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Part One

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Introduction

1. This year's report not only reflects significant changes to the internal organisation and working methods of the Commission in the field of EU competition policy, but also provides evidence of the way the Commission ensures coherence in the European economic governance fabric by balancing continuity and the need for new approaches.
2. On the one hand, the current Commission is approaching the end of its term, and 10 new Member States will soon be welcomed in the enlarged Union. Emphasis on continued and extended application of a common set of competition rules is essential for allowing them a soft landing. Preparations for the practical implementation of the modernised procedural framework for antitrust enforcement are therefore fully on course. In the same way, the review of the current Merger Regulation is scheduled to be finalised by the time the new Member States join. While the need to step up reforms in the field of state aid control has been known for some time, the time is now ripe for putting the vision into practice. This year's decisive intervention of the Commission in favour of equal application of state aid rules to all Member states, small and large, highlights the importance of tackling state intervention which distorts competition.
3. On the other hand, sectoral developments require a great deal of attention and work, both on the part of industry and by the Commission. Making a reality of the liberalisation of electronic communications, energy or transport in Europe without compromising on the effective provision of services to all consumers is difficult but attainable. For example balancing the sound economic development of the media sector with other public interest objectives, such as ensuring diversity of reliable information sources requires the careful application of the appropriate instruments.
4. EU competition policy plays an important role in achieving the competitiveness goals of the Lisbon agenda. It encompasses not only antitrust and merger rules which are fundamental to any well-functioning market economy, but also the application of an efficient and firm state-aid discipline. In view of the world economic situation in general and efforts in Europe to encourage growth, it is essential that the interaction between the various policy instruments at the Commission's disposal is used to the best effect and that the improvement of the EU's competitiveness remains high on the Commission's agenda.

Statistics on Commission activity in applying competition law in 2003

5. In 2003, the total number of new cases was 815, comprising 262 antitrust cases (under Articles 81, 82 and 86 of the EC Treaty), 212 merger cases and 377 state aid cases (excluding complaints). New cases decreased significantly in all fields, in the antitrust and in the merger fields by about one fifth, in the state aid field by approximately one seventh.
6. In antitrust, the number of new notifications decreased further (by about a quarter) in line with the final abolition of the notification system which will take effect in May 2004. According to the same logic, new own-initiative cases (97) are slightly on the rise. Figures for cases triggered by complaints (94) are of equal importance, although

they remain clearly below last years' figures (by about a quarter). As concerns concentrations, activity further slowed down and again reached the (already elevated) level seen in the late 1990ies. In state aid control, the number of notifications and new cases of non-notified aid decreased, while new cases concerning existing aid nearly quadrupled (after a steep decline in 2002). 203 cases were reported by Member States under the block exemption regulation.

7. The total number of cases closed in 2003 was 831, comprising 319 antitrust cases, 230 merger cases, and 282 state aid cases (excluding complaints)¹. In antitrust, 24 cases were closed by formal decision and the backlog of pending cases was further reduced. In the field of merger control, 231 formal decisions were taken during the year, the number of cases requiring in-depth investigation (9) remaining stable. As for state aid, the number of final negative decisions (20) was nearly halved and positive decisions (18) were down by more than a third compared to 2002. The number of formal proceedings initiated (55) was also lower than in the year before.

Box 1: Competition policy and the consumer

During 2003 there were significant developments towards the better integration of the Commission's competition and consumer protection policies. These are a good foundation for further progress in 2004.

On the occasion of the year's second Competition Day on 9 December in Rome, Commissioner Monti announced the appointment of Mr Juan Rivi re y Mart ² to the newly created function of Consumer Liaison Officer within the Commission's Competition Directorate-General. This post was created in order to ensure a permanent dialogue with European consumers, whose welfare is the primary concern of competition policy, but whose voice is not sufficiently heard when individual cases are handled or policy issues are discussed. It is also designed to intensify contacts between DG Competition and other Directorates-General (DGs) within the Commission, most notably with DG Health and Consumer Protection.

More specifically, the tasks of the Consumer Liaison Officer include:

acting as primary contact point for consumer organisations, and for individual consumers;

establishing more regular and comprehensive contacts with consumer organisations and in particular the European Consumer Consultative Group "ECCG"³;

alerting consumer groups to competition cases when their input might be useful, and advising them on the way they can provide input and express their views;

contacts with National Competition Authorities (NCA) regarding consumer protection

1 Number of state aid cases closed by final decisions of the following type: no objection, positive decision, negative decision, conditional decision.

2 Mr. Rivi re y Mart  has been working in DG Competition since 1989. In his previous position he was Advisor to the Policy Development and Coordination Directorate.

3 ECCG is comprised of 18 members, one representing the consumer organisations of each Member State, and one for each of three European consumer organisations, AEC, ANEC and BEUC. Observers representing consumer organisations from Acceding Countries are already participating in the work of ECCG.

matters.

As in the case of the Chief Competition Economist, the role of the Consumer Liaison Officer is not confined to the merger control area, but also concerns the antitrust field - cartels and abuses of dominant positions - as well as other competition cases and policies⁴.

Consumer organisations, as well as individual consumers, will be able to contact the Consumer Liaison Officer directly on competition-related issues by e-mail

COMP-CONSUMER-OFFICER@cec.eu.int

Moreover, for the first time the Commission chaired a Joint Meeting of Senior Competition and Consumer Officials from the 15 Member States, Acceding Countries and EFTA countries on 19 November in Brussels. Participants expressed support for the better integration of competition and consumer protection policies. In particular, they pointed to the need to develop a common methodology to collect and analyse relevant data, such as consumer complaints, to identify consumer detriment and other losses in consumer welfare in specific markets. They also agreed it was not sufficient, in itself, to maintain competition in the market, and that the outcome of competition was equally important, in terms of lower prices and/or better choices for consumers.

Apart from these important developments for consumers, the Commission has been involved in a number of cases which affect consumers or are of particular interest to them. Many of the decisions described in this Report - be they individual decisions (for example, in the mobile phone, broadcasting or airline sectors) or sector-based initiatives (for example, in the transport, liberal professions, motor vehicle and media sectors) – affect the day to day welfare of consumers directly.

The reform of merger control and the modernisation of antitrust rules, described in this Report, are major initiatives designed to make Community competition policy more effective and relevant in the market, while seeking to ensure that the consumer protection perspective is adequately taken into consideration. Another potentially significant development set out is the identification by the Commission of potentially unlawful state aid in the Acceding Countries.

Apart from formal procedures there are informal ways of tackling the potentially negative impact caused by the behaviour of market players and the Commission uses these means. The case described below is a topical example of such action in the interest of consumers.

Athens Olympic Games arrangement⁵

The organising committee for the Olympic Games in Athens, ATHOC, sought reassurance from the Commission that its ticketing arrangements for the 2004 Games were in line with European Union competition rules.

The arrangements provide for various sales channels for tickets for residents in the European Economic Area (EEA). For the first time residents in the EEA are able to purchase tickets directly from the organising committee via the Internet. EEA residents can also purchase

4 The intention to create such a post was first announced in December 2002, when a package of reforms concerning the control of mergers in the EU was adopted.

5 Case COMP/D-3/38.468.

tickets through any of the National Olympic Committees or their appointed agent(s). These measures ensure that all residents of the EEA are able to purchase tickets on equal terms without discrimination on the basis of nationality. Furthermore, spectators can purchase their tickets separately from the travel or accommodation agencies whose services they employ.

After discussions between ATHOC and the Commission with a view to safeguarding consumer interests and ensuring compliance with the competition rules, ATHOC modified the ticketing arrangements in respect of Internet sales as well as of sales by National Olympic Committees in the EEA by allowing them to sell tickets below face value, rather than imposing a minimum price. As a result of these modifications, the Commission came to the conclusion that, on the basis of the information available, the ticketing arrangements did not breach the EU competition rules.

I – Antitrust – Articles 81 and 82; state monopolies and monopoly rights – Articles 31 and 86

A - MODERNISATION OF THE LEGISLATIVE AND INTERPRETATIVE RULES

1. NEW COMMISSION COMPETITION RULES

Review of the technology transfer block exemption regulation

8. In October the Commission published draft rules and guidelines on technology transfer licensing agreements⁶ Licensing of technology such as patents, know-how and software copyrights is growing in importance and is vital to disseminating innovations on a large scale. The object of the proposed new rules is to clarify the application of competition rules in this area and to ensure their continuing relevance in today's changing economy.
9. It is proposed that the new rules should be aligned on the new generation of block exemption regulations and guidelines for distribution agreements and horizontal cooperation agreements while taking account of the specificities of licensing agreements. This was also requested by many of those who commented on the December 2001 evaluation report. This will have the following advantages:
 - The block exemption regulation will have only a black list: whatever is not explicitly excluded from the block exemption is now exempted. By doing away with the white and grey lists of the current regulation, the straitjacket effect is avoided. This increases the possibilities for companies to design the commercially most viable forms of licensing agreements while ensuring effective competition and providing adequate legal certainty to companies.
 - The scope of the new rules is extended to all types of technology transfer agreement for the production of goods or services. It is proposed that the new regulation should cover not only patent and know-how licensing but also software copyright licensing, as requested by many of those who commented on the evaluation report. Where the Commission does not have the power to adopt a block exemption regulation, as is the case with patent pools and with copyright licensing in general, the guidelines will give clear guidance as to future enforcement policy.
 - The new rules will make a clear distinction between licensing between competitors and licensing between non-competitors. For obvious reasons, competition policy should distinguish between licensing between competitors and between non-competitors as in particular the applicable hardcore list should differ. Competition problems are more likely to arise in licensing between competitors than in licensing between non-competitors.

6 OJ C 235, 1.10.2003.

10. When the draft regulation and guidelines were published, the Commission invited interested parties to comment on the new draft rules before the end of November. It received 79 comments. After analysing these comments, the Commission will revise the drafts and adopt the new rules. The aim is to have the revised rules in place before the new antitrust modernisation regime comes into force in May 2004.

2. MODERNISATION OF THE RULES IMPLEMENTING ARTICLES 81 AND 82 OF THE EC TREATY

11. In order to complete the modernisation of the enforcement of EU antitrust rules, the Commission has to adopt a series of acts commonly referred to as the modernisation package. These acts are meant primarily to facilitate the application of the enforcement powers vested in the Competition Authorities and to elaborate on the cooperation mechanisms with National Competition Authorities (NCAs) and National Courts provided for by Regulation 1/2003.
12. In September, the Commission adopted draft texts for public consultation on all elements of the modernisation package⁷ This public consultation led to around 50 comments. After analysis of these comments, the Commission will revise the drafts and adopt the new texts early next year, before 1 May 2004, the date of application of Regulation 1/2003.
13. The package contains a Commission regulation implementing Council Regulation 1/2003 and six notices. The Commission implementing regulation mainly addresses the modalities for the hearing of the parties concerned, complainants and third parties as well as a range of other procedural issues, such as access to the file and the treatment of confidential information. The six draft notices can be subdivided into three categories:
- (a) the first series of notices outlines the current state of the case law of the Court of Justice and of the practice of the Commission regarding two concepts that are central to the application of Article 81 of the EC Treaty, namely the concept of effect on trade between Member States and the principles underlying Article 81(3). By setting out the methodology for applying those Treaty provisions and summarising the existing case law, these notices will assist national competition authorities and national courts in applying the provisions;
 - (b) the second series of notices focuses on the mechanisms for cooperation between the various enforcers of EU competition rules - the Commission, national competition authorities and national courts - and is designed mainly to elaborate on the cooperation mechanisms provided for by Regulation 1/2003 to ensure efficient, consistent application of Articles 81 and 82 of the EC Treaty throughout the European Union. The notices address in particular the issue of division of casework and the subsequent coordination and cooperation activities between competition authorities within the European Competition

⁷ The draft texts were published for public consultation in OJ C 243, 10.10.2003.

Network (ECN) and the possibility for the Commission to make written and oral submissions to national courts;

- (c) the final series of draft notices deals with relations between the Commission and some of the key stakeholders in the field of competition policy: consumers and the business community. In this connection, the Commission envisages adopting a notice on the treatment of complaints and a notice on guidance letters, which the Commission may issue in order to assist companies in assessing novel or unresolved questions.

3. REVIEW OF PROCEDURAL RULES

3.1. Appointment of a Chief Competition Economist

- 14. The Commission appointed Professor Lars-Hendrik Röller for three years to the post of chief competition economist as of 1 September. A staff of 10 or so specialised economists is dedicated to this post.
- 15. Professor Röller holds the Chair in Industrial Economics at Humboldt University in Berlin. He is also Director of the Institute for Competitiveness and Industrial Change at the Wissenschaftszentrum Berlin für Sozialforschung. Since 1996, he has been programme director of the industrial organisation group of the London-based Centre for Economic Policy Research (CEPR). After obtaining a B.Sc. in Computer Science at Texas A&M University, he pursued his studies at the University of Pennsylvania (M.S. in Computer and Information Science, M.A. in Economics, Ph.D. in Economics). He has subsequently held posts at a number of academic institutions, including the French-based European Institute of Business Management INSEAD, Stanford University, New York University and the Universitat Autònoma de Barcelona. He has advised a number of public bodies as well as private firms in competition policy cases. He has published extensively on competition issues and sits on the editorial boards of a number of journals, including the International Journal of Industrial Economics (which he has edited since 1999).
- 16. “I am convinced that Professor Röller’s outstanding academic record and his experience in the field will provide invaluable support to the Commission in the preparation of its decisions in complex cases in the merger area but also in antitrust and state aid investigations”, said Competition Commissioner Mario Monti.
- 17. The Chief Economist has three main tasks:
 - Guidance on economics and econometrics in the application of EU competition rules. This may include contributing to the development of general policy instruments;
 - General guidance in individual competition cases from the early stages;
 - and
 - Detailed guidance in the most important competition cases involving complex economic issues, in particular those requiring sophisticated quantitative analysis.

18. The Chief Economist will be also responsible for maintaining contact with the academic world and will organise and chair meetings of the Academic Advisory Group for Competition Policy, a group of leading academics working in the area of industrial organisation and in the field of state aid.

3.2. Activities of the Hearing Officer

3.2.1. *The second year under the new Mandate*

19. In 2001, the Commission adopted a new decision in order to further strengthen the role of the Hearing Officer in competition proceedings under Articles 81 and 82 of the EC Treaty and the Merger Regulation⁸. In the preamble to Commission Decision 462/2001/EC, ECSC of 23 May 2001 on the terms of reference of Hearing Officers in certain competition proceedings⁹, the Commission acknowledges that, in order for the right to be heard to be guaranteed, the conduct of administrative proceedings needs to be entrusted to an independent person experienced in competition matters who has the integrity necessary to contribute to the objectivity, transparency and efficiency of those proceedings¹⁰. This was the second year in which the Hearing Officers¹¹ were able to benefit from the enlarged responsibility and enhanced independence conferred upon them by the new Mandate. In this, their first contribution to the annual Report, the Hearing Officers would like to take advantage of the opportunity to briefly outline their functions.

3.2.2. *Transparency to guarantee independence*

20. In order to guarantee the Hearing Officer's independence, his appointment and any reasoned decision by which he is transferred or dismissed must be published in the *Official Journal of the European Union*¹². Furthermore, the Hearing Officer is directly attached to the member of the Commission in charge of competition matters¹³ and does not receive any instructions from DG Competition.

3.2.3. *The Hearing Officer as guarantor of a fair process*

21. Although the Hearing Officer's main task is to ensure respect for the right to be heard, he can intervene whenever legitimate due process issues are at stake. To this end, he can be called upon to submit observations at any time in order to guarantee that all the relevant aspects of the individual case are examined thoroughly and objectively¹⁴.

8 Council Regulation (EEC) No 4064/89 of 21.12.1989 on the control of concentrations between undertakings.

9 OJ L 162, 19.6.2001; hereinafter "the Mandate".

10 Hearing Officer's Mandate, Preamble, recitals 1-3.

11 At present, the two appointed Hearing Officers are Serge Durande and Karen Williams.

12 Article 2(1) of the Mandate.

13 Article 2(2) of the Mandate.

14 According to Article 3(3) of the Mandate, the Hearing Officer may present observations on any matter arising out of any Commission proceeding to the competent member of the Commission. This is a means by which he seeks to ensure that, in the preparation of draft Commission decisions, due account is taken of all the relevant facts, whether favourable or unfavourable to the parties concerned, including the factual elements related to the gravity of any infringement (Article 5 of the Mandate). This requires,

22. In addition to dealing with individual cases, the Hearing Officers are frequently consulted by DG Competition¹⁵ about questions regarding rights of defence, and they participate in discussions on many fair process related issues.

3.2.4. *The conduct of the oral hearing*

23. As regards individual competition proceedings, the Hearing Officer's traditional function is to organise and to conduct objectively the oral hearing¹⁶. The oral hearing is a forum where the undertakings concerned are given the opportunity to present their case to a wider audience than the team of officials responsible for the investigation. As a matter of fact, the direction taken by a number of cases as presented in the statement of objections has been modified following the oral hearing. The value placed on oral hearings is also reflected in the fact that, in 2003, the vast majority of undertakings took advantage of their right to defend their case in an oral hearing¹⁷. The Hearing Officer decides if parties other than the addressee of the statement of objections can show a sufficient interest to be admitted as an interested third party¹⁸. Moreover, fresh documents may be produced only with the Hearing Officer's consent¹⁹. After the hearing, the Hearing Officer reports to the competent member of the Commission on the hearing and on the conclusions he draws from it with regard to respect for the right to be heard²⁰. While these observations, contained in the so-called "interim report", concern mainly procedural issues²¹, they may also relate to the need for further information or to the recommendation that certain objections be formulated or withdrawn²².

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- in line with Article 3(2) of the Mandate, that the Hearing Officer is kept informed by the Director responsible for investigating the case about the development of the procedure.
- 15 In this respect, the French job title "Conseiller Auditeur" is more appropriate to describe the full reality of the function than the English term "Hearing Officer".
- 16 According to Article 12(2) of the Mandate, the Hearing Officer shall be fully responsible for the conduct of the hearing. In preparing it, the Hearing Officer usually asks the responsible case -team to provide a comprehensive table which clearly spells out all the arguments of the parties in response to the Commission's objections and the answers which are given to them.
- 17 Only approximately one fifth of the addressees of a statement of objections waived this right to an oral hearing.
- 18 Article 6 of the Mandate.
- 19 Article 12(3) of the Mandate. It is important to note, however, that the hearing cannot operate as a substitute for a statement of objections. If the Commission advances new allegations of infringements or new essential facts, different from those contained in the statement of objections, it has to issue a supplementary statement of objections and conduct a new hearing.
- 20 Article 13(1) of the Mandate. A copy of the report is given to the responsible Director and the Director-General for Competition.
- 21 e.g. access to the file, time limits for replying to the statement of objections and the proper conduct of the oral hearing.
- 22 In this respect, the interim report has to be distinguished from the Hearing Officer's final report under Article 15 of the Mandate, which is concerned exclusively with respect for the right to be heard and the related question of whether the draft decision deals only with objections in respect of which the parties have been afforded the opportunity of making known their views. The final report is prepared on the basis of the draft decision that is submitted to the Advisory Committee. In contrast to the interim report, it is also communicated, together with the decision, to the addressee of the decision and is published in the *Official Journal of the European Union*.

3.2.5. *Extension of time limits and requests for confidentiality*

24. The Hearing Officer decides on applications for time extensions in order to ensure that parties have sufficient time to express their views adequately on both the substantive and the procedural issues relating to their case²³. He also decides on the issue of granting access to the file, balancing the interest of confidentiality against the undertaking's right to access all information collected throughout the proceeding²⁴. By the same token, he decides on the disclosure of information whose content is claimed to be confidential when a Commission decision is published in the *Official Journal of the European Union*. Where it is intended to disclose information containing alleged business secrets, the undertaking concerned must be granted the opportunity to challenge the Hearing Officer's decision before the Court of First Instance²⁵. It should be noted that these formal decisions on the disclosure of business secrets, which are taken by the Hearing Officer on the Commission's behalf, have been challenged before the Court in only a very small number of cases²⁶.

23 Article 10 of the Mandate.

24 Only information disclosed to the undertaking can be relied on by the Commission in its final decision. Therefore, the Hearing Officer must also take into account that the enforcement of competition law can be unduly impaired by third parties' claims to confidentiality.

25 This procedure is laid down in Article 9 of the Mandate. It is equivalent to that described by the Court of Justice in *AKZO II* (Case 53/85, *AKZO v Commission* [1986] ECR 1965).

26 In this context, the Court of First Instance is currently addressing an interesting issue. In the *Bank Austria Creditanstalt* case (T-198/03 R), a recent Court order (of 7.11.2003) has identified an ambiguity in Article 9(3) of the Mandate, questioning whether the Hearing Officer has to decide also whether or not parts of a Commission decision, being not part of the decision's "main content", should be published under Article 21 of Regulation 17.

B – APPLICATION OF ARTICLES 81, 82 AND 86

1. ARTICLE 81

1.1. Overview of anti-cartel enforcement

25. During 2003, the Commission maintained the trend of anti-cartel activity set during the two previous years by issuing another five decisions against unlawful horizontal agreements, involving some 27 individual companies or associations. These cases were: *French Beef*, *Sorbates Electrical and Mechanical Carbon and Graphite Products*, *Organic Peroxides*, *Industrial Copper Tubes*.
26. The sum of the fines imposed in these decisions amounted to EUR 404 million, bringing the total amount of fines imposed against hardcore cartels since 2001 to more than EUR 3 200 million. During these last three years, the Commission has been able to issue an average of more than eight decisions a year. This represents a considerably higher level of activity than during the entire 30-year period prior to 2001, during which the average number of decisions was 1.5 per year. Given the number of ongoing cartel investigations, well over 30 in total, the trend of the last three years looks set to continue.
27. The amount of fines imposed in 2003, at more than EUR 400 million, was commensurate with the size of the markets on which the cartels were operating, and the size of the infringing companies. In line with the Commission's standing practice, the level of fines set in each case was appropriate to ensuring deterrence.
28. As a consequence of the influx of new cases that took place in the second half of 2002 and the beginning of 2003, DG Competition had to shift resources from a number of ongoing investigations to these new cases, for which immunity requests needed to be examined and inspections had to be organised. During the course of the year, the Commission carried out cartel inspections in cases covering no less than 21 products or services. (It should be borne in mind that each case/inspection usually involves visits to a number of different companies.) The carrying out of inspections is of value, not only as a means of uncovering unlawful conduct, but also in itself, as companies usually stop their illegal behaviour immediately after the Commission's intervention.
29. The revised Leniency Notice adopted in 2002²⁷ continued to be an important source of new cases. The core elements of the 2002 Leniency Notice are briefly as follows²⁸: first, full immunity from fines is available to the first undertaking that comes forward; second, to qualify for immunity the evidence supplied should at least 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, by granting conditional immunity within a matter of weeks, applicants are provided up-front with legal certainty; fifth, even after the

27 Notice on immunity from fines and reduction of fines in cartel cases (OJ C 45, 19.2.2002).

28 More detail is provided in the XXXIInd Annual Report on Competition Policy (2002).

Commission has undertaken an inspection, immunity may still be available under certain circumstances and provided immunity has not already been granted to another undertaking; 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, the Commission informs the company of the band of reduction intended to be applied at the latest at the same time as it issues a statement of objections.

30. Since the entry into force of the new Leniency Notice in February 2002, the Commission has received 34 applications for immunity dealing with at least 30 separate alleged infringements. Conditional immunity has been granted in 27 cases. Almost all of these have been investigated by the Commission, most through inspections. Statements of objections are currently being prepared in most of these cases. These numbers, reached in not even two years of operation, signal that the new 2002 Leniency Notice is proving to be very effective. By comparison, full immunity has so far been granted in only 11 cases under the 1996 Leniency Notice²⁹.
31. The information for the start of new cases is not limited to immunity applications. Investigations into potentially illegal conspiracies are also started on an ex-officio basis following information collected through the monitoring of (specialised) press and industry data, information supplied by whistleblowers (these may include disgruntled employees or former employees), or by submissions from complainants (consumers or business customers, or sometimes even competitors).
32. The timing of investigations, is increasingly being influenced by cooperation efforts between cartel agencies worldwide due to the growing number of cases with an international dimension. The best example of this is the case of *Heat Stabilisers and Impact Modifiers*, where the Commission and the antitrust authorities in the USA, Canada and Japan closely coordinated their investigative actions and undertook near-simultaneous inspections or other investigative measures in February. Another example is the *Industrial Copper Tubes* case decided in December, where much of the evidence on which the decision relied resulted from inspections which were coordinated with the US antitrust authorities.
33. Among the substantive issues raised in the Commission's cartel decisions and investigations, three aspects are worth mentioning:
 - First, the imposition by the Commission of a fine on an entity which was not an undertaking active in the market in question. In *Organic Peroxides*, the Swiss consultancy firm AC Treuhand was fined for its role in the organisation and operation of a cartel. The fine imposed on the company was very small because of the relative novelty of the issue, but the Commission made clear in the press release that it would come down harder in future cases of a similar kind.
 - Second, the protection of client-attorney correspondence ('legal privilege'), which arose in certain inspections during 2003, notably in the course of

29 In cases decided in 2003 as well as in a number of ongoing investigations, the 1996 Notice is applied, since the undertakings had applied for leniency before the 2002 Notice entered into force.

inspections carried out in February in the *Heat Stabilisers and Impact Modifiers* case. An issue relating to the taking of copies for which the companies were claiming legal privilege has been brought before the Court of First Instance³⁰.

- Third, the efforts the Commission has made to protect the integrity of its leniency policy in the light of the US civil procedure rules on ‘discovery’. As a result of the US rules of civil procedure regarding ‘open discovery’ in cases where civil damages are being claimed before the US courts, information produced voluntarily by companies to antitrust agencies may become ‘discoverable’ to the opposing parties. Written corporate statements prepared for the Commission within the framework of immunity or leniency applications were on certain occasions considered by lower US courts to constitute such discoverable documents. Given the potential financial implications of such lawsuits, which can lead to the award of treble damages, companies might become reluctant to come forward to the Commission, or might even refrain from doing so completely, thus limiting the effect of the Commission’s Leniency policy. Apart from intervening before US courts as an *amicus curiae* or otherwise in order to preserve the use of these documents for the Commission procedure only³¹, the Commission started to revise its own procedures in 2003. The Commission is continuing its dialogue with the legal and business community with a view to further improvement of its procedures so as to minimise the risk of discovery of corporate statements. Its efforts are aimed solely at enhancing the effectiveness of its Leniency Notice and at ensuring that immunity or leniency applicants are not disadvantaged in respect of possible civil claims compared with companies that do not cooperate with it.

34. In terms of administrative organisation, an important change took place in the handling of cartel investigations as a result of the internal reorganisation of DG Competition. In 1998 the Commission set up a specialised cartel unit that processed most of the cartel cases dealt with by DG Competition. Following a gradual increase in resources, a second cartel unit was set up in 2002. During the period that these cartel units were in operation, the Commission was able, as a result *inter alia* of new management procedures, considerably to reduce the time elapsed between initiating and concluding cartel cases. Since July 2003, as a consequence of the internal reorganisation of DG Competition in anticipation of the entry into force of Regulation 1/2003, all antitrust units of DG Competition have been dedicating - and will increasingly dedicate - greater efforts and resources to the detection and prosecution of cartels within their area of responsibility.

30. Joined Cases T-125/03 and T-253/03 *Akzo Nobel Chemicals Ltd. and Akros Chemicals Ltd. v Commission*. While the President of the Court of First Instance issued an order rejecting partially interim measures on 30.10.2003, the main actions in these court cases are still pending.

31. To ensure that its position was clearly stated, the Commission intervened, by submitting *amicus curiae* briefs, before a number of US courts. It intervened firstly before the US District Court for the District of Columbia concerning the ongoing Vitamins litigation. Secondly, before the US District Court for the District of Northern California concerning the Methionine litigation; in this case, the Commission’s stance on the non-discoverability of corporate statements submitted to the Commission within the framework of its leniency programme was confirmed by the court at final instance. And thirdly, before the US Supreme Court in the *AMD v Intel* case. This last case, although it does not concern directly the issue of discoverability, has potential repercussions for the efficacy of the EU leniency programme and hence for the discoverability of corporate statements.

35. A last point worth mentioning in the area of cartel activity is the fifth international cartel workshop, which the Commission hosted in October. The purpose of these workshops is to share expertise in investigating, prosecuting and suppressing cartels. The workshop brought together around 160 officials from competition agencies in over 35 countries. A number of international organisations dealing with competition matters were also represented, such as the OECD.

1.2. Cartel cases

*French Beef*³²

36. On 2 April, the Commission decided to impose fines totalling EUR 16.68 million on six French federations in the beef sector, four representing farmers (including the Fédération Nationale des Syndicats d'Exploitants Agricoles, the main French farming federation) and two representing slaughterers. The fines are punishment for the conclusion on 24 October 2001 of a written agreement which was continued orally as from late November-early December 2001. In the context of depressed beef prices linked to the 'mad cows' crisis, the agreement provided for commitments to suspend beef imports provisionally and to set minimum purchase prices for certain categories of cattle.
37. The Commission concluded that the agreement infringed Article 81 of the EC Treaty and that it did not qualify for exemption under Article 2 of Regulation No 26/62³³. In view of the highly specific situation in the beef market, it substantially reduced the amount of the fines imposed. The various parties have appealed against the decision before the Court of First Instance³⁴ and asked for suspension of the payment of fines.

*Sorbates*³⁵

38. On 1 October, the Commission fined Hoechst AG (Germany), Daicel Chemical Industries, Ltd (Japan), Ueno Fine Chemicals Industry, Ltd (Japan) and The Nippon Synthetic Chemical Industry Co., Ltd (Japan) EUR 99.0 million, EUR 16.6 million, EUR 12.3 million and EUR 10.5 million respectively for participating in a price-fixing and market-sharing cartel in sorbates together with Chisso Corporation (Japan). Sorbates are chemical preservatives used for retarding or preventing growth of micro-organisms. They are primarily used in the food and beverage industry. Following an investigation started in 1998, the Commission found that these companies participated in a worldwide cartel between 1979 and 1996. Hoechst AG's penalty was increased to take account of the aggravating factor of a repeat infringement. With regard to the Leniency Notice, it is important to note that Chisso Corporation (Japan) was granted full immunity from fines because it was the first to submit decisive evidence on the operation of the cartel.

*Electrical and Mechanical Carbon and Graphite Products*³⁶

32 Case COMP/F-3/38.279; OJ L 209 of 19.8.2003.

33 Council Regulation No 26/62 of 4.4.1962 applying certain rules on competition to production of and trade in agricultural products, OJ 30 of 20.4.1962.

34 Cases T-217/03, T-245/03, T-252/03.

35 Case COMP/E-1/37.370.

36 Case COMP/E-2/38.359.

39. On 3 December, the Commission imposed fines totalling EUR 101.44 million on C. Conradt Nürnberg GmbH (EUR 1.06 million), Hoffmann & Co. Elektrokohle AG (EUR 2.82 million), Le Carbone Lorraine SA (EUR 43.05 million), Schunk GmbH and Schunk Kohlenstofftechnik GmbH (jointly and severally EUR 30.87 million) and SGL Carbon AG (EUR 23.64 million) for participating in a price-fixing and market-sharing cartel in the EEA market for electrical and mechanical carbon and graphite products. The cartel lasted from October 1988 to December 1999. Morgan Crucible Company plc received immunity from fines for having been the first undertaking to denounce the cartel.

*Organic peroxides*³⁷

40. On 10 December, the Commission fined Atofina SA, Peroxid Chemie GmbH & Co KG, Degussa UK Holdings Ltd and Peroxid Chemie GmbH & Co KG (Germany) jointly and severally, Peroxidos Organicos SA and AC Treuhand AG (Switzerland) EUR 43.47 million, EUR 8.83 million, EUR 16.73 million, EUR 0.5 million and EUR 1 000 respectively. Akzo (Akzo Nobel Polymer Chemicals BV, Akzo Nobel NV and Akzo Nobel Chemicals International BV) received immunity from fines for having been the first to denounce the cartel. Following an investigation which started in 2000, the Commission found that these companies had participated in an EEA-wide cartel concerning organic peroxides³⁸ between 1971 and 1999 (some companies for shorter periods).
41. With regard to the fine, it is important to note that the consultancy firm AC Treuhand was found to have violated EU law by participating in the organisation of the cartel, but its fine is limited in amount because of the relative novelty of the approach. Three addressees of the decision - Peroxid Chemie, Atofina and Degussa UK Holdings - incurred increased fines as they had been participants in other cartels before.

*Industrial Copper Tubes*³⁹

42. On 16 December, the Commission fined the leading European copper tubes producers, KM Europa Metal AG (together with its wholly-owned subsidiaries Europa Metalli SpA and Tréfinmétaux SA), Wieland Werke AG and Outokumpu Oyj (together with its wholly owned subsidiary Outokumpu Copper Products Oy), for an infringement of EU competition rules. Following an investigation started in 2001, the Commission established that the undertakings in question had colluded to fix prices and share markets for industrial copper tubes in level wound coils (LWCs) from 1988 to early 2001 within the framework of the Swiss-based Cuproclima Quality Association for ACR Tubes (air-conditioning and refrigeration).
43. All the addressees of the decision cooperated with the Commission in its investigation under the 1996 Leniency Notice. The Commission granted a 50% reduction in the fine to Outokumpu, 30% to the KME group and 20% to Wieland Werke for their cooperation. The highest fine was imposed on the companies of the

37 Case COMP/E-2/37.857.

38 Organic peroxides are double oxygen bond organic chemical products for the production of plastic and rubber.

39 Case COMP/E-1/38.240.

KME group, totalling EUR 39.81 million, whereas Wieland Werke received a fine of EUR 20.79 million. Outokumpu was rewarded by a mitigating factor for its cooperation outside the 1996 Leniency Notice, as it was the first undertaking to disclose the whole duration of the cartel, extending as it did over more than 12 years. On the other hand, its penalty was increased to take account of the aggravating factor of a repeat infringement, since it had been an addressee of another Commission decision condemning a cartel in the stainless steel sector in 1990. Outokumpu's final fine was EUR 18.13 million, and the total amount of fines imposed on the undertakings in this case was EUR 78.73 million.

1.3. Court cases

*Amino acids*⁴⁰

44. In the *Amino acids* judgments⁴¹ the Court of First Instance (CFI) rejected the applicants' argument that the Commission had to determine the amount of the fine by taking account of fines already imposed in other jurisdictions. The applicants contended that the Commission breached the principle that a second penalty may not be imposed for the same offence, and failed to take into account the deterrent effect of previous fines. The CFI concluded that, at present, there is no principle of public international law that prevents the authorities or courts of different States from trying and convicting the same person on the basis of the same facts.
45. The CFI also set out the principle that the provision of information which cannot be regarded as cooperation falling within the scope of the Leniency Notice, but which nevertheless assists the Commission in its investigation, constitutes effective cooperation outside the scope of the notice (within the meaning of the sixth indent of Section 3 of the guidelines). This information gives entitlement to an additional reduction in fines by reason of mitigating circumstances.
46. It also established that any percentage increases or reductions decided upon to reflect aggravating or mitigating circumstances must be applied to the basic amount of the fine set by reference to the gravity and duration of the infringement.

*Greek Ferries*⁴²

47. In 1992, following a complaint made by a passenger that prices on the various ferries operating crossings between Greece and Italy were very similar, the Commission opened an investigation into the activities of a number of companies providing passenger and freight transportation services on several lines between Greece and Italy. In 1998, the Commission concluded in a decision that seven of these companies had infringed EU competition rules through tariff fixing agreements and practices. Fines totalling approximately EUR 9 million were imposed on them.

40 Cases T-220/00, T-223/00, T-224/00 and T-230/00.

41 Case T-224/00.

42 Case COMP/D-2/34.466 Commission Decision 1999/271/EC of 9.12.1998 pursuant to Article 81 of the EC Treaty, OJ L 109 of 27.4.1999, p. 24; CFI judgements of 11.12.2003 in Cases T-56/99 *Marlines/Commission*, T-59/99 *Ventouris Group/Commission*, T-61/99 *Adriatica/Commission*, T-65/99 *Strintzis/Commission* and T-66/99 *Minoan/Commission*.

48. The judgments of the Court of First Instance (CFI) of December 2003 confirmed the substance of the Commission's decision and the initial amount of all fines except for two companies for which the fines were reduced.
49. On substance, the CFI confirmed notably that under certain circumstances, an inspection in the premises of an agent with a separate legal identity is lawful even if the decision for the inspection is addressed only to the principal. The CFI also confirmed that the actions of an agent of separate legal identity can be imputed to the principal where the two companies formed one and the same economic unit or undertaking for the purposes of applying Article 81 EC. As regards the role of public authorities, the CFI also accepted that, even in heavily regulated sectors where the authorities recommend a certain pricing policy, as the maritime transport in question, companies remain responsible for their participation in a price-fixing cartel as long as the public authorities do not exercise on them irresistible pressure compelling them to conclude price agreements. Furthermore, the CFI confirmed the Commission's current method of calculating the fines including the assessment of mitigating and aggravating factors. However, the CFI reduced the fines imposed on Adriatica and Ventouris, two medium-sized companies, because they were active only on the so-called southern routes (Bari, Brindisi) and because of the minor role that they played in the cartel.

1.4. Other cases

*BA/SN airline alliance*⁴³

50. On 25 July 2002, British Airways (BA) and SN Brussels Airlines (SN) notified to the Commission under Regulation 3975/87⁴⁴ a number of cooperation agreements enabling them to cooperate across their respective networks in terms of pricing, scheduling and capacity. The parties requested an exemption under Article 81(3) of the EC Treaty. The 90-day period expired on 10 March 2003 without the Commission having raised serious doubts.
51. The Commission's analysis showed that the parties' networks are largely complementary and that their network cooperation will bring benefits for consumers. In particular, the agreement will allow SN's passengers to have access to a long-haul network, while BA's passengers will benefit from easier access to SN's African destinations.
52. In order to ensure that the alliance would not result in competition being eliminated on certain affected markets, the Commission looked closely at the impact of the alliance on the overlap routes, and in particular on Brussels-London and Brussels-Manchester.

43 Case COMP/D-2/38.477.

44 Council Regulation (EEC) No 3975/87, OJ L 374 of 31.12.1987, p. 1, laying down the procedure for the application of the rules on competition to undertakings in the air transport sector, as last amended by Council Regulation (EEC) No 1284/91 of 14.5.1991 (OJ L 122, 17.5.1991, p. 2) and Council Regulation (EEC) No 2410/92 of 23.7.1992 (OJ L 240, 24.8.1992, p.18); The Regulation provides that notified agreements are automatically exempted for a maximum period of six years, if the Commission does not object within 90 days starting from the publication of a summary of the agreement by the Commission in the *Official Journal of the European Union*. In this case, the summary was published in OJ C 306 of 10.12.2002.

53. As far as Brussels-London is concerned, the Commission came to the conclusion that the alliance will not eliminate competition as BA and SN will continue facing two strong competitors, bmi and Eurostar. Brussels-Manchester was the route where the alliance would have the most restrictive effect as the parties' cumulated market share is close to 100%. Furthermore, there are capacity constraints at Brussels National airport at peak periods, which could prejudice a new entrant's ability to enter this market. In order to remedy the concerns raised by the Commission during the initial review, the carriers undertook to release enough landing and take-off slots at Brussels National for a new entrant to operate three daily services to Manchester, should these slots not be available through the normal slot allocation procedure.

*ARA, ARGEV, ARO*⁴⁵

54. On 16 October, the Commission adopted a positive decision on the Austrian packaging take-back system ARA. The decision grants negative clearance under Article 81(1) of the EC Treaty for all the notified agreements except for the agreement concluded between the ARA system and its collectors/sorters. This agreement benefits from an exemption under Article 81(3). In order to ensure unlimited access to the collection infrastructure for competitors of the ARA system, obligations are attached to the exemption.
55. Altstoff Recycling Austria AG (ARA) is the only undertaking to organise a comprehensive packaging take-back system for household and commercial packaging in Austria. ARA grants licences for use of the Green Dot and takes over the duties of companies covered by the Austrian Packaging Ordinance. The Sector Recycling Companies (SRCs, including ARGEV in charge of collection and sorting of plastic packaging and ARO in charge of paper packaging) cooperate with ARA in organising the collection and recovery of packaging waste. Together with ARA they form the ARA system. The actual collection, sorting and recovery are performed by companies which offer their services to the SRCs.
56. The decision on the ARA system in Austria applies and refines the Commission's overall policy line in the field of environmental packaging take-back systems as established in the 2001 decisions concerning DSD in Germany and Eco-Emballages in France⁴⁶. In particular, it seeks to ensure that the ARA system does not impose unjustified exclusivity clauses or other unjustified constraints in its contractual relationships with its partners, which could prevent the market entry of competitors. As a result of the Commission's intervention, the ARA system submitted substantial commitments concerning use of the Green Dot and the duration of agreements with collectors and sorters.
57. ARA does not charge a licence fee for packaging which does not take part in the system but bears the Green Dot. The licence fee provision therefore corresponds to the "no service no fee" principle. Furthermore, ARA has submitted a commitment to the effect that it will allow the use of the Green Dot on the full amount of packaging placed on the Austrian market even if producers and importers (partly) contract the

45 Cases COMP/D-3/35.470 and COMP/D-3/35.473.

46 DSD: Commission decisions of 20.4.2001, OJ L 166 of 21.6.2001, p. 1, and of 17.9.2001, OJ L 319 of 4.12.2001, p. 1; Eco Emballages: Commission decision of 15.6.2001, OJ L 233 of 31.8.2001, p. 37.

services of an ARA competitor. This is important for companies which sell their products in Member States where the Green Dot is obligatory, as they can place their products on the Austrian market without having to run two production lines.

58. Under the agreements with collectors and sorters, there is only one collector and sorter per region and per material. The contractual relationship can be terminated after three years and the ARA system has undertaken to award new contracts via a competitive, transparent and objective procedure after five years at the latest. A duration of between three and five years for these agreements with an exclusivity obligation can be accepted to allow recycling companies to recover the investments necessary to build up the collection infrastructure.
59. However, the specific supply-side conditions in the market for the collection and sorting of packaging waste at households make duplication of the existing collection infrastructure impossible or economically unviable. It was therefore necessary to attach obligations to the exemption decision, according to which ARGEV may not prevent collectors and sorters from opening up their infrastructure to competitors of the ARA system.

*UK and Germany network sharing agreements*⁴⁷

60. On 30 April and 16 July, the Commission adopted two exemption decisions which determine the extent to which mobile operators can cooperate through network sharing. In February 2002, T-Mobile and mmO2 had notified two agreements that provided for the parties' cooperation by way of network sharing in the build-out of their third generation ('3G') mobile telecommunications networks in the United Kingdom and Germany.
61. Site sharing between mobile operators was found not to restrict competition in either of the cases: the cooperation extends only to basic network elements and the parties retain independent control of their core networks. Site sharing was also considered beneficial for environmental and health reasons.
62. National roaming between mobile operators was found to restrict competition at the wholesale level with potentially harmful effects in downstream retail markets. However, national roaming allows operators to provide better coverage, quality and transmission rates for their services, as well as roll-out and service provision within a shorter time frame. In the two decisions, the Commission exempted national roaming in rural areas until 31 December 2008, whereas national roaming in urban areas is to be phased out in accordance with a strict timetable by 31 December 2008.

*Yamaha*⁴⁸

63. On 16 July, the Commission adopted a decision⁴⁹ imposing a fine of EUR 2.56 million on Yamaha Corporation Japan, Yamaha Europa GmbH, Yamaha Musica

47 Case COMP/C-1/38.370 O2 UK Limited/T-Mobile UK Limited - UK Network Sharing Agreement, OJ L 200 of 7.8.2003 and press release IP/03/589, 30.4.2003; Case COMP/C-1/38.369 T-Mobile Deutschland/O2 Germany - Network Sharing Rahmenvertrag, press release IP/03/1026, 16.7.2003.

48 Case COMP/F-1/37.975.

49 Commission decision of 16.7.2003, press release IP/03/1028 of 16.7.2003.

Italia SpA, Yamaha Musique France SA and Yamaha Scandinavia AB for restrictions of trade and resale price maintenance. Yamaha is the market leader in most of the relevant markets for musical instruments in Europe.

64. Yamaha's European subsidiaries and their official dealers implemented various agreements and/or concerted practices which had as their object the restriction of competition in various EU Member States and EEA Contracting Parties (Germany, Italy, France, Austria, Belgium, the Netherlands, Denmark and Iceland) within the meaning of Article 81(1) of the EC Treaty and Article 53(1) of the EEA Agreement. The measures in question, which were mainly contained in the distribution contracts, consisted of territorial restrictions (mainly composed of bans on supplies between dealers within the selective distribution network) and restrictions on the dealers' ability to determine their resale prices.

Box 2: Competition and TV distribution for top international sports events - fixing the ground rules: the UEFA Champions League decision⁵⁰

A limited number of sports rights – especially in football - together with first-run blockbuster feature films constitute the broadcasting content which determines broadcasters' ability to attract advertising and subscribers - the key sources of revenue for commercial free-TV and pay-TV operators. Exclusive possession of a majority of such content rights gives an incumbent broadcaster a market position that renders the successful emergence of new competing broadcasting services very difficult.

Competition problems in the markets for sports content rights are often caused by joint selling arrangements and exclusive rights contracts that have a wide scope and/or long duration. Promoting efficient competition for sports TV rights is likely to improve competition on TV broadcasting markets and to give viewers access to quality TV services that are reasonably priced, innovative and varied. The Commission is therefore seeking to ensure that TV rights are regularly offered to the market in a manner which allows potential bidders a genuine chance of winning them.

It is likely that the development of the new Internet and mobile media markets will parallel the development of the pay-TV markets in that sport content will be among the drivers of the development of these new services. However, rights holders currently have a tendency to hold back the exploitation of new media rights because they fear that they will cannibalise the value of the TV rights. The Commission cannot accept restrictive agreements that lead to the holding back of such rights.

The Commission's decision of 23 July in the *UEFA Champions League* case is an example of how to achieve a joint selling arrangement for exclusive media rights which creates consumer benefits and which avoids unnecessary restrictions of competition in terms of restricting output and price competition.

UEFA's joint selling arrangements that were in place prior to the Commission's intervention illustrate these points. UEFA sold all TV rights in one package to a single broadcaster on an exclusive basis for four years per Member State. Many rights remained unused as generally

⁵⁰ Exemption decision with conditions/obligations of 23.7.2003 in Case COMP/C-2/37.398, press release IP/03/1105, 24.7.2003.

only one or two matches were broadcast live out of a maximum of 16. No new media rights were exploited and football clubs could not exploit any media rights individually.

This situation was damaging for competition in the market for the acquisition of TV broadcasting rights of regular (as opposed to periodic) football events – a market where the UEFA Champions League on an EU average holds approximately 20%.

However, the Commission recognises that a joint selling arrangement has the potential to improve production and distribution to the advantage of football clubs, broadcasters and viewers. A joint selling arrangement creates a single point of sale for the acquisition of a branded and packaged league media product. It can lead to a substantial lowering of transaction costs. Obviously, a joint selling arrangement should not contain restrictions of competition that are not indispensable to achieving these efficiencies and consumer benefits.

The Commission considers that it has achieved this with the new joint selling arrangements that UEFA notified - following intense negotiations - in 2002. These agreements ensure that all media rights are sold via a tender procedure in 14 separate packages for up to three years. Moreover, UEFA will lose its exclusive rights to sell any TV rights that have not been sold before a certain cut-off date. Both UEFA and the individual clubs will exploit in parallel certain live TV rights, deferred TV rights, archive rights, and not least new media rights. This will provide a more extensive and diverse coverage of the competition. In addition to UEFA producing a wide selection of League products, football clubs are now able to produce totally new club-branded products emphasising individual clubs' action in the UEFA Champions League on their websites, mobile services, DVD and the like.

The Commission's intervention has led to a successful opening of the market. Twice as many broadcasters will be broadcasting the UEFA Champions League compared with before the Commission's intervention. The new scheme has created new competition on media markets, with broadcasters and new media operators competing to provide offers to consumers.

Applying the principles established in the *UEFA Champions League* case, the Commission is also investigating the joint selling of football by certain national leagues, where, however, market positions are substantially stronger and the risk of market foreclosure correspondingly higher. It will pay particular attention to the scrutiny of these aspects.

*Philips/Sony*⁵¹

65. On 25 July, the Commission cleared, by means of a comfort letter, a notification by Philips and Sony of their bilateral agreements establishing a worldwide joint CD disc licensing programme and the 2003 version of a standard licence agreement to be offered by Philips to third parties under the enforceable patents of Philips and Sony as well as those based on both companies' joint inventions in the CD technology field.
66. The Commission concluded that the agreements establishing the joint CD disc licensing programme were covered by the block exemption regulation concerning certain categories of technology transfer agreements (the TTBE regulation).

51 Cases COMP/C-3/37.228 *Ingman Disc + VDC/vs Philips and Sony*, COMP/C-3/37.561 *Pollydisc/vs Philips and Sony*, COMP/C-3/37.707 *Broadcrest & other/vs Philips and Sony* and COMP/C-3/38.787 *Philips and Sony: notification of the standard licence agreement*.

Although agreements between members of a patent pool are normally excluded from the TTBE regulation, Article 5.2(2) of that regulation covers patent pools concluded between only two parties without any territorial restrictions within the EEA.

67. Furthermore, the 2003 version of the standard licence agreement was found not to restrict competition appreciably within the meaning of Article 81(1) of the EC Treaty, particularly since only essential patents are now licensed under this version. In addition, licensees can opt to take the joint licence or individual licences from Philips or Sony and to use them within or outside the standard specifications. The grant-back provision applies only to patents essential for the type(s) of CD discs selected by each licensee.

*REIMS II*⁵²

68. On 23 October, the Commission adopted an exemption decision granting a further five-year exemption to the REIMS II agreement⁵³. This agreement concerns the remuneration, called terminal dues, that the parties pay each other for the delivery of cross-border mail, i.e. mail sent from one country to another. Seventeen public postal operators (PPOs), including those of all EU Member States apart from the Netherlands, and those of Norway, Iceland and Switzerland, have currently signed the REIMS II agreement.
69. The agreement, which had already been exempted by the Commission in 1999 until 31 December 2001, was re-notified by the parties on 18 June 2001 with a request for renewal of the previous exemption. The agreement was found to restrict competition within the meaning of Article 81(1) because of the obstacles it imposes on the parties' freedom to agree on terminal dues different from those fixed in the agreement.
70. However, given the benefits as already identified in the 1999 exemption decision, in particular the improved quality of service in the delivery of cross-border mail, the Commission decided to exempt the agreement again for a five-year period, subject to strict new conditions regarding non-discriminatory access by private postal operators to the REIMS II terms of delivery, on the one hand, and the provision of low-cost alternatives to terminal dues, on the other.

