grant State aid covering up to 100 % of the costs of removal (i.e. collection and transport) and 75 % of the costs of destruction (i.e. storage, transformation, destruction and final disposal). A whole 100 % aid for destruction may be granted in some circumstances, e.g. if it is financed through fees or contributions from the meat sector. In order to allow Member States to adapt existing financing systems, the Commission will authorise aid of up to 100 % of costs until the end of 2003.

519. These guidelines will apply to new State aid, including pending notifications from Member States, with effect from 1 January 2003. The Commission proposes that Member States amend their existing aid schemes to bring them into line with these guidelines by 31 December 2003 at the latest. The guidelines will remain in force until 31 December 2013.

4.2. Overview of cases

520. The Commission received 341 notifications of planned State aid measures in the agricultural and agri-industrial sector. The Commission also started the examination of 34 aid measures which had not been notified in advance under Article 88(3). No review of existing aid measures pursuant to Article 88(1) was commenced or concluded. Overall the Commission raised no objections to 250 measures. Several of these were approved after the Member States concerned either amended or undertook to amend

them in order to bring them into line with EU State aid rules. The Commission started the procedure laid down in Article 88(2) in respect of five cases, where the measures concerned raised serious doubts as to their compatibility with the common market. The Commission closed the Article 88(2) procedure in four cases, taking a final negative decision in three of them. In all the cases where a negative decision was taken, and State aid had already been granted by the Member State concerned, the Commission requested recovery of the aid paid.

521. The overview of cases which follows includes a selection of the cases which raise the most interesting issues of State aid policy in the agricultural and agri-industrial sector in 2002.

4.2.1. Natural disasters

522. The Commission approved five aid schemes aimed at compensating victims in the agricultural sector for the damage caused by the recent floods in Germany. The schemes were examined rapidly and it was concluded that the compensation proposed by Germany could be paid in its entirety. The measures were considered compatible with Article 87(2)(b) of the Treaty, which states that the Commission can approve aid to make good the damage caused by natural disasters. The measures approved were as follows.

- Financial compensation of up to a total of 20 % (30 % in disadvantaged areas) was to be granted to farmers for lost revenues due to floods and land surface damage ⁽¹⁾.
- On-the-spot-payments of up to a total of 50 % were to be handed out for damage due to floods and, in particular, the loss or destruction of or damage to economic goods, such as plant, machinery, land and livestock. Farmers were to be compensated for circulating capital as well as evacuation costs ⁽²⁾.
- Aid was also to be given for the full or partial compensation of property investment losses in order to keep businesses in operation ⁽³⁾.
- The special programme of the common 'Agri-culture' action (*Gemeinschaftsaufgabe*) for

⁽¹⁾ Case N 567/2002.

⁽²⁾ Case N 581/2002.

⁽³⁾ Case N 595/2002.

flood damage was especially to cover aid for the restoration of villages, streets in rural areas and forests and aquaculture activities. Particular emphasis would be given to environment-friendly restoration ⁽¹⁾.

- Loans from the Landwirtschaftliche Rentenbank would be supported by a guarantee of 80 % for loans for liquidity aid or for investments in agricultural and forestry holdings ⁽²⁾.

523. On 18 September, the Commission approved a major aid scheme designed to provide compensation for losses caused by natural disasters in Greece ⁽³⁾. The method for calculating losses is based not on total output in reference years, the main method recommended by the Community guidelines for State aid in the agriculture sector, but on departmental yields (the guidelines allow for the possibility of using other calculation methods than the above, provided that they are shown to be appropriate). The budget for the scheme is very high: over EUR 171 million in State aid and over EUR 126 million in aid which the Greek authorities are seeking to have co-financed by the EU and which is currently still under examination.

4.2.2. Promotion and advertising

524. On 13 February, the Commission authorised Germany (Bavaria) to pay aid totalling EUR 3.5 million in 2002 for the introduction of a new quality label. For the years 2003 and 2004, an annual budget of more than EUR 2 million was approved. The quality label is part of an extensive quality assurance and control programme which has been introduced in order to recover consumer confidence after a significant drop in beef sales following the BSE crisis. Access to the quality label is open to all enterprises in the EU that comply with the programme requirements.

525. The aid is to cover the cost of several individual measures, such as:

- controls on and certification of companies participating in the programme;
- information measures designed to explain the label and its advantages to the consumer;
- sales promotion and advertising measures.

526. The aid will be granted to groups of users of the quality label, such as marketing associations or other firms in the area of food production. The label users must meet the conditions in the field of production, processing and marketing of cattle and beef and will face clearly higher control standards than normal. It is also planned to extend the label to products other than beef at a later stage.

527. The Commission authorised this aid on the basis of new guidelines for State aid for the advertising of agricultural products, which entered into force on 1 January. These guidelines allow, for the first time, information on product quality and product origin to be combined under such a label. The label for which the Commission authorised the grant of State aid allows producers from all over the EU to indicate the respective origin of their products.

528. On 27 February, the Commission approved an aid scheme for promotion and advertising in Italy ⁽⁴⁾, which modifies the similar schemes already approved by the Commission in cases N 558/2000 ⁽⁵⁾ and N 729/A/2000 ⁽⁶⁾ in order to bring them into line with the requirements of the Community guidelines for State aid for advertising of products listed in Annex I to the EC Treaty and of certain non-Annex I products ⁽⁷⁾.

529. This is one of the first instances in which the above guidelines have been applied on a large scale (all types of association representing agricultural producers are eligible under the scheme). Implementation of the scheme will be checked on the basis of the annual reports which the Italian authorities will have to submit.

4.2.3. Increase in the cost of fuel

530. On 11 December, the Commission took a partly negative decision on support measures adopted by Spain following the increase in fuel prices and in respect of which it opened a formal investigation in April 2001 ⁽⁸⁾. It considered that a number of measures directly linked to the price increase did not fall within the scope of the State aid rules, but that Spain had not demonstrated

⁽¹⁾ Case N 647/2002.

⁽²⁾ Case N 682/2002.

⁽³⁾ Case N 143/2002.

⁽⁴⁾ Case N 30/2002.

⁽⁵⁾ Letter SG(2001) D/286564, 28.2.2001.

⁽⁶⁾ Letter SG(2001) D/286847, 13.3.2001.

⁽⁷⁾ OJ C 252, 12.9.2001.

⁽⁸⁾ Case C 22/2001.

that two of the measures in the package presented (interest-rate and guarantee subsidies and certain tax concessions) were limited to compensation for damage sustained following the increase in fuel costs. The Commission therefore found that those measures constituted operating aid that was incompatible with the competition rules.

531. The Commission decided that the following measures did not constitute aid within the meaning of the Treaty:

- amendment of the law on value added tax;
- tax measures to assist agricultural cooperatives;
- measures concerning personal income tax and value added tax including the following:
 - for 2000, the application to certain stock farming activities subject to the objective assessment scheme of a corrective index for animal feed purchased from third parties;
 - for 2001, reduction of net income under the scheme for the objective assessment of personal income tax for farming and stock farming activities;
 - also for 2001, reduction of the percentage used to determine quarterly payments under the simplified value added tax scheme for certain farming activities and increase in the percentage of expenses deductible that are difficult to substantiate for personal income tax purposes.

532. On the other hand, it decided that the State aid granted to farmers in the form of interest-rate and guarantee subsidies and the measure extending for 2000 and 2001 the tax concessions applicable for personal income tax purposes to the transfer of certain agricultural holdings and land were incompatible with the common market. With regard to these measures, Spain had not provided any information demonstrating a link between the oil price increase and the damage sustained by farmers. Since the aid was illegal, Spain had to abolish it and recover aid already paid from the beneficiaries without delay; it had to inform the Commission within two months of the decision of the steps it had taken to withdraw and recover the aid.

4.2.4. Opening of formal investigations

Aid to olive-pommace oil extraction, refining and bottling plants

533. On 14 March, the Commission decided to launch a formal investigation into aid granted by Spain to olive-pommace oil extraction, refining and bottling plants⁽¹⁾. The aid took the form of loans totalling up to ESP 5 billion (EUR 30.05 million) with an interest rate subsidy from the Agriculture Ministry, which could also subsidise the guarantees for such loans.

534. It regarded the measures at that stage as State aid which was designed to improve the financial position of the beneficiary firms but in no way contributed to the development of the sector. They could therefore constitute operating aid that was incompatible with the common market and could also be in breach of the rules on the common organisation of the market.

Aid to olive oil producer organisations

535. The Commission initiated formal proceedings on 19 July with regard to a regional aid scheme (Extremadura, Spain) to support olive oil producer organisations. The aid, in the form of a grant calculated on the basis of the number of applications submitted for olive oil and table olive production aid, was in addition to the EU aid granted under Regulation (EEC) No 136/66.

536. It took the view at that stage that a grant to producer organisations calculated on the basis of the number of applications submitted for olive oil and table olive production aid constituted State aid which was designed to improve the financial position of the organisations but in no way contributed to the development of the sector. It would therefore have to be regarded as operating aid that was incompatible with the common market; it was furthermore liable to interfere with the mechanisms governing the common organisation of the market and therefore to be in breach of EU legislation.

Aid to finance a public rendering service

537. On 10 July the Commission decided to launch a formal investigation into certain aspects of the rendering system in France⁽²⁾. It had

⁽¹⁾ Case C 21/2002 (ex NN 14/2002).

⁽²⁾ Case C 49/2002.

received several complaints claiming that the rendering charge created distortions. The rendering charge finances a public service which collects and destroys livestock carcasses and seizures from slaughterhouses declared unfit for human or animal consumption. Established with effect from 1 January 1977, the charge is levied on purchases of meat and other specified products by all persons engaged in the retail sale of such products and is based on the net value of VAT of purchases irrespective of their origin.

538. The Commission's examination is focusing on the fact that the rendering charge introduced to finance the system is levied also on meat from other Member States, which cannot benefit from the rendering system. The apparent effect of the service being free is also that the direct beneficiaries, in particular slaughterhouses, stock farmers and holders of animal meal, are relieved of the costs of eliminating waste produced in the course of their business. This could constitute State aid to those operators and could be deemed incompatible.

539. The Commission is also examining the fact that the charge is levied above a particular total turnover figure for a business, and not on the basis of meat sales: some businesses are exempted from the charge even if they sell more meat than others which generate a larger turnover with other products. Such exemption could constitute incompatible State aid to those firms which are not subject to the charge.

540. A request for a preliminary ruling on the interpretation of Article 87(1) of the Treaty in relation to the rendering charge has also been referred to the Court of Justice of the European Communities ⁽¹⁾.

Rationalisation aid scheme for pig slaughterhouses

541. On 28 December 2001 the Commission decided to initiate a formal State aid investigation into a notified rationalisation scheme for pig slaughterhouses in the Netherlands ⁽²⁾. In the light of the judgment of the Court of First Instance in *Weyl Beef Products BV and others v Commission* ⁽³⁾, it was deemed necessary to examine whether the noti-

fied measure, involving an agreement between undertakings to reduce capacity, complied with Article 81 of the Treaty. The Commission doubted whether the measure could be exempted as a crisis cartel because there appeared to be no structural overcapacity in the sector and it seemed doubtful that the measure would improve production. Lastly, the Commission had doubts as to the compatibility of the proposed measure with the provisions of Section 9 of the guidelines on State aid in the agriculture sector. By letter of 5 August the Dutch authorities withdrew the notification of the measure. No final decision will therefore be taken in this case.

5. Fisheries

542. On account of its social and economic features, the fisheries sector received during the reporting period large amounts of public assistance, both from the EU and from national sources.

543. The Commission assessed the compatibility of national aid schemes in the light of the guidelines for the examination of State aid to fisheries and aquaculture ⁽⁴⁾.

544. In December the Council agreed on the reform of the common fisheries policy. Council Regulation (EC) No 2369/2002 ⁽⁵⁾ simplified Article 19 of Regulation (EC) No 2792/1999, which determines how far the State aid rules of the Treaty are applicable to the fisheries sector.

545. To speed up the payment of EU Structural Funds and reduce the administrative burden on both Member States and the Commission resulting from 'routine' positive State aid decisions, without relaxing the control regime for State aid, Articles 87 to 89 no longer apply as from 1 January 2003 to past or future payments by Member States which are the obligatory national co-financing for expenditure under the rules of the Financial Instrument for Fisheries Guidance. However, Articles 87 to 89 remain applicable to any aid which goes beyond what is obligatory under these rules. In addition, *ex post* control when Member States are reimbursed under the rules of the Structural Funds will remain in place.

⁽¹⁾ Case C-126/2001 *Ministre de l'économie, des finances et de l'industrie v GEMO SA*.

⁽²⁾ Case C 91/2001 (ex N 568/2001) (OJ C 37, 9.2.2002).

⁽³⁾ Joined Cases T-197/1997 and T-198/1997, judgment of 31.1.2001.

⁽⁴⁾ OJ C 19, 20.1.2001.

⁽⁵⁾ Council Regulation (EC) No 2369/2002 amending Regulation (EC) No 2792/1999 laying down the detailed rules and arrangements regarding Community structural assistance in the fisheries sector (OJ L 358, 31.12.2002).

546. The Commission approved on 27 November an aid scheme notified by the Dutch authorities for the repurchase in the course of 2003 of 'reserved' fishing licences ⁽¹⁾. Such licences are not tied to a given vessel but placed on the market by their owner. They may be acquired by the owner of a fishing vessel at any time within a period of two years after their issue.

547. The notified scheme, involving aid amounting to EUR 900 000, will enable the Dutch authorities to repurchase reserved licences at the market price with a view to withdrawing them from circulation in the run-up to the disappearance of such licences on 1 January 2004. They have given assurances that no further aid will be paid for this purpose, and that the system of reserved licences will end by 2004.