2. ARTICLES 82 AND 86

2.1. Article 82 cases

*Deutsche Telekom*⁵⁴

71. On 21 May, the Commission adopted a decision under Article 82 regarding the pricing strategy employed by Deutsche Telekom AG (DT) for local access to the fixed telephony network and imposed a fine of EUR 12.6 million on the company⁵⁵.

52 Case COMP/C-1/38.170, OJ L 56 of 24.2.2004, p.76.

53 Press release IP/03/1438, 23.10.2003.

54 Case COMP/C-1/37.451, 37.578, 37.579, OJ L 263 of 14.10.2003, p. 9.

55 Press release IP/03/717, 21.5.2003.

In its decision, the Commission found that DT was engaging in a margin squeeze by charging new entrants fees for wholesale access to the local loop which were either higher than or too close to what subscribers had to pay for retail lines. This discouraged new companies from entering the market and reduced the choice of suppliers of telecommunications services as well as price competition for final consumers. The Commission's action originated in 1999 with complaints from 15 new entrants to the German fixed-line telecommunications market.

72. The Commission found that an abusive margin squeeze was in operation, because the difference between DT's retail and wholesale prices was either negative or slightly positive, but insufficient to cover DT's product-specific cost of providing its own retail services. Because of the insufficient spread, ever since local loop unbundling started in Germany and still at the date of the decision, new entrants had no scope to compete with DT for fixed-line access to end consumers.
73. The Commission found that DT could have avoided the margin squeeze, notably by increasing the retail charges for analogue, ISDN and ADSL connections within the German price cap system. Under the initial price cap system between 1998 and 2001 DT could have avoided the margin squeeze by restructuring its tariff system at retail level. Increases in access charges could have been offset by reduced call charges. From 2002 onwards, DT could have at least reduced the margin squeeze by raising its tariffs for ADSL access. Therefore, the margin squeeze was not imposed on DT by decisions of the German telecoms regulator.

*Wanadoo Interactive*⁵⁶

74. On 16 July, the Commission adopted a decision under Article 82 regarding Wanadoo's pricing strategy for its ADSL services⁵⁷. It found that Wanadoo, at the time a 72%-owned subsidiary of France Télécom, had engaged in predatory pricing from March 2001 until October 2002 and it imposed a fine of EUR 10.35 million on the company.
75. ADSL is the main technology available in France for the provision of high-speed Internet access to residential and small office/home office (SOHO) customers. ADSL makes it possible to provide broadband services over a conventional telephone line. During the period covered by the decision, almost all ADSL lines in France were operated by the incumbent operator, France Télécom. The first broadband services were marketed in 1998, but it was not until the end of 1999 that the market started to take off on a significant scale and at a significant pace. Since the mass marketing of Wanadoo's ADSL services began only in March 2001, the Commission considered that the abuse started only at that time.
76. The Commission found that, from the end of 1999 to October 2002, Wanadoo marketed its ADSL services at prices below their average total costs. The prices charged by Wanadoo were well below average variable costs until August 2001. In the subsequent period they were approximately equivalent to average variable costs, but significantly below average total costs. Wanadoo suffered substantial losses up to

⁵⁶ Case COMP/C-1/38.233.

⁵⁷ Press release IP/03/1025, 16.7.2003.

the end of 2002 as a result of this practice. The recoupment of these initial losses over a certain period of time was a likely scenario, although Wanadoo's predatory strategy may have responded to a different rationale. From documents found during an inspection at Wanadoo's premises, the Commission also concluded that Wanadoo had the intention of pre-empting the strategic market for high-speed Internet access⁵⁸.

Box 3: Price abuses in telecommunications

During the first half of the year, the Commission adopted two formal prohibition decisions pursuant to Article 82 of the EC Treaty regarding abusive exclusionary pricing for the provision of telecommunications services. These are the first such decisions since the telecommunications sector was fully liberalised in 1998, and even since 1982, when British Telecommunications, still acting under a state monopoly, was found to have been abusing its dominant position by restricting the use of telex and telephone facilities⁵⁹.

These two decisions are particularly noteworthy because they concern an economic sector subject to *ex ante* regulation in which the Member States play an important role through the decision-making practice of National Regulatory Authorities. The rules of such regulation were reformed in 2002 by the new EU directives on electronic communications, and are about to shift towards concepts based on competition law.

The Commission will continue to act forcefully against cases of price abuse, even in scenarios where the prices under examination are subject to sector-specific regulation. The two decisions set out the conditions for the relevant test to be carried out. Predatory pricing requires a straightforward comparison between prices and the underlying costs and triggers an obligation to increase prices above abusive levels. The margin squeeze test starts with a comparison between wholesale and retail prices. Only if retail prices are higher than wholesale prices will the underlying downstream costs also be assessed. Both tests bear important precedent value for other future cases of price abuse in network industries, not only for the Commission and national regulators, but also for National Competition Authorities (NCA).

*IMS Health*⁶⁰

77. In the sector of information services, the Commission decided to withdraw an interim measures decision adopted in 2001⁶¹. At that time, the Commission ordered IMS Health, the world leader in data collection on pharmaceutical sales and prescriptions, by way of interim measures, to license its "1860 brick structure"⁶² for data collection to its then competitors in the market for German regional pharmaceutical sales data services. IMS, in return, was entitled to royalties. This decision was suspended by the President of the Court of First Instance⁶³. In a judgment of 17 September 2002, a

58 Wanadoo has brought an action for annulment of this decision before the Court of First Instance: Case T-340/03.

59 OJ L 360, 21.12.1982.

60 Case COMP/D-3/38.044.

61 Case COMP/D-3/38.044 *NDC Health/IMS Health*, decision of 3.7.2001, OJ L 59 of 28.2.2002.

62 IMS's "1860 brick structure" segments Germany into 1 860 sales zones or "bricks".

63 Order of 26.10.2001, in Case T-184/01R and Order of 11.4.2002, in Case C-481/01P(R), the President of the Court of Justice dismissing NDC's appeal against the order of the President of the Court of First Instance.

German court⁶⁴ allowed NDC Health, the main competitor of IMS in the German market, to offer a structure that met customers' needs. Though the court recognised that IMS Health's 1860 brick structure was protected by national copyright, it held that third parties could not be barred from developing another structure based on administrative and postal divisions even if the resulting structure might have a similar number of brick segments to the 1860 structure and might be deemed to be derived from that structure. Therefore other brick structures very similar to the 1860 structure could be developed for the collection of pharmaceutical sales data and used legitimately to produce and market pharmaceutical sales reports. At the same time, NDC improved its market position. In addition, one other competitor, who should have benefited from the Commission's interim measures decision, withdrew from the German market.

78. Given this material change in circumstances, there was no longer any urgency requiring the Commission's intervention and the Commission decided to withdraw the 2001 interim measures decision.
79. National proceedings and a preliminary ruling procedure before the Court of Justice were pending. In the latter procedure, Advocate General Tizzano delivered his opinion on 2 October⁶⁵. He considers that the refusal to license a copyright-protected good (here, the "1860 structure") constitutes an abuse of a dominant position if there was no objective justification for such refusal and if the use of the immaterial good is indispensable for the activity on a derived market in a way that the owner excludes any competition on that market. The condition, however, is that the undertaking requesting the licence intends to offer products or services with other characteristics which fulfil special needs of consumers which cannot be satisfied by the existing products or services.

*GVG/FS*⁶⁶

80. On 28 August, the Commission took a decision under Article 82 against Ferrovie dello Stato SpA (FS), the Italian national railway carrier, for abusing its dominant position in the Italian railway market. It considered that FS had prevented the private German railway undertaking Georg Verkehrsorganisation GmbH (GVG) from providing an international railway passenger transport service from Basle to Milan.
81. Since 1995, GVG had been asking FS to enter into an international grouping⁶⁷, to provide information about the price and availability of train paths, and to provide traction, i.e. a locomotive and a driver. GVG wanted to transport passengers coming from different cities in Germany to Basle. It then proposed a non-stop ("Sprinter") rail link that would operate twice a day from Basle to Milan via Domodossola. This service would compete in particular with the Cisalpino, a joint venture between FS

64 Judgment of the Frankfurt Higher Regional Court (Frankfurter Oberlandesgericht) of 17.9.2002 in Case 11 U 67/2000.

65 Opinion of Advocate General Tizzano of 2.10.2003 in Case C-418/01 *IMS Health GmbH & Co. KG v NDC Health GmbH & Co. KG*.

66 Case COMP/D-1/37.685.

67 Directive 91/440/EEC requires the formation of an 'international grouping', an association of at least two train operators based in different Member States, to operate cross-border passenger or freight services, OJ L 237 of 24.8.1991.

and Schweizerische Bundesbahnen (SBB). The Cisalpino operates one daily connection between Basle and Milan.

82. As a vertically integrated company, FS has a statutory monopoly to operate the Italian railway infrastructure. In addition, as the designated infrastructure manager and allocation body, it has assumed regulatory functions of the State. It is responsible for establishing and maintaining the Italian railway infrastructure and for assigning train paths to railway operators in Italy in return for a fee. It is also responsible, as infrastructure manager, for issuing safety certificates to railway undertakings.
83. FS was found to be dominant in the market for access to its national rail network, the latter being considered an essential facility. As regards traction, the Commission concluded on the basis of a detailed market investigation that FS was dominant in that market, too. For the time being, no other Italian railway company is equipped to provide the required traction service to GVG⁶⁸. Also with regard to the downstream market FS was found to be dominant, being the only company providing railway passenger services on the Italian segment of the Basle – Milan route. Apart from the Cisalpino, FS provides a number of daily passenger train services between Basle and Milan in cooperation with SBB. In addition, access to the downstream market is limited to international groupings. The Commission concluded that only FS was in a position to enter into such an international grouping with GVG.
84. In its decision, the Commission concluded that FS had committed three abuses of a dominant position, infringing Article 82. First, by effectively refusing to deal with GVG's requests for access to the railway infrastructure, it had denied access to the network which is considered to be an essential facility. Second, as it had not responded to GVG's requests for traction, it had also effectively refused to provide traction services to GVG for this particular service. This constitutes an abuse as FS's refusal led to the elimination of a potential competitor and was not objectively justified. Lastly, FS did not provide any objective justification for its refusal to enter into negotiations with GVG to form an international grouping. By doing so, it prevented GVG from entering the downstream market for railway passenger transport services into Italy.
85. With a view to settling the case, FS made important commitments. In particular, it undertook to enter into international grouping agreements with any duly licensed train operator with concrete proposals to start an international rail service. It also undertook, for a period of five years, to provide traction to other railway companies which intended to provide cross-border passenger services. On this basis, it entered into agreements with GVG. It undertook furthermore to provide GVG suitable train paths as soon as corresponding train paths were made available by SBB on the Swiss network. While the Commission considered it appropriate to nevertheless issue a formal decision in this case, in view of ongoing liberalisation in the railway sector it refrained from imposing a fine owing to the novelty of the case.

68 As a result of its market investigation, the Commission also concluded, for a number of reasons, that GVG could not provide traction by itself on the Italian market.

2.2. Article 86 cases

No formal decision under Article 86 was taken during the year under review.

C – SECTOR-BASED COMPETITION DEVELOPMENTS

1. ENERGY

86. The year 2003 brought significant progress for the liberalisation process in the energy sector (electricity and gas). The main achievement was the adoption on 26 June of the legislative package ensuring that all European electricity and gas consumers can choose their supplier at the latest by 1 July 2007. These legislative measures were accompanied by continued activity by the Commission in competition cases. The discussions in the Council on security of supply in the gas sector led to political agreement on 15 December.
87. The legislative package consists of the following elements concerning the full liberalisation of the European gas and electricity industries. The Council and Parliament adopted (1) Directive 2003/54/EC concerning common rules for the internal market in electricity and repealing Directive 96/92/EC⁶⁹ (electricity directive), (2) Directive 2003/55/EC concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC⁷⁰ (gas directive) and (3) Regulation (EC) No 1228/2003 on conditions for access to the network for cross-border exchanges in electricity⁷¹ (electricity regulation). The gas and electricity directives replace earlier versions calling for a gradual market opening.
88. The new gas and electricity directives provide for a market opening for all non-household customers by 1 July 2004 and for all household customers by 1 July 2007. They also provide for the introduction of a regulated third party access (TPA) regime for access to the networks as well as to liquefied natural gas (LNG) terminals. Only for access to storage do Member States still have a choice between regulated and negotiated TPA regimes. Furthermore, the directives provide for the creation of a regulator, who will have the task of fixing or approving at least the methodologies used to calculate access tariffs prior to them being charged. For further details and guidance, reference is made to the interpretative notices published by the Commission's departments.
89. The electricity regulation promotes fair rules for cross-border trade in electricity, thus enhancing competition within the internal electricity market. To this end, it establishes a compensation mechanism in favour of transmission system operators for costs incurred as a result of hosting cross-border flows of electricity; it sets harmonised principles for cross-border transmission charges, concerning in particular the non-discriminatory, transparent, and non-distance-related nature charges; it sets rules to maximise availability of transmission capacity; and it establishes principles to deal with congestion.
90. One of the most controversial points of the gas directive as well as of the electricity regulation is the exemptions from the different rules of the TPA regime that can be

69 OJ L 176, 15.7.2003, p. 37.

70 OJ L 176, 15.7.2003, p. 57.

71 OJ L 176, 15.7.2003, p. 1.

granted for major new infrastructures (interconnectors or LNG terminals). These provisions aim to strike a balance between creating incentives for new infrastructure and the creation of a common market. It is obvious that exemptions can only be granted if all the conditions listed in the directive/regulation are fulfilled. The most important condition for obtaining an exemption from the obligation to grant access to third parties is that the level of risk attached to the investment is such that the investment would not take place without exemption. Another important condition is that the investment must enhance supply competition. At the same time, the exemption must not be to the detriment of competition or the effective functioning of the internal (gas or electricity) market, or the efficient functioning of the regulated system to which the infrastructure is linked. Exemptions may be expected to provide incentives to ensure that unused capacity is not hoarded and, where practical, use-it-or-lose-it mechanisms would be expected to apply. Similarly, it would be easier to demonstrate that the exemption meets the competition requirements where the developer in question is able to demonstrate that it had offered access to third parties in designing the infrastructure in question, for example through an open season process. More generally, it follows from the rationale of the rule that all exemptions must be limited in scope and time to the absolute minimum⁷².

91. Additionally, in December, the Commission adopted a proposal for a regulation on conditions for access to the gas transmission networks⁷³. This draft regulation aims at ensuring a level playing field across the EU on key conditions for third party access, and at improving compliance by all transmission system operators with the guidelines adopted in the framework of the Madrid Forum. The proposed regulation sets out basic principles concerning access charges, transparency requirements, a common minimum set of TPA services, capacity allocation and congestion management, balancing rules and imbalance charges, and the trading of capacity rights. It provides for minimum standards for access to the gas transmission networks, while Member States will be allowed to introduce or maintain more detailed measures.
92. Important progress for liberalisation is also initiated at the Madrid and Florence Fora, where the Commission, National Regulators and industry meet once or twice a year to discuss the liberalisation process. In September, the Madrid Forum, which relates to gas, adopted new Guidelines for Good Practice in improving the conditions for TPA to the European gas pipelines. The main achievements are improved transparency and better congestion management systems.
93. Security of supply was also high on the agenda in 2003. The electricity sector was confronted with a number of power cuts. They were at least partly attributed to insufficient investment into the network. As a reaction the Commission proposed a directive on security of supply in the electricity sector. For the gas sector the Commission had already proposed a directive in September 2002, on which a political agreement was reached as mentioned above.

72 For further details reference is made to the notice on Directive 2003/54-55 and Regulation No 1228/03, prepared by DG Energy and Transport.

73 COM(2003)741 Proposal for a Regulation of the European Parliament and of the Council on conditions for access to the gas transmission networks.

94. The liberalisation process was – as in previous years – accompanied by a number of competition cases in the energy sector in which the Commission made use of every competition instrument, namely merger control, state aid control, and antitrust enforcement.
95. As regards antitrust, one of the main tendencies which could be observed in 2003 was the high level of cooperation with national regulators and national competition authorities. Such cooperation is appropriate to ensuring consistent application of the law throughout Europe and efficient allocation of resources. A good example of successful cooperation is the *Dong/DUC* case⁷⁴, in which the settlement negotiations were carried out jointly with the Danish Competition Authority and in which the national authority was entrusted with monitoring the commitments given by the market operators concerned.
96. It is also noteworthy that the focus of antitrust enforcement in the gas sector is shifting from cases concerning upstream activities to cases dealing with downstream activities. Whilst in the past competition cases related mostly to gas production (*Corrib*⁷⁵, *GFU*⁷⁶, *Dong/DUC*⁷⁷), the cases currently under investigation relate more to downstream markets. They concern, for example, the question of long-term exclusive supply contracts, which might have foreclosure effects for new market participants, or territorial sales restrictions in transport contracts concluded between European operators.
97. Whilst in the past a number of cases were closed following settlements, it is expected that in future more formal decisions will be taken. This will provide additional legal certainty and allow the Commission to clarify its policy formally. Nevertheless, the Commission will continue to accept requests for settlements if it considers that through a settlement a real change in the marketplace can be better achieved.
98. The main achievement as regards antitrust enforcement in 2003 was the settlement of the *ENI/Gazprom* case⁷⁸. This case is part of the ongoing investigation into territorial sales restrictions contained in gas supply contracts between gas producers and European gas wholesalers/importers. The case was settled after the companies deleted the restrictive clause from their existing gas supply contracts and after ENI committed itself to taking a number of flanking measures, including the offer to sell significant gas volumes outside Italy. The settlement also added an element of legal certainty to long-term gas supply contracts, which are deemed necessary by the gas industry for the development of certain new gas fields.
99. Other cases related to the improvement of the TPA regimes in Germany⁷⁹ and the Netherlands⁸⁰. The commitments offered by the German gas company BEB led to the introduction of an entry/exit regime for the German gas market. Entry/exit regimes are considered superior to the TPA regime so far applied in Germany. Important

74 Press release IP/ 03/566, 24.4.2003.

75 Case COMP/E-3/37.708; Press release IP/ 01/578, 20.4.2001.

76 Case COMP/E-3/36.702; Press release IP/ 02/1084, 17.7.2002.

77 Press release IP/ 03/566, 24.4.2003.

78 Case COMP/E-3/37.811; Press release IP/ 03/1345, 6.10.2003.

79 Press release IP/ 03/1129, 29.7.2003.

80 Press release IP/ 03/547, 16.4.2003.

clarifications were also provided in the *Dong/DUC* case⁸¹, which underlined that use restrictions and reduction clauses are incompatible with European competition law. Use restrictions are clauses preventing the buyer from using the gas for purposes other than those agreed between it and the seller. Reduction clauses are clauses allowing the buyer to reduce the volumes bought from the seller if the latter starts selling into the supply area of the buyer.

100. With respect to mergers, the most important case dealt with in 2003 was the merger between the Austrian power producer Verbund with the Austrian regional supply companies operating under the name Energie Allianz⁸². The Commission cleared this merger after the companies agreed to assist in the creation of a stronger competitor in the Austrian market and after they offered to make certain amounts of electricity available for sale by auction to smaller competitors.

2. POSTAL SERVICES

2.1. Transposition of the new postal directive (Directive 2002/39/EC)

101. The new postal directive, adopted in 2002⁸³, sets a clear path towards completion of the internal market for postal services through, in particular, a progressive reduction of the reserved area and the liberalisation of outgoing cross-border mail. The implementation of these provisions, aimed at widening the scope of the area in which competition is allowed, is likely to affect the application of EU competition rules in the postal sector. The directive should have been transposed by 31 December 2002.
102. In January, the Commission opened infringement proceedings against those Member States which had not yet transposed (or notified the transposition of) the directive into national law. As of 14 October, all Member States except France had already completed the transposition of the directive.
103. Pursuant to Article 7 of Directive 97/67/EC as amended by Article 1 of Directive 2002/39, outgoing cross-border mail is liberalised in all Member States except in those where the revenue therefrom is deemed necessary to ensuring the provision of the universal service. An important issue as far as the application of the competition rules is concerned is therefore whether or not, in the context of the transposition of the directive, Member States have decided to maintain the market for outgoing cross-border mail within the monopoly area. As of 14 October, six Member States (Greece, Spain, Ireland, Italy, Luxembourg and Portugal) out of the 14 which had already completed the transposition had decided not to liberalise the market in question.

81 Press release IP/ 03/566, 24.4.2003.

82 Case COMP/M.2947; Press release IP/ 03/825, 11.6.2003.

83 Directive 2002/39/EC of the European Parliament and of the Council of 10.6.2002 amending Directive 97/67/EC with regard to the further opening to competition of Community postal services, OJ L 176, 5.7.2002, p.21.

104. The situation in the Member States is summarised in the following table:

Status of the implementation of Directive 2002/39/EC (as of 14.10.2003) ⁸⁴			
Member State	Status of implementation	Transposition provisions	Reservation of outgoing cross-border mail
B	Completed	Royal Decree transposing Articles 1.1 and 1.2 of Directive 2002/39/EC of the Parliament and of the Council with regard to the further opening up to competition of Community postal services	No
DK	Completed	Order No 1149 of 13 December 2002 amending the Order on the concession for Post Danmark. Order No 1148 of 13 December 2002 amending the Order on Post Danmark's universal service and reserved area	No
D	Completed	Third amendment to the Postal Act, 16 August 2002	No
EL	Completed	Law number 3185/03	Yes
E	Completed	Article 106 of Law 53/2002, amending Law 24/1998, of 13 July, on the Universal Postal Service and liberalisation of Postal Services	Yes
F	Ongoing	-	-
IRL	Completed	S.I. No 616 of 2002 European Communities (Postal Services) Regulations 2002	Yes (until 1.1.2004)
I	Completed ⁸⁵	Deliberation of 18 December 2002 – Instructions in order to transpose Directive 2002/39/EC amending Directive 97/67/EC with regard to the further opening up to competition of Community postal services Deliberation of 18 December 2002 – extent of the postal monopoly for the maintenance of the universal service	Yes
L	Completed	Law of 20 December 2002 amending Law of 15 December 2000 on postal services and postal financial services	Yes
NL	Completed	Amendment to the Decree on general postal provisions in connection with the transposition of Directive 2002/39/EC amending Directive 97/67/EC with regard to	No

84 This table should not be construed as the Commission's recognition of full compliance with all the directive's requirements.

85 Confirmation through primary legislation is still pending.

		the further opening up to competition of Community postal services. 20 November 2002	
A	Completed	72nd Federal Law amending the 1997 Postal Law	No
P	Completed	Law –Decree number 115/2003 of 12 June	Yes
FIN	Completed	Transposition was already achieved through existing legislation	No
S	Completed	Transposition was already achieved through existing legislation	No
UK	Completed	The Postal Services (EC Directive) Regulations 2002	No

3. ELECTRONIC COMMUNICATIONS AND THE INFORMATION SOCIETY

3.1. Transposition of the new regulatory package

105. On 25 July, the deadline for transposing the new regulatory package on electronic communications into national law expired. The Council and the European Parliament had adopted on 7 March 2002 four directives⁸⁶ while the Commission had adopted an Article 86 directive in parallel.⁸⁷ These directives replaced the legislative measures on which regulatory intervention in the sector had been based in the past.
106. On 6 October, the Commission initiated proceedings against those Member States which had not communicated transposition measures to it or provided information showing that they complied with the relevant obligations. Belgium, Germany, Greece, Spain, France, Luxembourg, the Netherlands and Portugal were concerned as regards all five directives, and Sweden only as regards Directive 2002/77/EC. On 17 December, the Commission sent out reasoned opinions against all those Member States with the exception of Spain, which had transposed the directives in the meantime. The case against Sweden was closed in December. On 19 November, the Commission adopted its 9th report⁸⁸ on the state of implementation of the EU electronic communications regulatory package. The report highlights that the number of fixed broadband access lines has almost doubled over the last year but adds that the competitive situation must improve further if the broadband sector is to truly thrive in the EU economy. It forecasts that in 2003 the number of mobile subscribers will grow at a faster rate than in 2002, despite the penetration rate being already close to 90% in a number of EU countries. It also points out that only eight Member States have completed their transposition of the new EU legislation into national law so far.

86 OJ L 108, 24.4.2002.

87 OJ L 249, 17.9.2002.

88 COM (2003) 715 final.

107. In view of this, the 9th report has deliberately focussed on key issues which need to be addressed in the transposition process, rather than assessing the situation in individual Member States. These key issues include the assignment of National Regulatory Authorities (NRA) tasks to competent national bodies and the clear division of those tasks where they are allocated among different bodies. The report also stresses the need to ensure wider powers and discretion as well as the full range of remedies for NRAs provided for in the new framework.
108. The report notes that the number of competing operators in each national market has remained more or less stable, although a number of operators have retrenched in their home markets. Competitive pressure seems to have shifted from the international and long-distance markets to the local call segment, where the incumbents' fixed market share has continued to decrease, while consumers have continued to benefit from price reductions for fixed voice telephony. While the downward trend in prices has been maintained, the pace in 2003 is significantly slower than in previous years and less than half that reported in 2002⁸⁹.
109. Timely transposition is all the more important as the new framework introduces significant changes as regards the scope and role of regulation and competition policy in the telecommunications sector in Europe. The new framework is characterised by three principles. First, the degree and intensity of *ex ante* regulatory intervention must be proportional to the competition problem at hand. Where markets are effectively competitive, existing regulatory measures have to be withdrawn. Second, markets need to be analysed on the basis of the principles used in competition law and practice. This concerns the definition of markets, the assessment of market power and the identification of remedies. In particular, under the new framework, an operator is to be regulated only if he has a dominant position within the meaning of Article 82. Third, all electronic communications services and networks are to be treated in a similar manner ("technological neutrality"), which implies, for example, that cable TV networks are now subject to the same rules as other telecommunications networks.
110. The framework directive requires national telecommunications regulators to carry out market analyses to establish the state of competition in relevant communications markets and identify any providers with significant market power ("SMP") in these markets. Once an operator is found to have SMP, regulators have to identify which specific obligations it is appropriate to impose on that operator. Obligations can vary according to the nature and source of the competition problem, which allows for a high degree of flexibility in tailoring countermeasures to the specific circumstances.
111. In its recommendation on relevant markets to be regulated *ex ante*⁹⁰, the Commission has included 18 markets susceptible of being so regulated. The decision to include these markets was based on their structural characteristics and on the information available to the Commission at the time concerning the situation of these markets in all Member States. A consultation mechanism ("Article 7 procedure") has been

89 IP/03/1572, 19.11.2003.

90 Commission Recommendation 2003/311/EC of 11.2.2003 on relevant product and services markets within the electronic communications sector susceptible to ex ante regulation, OJ L 114 of 8.5.2003.

introduced to provide for close cooperation between the Commission and national regulators in order to ensure consistent application of the new regulatory framework.

Box 4: The "Article 7" consultation mechanism

Pursuant to Article 7 of the framework directive, national regulators have to notify draft regulatory decisions to the Commission under certain circumstances. Within one month, the Commission may issue formal comments on the draft decisions of which national regulators have to take utmost account. When a draft measure affects trade between Member States and is based on a market definition which differs from that in the Commission recommendation or concludes/denies that an undertaking has SMP, the Commission may within two additional months require the national regulator to withdraw the intended measure ("veto powers" of the Commission).

With the adoption on 23 July of the Commission recommendation on procedural aspects⁹¹ and the current inflow of draft measures from national regulators since early August, the framework has become operational. To manage the consultation process, the Commission has set up two task forces, one in the Competition DG and another in the Information Society DG. The task forces review and analyse the draft regulatory measures ("cases") notified by national regulators pursuant to Article 7. They are expected to play a key role in the market analyses carried out by national regulators. In particular, they are responsible for the receipt of notifications of draft measures from national regulators, the assessment of the draft measures (i.e. of their compatibility with Community law), the drafting of Commission decisions and contacts with national regulators, national competition authorities and other interested parties.

Usually, pre-notification meetings are held with national regulators to facilitate the formal consultation process. By the end of December, the task forces had dealt with 40 cases (28 closed, 12 pending).

3.2. Monitoring the implementation of directives

3.2.1. *Failure to inform the Commission of compliance with Directive 2002/77/EC*

112. On 17 December, the Commission decided to send reasoned opinions to Belgium, Germany, Greece, France, Luxembourg, the Netherlands and Portugal. These Member States had not provided the Commission by that date with information that might have enabled it to ascertain whether the provisions of Commission Directive 2002/77/EC of 16 September 2002 on competition in the markets for electronic communications networks and services (the 'competition directive') were being complied with. Pursuant to Article 9 of the directive, Member States were to have supplied such information by 25 July 2003 at the latest. On 10 October, the Commission gave them formal notice to do so.
113. On the other hand, the Commission closed the proceedings it had also opened in October against Sweden and Spain, these countries having in the meantime

91 Commission Recommendation 2003/561/EC of 23.7.2003 on notifications, time limits and consultations provided for in Article 7 of Directive 2002/21/EC, OJ L 190 of 30.7.2003 and press release IP/03/1089, 23.7.2003.

communicated national measures. It began a review of the conformity of the notified measures with the obligations laid down in the competition directive.

3.2.2. *Cable networks in France*

114. On 8 April, the Commission sent France a reasoned opinion for having failed to comply with the “cable” directive and the “full competition” directive⁹² by maintaining special arrangements for the provision of telecommunications services by cable. The directives require Member States to allow cable television network operators to provide telecommunications services under the same conditions as any other telecommunications operator. France, however, has on two important points maintained separate regulatory arrangements for telecommunications services provided by cable operators. The provision of services by the latter requires systematic prior consultation of all the municipalities concerned. One cable operator was actually refused permission to provide telephone services in a number of municipalities after they had issued an unfavourable opinion. In addition, cable network operators do not enjoy the same rights to use public facilities as the operators of other telecommunications networks. In particular, the charges for use of public facilities are not subject to the same ceilings.
115. This state of affairs seriously handicaps cable operators' business and discourages them from attempting to move into these fields, while preventing the emergence of cable networks as an alternative infrastructure for the provision of telecommunications services. The Commission's investigation is in response to a complaint which the French Association of Multi-Service Network Operators (AFORM) lodged with the Commission in October 2001.

3.2.3. *Rights of way in Luxembourg*

116. On 12 June, the Court of Justice (ECJ) found that, by failing to ensure the effective transposition of Article 4d of Commission Directive 90/388/EEC of 28 June 1990 on competition in the markets for telecommunications services, as amended by Commission Directive 96/19/EC of 13 March 1996, the Grand Duchy of Luxembourg had failed to fulfil its obligations⁹³. The Commission had initiated an infringement procedure against Luxembourg because the licensing system for granting rights of way over public land lacked transparency. This favoured the publicly owned telecommunications operator, EPT, compared with new entrants to the market who had to start rolling out their public telecommunications networks. The ECJ confirmed that the national administrative procedures as a whole are far from transparent and that, therefore, the situation in Luxembourg is capable of discouraging interested parties from making applications for rights of way.

92 Commission Directive 90/388/EEC of 28.6.1990 on competition in the markets for telecommunications services, as amended by Commission Directive 95/51/EC of 18.10.1995 concerning the abolition of the restrictions on the use of cable television networks for the provision of already liberalized telecommunications services and Commission Directive 96/19/EC of 13.3.1996 concerning the implementation of full competition in telecommunications markets.

93 Case C-97/01.

3.2.4. *Rights of way in Portugal*

117. On 30 July, the Commission lodged an application with the Court of Justice against the Republic of Portugal for an infringement of Community law in relation to the transposition of Directive 90/388/EEC, as amended by Directive 96/19/EC. This action concerns the application of the non-discrimination principle regarding the allocation of rights of way. The Commission takes the view that the Portuguese legislation leads to discrimination between the incumbent operator, PT Comunicações, and new entrants regarding the economic conditions for the allocation of the necessary rights of way without there being any objective justification, which is a breach of Article 4d of the above directive.

3.3. Individual cases

T-Mobile Deutschland/O2 Germany - Network Sharing Rahmenvertrag and O2 UK Limited/T-Mobile UK Limited - UK Network Sharing Agreement

118. On 30 April and 16 July, the Commission adopted two exemption decisions which set out how far mobile operators can cooperate through network sharing⁹⁴. Site sharing between mobile operators was found not to restrict competition. National roaming was found to restrict competition at wholesale level with potential harmful effects in downstream retail markets. However, national roaming was exempted until 31 December 2008, with a strict timetable for phase out in urban areas. For more details, see points 62 *et seq.*

Deutsche Telekom AG

119. On 21 May, the Commission adopted a decision under Article 82 regarding Deutsche Telekom's pricing strategy for local access to the fixed telephony network⁹⁵. In its decision, the Commission found that Deutsche Telekom (DT) was engaging in a margin squeeze by charging new entrants fees for wholesale access to the local loop which were higher than or too close to what subscribers had to pay for retail lines. It therefore fined DT EUR 12.6 million. For more details see [points 71 et seq.](#)

Wanadoo Interactive

120. On 16 July, the Commission adopted a decision under Article 82 regarding Wanadoo's pricing strategy for its ADSL retail services⁹⁶. The Commission found that Wanadoo, at the time a 72%-owned subsidiary of France Télécom, had engaged in predatory pricing for those services between March 2001 and October 2002 and accordingly fined it EUR 10.35 million. For more details see [points 74 et seq.](#)

3.4. Information society

121. Considerable progress has been achieved in a number of cases based on complaints against registry operators of Internet domain names. These complaints, lodged by

94 UK agreement: OJ L 200 of 7.8.2003 and press release IP/03/589, 30.4.2003; German agreement: OJ L 75 of 12.3.2004, p. 32 and press release IP/03/1026, 16.7.2003.

95 Press release IP/03/717, of 21.5.2003 and OJ L 263 of 14.10.2003, p. 9.

96 Press release IP/03/1025, 16.7.2003.

registrants and resellers of domain names, alleged that certain EU registries of national, so-called country code domain names ("dot country name") abused their dominant positions under Article 82 by, for example, requiring registrants to have their domicile or a legal establishment in the country to which the respective domain name code was allocated, by limiting the number of domain names available per registrant or by restricting the choice of name to the business activity of the user. In four of these cases, the registration rules have subsequently been relaxed, with the result that the complaints have been withdrawn and the proceedings closed. Two cases are still pending.

4. TRANSPORT

4.1. Air transport

Industry dialogue

122. As one of its key policy objectives for the air transport sector in 2003, the Commission decided to enter into a comprehensive and non-case-related industry dialogue process with aviation industry stakeholders. The objective is to prepare transparent and coherent policy guidance on key competition enforcement issues in the field of airline alliances and mergers, including topics such as market definition, entry conditions and best practices for remedies.
123. As a first step, a comprehensive questionnaire was sent to all major stakeholders in the airline industry and to the National Competition Authorities in April. The next step is to draft a consultation paper on the basis of the replies received.

Amendments to Regulations 3975/87 and 3976/87

124. Council Regulation 3975/87 lays down the procedure for the application of EU competition rules in air transport. Currently, its scope is limited to air transport between Community airports. This means that, for traffic between the Community and third countries, the Commission has only limited powers to enforce the competition rules. It cannot, for instance, require undertakings to bring infringements to an end or impose remedies and penalties. The Commission's experience in dealing with transatlantic alliance cases has shown that this is a considerable handicap.
125. For that reason, the Commission adopted on 24 February a proposal for a Council regulation that aims to create an efficient framework for handling cases relating to air transport between the Community and third countries. The main impact of the proposal will be to extend the scope of Regulation (EC) No 1/2003 to air transport between the EU and third countries. Consequently, Regulation (EEC) No 3975/87 will be repealed in its entirety with the exception of Article 6(3), a transitional provision. Furthermore, the scope of the enabling block exemption regulation, Regulation (EEC) No 3976/87, will be broadened to allow block exemptions also in relation to EU/third country routes.
126. The proposal has been presented to the Council and the European Parliament (consultation procedure).

Open skies negotiations

127. Following the mandate given to the Commission by the Council on 5 June, the Commission commenced negotiations with the US with a view to concluding an open aviation area agreement. The first round of negotiations was held in Washington DC on 1-2 October. In relation to competition, the parties envisage negotiating an institutional framework for cooperation between the Commission and the US Department of Transportation in the assessment of transatlantic agreements and operations in the field of aviation, notably airline alliances.

Airline alliances/agreements

128. On 10 March, the Commission approved for a period of six years the alliance between British Airways and SN Brussels Airlines. In 2003, the Commission also closed by comfort letter its investigations into three cooperation agreements involving Spanair and Portugalia (in March), Aer Lingus and British Airways (in August) and between Finnair and American Airlines (in September).
129. On 1 July 2002, the Commission sent to Air France and Alitalia a letter of serious doubts informing them that the far-reaching cooperation agreement they had notified in November 2001 could not be approved in its current form. In 2003, the Commission conducted an intensive exploration of the market demand for air transport between France and Italy and intensive discussions took place with a view to exploring appropriate solutions for the competition concerns identified in the letter of serious doubts. In order to market test the proposals for remedies made by the parties, a notice was published on 9 December. Third parties have until 23 January 2004 to comment on the proposed set of remedies.
130. A similar market investigation was undertaken regarding the cooperation agreements between British Airways and Iberia. A notice summarising the agreements and the commitments submitted by the parties was published on 12 September⁹⁷. On 10 December, the Commission approved the alliance for a period of six years.
131. In April, SAS and Austrian Airlines agreed on an "amended cooperation agreement" which was subsequently notified to the Commission. Discussions are ongoing regarding a remedy package that would solve the competition concerns raised by this agreement.

Incentive schemes for travel agents

132. On the occasion of the Virgin-BA decision of 1999⁹⁸, the Commission set out a number of principles concerning travel agents' commissions. On this basis, it took the necessary measures to ensure that the above-mentioned principles are applied to other EU airlines in equivalent situations. In 2003, the Commission was able to close its investigations into the incentive schemes for travel agents operated by several EU airlines. It had to ascertain that these incentive schemes were not used by dominant carriers to remunerate travel agents for their loyalty, thereby creating illegal barriers to entry for their competitors. In several cases the Commission's investigation has

⁹⁷ OJ C 217 of 12.9.2003.

⁹⁸ Commission decision 2000/74/EC of 14.7.1999 in Case IV/D-2/34.780 *Virgin/British Airways*, OJ L 30 of 4.2.2000, p. 1-24, upheld in Case T-219-99 *British Airways v Commission* (Judgment of 17.12.2003).

triggered an in-depth reform or even a complete replacement of existing incentive schemes with a view to bringing them into conformity with EU competition rules.

IATA

133. In 2003, the Commission pursued its investigation of the IATA Passenger Agency Programme. This programme, which defines the conditions for IATA accreditation of travel agents and for ticket sales by these agents, was covered by an exemption decision from 1991 to 1998. The investigation was triggered by a complaint lodged by ECTAA, the European association of travel agents, in October 2002. Its main focus is to determine whether this IATA arrangement artificially partitions the internal market.
134. The Commission also pursued its investigation of an IATA cargo resolution dealing with low-density cargo. At the end of May 2002, the cargo members of IATA decided to amend the low-density cargo conversion factor from the present 6 000 cubic cm to 5 000 cubic cm. This change has triggered several formal and informal complaints, the core argument of which is that it will have a significant impact on shippers' and freight forwarders' costs.

4.2. Railways

135. On 5 March, the statutory deadline for transposition of the 1st railway package expired. This package of directives liberalises cross-border rail freight services and provides a framework for conditions of access, for both freight and passenger services, to the rail network - how train paths are allocated on the tracks, what the track charges should be, who should be responsible for the allocation and charging process, and how the newly created national railway regulators should oversee the process. Meanwhile, a 2nd railway package, including the liberalisation of national freight markets, was the subject of a common position in June.
136. On 14 January, on its first reading of the 2nd railway package, Parliament voted overwhelmingly in favour of the Commission's proposal not only to open up national freight markets but also to liberalise both national and international passenger markets. The Council adopted its common position on the package on 26 June. The Commission has decided not to include Parliament's amendments in its revised proposal because there is already a separate proposal on the table to open up public transport by means of 'controlled competition' (i.e. giving train operators the right to bid for exclusive, fixed-term contracts) and the Commission has stated that further proposals for opening up cross-border railway passenger services will be made early in 2004 backed by an extended impact assessment, now under way.
137. On 28 August, the Commission adopted a formal decision in *GVG/FS*⁹⁹. The decision found that Ferrovie dello Stato (FS), the Italian state-owned railway company, had abused its dominant position by refusing to enter into a so-called international grouping¹⁰⁰, by refusing to discuss terms for access to the track and by refusing to provide traction services (i.e. locomotives and train crews), which only FS was

99 Case COMP/D-2/C.37.685.

100 Currently a requirement of EU law for those intending to provide cross-border railway passenger services.

capable of providing. Following discussions with the Commission and in order to come to a settlement, FS agreed terms with GVG and also undertook to enter into international grouping arrangements with any duly licensed train operator with concrete plans to start services into Italy. FS also undertook to provide traction services, for a period of five years, to other railway companies for such services. In the light of this, the Commission concluded that the abuse had been terminated and, in view of the novelty of the case and the substantial commitments offered by FS, decided not to impose a fine.

138. Regulation 1/2003 will give National Competition Authorities (NCAs) competence to enforce Community antitrust rules fully in the rail transport sector. A new network of rail experts from the NCAs and DG COMP met for the first time on 8 October. Its task will be to identify current topics of common interest in the context of ongoing railway liberalisation, to discuss key issues arising out of individual cases and, in cooperation with DG Transport and Energy, to develop best practices between and among NCAs and the new National Rail Regulators set up under the 1st railway package. The overall aim is to arrive at a common approach to the application of antitrust law in the railway sector so as to avoid conflicting decisions.

4.3. Maritime transport

4.3.1. Legislation

Review of Council Regulation 4056/86

139. The Commission has embarked on a review of Council Regulation 4056/86, the central element of which is the block exemption for liner conferences. As a first step in the review process, the Commission published a consultation paper on 27 March. The consultation paper invited comments and evidence from governments and industry on certain key issues relevant to an assessment of whether a block exemption for liner conferences continues to be justified. It also invited comments on the need to simplify and modernise Regulation 4056/86 in other substantive respects.
140. A total of 34 responses were received and analysed by the Commission with the assistance of independent experts. That analysis showed the need for further in-depth exploration of certain issues. To that end, a public hearing was held on 27 November.

Modernisation of Commission Regulation 823/2000

141. On 30 September, the Commission published¹⁰¹ a preliminary draft Commission amending Regulation (EC) No 823/2000 on the application of Article 81(3) of the Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies (consortia), giving interested parties six weeks to comment.
142. Commission Regulation 823/2000¹⁰² contains a block exemption for liner shipping consortia. It enables consortia with a market share above the block exemption ceiling

101 OJ C 233 of 30.9.2003, p. 8.

102 Commission Regulation (EC) No. 823/2000 of 19.4.2000 on the application of Article 81 (3) of the Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies (consortia), OJ L 100, 20.4.2000, p. 24.

but below 50% to notify agreements to the Commission and obtain clearance via an opposition procedure. Given that Council Regulation 1/2003¹⁰³ abolishes the notification system as from 1 May 2004, the Commission's proposal aims at aligning the regulation with this forthcoming change.

143. The proposed amendments do not concern the substantive provisions of the block exemption, which remain valid until 25 April 2005.

4.3.2. Cases

144. In 2002, the Commission investigated the Wallenius/Wilhelmsen/Hyundai merger and approved the transaction subject to conditions. The transaction involved two specialised maritime car carriers, the Norwegian/Swedish Wallenius Wilhelmsen Lines (WWL) and the Korean company Hyundai Merchant Marine. During the assessment of that merger the Commission became aware for the first time that the deep-sea car carriers operating between the Far East and Europe had been engaging in horizontal price-fixing. These price-fixing activities involved three Japanese lines (NYK, MOL and K-Line) and the above-mentioned WWL – all current or former members of the Far Eastern Freight Conference. These four lines provide specialised maritime transport for exports of new cars from Japanese manufacturing plants to distribution centres in Europe. Their main customers are Japanese car manufacturers.

145. The Commission took the view that this price fixing was not covered by the EU liner conference block exemption (Council Regulation 4056/86) and was unlikely to qualify for individual exemption. When the car carriers became aware of the Commission's views, they immediately ceased their price-fixing activities.

146. The carriers subsequently sought the Commission's informal guidance on new arrangements intended to replace their previous illegal cooperation. The Commission expressed reservations about some aspects of the proposed cooperation and the four carriers have now agreed to limit their cooperation in such a way as to comply with the Commission's informal guidance.

4.3.3. Case-law developments

147. On 19 March, the Court of First Instance (CFI) ruled on an appeal against the Commission decision in the FETTCSA case¹⁰⁴. The case concerned an agreement between 16 shipping lines, operating liner shipping services between the Far East and Europe, not to grant discounts to their customers off the published tariffs for charges and surcharges. The CFI upheld the Commission's decision on the substance, but annulled the fines on the ground that an imposition of fines was time barred¹⁰⁵.

103 Council Regulation (EC) No 1/2003 of 16.12.2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1 of 4.1.2003, p. 1.

104 Commission decision of 19.3.2000 in Case IV/34.018 *Far East Trade Tariff Charges and Surcharges Agreement (FETTCSA)*, OJ L 268, 20.10.2000, p. 1.

105 The Commission has lodged an appeal against the judgment before the Court of Justice.

148. On 30 September, the CFI delivered its judgment in the *TACA* case¹⁰⁶, ruling on an appeal against the 1998 Commission decision finding that certain activities of the members of a liner shipping conference providing services between Northern Europe and the United States infringed Articles 81 and 82 of the EC Treaty. Liner shipping conferences benefit from a block exemption contained in Council Regulation 4056/86 (the maritime equivalent of Regulation 17) permitting them, among other things, to fix common freight rates and regulate the capacity offered by their members.
149. The CFI upheld the Commission's decision as regards four out of a total of five infringements, but annulled the fines that had been imposed for two Article 82 infringements. The CFI found that the parties to the TACA had infringed Article 81(1) of the EC Treaty by agreeing prices for inland transport services within the EU, by fixing brokerage and freight-forwarder remuneration and by agreeing the terms and conditions under which they could enter into service contracts with shippers. The CFI upheld the Commission's findings that these elements were not covered by the block exemption and did not qualify for individual exemption.
150. The CFI further ruled that the members of the TACA conference had infringed Article 82 of the EC Treaty by placing restrictions on the availability and contents of service contracts (the first abuse). In reaching that conclusion, the CFI confirmed that the TACA parties held a position of collective dominance and rejected the justifications based on alleged advantages produced by the restrictive practices.
151. The Commission decision had also found that the TACA had infringed Article 82 by altering the competitive structure of the market so as to reinforce the dominant position of the TACA parties (the second abuse). The CFI found that certain evidence relevant to a finding that the parties had taken specific measures to alter the competitive structure of the market was inadmissible inasmuch as the parties had not been given an opportunity to comment on that evidence. The CFI furthermore held that the Commission had in any case not provided sufficient evidence in support of its claim that the parties had taken specific and general measures to alter the competitive structure of the market. For those reasons, the CFI annulled the findings of a second abuse and the fines relating to that infringement. Fines had also been imposed for the first abuse. Despite upholding the Commission's findings on all essential parts of that abuse, the Court annulled those fines as well, partly on immunity grounds and partly due to mitigating circumstances.

5. MOTOR VEHICLE DISTRIBUTION

152. The year 2003 was a year of transition before the effective entry into force on 1 October of the new rules on motor vehicle distribution¹⁰⁷. During the course of the year, the main focus of the Commission's work was on informing and providing clarification to all those involved (participation in conferences, consultations with

106 Commission decision of 16.9.1998 in Case IV/35.134 *Trans-Atlantic Conference Agreement (TACA)*, OJ L 95, 9.4.1999, p. 1.

107 Commission Regulation (EC) No 1400/2002 of 31.7.2002 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices in the motor vehicle sector, OJ L 203 of 1.8.2002.

traders and consumers, answers to their questions on the regulation's implementation). This information campaign led to the publication of significant clarifications on certain questions to do with the new regulation's interpretation, complementing the explanatory brochure published in 2002 after the new regulation was adopted. The Commission also took a position on two cases involving the implementation of the new regulation, one concerning access by independent repairers to authorised networks and the other lubricants.

Transition period

153. The new block exemption regulation represents a major change compared with the previous regulation, Regulation (EC) No 1475/95. For that reason the Commission's departments focused their efforts during this year of transition on providing back-up support for the change in the form of information, consultation and clarification measures. The need for this approach was felt as a result of the many requests coming in from all the circles concerned, namely motor manufacturers, component and spare-part producers, dealers, independent repairers and, of course, consumers.
154. Special mention can be made of three significant areas of action involving the interpretation of the new regulation: firstly, access by independent repairers to Volkswagen/Audi's authorised network; secondly, vertical agreements for the supply of lubricants to repairers; and thirdly, the publication of questions and answers complementing the 2002 explanatory brochure.

Audi's repairer network

155. In order to ensure the provision of repair and maintenance services for the cars of its brand, Audi has established a network of authorised distributors who sell new cars and at the same time provide after-sales services. In addition, Audi has concluded agreements with authorised Audi repairers who only provide after-sales services.
156. The agreements between Audi and its authorised repairers cannot benefit from the transition period. Such agreements, which relate purely to servicing, were not covered by the former block exemption as they do not provide for a link between the sale of new vehicles and the servicing of vehicles, the existence of which was one of the conditions for the application of the former block exemption regulation.
157. Consequently, in Audi's case, the new block exemption regulation applied to servicing as from 1 October 2002, the date of entry into force of the new regulation. Since Audi had a market share for servicing of over 30%, it had to establish as from that date a qualitative selective distribution system for the selection of authorised repairers. The Volkswagen group confirmed that it would comply with these obligations for all brands of the group (VW, Audi, Seat and Skoda)¹⁰⁸.