548. In November the Commission took two positive final decisions ⁽²⁾ concerning schemes aimed at compensating fishermen who were obliged to stop fishing temporarily in 2000. For one scheme, the temporary cessation of fishing was caused by a pollution phenomenon and for the other scheme, the cessation of fishing was decided as part of a plan for the protection of marine resources. On the same date, the Commission decided not to raise any objections to schemes of the same kind set up under plans for the protection of resources for the years 2001 and 2002 ⁽³⁾.

D — Procedures

1. Existing aid

549. On 16 October, the Commission decided to open a formal investigation into existing aid paid to German producers of grain brandy (*Kornbranntwein*) ⁽⁴⁾. This was in response to the refusal by the German authorities to comply with the Commission's recommendation of 19 June calling on them to incorporate into German law by the end of 2003 appropriate measures for reforming the spirit monopoly act. As they stand, the German arrangements constitute aid to domestic producers which is not available to producers from other Member States. The German authorities take the view that grain brandy comes under the

— relatively lax — rules applicable to agricultural products, whereas the Commission considers that, being classed as a spirituous beverage, it is subject to the rules in Articles 87 and 88 of the EC Treaty.

550. The EU common position on the competition chapter adopted in November 2001 sets out a procedure for assessing State aid measures which will have entered into force before the actual date of accession and which the candidate countries wish to operate beyond that date.

551. The draft Accession Treaty provides that the following aid measures be regarded as existing aid within the meaning of Article 88(1) of the EC Treaty from the date of accession:

- (a) aid measures put into effect before 10 December 1994;
- (b) aid measures listed in an appendix to the Accession Treaty (the 'Treaty list'); and
- (c) aid measures which prior to the date of accession were assessed by the State aid monitoring authority of the new Member State and found to be compatible with the *acquis*, and to which the Commission did not raise an objection on the grounds of serious doubts as to the compatibility of the measure with the common market (the 'interim procedure').

552. All measures which constitute State aid and which do not fulfil the conditions set out above are to be considered new aid upon accession for the purposes of Article 88(3) of the EC Treaty.

553. The above provisions do not apply to aid to the transport sector, or to activities linked to the production, processing or marketing of products listed in Annex I to the EC Treaty with the exception of fisheries products and products derived therefrom. The above provisions will also be without prejudice to the transitional measures regarding competition policy set out in the draft Accession Treaty.

554. During 2002, and on the basis of measures submitted by the candidate countries, the Treaty list was established. By the end of October, candidate countries had submitted 322 State aid measures (57 % concerning individual aid cases and 43 % concerning aid schemes). The Commission departments assessed these measures on the basis of information provided by the candidate countries and concluded that 69 % of the measures submitted were compatible with the *acquis*. These measures were therefore proposed for inclusion in the Treaty list.

⁽¹⁾ Case N 546/2001.

⁽²⁾ Cases C 83 and C 84/2001.

⁽³⁾ Cases NN 159/2001 and NN 107/2002.

⁽⁴⁾ Case E 47/2002.

2. Exempted aid

555. Exemption regulations have been adopted in order to facilitate the granting of aid by the Member States to certain sectors. The practical consequence is that Member States do not need to officially notify the Commission of their plans before granting the aid.

556. However, to enable the Commission to exercise its controlling tasks in those sectors as well, Member States have to report once a year to the Commission which aid has been granted under the exemption regulations.

557. Reporting by Member States needs to be improved. The Commission has started a major training initiative directed at Member States to show them the utility of reporting in terms of increased transparency in the State aid sector as well as the minimum requirements for proper reporting that enable the Commission to comply with its monitoring obligations.

3. Recovery of aid

558. On 12 March, the Commission ordered the recovery of EUR 7.83 million of aid from Neue Erba Lautex GmbH (NEL), Germany, and its parent company, the bankrupt Erba Lautex GmbH. The two legal entities form a group artificially kept alive by this new aid and by non-recovered aid of EUR 61.36 million, which was already declared incompatible in July 1999. The Commission could not allow a company which had not repaid aid declared incompatible two and a half years ago to set up a subsidiary merely as a vehicle to obtain more State aid and further distort competition. In its decision the Commission first established that NEL was not an independent new company but formed a group together with its parent company, the bankrupt Erba Lautex GmbH. Second, the Commission ruled that the aid was incompatible with the common market as it clearly did not fulfil the conditions of the rescue and restructuring guidelines. Finally, the Commission noted that the new aid together with the non-recovered aid declared incompatible in July 1999 had a cumulative negative effect on competition, as distortions of competition had only been worsened.

559. On 30 October, the Commission brought a three-year investigation to a close by ordering the recovery of EUR 15.7 million of incompatible aid from the east German porcelain manufacturer

Kahla, which is headquartered in Thuringia⁽¹⁾. The decision concerns two different legal entities: Kahla Porzellan GmbH (Kahla I) — a porcelain manufacturer privatised in 1991 and declared bankrupt in 1993 after heavy losses — and its legal successor, Kahla/Thüringen Porzellan GmbH (Kahla II), which was created in 1993 to take over the assets of the bankrupt Kahla I and to continue its activities in the production of porcelain dishes and household china. The formal investigation procedure was initiated in November 2000 and extended in November 2001. The investigation encompassed a total of 33 measures in favour of both Kahla I and Kahla II, totalling some EUR 79 million. Of the 10 measures in favour of Kahla I, the Commission found that some EUR 37 million was not State aid and that a further EUR 19 million was covered by approved aid schemes. The remaining EUR 3 million was assessed under the rescue and restructuring guidelines but, since the criteria of these guidelines were not fulfilled, it was declared incompatible. The 23 measures in favour of Kahla II were found to be aid. Of the total amount, some EUR 7.3 million was covered by approved aid schemes and the remaining EUR 12.7 million was assessed as ad hoc aid. Reports drawn up when the company was formed clearly indicated that Kahla II had been in difficulties from the time of its creation until 1996. The aid awarded during that period was accordingly assessed on the basis of the rescue and restructuring guidelines. However, in the absence of a sound restructuring plan and a substantial contribution towards the restructuring, this aid was declared incompatible. The aid awarded as from 1996 was assessed as regional investment aid. However, since it was clearly operating aid not linked to any initial investment, it was also declared incompatible. The incompatible aid of EUR 15.7 million has to be recovered from Kahla I and Kahla II.

Recovery of aid and use by the Council of Article 88(2) of the Treaty

560. On 27 February, the Commission brought an action for annulment before the Court of Justice in respect of a Council decision⁽²⁾ of 21 January authorising Portugal to grant a maximum of EUR 16.3 million in aid to pig farmers. This amount is the same as that which 2 116 farmers

⁽¹⁾ Case C 62/2000.

⁽²⁾ Decision 2002/114/EC (OJ L 43, 14.2.2002).

were supposed to have repaid under two negative final Commission decisions of 25 November 1999 ⁽¹⁾ and 4 October 2000 ⁽²⁾.

561. The Commission had found that the measures concerned were incompatible with the Treaty's State aid provisions (Articles 87 and 88) and therefore demanded that Portugal take steps to recover the amounts unlawfully granted. Portugal did not appeal to the Court of Justice and so the Commission's decisions remained unchallenged.

562. The Portuguese authorities did in fact launch proceedings to recover the incompatible aid but they changed their minds and by letter dated 23 November 2001 they formally asked the Council to authorise, under Article 88 of the Treaty, aid totalling EUR 16.3 million for the 2 116 farmers affected by the Commission's two negative decisions.

563. On 21 January, the Council adopted a decision authorising this aid. The formal basis of that decision is Article 88(2) of the Treaty. The Commission considers that the Council has misused that provision. The Council took its decision more than 15 months after adoption of the Commission's decisions. For the first time, the Council has used this exceptional procedure to approve an aid measure the sole purpose of which is to cancel out the financial impact of two final Commission decisions. The Commission sees the legal security of European Union decisions as being seriously threatened by the Council's decision.

564. In the Commission's opinion, the Council's use of Article 88 to annul *de facto* and regardless of time the financial impact of the two final decisions:

- unacceptably violates the legal security of all the interested parties;
- involves an assumption by the Council of a position of higher authority that infringes both the Commission's decision-making power and the Court of Justice's jurisdictional power;
- raises questions of principle on the reality of the Commission's authority in State aid policy matters and on the allocation of responsi-

bilities between the institutions as intended by the Treaty itself.

The Commission has therefore laid the matter before the Court of Justice ⁽³⁾.

4. Non-execution of decisions

565. By judgment of 3 July 2001, the Court of Justice ruled that the Commission decision of 4 December 1996 ordering the recovery of aid unlawfully granted under the Belgian Maribel bis/ter scheme, which granted reductions in social security contributions to the sectors most exposed to international competition, had not been implemented.

566. Belgium admittedly adopted on 24 December 1999 a law for the recovery of the aid known as Maribel quater. However, in the Commission's view this law still did not enable all the aid in question to be recovered. In fact it allowed firms which had repaid the aid to deduct the amount repaid once more for tax purposes, which was tantamount to granting them fresh unlawful aid. Moreover, the application by the Belgian authorities of the *de minimis* rule appeared to the Commission to be incorrect in that it permitted firms in the excluded sectors (transport, agriculture, coal and steel) to benefit from the rule.

567. Since the Court's judgment had not been properly complied with, on 20 March the Commission served notice on the Belgian authorities under Article 228 of the Treaty. This resulted in the abolition of the double tax deduction. The problem posed by the *de minimis* rule, on the other hand, remained unresolved.

568. The Commission accordingly decided on 17 July to send the Belgian authorities a reasoned opinion for failing to comply with the judgment. If its demands are not met, the Commission may refer the matter to the Court, asking it to impose financial penalties on Belgium. This would be the first time such action has been taken in the State aid field.

5. Court judgments

569. On 17 October, the Court of First Instance, denying the State aid character of the contested measures, annulled the Commission decision of

⁽¹⁾ OJ L 66, 14.3.2000.

⁽²⁾ OJ L 29, 31.1.2001.

⁽³⁾ Case C-110/02 *Commission v Council*, not yet reported.

18 January 2000 ⁽¹⁾ in which the Commission had found aid being given to Linde AG to be incompatible. In 1996/97 the German State-owned privatisation agency Treuhandanstalt (THA/BvS), which owned a carbon monoxide production plant at the chemical site of Leuna, incurred substantial losses owing to the fact that it had agreed on an economically unfavourable long-term supply obligation to Union Chimique Belge (UCB). The price for the carbon monoxide did not even cover the production costs. In order to cut its losses, the THA/BvS subsidised with DEM 9 million the construction of a new carbon monoxide plant by Linde. In return for the subsidy, Linde took over the THA/BvS supply obligation to UCB.

570. The Commission considered that, despite the fact that the subsidisation of Linde presented an economic advantage for the German State, the subsidy constituted aid because it allowed Linde to obtain a new production facility without having to bear the full costs thereof. The Court denied the finding of aid owing to the specific market conditions of the product in question and in particular the fact that it had to be produced at the place of consumption. In the Court's legal reasoning the confirmation of the market economy investor principle (MEIP), though without naming it as such, is most important.

571. Even though the Court evaluates broadly the 'economically rational' behaviour of the THA/BvS in saving money for the State, it finally applies the MEIP as the lead test, in the way the Commission interprets it. The Court states that only the (hypothetical) part of the subsidy which might be higher than the market price (equivalent) for the transfer of the carbon monoxide supply obligation could constitute State aid. For that purpose the Commission should have examined whether the amount of the subsidy reflected the (market) price which would have been agreed between economic operators in the same situation in the way the Commission reads the judgment.

572. This required the Commission to determine a market price for the takeover of the delivery obligation and to compare this with the DEM 9 million paid by the German State. The subsidy given by the German State would not be aid if a private market investor would have paid

the same amount, i.e. if Germany acted as a *homo oeconomicus*. Consequently, if a part of the subsidy was in excess of the market price, this part would qualify as State aid. The Commission has again taken up the investigation.

573. On 11 July, the Court of First Instance gave judgment in an action brought by Hijos de Andrés Molina SA (HAMSA) with the support of Spain for the annulment of Commission Decision 1999/484/EC of 3 February 1999 ⁽²⁾ declaring State aid granted to HAMSA by the Spanish Government to be illegal and incompatible with the common market.

574. HAMSA had since 1993 benefited from several financial support measures, namely loans and guarantees from a public body (the IFA), the conversion into capital of part of the debts owed to the IFA, and the remission of debts by several public authorities. Of the eight grounds for annulment of the Commission decision submitted by the applicant with the support of the Spanish State, the only one to be accepted by the Court concerned the aid granted in the form of the cancellation of debts by State bodies.

575. In its judgment, the Court states that the Commission assessed the overall situation of the public creditors compared with that of the private creditors, drawing definitive conclusions from a mere comparison between the total amount of public debts and that of private debts and between the average percentage of remission by public creditors and that by private creditors and from the fact that, unlike most of the private creditors, the public creditors had preferential claims or mortgages. The Court considers that it was incumbent on the Commission to determine, for each of the public bodies concerned and taking into account the abovementioned factors, whether the debt remission it had granted was manifestly more substantial than that which would have been granted by a hypothetical private creditor placed, *vis-à-vis* the applicant, in a situation comparable to that of the public body concerned and trying to recover sums due to it. It is therefore the global, 'unsubtle' approach followed by the Commission that resulted in this part of the decision being annulled.

576. On the other hand, the Court dismissed all the other complaints formulated by the applicant, in particular that concerning the non-application

⁽¹⁾ Case COMP C 18/1999, Decision 2000/524/EC (OJ L 211, 22.8.2000).

⁽²⁾ OJ L 193, 26.7.1999.

of the regional discipline principle to an ad hoc sectoral aid and that concerning the effect on trade based on global data without any concrete analytical demonstration.

577. The Court of Justice heard two actions for annulment brought against Commission Decisions 2000/237/EC ⁽¹⁾ and 2000/240/EC ⁽²⁾ of 22 December 1999 declaring incompatible with the Treaty two Spanish aid schemes, one in favour of horticultural products intended for industrial processing, and the other to finance operating capital. In both cases, the Court confirmed firstly that the relatively small scale of an aid measure or the relatively modest size of the recipient firm does not rule out in advance the possibility that trade between Member States may be affected, and secondly that agricultural aid is not covered by the *de minimis* rule.

578. As to the alleged insufficient statement of reasons for the effect on trade, the Court confirmed that the Commission is not required to prove that the aid has such an effect. At the same time, it pointed out that the decisions appealed against did contain figures on trade between the other Member States and Spain, thereby indicating the overall context in which the aid had been granted, as well as information on the general

impact of the aid on production costs and on the existence of a common market organisation.

579. The Court also confirmed in the two judgments that:

- the use of the terms ‘abnormally’ and ‘serious’ in the derogation in Article 87(3)(a) shows that the derogation concerns only areas where the economic situation is extremely unfavourable compared with the EU as a whole, while the derogation in point (c) of that same provision has a wider scope in that it permits the development of certain areas of a State which are disadvantaged compared with the national average. It adds that, with respect to operating aid which is not designed as regional aid for investment or job creation and is not covered by another practice such as, for example, that relating to operating loans, the analysis of the sectoral impact takes precedence over that of the regional impact;
- the aid at issue contained a financial incentive to sell and buy raw materials produced in the region and hence it constituted a restriction on the free movement of goods, or more precisely a measure having an effect equivalent to a quantitative restriction prohibited by the Treaty. As a result, it could not be declared compatible with the common market, the common market organisation concerned being affected.

⁽¹⁾ OJ L 75, 24.3.2000.

⁽²⁾ OJ L 76, 25.3.2000.

E — Statistics

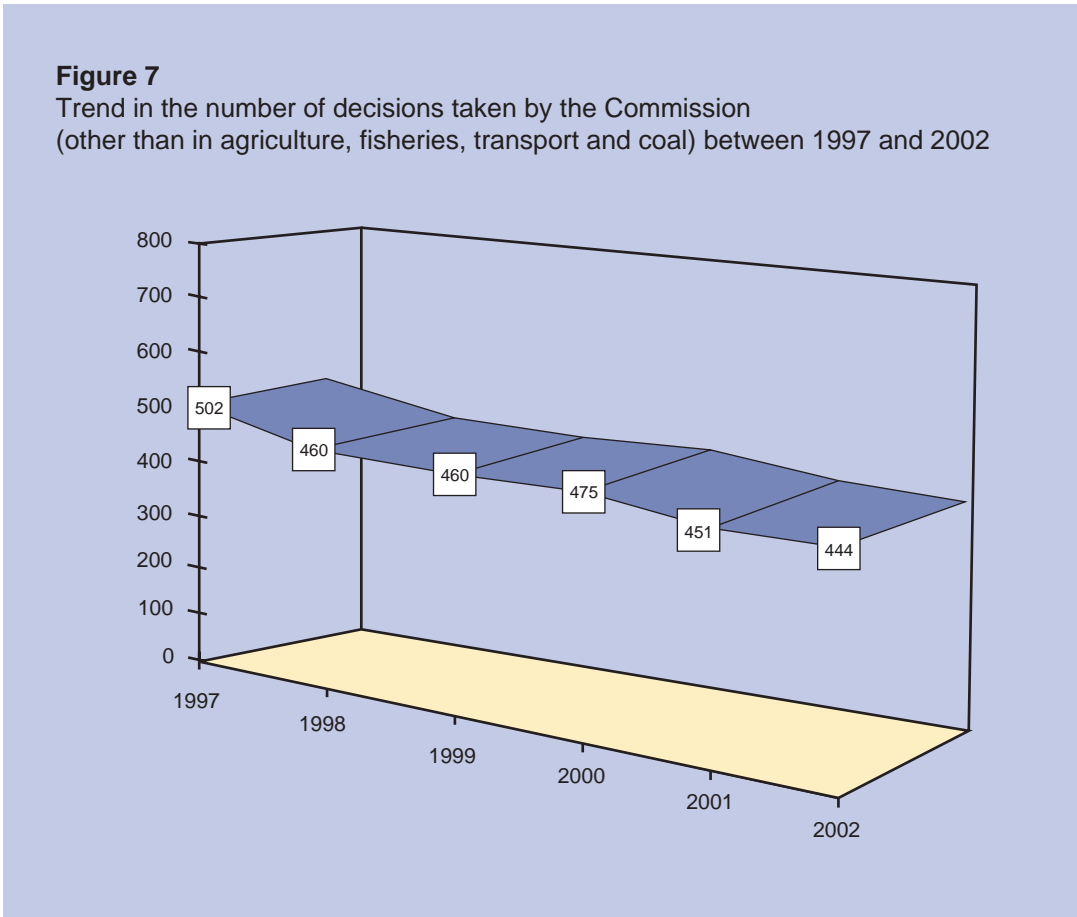
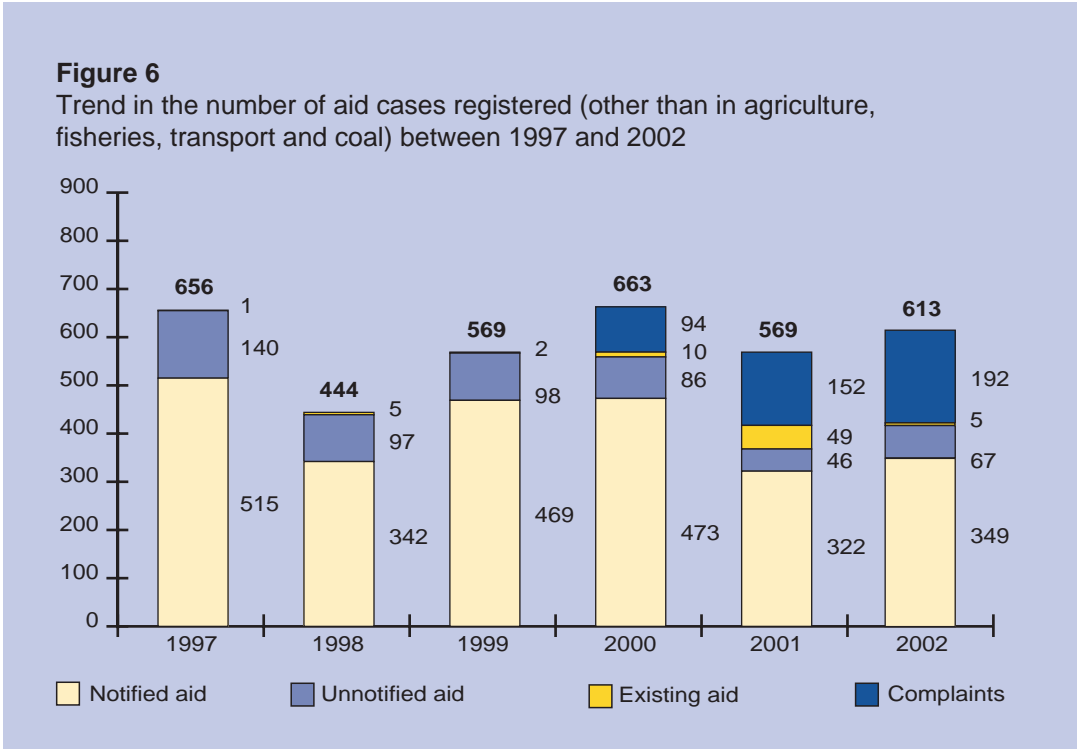
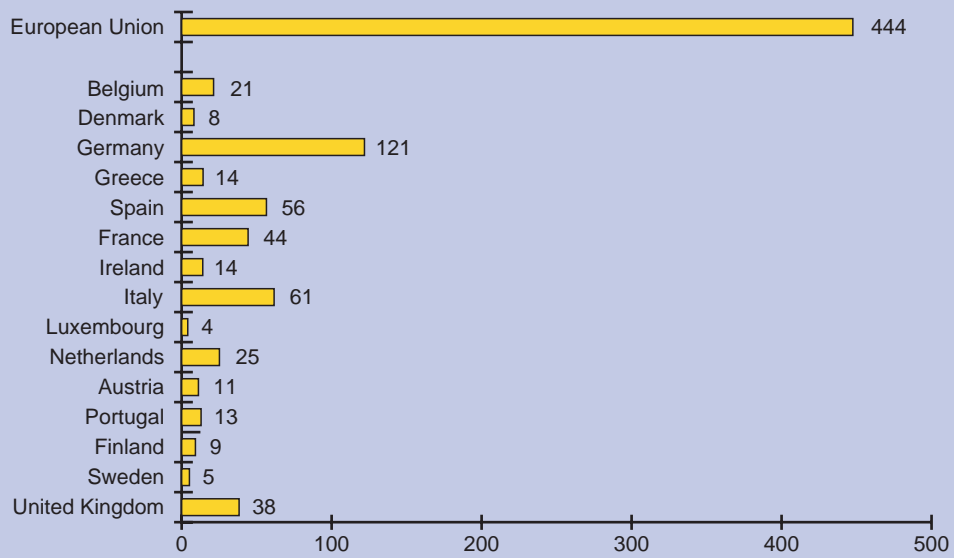


Figure 8

Number of decisions by Member State in 2002
(other than in agriculture, fisheries, transport, and coal)



IV — SERVICES OF GENERAL INTEREST

1. General principles

580. The importance which the European Union attaches to the maintenance and development of high-quality services of general interest at European level was reiterated in many ways in recent years, in particular by successive European Councils, and is reflected in the close attention the European Parliament pays to this matter. This separate chapter focuses on developments in 2002 in relation to services of general economic interest (SGEIs) ⁽¹⁾, following on from the special effort made for the first time in last year's report to facilitate access by a wider public to the relevant information on SGEIs ⁽²⁾.

581. In its report to the Laeken European Council, the Commission stated that it 'intends to establish during 2002, in close consultation with the Member States, a Community framework for State aid granted to undertakings entrusted with the provision of services of general economic interest. Such a framework will inform Member States and undertakings of the conditions under which State aid granted as compensation for the imposition of public service obligations can be authorised by the Commission. It could in particular specify the conditions for the authorisation of State aid schemes by the Commission, thus alleviating the notification obligation for individual aid. As a second step, the Commission will evaluate the experience gained with the application of this framework, and, if and to the extent justified, the Commission intends to adopt a regulation exempting certain aids in the area of services of general economic interest from the obligation of prior notification.'

582. The report was prepared by the Commission in the light of the case-law of the Court of First Instance ⁽³⁾, according to which public service compensation constitutes State aid within the meaning of Article 87(1) of the Treaty. In the meantime, however, the Court of Justice has delivered its judgment in *Ferring* ⁽⁴⁾, in which it

inclines to the view that compensation which does not exceed what is necessary to perform SGEIs does not confer any advantages on the recipient undertakings and does not, therefore, constitute State aid within the meaning of Article 87 of the EC Treaty.

583. After *Ferring*, Mr Advocate-General Léger delivered his opinion in *Altmark Trans* ⁽⁵⁾, in which he proposes that the Court of Justice should reverse *Ferring* and revert to the case-law of the Court of First Instance in *FFSA* and *SIC*. On 30 April, Mr Advocate-General Jacobs delivered his opinion in *GEMO* ⁽⁶⁾, in which he proposes that a distinction should be drawn between two categories of case based on the nature of the link between the financing granted and the general interest duties imposed and on how clearly those duties are defined. Those cases in which the link between, on the one hand, the State financing granted and, on the other hand, clearly defined general interest obligations is direct and manifest would be analysed according to a compensation approach such as that followed in *Ferring*. By contrast, those cases in which it is not clear that the State financing is intended as a *quid pro quo* for clearly defined general interest obligations should be analysed according to a State aid approach. The approach proposed by Mr Jacobs seems to have been followed by Mrs Advocate-General Stix-Hackl in her opinion of 7 November 2002 in *Enirisorse SpA* ⁽⁷⁾.

584. In its report to the Seville European Council ⁽⁸⁾, the Commission outlined the case-law developments and stated that, owing to the uncertainty surrounding the legal classification of public service compensation, it was not possible to finalise a text on the subject as envisaged in the report to the Laeken European Council. A text drawn up in the light of the current case-law would not provide the legal certainty expected by the Member States and undertakings performing SGEIs.

585. If in its forthcoming judgments the Court of Justice finds that public service compensation constitutes State aid, the approach envisaged by the Commission in its report to the Laeken European Council can be pursued. If, on the other

⁽¹⁾ In accordance with the definitions laid down in several Commission communications, services of general interest (SGIs) comprise general interest services of a non-economic and economic nature, whereas services of general economic interest (SGEIs) are confined to general interest services of an economic nature.

⁽²⁾ For a short summary of the general principles applicable in this field, please refer to Section IV.1, points 487–489, of the 2001 Competition report.

⁽³⁾ In particular, Cases T-106/95 *FFSA and others v Commission* (1997) ECR II-229 and T-46/97 *SIC v Commission* (2000) ECR II-2125.

⁽⁴⁾ Case C-53/00 (2001) ECR I-9067.

⁽⁵⁾ Opinion of 19 March 2002 in Case C-280/2000.

⁽⁶⁾ Case C-126/2001.

⁽⁷⁾ Joined Cases C-34/2001 to C-38/2001.

⁽⁸⁾ Report on the status of work on the guidelines for State aid and services of general economic interest, COM(2002) 280 final.

hand, the Court reaffirms its judgment in *Ferring*, compensation the amount of which does not exceed what is necessary to perform SGEIs does not constitute State aid and hence the obligation of prior notification provided for in Article 88(3) of the Treaty is not applicable.