Lubricants

158. The analysis of a notification of vertical agreements for the supply of lubricants to vehicle repairers afforded the Commission an opportunity to reaffirm its position on vertical restrictions, and in particular on non-compete clauses, which are not covered

108 Case COMP/F-2/38.554 *PO/Audi Deutschland*.

by block exemption Regulation 1400/2002. In the absence of other significant restrictions, such non-compete clauses can nonetheless be exempted by analogy with Regulation 2790/1999 on vertical restrictions up to a market share threshold of 30%. In this case, the Commission considered that, in those Member States where the market share of the supplier exceeded 30%, lubricant suppliers should allow repairers to change supplier more flexibly.¹⁰⁹

Frequently Asked Questions

159. On the basis of the questions and problems encountered by a good many parties, the Commission's departments have published a set of questions and answers in order to clarify the interpretation of the regulation in certain areas, including multibranding, cross-border purchases, guarantees and the nature of the qualitative criteria for the selection of dealers and repairers¹¹⁰. These questions and answers complement the explanatory brochure of 30 September 2002 to Regulation (EC) 1400/2002 and adopt the same pragmatic approach¹¹¹.
- 5.1. New car price trend
160. The Commission continues to compare the pre-tax prices of new cars in the European Union. It does so twice a year, in May and November, on the basis of manufacturers' recommended retail prices net of tax for each EU Member State¹¹².
161. The comparison of prices on 1 November 2002 revealed no notable change compared with pre-tax prices as they stood on 1 May 2002. On 1 November 2002, the standard deviation of prices between national markets was of the order of 10%, against the background of an overall decline in car prices of 0.2%. Within the euro zone, Austria and Germany remain the highest-price markets, while Finland, Greece and the Netherlands are the lowest-price markets. The price differences between national markets remain substantial, varying in the euro zone between 10 and 30% depending on the model. On the relevant date, the United Kingdom was still the most expensive car market in the EU for a significant proportion of the models examined.
162. In contrast to the price report of 1 May 2001¹¹³, the average price differential for segments A to C, which are those with the highest volumes of sales and number of models and for which the differential was well in excess of 20%, was moving towards that established in the other segments¹¹⁴.
163. The most significant change concerning pre-tax prices on 1 May 2003 was the reduction in the standard deviation between national markets from 10% to 8.6%, against a background of price stability. The substantial price differentials between Member States are similar to those registered on 1 November 2002. One notable

109 Case COMP/F-2/Case 38.730 *BP Lubricants*.

110 Available online at http://europa.eu.int/comm/competition/car_sector/distribution/faq_fr.pdf.

111 DG Competition's explanatory brochure is available in the 11 official languages in hard copy or on the Internet (http://europa.eu.int/comm/competition/car_sector/). It is not legally binding. See also Commission press release IP/02/1392, 30.9.2002.

112 Press releases IP/03/290, 27.2.2002, and IP/03/1117, 25.7.2002.

113 Press release IP/01/1051, 23.7.2001.

114 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).

development concerns the United Kingdom, where prices are no longer the highest in the EU in euro terms owing to the fall in the value of the pound.

5.2. Judgments of the Court of First Instance and the Court of Justice

Volkswagen I

164. By its judgment¹¹⁵ of 18 September 2003, the Court of Justice confirmed in its entirety the judgment¹¹⁶ of the Court of First Instance (CFI) upholding the substance of the Commission decision¹¹⁷ finding that VW had agreed with its dealers a series of measures intended to prevent or restrict parallel imports from Italy into Austria and Germany.

Opel

165. By a judgment¹¹⁸ delivered on 21 October 2003, the Court of First Instance (CFI) largely upheld the Commission decision¹¹⁹ condemning export restrictions implemented by Opel in the Netherlands. The CFI found, however, that the Commission had not adduced sufficient proof that a measure aimed at restricting supplies of vehicles to dealers had been communicated to them. The fine was therefore reduced from EUR 43 million to EUR 35.475 million.

Volkswagen II

166. The Court of First Instance¹²⁰ annulled the Commission decision¹²¹ in the Volkswagen II case, in which the Commission had found an infringement involving the fixing of prices for a car model in Germany. The Court considered that the Commission had not adduced sufficient proof that the instructions given by VW concerning the fixing of prices formed part of an agreement with dealers. In the Court's view, the Commission cannot hold that an instruction by a manufacturer, adopted in the context of its contractual relations with its dealers, in reality forms the basis of an agreement between undertakings if the Commission does not furnish proof of the dealers' actual acquiescence. The Court also considered that the Commission had not proved that the instructions had been carried out by dealers and that the Commission was mistaken in maintaining that signature of the dealership agreement implied explicit or tacit acceptance of all subsequent instructions issued by the manufacturer. The Commission has brought an appeal against this judgment (Case C-74/04).

5.3. Conclusion

167. The price trend reports still note the existence of substantial price differentials within the European Union. These differentials show that competition between distributors

115 Case C-338/2000 P *Volkswagen AG c./v Commission*.

116 Case T-62/98 *Volkswagen v Commission*, judgment of 6.7.2000.

117 Case COMP/F2/35.733 *Volkswagen*, Commission decision of 28.1.1998 imposing a fine, OJ L 124, 25.4.1998, p. 60.

118 Case T-368/00 *General Motors Nederland BV, Opel Nederland BV c./v Commission*.

119 Case COMP/F-2/36.653 *Opel*, Commission decision of 20.9.2000, OJ L 59, 28.2.2001, p. 1.

120 Case T-208/01, judgment of 3.12.2003.

121 Case COMP/F-2/36.693 *Volkswagen*, Commission decision of 29.6.2001, OJ L 262 of 2.10.2001.

from different Member States and cross-border purchases still do not exert any competitive pressure on manufacturers and that markets remain relatively fragmented. Now that the new block exemption regulation is fully in force with effect from 1 October 2003, the new rules ought to increase the competitive pressure and promote the integration of markets as well as simplify cross-border purchases. A further decisive stage in the march towards greater market integration will be reached on 1 October 2005. After that date, manufacturers will no longer be able to prevent distributors from opening additional sales outlets wherever they wish, including in other Member States.

6. FINANCIAL SERVICES

6.1. Legislation

*New block exemption regulation in the insurance sector*¹²²

168. On 27 February, the Commission adopted a new block exemption regulation for the insurance sector, which replaced Regulation 3932/92 on its expiry at the end of March. The regulation was adopted after an in-depth consultation process during which contributions were received from insurance sector organisations, consumer bodies and public sector bodies. The regulation grants an exemption to certain types of agreements in the insurance sector, namely agreements on:

- joint calculations and studies of risks;
- non-binding standard policy conditions;
- the joint coverage of certain types of risks; and
- the testing and acceptance of safety devices.

Chapter II: Joint calculations and studies of risks

169. It is important for insurers to have accurate information about the risks they insure, including possible future developments. This is not always possible with the information available to them internally, based on their own customers. For this reason, the exchange of statistical information and joint calculation of risks are authorised by the block exemption subject to certain conditions.

Chapter III: Non-binding standard policy conditions

170. Standard insurance policy conditions for many types of insurance policy are produced by national associations of insurance undertakings. The basic scope of the block exemption in this area is unchanged in the new regulation, as compared with Regulation 3932/92, although some additional conditions for exemption have been added. The insurance sector provided a number of substantial arguments, with

122 Commission Regulation (EC) No 358/2003 of 27.2.2003 on the application of Article 81(3) of the Treaty to certain categories of agreements, decisions and concerted practices in the insurance sector, OJ L 53 of 28.2.2003.

supporting concrete examples, to the effect that non-binding standard policy conditions meet all the criteria for exemption under Article 81(3) of the EC Treaty; in particular, standard policy conditions procure efficiencies for insurance undertakings, and can have benefits for consumer organisations and brokers.

Chapter IV: Insurance pools

171. Insurance pools involving a number of insurers are frequent for the coverage of large or exceptional risks, such as aviation, nuclear and environmental risks, for which individual insurance companies are reluctant to insure the entire risk alone. In this area, the scope of the block exemption has been extended as compared with Regulation 3932/92. Firstly, the market share thresholds for pools to be exempted have been slightly increased (from 10% to 20% in the case of co-insurance pools, and from 15% to 25% in the case of co-reinsurance pools). Secondly, for pools which are newly created in order to cover a "new risk" - a risk for which an entirely new insurance product needs to be developed - a new three-year exemption has been introduced, with no market share threshold.
172. As a counterbalance to this extended scope of the exemption, certain additional conditions for exemption are introduced, in particular, a condition removing the block exemption in cases where an undertaking is a member of or exercises a determining influence on the commercial policy of two pools active in the same market.

Chapter V: Security devices

173. In most Member States, there are agreements between insurers on technical specifications for safety equipment (for example, alarms, anti-theft and anti-fire devices); on this basis, devices are tested and lists of "approved" devices drawn up. The scope of Commission Regulation 3932/92 covered all such agreements. The scope of the new regulation has been narrowed, to place it in line with the harmonised single market rules that apply to security devices. Agreements are only exempted in areas where no Community-level harmonisation has taken place.
174. The new regulation will be valid for seven years and will thus expire on 31 March 2010.

6.2. Cases

*Clearstream*¹²³

175. On 28 March, the Commission sent a statement of objections to Clearstream Banking AG, the German central securities depository, and to its parent company Clearstream International SA. The Commission's objections relate to Clearstream Banking AG's refusal to supply certain cross-border clearing and settlement services as well as to its discriminatory behaviour in relation to one of its clients.
176. The Clearstream group provides clearing, settlement and custody services for securities. Clearing and settlement are the processes by which securities market

123 Case COMP/D-1/38.096.

transactions are finalised. The proper functioning of these processes across the EU is essential for the development of an efficient European capital market.

177. In the statement of objections, the Commission takes the view that Clearstream Banking AG is the dominant supplier of primary clearing and settlement services for securities issued according to German law. This dominance stems from the fact that the vast majority of securities issued in accordance with German law with a view to having those securities traded are kept in final custody in Clearstream Banking AG. The clearing and settlement services provided by the central securities depository for the securities that it keeps in final custody must be distinguished from the secondary clearing and settlement services provided by intermediaries, such as banks. There is a clearly identifiable group of large financial intermediaries for whom having recourse to another intermediary in place of the central securities depository is not an option.
178. The objections relate to Clearstream Banking AG's refusal to supply clearing and settlement services and to discriminatory pricing.
179. In the Commission's view, Clearstream refused to supply Euroclear Bank SA with clearing and settlement for registered shares, which have assumed growing importance in Germany since 1997, in particular by refusing Euroclear access to the settlement platform for registered shares in Germany for more than two years. Clearstream Banking AG's dilatory behaviour contrasts with the short time within which other customers received those services. In the Commission's view, such short times constitute the normal industry practice.
180. The objection relating to discriminatory pricing is based on the fact that until January 2002 Clearstream Banking AG charged a higher per transaction price to Euroclear than to national central securities depositories outside Germany. In the Commission's preliminary view, there is no justification for the difference in treatment. Among other factors, the transaction volumes and the level of automation are higher for Euroclear than for national central security depositories.
181. The statement of objections opened the formal procedure but does not prejudice its outcome. A hearing took place on 24 July.

*MasterCard Europe/International (multilateral interchange fee)*¹²⁴

182. On 24 September, the Commission sent a statement of objections to MasterCard concerning its multilateral interchange fees (MIFs)¹²⁵ for cross-border transactions with payment cards in the EU and the EEA. In the MasterCard system, the fee is paid by the merchant bank to the card-issuing bank. Merchant banks pass the cost on to merchants who in turn integrate them in their retail prices. The MIF is laid down in the MasterCard rules, which had been notified to the Commission.
183. The Commission's preliminary conclusions in the statement of objections are that MasterCard's MIF restricts competition between MasterCard member banks and does not qualify for exemption. The Commission pointed out that MasterCard's MIF

124 Cases COMP/D-1/34.324, COMP/D-1/34.579, COMP/D-1/35.578, COMP/D-1/36.518 and COMP/D-1/38.580.

125 A MIF is an interbank payment made for each transaction carried out with a payment card.

was not in line with the basic principles laid down in the Commission's decision of July 2002¹²⁶ regarding Visa's MIF. Merchants have no choice but to accept MasterCard cards. In order to prevent MasterCard from setting its MIF at a revenue-maximising level irrespective of the benefits to merchants and consumers, the MIF must be transparent and cost-based.

184. The statement of objections opened the formal procedure but does not prejudge its outcome.

7. MEDIA

Box 5: Joint selling in the TV sector - national football cases

The Commission dealt with several cases concerning national league football. The Commission's investigation of the joint selling arrangement for media rights in German Bundesliga football revealed competition concerns that are similar in many respects to the ones identified in the UEFA Champions League decision of 23 July. Against this background, the German football associations presented the Commission with a new plan that significantly amends the arrangement as originally notified. It is based on the pattern established in the UEFA Champions League decision but adapted to the circumstances of the present case. The Commission is planning to exempt the new system for marketing the rights to broadcast first and second division Bundesliga matches from the antitrust rules. The new marketing policy was outlined in a press release and a notice pursuant to Article 19(3) of Regulation 17 in October.

A preliminary assessment indicates that the plan submitted will ensure more variety and competition in the broadcasting of games from the Bundesliga first and second divisions. It is also expected to give a boost to new media, UMTS and broadband Internet. Under the new system, broadcasting rights will no longer be sold to a single broadcaster in one package. For the first time, broadcasting rights will be unbundled and offered for sale transparently in a number of separate packages. In future, it will be possible to show all games live and/or near live over the Internet and via mobile phones. First and second division Bundesliga clubs will also be allowed to sell some broadcasting rights themselves.

The marketing model and the possible exemption do not cover future licensing agreements concluded by the German league after a transition period. The Commission reserves the right to scrutinise them separately in the light of Community law, especially if several of the jointly sold packages comprising exclusive rights are acquired in combination by a single operator.

The Commission sent a statement of objections to the UK's FA Premier League (FAPL) in December 2002. The FAPL submitted a revised version of its sales policy, which – although an improvement – did not fully satisfy the Commission's concerns. Specifically, the proposals appeared to contain unjustified restrictions on output and to distort competition in the markets for the exploitation of the FAPL

126 Case COMP/D-1/29.373 *Visa International*, OJ L 318 of 22.11.2002.

rights. In December 2003, the Commission announced a provisional agreement with the FAPL and BSkyB – the licensee of live TV rights¹²⁷. The agreement provided for a larger number of rights being put on the market, and for a greater diversity of licensees providing FAPL content to consumers. The provisional agreement was to be submitted to public consultation in early 2004.

A complaint lodged in December 2001 by several French football clubs called into question, *inter alia*, the compatibility of national legislative provisions relating to the marketing of television broadcasting rights with EU competition rules. The complaint focused on the horizontal aspects of selling these rights. Moreover, a tender for national football championship rights gave rise to a complaint at the national level by a pay television operator, which led to the adoption of interim measures by the French competition authority against the Ligue du Football Professionnel at the beginning of 2003. This procedure focused on the vertical aspect of football rights selling. The part of the complaint lodged with the Commission was withdrawn in June. The reason for the withdrawal is that the relevant national provisions have actually been modified in the context of a legislative reform at the national level.

Restructuring and consolidation of European pay-TV markets – developing principles

185. During 2003, commercial arrangements regarding the restructuring and consolidation of a number of European pay-TV markets, including those in the Nordic region and Italy, were a focus of the Commission's competition law enforcement in the media sector. In the Nordic region, pay-TV operator Canal+ divested from its Nordic direct-to-home ("DTH") satellite pay-TV distribution platform, Canal Digital, by fully transferring its 50% shareholding in the platform to co-owner Telenor. In parallel, Canal+ and Telenor entered into long-term bilateral exclusivity agreements regarding the distribution of Canal+ Nordic's pay-TV and pay-per-view channels in the Nordic region in order to guarantee continuity of the economic advantages previously derived from Canal Digital's vertical integration with Canal+. The Commission considers that "demerger" transactions of such kind coupled with vertical contractual exclusivity and non-compete ties between economically distinct undertakings fall within the scope of Article 81(1) of the EC Treaty. In that context, the Commission is called upon to prevent long-term foreclosure of the upstream and downstream pay-TV markets, in particular, at the expense of potential entrants, *a fortiori* if these markets are highly concentrated. The Commission therefore endeavours to reduce exclusivity and non-compete arrangements in terms of both their scope and their duration so as to lower barriers to potential entry. This ultimately enables the Commission to exempt such agreements under Article 81(3) of the Treaty for a limited period while taking full account of the efficiencies generated and, in particular, the parties' legitimate concern to recoup relationship-specific investment into their business so far. In so doing, the Commission – in the *Telenor/Canal+/Canal Digital* case¹²⁸ - for the first time in this sector explicitly drew on the principles laid down in the Guidelines on Vertical Restraints issued in October

127 Press release IP/03/1748, 16.12.2003.

128 Case COMP/C-2/38.287.

2000¹²⁹. In substance, this approach is consistent with the one followed in the *Newscorp/Telepiù* merger case¹³⁰ regarding the Italian pay-TV markets. In that case, a range of conditions was put in place, such as access by third parties to the platform owned by the merged entity and a significant reduction in the duration and scope of licensing agreements for premium content, to ensure that market access for potential entrants remains possible.

Distribution of magazines in the print sector

186. In the print sector, in particular the markets for periodicals, the Commission continues monitoring closely the development of cross-border price differentials, which have become more visible to consumers after the introduction of the euro on 1 January 2002. Following a complaint by the Bundesarbeitskammer, which represents Austrian consumer interests, the Commission is carrying out an in-depth investigation into price increases for German-language magazines in Germany and Austria.

Box 6: Media plurality and competition law

Maintaining and developing media pluralism is a chief public interest goal of the European Union, together with the preservation of cultural diversity and the freedom of access for the Union citizen to all kinds of media platforms.

This clearly follows from the Union's firm commitment to protect media pluralism and the freedom to provide and receive information as values crucial to the democratic process¹³¹ and as enshrined in Article 11 of the Charter of Fundamental Rights, Article 10 of the European Convention on Human Rights and, finally, the draft European Constitution¹³².

The Commission has made it clear on a number of occasions that it considers media pluralism to be fundamental to both the working of the European Union and the cultural identity of the Member States¹³³, but that responsibility for the control of media concentration rests primarily with the Member States. Member States retain the right to issue national laws on the control of media ownership, as is expressly recognised, for instance, by Article 21(3) of the EU Merger Regulation.¹³⁴

A number of Member States have put in place controls concerning intra-media and cross-media ownership, choosing different approaches and/or mixes of limitations on audience shares, share capital and number of licences held.

The European Parliament has addressed the issue of media pluralism and control of media concentration in a number of initiatives and resolutions.

129 Commission - notice - guidelines on vertical restraints (2000/C 291/01), OJ C 291, 13.10.2000, p. 1.

130 Case COMP/M.2876.

131 See Article 6(1) of the Treaty and Article 2 of the draft European Constitution.

132 Title II, Article 11.

133 See the Amsterdam Protocol on the system of public broadcasting in the Member States, annexed to the Amsterdam Treaty.

134 "Member States may take appropriate measures to protect legitimate interests other than those taken into consideration by this Regulation and compatible with the general principles and other provisions of Community law plurality of the media shall be regarded as legitimate interests "

The application of competition policy instruments in the media sector is limited to addressing the underlying market structure and economic impact of media undertakings' behaviour and control of state aid. It cannot replace - nor does it intend to do so - national media concentration controls and measures to ensure media pluralism. The function of the application of competition rules is limited to resolving problems raised by the creation or strengthening of dominant positions in the respective markets and the control of foreclosure of competitors from those markets.

However, in applying antitrust and merger control principles, competition policy can make an essential contribution to the maintenance and development of media pluralism, both in the traditional television markets, as well as in other broadcasting markets and the new media. Open markets create the environment for the fostering of pluralism in television, print and the new media.

The application of competition rules has served this purpose by keeping the balance between safeguarding cultural diversity and media plurality on the one hand and guaranteeing efficiency on the other hand, as has been demonstrated consistently in the past in a number of cases¹³⁵. The conditions imposed in the context of recent merger cases¹³⁶, and for ensuring access by operators to premium sport content¹³⁷ and premium films, stand as examples.

By applying competition rules to the media sector strictly, within the limits of its mandate, the Commission lowers market barriers for broadcasters and new entrants, thereby preventing market foreclosure and undesirable concentrations.

In parallel with the application of state aid discipline to the sector, the application of antitrust rules and merger control therefore make a major contribution to securing freedom of access for the Union citizen to all kinds of media platforms.

8. LIBERAL PROFESSIONS

187. In 2003, the regulation of professional services provided by liberal professions in different Member States remained under close scrutiny.¹³⁸ The purpose of the "stocktaking exercise" was to obtain a thorough understanding of the regulation of liberal professions and its effects.
188. Commissioner Monti launched the exercise on 21 March with a speech to the German Lawyers' Association¹³⁹. He explained that the sector could make an important contribution to the Lisbon agenda of making Europe the most dynamic knowledge-based economy in the world by 2010. He then asked what is holding back the development of innovative and more competitive services. He invited all interested parties to submit observations.

135 See e.g. Cases COMP/M.469 MSG Media, OJ L 364, 31.12.1994, COMP/M.553 RTL/Veronica, OJ L 294, 19.11.1996, COMP/M.993 Bertelsmann/Kirch/Premiere, OJ L 053, 31.7.1999.

136 See for example, case COMP/M.2876 *Newscorp/Telepiù*.

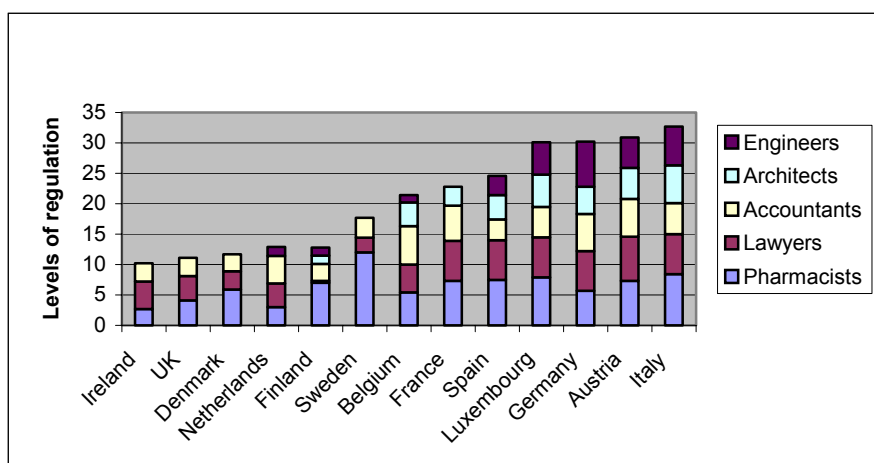
137 See the *UEFA Champions League* Case decision COMP/C-2/37.398.

138 See also points 197 to 209 of the XXXIInd Report on Competition Policy (2002).

139 "Competition in Professional Services: New Light and New Challenges", Bundesanwaltskammer - Berlin, Germany, 21.3.2003.

189. An independent study carried out for the Commission by the Vienna-based Institute for Advanced Studies (IHS) was made accessible to the public by DG Competition in order to stimulate the debate. This study revealed significantly different levels of regulation between Member States and between different professions. It found that there was no proof of malfunctioning of markets in relatively less regulated countries. On the contrary, more freedom in the professions would, it concluded, allow more overall wealth creation.

The differences in levels of regulation can be presented as follows:



Source: HISS study.

Note: Greece and Portugal are not included because of a lack of data on certain professions.

190. Nearly 250 responses to the stocktaking questionnaire were received from various interested parties, and an overview was posted on DG Competition's website. An overview of regulation in place was also drawn up on the basis of the study and the comments received from interested parties¹⁴⁰.
191. The conference on the regulation of professional services held on 28 October in Brussels brought together 260 representatives of the professions, their clients, consumer organisations, competition authorities and policy makers as well as academics. The purpose was to allow an open debate on the justifications, the "pros and cons", of various regulations impacting on the provision of professional services of lawyers, notaries, architects, engineers, accountants and pharmacists. The interventions concentrated on the effects of rules and regulations on business structure and consumer protection. The experience gained from recent reforms in some countries was also discussed.
192. The interventions made it clear that some carefully considered modernisation of the traditional rules would be helpful. The consumer representatives stressed in particular the need for transparency of the rules, of their justifications and of the elements of prices.
193. Commissioner Monti announced in his speech concluding the conference that he intended issuing a Commission report on competition in professional services in

140 These and other related documents are accessible at: <http://europa.eu.int/comm/competition/liberalization/conference/libprofconference.htm>.

early 2004. The report is meant to outline the economic rationale for a reform of some existing rules and regulations as well as the legal framework for assessing their compatibility with EU competition rules.

194. The Commission intends to further promote a level playing field for skilled professionals, so that cross-border mobility as well as healthy competition is enhanced, in the interests of both the professions and consumers. At the same time, the Commission reaffirms its commitment to respect those restrictive professional regulations and self-regulations which appear justifiable in the general interest¹⁴¹.
195. Collaboration with other competition authorities also continued and intensified. Regulation of professional services was discussed at meetings of NCA Directors General on 18 June and 19 November. An expert meeting was held on 26 November to discuss the results of the stocktaking exercise.
196. The ruling of the Court of Justice of 9 September in *Conorzio Industrie Fiammiferi*¹⁴² appears relevant to this sector, where regulations hindering competition are often endorsed by Member States. In order to give full effect to EU competition rules, a national competition authority is to “disapply” a national law requiring undertakings to engage in conduct contrary to Article 81 of the EC Treaty and to issue a cease and desist order to the undertakings.
197. Finally, the Commission also carried out traditional case work in this sector. In particular, a statement of objections was issued on 3 November in the *ex officio* case targeting the recommended fee scale put in place by the Belgian architects’ association¹⁴³.

141 See the reply to an oral question in the European Parliament on the subject of “Market regulations and competition rules for the liberal professions” (O-63/03).

142 Case C-198/01, Judgment of 9.9.2003.

143 Case COMP/D-3/38.549

9. STATISTICS

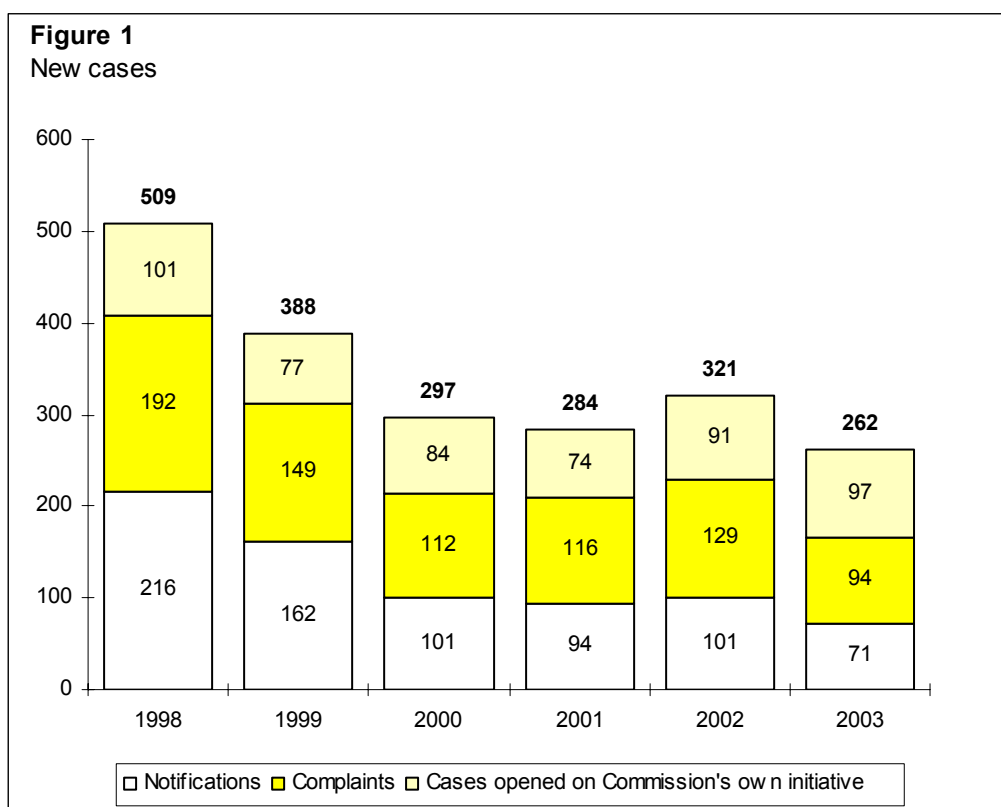
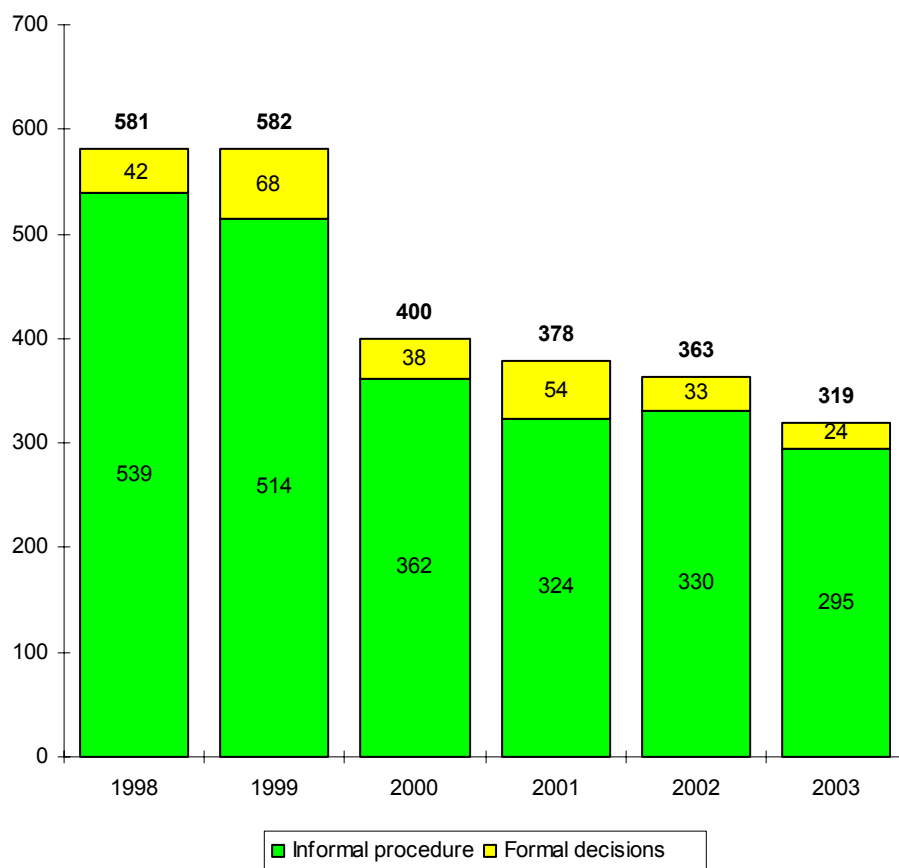


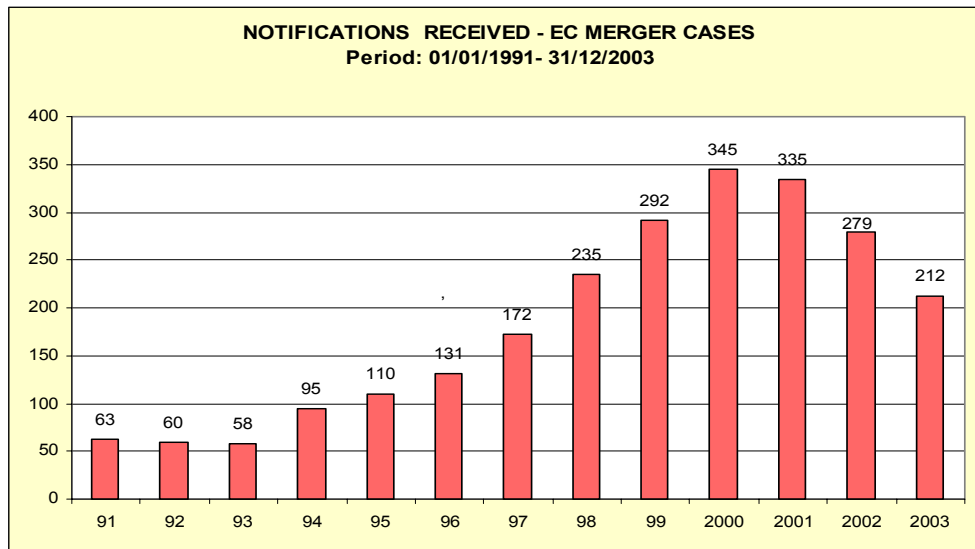
Figure 2
Cases closed



II – Merger control

1. INTRODUCTION

198. The number of mergers and acquisitions notified to the Commission in 2003 continued to decline to levels seen in the late 1990s. While 279 concentrations were notified in 2002, which already marked a slight decline from the year 2001 (335), there were only 212 notifications in 2003 (see chart).



199. In addition to this decrease in total number of notifications the percentage of cases that gave rise to serious doubts as to their effect on competition and hence requiring an in-depth (Phase II) investigation leading to a decision pursuant to Article 8 of the Merger Regulation also declined slightly, from 9 cases in 2002 to 8 cases in 2003. All 8 transactions were finally approved, either because the companies involved submitted undertakings that removed the original competition problems (6 cases) or initial competition concerns were not confirmed by the in-depth investigation (2 cases).
200. In total, the Commission took 231 final decisions in 2003, 8 of which followed “Phase II” in-depth investigations (no prohibitions, 2 clearances without conditions, 6 conditional clearances) and 11 were cleared with conditions at the end of an initial investigation (“Phase I”). The Commission also cleared 203 other cases in Phase I. Of these Phase I cases, 110 decisions (51 %) were taken in accordance with the simplified procedure introduced in September 2000. In addition, the Commission took 9 referral decisions pursuant to Article 9. In-depth investigations were opened in 9 cases.

2. REFORM OF MERGER CONTROL

2.1. A new Merger Regulation

201. On 27 November, the Council reached political agreement on a recast Merger Regulation incorporating substantially the reforms proposed by the Commission in December 2002. These reforms relate first to the substantive test in Article 2, to procedural issues such as the timing of notifications, investigation time limits, the Commission's decision-making powers, and lastly to the question of case allocation between national authorities within the EU.

202. The Merger Regulation was first adopted in 1989 and took effect on 21 September 1990. Under a regular review clause, the Commission launched in December 2001 a consultation exercise that resulted in the adoption a year later of a package of wide-ranging proposals for improving the EU merger control regime. In addition to the proposal amending the Merger Regulation, these reforms involved non-legislative measures designed to streamline the decision-making process and, in particular, to strengthen economic analysis and respect the rights of defence more effectively. Most of these reforms are now in place, including the appointment of a Chief Competition Economist and the setting up of panels to scrutinise investigating teams' conclusions with a "pair of fresh eyes". The principal elements of the reform package are set out below.

2.1.1. *The substantive test*

203. The aim of the Commission's proposed reform was to ensure that the substantive test in the Merger Regulation would cover effectively all anti-competitive mergers while at the same time ensuring continued legal certainty. The Commission had launched via its Green Paper a reflection on the effectiveness of the substantive test in Article 2 of the Merger Regulation (the dominance test) and in particular on how this test compares with the "substantial lessening of competition" (SLC) test used in several other jurisdictions. Among the main arguments in favour of a change to SLC were 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. Conversely, however, it was felt that adopting an altogether new test might jeopardise the preservation of the precedent built up under the regulation, including the case law developed by the Courts over the years, thereby reducing legal certainty. As a result, the Commission proposed that the scope of the test should be clarified.

204. The text of the new test adopted by the Council is as follows: "a concentration which would significantly impede effective competition, in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared incompatible with the common market". This new test achieves the Commission's original aims. Legal certainty is enhanced through the closing of any perceived gap in the previous test, while at the same time past precedent, including the case law of the Court of Justice, is retained. It should, moreover, be stressed that the new test will be applied on the basis of a sound economic framework of assessment as set out in the Guidelines on horizontal mergers adopted in December (see below). The Commission also intends to proceed

with the preparation of further Guidelines on non-horizontal (vertical and conglomerate) mergers.

2.1.2. *Procedural issues*

205. The new regulation provides for a number of changes that are aimed at increasing the flexibility of the system while retaining the principle of *ex ante* control with clear, legally binding deadlines. A system of mandatory notification with suspensive effect is retained, but greater flexibility is introduced into the requirements for the timing of notifications and the definition of the triggering event has been modified. At the same time, investigation timetables remain bound by tight deadlines, albeit with some additional flexibility.

Time limits for investigation

206. As regards the time limits for investigation, the new regulation makes a number of significant amendments to the existing provisions. First, the old deadlines have now all been converted into "working days", with some consequent minor alterations in the time periods. First, the previous Phase I deadline of one month will, from 1 May 2004, become 25 working days. Secondly, the Phase I six-week deadline applicable to cases where commitments have been offered or where a request for referral has been received, has become 35 working days. Thirdly, as regards the deadlines in Phase II, the new regulation provides for a 15 working day automatic extension of the deadline from 90 to 105 working days where the parties have offered remedies. The objective of this provision is to allow for greater consultation of third parties and Member States. However, this extension will not apply if remedies are offered at an early stage in the procedure, i.e. less than 55 working days into the Phase II procedure. Fourthly, there is provision for a 20 working day extension of the phase II deadline in complex phase II cases. Such an extension will, however, only be made at the parties' request or with their consent.

Timing of notifications

207. The new regulation also provides for more flexibility as regards the timing of notifications to the Commission. Under the new legislation it will be possible to notify a transaction prior to the conclusion of a binding agreement provided that there is a good faith intent to enter into an agreement. The current deadline for notification of one week from the conclusion of the agreement is also removed, provided that no steps are taken towards implementation. These more flexible rules should allow companies to better organise their transactions without having to fit their planning around unnecessarily rigid rules, and should facilitate international cooperation in merger cases, particularly when it comes to synchronising the timing of investigations by different agencies.

Enhanced fact-finding powers

208. With regard to the Merger Regulation's fact-finding provisions, the new regulation provides, with some exceptions, for the alignment of its fact-finding powers, including the fining provisions, with those provided in the new implementing regulation for Articles 81 and 82 of the EC Treaty. In particular, the new regulation provides for an increase in the maximum level of fines to be applied in the case of

incorrect or misleading information, as well as an increase in the level of periodic penalties applicable in case of failure to comply with requests for information. This should enable the Commission to obtain information more easily and thus improve the efficiency and efficacy of its investigations.

Procedure following annulment by the Court of Justice

209. The procedure to be applied following the annulment of a Commission decision, pursuant to Article 10(5), has been clarified with a view to codifying the Commission's practice in previous cases. Under the new provision the underlying principle is that the case is re-examined starting with a Phase I procedure on the basis of a new notification and a new assessment which takes into account current market conditions.

Decision-making powers under Article 8

210. The new regulation clarifies the conditions under which a prohibited transaction must be dissolved through the disposal of shares or assets (Article 8(4)). The new regulation also empowers the Commission to adopt interim measures in instances of unauthorised implementation of a concentration or breach of conditions imposed under Article 8(2).

2.1.3. Jurisdictional issues

Simpler and more flexible allocation of cases

211. One of the main objectives of the reforms proposed by the Commission was to optimise the allocation of cases between the Commission and national competition authorities in the light of the principle of subsidiarity, while at same time tackling the persistent and increasing incidence of "multiple filings", i.e. notifications of the same operation having to be made to several competition authorities within the EU. The new regulation provides, first, for a streamlining of the referral system, including a simplification of the criteria for such referral, and, secondly, it introduces the possibility for notifying parties to request referrals at the pre-notification stage. The changes are designed to ensure that, in line with the principle of subsidiarity, the case is dealt with by the authority best placed to deal with it, while at the same time keeping to a minimum the number of cases requiring multiple filing.

Cases with a Community dimension

212. For cases which have a Community dimension, but where parties believe that the case "may significantly affect competition" within a distinct national market, they may make a request for referral of the case to that Member State. Notifying parties have the exclusive right of initiative at this pre-filing stage. The request would have to be based on a reasoned submission and has to be acceded to by both the Commission and the national competition authority concerned, within short deadlines, thereby excluding situations of deadlock.
213. For cases with a Community dimension, Member States may - as at present - request a referral of the case after notification. However, a modified "test" will be applied in such cases, which is that a referral may be made if the notified transaction "threatens

to significantly affect competition" within a distinct national market. The deadline for making the referral request remains essentially unchanged, at 15 working days.

Cases without a Community dimension

214. The new regulation provides that cases that do not have a Community dimension may be referred to the Commission at the request of the merging parties, where the concentration is notifiable in at least three Member States. Where no Member State competent to review the concentration under its national law objects to the referral within 15 working days of receiving the merging parties' reasoned submission, the concentration acquires a Community dimension and must be notified accordingly. If any competent Member State objects within that time period, however, no referral is made.
215. The new regulation also modifies the existing provisions in Article 22 relating to referrals by Member States of cases that do not have a Community dimension. Such requests must be made within 15 days of the national notification or, where no notification is required, knowledge of the transaction. Other Member States may submit a request to join a referral within 15 days of having been informed of a referral request. The "test" to be applied in deciding whether such referrals should be accepted by the Commission is whether the transaction threatens to significantly affect competition within the territory of the Member State or States making the request and whether it affects inter-state trade.
216. It is intended that these amendments to the Merger Regulation should be complemented by the publication of a new notice on the principles, criteria and methodology upon which referral decisions should be based.

Follow-up measures

217. It is planned that a modified implementing regulation, together with a revised Form CO template, will also be adopted before 1 May 2004, when the new regulation will become applicable. Further work to update the other Commission notices is also scheduled for 2004. In line with the Commission's general practice and the recommendations of the ICN, it is envisaged that these follow-up measures will undergo a period of public consultation before adoption.
- 2.2. Guidelines on the assessment of horizontal mergers
218. On 16 December, the Commission adopted guidelines which describe in detail the analytical approach which it takes in assessing the likely impact on competition of "horizontal" mergers, i.e. mergers between competing, or potentially competing, firms, under the Merger Regulation. The guidelines make it clear that mergers and acquisitions will only be unlawful to the extent that they enhance the market power of companies in a manner which is likely to have adverse consequences for consumers, notably in the form of higher prices, poorer quality products, or reduced choice. They are designed to complement the re-wording of the Merger Regulation's substantive test for assessing the competitive impact of mergers agreed by the Council of Ministers and adopted on 20 January 2004.

219. This new standard makes it clear that all mergers likely to have a significant adverse impact on competition should be declared unlawful, irrespective of whether the anticompetitive effects result from the creation or strengthening of a single dominant market player or of whether the effects stem from a situation of oligopoly. The new guidelines explain that mergers may result in harm to competition either because the concentration eliminates a competitor from the market, thereby removing an important competitive constraint, or because it makes coordination between the remaining firms more likely. The new guidelines thus explain the circumstances in which the Commission may identify competition concerns.
220. Guidance is also provided in relation to the circumstances when the Commission would be unlikely to intervene. Intervention will be unlikely when the merger would not result in market concentration levels exceeding certain specified levels, as measured by the firms' "market share" or by the so-called Herfindahl-Hirschmann Index (HHI)¹⁴⁴.
221. The guidelines also specify that the Commission will carefully consider, in its overall assessment of the likely competitive impact of a merger, any substantiated claim that the merger will result in efficiencies. For such efficiencies to be taken into account, however, they must benefit consumers, they must only be attainable via the merger, they must be likely to be realised, and they must be verifiable.
222. The guidelines go on to explain that particular factors may mitigate an initial indication that a merger is likely to harm competition. This may, for example, be the case where the customers of the merging firms enjoy significant "buyer power" such that they can easily resort to alternative suppliers. Account will likewise be taken of the ease with which competing firms could profitably enter the market in which the merging companies are operating. The likely impact of a merger will, moreover, be assessed in relation to what would otherwise have occurred in the market. This may mean, for example, that the acquisition of a "failing firm" would not justify intervention by the Commission.
223. The new guidelines will become applicable as of 1 May 2004, the date of entry into force of the new Merger Regulation. During the course of 2004 the Commission further intends to publish draft guidelines on the assessment of mergers between non-competing firms ("vertical" and "conglomerate" mergers).
- 2.3. New best practices
224. As part of the package of reforms of December 2002 the Commission launched a public consultation on a revised version of the Best Practice Guidelines on the conduct of merger investigations first adopted in 1999. The consultation period officially ended on 28 February 2003. The consultation resulted in the submission of some 40 replies, with more than 20 of the submissions being received from international law firms and national and international law societies and associations, including comments from the OECD Competition Division. DG Competition also received some nine replies from industry (industry associations and individual companies), as well as three submissions from consumer organisations. Comments

144 The HHI is an internationally recognised measure of market concentration.

were also received from four Member States (France, Germany, Ireland and the United Kingdom) and from the Norwegian and Polish competition authorities. With the exception of two submissions, the written comments received during the public consultation have been published in full on DG Competition's website¹⁴⁵. The final text of the best practices can be found on DG Competition's website.

2.3.1. The purpose of the best practices

225. The aim of the best practices is to provide guidance for interested parties on the day-to-day conduct of EU merger control proceedings. They are intended to foster and build upon a spirit of cooperation and understanding between DG Competition and the legal and business community. The intention is to increase understanding of the investigation process, to enhance the efficiency of investigations and to ensure a high degree of transparency and predictability of the review process. In particular, they aim at making the short time available in EU merger procedures as productive and efficient as possible for all parties concerned. They are intended to remain a flexible instrument that can be adapted to the specificity of an individual case.

2.3.2. Main provisions

226. The new best practices contain more detailed guidance on the conduct of the pre-notification phase. They also make it clear in particular that the prenotification phase will be handled with flexibility and adapted to the complexity of the case in order not to put a disproportionate burden on the notifying parties in non-problematic cases. The text also clarifies the point that the Commission will not start prenotification investigations without the consent of the notifying parties.
227. The best practices systematise the use of “state-of-play” meetings between the Commission and the notifying parties at key points in the procedure, thereby guaranteeing that the merging parties are kept constantly informed of progress made in the investigation, and that they are given the opportunity to regularly discuss the case with senior Commission management.
228. The best practices furthermore introduce the possibility for the parties to discuss concerns about the transaction directly with the Commission and third party complainants, even before a statement of objections is issued, through so-called “triangular meetings”. Triangular meetings, which are voluntary, take place in situations where two or more opposing views have been put forward as to key market data and characteristics and the effects of the concentration on competition in the markets concerned. They aim to assist the Commission in reaching an informed view of the issues at stake before finalising its objections. For such triangular meetings to be as productive as possible, the mutual disclosure of non-confidential versions of key documents by the parties involved, including the notifying parties, is normally required.
229. In addition, the best practices provide that the Commission will, in the interests of the investigation and transparency, allow the parties the opportunity of reviewing non-confidential versions of “key documents” on the Commission's file before any

145 See further http://europa.eu.int/comm/competition/mergers/review/merger_control_comments.html

objections are raised. Such documents comprise key submissions of third parties running counter to the notifying parties' own contentions received during Phase I and thereafter, including market studies.

3. COMMISSION DECISIONS

3.1. Decisions taken under Article 6(1)(b) and 6(2) of the Merger Regulation

*Tetra Laval/Sidel II*¹⁴⁶

230. On 13 January, the Commission decided not to oppose the acquisition by Tetra Laval BV, which belongs to the Swiss-based Tetra Laval Group, the owner of the Tetra Pak packaging businesses, of the French packaging company Sidel SA, subject to compliance with a commitment and other obligations.

231. Following the annulment on 25 October 2002 by the Court of First Instance (CFI) of the Commission's decision dated 30 October 2001 prohibiting the transaction, the Commission recommenced its examination of the proposed operation. The operation concerned the market for the packaging of liquid food products. The Commission's examination focused on addressing the various points raised by the CFI judgment which required further investigation. On the basis of the CFI ruling, the Commission examined the impact of the transaction on the wider stretch blow moulding (SBM) machines markets rather than the narrower markets for SBM machines according to end use.

232. However, the Commission obtained evidence concerning a new SBM technology called "Tetra Fast", which Tetra had been developing and about which the Commission was not aware in the previous proceedings. Although the Tetra Fast technology was still being developed, it had reached field-testing stage and therefore gave rise to serious doubts as to the creation of a dominant position on the wider SBM markets. This is because, in combination with Sidel's clear technological and other advantages, it would seem to have been capable of having a decisive impact on the merged entity's equipment future positions on the SBM markets. However, this concern was removed by Tetra's commitment to license its Tetra Fast technology.

233. On 8 January, the Commission lodged an appeal against the CFI's annulment of its prohibition decision of 30 October 2001 and subsequent separation decision of 30 January 2002¹⁴⁷. The clearance decision in this case, which takes account of the CFI judgment, could be affected by the outcome of the Commission's appeal and any review of the Commission's earlier decision by the Court of Justice or the CFI, should the matter be referred back to it by the Court of Justice.

*Pfizer/Pharmacia*¹⁴⁸

234. On 27 February, the Commission authorised, subject to conditions, the acquisition of Pharmacia Corporation by Pfizer Inc. in a deal creating the largest pharmaceutical

146 COMP/M.2416 *Tetra Laval/Sidel*, 13.1.2003.

147 Press release IP/02/1952.

148 Case COMP/M.2922 *Pfizer/Pharmacia*, 27.2.2003.

company in the world in terms of sales and R&D spending. The operation gave rise to a number of horizontal overlaps in human pharmaceuticals (including existing and pipeline products) and animal healthcare.

235. The approval followed an investigation into a number of treatment areas both in human pharmaceuticals and in animal healthcare, where the transaction raised serious doubts as to its compatibility with the common market. In response to the serious doubts raised by the Commission, the parties offered commitments to remove the competition concerns identified by the Commission.
236. In this case the Commission closely cooperated with the US Federal Trade Commission (FTC) in the analysis of a number of issues, notably as regards remedies in the areas of urinary incontinence and erectile dysfunction, where the parties committed themselves to carrying out divestments on a worldwide basis.

*Konica/Minolta*¹⁴⁹

237. On 11 July, the Commission decided to clear the proposed acquisition of Minolta by Konica, both Japanese manufacturers of cameras, photocopiers and other imaging products. Both Konica and Minolta develop and manufacture imaging products and equipment, including cameras, photocopiers and light meters. Konica's main interest in the last-mentioned field consists of its shareholding in the Japanese firm Sekonic.
238. The Commission's investigation demonstrated that the activities of Konica and Minolta were largely complementary although they overlapped in several product markets, including photocopiers, compact cameras, digital cameras and light meters. The Commission had concerns about the effects of the merger on the market for light meters. However, Konica offered to divest its approximately 40% stake in Sekonic, the Japanese light meter manufacturer.
239. The Commission's investigation was carried out in close cooperation with the US Department of Justice (DoJ).

*Caemi/CVRD*¹⁵⁰

240. On 18 July, the Commission authorised the proposed acquisition by Companhia Vale do Rio Doce (CVRD) of sole control of Caemi, which it controlled jointly with the Japanese iron ore trader Mitsui. CVRD and Caemi are mining companies based in Brazil and active in the production and selling of iron ore, kaolin and bauxite. CVRD had acquired joint control of Caemi as a result of a transaction which the Commission cleared subject to conditions in October 2001. The Commission concluded that the change from joint to sole control did not give rise to any new competition concerns.
241. In line with the approach adopted by the Commission when clearing the first transaction, the analysis focused on the markets for the production and sale of iron ore, which were the only affected markets. The results of the Commission's enquiry showed that the market dynamics (contractual practice, price settling and discounts

149 Case COMP/M.3091 *Konica/Minolta*, 11.7.2003.

150 Case COMP/M.3161 *CVRD/CAEMI*, 18.7.2003.

policy) had not changed significantly since the original transaction was authorised and that CVRD's competitive position had remained substantially stable in the previous 18 months. The Commission concluded that the notified operation had no significant impact on the relevant markets. It did not alter the existing competitive situation resulting from the first transaction, nor had any additional competition concerns been identified.