586. From a substantive point of view, it must be stressed that, at all events, the legal debate about the classification of public service compensation does not affect the proper performance of SGEIs. If the *Ferring* judgment is confirmed, Member States may grant compensation which, if correctly calculated, does not constitute aid. If the *Ferring* judgment is not confirmed, the compensation is State aid, but if it does not lead to over-compensation it is compatible with the Treaty pursuant to Article 86(2). In either eventuality, undertakings performing SGEIs are therefore assured of having the resources necessary for their performance.

587. In its report to the Copenhagen European Council ⁽¹⁾, the Commission set out these principles once more and announced the preparation of a document dealing in particular with the following questions:

- the concept of SGEI and the freedom of Member States to define their SGEIs;
- the scope of the rules on State aid, particularly as regards the concepts of economic activity and effect on trade;
- the relationship between Member States and undertakings entrusted with the provision of SGEIs, in particular the need for a precise definition of undertakings' obligations, and any compensation granted by the State;
- the procedures for selecting undertakings entrusted with the provision of SGEIs;
- public service financing. Irrespective of how compensation is classified, the amount of any compensation must be correctly calculated so as to avoid any excess compensation constituting incompatible State aid.

588. Following a preliminary discussion with Member States' experts in December on the basis of a non-paper drawn up by its departments, the Commission intends to continue its work in 2003

and to prepare a document in the light of the case-law of the Court.

2. Recent developments

2.1. Draft Green Paper concerning a framework directive on SGIs

589. In its report to the 2001 Laeken European Council, the Commission promised to examine the suggestion that the principles of services of general interest (SGIs) underlying Article 16 of the EC Treaty be consolidated and specified in a framework directive. In response to a request by this year's Barcelona European Council, the Commission reported on the status of its work at the end of 2002. The Commission explained that it would first prepare a consultation document in the form of a Green Paper concerning a possible framework directive, thereby engaging in an exercise to take stock of all the EU's policies in the area of SGIs and reviewing them with regard to their coherence and consistency. The Green Paper, the adoption of which is scheduled for the first quarter of 2003, will allow the Commission to launch a debate at European level on a range of issues related to SGIs and to draw operational conclusions on the basis of the results of this debate, as well as of its own analysis.

2.2. State aid cases dealt with by the Commission

Crédit Mutuel

590. On 15 January, the Commission decided that Crédit Mutuel had been overcompensated by the French State for operating the Livret Bleu system ⁽²⁾. The Commission was not in any way criticising or compromising the Livret Bleu savings account, a financial product devised by the French State, which it recognised in its decision as delivering a benefit to consumers by providing a defiscalised savings product at the disposal of a very wide public.

591. A public service mission has both obligations and compensations which can be translated into costs and revenues. Whereas conducting a public service mission can in itself create an advantage for an undertaking, this is considered

⁽¹⁾ COM(2002) 636 final.

⁽²⁾ Case C 88/1997.

as not contravening the rules on State aid if the compensations exactly match the extra costs of carrying out this mission.

592. As costs, the Commission took into account the portion of branch operating costs resulting from the distribution of the Livret Bleu, the payment of tax-free interest to Livret Bleu account holders as well as overheads related to the management of the system, such as the transfer of funds to the Caisse des Dépôts et Consignations (CDC) or to selected investment projects. On the revenues side, the Commission took into account and classed as State resources the commission paid by the State-owned CDC on the State's instructions of 1.3 % of the funds deposited with the CDC and the reimbursement of the fiscal advantage. As Crédit Mutuel also managed part of the Livret Bleu funds itself, either investing in projects as directed by the State or making its own investment decisions, the net margins which it derived from these operations were also part of the Livret Bleu system. As the balance of these costs and revenues was positive for Crédit Mutuel over a long period, the Commission concluded that it had been overcompensated for this service. Crédit Mutuel was obliged to reimburse these extra revenues and the French authorities will amend and monitor the compensation system in line with the Treaty rules.

593. The decision taken by the Commission ended a long, complex proceeding which confirmed both its support for Member States' providing services which they consider to be of public interest and its role of ensuring that intermediaries in the process do not derive an unjustified financial or commercial benefit at the expense of taxpayers and other market competitors.

Ente Poste Italiane

594. In 1997, the Commission received a complaint alleging that Italy had adopted in connection with the transformation of Amministrazione Poste e Telegrafi into Ente Poste Italiane (EPI) ⁽¹⁾ a number of measures granting State aid without notifying these measures to the Commission. In July 1998, the Commission opened a formal investigation procedure, also identifying several other measures as possible State aid that had not been mentioned by the complainant, and

extended the procedure in the course of 1998. EPI was later transformed into Poste Italiane SpA.

595. The first step in the Commission's appraisal was to calculate the amount of financial support granted by these measures adopted in favour of EPI between 1994 and 1999. Over this period, the amount of the financial support provided by the State to Poste Italiane was ITL 17 960 billion (almost EUR 9 billion). The second step was to compare the amount of support with the extra cost borne by EPI in fulfilling the public service mission that the State has entrusted to it. Indeed, when evaluating the compliance with the Treaty of financial measures favouring an undertaking entrusted with a mission of general interest, it is important to check whether or not such financial measures result in support which goes beyond the extra cost incurred by that undertaking in fulfilling the mission of general interest. As the Court of Justice has consistently held, Member States are entitled to ensure that undertakings charged with a mission of general interest perform that mission in conditions of economic equilibrium. Therefore, if the support does not go beyond the extra cost, the measures do not raise concerns under the State aid rules.

596. To calculate the extra cost, the Commission referred to the separate certified accounts of EPI. Indeed, before the entry into force of the postal directive, EPI had already put in place a separate accounting system that complied with the wording and spirit of the directive and allowed for a calculation of the extra cost of every service EPI had to provide subject to a general service obligation.

597. The Commission concluded that over the period 1994–99 the extra cost of the general service mission entrusted to EPI had been around ITL 3 000 billion (EUR 1.5 billion) a year. This very high cost could be explained by a number of factors, especially the very heavy burden imposed by the preferential tariff for press and non-profit publications. The net extra cost incurred by Poste Italiane in fulfilling the various general service obligations entrusted to it amounted to more than ITL 18 000 billion.

598. The comparison between the amount of the extra cost of the general service mission and the amount of the support granted to EPI revealed that EPI had not been over-compensated for the general service mission. As the financial support granted to EPI up to 1999 by the measures

⁽¹⁾ Case C 47/1998.

considered in the Commission's investigation was not higher than the net extra cost of the general service mission entrusted to the same undertaking, the Commission decided to close its State aid investigation with a positive decision.

599. Based on similar comparisons between the additional costs to be incurred for the provision of services of general economic interest and related government payments, the Commission decided not to raise any objections to four postal notifications from the UK, Swedish and Irish State authorities. In each of these cases, the government required that the network remain economically over-dimensioned in order to maintain countrywide over-the-counter access to government and payment services.

600. In Sweden, a government payment is made to compensate the post office network for the net cost of providing basic payment and current account transaction facilities both through uneconomic offices (defined as being those based in locations without any bank presence) and through a rural postman service dedicated to the 700 000 individuals and 5 000 companies based in remote locations. In Ireland, the EUR 12.7 million equity injection intended to reconfigure the network in a way which will ensure its sustainability is clearly lower than the net extra cost of delivering public services through the uneconomic part of the network which the government has committed itself to maintaining open. Similarly in the United Kingdom, the government compensation payments within the proposed 'reinvention of the urban post office network' aims at guaranteeing the continuity of public service provision. Finally, in the 'UK universal banking service' proposal, which aims at enabling the compulsory migration of social security benefits to automated credit transfers on bank accounts and at facilitating access to current accounts by those who are unbanked, the government compensation payments paid to the post office network for ensuring the front- and back-office operations of a post office bank do not exceed the net costs of the related public service.

601. As the mechanisms are in place to ensure that there is no overcompensation and, should it occur, for it to be recovered within reasonable periods, the Commission decided not to raise any objections to any of the above notifications.

Italian utilities

602. In the Italian utilities case ⁽¹⁾ the Commission had to assess certain benefits granted to companies established under Italian legislation pertaining to the possible creation of joint stock companies with a majority or even minority public shareholding. These companies can take over the provision of services such as transport, water, gas, electricity, waste and pharmaceutical products, traditionally provided by municipalities. The reform allows greater participation of private capital in the utilities sector and the management of such activities in a more entrepreneurial way.

603. The companies in question enjoy a three-year income tax exemption as well as a transfer tax exemption and the possibility of taking out loans from an Italian administrative body, the Cassa Depositi e Prestiti. The loan facility and the income tax exemption were considered by the Commission to be State aid, giving the companies privileged access to private capital as well as to loans.

604. The Commission rejected the argument that these benefits had to be considered compensation for public services provided by the Italian authorities. Irrespective of whether or not the Court of First Instance's judgment in the *Ferring* case will be upheld by the Court of Justice, the principles of neutrality, entrustment and definition as well as proportionality were applied in assessing this case. The Commission found that none of these principles had been respected in the case in point. The aid was not linked to the entrustment of a general service mission, as no general service obligation could be deduced from the Italian legislation empowering the municipalities to set up the companies. The act did not clearly define the public service mission, nor did it explicitly entrust the new category of undertakings with such tasks. The proportionality of the benefits could therefore not be assessed, it being impossible even to determine the amount of public funds granted to these companies.

605. Assessed on the basis of the 2001 Commission communication ⁽²⁾, the benefits in question

⁽¹⁾ Case C 27/1999.

⁽²⁾ OJ C 17, 17.1.2001.

were considered State aid within the meaning of Article 86 of the Treaty.

Public service broadcasters

606. In 2002 the Commission took two decisions approving State financing of public service broadcasters after notification by Member States.

607. On 13 February, the Commission approved financial support for local television stations in the French-speaking Community in Belgium (Case N 548/01) ⁽¹⁾. The financial support was meant to compensate local television stations for their public service obligations. The Commission concluded that the public service obligation did not contain any manifest error and was officially entrusted to the stations. As regards proportionality, the Commission found that legal provisions were in place to safeguard the correct utilisation of the financial support for only the public service obligations and that control mechanisms were in place to prevent cross-subsidisation of non-public-service activities. The Commission therefore raised no objections to the aid.

608. On 22 May, the Commission approved State financing provided by the United Kingdom out of licence fee money to the BBC for running nine new digital channels (Case N 631/2001). The Commission concluded that the new digital channels formed part of the public service obligation of the BBC, which contained no manifest errors and which was officially entrusted to the BBC. Furthermore, the Commission found that the State compensation was not disproportionate to the net costs of the new channels. The Commission therefore concluded that the measure did not constitute State aid within the meaning of Article 87(1) of the EC Treaty.

Understanding on special credit institutions

609. On 1 March, Commissioner Monti and State Secretary Caio Koch-Weser reached an understanding on German special credit institutions as part of the overall exercise involving State guarantees to German public banks. The latter may continue to benefit from State guaran-

tees to the extent that they are entrusted with promotional tasks in compliance with the State aid rules of the EU. The fulfilment of promotional tasks will be subject to compliance with the prohibition of discrimination under EU law. Another public task, which will also in future be allowed under the umbrella of State guarantees, is participation in the financing of projects in the interests of the EU which are co-financed by the European Investment Bank. In addition, special credit institutions may pursue activities of a purely social character, financing of the State and municipalities, and export financing outside the EU, the European Economic Area and candidate countries, which is in line with the WTO rules and other relevant international obligations binding on the EU. The understanding is without prejudice to the examination of these activities under the EU State aid rules vis-à-vis the beneficiaries.

610. The understanding of 1 March provides that the German authorities will have to specify public tasks clearly in the relevant laws by the end of March 2004. Commercial activities will have to be either discontinued or isolated from State guarantees by being split off into a legally independent undertaking without State support. This has to be implemented by the end of 2007.

611. The understanding addresses the relationship between banks' commercial business and activities in the public interest from a State aid point of view. This represents quite a new field of analysis. When an undertaking's business includes both commercial activities and activities in the public interest, it is essential that aid granted to the activities in the public interest does not spill over into the commercial sphere. The Commission had to examine this in particular in the case of Kreditanstalt für Wiederaufbau (KfW). It came to the conclusion that the aid was likely to produce such an effect and that an effective separation between the two fields of activity was necessary. The Commission concluded that, if KfW wanted to keep the aid in the form of State guarantees, it would have to hive off the commercial business into a separate legal entity without any State support. Such a solution constitutes the benchmark against which the Commission will in future examine similar aid schemes in favour of commercial institutions charged with public service tasks.

⁽¹⁾ OJ C 150, 22.6.2002.

Box 4: Deutsche Post

On 19 June, the Commission concluded the State aid proceedings it had initiated in respect of various forms of State aid granted to Deutsche Post AG (DPAG) by finding that the German postal incumbent had, between 1994 and 1998, used EUR 572 million of State funds earmarked for financing its public service missions to subsidise below-cost pricing in competitive door-to-door parcel services. In the Commission's view, postal incumbents which receive State funding for the discharge of services of general interest may not use these State resources to subsidise below-cost prices in activities open to competition.

In 1994, United Parcel Service (UPS), a private operator specialising in door-to-door parcel services for business customers, lodged a complaint accusing DPAG of selling its own parcel delivery services below cost. In 1997, the German association of private parcel undertakings, BIEK, joined in this complaint, stating that, without State support, DPAG would not have been able to survive in the commercial parcels sector.

Unlike the general letter mail service, parcel deliveries in Germany are open to competition. Since the 1970s, private undertakings have been entering this market, specialising in door-to-door services for business customers. Since then, a number of private parcel operators have emerged, creating new job opportunities and, for the first time, a choice of suppliers for businesses and consumers resulting in improved services and price competition. By the 1990s the market saw the emergence of faster and safer parcel delivery services exemplified by the 24-hour door-to-door services offered by a variety of private operators. Besides Deutsche Post and UPS there are many other suppliers of door-to-door parcel services, such as Deutscher Paket Dienst, German Parcel and Hermes Versand Service.