242. As the remedy attached to the decision authorising the first transaction, namely the sale of Caemi's interest in Québec Cartier Mining Company, had not yet been implemented, CVRD undertook to assume responsibility for complying with this commitment. This was consistent with the Commission's previous practice in such cases.

*Procter & Gamble/Wella*¹⁵¹

243. On 30 July, the Commission cleared the proposed acquisition of sole control by the American corporation Procter & Gamble (P&G) of the German company Wella AG subject to a package of commitments.

244. Both P&G and Wella are active in the markets for hair care products, fragrances and colour cosmetics. The Commission considered that the operation as notified would have been likely to create a dominant position for the whole range of hair care products (shampoo, conditioners, treatments, styling products and colorants) in Ireland, and in some hair care markets in Norway and Sweden.

245. In order to restore effective competition in the markets for hair care products, P&G undertook to grant an exclusive five-year licence, followed by a three-year black-out (non-use) period of the following brands: the P&G hair care brand "Herbal Essences" for the whole range of hair care products in Ireland, Norway and Sweden; and the P&G colorant brands "Loving Care", "Lasting Color", "Glints", "Borne Blonde" and "Highlights". This also applied to Wella's styling brands "Silvikrin" in Ireland and "Catzy" in Norway. The remedy package, consisting of the licensing of these brands together with certain other assets offered by the parties, removed the concerns as regards the anticompetitive effects of the transaction in the hair care markets in Ireland, Norway and Sweden.

*Candover/Cinven/BertelsmannSpringer*¹⁵²

246. On 29 July, the Commission decided to authorise the acquisition of joint control by the investment companies Candover and Cinven of the German-based academic and professional publisher BertelsmannSpringer. The transaction created links between BertelsmannSpringer and the Dutch publisher Kluwer Academic Publishers, which had been acquired by Candover and Cinven in 2002. It also led to the creation of links between BertelsmannSpringer's business and that of the French professional publisher MediMedia, which is co-controlled by Cinven.

247. Both BertelsmannSpringer and Kluwer Academic Publishers were active in the global market for academic publishing with a special focus on scientific, technical

151 Case COMP/M.3149 *Procter & Gamble/Wella*, 30.7.2003.

152 Case COMP/M.3197 *Candover/Cinven/Bertelsmann*, 29.7.2003.

and medical (“STM”) journals, which are almost exclusively published in English. The Commission's investigation found that BertelsmannSpringer and Kluwer Academic Publishers would as a result of the merger become the number two player in the market, albeit lagging well behind the market leader Elsevier Science. The Commission found no indication that a collective dominant position would have been created as a result of the merger.

248. BertelsmannSpringer and MediMedia were both active in the French and German markets for professional medical publishing. The Commission's investigation showed that the operation would lead to a dominant position on the French market. In order to address the Commission's concerns, Candover and Cinven offered to divest BertelsmannSpringer's French business in the market for professional medical publishing known under the name “Groupe Impact Médecine”. The Commission was satisfied that this commitment would remove the competition concerns.

*Teijin/Zeon*¹⁵³

249. On 13 August, the Commission approved the proposed creation of a joint venture bringing together the DCPD RIM (dicyclopentadiene reaction injection moulding) activities of Zeon and Teijin.
250. Zeon is a Japanese company active in the design, manufacture and distribution of synthetic rubbers, synthetic latex, chemicals, medical equipment and environmental and civil engineering materials. It is also active in the DCPD RIM business via subsidiaries engaged in the manufacture of mouldings and the formulation of DCPD RIM. Teijin, which is also Japanese, is the ultimate parent company of a group of undertakings active in developing and marketing fibres. It operates in the DCPD RIM sector through its wholly owned subsidiary, Teijin Metton.
251. Zeon and Teijin were the only suppliers of DCPD RIM formulations in Europe. The combination of their activities in this area therefore gave rise to serious competition concerns. In order to remove these concerns, the parties undertook to divest Teijin's controlling interest in Metton America Incorporated, which was also active in the DCPD RIM business, to an independent and viable third party. As this divestment would remove the entire increment in market share resulting from the transaction, the Commission decided to clear the operation subject to the implementation of this condition.
252. The Japanese Fair Trade Commission had previously approved the transaction.

*Alcan/Pechiney II*¹⁵⁴

253. On 29 September, the Commission approved the proposed acquisition of the French aluminium producer Pechiney by the Canadian aluminium company Alcan. The activities of both companies include bauxite mining, alumina refining and power generation, as well as aluminium smelting, manufacturing and recycling. Both have research and development departments and also make fabricated products, most importantly packaging, including aerosol cans, cartridges and flexible packaging.

153 Case COMP/M.3235 *Teijin/Zeon*, 12.8.2003.

154 Case COMP/M.3225 *Alcan/Pechiney (II)*, 29.9.2003.

254. The transaction would create the number one aluminium company in terms of global turnover, followed closely by Alcoa. The Commission's market investigation identified competition concerns in the overall market for flat-rolled aluminium products (FRPs), particularly with regard to beverage and food can stock as well as beverage can end stock (can tops). The investigation also highlighted concerns in the markets for aluminium aerosol cans and aluminium cartridges that require rigid packaging. Finally, the examination indicated serious doubts with regard to three technology markets (alumina refining technology, smelter cell technology and anode baking furnace technology) where the transaction would combine the two leading active licensors in the aluminium metal production chain.
255. In order to meet the Commission's competition concerns, Alcan offered an extensive package of commitments. First, it offered the divestment of either its 50% share in AluNorf and its Göttingen and Nachterstedt rolling mills or Pechiney's Neuf-Brisach, Rugles foil mill and, at the purchaser's option, the Annecy rolling mill. Both divestment packages include state-of-the-art production facilities. Alcan's Latchford casting house could also be added to either the AluNorf or Neuf-Brisach packages at the purchaser's option. In addition, Alcan would transfer research and development resources to the buyer. This package would allow a potential buyer to act as a fully competitive force in the FRP industry. Alcan also offered to eliminate the overlap in relation to the two companies' activities in aluminium aerosol cans and aluminium cartridges. In addition, it undertook to continue offering licences for the technologies referred to above on terms and conditions comparable to those applied prior to the transaction, and to divest its anode baking furnace technology altogether.
256. These conditions ensured that the markets will comprise sufficient, strong and capable suppliers to the benefit of industry users and, ultimately, the consumer. A potential purchaser will have to demonstrate to the Commission its capability of maintaining and developing these assets as an active force in the aluminium industry¹⁵⁵.
- 3.2. Decisions taken under Article 8 of the Merger Regulation
- 3.2.1. *Article 8 decisions without conditions*
- Celanese/Degussa*¹⁵⁶
257. On 11 June, the Commission approved without conditions the proposed creation of a joint venture between the German chemical producers Celanese and Degussa. The parties would contribute most of their oxo chemicals businesses to the joint venture.
258. The Commission had opened an in-depth investigation because the concentration would have led to high market shares in several markets. However, the investigation revealed that the creation of the joint venture did not lead to the creation or strengthening of a dominant position. The Commission found that market shares in

155 In 1999, Alcan and Pechiney had already notified a friendly merger for regulatory clearance. The deal triggered many competition concerns and was the subject of an in-depth investigation. The plan was abandoned in March 2000, after the companies disagreed on the undertakings to submit to the Commission.

156 Case COMP/M.3056 *Celanese/Degussa*, 11.6.2003.

these markets were not a reliable indicator of market strength and that the presence of competitors with important spare capacities would have exerted sufficient competitive pressure on the joint venture. Further competitive pressure was exerted by producers from outside the EEA.

*SEB/Moulinex II*¹⁵⁷

259. On 11 November, the Commission confirmed that the purchase of Moulinex by SEB, both manufacturers of small electrical household appliances, did not pose any competition problems in Finland, Ireland, Italy, Spain and the United Kingdom.
260. The case was reviewed in the light of the April 2003 judgment of the Court of First Instance upholding the Commission's 2002 decision as regards the referral to France of the French aspects and the conditions imposed in a number of European countries, but annulling the unconditional clearance in the other five Member States.
261. The Commission carried out a fresh, wide-ranging survey of the five countries concerned in order to assess the effect of the operation on competition. The survey examined the position of each competitor in each market in terms of turnover, product offerings and brand value. This in-depth analysis confirmed that British, Finnish, Irish, Italian and Spanish consumers would benefit from sufficient competition even after the merger.
262. This decision did not affect the 2002 decision as regards fulfilment by SEB of the commitments it had entered into in relation to the other nine countries.

3.2.2. *Article 8 decisions with conditions and obligations*

*Siemens/Drägerwerk/JV*¹⁵⁸

263. On 30 April, the Commission approved, subject to conditions, the combination of the medical ventilators, anaesthesia delivery systems and patient monitoring businesses of the German companies Siemens AG and Drägerwerk AG in a joint venture known as Dräger Medical.
264. The Commission's investigation focused on the joint venture's impact on the markets for anaesthesia delivery systems, ventilators and patient monitoring devices. These markets had undergone a significant consolidation in recent years, as the main players became bigger through the acquisition of the smaller manufacturers. The Commission was concerned that Siemens and Drägerwerk through their joint venture would hold too high a share of the markets concerned, which would have been detrimental for hospitals. The transaction also removed a particularly close competitor, especially for ventilators.
265. In response to the competition concerns raised by the Commission, the parties offered to sell Siemens's ventilator and anaesthesia delivery business, which removed the horizontal overlap in this field, and to provide rivals with the

157 Case COMP/M.2621 *SEB/Moulinex II*, 11.11.2003.

158 Case COMP/M.2861 *Siemens/Drägerwerk/JV*.

information necessary to enable them to connect their patient monitors and clinical information systems to its equipment.

266. The Commission cooperated closely with the US Federal Trade Commission in this case. Siemens/Dräger had significantly lower market shares in North America than in Europe and consequently the US competition authorities did not challenge the transaction.

*Newscorp/Telepiù*¹⁵⁹

267. On 2 April, the Commission approved the merger between the two existing satellite pay-TV platforms in Italy subject to a complex package of conditions which will apply until 2011. The concentration consisted of the acquisition by News Corporation of sole control of Telepiù (from the Vivendi group) and a subsequent merger of Telepiù with Stream, the pay-TV platform controlled by News Corporation.
268. The situation of the Italian pay-TV operators has been characterised by severe financial difficulties since the beginning of their operations (1991 for Telepiù and 1998 for Stream). The two previous examinations of similar proposed transactions were conducted by the Italian antitrust authority.
269. The Commission concluded that the concentration would have led to the creation of a lasting near-monopoly in the Italian pay-TV market, raised barriers to entry in satellite pay-TV and created a monopolist position in Italy as regards the acquisition of some types of premium programme content (in particular the exclusive rights to certain football matches which take place every year and in which national teams participate, and blockbuster movies). This would have foreclosed third party access to premium content, the driver of pay-TV subscriptions and the key to successful pay-TV operations. The investigation also revealed that the survival of two operators in the pay-TV market in Italy would have been very unlikely.
270. The Commission took due account of the chronic financial difficulties faced by both companies, of the specific features of the Italian market and of the disruption that the possible closure of Stream would cause to Italian pay-TV subscribers. Overall, it was considered that an authorisation of the merger subject to appropriate conditions would be more beneficial to consumers than a prohibition decision followed most probably by the closure of Stream by its owners.
271. The commitments accepted by the Commission aimed at ensuring, in the long term (until 2011), third party access to premium content, the technical platform, the conditional access system and that the combined platform had no involvement in alternative means of transmission. At the same time, an effective system of implementation was put in place with a key role entrusted to the Italian communications regulatory authority.

*DaimlerChrysler/Deutsche Telekom/JV*¹⁶⁰

159 Case COMP/M.2876 *Newscorp/Telepiù*, 2.4.2003.

160 Case COMP/M.2903 *DaimlerChrysler/Deutsche Telekom/JV*, 30.4.2003.

272. On 30 April, the Commission authorised the acquisition of joint control by DaimlerChrysler AG and Deutsche Telekom AG of the newly created joint venture Toll Collect. Toll Collect will establish and operate a system for the collection of road tolls from heavy trucks in Germany which can also be used as a platform to provide telematics services.
273. The Commission found that the formation of the joint venture would lead to a dominant position of DaimlerChrysler on the emerging market for telematics systems for transport and logistics businesses in Germany. Rapid growth was expected for this market.
274. Through its joint control of Toll Collect, DaimlerChrysler, the biggest German truck manufacturer and one of the main players in the market for transport and logistics telematics systems, would control the access of third party services providers to the Toll Collect onboard units. Toll Collect would be the gatekeeper for the provision of telematics services on this platform and DaimlerChrysler would be able to control the conditions of competition in this market. At the same time, the emergence of a predominant standard for onboard units would cause the disappearance of suppliers of telematics systems already in the market.
275. In response to the Commission's competition concerns, the parties undertook to form an independent Telematics Gateway company and to develop a GPS interface for the Toll Collect onboard unit in order to connect it with third party peripherals and a toll collection module to be integrated into third party telematics devices.
276. The Commission found that the commitments package would, while removing its competition concerns and creating a level playing field for all competitors, form a basis for the development of the emerging market for telematics systems and, in particular, be in line with the interests of consumers.

*Verbund/EnergieAllianz*¹⁶¹

277. On 11 June, the Commission approved a merger between the Austrian power company Österreichische Elektrizitätswirtschafts-AG (Verbund) and five Austrian regional power suppliers grouped together as EnergieAllianz, subject to conditions and obligations.
278. The Commission concluded that the deal would have created or strengthened dominant positions held by EnergieAllianz and Verbund in the markets for the supply of electricity to large customers, small distributors and small customers in Austria.
279. The parties' combined share on these markets was high: depending on the class of consumer, it ranged from 50% to 75%. The situation would have been further exacerbated by the disappearance of Verbund as EnergieAllianz's most important existing and potential competitor, by the parties' leading position in power generation, and by existing links with competitors.

161 Case COMP/M.2947 *Verbund/EnergieAllianz*, 11.6.2003.

280. The parties entered into commitments that resolved the Commission's concerns. One of these commitments, the sale of Verbund's controlling stake in APC, its distributor for large customers, had to be completed before the merger took place.
281. The Commission took account of the fact that in the medium term, given the existing conditions in Austria with regard to the degree of market liberalisation and the adequate interconnection capacity to and from Germany, the scheduled entry into force of the new electricity market directive and the regulation on cross-border trade in energy could be expected to lead to a lowering of the barriers to entry. The Commission took note of the fact that the Austrian Minister for Economic Affairs and Labour indicated that he was willing to implement the provisions of the energy market directive concerning legal unbundling immediately.
282. The Commission acted in close and fruitful contact with the Austrian National Competition Authority and the Austrian energy regulator, E-Control. The regulator will supervise the implementation of sections of the commitment package. The decision has been challenged before the Court of First Instance by Wirtschaftskammer Kärnten and Best connect Ampere Strompool.¹⁶²

*DSM/Roche*¹⁶³

283. On 23 July, the Commission cleared the proposed acquisition of the vitamins and fine chemicals division of the Swiss company Roche (RV&FC) by the Dutch company DSM. DSM and RV&FC are active in a broad range of product areas. However, the only overlaps were in feed enzymes, in particular non-starch polysaccharide degrading enzymes (NSP degrading enzymes) and phytase. NSP degrading enzymes help animals release nutrients in their feed. Phytase is an enzyme used to increase the amount of digestible phosphorus in animal feed and to limit pollution by reducing the amount of phosphate in animal manure. DSM and RV&FC belong to two different vertical alliances: DSM has an alliance with BASF and RV&FC with Novozymes, a Danish producer of industrial enzymes.
284. The Commission had identified competition concerns in the market for phytase. The acquisition of RV&FC by DSM would have created a structural link between the two alliances and led to near monopolies in the market for phytase at both the levels of production and distribution.
285. DSM submitted a package of undertakings aimed at terminating its alliance with BASF for the production and distribution of feed enzymes and transferring its activities in the production of feed enzymes to a purchaser to be approved by the Commission. The Commission concluded that the remedies removed the competition concerns and restored effective competition.
286. The Commission cooperated closely with the US Federal Trade Commission, which also reviewed the operation.

*GE/Instrumentarium*¹⁶⁴

162 Case T-350/03.

163 Case COMP/M.2972 *DSM/Roche*, 23.7.2003.

287. On 2 September, the Commission approved, subject to conditions, the acquisition by GE Medical Systems of the Finnish firm Instrumentarium. General Electric (GE) is active globally in several business areas and, through GE Medical Systems, markets a wide range of medical devices including diagnostic imaging equipment (e.g. X-ray machines), electromedical systems (e.g. patient monitors) and IT solutions for hospitals. Instrumentarium is active in the areas of anaesthesia, critical care, and medical imaging technology through the brands Datex-Ohmeda, Ziehm and Spacelabs, a US-based patient monitor manufacturer that it acquired last year.
288. The Commission was concerned that GE and Instrumentarium would hold too high a share of the patient monitoring market, which would have been detrimental for hospitals.
289. The markets concerned have undergone significant consolidation in recent years, as the main players became bigger through the acquisition of smaller manufacturers. The merger further accentuated this trend, by bringing together two of the four leading players in Europe in patient monitors. The transaction removed a particularly close competitor from the market, thereby significantly increasing GE/Instrumentarium's market power in perioperative patient monitors vis-à-vis its customers, i.e. the hospitals.
290. The investigation also raised concerns that GE could in future favour its own critical care and perioperative patient monitors as well as its Clinical Information System by withholding the interface information necessary for competitors' own systems to interface with the anaesthesia delivery systems and other relevant equipment sold by the merged company. This would not be in the interests of hospitals as it would reduce their choice of suppliers and lead to potentially higher prices.
291. GE undertook to sell Instrumentarium's Spacelabs business and to enter into a series of supply agreements with its acquirer as well as to ensure that its anaesthesia equipment, patient monitors and clinical information systems will interoperate with third parties' devices.
292. The Commission cooperated closely with the US Department of Justice in the review of the GE/Instrumentarium case.
- 3.4. Decisions taken under Article 9 of the Merger Regulation
- Electrabel/Intercommunales*¹⁶⁵
293. In 2003, Electrabel notified a series of transactions with a Community dimension pursuant to which it proposed to acquire the electricity and gas supply activities of the regional cooperative utility companies (*intercommunales*).

164 Case COMP/M.3083 *GE/Instrumentarium*, 2.9.2003.

165 Cases COMP/M.3075 *ECS/Intercommunale Iveka*, COMP/M.3076 *ECS/Intercommunale IGAO*, COMP/M.3077 *ECS/Intercommunale Intergem*, COMP/M.3078 *ECS/Intercommunale Gaselwest*, COMP/M.3079 *ECS/Intercommunale Imewo*, COMP/M.3080 *ECS/Intercommunale Iverlek*, all 13.2.2003.

294. In order to implement the liberalisation of the Belgian electricity and gas markets, the *intercommunales* needed to separate their gas and electricity supply activities to eligible customers from their distribution activities. Electrabel Customer Solutions (“ECS”), an affiliate of Suez’s energy division Tractebel, proposed to acquire the supply contracts with eligible customers that have not selected a supplier, thereby becoming their default supplier. In return, the *intercommunales* would acquire a participation in ECS. In Flanders, the proposed operations covered both gas and electricity, whilst the agreements for the Walloon part of Belgium were restricted to electricity. As all contracts with the different *intercommunales* were notified as separate transactions, a number of these operations fell directly within the competence of the Belgian competition authority, which concluded that they would strengthen Electrabel’s dominant position in the market.
295. In order to ensure consistency with its previous decisions, the Belgian competition authorities requested the referral of the cases notified to the Commission. For all cases with a Community dimension, the Commission concluded that the operation could strengthen Electrabel’s already dominant position in the market for the supply of electricity and gas to eligible customers, markets which are national in scope. The Commission also concluded that these transactions would significantly increase the already high barriers to entry faced by competitors of Electrabel in the Belgian electricity and gas markets. Furthermore, these transactions would eliminate the possibility for competitors to become default suppliers, a qualification which in itself significantly enhances the credibility of suppliers in the market. The Commission therefore decided to refer these cases to the competent Belgian authorities. On 4 July, the Belgian Competition Authority authorized the operations (including those referred by the Commission), subject to certain commitments.

*Arla/Express Dairies*¹⁶⁶

296. On 10 June, the Commission decided to refer part of the proposed merger between Danish-based dairy products company Arla Foods and Britain's Express Dairies to the UK competition authorities, to assess the competitive impact on the markets for the supply of processed fresh milk and fresh cream in Britain. On the same day, the Commission cleared the operation as regards the remaining product and geographic markets.
297. The United Kingdom asked the Commission to refer the examination of certain parts of the case to its competition authorities, namely the markets for the procurement of raw milk in the UK, the supply of fresh processed milk in Great Britain and the supply of fresh potted cream (non-bulk cream) in the UK. The UK authorities also asked for referral of the market for bottled milk (primarily supplied to milkmen) in certain areas in England, where they considered that the transaction might affect competition.
298. The Commission considered that the operation would raise potential competition concerns which could be better dealt with by the British competition authorities in the markets for the supply of fresh milk, fresh non-bulk cream and for the supply of bottled milk. However, the Commission did not identify any competition concerns in

166 Case COMP/M.3130-*Arla/Express Dairies*.

the market for the procurement of raw milk, on the basis of single or collective dominance. It therefore rejected this part of the request and cleared the proposed transaction with regard to this market and the markets for which no referral had been requested.

*Lagardère/Natexis/VUP*¹⁶⁷

299. On 14 May, the French authorities lodged an application requesting that the planned acquisition of Vivendi Universal Publishing (VUP) by the French conglomerate Lagardère be referred to them. The operation involved the two largest publishers in France.
300. The French authorities considered that the transaction threatened to create dominant positions in France in a number of markets forming part of the "book chain" (markets for the acquisition of authors' rights, publishing and distribution). They therefore requested a partial referral of the merger so as to be able to analyse the impact of the transaction in France on these various markets.
301. The Commission concluded that most of the markets were of supranational geographical dimension, covering the whole of the French-speaking area in Europe, and could therefore not be subject to referral.
302. As far as the markets for the sale of schoolbooks and other textbooks are concerned, the Commission found that the first of these two markets was a separate national market, as the French authorities claimed (notably because of the existence of national educational programmes). However, the Commission was unable to decide on the geographical dimension of the second of the two markets. Given the substantial overlap between these two markets and all the other activities forming part of the parties' operations in the book chain, the Commission took the view that a single authority should examine the impact of the transaction on all the relevant markets. In reaching its decision, the Commission took account of the Lagardère group's preference for dealing with a single competition authority, particularly as only the market for the sale of schoolbooks was referred to the French authorities. Lastly, the Belgian authorities informed the Commission that they preferred the case to be dealt with at Community level. On 23 July, the Commission therefore adopted a decision refusing the request of the French authorities for the partial referral of the case.

*BAT/Tabacchi Italiani*¹⁶⁸

303. On 23 October, the Commission decided to refer to the Italian competition authorities the examination of the proposed acquisition of the Italian tobacco company Ente Tabacchi Italiani (ETI) by British American Tobacco (BAT).
304. BAT is an international tobacco company active in the manufacture, marketing and sale of cigarettes and other tobacco products on a global scale. ETI is a public stock company active in the manufacture, marketing and sale of tobacco products in Italy.

167 Case COMP/M.2978-Lagardère/Natexis/VUP.

168 Case COMP/M.3248-BAT/Tabacchi Italiani, 23.10.2003.

Its wholly owned subsidiary, Etinera SpA (Etinera), distributes these products in Italy.

- 305. The transaction constituted the final step in the privatisation of ETI by the Italian Government. BAT, along with two commercial partners, Axiter SpA and FB Group Srl, was selected as the preferred bidder for ETI.
- 306. ETI is the second-largest tobacco company in Italy after Philip Morris. After the merger, BAT would be the leader for the low-price segment of the market.
- 307. The Italian competition authority asked the Commission to refer the examination of the case to it. The Commission concluded that the request was well founded in that it coincided with the Commission's own preliminary finding that the increased level of industry concentration and the elimination of a vigorous player from the market could create or strengthen a dominant position in the tobacco markets in Italy.

4. COURT JUDGMENTS IN 2003

*Philips and BaByliss v Commission*¹⁶⁹

- 308. On 3 April, the Court of First Instance (CFI) delivered judgments in respect of two parallel applications by BaByliss and Philips for annulment of Commission decisions dated 8 January 2002 to conditionally approve under Article 6(2) and partially refer under Article 9(2)(a) of the Merger Regulation the acquisition by SEB, a French manufacturer of household electrical appliances, of its direct competitor, Moulinex. These judgments broadly upheld the substance of both Commission decisions and annulled the clearance decision in so far as it concerned five Member States (Spain, Finland, Ireland, Italy and the United Kingdom).
- 309. Philips had requested annulment of the conditional clearance decision and the referral decision whilst BaByliss sought annulment only of the conditional clearance decision. The CFI dismissed the application by Philips and upheld the application by BaByliss in so far as it related to Spain, Finland, Ireland, Italy and the United Kingdom.

Acceptance of amendments to commitments after the three-week deadline

- 310. The CFI dismissed the applicants' plea that the Commission was not entitled to accept amendments to the initial package of commitments submitted by the parties once the three-week deadline for commitments had expired. The CFI ruled that the amendments in question were merely improvements to the commitments initially proposed. If the Commission considers that it has sufficient time to examine late amendments and to carry out the necessary investigations, it must be in a position to clear the concentration even if such modifications are made after the deadline. Nevertheless, the CFI observed that the Commission must respect the terms of the Commission Notice on remedies acceptable under the Merger Regulation, by

169 Case T-114/02 *BaByliss v Commission*; Case T-117119/02 *Royal Philips Electronics N.V. v Commission*.

ensuring that any modifications to the various drafts of the commitments are limited to minor amendments.

Commitments sufficient in respect of geographic markets in which they were proposed

311. The applicants challenged the commitment to license the Moulinex trademark for a limited duration on the basis that it was not suited to removing the competition concerns identified. The CFI ruled that there is nothing to exclude a priori that a behavioural remedy such as a trademark licensing may be sufficient to resolve the competition concerns posed by a concentration. In view of the importance of trademarks in the markets in question, the CFI upheld the Commission's reasoning that the commitment was appropriate and proportionate. Similarly, the CFI held that the five-year licence followed by an additional three-year blackout on the reintroduction of the Moulinex trademark was sufficient. The CFI also held the Commission was correct to extend the licence for the Moulinex trademark to all categories of small electrical appliances even though serious doubts were raised in respect of only one category of product. The CFI thereby confirmed the validity of the Commission's analysis of the portfolio effects of the concentration on the relevant markets where the brand is the most important competitive element and the reputation of the brand benefits all of the products.

Serious doubts could not be ruled out in geographic markets where commitments were not proposed

312. BaByliss raised a plea that the Commission did not require commitments in some markets (Italy, Spain, Finland, the United Kingdom and Ireland) in which the concentration gave rise to serious competition concerns.
313. The CFI recalled that the Commission's decision followed a four-stage analysis. First, the Commission examined whether the new entity would have combined market shares exceeding 40% in each product market. Secondly, it considered serious doubts could be excluded where there were no significant overlaps or thirdly, when competitors had a significant presence. Fourthly, it considered that serious doubts could also be excluded when the product market in question was of little importance in relation to all small household electrical appliances of the combined entity because in that case retailers would have countervailing buyer power (an inverse portfolio effect).
314. With respect to the first step, the CFI did not object to the Commission's finding that a combined market share of 40% may indicate serious doubts in the individual markets concerned, subject to the examination of other factors. Regarding the second step, the CFI confirmed that serious doubts could be ruled out where overlaps were really non-significant. However, the CFI emphasised that markets with non-significant overlaps, but where the parties already have high market shares before the merger, should also be taken into account in the assessment of any portfolio effects. As to the third step, the CFI noted that, in the markets in which serious doubts had been raised, the presence of competitors could only exclude such serious doubts if these competitors had sufficiently strong market positions in order to be able to represent an actual counterbalance to the merging parties.

315. The CFI disagreed with the fourth step in the Commission's analysis. It did not follow the Commission's conclusion that, when the product markets in which the parties held strong positions were of little importance in relation to all small household electrical appliances of the combined entity, any abusive behaviour in any of the markets in which there was dominance could be punished by fewer purchases of SEB-Moulinex products in other markets. The CFI found that the Commission had not established that retailers would behave in the manner described and not simply pass on the price increases to end-consumers. The CFI also pointed out that the punishment by retailers of any abuse by the new entity merely indicates that retailers may be in a position to prevent SEB-Moulinex from abusing its position. However, the Merger Regulation aims to prohibit not the abuse of a dominant position, but the creation or strengthening of such a position. The CFI therefore held that the Commission's analysis in the decision did not enable it to exclude that serious doubts existed in Finland, Spain, Italy, the United Kingdom and Ireland.

Article 9 referral

316. The CFI ruled that Philips's application was admissible on the ground that the Article 9 reference decision was likely to produce direct and automatic legal effects for Philips, the main competitor of SEB-Moulinex in France. The referral decision affects the legal rights of Philips by depriving it of the possibility of participating in the Commission's investigation under the procedure laid down in Article 18(4) of the Merger Regulation in the event of the investigation proceeding to the second phase. It deprived such third parties of the right under the EC Treaty to challenge the Commission's decision before the CFI.

Partial referral to the French authorities

317. Philips argued that the Commission's referral violated the principles of Article 9 of the Merger Regulation and contradicted its previous practice in respect of referrals.
318. The CFI ruled that the two conditions of Article 9(2)(a) were satisfied in this case, recalling that the conditions laid down by that article are cumulative, are of a legal character and must be interpreted on the basis of objective elements. The existence of high market shares, significant barriers to entry and the pre-eminence of the major distribution channels were sufficient to establish that the French market was structurally different and separate from other markets. The CFI then examined whether the Commission was correct to partially refer the case to the French authorities. It stressed that Article 9(3)(a) of the Merger Regulation confers a broad margin of discretion in deciding whether or not to refer the examination of a concentration. However, this discretion is not unlimited. The Commission cannot decide to make a referral if, when the Member State's request for referral is examined, it is clear on the basis of a body of precise and coherent evidence that such a referral cannot safeguard or restore effective competition in the relevant markets. In this case, the CFI found that the Commission could reasonably consider the French authorities would adopt measures making it possible to preserve or restore effective competition and that it had therefore acted in accordance with the provisions of Article 9(3).

319. The CFI rejected the plea that the Commission had not observed its previous decisional practice as without relevance since the reference in question was within the terms of Article 9.
320. Following the CFI's judgment, the Commission conducted a detailed investigation of each relevant market required by the judgment and concluded that the transaction did not give rise to competition concerns, in particular in relation to the portfolio effect. On 11 November, the transaction was cleared without commitments.

*Petrolessence SA, Société de gestion de restauration routière SA v Commission*¹⁷⁰

321. On 3 April 2003, the Court of First Instance (CFI) dismissed an action for annulment of the Commission's decision of 13 September 2000 rejecting Mirabellier as a suitable purchaser of six petrol stations on French motorways. These petrol stations had to be divested by TotalFina/Elf (TFE) as a consequence of commitments made in the context of the acquisition by TotalFina of control over Elf¹⁷¹, which the Commission cleared pursuant to Article 8(2) of the Merger Regulation on 9 February 2000. The Commission found that, in the absence of these commitments, the merger raised serious competition concerns *inter alia* in the market for the retail sale of petrol on French motorways.
322. In the contested decision, the Commission had taken the view that Mirabellier - which was one of a number of buyers proposed by the merging parties - did not fulfil one of the criteria set forth in the commitments, namely that of being capable of maintaining or developing effective competition. The subsequent buyer proposal of the merging parties did not include Mirabellier and was accepted by the Commission.

Admissibility

323. The applicants (Petrolessence, SG2, companies of the relevant group one of them conducting the "Mirabellier" business) challenged the decision rejecting Mirabellier as appropriate purchasers. The CFI held that the decision to reject a proposal of the merging parties for a set of buyers modifies the legal position of those buyers. It found that the rejection was a decision which modified the legal position of the purchaser (Mirabellier).
324. The CFI rejected the application, confirming that the Commission had made no error in its assessment of the buyer proposed with regard to the criteria of the commitments. In this context the CFI dismissed the applicants' submission that, in referring to Mirabellier's position as a new entrant without recent experience in the relevant retail market, the Commission had applied a purchaser requirement not specified in the commitments. It also confirmed the other elements of the Commission's appraisal.
325. In this context, the CFI recalled that, according to established case law and in the light of the substantive rules of the Merger Regulation (in particular Article 2), the Commission has a certain discretionary power, notably concerning appraisals of an economic nature. Consequently the review by the Community Courts of the exercise

170 Case T-342/00 *Petrolessence SA, Société de gestion de restauration Routière SA v Commission*.

171 Case COMP/M.1628 *TotalFina/Elf Aquitaine*, 9.2.2002.

of such a power, which is essential in the application of the rules in the field of mergers, must be exercised taking account of the discretionary margin necessary for the economic assessment of concentrations. It followed that the judicial review of complex economic appraisals conducted by the Commission in the exercise of the discretionary power conferred by the Merger Regulation must be limited to the verification of the respect of procedural rules and of the duty to state reasons, as well as to the objective accuracy of the facts, and the absence of manifest errors of appraisal and any misuse of power.

*Verband der freien Rohrwerke v Commission*¹⁷²

326. On 8 July, the Court of First Instance (CFI) rejected a request by a third party for the annulment of the Commission decisions clearing the acquisition by German steel manufacturer Salzgitter AG (Salzgitter) of Mannesmannroehren-Werke AG (MRW).

The Commission decisions

327. By two decisions of 5 September 2000, pursuant to Article 6(1)(b) of the Merger Regulation (the "EC decision") and of 14 September 2000 taken under Article 66 of the ECSC Treaty (the "ECSC decision")¹⁷³, the Commission cleared the acquisition by Salzgitter of MRW. Salzgitter is an integrated steel producer which makes and distributes a wide range of products, including large diameter spirally welded pipe. MRW is engaged in the production of steel tubes and pipes of the feedstock for such products.
328. The operation presented overlaps in the production of semi-finished products, but the Commission found no competition problems due to the relatively low market shares of the parties in the EEA-wide steel and tube markets and the existence of overcapacity in the industry. A number of smaller manufacturers of large diameter tubes who purchased raw materials from Salzgitter having raised concerns that after the operation they may not be able to source their requirements from the merged entity on competitive terms, Salzgitter declared that it would continue to provide quarto plate and hot rolled wide strip (raw materials necessary to manufacture tubes) on non-discriminatory terms in order to allay these fears. The ECSC decision took note of this declaration.
329. The appeal was submitted by two small German tube manufacturers and a trade association. In essence the applicants submitted that the Commission's decisions did not sufficiently address the alleged horizontal and vertical issues of the concentration, in particular Salzgitter's alleged capability and incentive to discriminate against independent tube manufacturers to favour MRW's tube production.
330. The CFI upheld the Commission's conclusions as to the product and geographic scope of the market for hot rolled wide strip and concluded that the Commission did not commit any manifest error in assessing the effects of the concentration on the market for large diameter pipes. With regard to the market for smaller diameter

172 Case T-374/00 *Verband der freien Rohrwerke e.V. v Commission*.

173 Case COMP/M.2045 *Salzgitter/Mannesmannroehren-Werke*, 5.9.2000, and Case COMP/ECSC.1336 *Salzgitter/Mannesmannroehren-Werke*, 14.9.2000.

pipes, the CFI rejected the applicants' plea that the Commission had not sufficiently analysed the effects of the concentration on this market, since there was neither a horizontal overlap nor a significant position of the merged entity in the upstream market for hot rolled wide strip.

331. The CFI also rejected the plea of the applicants that the Commission should have examined the fact that, following the operation, Salzgitter jointly with Usinor/DH would control Europipe, a manufacturer of large diameter pipes made from quarto plate and hot rolled strip, and jointly with TKS controls HKM, a producer of crude steel, slabs and quarto plate. The CFI stated that, since the operation had been notified to the Commission under the Merger Regulation, in the absence of any evidence of actual coordination between the parent companies of both Europipe and HKM the Commission was under no obligation to analyse such effects under Article 81 of the EC Treaty.

*Schlüsselverlag J. S. Moser v Commission*¹⁷⁴

332. On 25 September, the Court of Justice (ECJ) delivered its judgment on an appeal brought by Schlüsselverlag J. S. Moser and Others (Moser) against the order of the Court of First Instance (CFI) dismissing an action for failure to act in respect of the Commission's refusal to examine a concentration without a Community dimension¹⁷⁵.
333. The applicants are active in the Austrian press sector and direct competitors of the merging parties. In 2001, they had complained to the Commission about the acquisition of Kurier-Magazine Verlags GmbH by Verlagsgruppe News GmbH (Bertelsmann group), contending that the Commission should have examined the concentration¹⁷⁶ owing to its alleged Community dimension.
334. On 12 July 2001, the Director of the Merger Task Force had informed the applicants that the concentration lacked a Community dimension because the relevant turnover thresholds were not reached and confirmed his view on 3 September 2001. These two letters had contained a disclaimer that the views expressed were those of the Merger Task Force and did not bind the Commission. His third letter had again confirmed this view but had contained no such disclaimer. The CFI had found that the applicants' interest in bringing an action for failure to act had ceased, on the basis that the Commission had by the last letter adopted its final position on the complaint and thus the action for failure to act was inadmissible.

The Commission's obligations regarding complaints in merger proceedings

335. The ECJ upheld the order of the CFI and took the opportunity to clarify the Commission's obligations regarding complaints in merger proceedings. First, the ECJ ruled that the Commission cannot refrain from taking account of complaints from undertakings that are not party to a concentration capable of having a Community dimension. It considered that the implementation of such a transaction for the benefit of undertakings in competition with the complainants is likely to bring

174 Case C-170/02 P *Schlüsselverlag J. S. Moser GmbH and Others v Commission*.

175 Case T-3/02 *Schlüsselverlag J. S. Moser GmbH and Others v Commission*.

176 Approved by the competent national court (OLG Wien) on 26.1.2001.

about an immediate change in the complainants' situation in the market or markets concerned. In the ECJ's view, this is one of the reasons why Article 18 of the Merger Regulation provides that interested third parties are entitled to be heard by the Commission.

336. Furthermore, the Commission cannot maintain that it is not required to take a decision on the question of its competence as supervising authority, when it is exclusively responsible, pursuant to Article 21 of the Merger Regulation, for taking the decisions provided for by that regulation. If the Commission were to refuse to adjudicate formally, at the request of third party undertakings, as to whether a concentration which has not been notified falls within the scope of the Merger Regulation, it would make it impossible for such undertakings to take advantage of the procedural guarantees afforded to them by Community legislation. The Commission would, at the same time, deprive itself of a means of checking that undertakings that are parties to a concentration with a Community dimension properly comply with their obligation to notify. Furthermore, complaining undertakings would not be in a position to challenge the Commission's refusal to assess a concentration where such refusal is likely to harm their interests.
337. Finally, the ECJ ruled that, in the interest of sound administration, the Commission has an obligation to undertake a thorough and impartial examination of the complaints it receives. It considered that the fact that complainants under the Merger Regulation do not have the right to have their complaints investigated in the same way as complainants under Regulation 17/62 does not mean that the Commission is not required to decide whether or not a concentration falls within its competence and to draw the necessary conclusions.
338. The ECJ held that parties who wish to challenge the competence of national authorities to examine a concentration owing to its Community dimension must complain to the Commission within a reasonable period of time. It based this requirement on the need to ensure legal certainty for businesses and procedural certainty under the Merger Regulation. In this case, the ECJ considered the complaint to have been lodged out of time.

*Sogecable/Canalsatélite Digital/Vía Digital v Commission*¹⁷⁷

339. On 30 September, the Court of First instance (CFI) rejected two applications made by Spanish cable operators (Aunacable and others) for annulment of the Commission decision of 14 August 2002 to refer - pursuant to Article 9 of the Merger Regulation - the appraisal of the concentration between Sogecable SA and Vía Digital to the Spanish competition authority ("the referral decision").
340. Sogecable is a pay-TV operator (via Canal+ and Canalsatélite Digital) jointly controlled by Prisa (a Spanish media group) and Groupe Canal+ (Vivendi). It runs an analogue pay-TV channel (Canal+) and a platform for digital satellite TV (Canalsatélite Digital). It provides technical services and is active in the production/sale/distribution of thematic TV channels and of films, as well as in the acquisition and sale of sports rights. Vía Digital is the second multi-channel pay-TV

177 Joined Cases T-346 and T-347/02 *Sogecable/Canalsatélite Digital/Vía Digital v Commission*.

operator in Spain and is controlled by Telefónica (the incumbent Spanish telecommunications operator). The Commission referred the entire case to Spain following a request to that effect.

Admissibility

341. The CFI ruled that, although the referral decision did not affect the competitive position of the applicants since only the decision of the Spanish competition authority could have such an effect, they were directly and individually affected by the referral decision. This was due to the fact that a referral decision deprives them of their legal rights to participate as third parties in the Commission's review under Article 18(4) of the Merger Regulation and to launch an appeal before the CFI.

Distinct market/distinct geographic market

342. The applicants claimed that the second condition of Article 9(2) of the Merger Regulation had not been met on the ground that the product markets identified in the contested decision did not constitute markets within a Member State that showed the characteristics of being a distinct market. According to the applicants, in order to make a finding of a "distinct market", it is necessary that the market in question differs from other markets not only on the basis that it constitutes a separate geographic market, but also because it is characterised by a structure of competition different from that existing in other Member States. The applicants argued that the pay-TV, TV rights and telecommunication markets concerned were broader than national. This was allegedly illustrated *inter alia* by the fact that Canal+ was active in several Member States and that the competitive structure was very similar in different geographical areas.
343. The CFI rejected this interpretation of Article 9(2), holding that the concept of distinct market must be understood as referring to a different product and geographic market pursuant to Article 9(7) of the Merger Regulation. On this basis, the CFI held that it was not relevant whether certain structural elements of the markets concerned are also present in other geographical areas. For a referral, it is sufficient to show that the conditions of competition in the area in which the undertakings concerned are involved in the supply of goods or services are not homogenous and that, in particular, consumer preferences and certain barriers to entry limit that market to the territory of a particular Member State. The fact that an undertaking is active in various Member States does not automatically mean that the markets in which the undertaking is active have a geographic dimension exceeding the territory of a particular Member State.
344. The CFI also dismissed the plea that the Commission should in its referral decision have analysed all markets mentioned in the notification and in the referral request of the Member State. The CFI noted that some of the markets identified in the notification were not affected markets and that the Commission's referral decision indicated that, for certain markets identified in the referral request, the threat of the creation or strengthening of a dominant position could be ruled out.
345. The CFI confirmed that the Commission's power to refer a concentration pursuant to Article 9(3)(a) of the Merger Regulation is only limited if, at the time of the examination of the referral request, it is clear on the basis of a body of precise and

coherent evidence that referral cannot safeguard or restore effective competition. The CFI considered that, given that the Spanish authorities had specific legislation for dealing with the concentration concerned, the Commission acted reasonably in considering that the referral to Spain would preserve and not threaten effective competition.

346. The CFI also rejected the applicants' plea that the referral deviated from the Commission's previous practice concerning cases in the media sector. These cases had no relevance for the legality of the referral in question, as each referral has to be examined on its own merits in the light of Article 9 of the Merger Regulation.

"Blank referral"

347. Referring to established case law, the CFI pointed out that the operative part of a decision is inseparable from the reasons upon which it is based. Having set out in the decision its reasons for finding that in each of the relevant (Spanish) markets the operation threatened to create or strengthen a dominant position which would impede effective competition, the Commission was not required to repeat this analysis in the operative part, particularly where the case was referred in its entirety. A partial referral may have required some clarification about which markets should be analysed.

348. Concerning the alleged absence of instructions to the Spanish authorities, the CFI held that these were implicit in Article 9 of the Merger Regulation and in Article 1 of the referral decision. Article 9(8) provides that the Member State concerned may take only the measures strictly necessary to safeguard or restore effective competition. This means that the national authority in question must take such measures.

*ARD v Commission*¹⁷⁸

349. On 30 September, the Court of First Instance (CFI) delivered a judgment fully upholding the Commission decision clearing the change of the (former) German pay-TV operator KirchPayTV from sole control (by Kirch Holding) to joint control (by Kirch Holding and the British pay-TV operator BSkyB). This decision, which had been taken in Phase I, was subject to commitments¹⁷⁹.

The Commission decision

350. The Commission found competition concerns in the market for German pay-TV and in the emerging market for digital interactive TV services. In the German pay-TV market, it considered that, since BSkyB was not likely to enter the German pay-TV market in the short to medium term, the elimination of BSkyB as a potential competitor was not an issue. However, it considered that the proposed operation, via the influx of additional financial resources and know-how provided by BSkyB, would have strengthened KirchPayTV's dominant position in that market by increasing the already high barriers to entry. The concentration would have given rise to the creation of a dominant, if not monopoly, position for KirchPayTV in the emerging market for digital interactive TV services.

178 Case T-158/00 *ARD v Commission*.

179 Case COMP/JV.37 *BSkyB/KirchPayTV*, 21.3.2000.

351. A range of commitments were given by the notifying parties which eliminated the competition concerns raised by the Commission with respect to the German markets for pay-TV and digital interactive services. These commitments sought to grant third party access to Kirch's technical platform, in particular to Kirch's d-box decoders, and to facilitate the creation of platforms competing with Kirch by granting third party access to Kirch's pay-TV services. The commitments thereby lowered the barriers to entry in the pay-TV market and prevented KirchPayTV from leveraging its dominance in that market into the market for digital interactive television services.

The judgment of the CFI

352. The Commission decision and its acceptance of the commitments were challenged by ARD, an association of German public service broadcasters, on five grounds. First, ARD argued that the Commission had wrongly assessed the concentration under Article 2(3) and (4) of the Merger Regulation in so far as the Commission came to the conclusion that the concentration would not lead to the elimination of potential competition on the basis that BSKyB was not likely to enter the pay-TV market in Germany in the short to medium term. Second, ARD alleged a violation of Article 6(2) of the Merger Regulation since only concentrations for which the competition problem is readily identifiable (as set forth in the eighth recital to the Regulation 1310/97) and which can easily be remedied may be cleared in Phase I. In this respect, ARD claimed that the Commission had previously prohibited three mergers in the German pay-TV market involving KirchPayTV, which allegedly proved that the competition problems were neither limited nor easy to remedy. Third, ARD submitted that the undertakings were not suited to solving the competition problems. In this regard, it claimed that the commitments were purely behavioural in nature and only reiterated the legal duty of dominant companies under Article 82 of the EC Treaty. Fourth, ARD argued that the failure to open Phase II proceedings was a procedural error since only concentrations where the competition problem is readily identifiable and can easily be remedied may be cleared in Phase I. Last, it was argued that ARD's rights as a third party were violated since modified commitments were accepted at such a late stage that ARD was unable to adequately present its views.
353. The CFI rejected the first claim since, despite KirchPayTV's financial weakness, absent the proposed transaction, BSKyB could not be considered a potential competitor in the German pay-TV market due to the barriers to entry.
354. Regarding ARD's second claim, the CFI took the view that there are two different questions to answer. The first question is whether the Commission may only clear transactions in phase I where the competition problem is readily identifiable and may be easily remedied, as indicated in the eighth recital to the Regulation 1310/97. The second question is whether the competition problem in question could be seen as clear-cut and straightforward to remedy. The CFI only took a view on the second question and stated that the fact that the Commission had previously prohibited three similar mergers in the German pay-TV market involving KirchPayTV was not sufficient to prove that competition problems in the transaction in question were neither limited nor easy to remedy. In this respect, the CFI emphasised that the previous prohibition decisions concerned different parties and different competition problems.

355. With respect to ARD's third claim, the CFI took the view that, although the commitments were of a more behavioural nature, they were of a structural character since they were intended to solve a structural problem, namely the problem of third party market entry. Therefore, the commitments could not be seen as merely behavioural commitments which were not suited to solving the competition problems identified by the Commission. Moreover, the CFI held that the commitments created added value compared with a mere commitment not to abuse a dominant position under Article 82 of the Treaty.
356. The CFI rejected ARD's fourth claim based on its reasoning regarding the second and third claim. As to ARD's fifth claim, the CFI took the view that ARD had been sufficiently involved in the procedure. ARD had received a questionnaire and had presented its view of the operation in its reply thereto. A meeting between ARD and the case team had been held in Brussels. ARD had been involved in the first market tests of the original proposal and of the first modified proposal. With respect to the second modified (final) proposal, the CFI took the view that the modified and final proposals contained only minor modifications which could be accepted by the Commission even after the expiry of the three-week deadline.

5. INTERNATIONAL COOPERATION

5.1. International Competition Network (ICN)

357. The Commission has been actively participating in the ICN's Working Group on multi-jurisdictional merger control since it was set up at the end of 2001. The Working Group's activities have been in three different sub-groups: one on investigative techniques in merger investigations, one on the analytical framework underlying merger control, and one on notification and procedures in merger control regimes. A number of private sector organisations and individuals are contributing to the work of these sub-groups. The Commission is an active participant in all three sub-groups. The basic aim is to find areas of merger control activity in relation to which best practice could be promoted, thereby reducing regulatory cost and overcoming obstacles to a mutual understanding of merger policy between jurisdictions.

The Notification and Procedures Sub-Group

358. The purpose of this sub-group is threefold: to enhance each jurisdiction's effectiveness, to facilitate convergence, and to reduce the public and private burden of multi-jurisdictional merger control. To that end, the sub-group and its private sector advisors have compiled an inventory of merger control laws and are 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 2002.
359. It is intended that the guiding principles should be fully fleshed out in a comprehensive set of best practice recommendations ("recommended practices"). The ICN membership has to date adopted seven recommended practices covering the following areas: (1) nexus between the transaction's effects and the reviewing

jurisdiction; (2) notification thresholds; (3) the timing of merger notification. These three recommended practices were adopted by the first annual conference which took place last year in Naples. Four new recommended practices were adopted this year by the membership of the ICN at the Merida conference in June. They cover the following topics: (4) review periods (i.e. the duration of investigations); (5) requirements for initial notification (i.e. what information notifying parties are required to provide to agencies "up front"); (6) transparency (i.e. how an agency communicates the reasons for its enforcement action/non-action); (7) review of merger control provisions (i.e. periodic review of merger control legislation, procedures, etc.).

360. The sub-group is working actively on four further recommended practices covering confidentiality, procedural fairness, conduct of merger investigations and interagency co-operation. It is also looking at ways in which to promote implementation and/or conformity with the guiding principles (adopted in Naples in 2002) and the recommended practices.