For Deutsche Post this new competitive environment brought about new challenges. Initially constrained by regulatory control in Germany over its parcel prices, in 1994 Deutsche Post was granted the commercial freedom to offer rebates to door-to-door parcel customers.

Door-to-door parcel services are provided to business customers who send large volumes and therefore prefer to have parcels collected by DPAG directly at their premises, rather than carry those volumes to the local post office for processing. DPAG offers special prices only to customers who do not use a post office. Users of the conventional 'over-the-counter' service pay the generally applicable uniform tariff.

Between 1994 and 1998, DPAG engaged in an aggressive rebate policy with respect to commercial door-to-door parcel services. Throughout that period, certain business customers paid significantly less than the uniform tariff deemed affordable by all other users. This generated total losses of EUR 572 million in the parcel delivery business between 1994 and 1998 — losses which were covered by the State funding DPAG received for the discharge of its public service mission. The situation was corrected in 1999, when revenues covered costs in the door-to-door parcel delivery business.

Following an antitrust case under Article 82 of the EC Treaty (abuse of a dominant position), which was also triggered by a UPS complaint, Deutsche Post last year decided to create a separate business parcel company in order to prevent this situation of cross-subsidisation from arising again.

The Commission would point out that Deutsche Post's behaviour cannot be explained by regulatory constraints or by public service obligations. The public service mission did not oblige DPAG to favour any door-to-door customers with prices significantly below the affordable and uniform tariff. As a result, there is no link between the losses incurred owing to the rebate policy and the public mission entrusted to DPAG.

Although not causally linked to the public service mission, the EUR 572 million loss was ultimately financed through State resources, which was unlawful. This distorted the competitive situation in the parcel delivery market to the detriment of private operators. In order to remedy this distortion, the German authorities are having to recover the amount of State support used to undercut parcel competitors.

3. Antitrust (including liberalisation)

612. In 2002 a number of Court judgments further clarified the scope of services to which competition rules do not apply and how SGEIs can be provided in a way that is compatible with those rules.

613. The Court of Justice has previously classified as non-economic activity the management of compulsory (i.e. State-imposed) social security schemes which are centrally based on the principle of solidarity ⁽¹⁾. Organisations charged with the management of such compulsory social security schemes are not undertakings within the meaning of EU competition law. This approach was confirmed by the Court of Justice in its *INAIL* judgment ⁽²⁾, in which it held that a body entrusted by law with the management of a compulsory scheme providing insurance against accidents at work and occupational diseases did not exercise an economic activity. The Court of Justice based this finding on two considerations.

- The insurance scheme was centrally based on the principle of solidarity because the rate of contributions was not systematically proportionate to the risk insured, and the amount of benefits not necessarily proportionate to the insured person's earnings. The absence of any direct link between the contributions paid and the benefits granted thus entailed solidarity between better paid workers and those who, given their low earnings, would be deprived of proper social cover if such a link existed. The Court of Justice also stressed that the compulsory nature of membership of the insurance scheme was essential to the scheme's financial equilibrium and to the application of the solidarity principle.
- The amounts of benefits and contributions were subject to supervision by the State and in the last resort fixed by the State.

614. In its *Aéroports de Paris* (ADP) judgment ⁽³⁾, the Court of Justice fully upheld a judgment ⁽⁴⁾ by the Court of First Instance confirming a Commission decision under Article 82 of the EC Treaty concerning an abuse of a dominant

position committed by ADP in its capacity as manager of the Paris airports. A key question in this case was whether and, if so, to what extent ADP was to be regarded as an undertaking within the meaning of the EU competition rules. In this context, the Court of First Instance and the Court of Justice stressed the functional approach which focuses on the activity concerned when assessing this question. As a result, the Court of First Instance made clear that the same entity can have a dual function. It can on the one hand engage in the exercise of public authority, which is an activity of a non-economic nature, and on the other hand also engage in economic activities with regard to which this entity will be considered an undertaking if these economic activities can be severed from the exercise of public authority. Therefore, in the case at hand, the fact that ADP was a public corporation placed under the authority of the minister responsible for civil aviation and that it managed facilities in public ownership did not in itself mean that ADP could with regard to some of its activities not be considered an undertaking within the meaning of Article 82. The Court of First Instance confirmed the severability between ADP's purely administrative and supervisory activities (in particular the supervision of air traffic control, embarkation and disembarkation of passengers), which constituted the exercise of public authority, and ADP's services as manager of the Paris airports, which were provided to other operators within the airports (airlines, groundhandling companies, etc.) and which were remunerated by commercial fees according to turnover. The Court of First Instance and the Court of Justice confirmed the Commission's view that the provision of these latter services constituted an economic activity.

615. In its *UPS* judgment ⁽⁵⁾, the Court of First Instance confirmed a Commission decision rejecting a complaint under Article 82 of the EC Treaty brought by UPS against Deutsche Post. UPS alleged that Deutsche Post had abused its dominant position on the standard letter market, for which it enjoyed an exclusive right, by using profits earned on this reserved market to finance the acquisition of an undertaking operating on the parcel market, which was open to competition. The complainant argued that the exclusive right was granted to Deutsche Post solely in order to guarantee the performance of a service of general

⁽¹⁾ The benefits paid perform an exclusively social function where they are prescribed by law and not proportional to the amount of the compulsory contributions.

⁽²⁾ Case C-218/2000 (2002) ECR I-691.

⁽³⁾ Judgment of 24.10.2002 in Case C-82/01 P, not yet reported.

⁽⁴⁾ Case T-128/1998 *Aéroports de Paris v Commission* (2000) ECR II-3929.

⁽⁵⁾ Case T-175/1999 (2002) ECR II-1915.

economic interest, i.e. the universal service for standard letter mail, by preserving the economic equilibrium of this service. Deutsche Post would therefore infringe Article 82 by using income flowing from the exclusivity for other purposes such as acquiring undertakings active in liberalised neighbouring markets.

616. In its judgment, the Court of First Instance first pointed out that the mere fact that an exclusive right was granted to an undertaking in order to guarantee that it provided a service of general economic interest did not preclude that undertaking from earning profits from the activities reserved to it or from extending its activities into non-reserved areas. Secondly, the Court of First Instance indicated that the acquisition of an undertaking operating in a liberalised neighbouring market could raise problems in the light of the EU competition rules where the funds used by the undertaking holding the monopoly derived from excessive or discriminatory prices or from other unfair practices in its reserved market. In such a situation, where there were grounds for suspecting an infringement of Article 82 of the EC Treaty, it was necessary to examine the source of the funds used for the acquisition in question in order to determine whether that acquisition stemmed from an abuse of a dominant position. However, with regard to the case at hand, the Court of First Instance finally concluded that the mere fact that Deutsche Post possessed funds enabling it to effect the acquisition at issue did not justify presuming the existence of abusive conduct in the reserved market. In the absence of any evidence to show that the funds used by Deutsche Post for the acquisition in question derived from abusive practices on its part in the reserved standard letter market, the mere fact that it used those funds to acquire joint control of an undertaking active in a neighbouring market open to competition did not in itself, even if the source of those funds was the reserved market, raise any problem from the standpoint of the competition rules and therefore could neither constitute an infringement of Article 82 of the EC Treaty nor give rise to an obligation of the Commission to examine the source of those funds in the light of that article.

4. Liberalisation through legislative measures

617. In line with the conclusions of the Lisbon European Council of March 2000, the Commis-

sion continued throughout 2002 to promote market opening and competition by making and following up on legislative proposals and by monitoring the implementation of existing EU legislation. As in previous years, this activity included areas in which services of general economic interest are performed, taking account of the proportionality principle and the particularities of each sector dealt with.

Transport

618. In the transport sector, discussions continued on the Commission's amended proposal for a regulation to introduce controlled competition in the road, rail and inland waterway sector⁽¹⁾. Much of public transport provided in the EU is likely to require public financial support for the foreseeable future and there is a long history of public authorities intervening to ensure a higher level of services and/or lower fares than the market will provide. Intervention has traditionally been through the establishment of a public operator, owned and/or controlled by the public authorities, and granted exclusive monopoly rights and financial compensation in return for public service obligations.

619. The fact that the services are SGEIs⁽²⁾ has not prevented several Member States from legislating at national level to introduce some sort of competition in their domestic public transport markets. There are now about a dozen European operators involved in providing services. However, substantial parts of the market remain closed to any form of competition.

620. Because of the particular characteristics of public transport, market opening has most often tended to take the form of 'controlled competition' (competitive bidding for the right to operate an exclusive and/or subsidised service for a specified period) and this is the model which the Commission has proposed.

Postal services

621. On 10 June, the Council and the European Parliament, following a Commission proposal, adopted the new postal directive (Directive 2002/

⁽¹⁾ Proposal on action by Member States concerning public service requirements and the award of public service contracts in passenger transport by rail, road and inland waterway, COM(2002) 107 final.

⁽²⁾ *Ibid.*, recitals 11, 14 and 17.

39/EC) ⁽¹⁾ amending the existing postal directive (Directive 97/67/EC). The new postal directive sets a clear path towards completing the internal market for postal services, through a gradual and controlled liberalisation of these services combined with the continued provision of a high-quality universal service. This is to be achieved through a progressive reduction of the reserved area. The need to establish a balance between completion of the internal postal market and the maintenance of a high-quality universal service is attested to by other elements of the new postal directive. First, outgoing cross-border mail has been opened to competition except in those Member States where its revenues are deemed necessary to ensure the provision of the universal service. Secondly, cross-subsidisation of universal services outside the reserved area out of revenues from services in the reserved area is prohibited unless strictly necessary to fulfil specific universal service obligations imposed in the competitive area. The new directive also states that, whenever universal service providers apply special tariffs, they need to do so in a transparent and non-discriminatory way.

Telecommunications

622. On 14 February, the Council adopted a new regulatory framework for the *ex ante* regulation of electronic communications networks and services which entered into force on 24 April. This new legislative package made up of four directives is a major overhaul of the regulatory framework for telecommunications, aimed at bringing more competition into this crucial sector for the European economy. The directives are to be implemented by 25 July 2003. The directive on universal service and users' rights forms part of this package. Its main purposes are, on the one hand, to ensure the availability of universal service in electronic communications and, on the other, to safeguard users' and consumers' interests. The latter are addressed mainly through regulated retail tariffs if wholesale tariff regulation is not sufficient.

Energy

623. In the energy sector, the Commission proposed two new directives, which will assist in

improving the security of the EU's oil and gas supplies ⁽²⁾. In the oil sector the directive proposes new measures to add to the already existing ones. The proposal provides for the increasing of the current security stock obligations from 90 to 120 days' consumption. It also provides for the creation of a public oil stockholding body, which will own stocks representing at least 40 days' consumption. The proposal also envisages that the EU will adopt a common strategy in the event of an energy crisis. Finally, the stocks could be used not only in the case of an oil crisis but also if there is a risk of dangerous market volatility.

624. In the gas sector the proposed directive provides that Member States must define a general policy and standards for the security of gas supply based on a clear definition of the roles and responsibilities of the various market players. In a crisis, joint and coordinated mechanisms will be implemented. Member States will also be obliged to determine national objectives so that gas storage and other measures ensure continued supply for non-interruptible gas customers.

625. Apart from these measures aiming at an improved security of supply policy, the Commission adopted an amended proposal for a directive on the completion of the common gas and electricity market ⁽³⁾. This revised proposal incorporated a series of suggested amendments on universal and public service obligations made by the European Parliament within the framework of its first reading of the Commission proposal. On 25 November, the Council reached a political agreement, endorsing the Commission proposals notably reinforcing the protection of the most vulnerable customers. Once adopted, this directive will significantly contribute to the high level of universal service obligations, in particular for all households and small businesses consuming electricity, which will have the right to be supplied with electricity of a specified quality at reasonable prices. In addition, the energy-labelling provisions require the contribution of each energy source to the fuel mix to be shown on energy bills as well as the environmental impact in terms, at least, of CO₂ emissions and radioactive waste. The elements of this proposal which relate to market opening are described in the sectorial chapter on energy ⁽⁴⁾.

⁽¹⁾ Directive 2002/39/EC of the European Parliament and of the Council of 10 June 2002 amending Directive 97/67/EC with regard to the further opening to competition of Community postal services.

⁽²⁾ COM(2002) 488 final, 11.9.2002; see also IP/02/1288.

⁽³⁾ COM(2002) 304 final, 7.6.2002.

⁽⁴⁾ See Section I.C.1 above.

V — INTERNATIONAL ACTIVITIES

A — Enlargement

1. Accession preparation and negotiations

626. In 2002, the European Union continued with the accession preparations in the competition field with the 12 negotiating candidate countries, Bulgaria, Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Romania, Slovakia and Slovenia. With Turkey the analytical examination of the Turkish competition legislation has been started.

627. With a view to fulfilling the criteria for accession, the candidate countries have been required to demonstrate the existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the Union. In the field of competition policy, this implies that the candidate countries need to show well before accession that their companies and authorities have become accustomed to operating in an environment such as that of the EU and will therefore be ready to withstand the competitive pressures of the internal market. The EU has in this context set out in the negotiations three elements that must be in place in the candidate countries: (i) the necessary legislative framework (for antitrust and State aid); (ii) the necessary administrative capacity; (iii) a credible enforcement record of the competition *acquis*.

628. On the basis of an assessment of these criteria, the EU was able to provisionally conclude negotiations on the competition chapter, as proposed by the Commission, with Estonia, Latvia, Lithuania and Slovenia at the accession conferences of November 2001.

629. In June, the negotiations were provisionally concluded with Cyprus. This required substantial changes to the Tax Code, and subsequently fiscal aid was brought under full State aid control. International business enterprises are allowed to continue to pay a reduced corporate income tax rate until 31 December 2005.