The Investigative Techniques Sub-Group

361. 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.
362. The subgroup on investigative techniques presented three reports to the 2003 Annual Conference, namely an analysis of the investigative tools applied in various jurisdictions, a report on developing reliable evidence, and a report on the role of economists and econometric data in merger cases. DG COMP was responsible for drafting the first report and made substantial contributions to the other two projects.

The Analytical Framework Sub-Group

363. This subgroup is focusing 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 gathered on the substantive standard applied in each member jurisdiction, including information on enforcement guidelines or other interpretative material. An in-depth study has been made of the impact of different standards in four different jurisdictions (Australia, South Africa, Germany and the US).
364. This year, the sub-group undertook an analysis of the merger guidelines of a number of jurisdictions (including the EU's draft guidelines on horizontal mergers) with the help of private sector advisers. Five papers have been produced, on: (i) market definition, (ii) unilateral effects, (iii) coordinated effects, (iv) barriers to entry and expansion, and (v) efficiencies, which were presented together with an overview paper drawing some conclusions at the annual conference. DG COMP contributed to the drafting of all these papers.

6. STATISTICS

Figure 4

Number of final decisions adopted each year since 1997 and number of notifications

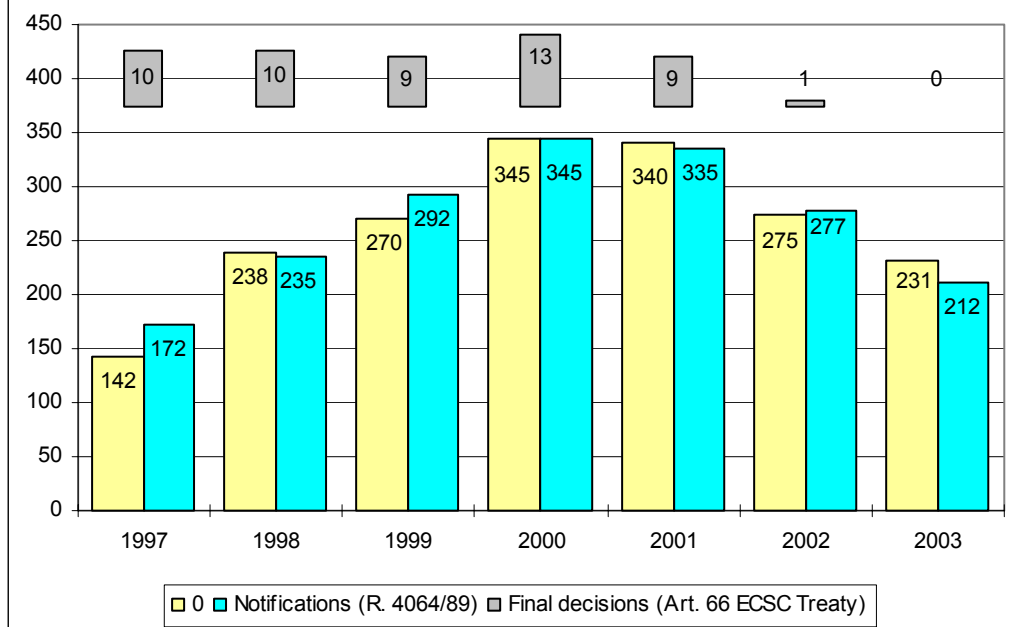
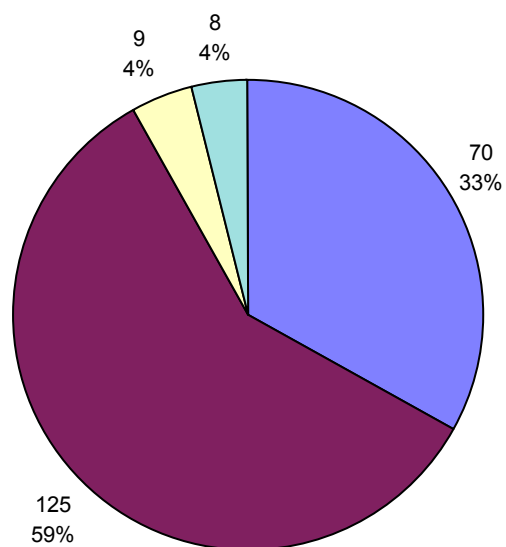


Figure 5

Breakdown by type of operation (1994-2003)



III – State aid

A - GENERAL POLICY

INTRODUCTION

365. The control of state aid focuses on the effects on competition of aid measures granted by Member States to undertakings. The objective is to ensure that government interventions do not interfere with the smooth functioning of the internal market, to foster competition and competitive markets throughout the Community, and to enhance structural reforms. Particular attention is given to ensuring that the proven beneficial effects of liberalisation are not undermined by state aid measures. In line with the policy objectives set out in the Stockholm European Council conclusions, Member States will have to continue their efforts to reduce the general level of state aid, expressed as a percentage of their respective gross domestic product (GDP), while redirecting aid towards horizontal objectives of Community interest, such as 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.
366. State aid control is exercised through the implementation of regulatory instruments. These may take the form of legal instruments binding both on the Commission and on Member States or of soft law texts binding only on the Commission, such as guidelines, frameworks or communications. Regulations lay down the procedures for the notification and assessment of aid and exempt certain non-problematic types of aid from notification. Certain specific texts also set out the state aid rules applicable to particular sectors (e.g. shipbuilding). Soft law texts endeavour to clarify the criteria upon which the Commission bases its assessment in specific areas.
367. The Commission monitors, moreover, the recovery of unlawful aid by Member States, as well as aid measures which are exempted from notification, on the basis of specific legal instruments. 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

368. A substantial reform project to improve and modernise the state aid rules, both on the procedural and the substantive side, has progressed considerably and is expected to be finalised before enlargement takes place so that the new rules can be applied in all 25 Member States as of the date of enlargement.
369. As regards the procedural side, one of the main purposes of the “modernisation package” is to streamline and simplify the procedures concerning notification and reporting by Member States while enhancing transparency and legal certainty. The objective is thus to free the process of examining state aid measures from

unnecessary procedural burden, thereby facilitating rapid decisions, when feasible. Moreover, through the notification forms, Member States should be given clearer indications as to the type of information the Commission needs in order to properly assess the different aid measures. This is expected to accelerate the review process since it will avoid the need for the Commission to request supplementary information from the Member State concerned.

370. The reform aims also at major improvements in the cooperation with Member States, by encouraging greater dialogue and exchange of information, as well as by raising awareness of state aid issues among regional, local and national authorities and the national judiciary. At the same time, efforts will be undertaken to put state aid control in the context of the broader range of Community policies, in particular the economic reform agenda. Light, predictable and transparent procedures as well as more economically sound and robust criteria for the assessment of state aid measures should be the result of the reform process undertaken.

Box 7: The significant impact test

During 2003, DG Competition conducted an intensive internal discussion on how to identify aid which is unlikely to produce significant effects on competition while maintaining strict control of more distortive aid. It seems reasonable that priority should be given to cases where other Member States are more likely to be negatively affected.

As a result of this discussion, two complementary instruments are envisaged. The first instrument is based primarily on the limited amount of aid involved and the objectives of the aid. It starts from the premiss that, other things being equal, the smaller the amount of aid, the smaller the distortion of competition which is likely to result. If the aid amount is sufficiently small, this might be enough to qualify an aid measure as being “of less concern”. The second instrument is based more on sectoral considerations, and tries to single out activities where trade between Member States is more limited. Indeed, sectors producing non-tradable goods and services would not directly shift production away from other Member States. It might, however, prevent the establishment of foreign competitors. This risk can be reduced by ensuring that aid is awarded on non-discriminatory terms. Additional conditions are set in order to prevent individual players within a sector from unduly benefiting from aid.

Transparency

371. In an integrated market like the internal market, it is obvious that the commonly agreed objective of modernising the economy can only be reached 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 they were first created in 2001.

Development of statistical tools

372. Member States are obliged to provide statistics and detailed information on their state aid schemes. As part of the reform of the procedural regulation, a Commission proposal is currently being adopted for a standardised reporting format for annual reporting on the application of all existing aid schemes and individual aid awards. This reporting format will enable the Commission to receive accurate information

from Member States about the types and amounts of aid being granted in order to form a general view of the effects of different types of aid on competition.

State aid scoreboard

373. As part of the drive to make the EU the most competitive and dynamic knowledge-based economy in the world, the Lisbon European Council in March 2000 requested the Council, Commission and Member States to continue their efforts to reduce the general level of state aid. Indications are that most Member States have taken steps to ensure that these commitments to reduce and redirect aid are being met. The overall volume of state aid in the 15 Member States, as a percentage of GDP, continues to decline: in 2002, the total amount of aid granted was EUR 49 billion, equivalent to 0,56% of GDP, compared with EUR 60 billion in 1998.
374. In November 2002, the Competitiveness Council adopted a further set of conclusions on an economic approach towards less and better state aid. The thrust of the conclusions is to develop a broader economic analysis of the effects of state aid by encouraging greater dialogue and exchange of information between Member States. The latter have been invited, among other things, to consider whether intervention in the form of state aid is the most appropriate and effective way to address market failures. The Commission's progress report to the Council in 2002 on the reduction of aid included a formal request to Member States to send a contribution indicating the actions they have undertaken to follow up the various conclusions on state aid.
375. The autumn 2003 edition of the scoreboard summarises the contributions received from 13 Member States. It also looks at one of the most distortive types of state aid, namely aid for rescuing and restructuring firms in difficulty, and at recent developments in the Commission's state aid reform programme. The spring 2004 scoreboard update provides an overview of the state aid situation in the Union and examines the underlying trends based on the latest available data (2002). In addition to these editions, a permanent online scoreboard consisting of a series of key indicators, statistical information and a Member State forum was launched in 2002.
376. In dealing with individual cases, the Commission has recently taken a more economics-based approach in its state aid policy. It has reoriented its state aid policy towards cases and issues of significance for the further development of the internal market. Thus, cases such as the state guarantees for German, Austrian and French public banks, capital transfers to *Landesbanken* in Germany, Deutsche Post, the unlimited state guarantee for EdF or the "shareholder's advance" in favour of France Télécom were high on the Commission's agenda in 2003.
377. Another important issue has been the question of fiscal aid, where the exercise under the Code of conduct against harmful tax competition has led to the identification of a number of potentially harmful tax measures which subsequently were the subject of state aid enquiries. A number of cases have been decided in this context, in some cases granting Member States a certain transitional period in order to adjust their systems.

1.2. Legislative activities

1.2.1. *State aid for rescuing and restructuring firms in difficulty*

378. Under the 1999 Community guidelines on state aid for rescuing and restructuring firms in difficulty¹⁸⁰, state aid which allows firms in difficulty to avoid bankruptcy and helps them to restructure may be regarded as compatible only under certain strict conditions imposed on the recipient and the Member State. A review of the 1999 guidelines, which expire in October 2004, has taken place with a view to tightening up these conditions while simplifying the rules and closing some loopholes. Amongst the key issues which are currently being considered are the following possibilities:

- to ensure that rescue aid is limited to reversible, temporary, short-term financial support which is granted only for so long as is necessary to put a comprehensive restructuring plan into effect;
- to focus state aid control on large enterprises that trade across the EU. These enterprises usually have larger market share, and state support in their favour affects competition and trade more significantly;
- to reinforce the principle, in particular in the case of large enterprises, that the aid recipient is obliged to finance a large part of the restructuring cost without any state aid.

379. There are also a series of technical issues which need to be looked at, such as the application of the "one time, last time" principle in the context of short-term rescue operations, or the possibility of establishing automatic criteria to determine the amount of rescue aid.

380. The on-going review is a complex process which involves large internal and external consultations – the aim being to have the new Guidelines in place before the current ones expire.

1.2.2. *Shipbuilding framework*

381. On 26 November, the Commission adopted a Framework on State aid to Shipbuilding¹⁸¹ ("the Framework") replacing Council Regulation 1540/98 of 29 June 1998 establishing new rules on aid to shipbuilding¹⁸² ("1998 Shipbuilding Regulation") which was due to expire on 31 December 2003. The guiding principle of the new text is the simplification of the state aid rules applicable to the shipbuilding sector, both as to the form and the substance of these rules. This also marks the completion of the "normalisation" process initiated by the 1998 Shipbuilding Regulation which provided for the phasing-out of operating aid¹⁸³.

180 OJ L 288 of 9.10.1999, pp. 2-18.

181 OJ C 317 of 30.12.2003, p. 11.

182 OJ L 202, 18.7.1998, p. 1.

183 The TDM is an exceptional and limited measure that was difficult to propose from a competition point of view. Regarding the interpretation of the TDM, it is clear from the Regulation itself that aid may only be authorised where there has been competition for the contract from a Korean yard offering a lower price. In practical terms when assessing the Member States' schemes it was important to decide

382. The new rules take the form of a Commission framework. As to the substance, horizontal state aid rules are extended, as far as possible, to this sector. This includes notably the application of the so-called “block exemption regulations” on training aid, aid to SMEs, employment aid as well as the rules on *de minimis* aid; that previously were not applicable to the sector. Moreover, notification requirements have been eased compared to the 1998 Shipbuilding Regulation.
383. At the same time, the new text does recognise certain specificities that distinguish shipbuilding from other industries. These particularities are reflected in a number of sector-specific measures in the areas of innovation aid, closure aid, export credits and development aid, as well as regional aid.
384. The new provision on innovation aid is one of the most interesting features of the Framework. Given certain unique characteristics of the shipbuilding industry – such as a short production series, the size, value and complexity of the units produced – innovation aid was introduced by the 1998 Shipbuilding Regulation. In fact, shipbuilding is the only sector eligible for this type of aid. However, the implementation of the innovation aid provision was not entirely satisfactory. The Framework aims at improving and strengthening support to innovation by introducing two main changes to this provision¹⁸⁴. First, it is based on a definition of innovation which is better suited to the nature and the special needs of this industry. Second, it allows for higher aid intensity (up to 20% instead of the previous 10% ceiling). These improvements should make the provision more workable and quite attractive for the sector. However, the need of a specific incentive effect is maintained by requiring that only projects that carry a risk of technological or industrial failure can be aided.
385. In order to encourage the closure of economically non-viable capacity as well as the transition to specialised, highly technological market segments; the Framework maintains the possibility to grant closure aid for both total and partial closures of shipyards. Finally, in line with the 1998 Shipbuilding Regulation, the Framework refers to the relevant OECD disciplines on export credits and development aid and contains special rules on regional aid to shipbuilding.

1.2.3. New guidelines for the maritime transport sector

386. On 30 October, the Commission published new guidelines on state aid to the maritime transport sector. The new guidelines are intended to strengthen the methods of monitoring the effects of state aid and to give new guidance on tax exemptions, while at the same time ensuring fair competition in the internal market.

1.2.4. Implementing regulation

387. The Commission has proposed a new Regulation implementing and clarifying certain parts of the Procedural Regulation 659/99. The proposal tries in particular to clarify

on the type of evidence needed to demonstrate competition for the contract. The Commission had to strike a balance between ensuring that this requirement is met, without imposing such difficult conditions as to make the TDM unworkable. Until now, the Commission has approved TDM schemes for Denmark, Germany, the Netherlands and France.

184 See paragraph 15 of the Framework.

and streamline notification procedures. It moreover sets out methods for the calculation of time-limits and the interest rate to be used in recovery proceedings. It is expected that the Regulation will be adopted in the first quarter of 2004.

1.2.5. Multisectoral Framework for large investment projects (2002)

388. After intensive consultations with the Member States, the Commission has modified the “Multisectoral Framework on regional aid for large investment projects”, which was adopted in 2002 to establish a faster, simpler and more accountable control system of government support to large investments¹⁸⁵.
389. In order to prevent serious distortions of competition, the Framework provides for strict rules in sectors with structural difficulties. A list of such sectors should have been established by the end of 2003. Due to the methodological and technical difficulties in establishing such a list, and taking into account the requests of Member States, the Commission has decided to postpone the adoption of the list.
390. In the absence of this list, the Commission proposed on 30 October 2003 to all Member States, as an appropriate measure pursuant to Article 88(1) of the Treaty, the extension of the existing transitional rules for large investment projects in “sensitive” sectors until 31 December 2006. These rules provide that no aid can be allowed to large investment projects in the synthetic fibres sector, and that only limited aid can be allowed in the car sector. The Commission also proposed to introduce a procedural requirement concerning regional investment projects in the shipbuilding sector.
391. All Member States accepted the Commission proposals, and the MSF 2002 has accordingly been modified¹⁸⁶.

1.2.6. R&D aid for SMEs

392. Aid for research and development can contribute to economic growth, strengthening competitiveness and boosting employment. Aid for research and development for SMEs is particularly important, since one of the structural disadvantages of SMEs lies in the difficulty to gain access to new technological developments and to technological transfer. The Commission has taken the view that state aid for Research & Development will represent an incentive for SMEs to engage in more research and development, since they tend to only spend a low percentage of their turnover on research and development activities. On 12 August the Commission therefore proposed an amendment to Regulation 70/2001 in order to include R&D aid¹⁸⁷. The amended version was published on 28 February 2004.

1.2.7. Provisional contribution on state aid to broadband infrastructure for the ARCP

393. On 28 July, the Commission’s departments adopted a working paper entitled “Guidelines on criteria and modalities of implementation of structural funds in support of electronic communications”. The guidelines focus on criteria for granting

185 See XXXIIInd Report on Competition Policy (2002)

186 OJ C 263 of 1.11.2003.

187 OJ C 190 of 12.8.2003, p.3.

Community support to initiatives for broadband infrastructure, but also include considerations on the related state aid issues. With respect to competition rules, it should be noted that Community support does not represent state aid within the meaning of Article 87(1), but it must follow the same rules and must be taken into account – where it concurs with Member State funding – for the purpose of determining the compatible amount of aid. The following aspects are dealt with in the guidelines:

Infrastructure owned by public authorities

394. The funding of broadband infrastructure owned by a public authority does not constitute the granting of state aid within the meaning of Article 87(1). The procurement of the works for the creation of such infrastructure must comply with the appropriate Community legislation on the subject. However, when the infrastructure is made available to undertakings, this should be done on non-discriminatory terms and upon payment of appropriate fees. Such fees are not expected to cover the entire cost of the investment – in cases where the market is not capable of providing equivalent services – but should not allow the users of the infrastructure to make extra profits.
395. If a service equivalent to that provided by the infrastructure is already supplied by the market, then the infrastructure should be rented out for fees allowing coverage of costs and a fair return on investment. If the management of the facility is entrusted to a third party, it should be conceded for a limited amount of time following an open, transparent and non-discriminatory procedure, preferably determined through a competitive process and leading to a market compensation paid by the concession holder. As a general rule, this should be organised at the appropriate level (national, regional or local) under the supervision of the competent authority, which should ensure compliance with the relevant legislation and consistency with national and regional IS policies. The manager of the infrastructure should be subject to operating requirements that preserve the nature of the infrastructure as a facility open to all operators providing electronic communication networks and services under non-discriminatory conditions.

Infrastructure owned by undertakings

396. In the case of the (co-)funding of a facility which is owned by an undertaking, the state financial contribution would have to be made conditional on the acceptance of operating requirements which would preserve the nature of the infrastructure as a facility open to all operators providing electronic communication networks and services under non discriminatory conditions.
397. There should be evidence that the amount of state funding was the minimum necessary to allow the project to proceed, so as to ensure that the operator using the facility does not receive more than a normal market return for its activity. To this end, state funding should be awarded through open calls for tenders. As a general rule, this should be organised at the appropriate level (national, regional or local) under the supervision of the competent authority, which should ensure compliance with the relevant legislation and consistency with national and regional IS policies. Competitors would be invited to submit their technical and financial offer. The contract will need to be awarded to the operator(s) providing electronic

communication networks which fulfils/fulfil the minimum specified requirements for the service (in terms of quality of service, future improvements, etc.) at the lowest cost.

The case of non-open infrastructure projects

398. Direct financing of installations and equipment which are not open to all but are dedicated to one or more operators, e.g. installations reserved to a specific operator as a result of an agreement with the regulatory authority, does not qualify as funding of an ‘open infrastructure’ project.
399. Funding of installations and equipment dedicated to a specific final user may constitute state aid where such user is an undertaking. Depending on the particular circumstances, such funding may not constitute state aid or may be found compatible where it is necessary for the provision of a ‘service of general economic interest’ (SGEI). Where it constitutes state aid, it may be compatible under the rules governing aid to small and medium-sized enterprises, regional aid or ‘de minimis’ aid.
400. The provision of the service should respect the principles of transparency, non-discrimination, proportionality and least market distortion. If the service is not awarded following an open, transparent and non-discriminatory procedure, the operator is required to hold a separate accounting system for the service in question which makes it possible to establish the amount of public compensation or tariffs applicable for use of the service.

1.2.8. Review of the regional state aid guidelines for the period after January 2007

401. The 1998 Guidelines on national regional aid stipulate that the Commission will review them within five years of their becoming applicable¹⁸⁸. The Commission carried out such a review in the spring and concluded that a revision of the guidelines was not necessary at this stage. However, it decided on 2 April 2003¹⁸⁹ to conduct an overall review in due course to enable Member States and the Commission to draw up, notify and approve the regional maps for the period after 1 January 2007.
402. In order to take into account the structural changes brought about by enlargement, economic development and the strong political emphasis on an increase in European competitiveness, the Commission has started a comprehensive reflection process on the future of its regional aid policy. The process is being conducted in close cooperation with both old and new Member States and in full compliance with the principle of transparency. Consequently, the old and the new Member States have been invited to present any comments they consider relevant to a review of regional aid.

188 OJ C 74 of 10.3.1998, pp. 9-31 (98/C 74/06).

189 OJ C 74 of 10.3.1998.

2. ENLARGEMENT¹⁹⁰

403. In a solemn act, the Accession Treaties with ten countries were signed on 16 April 2003. The preparations for integrating the ten countries into the European Union have resulted in a first list of existing aid measures to be included in the Accession Treaty of the ten new Member States. The work has continued under the so-called interim mechanism, which constitutes the legal framework for the assessment of aid schemes and individual aid measures put into effect in a new Member State before the date of accession and still applicable after accession. It applies to those measures which have not already been included in the list of 'existing aid' measures attached to Annex IV of the Act of Accession. This mechanism will be applicable until 30 April 2004 and requires the future Member States to notify planned state aid measures to the Commission.
404. Under the mechanism, the future Member States must provide the Commission regularly with a list of existing aid measures which have been assessed by the national state aid monitoring authority and which that authority has found to be compatible with the *acquis*, together with any other information which is essential for the assessment of the compatibility of the aid measure to be examined. Upon notification, the Commission will consider the compatibility with the common market of notified measures which are applicable after accession. If the Commission does not object to a particular aid measure submitted on the ground of serious doubts as to its compatibility with the common market within three months of receipt of complete information on that measure, the Commission will be deemed not to have raised any objection. If the Commission decides to object to a particular measure, this will take the form of a decision to initiate the Article 88(2) investigation procedure. If such a decision is taken before the date of accession, the decision will only come into effect on the date of accession.

190 See also Chapter V on international activities.

B - CONCEPT OF AID

1. ORIGIN OF AID

405. On 19 March, the Commission authorised two measures called MEP (*Milieukwaliteit van de ElektriciteitsProductie* - Environmental Quality of Electricity Production), aimed at stimulating renewable energy¹⁹¹ and combined heat and power (“CHP”) production¹⁹². The purpose of this subsidy scheme is to increase supply. The new scheme will provide operating aid for a fixed period of a maximum of 10 years, with a total budget of EUR 2.503 million. The scheme is financed through a compulsory contribution by electricity consumers in the form of an increased connection fee that is fed into a fund. The fund will favour Dutch producers of renewable electricity and of CHP electricity who feed their electricity into the high-voltage grid.
406. Three of the state aid criteria, namely selectivity, advantage and effect on trade, were obviously met in this case. As regards state resources, the scheme will be financed through a fund. The case law of the Court of Justice has established three cumulative criteria for assessing the involvement of state resources where money is transferred by a fund¹⁹³: the fund must be established by the State, it must be financed by contributions imposed or managed by the State, and it must be used to favour specific enterprises. The Commission noted that the fund was set up by the State, is managed by the state company TenneT and will support only Dutch producers of renewable electricity and of CHP electricity. The Commission therefore concluded that the scheme constituted state aid within the meaning of Article 87(1) of the EC Treaty. It assessed the measures in the light of the Community guidelines on state aid for environmental protection¹⁹⁴.
407. The scheme will be financed through a compulsory contribution by all electricity consumers in the form of an increased connection fee, equal for every consumer (irrespective, therefore, of whether it is a large or a small consumer). During the year under review, the increase will amount to EUR 34. In terms of energy and environmental policies, the Commission does not favour such a system, which is not in line with the polluter-pays principle. Moreover, such a system could run counter to the ‘universal service’ principle. The price to be paid for good-quality electricity might appear disproportionately high for small consumers. Nevertheless, in the present state of Community law, Member States remain free in this respect when it comes to designing their fiscal and parafiscal regimes.
408. On 24 June, the Commission authorised a Dutch legal framework for an emission trading mechanism for private companies for the atmospheric pollutant NOx¹⁹⁵ directly under Article 87(3)(c) of the EC Treaty. The Commission had already taken various decisions on emission or pollution trading schemes akin to the notified

191 N 707/2002.

192 N 708/2002.

193 Judgments of the Court of Justice of 2.7.1974 in Case C-173/73 *Italy v Commission* and of 22.3.1977 in Case C-78/76 *Steinike v Germany*.

194 OJ C 37 of 3.2.2001, p. 3.

195 N 35/2003, OJ C 227 of 27.9.2003.

scheme. Under these schemes, a variety of tradable emission or pollution documents are used, such as quotas, allowances, certificates and credits. The Commission considers tradable emission documents to be intangible assets provided by the authorities to the recipients. From the point of view of state aid assessment, there are two kinds of trading scheme, the first falling within the meaning of Article 87(1)¹⁹⁶ and the second falling outside its scope

409. The difference between the two types of scheme lies in whether the public authorities have an alternative to selling or auctioning the intangible asset to the recipient. In the first kind of scheme there is a rationale for the public authorities to sell or auction the emission or pollution document to the producer of that emission or pollution, as the tradable emission or pollution document gives him the right to emit or pollute (directly or indirectly). In the second kind of scheme, the tradable emission or pollution document has no value to the recipient in relation to the State and merely serves as authorised proof of a certain production or emission.
410. The fact that there will be a market for trading emission or pollution documents is a sign of the value of the asset being allocated. The expenses undertakings will have to incur in order to realise the value of the tradable emission or pollution documents do not negate the existence of an advantage, but can be considered a positive factor in the assessment of the compatibility of the scheme concerned.
411. First, tradable NOx credits contribute directly to the absolute emission standard per company imposed by the State. Thus the notified NOx emission trading scheme is comparable to a direct NOx emission allowance allocation. Secondly, it is the producer himself who is obliged to meet his emission standard. Thirdly, the Dutch authorities do have an alternative to selling or auctioning the emission standards. Therefore, these private schemes constitute state resources within the meaning of Article 87(1).
412. On 17 September, the Commission closed its formal investigation into whether state aid had been granted in the context of the *Space Park Bremen*¹⁹⁷ project in Germany. The Commission concluded that the participation of Bremen in Köllmann AG, the project's lead investor, had become moot since it had not taken place. Since Germany had contested the presence of state resources and the imputability of the granting of the loan to the State, a loan was granted by a public undertaking the Commission discussed the rules developed by the Court of Justice in its *Stardust* ruling¹⁹⁸ and concluded as to the involvement of state resources and the imputability of the granting of the loan to the German authorities.
413. After having scrutinised the conditions of the loan and its aid element under market conditions, the Commission decided to adopt a partly negative decision. It found that the loan involved illegal and incompatible state aid, to be calculated on the basis of the difference between the interest rate actually charged and the relevant applicable reference rate, increased by 400 basis points as from 1 April 2002 to reflect an

196 See, for instance, Commission decision of 29.3.2000 in Case N 653/1999 *Denmark - CO2-quota system*, OJ C 322 of 11.11.2000, p. 9, and Commission decision of 28.11.2001 in Case N 416/2001 *United Kingdom - Emission trading scheme*, OJ C 88 of 12.4.2002, p. 16.

197 C 53/2002.

198 Case C-482/99; see also *France v. Commission "Stardust Marine"*, [2002] ECR I-04397.

assumed risk increase for the lender. It ordered Germany to take immediately all necessary steps to abolish forthwith the illegal incompatible state aid contained in the loan. If the loan were to continue, Germany was forthwith to alter the measure, imposing an interest rate at the reference rate plus 400 basis points, and inserting a provision pursuant to which the loan was to be paid back at short notice.

2. ADVANTAGE TO A FIRM OR FIRMS

414. In its decision of 17 September concerning an aid scheme notified by Italy¹⁹⁹, the Commission found that, in the absence of any advantage to investors, the fund and the companies invested in, the first requirement for the applicability of Article 87(1) of the EC Treaty was not satisfied. The Commission was therefore able to conclude that the measure at issue did not constitute state aid.
415. In making its assessment, the Commission was guided by the notice on state aid and risk capital²⁰⁰. According to that notice, where state resources are invested in a fund on the same terms as those applying to private investors (*pari passu*), it will normally be possible to conclude that the measure does not confer an advantage. A number of factors led the Commission to conclude that there was no aid element in this scheme. Two of them can be singled out: first, the risk capital fund manager, who would also have to contribute his own capital to the fund, was to be selected by a call for tenders, with the lowest bid winning; secondly, the investor was not granted any preferential terms under the scheme.
416. In a case involving business start-up aid in Sardinia, the Commission found that the aid was compatible²⁰¹. The scheme at issue here displayed certain differences which meant that it was not possible to conclude that there was no aid. One of these differences related to the remuneration of the fund manager, who was also an investor inasmuch as he contributed capital to the fund. The scheme provided for a basic annual remuneration of 5% of the capital paid into the fund on average. In addition to this basic remuneration, a bonus of 35% of the difference between the actual return on the participation and the “objective minimum return” was paid to the manager/investor. Owing to the existence of this bonus, which was not limited to 5% as in the case of the other scheme, the Commission could not rule out the existence of an advantage in favour of the manager/investor. Since the other conditions determining the existence of aid were also met, the Commission concluded that the measure qualified as state aid.
417. In its decision of 27 November concerning an aid scheme notified by Italy²⁰², the Commission stated its views on a scheme which provides for the creation of three funds which will provide support in the form of acquisitions of shareholdings, the granting of loans to investors, capital advances to investors and equity loans.
418. Under the scheme, the manager of the risk capital funds, who is chosen by a call for tenders, must contribute his own capital to the fund. The Commission pointed out

199 N 511/2002.

200 OJ C 235 of 21.8.2001.

201 N 597/2002.

202 Case N 152/2003.

that selection by a call for tender makes it possible *inter alia* to determine the management costs, i.e. the maximum remuneration of the person chosen in his capacity as manager. The scheme lays down selection criteria which are both technical (award of a maximum of 80 points out of 100) and economic (award of a maximum of 20 points out of 100). The Commission thus observed that, in the case in point, the criterion of price was only one of two factors to be taken into account in awarding the contract. Above all, the award of a maximum of 80 points out of 100 on the basis of technical criteria and a maximum of 20 points out of 100 on the basis of price strongly favoured the assessment of quality over the strictly objective criterion of the least cost to the public authorities. In other words, in the case in point, owing to the award of the contract on the basis of an apparently disproportionate combination of technical and economic elements, and not exclusively on the basis of price, the public procurement procedure might not be able to choose for certain the candidate capable of providing the services at the least cost²⁰³. The Commission also observed that certain measures provided for by the scheme necessarily involved using the capital contributed to the funds by the manager/investor. However, an investor acting in accordance with the principle of a private investor in a market economy would not agree to grant aid out of his own resources. On the basis of these considerations, the Commission accordingly concluded that it was impossible to rule out the existence of an advantage at the investor level.

419. In February 2003, the Commission opened an investigation into new aid to *Fairchild Dornier GmbH*, a German aircraft manufacturer insolvent since March 2002. This new aid came in addition to a 50% loan guarantee granted by the Federal Government and the *Land* of Bavaria on a USD 90 million (around EUR 85 million) loan, which had been approved by the Commission in June. The new aid consisted in a prolongation of the approved guarantee and in grants of EUR 19.2 million from the Federal Agency for Employment (*Bundesanstalt für Arbeit*) aimed at covering 65% of the costs of a social plan which would benefit half of Dornier's workforce. The investigation should primarily clarify whether the measures constitute state aid. The German Government, for its part, argues that they do not fall within the scope of state aid control owing to the individual entitlements of the employees.
420. On 13 May, the Commission decided not to raise any objections to the introduction of a risk equalisation scheme in the Irish health insurance market²⁰⁴. By introducing this scheme, the Irish authorities are seeking to prevent new entrants in the market from "cherry picking" good insurance risks. According to the findings of the Commission's investigation, the risk equalisation scheme is necessary for the stability of the health insurance system chosen by the Irish authorities. This choice implies a market relying on uniform rates for different insurance products. Furthermore, the scheme has been designed to ensure that the envisaged equalisation payments, to be administered by the Irish Health Insurance Authority, are limited to the minimum necessary to neutralise differences in health insurers' risk profiles. The

203 In its judgment in *Altmark* (Case C-280/00, paragraph 93), the Court of Justice stressed the importance, when it comes to determining the compensation for the costs incurred in the discharge of public service obligations, of "a public procurement procedure which would allow for the selection of the tenderer capable of providing those services at the least cost to the community. This principle is applicable by analogy to the scheme in question.

204 N 46/2003.

risk equalisation scheme therefore does not fall within the scope of EU rules on state aid.

3. SELECTIVITY

421. On 24 June, the Commission approved under Article 87(3)(c) of the EC Treaty a Swedish investment subsidy scheme which temporarily reduces the cost of constructing a certain type of housing in Sweden's growth areas²⁰⁵. The scheme grants subsidies to the owners of small rental dwellings. It is neutral as regards the origin of the investment since it is open to both domestic and foreign property owners/investors.
422. On 30 April, the Commission opened the formal investigation procedure provided for in Article 88(2) in respect of the Energy Tax Rebate Act in Austria²⁰⁶. Applicable from 1 January 2002 to 31 December 2002, the Act entitles all businesses to a refund of the energy taxes on natural gas and electricity if those taxes together exceed 0.35% of their net production value. The Energy Tax Rebate Act 2000 widened the original scope of beneficiaries, namely the manufacturers of goods, to take account of the ruling by the Court of Justice in the *Adria-Wien Pipeline*²⁰⁷ case. Austria argued that the modification would change the measure into a general measure. The Commission recognises that the amendment to the Act eliminates the statutory restriction to certain sectors of the economy. However, it considers at this stage that the tax rebate as amended is still selective. The threshold of 0.35% is considered still to have the effect that the beneficiaries under the scheme are undertakings which have a high consumption of energy in relation to their net production value. These undertakings have to be considered a selective group of undertakings within the meaning of Article 87(1).
423. All the other state aid criteria being fulfilled, the Commission assessed the compatibility with respect to two groups of beneficiaries, namely the manufacturers of goods for which the rebate was continued and the service sector, to which the rebate has been granted only since 2002, on the basis of the 2001 Community guidelines on state aid for environmental protection²⁰⁸.

4. DISTORTION OF COMPETITION

424. The Commission decided on 19 March that a subsidy of EUR 4.6 million (DEM 9 million) given by Germany to *Linde AG* in 1997 did not constitute aid within the meaning of the EC Treaty²⁰⁹. The decision follows the judgment of the Court of First Instance of 17 October 2002 in Case T-98/00. Linde AG is part of the Linde Group, an international technology group which employs 46 000 people worldwide. In 1993, the German privatisation agency Treuhandanstalt (THA) sold an amine production facility, based in Leuna (Saxony-Anhalt), to Union Chimique Belge (UCB). At the

205 N 40/2003.

206 NN 34/2003.

207 C 143/99.

208 OJ C 37 of 3.2.2001.

209 OJ L 250 of 4.10.2003.

same time, THA entered into a long-term supply obligation, promising to deliver carbon monoxide to UCB at a fixed price.

425. However, the production costs for carbon monoxide exceeded THA's initial expectations. At the contractually agreed price, execution of the contract would cause THA high losses. In order to cut its losses, THA was looking for an investor to take over its loss-making supply obligation. The only investor interested in, and objectively suited to, taking over THA's carbon monoxide delivery obligation was Linde AG, as this company had been established in the Leuna area as a gas producer since 1994. The building cost for the new facility was EUR 6.4 million (DEM 12.5 million). Linde AG contributed EUR 1.8 million (DEM 3.5 million) to this cost from its own funds and the BvS (the successor to THA) contributed EUR 4.6 million (DEM 9 million) ("the subsidy"). The subsidy was below the cost for a completely new plant, which would have amounted to around EUR 10.3 million (DEM 20 million).
426. The Commission opened the formal investigation procedure in July 1999 as it had serious doubts whether the subsidy awarded to Linde constituted aid. In January 2000, the Commission closed the procedure with a partially negative decision, stating that - in accordance with the regional aid provisions - the part exceeding 35% of the eligible investment costs of the facility (approximately EUR 2.3 million (DEM 4.4 million)) was incompatible with the Treaty. On 17 October 2002, the Court of First Instance annulled the Commission decision, finding that no aid was granted to Linde AG.
427. On the basis of the Court's ruling, the Commission reassessed the measure and found that the subsidy did not constitute aid since it appears that the measure had no effect on trade and did not distort competition. Linde was the only company objectively suited to providing the carbon monoxide to UCB and delivered all its production exclusively to UCB. For the German Government, Linde was simply the means of ensuring the continuation of its delivery obligation for carbon monoxide to UCB. The subsidy was limited to the minimum necessary for this purpose.

5. EFFECT ON TRADE

428. On 2 July 2002, the Commission initiated the formal investigation procedure in respect of an individual application of an aid scheme in favour of a Portuguese company, Vila Galé, for the acquisition and refurbishment of a hotel in Brazil²¹⁰. The proposed aid measure comprises both national funds and Community co-financing from the ERDF. As a result of the investigation, the Commission reached the conclusion that ERDF funds could not be used for an investment outside the EU.
429. On the other hand, in the absence of Community guidelines for tourism, the Commission had to assess this aid directly on the basis of Article 87(3)(c) of the EC Treaty. In particular, it considered whether the aid would facilitate the development of tourism in Portugal without adversely affecting trading conditions to an extent contrary to the common interest. For a number of reasons, notably the relatively

210 C 47/2002.

small size of the beneficiary and of the aid and the fact that this was the first internationalisation experience of the company, the Commission found that the aid would have a very limited impact on EU trade and that it would, to a certain extent, have a positive impact on the Portuguese economy. On 15 October, the Commission took a final conditional decision on the measure. The aid was found to be compatible with the EC Treaty, subject to the condition that no Community funds from the ERDF were used.

C - ASSESSING THE COMPATIBILITY OF AID WITH THE COMMON MARKET

1. HORIZONTAL AID

1.1. Rescue aid

430. On 17 September, the Commission initiated the formal investigation procedure to assess the compatibility of all the aid measures in favour of Alstom reported by France in August. The investigation also included a series of measures of which the Commission had been informed by different sources and which could entail elements of state aid.
431. In parallel with the initiation of the formal investigation procedure, the Commission considered that the conditions were met for issuing an order suspending payment of two of the measures in the package until it had decided on their compatibility. The measures at issue were France's participation in Alstom's capital increase and the payment of a subordinated loan.
432. The Commission decided to request France to modify the package before issuing the order. It granted France five days in which to discontinue any measure which would imply an irreversible participation in Alstom's capital. Otherwise, the Commissioner responsible for competition policy, acting in conjunction with the Commission's President, would adopt and notify the suspension order. France agreed, within the time limit, to modify the aid package, replacing its direct stake in Alstom's capital by debt instruments which will not have irreversible effects on the market. France also agreed to subject any future acquisition by it of a stake in Alstom's capital to authorisation by the Commission. On the strength of this, the Commission refrained from issuing a suspension order, since the new measures were reversible, without, however, implying approval by the Commission. The Commission will only approve or disapprove once it concludes its ongoing investigation.
433. The changes, which were not just formal, but changes of substance (increase in short-term liquidity by EUR 1.1 billion), led the Commission to extend its ongoing investigation by means of a decision adopted on 15 October. The modified aid package is now worth some EUR 8.2 billion, including some EUR 4.275 billion in state aid provided by France²¹¹. The extension of the procedure allows the Commission to evaluate the compatibility of the whole package. In its investigation in the light of the Community guidelines on state aid for rescuing and restructuring firms in difficulty, the Commission will first look closely into the adequacy of the restructuring plan as a means of restoring Alstom's viability. Secondly, it will examine the markets in which Alstom is active and the need for compensatory measures to counterbalance the distortions of competition created by the aid. And lastly, it will determine whether the aid is the strict minimum needed to restore the company's viability, as it cannot approve any aid in excess of the minimum needed for restructuring.

211 C 58/2003.

434. On 19 March, the Commission approved rescue aid to Babcock Borsig Power Service GmbH (BBP Service)²¹² in the form of a 90% state guarantee for two credit lines amounting to EUR 52.5 million. The credit lines would be extended over a period of six months. A consortium of banks would provide the underlying credit. The guarantee and the credit lines would help the company to continue its operations for six months, giving it time to decide on its future. BBP Service was a subsidiary of the now insolvent Babcock Borsig AG. It is active in the field of power station services and has been under administration since September 2002. The company had run into difficulties because of the insolvency of the Babcock Borsig group, which had caused significant payment defaults.
435. The Commission assessed the guarantee on the basis of the Community guidelines on state aid for rescuing and restructuring firms in difficulties²¹³. Under these guidelines the Commission can approve rescue aid as one-off liquidity support to a firm in difficulties to keep it in business while a restructuring plan or liquidation plan is worked out. The Commission concluded that the guarantee for the credit lines at issue fulfilled the conditions set out in the guidelines. It was justified by serious social difficulties, it was granted in the form of credit lines at a market rate which must be repaid or in the form of state guarantees of such credit lines, it was restricted to the minimum necessary, and it has no unduly adverse spill-over effect on other Member States.
- 1.2. Restructuring aid
436. On 23 July, the Commission decided to initiate a formal investigation in order to examine in detail the restructuring aid granted by the UK Government to British Energy plc (BE)²¹⁴. BE is one of the most important players in the UK electricity market. It operates primarily nuclear power stations. The fall in electricity wholesale prices that 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 11 November 2002, the Commission had decided not to raise any objections to rescue aid granted by the UK Government²¹⁵.
437. On 7 March, the UK authorities notified a restructuring plan aimed at restoring BE's long-term viability. The UK Government undertook to assume the funding of historic nuclear liabilities, in particular with respect to the management of fuel loaded prior to the restructuring and to the decommissioning of BE's nuclear plants. The plan also provides for the renegotiating of fuel supply and spent fuel management contracts with state-owned British Nuclear Fuels Limited (BNFL), leading to a decrease in the prices charged by BNFL to BE for these services. BE also negotiated a standstill agreement and a number of financial restructuring arrangements with its major creditors. BE has also designed a new trading strategy and has disposed of its North American assets. Finally, BE was granted a three-month deferral of business rates by local authorities.

212 N 703/b/2002.

213 OJ C 288 of 8.9.1999, pp. 2-18.

214 C 52/2003.

215 See summary of Case NN 101/2002 in the XXXIInd Report on Competition Policy (2002-point 409).

438. The Commission has conducted a preliminary examination of the aid notified under the EC Treaty. Since some of the measures in question concern issues covered by the Euratom Treaty, they will have to be assessed in the light of the latter Treaty's objectives. From the documents submitted so far, the Commission has come to the conclusion that there are serious doubts regarding the nature and the compatibility with the common market of the measures. In particular, it doubts whether the plan will lead to the restoration of BE's viability within a reasonable time span, whether the level of the company's contribution to the restructuring is sufficient and whether the aid can be authorised without any compensatory measure. The plan does not seem to meet the requirements of the Community guidelines on state aid for rescuing and restructuring firms in difficulty.
439. The Commission decided that the lack of sufficient action by the Spanish authorities to recover outstanding tax and social security debts from Hilados y Tejidos Puignero SA²¹⁶, a large Spanish textiles and clothing producer, constituted aid to the company. The company had been in financial difficulties since the early 1990s. In 2000, its tax and social security debts amounted to EUR 44 million and EUR 60 million respectively. The company further benefited from aid from the Catalan Finance Institute, consisting of various loans and guarantees, including a EUR 12 million loan in 2000. The Commission found that these measures constituted non-notified state aid.
440. The Commission assessed the aid in particular under the guidelines on state aid for rescuing and restructuring firms in difficulties²¹⁷. The aid could not be found compatible with the common market because at the time of its granting there were insufficient guarantees for the restoration of the company's viability and undue distortions of competition were not avoided. The aid had instead enabled the company to continue production despite mounting debts without taking the necessary restructuring measures, distorting competition by a low-pricing strategy for part of its production. Spain must recover the incompatible aid, with interest, from the beneficiary.

1.3. Guarantees in favour of public banks

441. Austria notified two guarantees provided by the Province of Burgenland to Bank Burgenland AG (BB)²¹⁸, an Austrian regionally active bank whose main shareholder is the Province of Burgenland. BB was granted a fallback guarantee by the Province, under which the latter would step in, in the event of liquidation or bankruptcy, should the bank's assets be insufficient to cover its liabilities. Owing to criminal activities, BB was facing claims that would have led to its insolvency. In order to avoid the bankruptcy and payments under the fallback guarantee, the Province granted a limited explicit guarantee covering the uncollectable claims in question. Subsequently, a detailed scrutiny of BB's loan portfolio revealed further bad loans. In order to keep the bank in operation, the Province and the Bank of Austria agreed that the latter would renounce certain loans in exchange for a claim for repayment from future profits ("better fortune clause") and cede its Bank Burgenland shares

216 C 70/2001, C 518/2003.

217 OJ C 37 of 3.2.2001, p.3-15.

218 C 44/2003 ex NN 158/2001

(34%) to the Province for ATS 1. The Province granted an additional guarantee covering the bad loans.

442. The Commission considered these measures to be state aid because the bank was kept in business instead of going bankrupt. Also, the measures were considered to constitute new aid because the existing fallback guarantee could be honoured only after bankruptcy and not before in order to keep the bank in business. The new measures went beyond this.
443. The Commission made a preliminary assessment of the restructuring plan by applying the conditions laid down in its rescue and restructuring guidelines. However, it had doubts whether the restructuring plan could effectively restore viability. Also, Austria had failed to prove avoidance of undue distortion of competition on the basis of the counterpart measures submitted. Finally, the Commission could not judge whether the aid was really limited to the minimum necessary. On the basis of these open questions, the Commission decided on 26 June to initiate the formal investigation procedure²¹⁹.
444. In the spring, the French authorities accepted the Commission's proposal on the phasing out of the guarantee to CDC IXIS, a subsidiary of the French public financial institution Caisse des Dépôts et Consignations (CDC)²²⁰. CDC transferred its commercial banking activities to CDC IXIS at the end of 2000. CDC had decided to support its subsidiary by giving a guarantee covering a large part of CDC IXIS's activities. Unlike in the case referred to above (Bank Burgenland), the subsidiary is not a public but a commercial bank.
445. The Commission established that the guarantee to CDC IXIS would qualify under the state aid rules as a state guarantee. Indeed, CDC could not give a guarantee to CDC IXIS without taking account of the requirements of the public authorities, and it was extremely unlikely that such a decision could be taken without its knowledge. The Commission examined whether the guarantee could be exempted on the basis of the Commission Notice on guarantees. However, it was evident that CDC's guarantee could not be considered limited in scope or in duration. By definition, a financial institution trading on capital markets has a portfolio which will vary in value from day to day. Furthermore, it includes actual and potential risks which in the case of CDC IXIS are particularly important due to its very strong involvement in derivatives and other off balance sheet operations. A guarantee for a continuously fluctuating amount and value of operations, and therefore potential outlay by the guarantor, cannot be considered limited. Lastly, it was impossible to calculate the market price of the premium for such an open guarantee.
446. The conclusion reached by the Commission was therefore that this guarantee constituted state aid which could not qualify for exemption. Thus, in January, the Commission proposed a phasing out of the guarantee, which was accepted by the French Government²²¹. This phasing out involves a transition period that will allow CDC IXIS to adjust its operational and legal environment so as to be able to operate

219 OJ C 189 of 9.8.2003.

220 E 50/2201.

221 C/2003/42/3.

at the same level as its competitors. It will also allow counterparties to know clearly when they are transacting with CDC IXIS under cover of the guarantee and when they are not. The market will then be able to operate under conditions of full transparency.

1.4. Environmental aid

447. On 9 July, the Commission approved a German scheme to promote insulation materials made from renewable raw materials²²². The scheme offers grants of EUR 30 or EUR 40 per cubic metre for buyers of insulation made from renewable resources such as flax and hemp fibre or grain and sheep's wool. The grants are meant to encourage people to buy environmentally friendly insulating board, which costs more than conventional insulation made from fossil materials.
448. One of the main reasons for the Commission's approval of the proposed grants was that environmentally friendly insulating board is considerably more expensive than traditional insulation made from fossil materials. Insulating board made from renewable material offers environmental advantages over traditional insulation. It saves natural resources, using renewable materials instead. These renewable materials are generally CO₂ neutral, so that using them helps to protect the atmosphere and contributes to attaining the targets set in the Kyoto Protocol. Grants to encourage people to buy environmentally friendly insulation can be approved as aid for environmental protection. As a rule the grants will still be less than the extra cost of environmentally friendly insulation material.
449. On 30 April, the Commission closed the formal investigation procedure in respect of a scheme aimed at reducing greenhouse gas emissions in Tuscany, Italy²²³. The scheme sought to attain its objective through the promotion of renewable energy sources and energy saving programmes. It was assessed in the light of Section E.1.3 of the Community guidelines on state aid for environmental protection²²⁴, relating to investment in energy.
450. In the light of information furnished by the Italian authorities following the opening of the procedure, it was considered that the necessity of the aid rate of 75% for photovoltaic plants was proven. The third paragraph of point 32 of the guidelines, which provides for the possibility of granting aid up to 100% of eligible costs as long as the aid is shown to be indispensable, was applied for the first time to this type of investment. This constitutes a precedent for other regions and Member States when it comes to introducing solar energy promotion programmes²²⁵.
451. On, 4, 5, 19 February and 22 April, the Commission found water schemes to be compatible with the Community guidelines on state aid for environmental protection (and, as regards studies, with the R&D framework)²²⁶. The schemes were

222 OJ C 197/2003 of 28.8.2003 (N 694/2002).

223 C 60/2002 (ex N 747/2001).

224 OJ C 37 of 3.2.2001, pp. 3-15.

225 See also decision of 9.7.2003 in Case N 762/2002 – Italy (Marche): Measures to promote the reduction of polluting emissions and energy consumption and the production of renewable energy. Note: 75% for photovoltaic energy.

226 N 492, N 493, 494/B and 497/03.

implemented by the French water agencies, which are public bodies responsible for ensuring the quality of drinking water. They are aimed at carrying out studies into water pollution, the reduction of water consumption by businesses, the cleaning up of sites capable of polluting the water table and the fight against drinking water pollution.

452. On 11 November, the Commission took a positive decision on the *Waste and Resources Action Programme - WRAP* case (UK), on which the formal investigation procedure had been opened on 19 March.
453. The WRAP case comprised two aid measures: a grant funding scheme and a guarantee fund. The logic behind all projects funded by WRAP either by grants or guarantees is to create a demand for waste products (wood, plastics, glass, aggregates, compost), by subsidising investments in recycling facilities. This will, in turn, encourage local authorities to selectively collect them. In that way the UK authorities expect that a market for waste products will be created and that waste recycling will increase. The UK authorities notified these two aid measures on the basis of the guidelines on state aid for environmental protection. However, the Commission concluded that these guidelines are not applicable. The guidelines normally apply to investments that aim at reducing the pollution caused by the aid beneficiary. They are not meant to apply to situations where the whole economic activity of the beneficiary (i.e. waste recycling in the present situation) is environmentally beneficial.
454. Since these measures are not covered by the guidelines on state aid for environmental protection, the Commission considered whether they are directly compatible with Article 87(3) of the EC Treaty. It first noted that these aid measures support waste recycling, which is a priority environmental objective of the Community. This aid is necessary to overcome the extra costs linked to the recycling of certain waste products that are hardly reprocessed at all or to the development of new recycling technologies that are not market tested. In addition, the amounts of aid are relatively small, and an open tender procedure is used to select the beneficiaries and to determine the amount of aid. Finally, the eligible costs and the aid intensities are in line with the principles laid down in the guidelines on state aid for environmental protection. These aid measures can therefore be seen as proportionate to the objectives pursued and not causing an undue restriction of competition or effect on trade between Member States. For these reasons, the Commission could conclude that these measures are compatible with the Treaty.
455. In March 2002, the UK notified a total aid amount of EUR 35 million (GBP 23 million) in favour of Shotton, a newsprint producer owned by UPM-Kymmene and located in North Wales. The total cost of the project amounts to EUR 200 million. Shotton had been selected on the basis of an open and transparent tender procedure, but the measure nevertheless constituted state aid within the meaning of Article 87(1) of the EC Treaty. As the aid is intended to adapt Shotton's facilities to produce newsprint from waste paper rather than virgin pulp, and will result in an increase in wastepaper consumption of approximately 321 000 tonnes per annum, the UK decided to notify the aid under the environmental aid guidelines. The aid would be granted under the WRAP programme, established to promote sustainable waste

management. On 2 October 2002, the Commission decided to open a formal investigation procedure²²⁷ in respect of the aid because it had doubts whether the aid could be approved under the environmental and regional aid guidelines. In fact, this type of investment does not appear to fall within the scope of the environmental guidelines and the aid intensity was significantly higher than the regional aid ceiling.

456. On 23 July²²⁸, the Commission decided to approve part of the aid. Although it recognised the environmental benefits of re-using waste paper instead of putting it into landfill, the Commission concluded that the whole investment was not eligible for environmental aid. The environmental aid guidelines only provide for aid to be granted to investments that improve a company's individual environmental record. However, in this case, the aid was intended to help the UK to improve its environmental record in general, and to help the UK to fulfil its obligations under the EU landfill and packaging directive.
457. As part of the aid related to the building of a sludge combustor which was meant to reduce Shotton's own pollution, the Commission applied the environmental aid guidelines to this part of the investment. This resulted in the approval of EUR 13 million in aid, based on the fact that without aid Shotton could have continued with spreading the sludge on land, also in larger quantities. In accordance with the guidelines the economic benefits over a period of five years were deducted from the eligible investment costs. These included the value of electricity and steam produced by the combustor, but also the cost forgone of landspreading the sludge. The actual sludge combustor would be relatively large since it would also combust pre-treated household waste. The Commission verified whether the eligible cost was confined strictly to the extra investment costs necessary to meet the environmental objectives by calculating also the eligible cost had Shotton restricted itself to a smaller gas-fuelled sludge combustor. Owing to differences in the economic benefits over the first five years, this smaller investment, however, did not lead to a lower eligible investment cost.
458. The investment costs were also assessed under the Multisectoral Framework on regional aid for large investment projects. Taking into account the rules on cumulation of regional and environmental aid, the Commission allowed an additional EUR 11 million to be granted on this basis. The Commission concluded therefore that a total amount of EUR 24 million could be approved in favour of Shotton.
459. On 7 September, the Commission approved, after an in-depth examination under Article 88(2) of the EC Treaty, a scheme which exempts from the "Climate Change Levy" (CCL) energy tax, supplies of electricity generated from coal mine methane (CMM) from abandoned coal mines²²⁹. The Commission assessed the compliance of the state aid with Article 87(3)(c) under the environmental aid guidelines, and in particular Section E.3.1 thereof. The Commission considered that the extraction of methane from abandoned coal mines for electricity production is a way of managing waste in a responsible manner and is therefore consistent with the spirit of point 42(a) of the guidelines.

227 C/2002/3569.

228 C 61/2002, OJ L 314/2003 of 8.11.2003.

229 C 12/2003 ex N 778/2002.

460. Using CMM for electricity production will lead to energy savings. As the purpose of energy saving measures is the sustainable use of energy sources and the reduction of greenhouse gases, the measure can be considered to contribute to energy saving in line with point 42(b) of the guidelines²³⁰. The aid will be granted for five years and will not exceed 50% of the extra costs either at the level of the CMM gas suppliers or at the level of the electricity generators.
461. On 11 June, the Commission took a far-reaching decision on a British aid measure aimed at remediating contaminated land²³¹, brownfield land and derelict land. The British measure intends to bring such land back into productive use by addressing detrimental effects of previous usage and making it suitable for new use, thereby reducing pressure on greenfield land and limiting urban sprawl. Those submeasures of the scheme aimed at remediating contaminated polluted industrial sites were found to be compatible with the common market as they fulfil the conditions outlined under point 38 of the Community guidelines on state aid for environmental protection.
462. Those submeasures aimed at remediating land on which there are buildings, structures or works that are derelict were assessed directly on the basis of Article 87(3)(c) of the EC Treaty. The Commission found these submeasures to be compatible with the common market as they promote the Community objectives of environmental protection and sustainable development without having disproportionate effects on competition and economic growth.
- 1.5. Research and development (R&D) aid
463. On 23 July, the Commission decided to authorise a scheme providing for the granting by the Basque Government of a subsidised loan to the Spanish company Gamesa for its participation in the development of two new regional aircraft by the Brazilian manufacturer Embraer²³². On 12 March 2002, the Commission had launched a detailed enquiry to check that the planned loan notified by the Spanish authorities was compatible with the Community rules on state aid for research and development²³³. At the time, the Commission had doubts about the incentive effect of the aid and the eligibility of certain certification activities and maintenance studies.
464. After analysing the information supplied following the initiation of the detailed inquiry procedure, the Commission concluded that the incentive effect could be established. But it also concluded that the doubts it had about the certification activities and maintenance studies being too close to the market still applied. The Commission accordingly concluded that the planned aid could be considered compatible with the EC Treaty under Article 87(3)(c), provided that the cost of certification activities and maintenance studies is deducted from the eligible costs and that the gross grant equivalent of the aid does not exceed 30% of the eligible costs after this deduction.

230 For the same reasoning see the Commission decision in Case on State aid N 74/B/2002 – Finland, OJ C 59 of 14.3.2003, p. 23, and in particular point 3.2.2 of the decision.

231 N 385/2002.

232 C 20/2002.

233 OJ C 45 of 17.2.1996, p.5.

465. On 13 May, the Commission decided that the award of individual aid to the French company Latécoère was compatible with the R&D framework²³⁴. The aid is being granted in connection with the company's participation in the new business aircraft project of Dassault Aviation, the F7X. Latécoère will produce the aircraft's entire rear section, which is particularly challenging as it houses all three engines. The aid is to take the form of a EUR 26 million loan, reimbursable in the event of the project being successful.
466. On 7 February, the Commission decided to initiate the formal investigation procedure under Article 88(3) of the EC Treaty in respect of part of the R&D project carried out by the company IFS SpA. The Commission doubted whether preclinical test activities ('step 5' of the project) could be classified as industrial research - rather than as pre-competitive development - within the Community meaning of the term and thus benefit from a 50% aid intensity. Preclinical tests come before Phase I clinical tests. Active principles are tested in the laboratory on various animal species, increasingly akin to man. In fact, even if preclinical test protocols are based on a series of experiments on a number of different animal species, the results of which are collected and critically analysed to check whether Phase I tests can be launched, they are, like Phase I clinical tests, based on "prototype" versions of the product, albeit very crude ones. Thus, in this respect, they could be considered similar to Phase I clinical tests even if, as they come before Phase I tests and are conducted with less mature products, they are not closer to the market than Phase I tests.
467. In view of the above, the Commission could not exclude in principle that at least part of the preclinical test activities were classifiable as pre-competitive development. Taking into account the evidence provided by the recipient (IFS) and having regard to the very high rate of unsuccessful tests (60-70%) during the drug development phase of preclinical testing, the Commission concluded on 26 November that the knowledge acquired may only prove essential at a later stage of development. In fact, the success rate of 10% appears to be in line with the sector's average and proves that the results obtained in this phase of drug development are still a long way from both the production of a particular drug and its marketing. Therefore, preclinical testing could be considered industrial research within the meaning of the R&D framework in the case at hand.
468. On 10 December, the Commission took a "no objections" decision on a case concerning a tax reserve for investment in Portugal²³⁵. The objective of the measure is to provide incentives for productive investments and to promote the development of R&D activities. Under the scheme, companies may constitute a tax reserve of 20% of their tax amount payable in 2003 and 2004 provided that this amount is spent within a period of two years from the date of constitution of the tax reserve, either on initial investments or on R&D projects. The scheme is applicable throughout Portugal and is open to all enterprises belonging to the extraction and industrial sectors of activity and to hotels, restaurants, travel agencies and other firms active in the tourism sector. The total budget allocated for the measure is EUR 318 million for the two years of implementation.

234 N 453/2002.

235 N 247/2003.

469. The Commission assessed the notification on the basis of the Community guidelines on national regional aid, as far as the initial investments are concerned, and of the Community framework for state aid for research and development, as regards the R&D projects. Portugal proposed a technical definition of initial investment which equals the difference between the gross investments of the company in new tangible fixed assets during a given period and the sale, amortisation and reintegration of all tangible fixed assets included in the company's balance sheet during the same reference period. The Commission reached the conclusion that this technical definition is in compliance with the Community guidelines on national regional aid, since it precludes replacement investments from taking place. Since the eligible costs, aid intensities and other conditions of the measure respected the provisions of the applicable state aid legislation, the Commission raised no objections to its implementation.
470. On 27 May, the Commission closed the formal investigation procedure into planned aid amounting to EUR 37.2 million (net present value) for BMW's engine plant in Steyr, Austria, by approving a major part of the planned aid²³⁶. The project was notified in April 2002 and therefore still assessed, as regards the regional aid, under the framework for state aid in the motor vehicle industry. The Commission found that a total amount of EUR 29.9 million for regional aid, training aid, environmental aid and R&D aid was compatible with the respective Community rules.
471. However, a further EUR 7.3 million could not be reconciled with these rules and could not be granted. The aid reduction concerns part of the regional aid and R&D aid, respectively, and the innovation aid. As regards the regional investment aid, the Commission considered that the regional disadvantage of Steyr - compared with the alternative site in Landshut, Germany - was lower than notified, and owing to the capacity increase the allowable aid intensity was reduced. As regards the research and development aid, the Commission considered that certain R&D projects would have been undertaken by BMW even in the absence of aid in order to stay competitive. As the necessary incentive effect for these projects had not been proven, the planned aid was not considered compatible with the common market. As regards the planned innovation aid, the projects in question could not be regarded as genuinely innovative in the sense that the technology had not yet been used or marketed by other parties operating in the industry. In addition, the aid in question was not considered an incentive for industrial or technological risk-taking as BMW would have to carry out the investment even in the absence of state aid. Therefore, the planned innovation aid could not be approved.

1.6. Training aid

472. On 17 September, the Commission authorised Italy to grant a total of EUR 44 million in training aid to Fiat Auto and Comau, two companies belonging to the Fiat Group²³⁷. The aid was granted in support of a three-year, EUR 84 million training programme aimed at improving the skills and employability of workers employed at the Italian operations of the two companies. The Commission assessed the

236 C 64/2002.

237 N 322/2003.

compatibility of the aid with the rules governing state aid for training projects²³⁸, and concluded that the aid was in line with the substantive requirements of these rules. It therefore decided to authorise the proposed aid.

2. REGIONAL AID

473. On 2 April, the Commission decided not to raise any objections to the granting by the Greek authorities of aid aimed at supporting the construction of a pipeline for the transport of fuel to the new Athens International Airport²³⁹. At present, 120 trucks are used daily for this transport over a distance of 60 kilometres. The pipeline contributes to the development of the Attiki region by providing a more secure and environmentally friendly way of transporting fuel. Therefore, the envisaged aid, which is below the maximum aid ceiling imposed by the regional guidelines, is considered compatible with the common market under Article 87(3)(a) of the EC Treaty.

474. On 5 February, the Commission opened a formal investigation into a measure aimed at facilitating the development of incubators for small firms in their start-up phase (SBS Incubation Fund)²⁴⁰. The fund, which would have a EUR 115 million budget over four years, would be able to grant soft loans to undertakings that intend to set up and operate incubators, but could not obtain funding from the private sector. The fund could grant aid even to large firms in the most developed areas of the United Kingdom. This is not in line with the Guidelines on national regional aid²⁴¹, which provide that investment aid to large enterprises should be limited to the most needy regions. Furthermore, the UK authorities did not commit themselves to respecting the aid intensity ceilings applicable under the regional guidelines or under Commission Regulation (EC) No 70/2001 on state aid to SMEs²⁴², or the rules on cumulation. Finally, the loans would cover part of the working capital of the incubators, which may constitute operating aid.

2.1. State aid to overseas territories

475. A number of Member States have urged the Commission within the framework of the consultations on the Implementing Regulation (see 1.2.4. above) to provide for a number of specific conditions for overseas territories. A Memorandum had been adopted by those Member States which still have overseas territories to cater specifically for their concerns in relation to legislative measures. As long as this is not the case, state aid measures will be assessed under the generally applicable rules.

476. A large number of decisions were taken between 2000 and 2003 concerning these regions. The Commission decisions concerning the overseas programme law promulgated by France on 21 July 2003 were the most important adopted in 2003²⁴³. Following its approval of the tax provisions of the overseas programme law on 11

238 Commission Regulation (EC) 68/2001, OJ L 10 of 13.1.2001, pp. 20-29.

239 N 527/2002

240 C 7/2003 ex N 107/2001.

241 OJ 74 of 10.3.1998, pp. 9-31 (98/C74/06).

242 EC 70/2001, OJ L 10 of 13.1.2001.

243 N/96/a and N/96/b/2003.

November, the Commission approved the social provisions of that law on 16 December. The Commission considered that the level of operating aid envisaged was proportional to the handicaps it sought to alleviate and that it was justified in terms of its contribution to regional development and its nature in accordance with point 4.16.2 of the guidelines on national regional aid.

2.2. Depressed urban areas

477. On 16 December the Commission approved the extension of the urban tax-free zones scheme in France to include 41 new depressed urban areas, adding to the 44 such areas already existing in France²⁴⁴. The scheme is designed to underpin economic activity in depressed urban areas by strengthening the local economic fabric, comprising for the most part small businesses, via incentives in the form of specific tax exemptions and exemptions from social security contributions that will help promote employment.
478. The Commission had approved on 23 April 1996²⁴⁵ the urban tax-free zones scheme set up by French Law No 96-987 of 14 November 1996 on the implementation of the Urban Renewal Pact, and on 30 April 2003²⁴⁶ the extension, for the neighbourhoods already selected, of this scheme with effect from 1 January 2003 to small businesses newly created or newly established in these neighbourhoods, and this for a period of five years. The Commission has decided to consider the aid compatible with the EC Treaty on the basis of Article 87(3)(c).

3. FISCAL AID

Application of the state aid rules to tax measures

479. In the course of the year, the Commission refined its position with regard to the concept of state aid in the tax aid field. In particular, it examined the concept of advantage in the context of the application of alternative taxation methods, such as the cost-plus method²⁴⁷ or the exemption method²⁴⁸, aimed at dealing better with income earned from cross-border intra-group transactions. The Commission stated that, in order to determine whether an alternative taxation method is behind state aid,

244 N 211/2003.

245 N 159/1996.

246 N 766/2002.

247 This method involves taking the costs incurred by the supplier of goods (or services) in a transaction between associated companies and then adding to those costs a cost-plus mark-up to obtain an appropriate profit in the light of the functions performed, assets used, risks assumed and market conditions. In the course of 2003, the Commission had occasion to express its opinion on the lawfulness of schemes based on the application of the cost-plus method in the following cases: *Belgian coordination centres scheme*, decision of 17.2.2003 (OJ L 282, 30.10.2003); *Luxembourg finance companies scheme*, decision of 16.10.2002 (OJ L 153, 20.6.2003); *Vizcaya coordination centres scheme (Spain)*, decision of 6.2.2003 (OJ L 31, 6.2.2003); *French headquarters and logistics centres scheme* (not yet published); and the *scheme for US foreign sales corporations in Belgium*, decision of 25.6.2003 (not yet published).

248 This method is designed to avoid double taxation. No national tax is paid at all, irrespective of the amount of tax due abroad. The Commission ruled on the lawfulness of this method in its decision of 17.2.2003 on the *Irish scheme applicable to the taxation of certain categories of foreign income* (OJ L 204, 13.8.2003, p. 51)

it must be established whether the tax burden resulting from the application of that method is lower than that which would have resulted from the application of a “traditional” taxation method.

480. The Commission indicated, moreover, that, where tax aid granted to a member of an international group also directly benefits other members of the same group located abroad, those members must also be regarded as recipients of the aid. The Commission considered, furthermore, that the criterion of transfer of state resources must be assessed in the light of the aid recipient's situation²⁴⁹.
481. As regards material selectivity, the Commission made clear that certain measures open to virtually all sectors of the economy may nevertheless be regarded as selective where they exclude *de facto* certain firms. This may be the case in particular with measures applicable only to multinationals²⁵⁰ or to companies of a sufficiently large size²⁵¹.
482. As regards regional selectivity, the Commission stated that a tax measure taken in the context of the regional autonomy of a regional or local authority may be regarded as selective where the authority in question introduces an exemption from a tax forming part of the national tax system²⁵².
483. Lastly, the Commission continued to adopt a restrictive approach towards justifications of differential tax measures based on the nature or general scheme of the tax system concerned. It took particular care to verify whether the eligibility criteria for firms to benefit from a measure were consistent with the justifications put forward by the Member States²⁵³.
484. The Commission also had occasion in the course of 2003 to apply, in a number of decisions concerning the application of the cost-plus method, the principle of legitimate expectation. In line with the case law of the Court of Justice and the Court of First Instance, the Commission applies this principle strictly. It did, however, recognise it in these cases in view of their similarity with a similar Belgian scheme, which was previously found to be outside the scope of Article 87(1) of the Treaty.
485. Belgian coordination centres: in the course of the year, the Commission took two decisions concerning Belgian schemes targeted at the coordination centres of large multinational corporations (eligibility criteria in terms of number of countries, amount of equity capital and turnover). A coordination centre may be defined as an economic entity which, within a group of companies, centralises and coordinates, for the benefit of the companies belonging to the group, certain auxiliary activities such as financing, cash-flow management and accounting, together with personnel

249 See the above-mentioned case concerning coordination centres in Belgium and the case concerning aid for international financing activities in the Netherlands, decision of 17.2.2003 (OJ L 180, 18.7.2003), paragraphs 91 et seq.

250 Decision of 17.2.2003 on the *Dutch international financing activities scheme* (OJ L 180, 18.7.2003), and decision of 11.10.2002 on the aid scheme applicable to *central corporate treasuries in France* (not yet published).

251 Decision of 11.12.2002, OJ L 150 of 18.6.2003, p. 52.

252 Decision of 11.12.2002, OJ L 150 of 18.6.2003, p. 52.

253 See the above-mentioned case involving international financing activities in the Netherlands.

management, IT policy and the provision of tax advice. Such centralisation results in principle in economies of scale.

486. The first decision, which was taken on 17 February²⁵⁴ (and rectified by a corrigendum on 23 April), was a negative final decision and concerned the scheme in force since 1982. Since the aid involved was existing aid previously approved by the Commission, its recovery was not requested and a transitional period was granted to centres covered by the scheme on the date of the decision. The second decision adopted by the Commission on 23 April²⁵⁵ concerns the new scheme drawn up by Belgium to replace the 1982 scheme. It is a partly positive decision involving an initiation of proceedings in relation to three aspects of the new scheme, which was notified in May 2002. The first coordination centres scheme dates back to Royal Decree No 187 of 30 December 1982. The advantage of the scheme is granted through prior individual approval of centres by royal decree. Approval is valid for 10 years and can be renewed for 10 more years.
487. By way of derogation from the provisions of ordinary law, the taxable income of approved centres is determined on a flat-rate basis as a percentage of the amount of operating expenditure and expenses (cost-plus method). The cost base comprises all of the centre's costs excluding staff costs, financial charges and corporation tax, a point that was criticised by the Commission. The profit margin must in principle be calculated case by case, taking into account the work actually carried out by the centre, but was generally set at 8%, a point also criticised. According to some estimates, this system would result in an actual tax rate of 1%, compared with the corporation tax rate of 39% then in force in Belgium. Lastly, approved centres also benefit from a specific exemption from withholding tax and capital duty, a feature judged to constitute incompatible aid.
488. A total of nearly 250 centres undergoing approval on the date of the Commission's final decision will continue to benefit from the scheme, some until the end of 2010. The new scheme is an amendment of the previous one, and incorporates the rudiments of a new way of applying cost-plus which, in the eyes of the Commission, no longer involves, in itself, any aid element. The new scheme nevertheless maintains the previously contested exemptions from withholding tax and capital duty, with respect to which the Commission has had no choice but to open formal proceedings once more.
489. The analysis of these schemes has raised questions of principle or of procedure which the Commission tried to answer in the two decisions adopted this year²⁵⁶. Mention may be made of the treatment to be accorded to an aid scheme previously authorised as "non-aid", the recognition of a certain legitimate expectation on the part of beneficiary firms engendered by such authorisation, recourse to anticipatory decisions whereby a tax authority commits itself unilaterally to the tax treatment that will be accorded in future to the investments or transactions described by the taxpayer, or the use of alternative flat-rate methods for determining taxable profits.

254 OJ L 282/2003, C 15/2002.

255 OJ L 282/2003, C 15/2002.

256 OJ L 282/2003, C 15/2002.

490. As regards the litigation generated by this matter, the negative final decision of 17 February gave rise to applications for annulment from Belgium and Forum 187, the professional federation of coordination centres. On 26 June, the Court of Justice suspended that part of the Commission's decision which prohibited the renewal of the scheme with respect to centres approaching expiry, pending judgment on the substance²⁵⁷. At the same time, as part of the negotiations surrounding the adoption of the taxation package (consisting of the directive on the taxation of savings income, the directive on interest and royalty payments and the code of conduct for business taxation), Belgium requested the Council to make use of the third subparagraph of Article 88(2) of the Treaty in order to authorise the old scheme until 2005. The Council decision acceding to this request was adopted on 16 July²⁵⁸, in contradiction with the final decision taken by the Commission in February. The Commission, challenging the legality of this manner of proceeding, in turn brought an action for annulment before the Court of Justice, this time against the Council.
491. International Financing activities (NL): on 17 February, the Commission decided to close with a negative decision the procedure opened on 11 July 2001 with respect to the scheme of taxation of international financing activities in the Netherlands²⁵⁹.
492. This tax scheme allowed the establishment free of tax of a special reserve for international financing risks. The benefit of the scheme was not limited to certain sectors of the economy or to certain regions of the Netherlands. Nevertheless, the Commission considered that it was a selective measure as only companies present in at least four countries or on at least two continents were eligible. The Commission rejected the argument that the sole purpose of the minimum four countries/two continents requirement was to provide objective criteria which could be used to assess whether the basic requirements were met. Although it was logical to set certain limits or thresholds in a tax structure to ensure that it worked properly, this should not result in excessive demands being made which are not proportionate to the desired aims. Objectively speaking, groups which are active in only three countries or on one continent are no less exposed to the risks associated with international financing activities.
493. The Commission also rejected the argument that measures to combat erosion of the tax base or to improve the lack of competitiveness which group financing activities in the Netherlands suffered from before 1997 justified preferential tax treatment for a limited number of companies. These aims correspond first and foremost to economic policy objectives and not to objectives inherent in the Dutch taxation system. In so far as the benefits associated with the scheme were not linked to investments, job creation or specific projects, they merely entailed a reduction in overheads and were therefore to be regarded as operating aid, which is currently authorised only under strict conditions which were not satisfied in the case in point. The Commission therefore concluded that the scheme was incompatible, but it did not order the recovery of aid already paid as it considered that beneficiaries under the scheme had a legitimate expectation, and it authorised by way of exception a transitional period during which the scheme would be gradually run down. The scheme presented

257 Order of the President of the Court of Justice of 26.6.2003 in joined Cases C-182/03R et C-217/03R.

258 OJ L 184 of 23.7.2003, pp. 17-18 (2003/531/EC).

259 OJ L 180 of 18.7.2003, p. 52.

similarities with the Belgian coordination centres scheme, which was found to be a general measure by the Commission back in 1984, and a Commission reply to a parliamentary question had intimated that special schemes for the taxation of multinationals did not fall within the purview of the control of state aid.

494. Irish foreign income: on 17 February, the Commission took a negative final decision on an Irish tax scheme known as the "foreign income" scheme²⁶⁰, which was found to be illegal and incompatible. It did not, however, order the aid to be recovered. The Commission considered that, although Member States are free to choose the general method (tax exemption or tax credit) of avoiding the double taxation of the income distributed by a subsidiary to its parent company, any specific departure from this choice, once made, may constitute incompatible state aid. The method chosen by Ireland to avoid double taxation is the tax credit. The Irish tax payable on profits and gains subject to double taxation is reduced by the amount of foreign tax paid thereon. Under the foreign income scheme, the reduction is granted in the form of an exemption from corporation tax on profits or gains of foreign origin.
495. The measure is based on sections 222 and 847 of the Taxes Consolidation Act 1997. Under section 222, dividends received by an Irish resident company from its foreign subsidiaries are exempt from Irish corporation tax where those dividends are linked to an investment plan directed towards the creation or maintenance of employment in Ireland. A "foreign subsidiary" is a company resident in a State with which Ireland has a double taxation treaty and which is a 51% subsidiary of the exempted Irish resident company. The investment plan must be submitted in advance to the Irish authorities who determine the amount of the exempted dividends. There is no requirement as to the number of jobs created or maintained. Under section 847, the exemption of profits and gains may also be granted on the basis of an investment plan directed at the creation of "substantial new employment" in Ireland. Exemption is granted only where the activities carried out abroad are in the country specified in the exemption certificate issued by the authorities.
496. In its final decision of 17 February, the Commission stated that the scheme constituted illegal operating aid incompatible with the common market, but owing to the legitimate expectation existing on the part of beneficiaries in view of the positive Commission decision of 2 May 1984 in the *Belgian coordination centres* case²⁶¹ it did not order the aid to be repaid. The key features of the decision are the findings of (1) the advantage resulting from the coexistence of two methods of avoiding double taxation, (2) the specific character of the measure resulting from the express or implied restrictions imposed on companies wishing to benefit from the advantage, and (3) the recognition of a legitimate expectation created by an earlier Commission decision. The specific exemption of the foreign income of certain companies, granted in a system where the general rule is a credit, constitutes an advantage which reduces the tax burden of those companies inasmuch as, under the credit system, where the Irish tax due is greater than the tax paid in the foreign country, an amount of tax still remains to be paid, whereas under the exemption system there is no longer any tax to be paid. The measure is selective in that the companies benefiting from the scheme necessarily form part of international groups with subsidiaries or branches abroad

260 OJ L 204 of 28.8.2003, C 54/2001.

261 See above.

and in that it favours only those companies which have obtained an exemption certificate in accordance with the highly restrictive specific requirements imposed.

497. Headquarters and logistic centres – France: on 13 May, the Commission took a negative decision on the special tax arrangements applicable to headquarters and logistic centres located in France²⁶². Because at the time of implementation of the scheme the French authorities as well as the beneficiaries had legitimate reasons to believe that the scheme did not constitute state aid, the Commission decided not to seek reimbursement of the tax advantages that might have been received. The French headquarters and logistic centres scheme was designed to promote the establishment of subsidiaries or branches of multinational groups in France by providing a special agreement concerning the tax treatment of certain intra-group activities of such groups. French subsidiaries and branches of multinational groups could apply to the tax authorities to have their taxable income calculated as a fixed percentage of their expenditures, using the cost-plus method. However, under the French scheme, certain subcontracting costs were not taken into account for the cost-plus computation if they represented less than 50% of total business costs. Furthermore, headquarters and logistic centres are partially exempted from the application of the alternative minimum turnover tax – *impôt forfaitaire annuelle* (IFA) - provisions of the French tax code.
498. Under the French tax code, all profitable activities are taken into consideration for tax purposes and all profitable companies are subject to IFA. Under the headquarters and logistic centres scheme, however, a French headquarters or logistic centre operating under an approved agreement could exclude a significant amount of its activities from taxation by subcontracting them to third parties. Similarly, a headquarters or logistic centre was substantively exempt from the advance payment of tax normally imposed under the IFA rules. The Commission therefore concluded that the French scheme reduced the taxable earnings of French headquarters and logistic centres party to such an agreement and conferred a cash flow advantage by exonerating them from the advance payment of IFA. The scheme resulted in selective lower effective taxation, which is not allowed under the state aid rules.
499. The French scheme was originally introduced to attract the location of certain activities of multinational groups by increasing their international competitiveness. However, the Commission's investigation revealed that the tax advantages granted under the scheme constituted a selective advantage benefiting only French subsidiaries and branches operating under the above-mentioned agreements. Especially in the case of intra-group international activities such as research and development, which are subject to fierce competition and are potentially covered by the scheme, the distortion was created by the tax advantage very substantial and the negative effect on competition and trade in the single market considerable.
500. On 24 June, the Commission took a negative decision on the special tax arrangements applicable to the activities of US foreign sales corporations located in Belgium²⁶³. Because at the time of implementation of the scheme the Belgian authorities as well as the beneficiaries had legitimate reasons to believe that the

262 C 45/2001.

263 C 30/2002.

scheme did not constitute state aid, the Commission decided not to seek reimbursement of the fiscal advantages that might have been received.

501. Under the former US legislation (effectively repealed in September 2000 following multiple rulings by the WTO), an FSC is a foreign company, typically fully owned by a US exporting company that elects to be subject to FSC rules, effectively exempting the foreign trade income earned by such an FSC from US taxation otherwise due. Under the US FSC legislation, an FSC must be organised or have an office in a foreign country having an agreement with the US for sharing tax information (as is the case with Belgium). The foreign trade income of an FSC is exempt from US taxation only if certain economic processes, such as the sale or lease of exporting products or the supply of services concerned with such sale and lease transactions, take place outside the US. In particular, an economic process is considered to take place outside the US if at least a portion of the FSC's direct costs is incurred outside the US, including advertising and sales promotions, processing customers' orders and arranging delivery, transporting goods, invoicing customers and assuming credit risks.
502. Under the Belgian scheme, the business activities of an FSC in Belgium could obtain a special tax ruling with a view to determining the amount of taxable profits with respect to its operations with related foreign companies. In particular, the taxable profits of an FSC were determined by applying a fixed 8% mark-up to certain eligible costs incurred by the FSC. However, such eligible costs did not include the direct costs relating to advertising, sales promotion, carriage of goods and credit risks. The scheme only applied to Belgian subsidiaries or establishments of FSCs operating within a multinational group of companies, provided that such FSCs had obtained a special ruling from Belgium's tax authorities.
503. In its decision, the Commission took the view that the Belgian scheme constituted state aid. It considered that the Belgian-FSC scheme offered excessive benefits to the FSCs and the multinational groups to which they belonged, by reducing their normal tax burden. The Belgian scheme was introduced to attract the location of FSCs by exempting their activities from local taxation so as to increase their international competitiveness in the EU single market. The Commission's investigation confirmed that the tax advantages granted under the scheme constituted a selective measure benefiting only FSCs' subsidiaries and branches operating under the above-mentioned agreements. Especially in the case of certain intra-group services such as the assumption of credit risk, advertising and sales promotions, which are subject to fierce competition and are covered under the scheme, the distortion created by the tax advantage was substantial and the negative effect on competition and trade considerable.

Parafiscal levies

504. The Commission also dealt with a case involving parafiscal levies in the cinema sector, the *FFG* case²⁶⁴, in which parafiscal levy aid to film production was considered to be compatible with the Treaty in accordance with the relevant case law

264 N 261/2003 German Filmförderungsgesetz - FGG.

of the ECJ, and with a case concerning state aid for entertainment productions in France²⁶⁵.

4. SECTORAL AID

4.1. Shipbuilding

505. Following the failure to reach an amicable settlement with Korea, the European Union decided to implement a temporary defensive mechanism (TDM) against unfair competition in the shipbuilding sector²⁶⁶. In accordance with the TDM, operating aid may be granted subject to Commission approval. Direct aid in support of contracts for the building of container ships and product and chemical tankers is to be considered compatible with the common market. Subject to the Commission's approval of Member States' schemes, aid may be authorised for shipbuilding contracts up to a maximum intensity of 6% of contract value before aid. After investigations confirmed that the Community industry had suffered material injury from unfair Korean practices, the supporting of contracts for the building of liquefied natural gas (LNG) carriers was authorised as well²⁶⁷.
506. The TDM is an exceptional and limited measure that was difficult to propose from a competition point of view. Regarding the interpretation of the TDM, it is clear from the regulation itself that aid may only be authorised where there has been competition for the contract from a Korean yard offering a lower price. In practical terms when assessing the Member States' schemes it was important to decide on the type of evidence needed to demonstrate competition for the contract. The Commission had to strike a balance between ensuring that this requirement is met, without imposing such difficult conditions as to make the TDM unworkable. Until now, the Commission has approved TDM schemes for Denmark, Germany, the Netherlands and France.
507. On 16 December, the Commission approved new German ship-financing guarantee schemes. The guarantees will be operated in Germany's five coastal *Länder* of Lower Saxony, Bremen, Hamburg, Schleswig-Holstein and Mecklenburg-Western Pomerania.
508. The novelty of the schemes consists in the introduction of risk differentiation. Different premiums will be charged for different risks to be covered by the guarantee. Germany devised a sophisticated rating system comprising six risk categories allowing allocation of projects according to their respective risks. Low risk projects will thus be able to benefit from cheaper premiums compared to higher risk projects. High-risk projects will in the future face premium payments commensurate with the risk that is being insured.
509. The guarantees are granted in relation to bank credits granted by any financial institution, irrespective of its location. Two types of guarantees can be granted: so-called construction financing guarantees, i.e. guarantees to secure the pre-financing

265 N 463/2003.

266 Council Regulation (EC) N 1177/2002 of 27.6.2002.

267 OJ L 252 of 4.10.2003, pp. 18-22 (2003/691/EC).

of the construction cost of the vessel until the delivery by the yard and so-called end-financing guarantees, i.e. guarantees to finance the purchase of the completed ship by the owner.

510. The schemes were approved until the end of 2006. Before that date, the Commission will review the functioning of the new system in the light of the experience gained within the first three years.
511. On 30 April, the Commission initiated the formal investigation procedure in respect of possible state aid involved in an Italian shipbuilding guarantee fund²⁶⁸. After an initial assessment of the scheme - which is not yet operative - the Commission could not exclude the possibility that it involved state aid. In particular, the Commission had doubts about whether the state-provided guarantee scheme, under which all users are charged the same premium irrespective of the individual risks involved in the financed project (while operating in a sector for which there is a market willing to offer such guarantees on the basis of an individual risk assessment), could be considered to be in all probability self-financing, taking into account all relevant cost elements.
512. On 27 May, the Commission took two decisions concerning public shipyards in Spain²⁶⁹. In the first decision, it extended the formal investigation into the possible granting of further restructuring aid to those shipyards. The Commission intends to clarify whether a sum of EUR 515 million was granted to the public yards that today are owned by the IZAR group. The potential aid apparently took the form of capital injections and loans. It appeared that this money had been provided by the state holding company Sociedad Estatal de Participaciones Industriales (SEPI) in 1999 and 2000. The Commission had concerns that this might constitute further state aid which, after the approval of a restructuring package of EUR 1 377 million in 1997, would not be compatible with the EU's shipbuilding aid rules.
513. In the other decision, the Commission opened a formal investigation into capital injections of around EUR 1 500 million by SEPI into IZAR during the years 2000-2002²⁷⁰. The Commission had concerns about whether the capital provided by SEPI to IZAR might confer economic benefits on civil shipbuilding which it was unlikely to have received from commercial sources. Capital provided to IZAR via SEPI or any other public source may therefore constitute incompatible state aid.

4.2. Motor vehicle sector

514. Although the motor vehicle aid framework expired in 2002, cases notified before its expiry were assessed under the framework also in 2003. Since January 2003, the motor vehicle sector has been integrated into the new Multisectoral Framework on regional aid for large investment projects. According to the new, simple rules, projects in the motor vehicle sector are eligible for aid up to 30% of the maximum allowable for each region (compared with up to 100% under the old rules).

268 N 371/2001.

269 C 40/2000.

270 C 38/2003.

515. On 11 June, the Commission partially approved regional investment aid to car producer Volkswagen for its plant in Arazuri, Pamplona²⁷¹. After an in-depth investigation, the Commission concluded that only part of the EUR 62 million in aid proposed by Spain was necessary for the investment to be carried out. In accordance with the rules of the (expired) motor vehicle framework, the Commission concluded that the proposed aid was higher than what was necessary to compensate for the additional costs of carrying out the project in Spain, and reduced the allowable aid accordingly.
516. On 23 July, the Commission initiated a formal investigation into aid amounting to EUR 178 million for a EUR 219 million investment planned by car maker De Tomaso in Cutro, Calabria (southern Italy)²⁷². De Tomaso intends to invest in a greenfield plant in Cutro that will employ around 800 staff in 2009 to produce luxury sports cars and assemble an off-road vehicle produced by the Russian motor vehicle constructor UAZ. In the decision opening the procedure, the Commission expressed doubts about whether the cost-benefit analysis carried out by the Italian authorities established the real cost disadvantage of Cutro compared with alternative sites for the same project. The Commission's main doubts concerned the scope of the comparison in the cost-benefit analysis, and in particular the investments that would be undertaken at Cutro but not at the alternative sites.
517. On 30 April, the Commission initiated a formal investigation into aid amounting to UKL 16 million for a UKL 165 million investment planned by carmaker Peugeot at its Ryton plant in the United Kingdom²⁷³. Peugeot intends to carry out an investment for the production of the replacement model for the current Peugeot 206. In the decision opening the procedure, the Commission expressed doubts about whether there was a viable alternative to carrying out the project at Ryton. It also expressed doubts about the cost-benefit analysis carried out by the UK authorities to establish the real cost disadvantage of Ryton compared with alternative sites for the same project.
- 4.3. Steel
518. On 15 October, the Commission issued a final decision stating that the acquisition of a EUR 9 million stake by Belgian state-controlled company Sogepa in steel producer Carsid constituted state aid which is incompatible with the common market.
519. In the decision the Commission considered that a minority shareholder, such as Sogepa, operating under normal market conditions would not be prepared to provide funds for an operation like the one at issue, because profitability could not be guaranteed in view of the risks involved. Instead, Sogepa's partners would, both directly and indirectly, be the main beneficiaries. This being so, the Commission took the view that Sogepa's stake in Carsid would constitute state aid. As the Commission considered state aid for investment and restructuring in the steel industry to be incompatible with the common market, it adopted a negative decision.

271 C 38/2002.

272 C 48/2003 ex N 791/2002.

273 C 30/2003.

520. The Usinor Sacilor group had announced in February 2001 that it intended to close down Cockerill Sambre's hot-rolling line in Charleroi. Therefore negotiations commenced between Usinor-Cockerill Sambre, the Duferco group and Sogepa (which is controlled by the Walloon Region) primarily with a view to setting up a joint venture to produce slabs based on Cockerill Sambre's existing mill in Charleroi together with a plant owned by Duferco Clabecq (continuous casting).

4.4. Telecommunications

521. The year began with a flurry of activity on the part of DG Competition in the area of state aid to the telephony sector. The results of this are to be seen in the form of two Commission decisions adopted in January, one concerning a German private operator and the other the French incumbent operator. In both cases, the Commission had to opt for initiation of the formal investigation procedure as the information furnished by the two countries' authorities did not remove all doubt about the compatibility of the measures with the internal market.

522. On 21 January, the Commission decided to authorise EUR 50 million of rescue aid for MobilCom AG and at the same time launched a formal investigation into a guarantee granted by the German authorities on an additional loan of EUR 112 million²⁷⁴. On 19 September 2002, the German State stood guarantee for a EUR 50 million loan to MobilCom ("the first aid measure"). The loan itself was provided by the state-owned development bank KfW. On 20 November 2002, the German State stood guarantee for a further EUR 112 million loan ("the second aid measure"). This was provided by a consortium of public and private banks.

523. During the course of the preliminary examination it transpired that MobilCom had needed the first loan as a result of the withdrawal of financial support by its principal shareholder France Télécom, a step which plunged MobilCom into a serious liquidity crisis. The Commission found that the first aid measure qualified as rescue aid within the scope of the Community guidelines on state aid for rescuing and restructuring firms in difficulty²⁷⁵ ("the guidelines"). In accordance with the guidelines, The German authorities demonstrated that the EUR 50 million loan was indeed necessary to cover MobilCom's current operating expenses and they undertook to submit a restructuring plan within six months of the rescue loan being approved by the Commission.

524. With regard to the other state guarantee covering the EUR 112 million loan, the Commission had serious doubts whether this measure could qualify as rescue aid. On the basis of the information submitted by the German authorities, it appeared that the second loan was employed not only to cover current expenditure but also to finance a series of restructuring measures. However, as no restructuring plan had been submitted to it, the Commission lacked the information needed to assess whether the second aid measure could be considered restructuring aid within the meaning of the Community guidelines.

274 OJ C 80/2003, NN 115/2002.

275 OJ C 288/2 of 9.10.1999.

525. The Commission could not accept the German authorities' argument that a single rescue aid package was involved and it therefore initiated a formal investigation into the second measure. On 15 March, the German authorities notified the Commission of their intention to prolong the two guarantees until 2007. On 9 July, the Commission decided to widen the formal investigation to include this prolongation. In September, MobilCom sold 20% of its stake in the Internet operator Freenet.de AG. This transaction enabled MobilCom to reimburse the loans and, as a result, the guarantees were automatically cancelled. During the course of the formal procedure the Commission will have to examine whether these measures are compatible, especially from the angle of the necessity of the aid.
526. On 30 January, the Commission decided to initiate the formal investigation procedure laid down in Article 88(2) of the EC Treaty in respect of financial measures planned by the French Government in support of France Télécom, which had been notified on 3 December 2002²⁷⁶. The procedure also concerns the business tax scheme applicable to France Télécom, which is the subject of a complaint. The plan is intended to enable France Télécom to repay its debts in the short term by increasing the company's capital through a rights issue to which the State and private shareholders will subscribe in proportion to their current stakes in the company. As the French authorities considered that it would not be possible to recapitalise France Télécom in the near future, they announced that a shareholder's advance in the form of a credit line not exceeding EUR 9 billion would be granted ahead of their participation in the rights issue via a public institution, ERAP. They indicated that the advance would carry a market interest rate. The Commission has concerns about whether the plan might confer an advantage on France Télécom which it would not have enjoyed under normal market conditions and about whether the French Government's conduct is consistent with the actions of a prudent investor. It seems to have been admitted by the French Government itself that France Télécom was in such a financial state that, until the shareholder's advance was announced, it had been unable to raise capital on the market on appropriate terms. At the same time, since the French Government has left no doubt that the credit line anticipates the State's contribution to boosting France Télécom's own resources, it can scarcely be claimed in these circumstances that the French authorities' participation in France Télécom's recapitalisation is concomitant with the private investor intervention. The investigation will therefore have to establish whether the credit line enabled France Télécom to bring forward its return to the bond market as well as carry out its recapitalisation under the best possible conditions.
527. After the announcement and the apparent granting of the credit line, and following the submission by France Télécom's management of a recovery plan, France Télécom has been able, without drawing on the credit line, to return to the bond market for the first time after 18 months and to raise large amounts of capital, as well as to renegotiate the maturity of part of its debt. The operator's recapitalisation, which was launched on 24 March to the tune of EUR 15 billion, has been well received by the market. These various events have thus taken place subsequent to the investment decision taken by the French Government, which at the time of the notification would appear not to have had any certainty about the market's confidence and its participation in the recapitalisation, the banks having made their

276 OJ C 57/2003, NN 47/2002.

agreement conditional on prior examination of the recovery plan and its initial results. Moreover, the conditions under which the advance would be remunerated are such that the possibility that the company is enjoying an advantage which it would not have enjoyed under normal market conditions cannot be ruled out.

528. The Commission notes also that the French Government has not furnished sufficient evidence that the return on the invested capital would be acceptable to a private investor. For one thing, France Télécom is heavily indebted and the State's investment according to its own description is exceptional, and for another the French Government did not attach to the notification France Télécom's recovery plan either in its entirety or in sufficient detail to demonstrate the existence of a return acceptable to a private investor.

4.5. Public broadcasting

529. The Commission approved a series of state financing measures granted to the Portuguese (RTP) and Italian (RAI) public service broadcasters on 15 October²⁷⁷, as well as to the French public broadcasters (France 2 and France 3) on 10 December²⁷⁸. These cases relate to ad-hoc state funding measures granted to the public service broadcasters after the opening-up of the television market in these countries in the 1990s. This ad-hoc funding comprised a series of different measures, e.g., capital injections, debt rescheduling, operating aid, tax exemptions and subordinate loans. The Commission found that these measures did not bring total public compensation payments beyond the net additional cost of public service broadcasting. Moreover, in the Italian and French cases, no distortion of competition in commercial markets (for instance advertising) could be established.

530. These ad-hoc measures are distinct from the recurrent funding mechanisms that the Member States concerned established before the entry into force of the EC Treaty. These mechanisms generally take the form of a licence fee charged to the owners of radio and television sets or annual compensation directly from the state budget. DG Competition's services found that, in all three countries, they are to be considered existing aid and must be dealt with according to the existing state aid procedure. Regarding a fourth country, Spain, the Commission had not opened formal proceedings in connection with any ad-hoc measures and, therefore, has not taken any formal decision. However, DG Competition's services found that, like in the Portuguese, Italian, and French cases, the Spanish recurrent funding mechanism qualified as existing aid.

531. DG Competition's services determined that the smooth functioning of competition and the single market requires that the licence fee mechanisms of these four countries be modified. They therefore proposed some amendments to the national authorities of Portugal, Italy, France, and Spain in order to bring these mechanisms into line with the Communication on the application of state aid rules to public service broadcasting²⁷⁹. In particular, this initiative aims at ensuring that these financing

277 *Finanziamento de RTP pelo Estado*, decision C (2003) 3526; *Misure in favore della RAI*, decision C (2003) 3528.

278 Aid to France 2 and France 3, decision C (2003) 4497.

279 Communication from the Commission on the application of state aid rules to public service broadcasting, OJ C 320 of 15.11.2001, p. 5.

systems contain safeguards against excessive compensation and oblige public broadcasters to run their commercial activities in line with market prices.

532. The Commission decided to initiate the formal investigation procedure in respect of the state financing of the Danish public broadcaster TV2. The preliminary investigation led the Commission to conclude that the Danish State had overcompensated TV2 for its net public service cost during the period under investigation (1995-2002). TV2 is dually funded, i.e. by means of state funding as well as commercial revenue, mainly advertising income. The information at hand suggested that TV2 might have used the overcompensation to cross-subsidise its commercial operations. The Commission therefore stated that it would, as a part of the in-depth investigation, further analyse the pricing behaviour of TV2 in relation to its competitors in order to be able to assess whether the behaviour of TV2 might have distorted competition in the advertising market.
533. The financing measures under review comprise licence fee resources, interest and instalment free loans, state guarantees for operating loans, a tax exemption as well as a transfer of resources from TV2 Fund and the Radio Fund. TV2 also enjoys a must-carry status and has access to a free transmission frequency with national coverage.
534. The Commission will assess these measures in line with the principles of the Commission Communication on the application of state aid rules to public service broadcasting.

4.5.1. *Business tax scheme*

535. French Law No 90-568 of 2 July 1990 exempts France Télécom from the ordinary law scheme provided for in the General Tax Code. In practice, there were two schemes: a “transitional” scheme, applicable from 1 January 1991 to 1 January 1994, under which France Télécom was not subject to business tax as such, then the “definitive” scheme, which provides for the payment of business tax as from 1994 in accordance with rules falling outside the scope of French ordinary law. The basis of assessment used is that at the place of principal establishment, the business tax base for France Télécom is reduced in relation to the tax payable by other firms, and the rate of tax payable by France Télécom is different from the rates applied to other firms. The business tax scheme applicable to France Télécom appears to meet the criteria for defining a measure as state aid under the Treaty. It appears to have conferred an advantage on France Télécom inasmuch as it paid a lower business tax than it would normally have had to pay under the rules of ordinary law. The Commission also has serious doubts as to the compatibility of any such aid with the proper functioning of the internal market. Following a preliminary investigation which did not dispel its doubts, the Commission decided in accordance with the Treaty to initiate the formal investigation procedure in respect of the two aspects in question.

5. COAL

536. Since 24 July 2002²⁸⁰ a new framework has applied to state aid granted in the coal sector. Currently, four Member States continue to produce coal in the EU: Germany, France, the UK and Spain. Due to unfavourable geological conditions most EU mines are not competitive against imported coal.
537. With regard to Spain, the Commission authorised aid in respect of private coalmining companies in the Principality of Asturias for research and technological development, environmental protection and mining training²⁸¹ as well as aid related to the restructuring process in respect of the coalmining company Hunosa²⁸². However, the investigation procedure was initiated with respect to different aid measures in favour of private coalmining companies in the Autonomous Community of Castile-Leon²⁸³.
538. The Commission also decided to reopen the procedure against the company González y Díez SA in order to replace Decision 2002/827/ECSC of 2 July 2002 with a new decision²⁸⁴. It was considered that, after the expiry of the ECSC Treaty, the procedural rules that are now applicable offer better opportunities to guarantee the rights of Member States, the concerned company and third parties. On 5 November, the Commission closed the procedure and decided that the aid authorised for 1998 and 2000 had not respected conditions applicable and that the aid for 2001 can only partially be authorised²⁸⁵.
539. On 7 May, the Commission authorised both the restructuring plan and aid to the German coal industry for the year 2003²⁸⁶.
540. On 28 May, the Commission authorised aid in respect of redundancy payments arising from the closure of the Selby Complex owned by UK Coal²⁸⁷. On 25 June, the Commission authorised an aid scheme to cover initial investment costs to the United Kingdom coal industry for the period 2003-2005²⁸⁸. The scheme is designed to support commercially realistic investment projects that maintain access to reserves at mines with a viable future and create or safeguard jobs in socially and economically disadvantaged areas.