630. Further progress by the remaining countries, in particular in improving the record of enforcement of the competition *acquis* in the State aid control field, made it possible for the Commission in September to propose closing the negotiations with the Czech Republic, Hungary, Malta, Poland and Slovakia. On the basis of the Commission's proposal, the EU finally

concluded the negotiations first with the Czech Republic, Malta and Slovakia in October, and then in November with Poland and in December with Hungary.

631. Overall, where identified State aid measures have been deemed to be incompatible with the EU *acquis*, the candidate countries have been required either to abolish these measures or to modify them into aid arrangements that are in close conformity with the principles of the *acquis*. In exceptional cases, arrangements have been negotiated whereby incompatible aid will be gradually phased out. Furthermore, restructuring aid has in certain cases been exceptionally authorised, the *quid pro quo* being a reduction in the production capacity of recipient firms so as to minimise the risk of distortions of competition.

632. On the basis of this restrictive approach, the EU has agreed to limited transitional arrangements in the area of fiscal aid measures and of restructuring of sensitive industries (steel and shipbuilding) for Hungary, Malta, Poland and Slovakia ⁽¹⁾.

633. As to the Czech Republic, a transitional period was agreed on for steel restructuring, stipulating conditions for obtaining the viability of Czech steel companies, the proportionality of the aid and capacity reduction.

634. The grace period under Protocol 2 to the Europe Agreement, which provides for the possibility of exceptionally granting restructuring aid in the steel sector, was also prolonged. This was done on the basis of the steel restructuring programme submitted by the Czech Government at the end of June, which was considered acceptable to the EU.

635. As to Hungary, limited transitional arrangements were agreed on concerning the conversion and phasing-out of incompatible fiscal benefits granted under the old tax legislation. The agreed conversion system sets out strict maximum ceilings in relation to the tax exemptions already granted under two investment-related schemes, whereas for tax reductions previously granted to offshore companies and certain tax exemptions granted by local authorities, the benefits will be phased out by 2005 and 2007 respectively.

⁽¹⁾ In addition to the already mentioned Cyprus.

636. As to Malta, limited transitional arrangements were agreed on concerning the adjustment until 2005 of the market in the importation, stocking and wholesale marketing of petroleum products under Article 31 of the EC Treaty. Moreover, limited transitional arrangements were agreed on concerning the conversion and phasing-out of incompatible fiscal aid measures under the old tax legislation, whereby strict maximum ceilings are imposed in relation to the tax exemptions already granted. Furthermore, it was agreed that Malta may retain a system of a reduced rate of tax under certain fiscal aid schemes until 2008, and that it may grant restructuring aid to its shipyards, subject to conditions on levels of production and reductions of capacity.

637. As to Poland, a framework has been set out in the negotiations for approving restructuring aid to the steel industry on the basis of the revised restructuring programme, which lays down strict conditions on reductions in capacity. Before the transitional arrangement for the restructuring aid can come into effect under the Accession Treaty, the grace period under Protocol 2 to the Europe Agreement for the acceptance of restructuring aid is still to be prolonged.

638. For the aid measures applied in the Polish special economic zones, fiscal aid granted on the basis of Polish tax legislation which is incompatible with the EU State aid rules is to be converted into aid arrangements so that strict maximum ceilings are imposed in relation to the tax exemptions already granted. For the measures applied in favour of SMEs, Poland may apply the tax measures for a shortened period of time, i.e. until 2011 for small companies in the zones and until 2010 for medium-sized companies.

639. Finally, in certain areas, Polish companies will, for a limited period of time, be able to benefit from State aid for environmental investments aimed at meeting EU environmental standards.

640. As to Slovakia, the transitional arrangements relate to fiscal aid measures in favour of two companies. Incompatible fiscal aid to one beneficiary in the steel sector is to be discontinued at the end of 2009 or when aid reaches a predetermined amount, whichever occurs first. The object of this aid is to facilitate the orderly rationalisation of excessive staffing levels, the resulting total cost being comparable to the aid. Furthermore, incompatible fiscal aid to one beneficiary in the motor vehicle manufacturing sector was

converted into regional investment aid; the aid will be limited to a maximum of 30 % of the eligible investment costs.

641. An essential part of the accession negotiations in the competition field concerns the procedure with regard to aid which the candidate countries wish to continue to operate beyond the date of accession. A list of all existing aid measures (both schemes and ad hoc aid) which has been assessed by the State aid authorities of the respective candidate countries and which was found to be compatible with the *acquis* is transmitted to the Commission. If the Commission does not object, the aid measures are considered to be existing aid. All aid measures which are considered to be State aid according to the *acquis* and which are not included in the list will be considered new aid upon accession.

2. Progress in alignment of competition rules

642. The Commission reports regularly on progress made by each of the candidate countries towards accession. The fifth regular reports for the 10 central and east European countries (CEECs), Cyprus, Malta and Turkey, which were adopted by the Commission in October, assess progress made since the previous reports of 2001.

643. The achievements in the area of antitrust and mergers are generally satisfactory, both on the legislative side and with regard to the creation of the necessary administrative capacity. All the candidate countries have adopted basic competition laws, taking over the core elements of Articles 81 and 82 of the EC Treaty, and most of them have also established merger control. The establishment of competition authorities has also taken place relatively quickly.

644. Not least in view of the planned modernisation and decentralisation of the application of EU antitrust rules, efforts to reinforce the administrative capacity of the authorities and to further strengthen the antitrust enforcement record need to continue, giving priority to cases concerning the most serious distortions of competition, and imposing more deterrent sanctions. Similarly, it is important to continue with awareness-raising efforts, and to further involve the judiciary in antitrust matters.

645. In comparison with the antitrust field, the introduction of State aid control in the candidate

countries has generally proved more controversial, slower and politically sensitive. However, the accession negotiations have helped to speed up the creation of legal and procedural frameworks for State aid discipline. At the end of 2002, most of the candidate countries control State aid in line with criteria similar to those of the EU.

646. All negotiating candidate countries have created national State aid monitoring authorities. Turkey has agreed to do so by 1 January 2003. The Commission has emphasised that these authorities should effectively control new and existing State aid granted by all aid-granting authorities.

647. To ensure the necessary transparency, most candidate countries have created comprehensive inventories of existing aid that are kept permanently up to date. In addition, the Commission has continued to work with the monitoring authorities of the candidate countries to ensure that their annual State aid reports conform to the methodology of the Commission's State aid survey. In 2002, data from the candidate countries were for the first time included in the Commission's State aid scoreboard. This provides a transparent and publicly accessible source of information on the overall State aid situation in the European Union and the candidate countries.

3. Instruments under the association agreements

648. With a view to further completing the legal framework for relations between the EU and the 10 associated CEECs in the field of competition, two sets of implementing rules have been subject to discussion with the CEECs⁽¹⁾. The first concerns the implementation of the competition provisions of the Europe Agreements applicable to undertakings (antitrust). The second relates to the rules concerning State aid.

649. Implementing rules for antitrust had already been adopted in the preceding years for all CEECs (Czech Republic⁽²⁾, Poland⁽³⁾, Slovak

Republic⁽⁴⁾, Hungary⁽⁵⁾, Bulgaria⁽⁶⁾, Romania⁽⁷⁾, Estonia⁽⁸⁾, Lithuania⁽⁹⁾, Slovenia⁽¹⁰⁾ and Latvia⁽¹¹⁾). However, in view of certain constitutional problems regarding the application of the implementing rules in Hungary, the Association Council adopted amended antitrust implementing rules for Hungary in 2002⁽¹²⁾. State aid implementing rules had previously been adopted for eight CEECs (Czech Republic⁽¹³⁾, Lithuania⁽¹⁴⁾, Latvia⁽¹⁵⁾, Romania⁽¹⁶⁾, Slovenia⁽¹⁷⁾, Poland⁽¹⁸⁾, Bulgaria⁽¹⁹⁾ and Slovakia⁽²⁰⁾), and were in 2002 also adopted with Estonia⁽²¹⁾.

650. As regards regional aid maps, which are to be adopted by the respective Association Committees, the Council in 2002 approved regional aid maps for Estonia, Latvia, Lithuania and Slovenia, which had been submitted by the Commission based on proposals by the associated countries. The Commission also submitted to the Council in 2002 draft regional aid maps for Poland and Romania.

651. As regards steel, the grace period under Protocol 2 to the Europe Agreement for the acceptance of steel restructuring aid was prolonged in 2002⁽²²⁾, including the approval of a restructuring programme, for the Czech

⁽¹⁾ The EC–Turkey Association Council of December 2001 adopted single implementing rules as requested under the customs union decision of 1995, covering both rules for undertakings and State aid control.

⁽²⁾ Decision 1/96 of the EC–Czech Association Council of 30 January 1996 (OJ L 31, 9.2.1996).

⁽³⁾ Decision 1/96 of the EC–Poland Association Council of 16 July 1996 (OJ L 208, 17.8.1996).

⁽⁴⁾ Decision 1/96 of the EC–Slovak Association Council of 15 August 1996 (OJ L 295, 20.11.1996).

⁽⁵⁾ Decision 2/96 of the EC–Hungary Association Council of 6 November 1996 (OJ L 295, 20.11.1996) superseded by Decision 1/2002, see footnote 403.

⁽⁶⁾ Decision 2/97 of the EC–Bulgaria Association Council of 7 October 1997 (OJ L 15, 21.1.1998).

⁽⁷⁾ Decision 1/99 of the EC–Romania Association Council of 16 March 1999 (OJ L 96, 10.4.1999).

⁽⁸⁾ Decision 1/99 of the EC–Estonia Association Council of 28 April 1999 (OJ L 144, 9.6.1999).

⁽⁹⁾ Decision 4/99 of the EC–Lithuania Association Council of 26 May 1999 (OJ L 156, 23.6.1999).

⁽¹⁰⁾ Decision 4/2000 of the EC–Slovenia Association Council of 21 December 2000 (OJ L 130, 12.5.2001).

⁽¹¹⁾ Decision 5/2001 of the EC–Latvia Association Council of 25 April 2001 (OJ L 183, 6.7.2001).

⁽¹²⁾ Decision 1/2002 of the EC–Hungary Association Council of 29 January 2002 (OJ L 145, 4.6.2002).

⁽¹³⁾ Decision 1/98 of the EC–Czech Association Council of 24 June 1998 (OJ L 195, 11.7.1998).

⁽¹⁴⁾ Decision 2/2001 of the EC–Lithuania Association Council of 22 February 2001 (OJ L 98, 7.4.2001).

⁽¹⁵⁾ Decision 4/2001 of the EC–Latvia Association Council of 20 March 2001 (OJ L 163, 20.6.2001).

⁽¹⁶⁾ Decision 4/2001 of the EC–Romania Association Council of 10 April 2001 (OJ L 138, 22.5.2001).

⁽¹⁷⁾ Decision 2/2001 of the EC–Slovenia Association Council of 3 May 2001 (OJ L 163, 20.6.2001).

⁽¹⁸⁾ Decision 3/2001 of the EC–Poland Association Council of 23 May 2001 (OJ L 215, 9.8.2001).

⁽¹⁹⁾ Decision 2/2001 of the EC–Bulgaria Association Council of 23 May 2001 (OJ L 216, 10.8.2001).

⁽²⁰⁾ Decision 6/2001 of the EC–Slovakia Association Council of 22 November 2001 (OJ L 48, 20.2.2002).

⁽²¹⁾ Decision 1/2002 of the EC–Estonia Association Council of 15 January 2002 (OJ L 299, 1.11.2002).

⁽²²⁾ See point 634.

Republic. Similar prolongations for Poland, Romania and Bulgaria are envisaged pending the approval of restructuring programmes.

4. Technical assistance to the candidate countries

652. Technical assistance in the field of competition continues to be an essential tool to prepare the candidate countries for accession. Specific actions are being taken under the Phare programme. Under the institution building ('twinning') arrangement, EU Member State experts are providing advice on a long-term basis to the competition and State aid authorities in the CEECs. In addition, joint training sessions were organised in April for officials from the competition offices of the candidate countries. These sessions focused on the explanation of the new competition *acquis* to the candidate countries as well as on the implementation and enforcement of the competition rules. In October, a training session in the field of competition policy was organised for judges in the candidate countries.

653. The Commission is pursuing a proactive policy of further intensifying its contacts with the competition authorities of the candidate countries. In June, the eighth annual competition conference between the competition offices of the candidate countries and the Commission took place in Vilnius, Lithuania. The delegations included high-level officials from the respective competition and State aid authorities, including Commissioner Monti. The annual conference serves as a forum for the exchange of views and experience. It also serves to establish and strengthen professional contacts between officials responsible for competition policy. This year's conference concentrated on the concrete preparations for accession in the competition field.

654. The Competition DG continued to hold various bilateral meetings with the competition and State aid authorities of the candidate countries during 2002. Technical discussions at expert level were held on antitrust approximation, institution building and enforcement. Similar meetings also took place on legislative approximation in the State aid area, on the creation of State aid monitoring authorities and on specific State aid issues, such as the drafting of the annual State aid reports, regional aid maps, the State aid aspects of investment incentives and special economic zones, and the assessment of individual cases in the sensitive sectors.

B — Bilateral cooperation

1. United States

655. Bilateral cooperation with the United States is based on the Competition Cooperation Agreement dating from 23 September 1991. Every year, the Commission reports in detail to the Council and the European Parliament on its cooperation activities with the United States under the 1991 Cooperation Agreement ⁽¹⁾ and the 1998 Positive Comity Agreement ⁽²⁾. The latest report covered the period 1 January 2001 to 31 December 2001 ⁽³⁾. The report for 2002 will be published in the course of 2003.

656. During 2002, the Commission continued its close cooperation with the Antitrust Division of the US Department of Justice (DoJ) and the US Federal Trade Commission (FTC). A large number of operations in all areas of antitrust were scrutinised simultaneously by the Commission and the US agencies. Inter-agency discussions tend to focus on issues such as the definition of markets, the likely competitive impact of a transaction on those markets, and the viability of any remedies suggested.