280 OJ L 205 of 2.08.2002, p. 1.

281 Commission decision of 21.1.03, C(2003)244

282 Commission decision of 19.2.03, C(2003)526.

283 Commission decision of 19.2.03, C(2003)525.

284 Commission decision of 19.2.03, C(2003)524.

285 Commission decision of 5.11.03, C(2003)3910.

286 Commission decision of 7.5.03, C(2003)1295.

287 Commission decision of 27.5.03, C(2003)1668.

288 Commission decision of 24.6.03, C(2003)1908.

6. TRANSPORT

6.1. Rail transport

541. On 16 December, the Commission authorised a new scheme to support the movement of intermodal containers by rail in Great Britain²⁸⁹. This scheme will provide continued support for the deep-sea and short-sea intermodal container business that currently uses rail by granting a fixed rate for each container moved. The aid scheme should contribute to securing growth in this sector and in the domestic intermodal freight business.

6.2. Combined transport

542. The Commission authorised different aid schemes which aim at promoting combined transport as an alternative to road transport by compensating for its additional costs²⁹⁰. In particular: a French scheme²⁹¹ covering all categories of intermodal transport which grants a flat-rate payment per intermodal transport unit transhipped and a national Italian rationalisation aid scheme²⁹² which awards, among other measures, aid to companies making use of a minimum annual quantity of trains for combined transport or for the transport of dangerous goods.

543. One of the measures included in the above-mentioned Italian scheme is the Franco-Italian experimental rolling motorway between Aiton and Orbassano (Lyon-Turin). This new service will be operated by AFA - Autoroute Ferroviaire Alpine (a company in which the main partners are SNCF and TRENITALIA²⁹³) from 2003 to 2006. Whilst the Italian contribution for this project comes from this authorised aid scheme, the French financing of its experimental phase was authorised by another Commission decision²⁹⁴.

544. The Commission also closed two formal investigation procedures which raised doubts about the proportionality of planned aid in two infrastructure projects. These cases concerned the provision of a larger berth and enhanced freight handling facilities at Corparch Pier, near Fort William (Scotland)²⁹⁵ and the construction of a container terminal at Alkmaar (Province of North Holland) to promote household waste transport by inland waterways instead of by road transport²⁹⁶.

289 N 464/2003 (UK) *Company Neutral Revenue Scheme (CNRS)*, Commission decision of 16.12.2003.

290 N 64/03 Italy (Trento) – Granting of aid in support of combined transport. Commission decision of 1.10.2003, OJ C 284/03.

291 N 623/02 Commission decision of 30.4.2003, OJ C 248/03.

292 N 810/02 Commission decision of 10.12.2003, not yet published.

293 Approved by the European Commission on 4.8.2003.

294 NN 155/03 Commission decision of 10.12.2003, not yet published.

295 C 62/2002 (ex N 221/2002) – United Kingdom - Ad hoc aid to CLYDEBoyd under the Freight Facilities Grant Scheme (FFG). Commission decision of 5.2.2003.

296 C 51/2002 (ex 840/01) - The Netherlands-Alkmaar container terminal. Commission decision of 24.6.2003, OJ L 327/03.

545. Finally, the Commission opened the formal investigation procedure regarding start-up aid for the development of new rail and maritime services to and from Friuli-Venezia Giulia²⁹⁷.
- 6.3. Road transport
546. In January, the Commission took a positive decision on rescue aid in favour of ABX Logistics²⁹⁸, an entity owned by the Belgian railway company SNCB which carries out integrated transport logistics in *inter alia* the road, maritime and air sectors as well as contract logistics. However, the Commission decided to open the formal investigation procedure as regards a restructuring plan for the same company (ABX Logistics)²⁹⁹.
547. Additionally, the Commission opened the formal investigation procedure following the wrongful application of a previous positive Commission decision concerning the restructuring of the company Sernam³⁰⁰, a subsidiary of the French railway company SNCF, which carries out road and rail transport as well as freight forwarding.
548. On 5 March, the Commission gave the French authorities permission to introduce an aid scheme aimed at limiting greenhouse gas emissions linked to the transport sector and its activities. This multiannual scheme³⁰¹, which will be run by Agence française de l'Environnement et de la Maîtrise de l'Energie (Ademe), meets the objectives of lasting development in compliance with the commitments entered into by the European Union under the Kyoto Protocol.
549. The Commission also authorised the region of Piedmont³⁰² in Italy to reimburse up to 40% of the toll charges which heavy goods vehicles weighing more than 7.5 tonnes would have to pay between June and September when they were banned from using the Lake Maggiore state highway and obliged to use the A 26 motorway.
550. On 23 July, the Commission decided to open the formal investigation procedure regarding a compensation measure that the German authorities intend to implement after having introduced a new toll system levied on heavy goods vehicles for the use of German motorways³⁰³. This compensation measure consists in a one-off toll reimbursement of a maximum of 2.6 cents/km against proof of payment of 8.6 cents of excise duties on fuel purchased within Germany. The Commission had some doubts as regards the compatibility of the compensation measure with state aid rules and European law, in particular with Directive 1999/62/EC (the “Eurovignette”).

297 N 134/2001 - Italy (Region Friuli-Venezia Giulia) Draft Law No 106/1-A – “Aid for the establishment of infrastructure and services in the goods transport sector, for the restructuring of road haulage and the development of combined transport”. Commission decision of 26.9.2003, OJ C 311/2003.

298 N 769/02 - Belgium – Rescue aid in favour of three entities ABX Logistics (F, D, NL). Commission decision of 21.1.2003.

299 NN 62/2003 – Belgium – Restructuring of ABX Logistics. Commission decision of 23.7.2003.

300 NN 122/2000 – France “SERNAM 2: review of restructuring aid”. Commission decision of 30.4.2003.

301 N 353/2001- France- ADEME aid scheme in the field of transport.

302 C 11/2002 (ex N 382/2001)- Italy – Commission decision of 9.7.2003.

303 C 54/2003 (ex N 194/2002) – Germany- Compensation measures accompanied by the introduction of a mileage-based motorway user charge for heavy goods vehicles. Commission decision of 13.7.2003, OJ C/202/2003, 27.8.2003, p. 5.

551. Passengers: On 19 February, the Commission decided not to raise any objections to the grant (GBP 12million - EUR 18.7 million - annually) that the UK Government will give to long-distance bus operators on condition that they offer half-fare concessions for older and disabled passengers³⁰⁴. The grant will compensate for the extra costs inherent in the provision of these half-fares. The Commission was of the opinion that this scheme aims at achieving an important objective of a public service nature.

6.4. Maritime transport

552. On 4 February, the Commission decided to raise no objections to the aid scheme of the *Free Zone of Madeira* for the period 2003-2006³⁰⁵, which will allow registered maritime companies, established between 1 January and 31 December 2003 to benefit, in particular, from a reduced rate of corporation tax of 1% in 2003-2004, 2% in 2005-2006 and 3% in 2007-2011.

553. On 19 March, the Commission approved for 10 years, with the exception of some of its provisions³⁰⁶, a package of tax measures in favour of the Belgian merchant marine. The package consists of, among other things, a flat-rate tax scheme applicable to maritime transport companies along the lines of what exists in most Member States with a commercial fleet. The set of tax measures approved by the Commission will help to strengthen the competitiveness of the Belgian fleet in the face of competition from third countries.

554. On 13 May, the Commission approved a flat-rate tax scheme applicable to French maritime transport companies³⁰⁷. France thus becomes the tenth Member State to have such a flat-rate tax scheme, after Greece (whose scheme predates its accession), the Netherlands, Denmark, the United Kingdom, Germany, Spain, Finland, Ireland and Belgium.

555. On 9 July, the Commission gave its conditional approval to the recapitalisation of Société Nationale Maritime Corse Méditerranée (SNCM)³⁰⁸ to the amount of only EUR 66 million, whereas the French authorities had originally planned to grant EUR 76 million to the publicly owned shipping company. The Commission demanded among other things that, throughout the restructuring period, SNCM should limit the total number of its vessels and the number of its services on the routes between Nice/Toulon and Corsica, refrain from posting the lowest fares on the market and increase its contribution to the restructuring plan by selling all of its non-strategic shareholdings.

304 N 588/2002 – UK - BSO Grant for long-distance bus services. Commission decision of 19.2.2003.

305 N 222/B/02 – Portugal – Commission decision of 4.2.2003, OJ C 148 of 25.6.2003, p. 7.

306 C 20/2003 (ex- N 433/2002) – Belgium – positive decision and initiation of procedure – Tax measures in favour of maritime transport, 19.3.2003.

307 N 737/2002 – France – Tonnage-based flat-rate taxation scheme in favour of maritime transport companies, 13.5.2003.

308 C 58/2002 – France - SNCM – Restructuring aid, final decision of 9.7.2003.

556. The Commission also approved the prolongation of a training aid scheme³⁰⁹ set up in 1999 in Germany as well as various schemes intended to reduce the employers' social security contributions borne by shipowners³¹⁰.
- 6.5. Air transport
557. In 2003, the Commission continued to apply its policy as set out in its communication of 10 October 2001 on the repercussions of the terrorist attacks in the United States on the air transport industry³¹¹. It had indicated in its communication that, if the situation characterised by inadequate insurance cover were to persist, Member States would have to decide either to continue providing supplementary cover or to underwrite the risks directly themselves. The possibility of intervention at national level was thus prolonged until 31 October 2002³¹². The Commission had also indicated in its communication the conditions under which it would consider the measures taken by governments with respect to insurance to be in keeping with Article 87(2)(b) of the Treaty. The latter provision permits Member States to grant aid "to make good the damage caused by exceptional occurrences". The Commission accordingly examined the measures notified to it by 13 Member States on the basis of that article³¹³.
558. The Commission also approved new compensation schemes drawn up by several Member States to cover the losses incurred by airlines as a consequence of the closure of certain parts of the airspace from 11 to 14 September 2001. It took the view, however, that a number of criteria laid down in its communication should be satisfied before such aid could be authorised.
559. The Commission thus approved the schemes introduced by Ireland and the Netherlands³¹⁴ and it took a final, essentially positive, decision regarding the scheme notified by Austria³¹⁵. On 27 May, the Commission decided in relation to the scheme planned by Greece to initiate the formal investigation procedure in respect of the compensation for costs incurred after 14 September 2001 or for zones not closed to

309 NN 126/2003 – Germany - Directive for the promotion of German maritime shipping of 5.5.2003 (Financial contributions for 2003), Commission decision of 1.10.2003.

310 N 19/2003 – Italy - Prolongation of a scheme to reduce employers' social security contributions in the coastal shipping sector, Commission decision of 11.3.2003; NN 135/2003 – Germany – Directive on reducing non-wage labour costs in the German maritime shipping sector, Commission decision of 26.11.2003.

311 COM (2001) 574.

312 Communication of 2.7.2002, COM (2002) 320 final.

313 Germany: NN 125/2002, decision of 20.8.2003, OJ C 230 of 26.9.2003. Austria: NN 124/2002, decision of 20.8.2003, OJ C 230, 26.9.2003. Belgium: NN 52/2002, decision of 20.8.2003, OJ C 230 of 26.9.2003. Denmark: NN 171/2002, decision of 9.7.2003, OJ C 206 of 2.9.2003. Spain: NN 169/2001, decision of 9.7.2003, OJ C 206 of 2.9.2003. Finland: NN 55/2003, decision of 9.7.2003, OJ C 206 of 2.9.2003. France: NN 19/2002, decision of 9.7.2003, OJ C 206 of 2.9.2003. Greece: NN 145/2001, decision of 9.7.2003, OJ C 206 of 2.9.2003. Ireland: NN 32/2002, decision of 9.7.2003, OJ C 206 of 2.9.2003. Netherlands: NN 47/2003, decision of 9.7.2003, OJ C 206 of 2.9.2003. Portugal: NN 173/2001, decision of 20.8.2003, OJ C 230 of 26.9.2003. United Kingdom: NN 123/2002, decision of 9.7.2003, OJ C 206 of 2.9.2003. Sweden: NN 168/2002, decision of 9.7.2003, OJ C 206 of 2.9.2003.

314 Ireland: NN 38/2002, decision of 13.5.2003, OJ C 148 of 25.6.2003, p. 7; Netherlands: NN 39/2002, decision of 14.9.2003, not yet published.

315 Austria: C 65/2002 (ex N 262/2002), OJ L 222 of 5.9.2003, p. 33.

traffic³¹⁶. Lastly, it decided that the temporary compensation for exceptional security measures imposed in the air transport sector in France following the terrorist attacks did not constitute aid³¹⁷.

560. Again in the context of the consequences of 11 September 2001 and following the authorisation of rescue aid at the end of 2001³¹⁸, the Commission authorised restructuring aid³¹⁹ notified by Germany for the charter airline LTU (Lufttransport Unternehmen GmbH). The aid will enable the airline to contribute to the financing of a restructuring plan aimed at returning the airline to profit by 2004.
561. On 21 January, the Commission initiated formal investigation proceedings against France in respect of non-notified rescue and restructuring aid measures in favour of the airline Air Lib³²⁰; the measures included an extension of loans already granted, additional loans or guarantees and interest payment facilities. Following the failure of attempts to take over the airline, Air Lib was wound up by the French courts on 17 February.
562. On 5 March, the Commission authorised³²¹ a temporary aid scheme of a social character aimed at enabling certain categories of passenger to benefit from low-cost fares on flights between Paris (Orly) and four airports in Corsica³²².
563. The Commission authorised a series of measures aimed at supporting the replacement and refurbishment of aircraft used on regional routes³²³. The measures form part of a general scheme to promote the growth of investment in the French overseas departments (Guyane, Réunion, Martinique, Guadeloupe). The Commission thus approved a French scheme to reduce social security contributions in respect of certain activities pursued in the overseas departments³²⁴. In particular, the scheme exempts establishments in the overseas departments in the air, sea and river transport sectors from the payment of employers' contributions.
564. Lastly, the formal investigation procedure decided on by the Commission on 11 December 2002 in respect of the advantages received by Ryanair when it set up its first base in continental Europe at Charleroi in 2001 was published³²⁵. These advantages were granted by the Walloon Region (reduction in airport taxes in a non-transparent and discriminatory manner) and the airport management body, a public

316 C 39/2003 (ex NN 119/2002), OJ C 199 of 23.8.2003, p. 3.

317 France: N 309/2002, decision of 19.3.2003, OJ C 148 of 25.6.2003, p. 7.

318 N 723/01, decision of 20.12.2001.

319 N 428/2002, OJ C 148 of 5.6.2003, decision of 19.3.2003 based on the Commission communication on the application of Articles 87 and 88 of the EC Treaty and Article 61 of the EEA Agreement to state aids in the aviation sector, point 27, OJ C 350 of 10.12.1994, and the Commission's 1999 guidelines on aid for rescuing and restructuring firms in difficulty, OJ C 288 of 9.10.1999.

320 France: C 3/2003 (ex NN 42/2002), OJ C 88 of 11.4.2003, p. 2.

321 N 309/2002, OJ C 110 of 8.5.2003.

322 Ajaccio, Bastia, Calvi and Figari.

323 Aid to Caraïbes Air Transport (CAT), OJ C 196 of 20.8.2003, decision of 2.4.2003; aid to Air Caraïbes (ex-CAT), N 474/2003 – France – Overseas investment programme 2003 – Air Caraïbes, decision of 16.12.2003; aid to Air Austral, N 427/2003 – France – Overseas investment programme 2003 – Air Austral, decision of 16.12.2003.

324 N 96a/2003 – France – Overseas programme law – Title I: measures in favour of employment, decision of 10.12.2003.

325 Belgium: C 76/2002 (ex NN 122/2002), OJ C 18 of 25.1.2003, p. 3.

undertaking controlled by the Region (subsidies for opening new routes, staff hotel expenses, meeting of advertising/marketing costs, etc.). The investigation is currently under way.

7. AGRICULTURE

7.1. Commission Regulation on the application of Articles 87 and 88 of the EC Treaty to State aid to small and medium-sized enterprises active in the production, processing and marketing of agricultural products

565. On 23 December, the Commission adopted a new regulation³²⁶ introducing a block exemption regime for certain categories of state aid granted up to certain ceilings to farmers or enterprises processing or marketing agricultural products. Member States no longer need to notify them in advance to the Commission for approval. The new regulation will be applicable until the end of 2006.

566. The regulation concerns state aid granted to small and medium-sized enterprises (SMEs) in the agricultural sector. In view of the definition of SME (no more than 250 employees, a turnover of no more than EUR 40 million or a balance-sheet total of no more than EUR 27 million), almost all holdings or enterprises in the agricultural sector come under these provisions.

567. The Commission is also introducing a new transparency standard: a summary of all exempted state aid measures, by Member State, will be published on the Internet five days before the aid is first paid out. Every farmer and any other interested party will thus have access to all the information on all the state aid measures falling under the block exemption. This measure will be an effective guarantee of transparency and of benchmarking, while avoiding the cumbersomeness of the procedure of formal notification and subsequent approval by the Commission.

568. The following types of aid are covered by the regulation and are therefore exempt from notification to the Commission, provided the conditions laid down in the regulation are fulfilled:

- investment aid for farmers of up to 40%, or 50% in less favoured areas, increased by 10% in the case of young farmers. The aid must not be limited to specific agricultural products. Farmers will be free to invest in the sector of their choice provided there are sufficient market outlets. Aid helping to increase production capacity is exempted up to 20% measured in livestock units or area cultivated. Aid of up to 60% - or 75% in less favoured areas – may be granted towards the cost of investing in the protection and improvement of the environment, the improvement of hygiene conditions of livestock enterprises or the welfare of farm animals, in so far as the investment goes beyond the minimum requirements imposed by the EU. Such aid may even be targeted at specific products;

326 Commission Regulation (EC) No 1/2004 of 23 December 2003 on the application of Articles 87 and 88 of the EC Treaty to State aid to small and medium-sized enterprises active in the production, processing and marketing of agricultural products, OJ L 1 of 3.1.2004.

- aid of up to 100% may be granted towards the cost of conserving traditional landscapes and buildings and may include reasonable compensation for the work undertaken by the farmer himself, or his workers, up to a limit of EUR 10 000 a year;
- aid may be granted for the relocation of farm buildings in the public interest;
- investment aid of up to 40% may be granted to enterprises engaged in the processing and marketing of agricultural products, this rate being increased to 50% in Objective 1 regions. The aid must not be limited to specific agricultural products. Thus, for example, a specific aid scheme applicable exclusively to the milk sector would not be covered by the regulation. Enterprises will be able to invest in the sector of their choice, subject to there being sufficient market outlets;
- aid of up to EUR 30 000 may be granted for the setting up of young farmers;
- aid may be granted for early retirement, provided the cessation of commercial farming activities is permanent and definitive;
- start-up aid may be granted to producer groups or producer associations, provided the total amount of aid does not exceed EUR 100 000 and is degressive over a period of five years (100% of the start-up costs incurred in the first year, with a reduction of at least 20% for each of the following years);
- aid towards the payment of insurance premiums may be granted up to 80% of the cost of premiums covering losses caused by adverse climatic events which can be assimilated to natural disasters; this rate is reduced to 50% where the policy provides cover against other losses caused by climatic events or by animal or plant diseases;
- aid of up to 100% is exempt from notification if it is granted towards the legal and administrative costs inherent exclusively in land reparation;
- aid of up to EUR 100 000 per beneficiary over a period of three years may be granted to encourage the production and marketing of quality agricultural products; the following may be assisted: the costs of market research and such like, the costs of the introduction of quality assurance schemes, the costs of training personnel to apply such schemes, the costs of the charges levied for the initial certification of quality assurance and similar systems, and the costs of control measures undertaken by third parties;
- aid of up to EUR 100 000 per beneficiary over a period of three years may be granted for technical support services in the agricultural sector, in particular for the education and training of farmers and farm workers, the provision of certain replacement services for farmers, consultancy services and the organisation of and participation in competitions, exhibitions and fairs;
- support for the livestock sector may be granted at a rate of up to 100% to cover the administrative costs directly linked to the establishment and maintenance of herd books; at a rate of up to 70% of the costs of tests performed by or on

behalf of third parties to determine the genetic quality or yield of livestock; at a rate of up to 40% for investments in animal reproduction centres and for the introduction at farm level of innovative animal breeding techniques or practices; and at a rate of up to 100% towards the costs of TSE tests, subject to a limit of EUR 40 per test carried out on bovine animals slaughtered for human consumption.

7.2. Draft regulation on “de minimis” aid in agriculture and fisheries

569. On 23 December, the Commission adopted a draft regulation concerning “de minimis” aid for the agriculture and fisheries sectors. The future regulation would have the effect of abolishing for three years the obligation of prior notification as regards national aid of up to EUR 3 000 per farmer and per fisherman. To avoid large-scale support operations, Member States granting such aid would have to respect an overall ceiling roughly equal to 0.3% of their agricultural or fisheries output.

570. Member States could grant aid fulfilling all the conditions of the regulation without prior approval by the Commission. But they would have to keep registers to show both ceilings have been respected. The draft will now be submitted to a broad consultation of Member States and third parties. The Commission plans to implement it towards the end of 2004.

7.3. Developments in the application of the new guidelines

7.3.1. *Promotion and advertising*

571. In 2003, the Commission had occasion to deal with numerous cases of state aid to promote and advertise agricultural products. The assessment of and taking of decisions on such measures enabled it to develop a certain practice in the application of the new guidelines on the advertising of agricultural products. Specifically, the decisions taken in this sphere made it possible to

- clarify the meaning of certain concepts in the guidelines, in particular the concepts of promotion and advertising³²⁷;
- define its position on aid aimed at numerous labels containing references to the origin of products³²⁸;
- draw up a fairly exhaustive list of eligible costs in relation to aid for promotion and advertising³²⁹;
- define more precisely the concept of “quality”³³⁰;

327 NN 44/03 (ex- N 6/03) and N 389/03 Italy (Tuscany) “Toscana promozione”; N 853/01 Spain; N 727/02 Spain (Madrid); N 829/01 Germany (Saxony); NN 166/02 and N 10/03 Italy (Mantova); N 145/02 Italy (Piemonte); N 434/02 Italy (Chamber of Commerce of Bologna); N 418/01 Italy (Veneto).

328 N 525/02 Germany (Baden Württemberg) “Biolabel B W”.

329 NN 44/03 (ex-N 6/03) Italy (Tuscany); NN 150/02 (ex-109/02) Italy (Tuscany).

330 N 260 A/02 Germany (Hessen); Aid 200/03 Germany (Lower Saxony); N 368/03 Germany (Saxony); Aid 442/02 Germany (North Rhine-Westphalia) “Promotion of Sales”; N 541/ 02 Germany (Baden-

- define its position on the 100% financing of aid for advertising outside the EU³³¹.

7.3.2. *TSE and BSE*

572. Similarly, since the guidelines on state aid concerning TSE tests, fallen stock and slaughterhouse waste entered into force³³², the submission of numerous notifications has provided the Commission with an opportunity to establish a certain decision-making practice and to clarify its position in this sphere.

573. In 2003, the Commission defined its position on the interpretation of certain points of the guidelines when dealing with the following cases:

- Aid No N 256/03 Germany (Baden-Württemberg)-“Compensation for slaughterhouses that destroy carcasses contaminated with BSE”;
- Aid No NN 21/02 (ex-N 730/01) Spain – “Measures against BSE”
- Aid No 150/02 Germany(Bavaria) –“Aid for rapid tests for BSE”;
- Aid No N 371/03-Germany (Saxony) “BSE test cost”
- Aid No N 129/03 Spain (Navarra) –“BSE test cost”
- Aid No N 268/03 Italy –(Piedmont) “Consortium for animal waste removal”
- Aid No N 164/03 Sweden “TSE and BSE testing costs”;
- Aide No NN 48/2003 (ex-N 157/2003) Belgium (Wallonia) – “Management of the disposal of animal carcasses on farms in the Walloon region”.

7.3.3. *Drought*

574. This year the drought in some Member States necessitated the taking of urgent measures at both Community and national level to compensate for the substantial losses incurred by the agricultural sector.

575. In this context, besides adopting Community support measures, the Commission had occasion to assess several state aid schemes³³³ and to reiterate its policy in this area.

576. When assessing aid schemes to compensate farmers for losses caused by adverse weather conditions, the Commission applies point 11.3 of the Community Guidelines for State aid in the agriculture sector³³⁴. Under point 11.3.1 of the Guidelines,

Württemberg); N 716/2002 UK (Wales) “Meat quality advertising scheme”; N 166/02 France “advertising of quality wines”.

331 N 166/02 France “advertising for quality wines”; N 658/02 UK “Food from Britain”.

332 Community guidelines for state aid concerning TSE tests, fallen stock and slaughterhouse waste, OJ C 324 of 24.12.2002.

333 Aid N 436/03 Germany - “Aid to compensate for drought damage”; Aid N 398/2003 Austria - “Aid for the purchase of forage and forage replacement products”; Aid N 661/01 Italy (Sardinia) - “Drought compensation, olives”; Aid N 353/02 Greece - “Bad weather compensation”.

334 OJ C 232, 12.8.2000, p. 19.

adverse weather conditions such as frost, hail, ice, rain or drought cannot of themselves be regarded as natural disasters within the meaning of Article 87(2)(b). However, because of the damage that such events may cause to agricultural production or the means of agricultural production, the Commission has accepted that such events may be considered equivalent to natural disasters once the level of damage reaches a certain threshold, which has been fixed at 20% of normal production in less-favoured areas and 30% in other areas.

7.4. Overall workload

577. The Commission received 268 notifications of state aid draft measures to be granted in the agricultural and agro-industrial sector. The Commission also started the examination of 29 aid measures, which had not been notified before under Article 88(3) of the EC Treaty. No review of existing aid measures pursuant to Article 88(1) was commenced or concluded. Overall the Commission raised no objections to 269 measures. Several of these measures were approved after the Member States concerned either amended them or undertook to amend them in order to bring them in line with Community state aids rules. The Commission started the procedure envisaged by Article 88(2) in respect of nine cases, where the measures concerned raised serious doubts as to incompatibility with the common market. The Commission closed the procedure envisaged by Article 88(2) in respect of six cases, by taking in four of them a final negative decision. 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.

8. FISHERIES

8.1. Overview

578. The fisheries sector is a sector which is the subject of extensive public intervention, on the Community level as well as on the national level, due to its characteristics of a social and economic nature.
579. With reference to the Guidelines for the examination of State aid to fisheries and aquaculture³³⁵, the Commission has assessed the compatibility with Community law of national schemes granting state aid in the fisheries sector.
580. The Commission intends to overhaul the rules governing the granting of state aid in the fisheries sector. For this purpose, the Commission adopted on 9 July a “Draft Commission Regulation on the application of Articles 87 and 88 EC to State aid to small and medium-sized enterprises active in the production, processing and marketing of fisheries products”. This draft regulation sets out the principle according to which a high number of state aids to the fisheries sector would no longer have to be notified to the Commission before being granted, provided that these aids comply with the rules laid down in the Regulation.
581. The draft regulation was discussed with Member States during a meeting of the Advisory Committee on State aid, held on 22 October. It was published in the

335 OJ C 19 of 20.1.2001, p. 7

Official Journal of 4 November 2003 for consultation³³⁶. A second meeting with Member States will take place on this text; it will then be adopted definitively by the Commission and enter into force before summer 2004.

582. State aid in the fisheries sector which does not fall within the block exemption regulation would still have to be notified to the Commission. It will be subject to new Guidelines on state aid to fisheries, which are currently being elaborated, and which will enter into force at the same time as the block exemption regulation.
583. The fisheries sector would also be covered by the Commission Regulation on the application of Articles 87 and 88 of the EC Treaty to “de minimis” aid in the agriculture and fisheries sector. A draft of this regulation was adopted by the Commission on 10 December. It provides that aid under EUR 3 000 may be granted to an undertaking over a period of three years without being notified to the Commission, provided that the global amount of such aid does not exceed 0.3% of the production of the fisheries sector of the Member State concerned. This draft regulation will be discussed by Member States in the course of the 2004 and should enter into force at the beginning of 2005.
- 8.2. Cases
584. By two negative decisions taken on 3 June, the Commission terminated the examination of two UK aid schemes whereby a council in northern Scotland in one case (Orkney) and a company controlled by a council in that region in the other case (Shetland) purchased fish quotas which were subsequently rented to fishermen belonging to these communities.
585. The Commission was informed about the existence of these schemes by a letter from a member of the European Parliament elected in a constituency in another part of the UK.
586. After a thorough examination of the schemes in question, the Commission found that the four criteria for the existence of state aid were met: advantage to beneficiaries, namely the fishermen, existence of state resources, distortion or threat of distortion to competition and impact on trade between Member States.
587. Recovery of the aid was, however, not required. The Commission considered that the funds used for the aid schemes had the same origin as funds considered by the Commission to be private funds in the area of structural funds. Even if there is not necessarily a link between Community structural funds and state aid, the councils could have the legitimate expectation that those funds could also be considered private funds in the field of state aid.

336 OJ C 265 of 4.11.2003, p. 17.

D - PROCEDURES

1. EXISTING AID IN THE NEW MEMBER STATES

588. The Accession Treaty provides that the following aid measures are to 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");
 - (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 ground of serious doubts as to the compatibility of the measure with the common market (the "interim procedure").
589. 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 applying Article 88(3) of the EC Treaty.
590. During 2003 the new Member States submitted to the Commission 171 measures under the interim mechanism, of which 76 were proposed to be considered existing aid. The other 95 measures are still being assessed. Under the mechanism the Commission puts an emphasis on the full compatibility assessment for those aid measures that are most complicated, most important in size and also likely to have the biggest/longest impact on competition after accession, such as aid cases in the banking sector in the Czech Republic and Hungary, and stranded cost cases in the energy sector in Poland. It is the first time that the interim mechanism has been used for acceding countries. For previous accessions all measures implemented by acceding countries before the actual accession date were considered existing aid without the Commission assessing the aid.

Stranded costs, Poland

591. During the 1990s, a number of Polish electricity generators signed long-term power purchase agreements with the Polish public electricity network operator. Under these agreements, the network operator undertook to buy the electricity produced by these generators at a fixed price for a very long period. The Polish Government plans to cancel these agreements by law and to grant aid to compensate the electricity generators for the losses they incur following the termination of the agreements. It has notified this compensation plan under the interim mechanism. The Commission is currently analysing it in the light of the methodology it has designed and used in the past for current Member States to analyse aid granted by States to electricity generators to cover stranded costs generated by the liberalisation of the Community electricity sector.

Czech bank cases

592. In the period from 1994 to 1998 the whole banking sector in the Czech Republic was subject to serious economic difficulties. In this period, the Czech State took several support measures aimed at ensuring the rescue and restructuring of several banks and their subsequent privatisation. In the light of this, the Czech authorities undertook to notify the Commission, under the interim mechanism, of all measures implemented in favour of the banking sector.
593. On 16 December, the Commission adopted the first decision on the restructuring of the Czech banks. In its first decision under the interim mechanism procedure, the Commission concluded that none of the measures notified by the Czech authorities in favour of Komerční banka a.s. ("KB") are "applicable after accession".
594. Therefore, an assessment of the compatibility with the common market on the part of the Commission was not required, pursuant to Annex IV.3 of the Act of Accession.

2 RECOVERY OF AID

595. In June, as part of its reorganisation, DG Competition set up a new unit within State Aid Directorate H. A new Unit which is specifically charged with ensuring the enforcement of state aid decisions. Commissioner Monti has repeatedly declared the enforcement of state aid decisions, and in particular of recovery decisions, to be one of the priorities of his state aid policy. The fact that Commission decisions are enforced not by Commission departments, but by Member States under their national procedures, constitutes a weak point in the enforcement system. The experience gained in recent years suggests that Member States do not always give sufficient priority to the implementation of Commission recovery decisions. This may be due to the inherent conflict of interest given that Member States are, at the same time, both the donor of aid and the recovering institution. Particular problems arise in cases where the beneficiary has gone bankrupt (around a third of all recovery cases). In such cases, the recovery takes place under national insolvency procedures since there is no harmonised European insolvency law. In order to allow for a "fresh start", national bankruptcy laws tend to shield the economic activities of the insolvent company against its creditors, including state aid recovery claims.
596. The new unit has three main tasks. The first and most urgent priority is the effective enforcement of recovery decisions. Secondly, it has been given the task of ensuring a more coherent approach to the monitoring and control of implementation by Member States of other state aid decisions (especially, but not exclusively, conditional decisions) and the application of block exemption regulations. The third area covers a number of horizontal tasks. These include the development of an enforcement policy by defining a comprehensive and effective enforcement strategy. The new Unit in DG Competition is developing effective methods and (legal) instruments for more immediate and thorough enforcement. In parallel, the unit will provide advice and support on enforcement issues to national authorities, judges, lawyers and companies.

597. The Commission assessed aid for the reduction of greenhouse gas emissions via alternative energy sources and energy saving³³⁷ in Lazio, Italy. The case concerns two projects whose objective consists in developing (a) the production and use of alternative energy sources (windpower) and (b) energy saving (by means of combined heat and energy production and district heating). With regard to both projects, the Commission found them to constitute compatible aid as they are in line with the relevant provisions of the Guidelines on state aid to environmental protection, notably points 30 (aid intensity for energy saving), 32 (aid intensity for renewable sources of energy), 36 (eligible investment) and 37 (eligible costs).
598. Nevertheless, on 3 May, the Commission opened the formal investigation procedure with regard to the first project (TLR/ACEA SpA) on the basis of the “Deggendorf” case law. The aid recipient, ACEA SpA, is one of the aziende municipalizzate to which the Commission addressed the decision of 5 June 2002 on state aid granted by Italy in the form of tax exemptions and subsidised loans to public utilities with a majority public capital holding³³⁸. Article 3 of the Commission decision stipulates that all necessary measures must be taken by Italy in order to recover from the beneficiaries the unlawful aid thus granted. ACEA SpA has not yet reimbursed the aid granted under case C 27/1999. Therefore, new aid to be granted to ACEA SpA is not in line with the *Deggendorf* principles³³⁹.
599. On 9 July 1992, the Regional Council of Vizcaya and P&O Ferries signed an agreement relating to the establishment of a ferry service between Bilbao and Portsmouth. It provided for the purchase by the authorities of travel vouchers to be used on the Bilbao-Portsmouth route. The Commission opened a formal investigation with regard to this agreement. In the course of the procedure, P&O Ferries proposed amendments to the original agreement and proposals for replacing it with a new one, which the Commission considered as not constituting state aid, whereupon it decided to terminate the procedure. By a new decision³⁴⁰ of 29 November 2000 on the aid scheme implemented by Spain in favour of the shipping company Ferries Golfo de Vizcaya³⁴¹, the Commission terminated the procedure declaring the aid in question incompatible with the common market and ordering the Kingdom of Spain to require its recovery.
600. According to the decision, the Diputación sought, by purchasing travel vouchers, first, to subsidise trips for senior citizens resident in Vizcaya, under a programme of made-to-measure holiday packages called Adineko, and second, to facilitate access to transport for people and institutions in Vizcaya in need of special arrangements for travel.
601. The Court of Justice found in this instance that the aid instituted by the new agreement was not granted in accordance with the procedure laid down in Article 88(3) of the EC Treaty and therefore was unlawful. It found it also apparent from the contested decision that the original agreement and the new agreement constituted a

337 C 35/2003 ex N 90/2002.

338 Case C 27/99, ex NN 69/98, Decision 2003/193/EC, OJ L 77 of 24.3.2003, p. 21.

339 Judgment of the Court of Justice of 15.5.1997 in Case C-335/95 P.

340 2001/247/EC.

341 OJ L 89/01 of 29.3.2001, p. 28.

single grant of aid, instituted and implemented in 1992 in the context of the original agreement's conclusion without prior notification to the Commission.

602. In its assessment of the aid, the Commission observed that the total number of travel vouchers purchased by the Diputación was not fixed by reference to its actual needs to pursue the objectives of the scheme. The Commission also found that the new agreement contains several provisions which a normal commercial agreement concerning the purchase of travel vouchers would not include. It therefore concluded that the transaction constituted aid to the shipping company.
603. The Diputación argued that the Commission should have exempted the aid at issue on the basis of the derogation laid down in Article 87(2)(a), given that the vouchers purchased were distributed under the social programmes administered by the Diputación and, therefore, the aid benefited individual consumers. The ECJ stated that, in order to determine whether aid is granted without discrimination related to the origin of the products concerned, it must be ascertained whether consumers benefit from the aid in question irrespective of the economic operator supplying the product or service capable of fulfilling the social objective relied on by the Member State concerned. Under the new agreement, P&O Ferries receives an annual amount determined in advance, irrespective of the number of travel vouchers in fact used by the ultimate consumers. Also, the agreement for the purchase of travel vouchers in the present instance was entered into by the Diputación and P&O Ferries alone. It is not in dispute that the new agreement does not provide that the travel vouchers distributed by P&O Ferries may be used with other companies capable of fulfilling the social objective pursued by the Diputación.
604. In the absence of any evidence to prove that the ultimate consumers could also benefit from the aid at issue by using the services of other companies capable of fulfilling the social objective pursued by the Diputación, the ECJ found that the Commission was justified in concluding that the aid had not been granted to individual consumers without discrimination related to the origin of the products concerned and that, therefore, the conditions laid down in Article 87(2)(a) were not met. Spain also submitted that, should the aid at issue be classified as unlawful aid, the presence of exceptional circumstances giving rise to a legitimate expectation would prevent its recovery, in accordance with the final sentence of Article 14(1) of Regulation No 659/1999.
605. The ECJ's reasoning in rejecting the plea was as follows. In the field of state aid, there is an important public interest in preventing the operation of the market from being distorted by state aid injurious to competition, a fact which, in accordance with settled case law, requires unlawful aid to be repaid in order to re-establish the previously existing situation. It is true that a recipient of unlawfully granted aid is not precluded from relying on exceptional circumstances on the basis of which it had legitimately assumed the aid to be lawful and thus declining to refund that aid³⁴². On the other hand, a Member State whose authorities have granted aid in breach of the procedural rules laid down in Article 88 may not plead the legitimate expectations of recipients in order to justify a failure to comply with the obligation to take the steps necessary to implement a Commission decision instructing it to recover the aid.

342 Case C-5/89 *Commission v Germany* [1990] ECR I-3437, paragraph 16.

Thus, it is not for the Member State concerned, but for the recipient undertaking, to invoke the existence of exceptional circumstances on the basis of which it had entertained legitimate expectations, leading it to decline to repay the unlawful aid. In this regard, the fact that the Commission initially adopted a positive decision approving the aid at issue could not have caused P&O Ferries to entertain a legitimate expectation, since that decision was challenged in due time before the Community judicature, which annulled it. It follows from the foregoing considerations that, in the circumstances of the instant case, no legitimate expectation could have been entertained by P&O Ferries.

3. NON-EXECUTION OF DECISIONS

606. On 13 November 2002, the Commission decided³⁴³ to approve EUR 450 million in rescue aid granted to Bull during the first half of 2002³⁴⁴. This positive decision was subject to the express condition that Bull must reimburse the cash advance by 17 June 2003. The decision closed the investigation procedure, which had been initiated by decision of 9 April 2002. The final decision was based on the fact that the cash advance satisfied the conditions laid down in the guidelines on aid for rescuing and restructuring firms in difficulty. The Commission had verified during its investigation that the cash advance was indeed rescue aid and that it had not been used to finance Bull's restructuring.
607. However, the rescue and restructuring aid guidelines require rescue aid to be reimbursed within 12 months of payment of the last aid instalment. As compliance with this condition could not be verified at the time the decision was taken, the Commission had made its approval conditional on France submitting to it proof of reimbursement of the aid by 17 June 2003. The Commission established that France did not intend to require reimbursement of the aid granted to Bull within the time limit set. It accordingly found that France had clearly failed to fulfil its obligations and decided to institute proceedings against that country before the Court of Justice as the Treaty authorises it to do where a Member State does not comply with a final decision on state aid within the prescribed time.

4. COURT JUDGMENTS

608. On 6 March, the Court of First Instance (CFI) gave judgment in the *WestLB* case³⁴⁵ concerning the transfer of the Wohnungsbauförderungsanstalt (Wfa) to WestLB and the involvement of state aid in this transaction. WestLB is the largest German Landesbank (public law credit institution) and is owned by the *Land* of North Rhine-Westphalia (roughly 43%) as well as by two other public bodies and two savings bank associations. In December 1991 the *Land* transferred to WestLB as own capital the WfA, a public development credit institution granting aid for the construction of housing and wholly owned by the *Land*. While the liquidity contained in the funds remained reserved for Wfa's public tasks, the funds increased WestLB's equity base allowing the bank to increase its commercial activities. This was particularly

343 OJ L 209 of 19.8.2003.

344 C 29/2002.

345 Case T-233/99 *Westdeutsche Landesbank Girozentrale v Commission*.

important in view of the stricter own capital requirements imposed by European legislation (solvency ratio and own funds directives) as of 30 June 1993. The transfer was not accompanied by a corresponding increase in the *Land*'s shareholding in WestLB. However, with effect from January 1992, the *Land* of North Rhine-Westphalia received for its capital contribution a cash remuneration at an annual rate of 0.6% after tax.

609. The Bundesverband deutscher Banken, an association of German private banks, lodged a complaint alleging that the transfer involved unlawful state aid due to an inadequate remuneration for the capital provided by the *Land*. Following an in-depth investigation of the matter, the Commission decided on 8 July 1999 that the remuneration the *Land* received was not in line with the so-called market investor principle and that WestLB therefore benefited from unlawful state aid incompatible with the common market. The Commission took the view that, in respect of part of the assets transferred to WestLB, a return at a market value ought to have been 9.3% per annum after tax. This figure was calculated by the Commission on the basis of a 12% basic rate of return (average return on cash core capital investments in the banking sector at the time of the investment) plus a 1.5% top-up for the specific features of the transaction minus 4.2% for the lacking liquidity of the capital injected.
610. Though the CFI annulled the Commission's decision on grounds of insufficient reasoning concerning the calculation of the aid amount of roughly EUR 808 million, the judgment confirmed and thereby clarified major policy issues as applied by the Commission in the field of state aid control, in particular the application of the market economy investor principle to companies not being in difficulty. The CFI rejected the applicants' contention in this respect that the Commission had unlawfully extended the concept of state aid. It confirmed that state aid is given where the return demanded by the State for such an investment is less than that which a private investor operating in a market economy would have demanded for a similar investment. The CFI also considered that the Commission was entitled to take account of the average return on investments in the relevant sector in order to determine the appropriate return.
611. In *Van Calster and Cleeren*³⁴⁶, a Belgian law³⁴⁷ on animal health, which established a system to finance services to combat animal diseases and improve animal hygiene, and its state aid applications were questioned before the Court of Justice (ECJ). The law's purpose was to combat animal disease in order to promote public health and the economic welfare of livestock farmers. Under this law Mr Van Calster, Mr Cleeren and Openbaar Slachthuis NV, a slaughterhouse, had to pay contributions to the 1987 fund. In the disputes in the main proceedings the applicants were seeking reimbursement of part of the charges on the ground that they were levied contrary to Community law.
612. Mr Van Calster and Mr Cleeren submitted that the rule, which aims to prevent Member States from being induced to infringe Article 88(3) of the EC Treaty and which follows from the same judgment, applies equally to aid with retroactive effect,

346 Joined Cases C-261/01 and C-262/01 *Belgische Staat v Eugène van Calster and Felix Cleeren and Openbaar Slachthuis NV*.

347 *Moniteur belge* of 17.4.1987.

that is to say, to aid which a Member State wishes to grant in respect of a period which has already expired when the aid was notified.

613. The ECJ first determined whether the obligation to notify state aid pursuant to Article 88(3), and the consequences of a failure to comply with that obligation, apply also to the method of financing such aid. That question is posed in relation to an aid measure which provides for a scheme of charges that forms an integral part of that measure and is intended specifically and exclusively to finance it. The ECJ has already held that Article 87 does not allow the Commission to isolate the aid as such from the method by which it is financed and to disregard this method if, in conjunction with the aid in its narrow sense, it renders the whole incompatible with the common market³⁴⁸.
614. Consequently, the method by which an aid measure is financed may render the entire aid scheme incompatible with the common market. Therefore, the aid cannot be considered separately from the effects of its method of financing. In such a case, the notification of the aid provided for in Article 88(3) must also cover the method of financing, so that the Commission may consider it on the basis of all the facts. If this requirement is not satisfied, it is possible that the Commission may declare that an aid measure is compatible when, if the Commission had been aware of its method of financing, it could not have been so declared. Since the obligation to notify also covers the method of financing the aid, the consequences of a failure by the national authorities to comply with the last sentence of Article 88(3) must apply also to that aspect of the aid. The Member State is in principle required to repay charges levied in breach of Community law.
615. The 1998 law was notified to the Commission and declared compatible with the common market by the 1996 decision. Inasmuch as they relate to the period commencing on the exact date of that decision, 9 August 1996, both the aid in the narrow sense and the charges imposed in order to finance it are therefore lawful. However, the 1998 law imposes charges with effect retroactively to 1 January 1988. Part of the charges provided for by the 1998 law is therefore imposed in respect of a period which predates the 1996 decision. Accordingly, inasmuch as the 1998 law imposes charges with retroactive effect it is illegal owing to the failure to observe the requirement for notification prior to putting the aid scheme into effect. Those charges are therefore levied in breach of the last sentence of Article 88(3).
616. The ECJ also found that the Commission cannot order the recovery of a state aid paid out before its decision on the sole ground that the aid was not notified in accordance with the Treaty. However, the ECJ held that national courts do have this power. National courts “must take all the consequential measures under national law as regards both the validity of decisions giving effect to the aid measures concerned and the recovery of the financial support granted”³⁴⁹.
617. In its ruling of 20 November³⁵⁰ in *Ministre de l'économie, des finances et de l'industrie v S.A. GEMO*, the Court of Justice (ECJ) confirmed the Commission's

348 Case 47/69 *France v Commission* [1970] ECR 487, paragraph 4.

349 See paragraph 64 of the judgment.

350 Case C-126/01.

position expressed in an ongoing formal state aid investigation³⁵¹, that the free removal of slaughterhouse waste and fallen stock offered by the French public service system of “équarrissage” (rendering) is a state aid to farmers and slaughterhouses. The ECJ also confirmed that offering a public service for free to enterprises does result in state aid to these enterprises, if (a) the State bears the costs of that service, (b) the enterprises are thus relieved of costs they would normally have to bear as part of their activity and (c) the service is offered to selected enterprises.

618. In its *Freskot* ruling³⁵² of 22 May, the Court of Justice (ECJ) had to check whether a parafiscal tax levied only on domestic products was as such incompatible with a common market organisation (CMO). The tax was levied on the turnover of farm products. The proceeds of the tax were used to finance an insurance system (administered by ELGA) for Greek farmers. The ECJ declared that even where only domestic products are taxed and there is no discrimination between domestic products processed and marketed at home and those that are exported to other Member states, a parafiscal tax can be in infringement of the CMO if it has an impact on trade. The Court identified several elements to establish whether such an impact exists: the level of the tax (a high level of tax has greater impact than a low level); the duration (a permanent tax has greater impact than a short-term tax); the beneficiary and compensation (if the proceeds of the tax go back to the producers paying it, the possible impact is reduced or can be excluded.)

351 C 49/2002.

352 Case C-355/00.

E – STATISTICS

Figure 6

Trend in the number of aid cases registered (other than in agriculture, fisheries, transport and coal) between 1998 and 2003

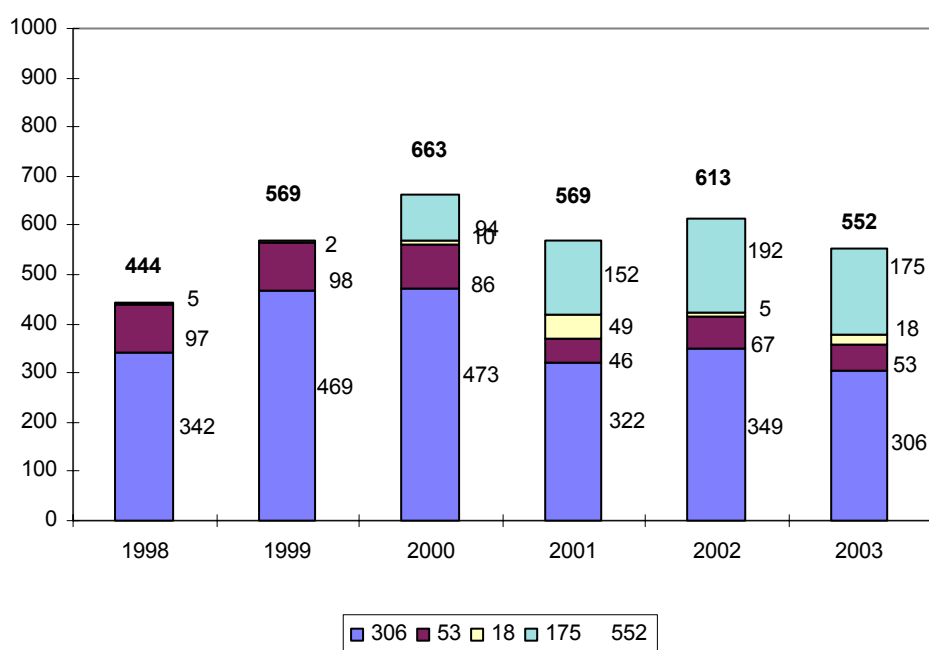


Figure 7

Trend in the number of decisions taken by the Commission (other than in agriculture, fisheries, transport and coal) between 1998 and 2003

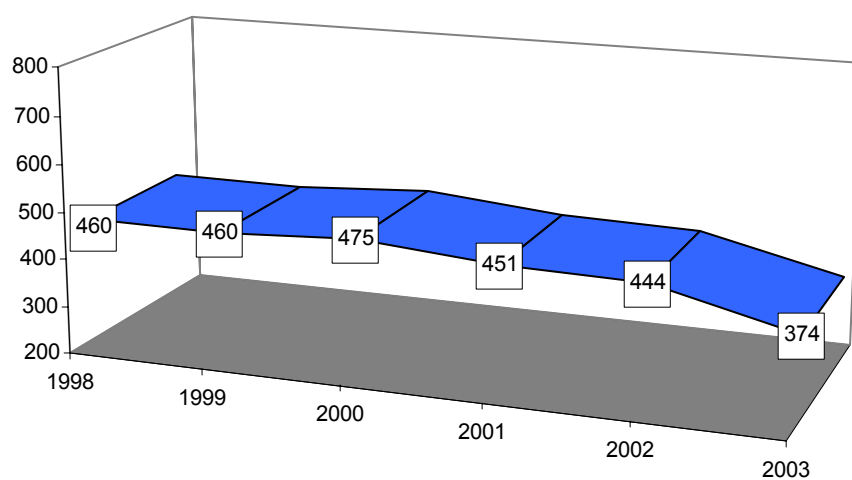
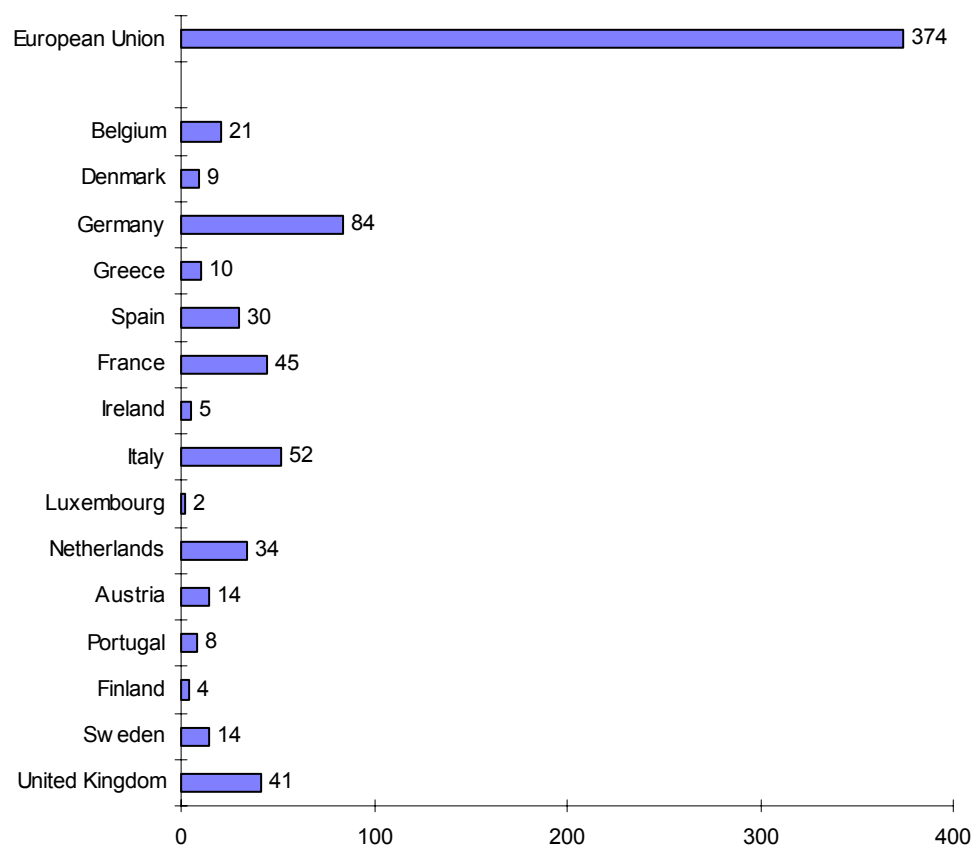


Figure 8

Number of decisions by Member State in 2003 (other than in agriculture, fisheries, transport and coal)



IV – Services of general interest

1. RECENT DEVELOPMENTS

General principles

619. It is important to specify the conditions under which Member States may give financial support to those of their undertakings which are entrusted with the operation of services of general economic interest (SGEIs), and in particular the links between such financing and the EU rules on state aid. With a view to increasing foreseeability and legal certainty for Member States, the Commission proposed in its report to the Laeken European Council of 14 and 15 December 2001 a two-phased approach:

- As a first step, preparation of a Community framework for state aid in the form of public service compensation.
- As a second step, to the extent justified by the experience gained with the application of the framework, preparation of a block exemption regulation whose scope should then be defined with care.

620. Progress with this work was delayed by uncertainties surrounding the legal nature of public service compensation. In this context, the judgment of the Court of Justice (ECJ) of 24 July in *Altmark*³⁵³ sheds much light on the procedures for applying Articles 87 and 88 of the Treaty to the public financing of undertakings entrusted with the operation of SGEIs.

The Altmark case

621. The case giving rise to this judgment concerns the arrangements for granting licences for the transport of passengers by bus on scheduled services in the German rural district of Stendal and the public subsidies for operating those services. Operating licences had been granted by the competent German authorities to the company Altmark Trans in 1990, and were twice extended, first in 1994 and then in 1996. These licences impose certain obligations on the company, especially in relation to compliance with the fares and timetables set by the authorities. In return, financial compensation may be granted to compensate for the operating deficit.

622. A competing company whose licence applications had been rejected by the German authorities brought an action before the German courts on the ground that Altmark did not satisfy the conditions laid down by the German rules. In particular, Altmark was, it claimed, not a financially sound company as it was incapable of surviving unaided. The appeal court followed this line of argument and cancelled the licences granted to Altmark. For Article 87(1) of the Treaty to be applicable, it must be shown that the company in question enjoys an advantage which it would not have enjoyed under normal market conditions. The Commission has traditionally taken the view

353 Case C-280/2000.

that this criterion is not met in the case of public service compensation where this simply “compensates for” a particular obligation imposed by the State.

623. Against the background of an appeal lodged by Altmark, the ECJ responded to a request for a preliminary ruling in this case. In its judgment, the ECJ confirms the compensatory approach, but strictly limits the conditions under which Member States may grant compensation which does not qualify as state aid.
624. The ECJ points out first of all that the existence of an advantage is a *sine qua non* in order for a measure to constitute state aid. In accordance with its earlier judgments in *ADBU* and *Ferring*, the ECJ concludes from this that “where a state measure must be regarded as compensation for the services provided by the recipient undertakings in order to discharge public service obligations, so that those undertakings do not enjoy a real financial advantage and the measure thus does not have the effect of putting them in a more favourable competitive position than the undertakings competing with them, such a measure is not caught by Article 87(1) of the Treaty”.
625. It remarks, however, that the absence of aid is subject to four conditions:
- The recipient undertaking must actually have public service obligations to discharge, and the obligations must be clearly defined.
 - The parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner, to avoid it conferring an economic advantage which may favour the recipient undertaking over competing undertakings.
 - The compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of public service obligations, taking into account the relevant receipts and a reasonable profit.
 - Where the undertaking which is to discharge public service obligations, in a specific case, is not chosen pursuant to a public procurement procedure which would allow for the selection of the tenderer capable of providing those services at the least cost to the community, the level of compensation needed must be determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with means of transport so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations.
626. Where these conditions are met, the compensation does not constitute state aid and the prior notification obligation is not applicable.
627. The Court thus confirms in many respects the approach traditionally recommended by the Commission: as far as characterisation as a service of general interest is concerned, public service compensation may be envisaged only in the case of undertakings that are actually entrusted with the operation of an SGEI. Although Member States enjoy considerable discretion in this area, the Commission must nevertheless ensure that it is exercised in an error-free manner. There is no justification for granting public subsidies to undertakings which carry on activities

that manifestly pursue no general interest objective. Likewise, it is imperative that the obligations on the undertaking entrusted with the operation of an SGEI be clearly defined. The existence of a state act specifying, first, the obligations to be discharged by the undertaking and, secondly, the obligations to be discharged by the State, notably in relation to financial compensation, is a *sine qua non* for transparency in the area of public service financing.

628. The methods of setting and calculating the financial compensation are the most important aspects. The requirement that the parameters on the basis of which the compensation is calculated be established in advance follows logically from the “contractualisation” of relations between the State and the undertaking entrusted with the operation of an SGEI. Payment by a Member State of compensation for an operating deficit without the parameters of such compensation having been established beforehand constitutes state aid. The requirement imposed by the Court concerns, not the amount of the compensation, but only the parameters on the basis of which it is calculated. The concept of “parameter” is not defined more closely by the judgment. This criterion as laid down by the Court is also in keeping with the decision-making practice of the Commission. While undertakings entrusted with the operation of an SGEI must have at their disposal the resources necessary to operate the service, there is no justification for the state compensation exceeding the costs incurred. The Court also confirms that the undertakings in question are, of course, entitled to a reasonable profit.
629. The judgment brings about certain changes in the way compensation is calculated. According to the Court, where the undertaking which is to be entrusted with the operation of an SGEI is chosen “pursuant to a public procurement procedure which would allow for the selection of the tenderer capable of providing those services at the least cost to the community”, the compensation in question does not constitute state aid.

Green Paper on services of general interest

630. The European Council and the European Parliament asked the Commission to reflect on the desirability of a framework directive on services of general interest.
631. Such services of general interest differ widely from one Member State to another and cover a broad range of activities, depending to a large extent on the choices made by each Member State. The European Union respects this diversity and the important role played by national, regional or local authorities. Before examining whether a framework directive is desirable or not, the Commission considers it appropriate to hold a wide-ranging discussion about the position occupied by services of general interest in the European edifice.
632. The Green Paper adopted by the Commission in May tackled four main topics:
- the scope of a possible Community action implementing the Treaty while respecting the principle of subsidiarity;
 - the principles that could be included in a possible framework directive or in another general instrument on services of general interest, and the added value of such an instrument;

- the definition of good governance in the area of organisation, regulation, financing and evaluation of services of general interest in order to ensure a better competitiveness of the economy and efficient and equitable access by all persons to high-quality services meeting their needs;
- any measures that could possibly be put in place in order to increase legal certainty and permit coherent and harmonious articulation between the objective of maintaining high-quality services of general interest and the rigorous application of competition and internal market rules.

633. The Green Paper has given rise to numerous reactions on the part of the European Parliament, Member States and civil society. In the light of these reactions, the Commission will decide in 2004 what sort of follow-up is required.

2. STATE AID CASES

Energy sector

634. On 18 December, the Commission, applying the *Altmark* case law for the first time, authorised a measure to promote investment in new power stations in Ireland aimed at ensuring security of electricity supply³⁵⁴.

635. In its decision, the Commission applied the criteria laid down by the Court of Justice and came to the conclusion that the arrangements notified by the Irish authorities on 8 October contained no element of state aid. Having established a shortage of electricity production capacity on the national market in the near future, the Irish authorities have set up a system which makes it possible to make good an electricity supply deficit in Ireland.

636. The Irish authorities launched a transparent tendering procedure which was open to all Community operators. The successful tenderers were awarded contracts under which they will earn bonuses when their production capacity comes on stream. The size of these bonuses depends on how much of their investment the generators might recoup on the market.

637. In its *Altmark* judgment, the Court laid down four criteria for determining whether payment by the State of compensation for the operation of a service of general economic interest can escape classification as state aid within the meaning of Article 87(1) of the Treaty.

638. Since the measure introduced by the Irish authorities satisfied all four criteria, the Commission decided not to raise any objections. The decision tackles in particular the question of classification as a service of general economic interest in the electricity market. It finds that, owing in particular to Ireland's situation as an island, the safeguarding of the existence of a "reserve capacity" thanks to which distributors can supply every consumer with electricity all year round may constitute such a service of general economic interest.

354 N 475/03.

Postal sector

639. On 27 May, 23 July and 11 November, the Commission adopted three decisions not to raise any objection to government compensation measures notified by the UK³⁵⁵, Belgian³⁵⁶ and ³⁵⁷Greek Governments.
640. An additional set of measures was notified by the UK Government relating to Post Office Limited (POL). The purpose is to return POL to sustainability while keeping its extensive rural universal service cover and enabling it to provide specific services of general economic interest. POL, the largest retailer in Europe by number of outlets and a 100% subsidiary of Royal Mail Group plc, itself wholly government-owned, acts as a main interface between government and citizens by providing countrywide over-the-counter access to services, predominantly services of general economic interest (90% of turnover). The losses of POL, which is a public service network, are caused essentially by the universal country cover obligation leading to the maintenance of structurally loss-making counters. Without the existing loan from Royal Mail Group plc, POL would no longer be a going concern.
641. The three notified measures potentially constitute aid under Article 87(1) of the EC Treaty. However, the planned rural counter annual compensation of GBP 150 million (maximum) does not exceed the cost of maintaining the 2 000 structurally loss-making rural outlets, once taken into account the positive contribution of competitive activities. The government payments (maximum ceiling of 1.3 billion) - to enable POL first to pay back its debts to Royal Mail Group and then to meet its debts in full up to the end of the financial year 2006/07 - are designed to be the minimum necessary to keep POL as a going concern. The rolling capital loan capped at GBP 1 150 million to POL - which is not a bank and therefore does not have access to deposits - is also designed to be the minimum necessary to enable the continued delivery at counters of cash payment services of general economic interest.
642. In addition, ring-fencing prevents any double government compensation within the overall package of POL measures (another two sets of notified measures with the same objectives were approved last year by the Commission). Furthermore, the UK Government committed itself to recovering any potential overcompensation, as evidenced by POL's separate accounts.
643. As the mechanisms are in place to prevent any a priori overcompensation and, should such overcompensation occur, to recover it a posteriori, no real advantage has therefore been conferred on POL. In the final analysis, this means the measures are compatible with the common market, which led to the Commission's decision not to raise objections on 27 May.
644. The Commission assessed a proposed EUR 300 million capital injection into the Belgian Post Office, La Poste SA, notified by the Belgian State in the postal sector.
645. In fact, the cancellation of the retirement provision did not provide La Poste with an advantage, as it placed La Poste in the same position as a private market investor. In

355 N 784/2002.

356 N 763/2002.

357 N 183/2003

the same way, no recourse to a state guarantee - which can apply only on request - had been made and the exemption from corporate profit taxation had a neutral effect as the net cumulated results over the period were negative. These two measures did not therefore lead to a transfer of state resources. None of the three measures constituted aid as, for each of them, the four conditions set out in Article 87(1) of the EC Treaty were not met.

646. On the other hand, two previously un-notified capital increases, exemption from local taxes and overcompensation for the net public service cost between 1993 and 1995 - as recorded in separate accounts - were deemed potentially to constitute state aid under Article 87(1).
647. The separation of accounts also showed that there had been, since 1995, a cumulated undercompensation of net public service costs. As the present value of the overcompensation and of the three potential state aid measures was lower than the present value of the subsequent undercompensations combined with the notified capital increase, the Commission decided not to raise any objection: the new measure did not lead to an overcompensation of net public services costs and, as such, was compatible with the common market. It is to be noted that the separation of accounts, implemented eight years before it became compulsory under the first postal directive, facilitated the work of the Commission and contributed to legal security.
648. In April 2003, Greece notified aid of EUR 80 million to finance modernisation of the Greek Post Office. The Greek Post Office is entrusted with the provision of the universal postal service and of other non postal services of general economic interest, namely the provision of basic banking facilities. The aid aims at upgrading the Greek Post Office's infrastructure and is necessary in order to improve the quality of the postal universal service, which is currently below EU standards. It is limited to the financing of the modernisation costs corresponding to the Greek Post Office's services of general economic interest and does not lead to an undue distortion of competition. Therefore, the Commission decided to approve the aid on the basis of Article 86 (2) of the EC Treaty.
649. In the same decision the Commission also approved modernisation grants of EUR 41,8 million given to the Greek Post Office between 2000 and 2002 which were also strictly necessary for the fulfilment under satisfactory quality conditions of the general interest tasks entrusted to the Greek Post Office. The Commission also found that capital injections of EUR 293,469 million made between 1997 and 2001 were compatible with the EU rules, since they were only aimed at clearing the Greek Post Office's debts due to its universal service obligations.

BBC

650. The British Broadcasting Corporation (BBC) proposed a new service providing electronic learning materials free to students at schools and homes. The service would be funded out of state resources, in this case the licence fee. The service would result in the creation of virtual classrooms whereby teachers and students would access material via the Internet; BBC material would coexist alongside material provided by commercial players. The main issues that were addressed in the assessment of this case were:

- To what extent is state aid involved in the delivery of this service and is the service one of general economic interest?
- How far can the BBC move away from its traditional radio and television services in providing new public services?
- Are there adequate safeguards in place to ensure that the service is not contrary to the Community interest?

651. The adverse impact the BBC, with its brand, image and resources, could have on the incumbent players in the market was examined; the adequacy of safeguards to address this adverse impact was also assessed. At the same time, the positive role the BBC could play in providing a free, quality educational service was recognised. The Commission found that information had not been provided by the notifying authorities to allow the service to escape classification as state aid (in the light of the criteria set out in the *Altmark* ruling). After receiving various clarifications both from the UK authorities and from the complainant, it was found that, although the proposed public service went into a domain other than the BBC's traditional markets, the definition and the safeguards inherent in the proposal allowed the service to be compatible with the derogation under Article 86(2).

3. LIBERALISATION THROUGH LEGISLATIVE MEASURES

Energy: Oil and gas

652. The Commission's proposals aimed at improving the security of the EU's oil and gas supplies³⁵⁸ were discussed in the European Parliament and the Council. At first reading under the co-decision procedure, Parliament's Committee on Industry, External Trade, Research and Energy approved its reports on the Commission's proposals on 9 September. The reports propose a large number of amendments³⁵⁹. At its 22-23 September plenary session Parliament, however, rejected the Commission proposal on security of supply in relation to petroleum products. This rejection was confirmed at the 17-20 November plenary session. As regards natural gas, the Energy Council reached a political agreement on 15 December on a new text that also departs significantly from the Commission's proposal. The new text leaves a greater margin of manoeuvre for Member States to define their own security of supply standards. The importance of gas storage in the proposal is reduced. There is no support either for the Commission proposal to protect new market entrants and small market share holders against competitive disadvantages because of the security of supply measures adopted at national level. Finally, the creation of a European Observatory in this field is rejected. The Council also considered that the legal basis of the proposals should be Article 100 (security of supply) and not Article 95 of the EC Treaty (internal market).

358 See Section I.C.1 and Section IV.4 of the XXXIInd Report on Competition Policy (2002).
 359 Report A5-0293/2003 of 10.9.2003 and Report A5-0295/2003 of 10.9.2003.

V – International activities

1. ENLARGEMENT AND THE WESTERN BALKANS

1.1. Introduction

653. The European Union is preparing for its biggest enlargement ever in terms of scope and diversity. Following the signature of the Accession Treaty in Athens on 16 April, 10 countries will join the EU on 1 May 2004, once the Accession Treaty is ratified: Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, the Slovak Republic and Slovenia. These countries are currently known as “acceding countries”.
654. Bulgaria and Romania hope to become Member States by 2007, and if the European Council in December 2004, on the basis of a report and a recommendation from the Commission, decides that Turkey fulfils the Copenhagen political criteria, the European Union will open accession negotiations with Turkey without delay. These three countries are currently known as “candidate countries”.
655. Before accession negotiations can be concluded in the field of competition policy, the candidate countries are required to demonstrate that they have national competition laws in place reflecting the principles of the *acquis*, that national competition authorities have been set up to implement these laws, and that these authorities have a credible enforcement record in all areas of competition policy. These requirements derive from the general Copenhagen criteria which set out the political and economic standards for enlargement.
656. The detailed laws and rules (*acquis*) of the EU have been divided into a total of 31 different chapters for the purposes of the accession negotiations. Competition policy is covered by Chapter 6, and it includes the relevant articles of the EC Treaty (as well as subsidiary legislation), namely: Article 31 (State monopolies of a commercial character), Articles 81-85 (Rules applicable to undertakings), Article 86 (Public undertakings and undertakings with special or exclusive rights) and Articles 87-89 (Rules applicable to state aid). Furthermore, mergers are monitored on the basis of the EU Merger Regulation.
657. In the field of state aid, part of the competition *acquis* is addressed under other chapters of the negotiations with the candidate countries, such as transport, certain types of coal, agriculture and fisheries. As regards former regulated sectors, legislation concerning the liberalisation of, for example, the energy, transport as well as telecommunications and information technologies sectors are also addressed under the respective negotiating chapters.
658. In the countries of the western Balkans, the stabilisation and association process is gradually gaining momentum also in the competition field.

1.2. Acceding countries

659. The accession negotiations with all the acceding countries were completed by December 2002. In 2003, the precise text on competition policy to be included in the Accession Treaty, particularly for transitional arrangements, was agreed between the EU and the acceding countries prior to its signature in April. The following transitional arrangements have been included in the Accession Treaty:

Cyprus

- Phase-out of incompatible fiscal aid for offshore companies by the end of 2005.

Czech Republic

- Restructuring of the steel industry is to be completed by 31 December 2006.

Hungary

- Phase-out of incompatible fiscal aid for small- and medium-sized enterprises (SMEs) by the end of 2011.
- Conversion of incompatible fiscal aid for large companies into regional investment aid; the aid will be limited to a maximum of 75% of the eligible investment costs if the company started the investment under the scheme before 1 January 2000, and to 50% if the company started the investment after 1 January 2000; in the motor vehicle industry the aid is further limited, and set at a level that corresponds to 40% of the maximum aid ceiling (e.g., where the above-mentioned regional aid ceiling for other types of investment is 75%, the formula gives $40\% \times 75\% = 30\%$).
- Phase-out of incompatible fiscal aid for off-shore companies by the end of 2005.
- Phase-out of incompatible fiscal aid granted by local authorities by the end of 2007.

Malta

- Phase-out of incompatible fiscal aid for SMEs by the end of 2011.
- Phase-out of operating aid under the Business Promotion Act by the end of 2008.
- Modification of incompatible fiscal aid for large companies into regional investment aid; the aid will be limited to a maximum of 75% of the eligible investment costs if the company has obtained the entitlement for the tax exemption before 1 January 2000, and to 50% if the company has obtained the entitlement for the tax exemption after that date up until 30 November 2000.
- Aid for restructuring of the shipbuilding sector during a restructuring period lasting until the end of 2008.

- Adjustment of the market in the importation, stocking and wholesale marketing of petroleum products under Article 31 of the EC Treaty by the end of 2005.

Poland

- Restructuring of the steel industry to be completed by 31 December 2006.

Fiscal aid (special economic zones)

- Phase-out of incompatible fiscal aid for small enterprises by the end of 2011.
- Phase-out of incompatible fiscal aid for medium-sized enterprises by the end of 2010.
- Modification of incompatible fiscal aid for large companies into regional investment aid; the aid will be limited to a maximum of 75% of the eligible investment costs if the company has obtained its zone permit before 1 January 2000, and to 50% if the company has obtained it between 1 January 2000 and 31 December 2000. In the motor vehicle industry the aid is further limited, and set at a level that corresponds to 30% of the eligible costs.

State aid for environmental protection

- For investments that relate to standards for which a transitional period has been granted under the negotiations on the environment and for the duration of that transitional period, whereby the aid intensity is limited to the regional aid ceiling (30%-50%) with a 15% supplement for SMEs;
- For existing IPPC installations covered by a transitional period under the negotiations on the environment, aid up to 30% intensity until end 2010;
- For the IPPC-related investment not covered by a transitional period under the negotiations on the environment, aid up to 30% intensity until 31 October 2007;
- For large combustion plants, an aid intensity of 50% was agreed for investments that relate to a transitional period granted under the negotiations on the environment.

Slovakia

- Fiscal aid to a beneficiary in the motor-vehicle manufacturing sector to be discontinued by the end of 2008; the aid will be limited to a maximum of 30% of the eligible investment costs.
- Fiscal aid to one beneficiary in the steel sector to be discontinued at the end of 2009 or when aid reaches a pre-determined amount, whichever comes first. The objective of the aid is to facilitate the ordered rationalisation of excess staffing levels, the resulting total cost being comparable to the aid.

660. There are no transitional arrangements for Estonia, Latvia, Lithuania and Slovenia.

661. In order to ensure that the acceding countries' state aid measures are aligned with the requirements of the EU *acquis* in time for accession, the acceding countries have been required to transmit to the Commission a list of all existing aid measures (both schemes and ad hoc aid) approved by the national state aid authorities. Since the signature of the Accession Treaty, the acceding countries have submitted a large number of measures to the Commission under this arrangement. If the Commission does not object, the aid measures are considered existing aid. All aid measures which are considered state aid according to the *acquis* and which are not included in the list are to be considered new aid upon accession.
662. The Commission closely monitored developments in the acceding countries, particularly as regards enforcement of the competition rules. The Commission's comprehensive monitoring report is a compilation of the main findings of this monitoring process. This gives an opportunity for the acceding countries to remedy any problems that are highlighted in the run-up to accession, and therefore to be in the best position to meet the challenges of full membership by May 2004.
663. Preparations have also been made in the acceding countries for the application of the EU's new procedural regulation for antitrust. The entry into force of the new regulation coincides with accession and increases the importance of further strengthening both the administrative capacity and the enforcement activities of the national competition authorities in the acceding countries. In this respect, efforts have also been under way within the framework of the European Competition Network.

1.3. Candidate countries

664. In order to fulfil the criteria for accession, the candidate countries are 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 means that, well before accession, the candidate countries are required to show that their companies and authorities have become accustomed to operating in an environment such as that of the EU and would 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; and (iii) a credible enforcement record in relation to the competition *acquis*.
665. Whereas 2003 saw the conclusion of the accession preparations with the ten acceding countries, the negotiations with Bulgaria and Romania continued in a constructive spirit. Updated EU common positions in the competition chapter were adopted in May for both Bulgaria and Romania, with the finding that negotiations on competition policy should continue. With Turkey, an assessment will be made of the fulfilment of the political criteria for membership: on this basis, a decision will be made in 2004 on the opening of negotiations.
666. For Bulgaria and Romania, the achievements in the area of antitrust and mergers are generally more advanced than in that of state aid control. However, further efforts are still needed to develop a more deterrent sanctioning policy as well as to put more emphasis on preventing serious distortions of competition. Continued efforts are also

needed in relation to competition advocacy, awareness raising and training of the judiciary.

667. 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. Whereas Bulgaria and Romania have created national state aid monitoring authorities, the administrative capacity of these authorities is still far from sufficient. An enforcement record is emerging in Bulgaria and Romania, but is still insufficient in relation to the objective of exercising an effective control over new and existing state aid granted by all aid-granting authorities.

1.4. Technical assistance

668. Technical assistance in the field of competition has continued to be an essential tool to prepare the candidate countries for accession. Specific actions are being taken under the PHARE programmes. Under the institution building ('twinning') arrangement, EU Member State experts are providing advice on a long-term basis to the competition and state aid authorities in the acceding and candidate countries.

State aid workshops

669. From July to October, the Commission provided one- to two-day training seminars on state aid rules and procedures in every single acceding country. The ten seminars were targeted at national, regional and local officials from the acceding countries who will be directly involved in the management of Structural Fund operations. Accordingly, the seminars were jointly organised by the Structural Fund managing authorities of the acceding countries, the respective national state aid authorities, and, from the Commission's side, DG Regional Policy and DG Competition. The seminars focused on topics that were of particular relevance for the Structural Funds (regional aid, employment, training, SME, R&D and environmental aid and issues regarding aid for the provision of services of general economic interest). Special workshops were also provided on aid to agriculture, fisheries and transport.

Advisory role

670. The Commission continued to have bilateral meetings with the competition and state aid authorities of the enlargement countries during the year. 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;
 - the creation of state aid monitoring authorities; and
 - specific state aid issues, such as the drafting of 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.

Seminars on state aid and antitrust

671. In October 2003, the Commission hosted two four-day training seminars for a total of 80 competition officials from the acceding and candidate countries. The first

covered state aid, while the second dealt with antitrust issues. Both seminars were given by the Commission's top specialists in their respective fields. The state aid seminar also included a presentation from Denmark giving the perspective of an existing Member State on the application of the state aid block exemption regulations.

672. The seminars were jointly presented by the Competition Directorate-General and the TAIEX Office of the Enlargement Directorate-General. They gave participants the opportunity to learn about the latest developments in EU competition policy. They also enabled participants from the acceding countries to meet their counterparts in other national administrations with whom they will in future be working more closely as part of the European Competition Network.

1.5. Western Balkans

673. In the area of the western Balkans, the Commission intensified cooperation and the discussion of competition matters with Croatia, the former Yugoslav Republic of Macedonia, Serbia and Montenegro.

674. Subcommittee meetings were held with Croatia and the former Yugoslav Republic of Macedonia, respectively, as were technical consultations. In Croatia which has applied for EU membership, the process of alignment with European competition law seems to be the more advanced for the time being.

2. BILATERAL COOPERATION

2.1. Introduction

675. The increasing importance of international cooperation between competition law enforcement authorities is widely recognised. For this reason, the Commission pursues a dual policy of, on the one hand, developing enhanced bilateral cooperation with the European Community's main trading partners and, on the other, examining ways to expand multilateral cooperation in the field of competition.

676. With regard to bilateral cooperation, the European Union has concluded dedicated cooperation agreements in competition matters with the United States, Canada and Japan. The principal elements are mutual information and coordination of enforcement activities and exchange of non-confidential information. The agreements contain, furthermore, provisions on the possibility for one party to request the other to take enforcement action (positive comity), and for one party to take into account the important interests of the other party in the course of its enforcement activities (traditional comity). Cooperation between the Commission and the competition authorities of other OECD member countries is carried on the basis of a recommendation adopted by the OECD in 1995. The European Union has also concluded numerous free trade agreements (in particular the EuroMed agreements and the agreements with Latin American countries). These agreements usually contain basic provisions on cooperation in competition matters.

2.2. Agreements with the USA, Canada and Japan

2.2.1. *United States*

Introduction

677. The cooperation agreement in competition matters with the United States was concluded by the Commission on 23 September 1991³⁶⁰ (the “1991 agreement”). By a joint decision of the Council and the Commission on 10 April 1995³⁶¹ the agreement was approved and declared applicable from the date it was signed by the Commission. On 4 June 1998, the positive comity agreement, which strengthens the positive comity provisions of the 1991 agreement, entered into force³⁶² (the “1998 agreement”), after having been approved by a joint decision of the Council and the Commission on 29 May 1998.
678. To summarise, the 1991 agreement provides for: (i) notification of cases being handled by the competition authorities of one party, to the extent that these cases concern the important interests of the other party (Article II), and exchange of information on general matters relating to the implementation of the competition rules (Article III); (ii) cooperation and coordination of the actions of both parties' competition authorities (Article IV); (iii) a “traditional comity” procedure by virtue of which each party undertakes to take into account the important interests of the other party when it takes measures to enforce its competition rules (Article VI); (iv) a “positive comity” procedure by virtue of which either party can invite the other party to take, on the basis of the latter's legislation, appropriate measures regarding anticompetitive behaviour implemented on its territory and which affects the important interests of the requesting party (Article V).
679. In addition, the 1991 agreement makes it clear that none of its provisions may be interpreted in a manner which is inconsistent with legislation in force in the European Union and the United States of America (Article IX). In particular, the competition authorities remain bound by their internal rules regarding the protection of the confidentiality of information gathered by them during their respective investigations (Article VIII).
680. The 1998 positive comity agreement clarifies both the mechanics of the positive comity cooperation instrument, and the circumstances in which it can be availed of. In particular, it describes the conditions under which the requesting party should normally suspend its own enforcement actions and make a referral.

EU/US case cooperation during 2003

360 Agreement between the Government of the United States of America and the Commission of the European Communities regarding the application of their competition laws, OJ L 95, 27.4.1995, pp. 47 and 50.

361 OJ L 95, 27.4.1995, pp. 45 and 46.

362 Agreement between the European Communities and the Government of the United States of America on the application of positive comity principles in the enforcement of their competition laws, OJ L 173, 18.6.1998, pp. 26–31.

681. During 2003, the Commission continued its close cooperation with the Antitrust Division of the US Department of Justice (DoJ) and the US Federal Trade Commission (FTC). Contact between Commission officials and their counterparts at the two US agencies was frequent and intense. These contacts range from cooperation on individual cases to more general competition policy related matters. Case-related contacts usually take the form of regular telephone calls, e-mails, exchanges of documents, and other contacts between the case teams. The cooperation continues to be of considerable mutual benefit to both sides, in terms of enhancing the respective enforcement activity, avoiding unnecessary conflicts or inconsistencies between those enforcement activities, and in terms of better understanding each other's competition policy regimes.
682. Although the overall number of transnational mergers decreased in 2003 compared with previous years, cooperation in merger cases was good and fruitful. Cooperation is most effective where the parties involved agree to permit the EU and US authorities to share the information they provide by means of a waiver, which now frequently occurs. Examples of merger cases include the *Pfizer/Pharmacia* case, a merger which created the largest pharmaceutical company in the world. The Commission cooperated closely with the FTC in the analysis of a number of issues, notably in remedies where the parties committed to divestments on a worldwide basis. Close cooperation with the FTC also took place in the *DSM/Roche* case, a merger in the chemical industry, and in the *Siemens/Drägerwerke* case, a joint venture in the medical equipment sector. The Commission was also in close and frequent contact with the DoJ in the *Konica/Minolta* case, and in *GE/Instrumentarium*, a merger concerning medical devices.
683. During the course of the year there were also frequent contacts in a number of non-merger cases. Bilateral cooperation between the Commission and the US DoJ was particularly intensified in cartel cases: numerous contacts took place between officials of the Commission's cartel units and their counterparts at the DoJ. The exchanges of information on particular cases, within the limits of the existing provisions on confidentiality, were most frequent, but discussions also concerned policy issues. Many of the case-related contacts took place as a result of simultaneous applications for immunity in the US and the EU. Furthermore, in a number of instances, coordinated enforcement actions took place in the US and the European Union, whereby the agencies tried to ensure that the time lapse between the start of the respective actions was as short as possible.
684. A good example of such coordination concerns the case of *Heat Stabilisers and Impact Modifiers*, where the Commission and the antitrust authorities in the US and also Canada and Japan closely coordinated their investigative actions and undertook near-simultaneous inspections or other investigative measures in February. Another example is the *Bulk Liquids Shipping* case, where the Commission, in a joint effort with the EFTA Surveillance Authority and the Norwegian authorities, undertook inspections simultaneously with the DoJ.

High-level contacts and policy cooperation

685. There were numerous bilateral contacts between the Commission and the relevant US authorities and frequent visits by officials from both sides during the course of 2003. The annual bilateral EU/US meeting took place on 27 October in Washington;

Commissioner Mario Monti met the heads of the US antitrust agencies, Assistant Attorney General Hew Pate of the DoJ and Chairman Timothy Muris of the FTC.

686. In addition to case-related cooperation, there were close contacts in the course of the preparation of the Commission's guidelines on the appraisal of horizontal mergers. This included fruitful exchanges of views on a number of topics dealt with by the guidelines, such as efficiencies and market concentration levels. Cooperation with the US authorities will continue to focus on specific policy projects of both agencies.
687. The working group on intellectual property rights started work in November 2002 and continued throughout 2003. Topics of discussion included multiparty licensing and standards set by standard-setting organisations.
688. There were a total of 56 formal notifications made by the Commission during the year. The Commission received a total of 46 formal notifications from the US authorities during the same period.

2.2.2. *Canada*

689. The cooperation agreement between the European Communities and the Government of Canada³⁶³ was signed at the EU/Canada summit in Bonn on 17 June 1999 and entered into force upon signature.
690. The agreement provides for, among other things: (i) reciprocal notification of enforcement activities by either competition authority, where such activities may affect the important interests of the other party; (ii) one competition authority rendering assistance to the competition authority of the other party in its enforcement activities; (iii) coordination by the two authorities of their enforcement activities; (iv) requests by a party that the competition authority of the other party take enforcement action (positive comity); (v) one party to take into account the important interests of the other party in the course of its enforcement activities (traditional comity); and (vi) the exchange of information between the parties, subject to applicable domestic laws to protect confidential information.
691. Contacts between the Commission and its Canadian counterpart, the Canadian Competition Bureau, were frequent and fruitful. Discussions concerned both case-related issues and more general policy issues. Case-related contacts concerned all areas of competition law enforcement. In the area of cartel cases, this includes also the coordination of investigative measures. The Commission and the Canadian Competition Bureau also continued to maintain an ongoing dialogue on general competition issues of common concern.
692. A high-level bilateral meeting between Director-General Philip Lowe and the Canadian Commissioner for Competition, Konrad von Finckenstein, took place on 12 May. Both sides discussed recent policy developments and other issues of common interest.

363 Agreement between the European Communities and the Government of Canada regarding the application of their competition laws, OJ L 175, 10.7.1999, p. 50.

693. There were a total of seven formal notifications made by the Commission during the year. The Commission received a total of six formal notifications from the Canadian authorities during the same period.

2.2.3. *Japan*

694. The cooperation agreement between the European Community and Japan was signed in Brussels on 10 July and entered into force on 9 August³⁶⁴.

695. To summarise, the agreement provides for: (i) the reciprocal notification of cases under investigation by either authority, where they may affect the important interests of the other party; (ii) the possibility of coordination by the two authorities of their enforcement activities, as well as of rendering assistance to each other; (iii) the possibility for one party to request the other to take enforcement action (positive comity), and for one party to take into account the important interests of the other party in the course of its enforcement activities (traditional comity); and (iv) the exchange of information between the parties, while not affecting either party's confidentiality obligations with respect to such information. The cooperation agreement provides for regular meetings to exchange information on the parties' current enforcement activities and priorities and on economic sectors of common interest, to discuss policy changes which they are considering, and to discuss other matters of mutual interest relating to the application of competition laws.

696. The agreement will lead to a much closer relationship between the Commission and the Japanese competition authority and to a greater understanding of their respective competition policies.

697. Numerous meetings and official contacts on policy issues and on individual cases between the Commission and the Japanese authorities took place during the year. It is remarkable that for the first time case cooperation also included the organisation of an investigation in a cartel case, concerning an alleged cartel in the market for impact modifiers and heat stabilisers. It is also noteworthy that this case involved coordination of simultaneous inspections not only between the Japanese Fair Trade Commission and the Commission but also with the Department of Justice and the Canadian Competition Bureau for the first time ever. On the occasion of the annual bilateral meeting between the Commission and the Fair Trade Commission of Japan, Commissioner Monti met Chairman Kazuhiko Takeshima on 21 November in Tokyo. Both sides discussed recent policy developments and further prospects for bilateral cooperation.

3. COOPERATION WITH OTHER SPECIFIC COUNTRIES AND REGIONS

Australia and New Zealand

698. During 2003, the Commission engaged in cooperation with the competition authorities of a number of other OECD countries, most notably Australia and New

364 Agreement between the European Community and the Government of Japan concerning cooperation on anticompetitive activities, OJ L 183, 22.7.2003, p. 12.

Zealand. These contacts concerned both case-related and more competition policy related issues.

China

699. The 2003 Commission policy paper on China includes as one of the new Commission action points the initiative of establishing a dialogue with China on competition policy.
700. This new initiative is very timely as the need for a dialogue between the European Commission and China on competition matters became apparent after the adoption by China in the first half of 2003 of rules on mergers involving foreign companies and the prevention of monopolistic price practices. The fact that China now has competition legislation could inaugurate a new framework for discussion between competition agencies on competition enforcement.
701. Exploratory talks with the relevant Chinese authorities on modalities for a dialogue in the competition field took place in the context of the visit to Beijing by Commissioner Monti on 24 November 2003.

European Economic Area

702. During the course of the year 2003 the Commission also continued its close cooperation with the EFTA Surveillance Authority in enforcing the Agreement on the European Economic Area.

Korea

703. On 21 May, Commissioner Monti held a meeting with the Head of the Korea Fair Trade Commission, Dr Kang. The collaboration between the competition agencies of the Republic of Korea and the European Commission is excellent and we often share common views in multilateral competition forums. The Korea Fair Trade Commission contribution to the International Competition Network is highly appreciated. The Korea Fair Trade Commission is organising the annual conference of the International Competition Network that will take place in Seoul in 2004. In the latter context, both agencies hold regular contacts to exchange views on competition issues of common interest.

Latin America

704. In the Andean region, the Commission provided funding of over EUR 2 million to a three-year project, launched in March, to improve and harmonise Bolivian, Colombian, Ecuadorian, Peruvian, and Venezuelan legislation on competition and support the institutions responsible for its control and application. The aim of the project is to improve the region's legislative, administrative and judicial context for competition law, support the Andean institutions responsible for the application and control of provisions on the subject, and promote a culture of competition. A number of activities will be carried out to attain these objectives, with the participation of European and Andean experts, including sub-regional and national seminars, judicial consultancies and sectoral studies, and training of officials and magistrates responsible for the application and control of competition regulations.

4. MULTILATERAL COOPERATION

4.1. International Competition Network

705. The International Competition Network (ICN), of which the Commission is a founding member, is developing into a leading forum for the discussion of international competition policy at the multilateral level³⁶⁵. The ICN was founded as a virtual network by 14 competition authorities in October 2001. In response to the proliferation of competition regimes around the world, the ICN seeks to facilitate international cooperation and to formulate proposals for procedural and substantive convergence. Membership in the ICN has risen to more than 80 agencies and thus encompasses the vast majority of the world's existing competition authorities. The ICN also invites advisors from academia, the business community, consumer groups and the legal profession to contribute to the work projects.
706. Since the ICN's inaugural conference in Naples, the Commission is co-chairing one of the ICN's three major work projects. The mission of this project is to find ways to facilitate the establishment of credible competition authorities in developing and transition countries. As a first result of these efforts, the Commission, together with the South African Competition Tribunal, presented a comprehensive report³⁶⁶ at the ICN's second annual conference, which was held in Merida, Mexico, on 23-25 June. This report, drawing on the experiences of competition authorities in both developing and developed countries, highlights the challenges that the establishment of competition regimes in developing or transition countries typically has to overcome. The report describes, moreover, how an authority's standing with such relevant stakeholders as the government, the judiciary, civil society, the community of competition 'professionals' and the business community could be improved. Finally, the report considers which steps may be taken to make external assistance to such processes more effective. The report concludes with a list of issues that should be considered when designing technical assistance programmes.
707. The Commission also played an active role in the ICN's ongoing work in the merger field. For details, see Merger section under II.5.1.
708. The ICN completed its work in the advocacy field in Merida. Among other issues, delegates reviewed how certain competition agencies have used their advocacy powers as a means of improving the regulatory environment in a number of regulated sectors. In addition, as part of a new tool kit to support the advocacy work of agencies, the Commission had prepared a CD-ROM setting out its own advocacy initiatives. These and other materials are now made available through an online database, or "information centre", via the ICN web site³⁶⁷.
709. Finally, ICN members in Merida decided to launch a new work project that will discuss antitrust enforcement in the regulated sectors. The French and Italian competition authorities are co-chairing this project with which the ICN will expand its coverage of issues into the traditional antitrust field as well.

365 More information on the ICN is available on its web site: www.internationalcompetitionnetwork.org.

366 See www.internationalcompetitionnetwork.org/Final_Report_16.6.2003.pdf.

367 At www.internationalcompetitionnetwork.org/notification.html

4.2. World Trade Organisation

710. As regards the subject of competition in the WTO, the WTO ministerial meeting in Cancún in September ended with no decisions being taken, and consequently no formal negotiations on a WTO agreement on competition were launched. This was despite the fact that the Doha Declaration of November 2001 stated that such negotiations would take place after the next WTO ministerial meeting, and that significant progress had taken place in the Geneva-based WTO working group on the interaction between trade and competition policy in clarifying many of the issues involved (this process of clarification included two meetings of the working group in 2003 preceding the Cancún ministerial).

4.3. Organisation for Economic Co-operation and Development

711. The Commission was very active in the OECD Competition Committee in 2003. The Competition Committee includes a Bureau (the Director-General of the Competition Directorate-General of the European Commission being a member) and several working parties on issues such as competition and regulated sectors and the international aspects of competition, mergers and cartels.

712. The Commission also participated in competition-related OECD meetings such as the Global Forum on Competition that meets once a year with non-OECD members, the joint sessions of the Competition Committee with the Committees on Consumer Policy and Trade, the Special Group on Regulatory Policy and the Amsterdam Conference on access pricing in infrastructure sectors that was co-sponsored by the newly established Netherlands Centre of Excellence for Economic Regulation.

713. The Commission participated actively in all competition-related OECD round tables and in the peer reviews of Norway, Germany and France. During 2003, it presented seven written submissions to the Competition Committee on the following issues:

- (i) International information sharing in merger control procedures;
- (ii) Regulation of access services;
- (iii) Media mergers;
- (iv) Procedural fairness for merging parties in merger investigations;
- (v) Competition and consumer policy³⁶⁸: complementarities, conflicts and gaps;
- (vi) Non-commercial service obligations and liberalisation; and
- (vii) Merger remedies.

714. The Commission also contributed to the work of the OECD Economic and Development Review Committee (EDRC), which published the 2003 euro area report.

368 In this paper, consumer protection will refer mainly to the protection of consumers' economic and legal interests, although in general it includes the protection of health and safety.

4.4. UNCTAD

715. The Commission was represented at the fifth session of the UNCTAD Inter-governmental group of experts on competition on 2-4 July, and submitted two papers to the meeting, one on the interaction between competition policy and industrial policy, and the other on technical assistance for capacity building in the competition field. The first paper emphasised that many methods exist for avoiding conflict between competition policy and industrial policy in developing (and developed) countries, while the second pointed out the European Commission's willingness to contribute to technical assistance for competition agencies in developing countries, to the extent that its resources permit, taking into account the fact that such technical assistance is funded from the development budget of the European Union, and not directly by the Competition DG of the European Commission. In addition to the formal sessions, the meeting provided a useful opportunity to meet representatives of competition agencies of developing countries and hear their experiences and concerns.

4.5. International cartel workshop

716. The Commission hosted a cartel workshop in October which brought together around 160 competition officials from over 35 countries, including Australia, Brazil, Canada, Indonesia, Israel, Japan, Norway, South Africa, Switzerland, Turkey and the USA, as well as the EU Member States and the acceding countries. A number of international organisations dealing with competition matters were also represented, such as the OECD.
717. The workshop, the fifth of its kind, enabled officials to share expertise and step up cooperation in the fight against international cartels. As Commissioner Monti said: "Cartels are increasingly international in scope. To meet the challenge posed by this 'internationalisation' of cartels, competition authorities must liaise more with each other, for example, by synchronising surprise inspections and by exchanging tips on how best to eradicate this scourge of the economy".
718. Cartels are one of the most serious infringements of competition law throughout the world because they generally result in higher prices for the economy and for consumers. In the long run, they also contribute to a loss of competitiveness and a threat to sustainable employment as companies concerned may be less innovative than if the forces of competition had been in full swing.
719. Article 81 of the EC Treaty bans agreements which directly or indirectly fix prices, limit or control production and share markets or sources of supply. The Commission has the duty to enforce this provision in all EU Member States but also in Norway, Iceland and Liechtenstein pursuant to Article 53 of the Agreement creating the European Economic Area.
720. The purpose of the workshops is to share expertise on investigating, prosecuting and suppressing this type of conspiracy. The 2003 workshop discussed in particular the immunity programmes adopted by an increasing number of countries to encourage companies to reveal the existence of cartels against the promise of reduced or 'zero' fines.

721. Other topics for discussion included the mechanisms for enhancing the exchange of information between jurisdictions and the effectiveness of specific investigative and legal tools in investigating cartel cases.

VI – Outlook for 2004

Antitrust

722. Cartel enforcement will remain a top priority in the Commission's antitrust activities. On the basis of the investigations that are currently open, the Commission expects to issue a significant number of decisions and statements of objections in 2004, in line with the trend in the previous three years.
723. The fight against hardcore cartels can only produce results if there is credible deterrence for (potential) offenders, which implies a high probability of detection of such 'conspiracies against the customer' and the imposition of sufficiently tough sanctions.
724. The likelihood of detection should continue to increase in 2004. This is the result of a number of developments. First, DG Competition itself will be able to redirect greater resources to the active pursuit of hardcore infringements following the entry into force of the modernisation regulation, Regulation 1/2003, and the completion of its reorganisation. Second, competitors are expected to continue to blow the whistle on cartels spontaneously, by making use of the leniency programme. Third, Regulation 1/2003 provides for a strengthening of the investigative tools available to the Commission. This is coupled with a reinforcement of the cooperation and networking between the Commission and the Member States of the European Union, particularly by means of exchanging confidential information within the European Competition Network. Lastly, international cooperation of various levels of intensity between cartel agencies, be it case specific or more generally in relation to the establishment of best practices, will continue to grow.
725. Regarding the level of sanctions, the Commission will maintain its policy of setting fines at a level that guarantees that companies are not only punished for their illegal behaviour, but also deterred from engaging in similar conduct in the future.

Mergers

726. In the early part of the year efforts will be necessary to revise the secondary legislation, the Implementing Regulation, Form CO, etc. so as to be ready for the entry into force of the revised framework for assessing mergers of a Community dimension on 1 May 2004. In the second part of the year the challenge will be the application of these new instruments including the Guidelines on the Assessment of Horizontal Mergers and the best practices Guidelines. Work will continue on the Guidelines for Non-Horizontal Mergers.

State aid

727. The reform process will be continued throughout 2004. It rests on three pillars: procedural reform, improvement of the economic underpinning and reform of state aid control instruments.
728. Procedural reform is the area which is the most advanced. A series of changes to simplify and modernise procedures have been identified and a draft Regulation

laying down detailed provisions for the implementation of the state aid procedural regulation has been discussed with Member States in the Advisory Committee and should be adopted before May 2004.

729. The improvement of the economic underpinning should result in the development of new instruments based on a significant impact test which should allow for considerable simplification in the treatment of cases which - despite meeting the state aid definition of Article 87(1) EC - do not give rise to significant concerns as regards distortion of competition or effect on trade.
730. As regards existing instruments, following the adoption of amendments to the SME and training aid block exemptions, priority will be given to updating and simplifying the state aid frameworks with a view to taking account, in particular, of the needs resulting from enlargement and from new priorities in Community policies. New texts envisaged include: revised Guidelines on rescue and restructuring aid, of the Communication on reference rates (including the establishment of reference rates for the new Member States before 1 May 2004), of the current Communication on cinema, as well as of the Guidelines relating to export credit insurance. In parallel with the review of the structural fund regulations being undertaken by DG REGIO, in particular the state aid rules on national regional aid will be revised. Other rules will be revised accordingly, if necessary. Other issues on the agenda are, inter alia, monitoring the implementation of the Guidelines on shipbuilding, a review of the Guidelines on research and development, and new policy initiatives in the area of fiscal aid.

International relations

731. The European Commission expects to have a leading role in a new International Competition Network (ICN) working group on cartels and EU competition policy will be reviewed by the OECD in 2004.
732. The European Commission will conduct exploratory talks with the US on the possibility of starting negotiations on a "Second Generation Agreement" which would allow the exchange of legally protected information. It will also be involved in the negotiation of competition chapters with candidate countries Bulgaria and Romania, as well as conducting assessments of the competition regimes in Turkey, Croatia and the Former Yugoslav Republic of Macedonia.

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