657. Merger investigations involving close transatlantic cooperation included Bayer/Aventis Crop Science, HP/Compaq and Solvay/Ausimont. The Commission also cooperated closely with its US counterparts in a number of non-merger investigations. In particular, large international cartel cases are often treated simultaneously by the Commission and the Department of Justice. The cooperation in cartel investigations includes also the coordination of investigative measures, such as the timing of inspections. Case-related EU-US cooperation is discussed in further detail in this report's chapter on merger control.

658. Numerous bilateral contacts between the Commission and the relevant US authorities and frequent visits by officials from both sides took place during 2002. On 23 July, Commissioner

⁽¹⁾ Agreement between the European Communities and the Government of the United States regarding the application of their competition laws (OJ L 95, 27.4.1995, as corrected by OJ L 131, 15.6.1995).

⁽²⁾ Agreement between the European Communities and the Government of the United States on the application of positive comity principles in the enforcement of their competition laws (OJ L 173, 18.6.1998).

⁽³⁾ Adopted on 17.9.2002 (COM(2002) 505 final).

Monti met in Brussels the heads of the US anti-trust agencies, Assistant Attorney-General Charles James and Chairman Timothy Muris of the Federal Trade Commission, for the annual bilateral EU–US meeting.

659. The EU–US merger working group continued its work in 2002. The working group consists of several sub-groups, of which one is dealing with procedural issues and the others with issues of substance. In October, the Commission and the antitrust authorities of the United States, the DoJ and the FTC, agreed on ‘best practices’ on cooperation in merger investigations. In these guidelines the Commission and the US agencies set forth practices to be followed when they review the same transaction.

2. Canada

660. The bilateral cooperation with Canada is based on the Competition Cooperation Agreement which entered in force in June 1999⁽¹⁾. Every year, the Commission reports in detail to the Council and the European Parliament on its cooperation activities with Canada. The latest report covered the period 1 January 2001 to 31 December 2001⁽²⁾. The report for 2002 will be published during the course of 2003.

661. An increasing number of cases are being examined by the competition authorities on both sides. Contacts between the Commission and its Canadian counterpart, the Canadian Competition Bureau, have been frequent and fruitful. Discussions have concerned both case-related issues and more general policy issues. Members of the merger and cartel units from the respective authorities met to discuss issues specific to their areas of enforcement. Furthermore, for the first time in 2002 a staff exchange for a period of six months was organised and an official from the Commission and one from the Competition Bureau were seconded to the other agency.

3. Japan

662. Numerous meetings and official contacts between the Commission and the Japanese authorities took place. The annual bilateral meeting between the Commission and the Fair Trade

Commission of Japan took place in Brussels on 25 October. Both sides discussed recent policy developments and further prospects of bilateral cooperation.

663. The Commission successfully concluded negotiations with the Government of Japan on a bilateral cooperation agreement. Consequently, on 8 May, the Commission adopted a proposal for a Council and Commission decision concluding the agreement between the European Communities and the Government of Japan concerning cooperation on anticompetitive activities⁽³⁾. Annexed to this proposal is a draft of the envisaged EU–Japan bilateral agreement. The draft agreement is the result of intensive negotiations between the Commission and the Government of Japan — in Tokyo and Brussels — from June 2000 until May 2002. The Commission conducted the negotiation of the proposed draft text on the basis of directives approved by the Council on 8 June 2000. The envisaged agreement will usefully reinforce the expanding network of bilateral competition cooperation agreements, next to agreements such as the 1991 and 1998 EU–US agreements, the 1999 EU–Canada agreement⁽⁴⁾ and the 1999 US–Japan agreement⁽⁵⁾. Before taking a decision on the text proposed by the Commission, the Council consulted the European Parliament, which approved the text on 3 July. The procedure for the adoption and the signature of the agreement will now be continued in the Council. The proposed agreement will increase the ability of the Commission and the Japanese Fair Trade Commission to cooperate with each other and is expected to lead to a much closer relationship between the two competition authorities and to a greater understanding of their respective competition policies.

4. Other OECD countries

664. During 2002 the Commission engaged in cooperation with the competition authorities of a number of other OECD countries, most notably Australia, New Zealand and Korea. These contacts concerned both case-related and more competition policy-related issues.

⁽¹⁾ Agreement between the European Communities and the Government of Canada regarding the application of their competition laws (OJ L 175, 10.7.1999).

⁽²⁾ Adopted on 17.9.2002 (COM(2002) 505 final).

⁽³⁾ COM(2002) 230 final, 8.5.2002, available online at http://europa.eu.int/eur-lex/en/com/pdf/2002/com2002_0230en01.pdf

⁽⁴⁾ Agreement between the European Communities and the Government of Canada regarding the application of their competition laws (OJ L 175, 10.7.1999).

⁽⁵⁾ Available online at <http://www.usdoj.gov/atr/public/international/docs/3740.htm>

665. During the course of the year the Commission also continued its close cooperation with the ESA (EFTA Surveillance Authority) in enforcing the Agreement on the European Economic Area.

C — Multilateral cooperation

1. International competition network (ICN)

666. The international competition network (ICN) is a recent initiative that provides a forum for antitrust authorities from all over the world to discuss possibilities for convergence in relevant fields of international competition policy. The Commission has been one of the driving forces behind the ICN's launch by 14 competition authorities in New York in October 2001. One year on, 77 competition agencies from 68 jurisdictions representing five continents have joined the ICN. One of its distinguishing features is the integration of many of the younger competition authorities from developing and transition economies. The ICN was created as a virtual network, engaged in work on specific projects that are expected to facilitate practical cooperation between competition authorities. It ultimately aspires to recommend concrete 'best practices' that are expected to help to enhance governance in a globalising world.

667. During its first year of existence, the ICN initially focused on two projects: one working group studied procedural and substantive aspects of the control of concentrations that concern more than one jurisdiction. The second project reviewed approaches to competition advocacy, a term which refers to the particular mission of competition authorities in preventing and addressing distortions of competition created by public intervention. The results of these projects were presented to senior competition officials, representatives of other international bodies working in the same field as well as non-governmental advisors during ICN's inaugural annual conference in Naples, Italy, from 27 to 29 September. In particular, ICN members endorsed a set of non-binding 'Guiding principles for merger notification and procedures', and discussed a number of more operational 'recommended practices' in the area of international merger control. In Naples, ICN members also debated an appropriate analytical framework for the review of mergers. The ICN working group on competition advocacy, for its

part, presented a comprehensive study on what ICN's agencies are doing in terms of competition advocacy, and which tools they employ in this particular mission. The findings of this unparalleled overview, to which the Commission was one of the key contributors, are to a large extent based on a survey conducted among ICN's membership. All ICN documents are available on its web site, www.internationalcompetitionnetwork.org.

668. In Naples, ICN members also set up an additional working group to address the specific needs of developing and transition economies, and asked the Commission and the South African Competition Tribunal to co-chair the project, labelled 'Capacity building and competition policy implementation'. The working group will initially focus on three themes: (i) the benefits of competition law enforcement in developing countries; (ii) an assessment of the challenges faced by developing countries in implementing competition policies and in establishing credible enforcement agencies, including strategies these countries have used to overcome such challenges; (iii) models of support from partner countries and multinational agencies.

2. WTO working group on trade and competition (WGTCPC)

669. At the fourth WTO ministerial conference in Doha, Qatar (9–14 November 2001) ministers recognised 'the case for a multilateral framework (on competition policy) to enhance the contribution of competition policy to international trade and development (...)' and the WGTCPC was given a new and more focused mandate for its work in the period leading up to the fifth ministerial conference. Ministers further agreed that WTO negotiations would commence after the fifth ministerial conference. The WGTCPC meeting on 23 and 24 April was the first one since the WTO ministerial conference in Doha and the clear mandate given in the Doha development agenda (DDA) to 'clarify' issues related to the negotiation of a multilateral agreement on trade and competition in the WTO. The main item on the agenda for this meeting was the short- and long-term technical assistance and capacity building (TACB) needs of developing countries to understand the issues relevant for future negotiations and to establish credible domestic competition systems. With a view to the discussion, the secretariat produced a background document on TACB. The secretariat also produced three

further background papers in 2002: on voluntary cooperation, on hardcore cartels; on core trade and competition principles. The EU submitted a contribution ⁽¹⁾ on technical assistance and international voluntary cooperation modalities. During the discussion, the EU stressed the need to provide TACB support that, on the one hand, will build a country's institutional capacity to analyse its economy and the marketplace and also to enforce the rules and, on the other, will raise public awareness of the objectives of competition policy and spread competition culture.

670. The second meeting of the WGTCP took place on 1 and 2 July and was an occasion for lively and substantive discussion on both issues on the agenda: hardcore cartels and voluntary cooperation between competition authorities. The EU submitted a contribution on hardcore cartels (WT/WGTCP/W/193). Discussions covered the options for the scope of a prohibition of hardcore cartels (international cartels only; all cartels with an impact on international trade; all cartels without exception) and the link between 'per se' prohibition and 'rule of reason' type approaches. Another issue focused on was that of the minimum features of a multilateral prohibition (e.g. explicit ban, obligation to provide effective sanctions, etc.). Participants also reviewed the general aspects of cooperation (multilateral discussion, WTO Committee, peer review, methodologies, etc.) and cooperation in specific cases (including a discussion on positive comity).

671. The third WGTCP meeting took place on 26 and 27 September and was devoted to core principles of trade and competition. The EU position was presented orally and in the light of comments made and questions raised during the September meeting, the EU tabled a paper on 'core principles' ahead of the November meeting. Other papers and presentations for the September meeting were given by New Zealand (proposing to introduce a new 'principle of comprehensiveness' requiring that exemptions/exceptions be implemented in a way minimising economic distortions), Australia, Korea, Thailand (which proposed a separate principle on 'special and differential treatment'), Switzerland, the United States (including detailed questions on the contents of 'procedural fairness'), Japan, India (hinting at possible agreement if given a sufficiently long

transitional period prior to implementation) and the Czech Republic.

672. The last WGTCP meeting for the year took place on 20 November. The EU paper on 'core principles' (the sole substantive contribution) was well received and elicited some positive reactions, despite the widespread absence of capital-based officials. On the procedural front, there was agreement on two substantive meetings of the group in 2003 before the fifth WTO ministerial conference in Cancun in September 2003 where ministers will agree on the modalities for negotiations.

3. OECD Competition Committee (CC)

673. In 2002, three CC meetings were held, on 12 February, 5 and 6 June, and 23 and 24 October. The first CC meeting dealt with the peer review of Turkey and Turkey's report focusing on its growing enforcement efforts. The CC secretariat also presented its note on product market competition, on which the EU expressed a positive position, adding that the performance indicators needed to be developed and updated.

674. The second CC meeting reviewed plans for future meetings of the Global Forum on Competition (GFC) and agreed to hold the next GFC in February 2003 ⁽²⁾, back to back with the OECD CC meetings. Furthermore, the CC discussed loyalty/fidelity rebates and discounts. Some jurisdictions are keen to prohibit such discounts whenever they are offered by firms enjoying a dominant position, while others insist on evidence that buyers are ultimately harmed by behaviour that, at least initially, should benefit buyers receiving the discounts. There was consensus, however, on the point that market power makes it more likely that fidelity discounts will have anticompetitive effects. Finally, the CC held a round table on merger review in emerging (high innovation) markets. Delegates agreed that, while a special approach to merger review is not required in high innovation markets, competition authorities will experience special difficulties in defining markets, assessing barriers to entry, and predicting how markets will likely evolve. Those special difficulties necessitate placing less weight

⁽¹⁾ WT/WGTCP/W/184.

⁽²⁾ The agenda will include the following topics: (1) an in-depth review of South Africa's competition institutions; (2) a discussion on optimal design of competition institutions and the objectives of competition law and policy; (3) a discussion on the role of competition policy in a small economy.

on structural characteristics, i.e. concentration indices. They also put a premium on improving understanding of high innovation markets, including through making full use of information gleaned from competition advocacy in relation to markets featuring network infrastructures. Competition authorities are well aware that in mergers in such markets, significant pro- and anti-competitive effects are more likely to show up in effects on dynamic as contrasted with static efficiency. The focus is typically confined to product and technology markets, with a good deal of attention being paid to potential competition. The most obvious difference between merger review in other markets and in emerging markets lies in the remedies applied. Concerning emerging markets, much greater reliance is placed on highly customised behavioural or mixed behavioural/structural remedies to eliminate net anticompetitive effects.

675. The last CC meeting held a round table on communication and policy towards the media, with discussion focusing on methods for improving communication in the competition policy area. A further round table addressed the substantive tests used to assess mergers and discussed the pros and cons of the 'substantial lessening of competition' and the 'dominance' test. Finally, it was agreed to hold a round table on merger remedies (spring 2003), predatory foreclosure (autumn 2003), consumer protection issues (autumn 2003) and competition and innovation (spring 2004).

4. Unctad Intergovernmental Group of Experts (IGE)

676. The fourth Unctad IGE session took place in Geneva from 3 to 5 July, with a satisfactory

level of participation by competition experts from developing countries and regional organisations. Following a keynote speech by the Chairman of the Korean FTC, Mr Nam Kee Lee, delegates took the floor to present policy and enforcement developments in their respective countries, notably Russia, France, Ukraine, Iran, India, Cuba, South Africa, Zimbabwe, Zambia, Qatar, Sri Lanka, Venezuela, Romania, China⁽¹⁾, Côte d'Ivoire, Malaysia, Morocco, Argentina, Dominican Republic, Burkina Faso, Lebanon, Bangladesh, Costa Rica, Korea, Benin and the African regional organisations UEMOA and Comesa. The contributions stressed the particular needs and requirements of developing economies and requested enhanced technical cooperation and assistance to build their capacity with a view to the forthcoming negotiation round in the WTO. The EU delegation intervened from the panel in the discussion on the interface between sector regulation and 'generalist' competition agencies and presented the basic principles behind the decision to open up public utilities to competition, the share of work between regulators and antitrust agencies and EU experience in a number of areas (e.g. telecommunications ONP, local loop unbundling, *ex ante* asymmetric regulation, etc.). The EU also joined in the discussion on technical assistance and capacity building activities.

⁽¹⁾ A competition law dealing with both antitrust and unfair competition was passed in 1993. The Chinese authorities dealt with 285 cases involving restrictive business practices and 203 cases involving monopolisation attempts in 2001 (the case load in 2001 exceeded the total load for the five years from 1995 to 2000).

VI — OUTLOOK FOR 2003

1. Antitrust and liberalisation

New instruments in the context of the modernisation of the rules implementing Articles 81 and 82 of the EC Treaty

677. In order to prepare for the effective application of Regulation (EC) No 1/2003 ⁽¹⁾ from 1 May 2004 onwards, the Commission will adopt in the course of 2003 a Commission implementing regulation and a number of notices intended to assist NCAs, national courts, consumers and industry in the functioning of the new enforcement regime. It is expected that the Commission will adopt notices on cooperation with NCAs and national courts, on the application of Article 81(3) of the EC Treaty and of the 'effect on inter-State trade' criterion, on the issuing of guiding opinions and on the handling of complaints.

Enforcement activities

678. The main part of the Competition DG's work of enforcing the antitrust rules will continue to consist in dealing with individual cases. Continued efforts will be made to further shorten the average length of proceedings and to focus resources on cases of major legal, economic or political importance to the EU, including measures which prevent full market integration and damage consumers' interests.

679. Cases of abusive behaviour by dominant firms, particularly in sectors involving rapid economic or technological development (e.g. telecommunications, the media) will be given top priority.

680. Casework will remain the first priority in the Commission's cartel enforcement activity. The fight against hardcore cartels can only be won if there is credible deterrence. Without a sufficiently large number of secret cartels being detected and terminated, as well as being continually punished by decisions imposing fines, deterrence from this kind of illegal behaviour will not occur. On the basis of the work done in 2002, a number of decisions punishing cartels as effectively as in the previous year can be expected in 2003.

681. With respect to casework, the Commission will continue to give priority to important sectors of the European economy, where its enforcement action directly improves consumer welfare.

682. As regards procedural aspects of antitrust enforcement, access to the file is one of the principal safeguards designed to protect the rights of the defence. To take account of experience gained so far under the Commission notice on the internal rules of procedure for processing requests for access to the file ⁽²⁾, and to adapt the notice in the light of recent case-law, a revised notice is expected to be adopted by the Commission in the course of 2003.

683. A further effort will be made to improve expertise in carrying out on-the-spot inspections in view of the new powers that antitrust modernisation assigns to the Commission, including in particular the methods and skills needed to search for electronic information. The new antitrust rules will strengthen the Commission's capacity to obtain evidence, notably by enabling it to inspect private homes where business records may be kept.

684. Last but not least, the fifth International Cartel Workshop also forms part of the Commission's agenda for 2003, in order to demonstrate the priority attributed to international cooperation. This is a yearly conference of around 200 representatives of cartel enforcement agencies from all over the world, organised on a rotating basis, where 'best practices' of the respective agencies are shared, for instance on investigation techniques, conducting electronic searches, international cooperation and other related cartel issues.

685. Building on the Lisbon process, priority for liberalisation will be given to enforcement actions relating to opening the electricity and gas markets, as well as to cases in the transport sector. Furthermore, specific attention will be paid to competition in sensitive sectors/areas where the Commission is undertaking single market measures, such as financial services and liberal professions.

2. Mergers

686. In the area of merger control, the most important task is the initiative for a revised framework in which mergers of a Community

⁽¹⁾ Council regulation on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ L 1, 4.1.2003).

⁽²⁾ OJ C 23, 23.1.1997.

dimension are to be dealt with by the Commission (review of the basic Council regulation and the derived regulatory measures). Another focus in 2003 will be the adoption of a notice on the assessment of horizontal mergers and the enhancement of cooperation with other competition authorities internationally towards possible convergence in procedures and substantive analysis.

3. State aid

687. State aid policy will be further developed in 2003 in order to modernise and simplify it and provide all parties concerned with a predictable and clear framework within which they can operate. Its objectives and rationale should be more explicitly described in a Commission communication. Existing State aid control instruments will be scrutinised with a view to removing possible conflicts between them and to simplify them substantially. Wherever possible, attempts will be made to simplify and rationalise procedures.

688. Specific priorities for 2003 will include the development of a block exemption regulation for research and development aid for SMEs, and the

establishment of a list of sectors suffering from serious structural problems in which regional investment aid is restricted. New rules for the shipbuilding sector will be prepared, the existing rules expiring in 2003. High priority will also be given to the establishment of guidelines concerning the provision of compensation for the cost of providing services of general economic interest. Cooperation with the candidate countries will continue in 2003 in order to establish the lists of existing aid measures which need to be included in the Accession Treaties.

4. International field

689. As regards enlargement, the Commission will closely monitor the fulfilment by the 10 candidate countries of the agreed conditions and requirements for accession.

690. With a view to promoting international convergence, the Commission will continue its substantial work within the framework of the international competition network and on the preparation of the fifth WTO ministerial conference to be held in Cancun in September 2003.

Annex — Cases discussed in the report

1. Articles 81, 82 and 86

| Case | Publication | Point |
|---|------------------------|-------------|
| Air France/Alitalia | | 113 |
| Austrian banks | IP/02/844, 11.6.2002 | 39, 190 ff. |
| Carlsberg and Heineken | IP/02/1603, 4.11.2002 | 43 ff. |
| Concrete reinforcing bars | IP/02/1908, 17.12.2002 | 56 ff. |
| Deutsche Bahn AG (DB)/Georg Verkehrsorganisation (GVG) and Statens Järnvägar (SJ) | | 133 |
| Deutsche Lufthans/Austrian Airlines | OJ L 242, 10.9.2002 | 114 |
| Ferrovie dello Stato (FS)/Georg Verkehrsorganisation (GVG) | | 133 |
| Fine art auction houses | IP/02/1585, 30.10.2002 | 46, 47 |
| Food flavour enhancers | IP/02/1907, 17.12.2002 | 53, 54 |
| IMS Health | OJ L 59, 28.2.2002 | 68, 69 |
| Industrial and medical gases | IP/02/1139, 24.7.2002 | 42 |
| International Federation of the Phonographic Industry (IFPI) | IP/02/1436, 8.10.2002 | 147 ff. |
| KLM/Northwest Airlines | OJ C 264, 30.10.2002 | 110 |
| Leased lines | IP/02/1852, 11.12.2002 | 101 ff. |
| Lufthansa/SAS/United Airlines | OJ C 264, 30.10.2002 | 110 |
| Methionine | IP/02/976, 2.7.2002 | 40, 41 |
| Methylglucamine | IP/02/1746, 27.11.2002 | 48, 49 |
| Nintendo | IP/02/1584, 30.10.2002 | 61 ff. |
| Plasterboard | IP/02/1744, 27.11.2002 | 50 ff. |
| 'Skyteam' Airline Alliance | OJ C 76, 27.3.2002 | 112 |
| Specialty graphite | IP/02/1906, 17.12.2002 | 55 |
| Trans-Atlantic Conference Agreement (TACA) | OJ L 26, 31.1.2003 | 128 ff. |
| UEFA Champions League | | 138 ff. |
| United Air Lines/SAS | OJ C 264, 30.10.2002 | 110 |
| United Airlines/Lufthansa | OJ C 264, 30.10.2002 | 110 |
| Visa International (Multilateral interchange fee) | OJ L 318, 22.11.2002 | 187 ff. |

2. Merger control

| Case | Publication | Point |
|----------------------------------|---|---------|
| Airtours/First Choice | OJ L 93, 13.4.2000 OJ C 191, 10.8.2002 | 224 ff. |
| Aker Maritime/Kvaerner (II) | | 272 |
| Barilla/BPL/Kamps | IP/02/914, 26.6.2002 | 262 |
| Bayer/Aventis Crop Science | IP/02/570, 17.4.2002 | 214 |
| BP/Veba Oel | IP/02/974, 2.7.2002 | 263 |
| Cargill/Cerestar | IP/02/97, 21.1.2002 | 271 |
| Carnival Corporation/P&O Cruises | IP/02/552, 11.4.2002 IP/02/1142, 24.7.2002 | 220 ff. |

| | | |
|---|---|--------------|
| Compass/Restorama/Rail Gourmet/Gourmet Nova | IP/02/319, 26.2.2002 | 274 |
| Connex/DNVBVG/JV | IP/02/267, 25.4.2002 | 275 |
| Danish Crown/Steff-Houlberg | IP/02/260, 15.2.2002 | 273 |
| Electrabel Customer Solutions/Intercommunale d'Electricité du Hainaut | IP/02/1962, 23.12.2002 | 280 |
| EnBW/ENI/GVS | IP/02/1312, 17.12.2002 | 222 |
| GEES/Unison | IP/02/578, 18.4.2002 | 282 |
| Haniel/Cementbouw/JV (CVK) | IP/02/313, 25.2.2002 IP/02/933, 26.6.2002 | 215 ff. |
| Haniel/Fels | IP/01/1438, 18.10.2001 IP/02/288, 21.2.2002 | 215 ff. |
| Haniel/Ytong | IP/01/1709, 30.11.2001 IP/02/530, 9.4.2002 | 215 ff. |
| Hollandsche Beton Groep/Koninklijke BAM NBM | IP/02/1267, 4.9.2002 | 278 |
| Imperial Tobacco/Reemtsma Cigarettenfabriken | IP/02/692, 8.5.2002 | 260 ff. |
| Leroy Merlin/Brico | IP/02/1881, 13.12.2002 | 279 |
| Masterfoods/Royal Canin | IP/02/263, 15.2.2002 | 258 |
| Nehlsen/Rethmann/SWB/Bremerhavener Entsorgungsgesellschaft | IP/02/785, 31.5.2002 | 276 |
| Promatech/Sulzer Textil | IP/02/569, 17.4.2002 | 281 |
| RAG/Degussa | IP/02/1698, 19.11.2002 | 265 |
| Schneider/Legrand | IP/01/481, 30.3.2001 IP/01/1393, 10.10.2001 IP/02/173, 31.1.2002 | 235 ff. |
| SEB/Moulinex | IP/02/22, 9.1.2002 | 257, 269 ff. |
| Sogecable/Canalsatélite Digital/Via Digital | IP/02/1216, 16.8.2002 | 277 |
| Solvay/Montedison/Ausimont | IP/02/532, 9.4.2002 | 259 |
| Telia/Sonera | IP/02/1032, 10.7.2002 | 264 |
| Tetra Laval/Sidel | IP/01/965, 5.7.2001 IP/01/1393, 10.10.2001 IP/02/173, 31.1.2002 IP/02/1952, 20.12.2002 OJ C 19, 25.1.2003 | 246 ff. |

3. State aid

| Case | Publication | Point |
|--|----------------------|---------|
| Aid for damage caused by German flood | Not yet published | 522 |
| Bankgesellschaft Berlin | OJ C 141, 14.6.2002 | 412 |
| Belgian coordination centres | OJ C 384, 10.12.1998 | 375 |
| BMW Leipzig | Not yet published | 473 |
| BSIK | OJ C 18, 22.1.2002 | 424 |
| Cableways Italy | OJ C 172, 18.7.2002 | 453 |
| Captive insurance companies | OJ L 329, 5.12.2002 | 397 |
| Excise duties on rum produced in the French overseas departments | OJ C 252, 19.10.2002 | 428 |
| Exemption from the UK climate change levy | OJ L 229, 27.8.2002 | 378 |
| Existing tax scheme in Italy | OJ L 296, 30.10.2002 | 403 |
| First solar power station Germany | Not yet published | 419 |
| GEA | OJ L 329, 5.12.2002 | 399 |
| German coordination centres | Not yet published | 384 |
| German producers of energy from renewable sources | OJ C 164, 10.7.2002 | 357 |
| German regional banks | IP/02/354 | 360 ff. |

ANNEX — CASES DISCUSSED IN THE REPORT

| | | |
|----------------------------------|----------------------|---------|
| Hamburger AG | OJ L 296, 30.10.2002 | 438 |
| Infineon, Germany | OJ L 307, 8.11.2002 | 437 |
| Italian tax measures for banks | | 366 ff. |
| KLICT | OJ C 88, 12.4.2002 | 422 |
| KSG | Not yet published | 464 |
| Leuna Refinery Saxony-Anhalt | Not yet published | 370 |
| Mutterer Alm Austria | OJ C 150, 22.6.2002 | 456 ff. |
| Natural disasters in Greece | OJ C 257, 24.10.2002 | 523 |
| Northern Ireland aggregates levy | OJ C 133, 5.6.2002 | 417 |
| Northern Ireland Electricity | OJ C 113, 14.5.2002 | 388 |
| Rescue aid to British Energy plc | IP/02/1747 | 409 ff. |
| Rescue aid to Bull | Not yet published | 406 ff. |
| Schott Lithotec | Not yet published | 440 |
| STMicroelectronics Sicily | OJ C 146, 19.6.2002 | 436 |
| Support for fuel price increase | Not yet published | 530 |
| Tax arrangements in the Azores | Not yet published | 429 ff. |
| Terra Mitica | Not yet published | 381 |
| UK climate change levy | OJ L 229, 27.8.2002 | 416 |
| UK competitive transition charge | OJ C 113, 14.5.2002 | 359 |
| US foreign sales corporations | Not yet published | 383 |
| ZDF leisure park | OJ C 137, 8.6.2002 | 374 |
| Zellstoff Stendal | OJ C 232, 28.9.2002 | 439 |

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