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EUROPEAN ECONOMIC COMMUNITY
EUROPEAN ATOMIC ENERGY COMMUNITY
COMMISSION

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on
Competition Policy

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on the Activities of the Communities")

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INTRODUCTION

The Commission's competition policy took on a new dimension during 1972. At a time when the Community is preparing to achieve the gradual approximation of the Member States' economic policies, it is more than ever necessary that the Commission should see to it that the fundamental rules of the Treaty are observed, and, in particular, that effective competition between undertakings is maintained.

Community competition policy towards undertakings, being a basic policy supported by effective national competition policies, can help considerably to influence the economic conditions characterizing this day and age. For the bans imposed by the Commission on restrictive practices or abuses under its competition rules help in the fight against inflation, since they eliminate the unjustified advantages which some undertakings may derive from fragmentation of markets. The Council of Ministers, called upon to consider what action should be taken to control inflation, has realized what effects a strict competition policy could have on prices, even though such effects would generally make themselves felt only in the medium term. In its resolution of October 31st, 1972, the Council noted "the determination expressed by the Commission to strengthen its action against restraints of competition which may derive either from horizontal price agreements, concerted practices with regard to prices or price discriminatory measures applied by undertakings in dominant positions, or from market-sharing agreements or other restrictive practices pursued by undertakings the purpose of which is to maintain the fragmentation of the markets, or from self limitation agreements, wherever such agreements hamper the Community's commercial policy."

With effect from 1 January 1973 the competition rules of the Treaties, as well as the measures to implement them taken by the

Council and the Commission, are applicable throughout the enlarged Community because of the accession of new members. The previous Free-trade agreements also provided for competition rules comparable to those in the EEC Treaty. But even if the Community rules are not directly applicable to the trade covered by these agreements, the fact remains that a vast economic area has thus been constituted which is subject to a common discipline that guarantees an ordered, non-discriminatory development of commerce.

The implementation of the rules of competition applying to undertakings led the Commission to adopt a number of measures in 1972: Fourteen decisions were taken under Articles 85 and 86 of the EEC Treaty and 15 decisions under Articles 65 and 66 of the ECSC Treaty. Some of these decisions are of great importance in the effort to restore conditions of competition on the Community markets and to ensure the maintenance of the unity of the Common Market. Heavy fines were imposed in cases of grave infringements harming the interests of the consumers. While applying the principle that restrictive agreements are prohibited, the Commission at the same time availed itself, by adopting regulations or individual decisions, of the opportunities provided by exemption clauses to encourage cooperation between undertakings aimed at strengthening their competitive positions. Progress was made in the field of patent licensing agreements and the communication of knowhow, two fields which are essential in the transfer of technological knowledge in the modern economy, by standard decisions adopted in specific cases.

Available information shows that the general movement towards industrial combination is gathering strength in the Common Market. International concentration operations in the Common Market, which showed a marked increase from 1966 to 1970, were even more numerous in 1971. While the participation of the undertakings of non-member countries in international operations remained substantial, it declined as a ratio of the number of concentration operations involving only Common Market undertakings. A study of 32 surveys of specific industries shows that during the 1962-1969 period there was an increase in the number of firms in the industry concerned in only three cases.

In the other cases, the number of firms declined. The degree of concentration fell in only four cases, while elsewhere there was an increase, which grew faster as time went on.

The Summit Conference of Heads of State or of Government of the enlarged Community, held from 19 to 21 October 1972, studied the problem of industrial concentration, and the Final Communiqué called for both “the formulation of measures to ensure that mergers involving firms established in the Community are in harmony with the economic and social aims of the Community, and the maintenance of fair competition”, it also called for the broadest possible use of Article 235 of the EEC Treaty, which empowers the Council, acting unanimously on Commission proposals, after consulting the Parliament, to take any powers not provided for elsewhere necessary to achieve, in the working of the Common Market, a specific Community objective. This political pronouncement led the Commission to advise the Council, on 30 and 31 October 1972, of its intention “to submit, independently of the application of Article 86 to specific cases, proposals designed to introduce a more systematic control of merger operations of a given scale”.

On the question of aids, the Summit Conference stressed the need for coordination of the future regional development fund with national aids, and acknowledged implicitly the importance attaching to coordination among themselves of national aid measures having a regional purpose. Coordination of this kind is in fact already ensured to a great extent by the principles to which the Commission decided to give priority in 1971. These principles were being progressively implemented during 1972.

On the question of aids to specific industries, the Commission continued its efforts to build up Community arrangements with which the Governments will have to comply, in respect of certain industries which are generally assisted by the Member States: following textiles and shipbuilding, aircraft construction is now the industry under scrutiny.

Lastly, progress made with regard to regional aids and aids to individual industries led the Commission to consider state assistance by other methods (general aids, temporary acquisition by the State of holdings in companies).

In addition, the Commission's efforts to improve consumer protection in 1972 were given further encouragement by the Summit Conference, which, in its Final Communiqué, called upon the Institutions to seek out ways and means of "strengthening and coordinating consumer protection". The Commission is planning to establish a programme in this area.

Part one

Competition policy with regard to undertakings

CHAPTER I

MAIN DEVELOPMENTS IN THE COMMUNITY'S POLICY

1. Continuity of implementation of the Commission's policy on restrictive practices and dominant positions

1. In 1972, as part of its policy with regard to enterprises, the Commission continued to give priority to action against restrictive or improper practices which hamper the creation of a single market and the maintenance of effective competition within this uniform market. The aim is to use Article 85 of the EEC Treaty, to terminate market-sharing, the fixing of prices and quotas, and other devices employed by firms to maintain market fragmentation. Under the Commission's previous practice, such measures obviously cannot escape the general ban on agreements.¹ Under Article 86, the practices attacked were improper practices by undertakings in dominant positions designed either to curtail the commercial freedom of dealers or to cut off supplies to a competitor.

2. Side by side with application of the banning principle the Commission continued its policy of strengthening the competitive position of undertakings by exempting the desirable forms of cooperation between them from the ban on restrictive agreements via regulations or case-by-case decisions. This line is followed with regard to specialization agreements and exclusive-marketing agreements, especially as far as small and medium-sized firms are concerned. In the distribution field the Commission has still had to combat the tendency on the part of certain undertakings to keep the national markets separated by prohibiting exports or by concerted price discrimination according to country of destination within the common market.

3. In two decisions, the Commission pursued its work of making clear its position on the application of Article 85 to the contractual exploitation of industrial property rights and technical knowhow². The main point made is that a rule forbidding exports to countries situated outside the sales territory, imposed on the licensee, may be caught by Article 85(1). In addition, where new technology could not be made available in the concession territory without an

¹ *First Report on Competition Policy*, sec. 1.

² *First Report on Competition Policy*, secs. 73 to 79.

exclusive licence being granted, the agreement can be exempted by the Commission under Article 85(3). By checking that no commitments have been accepted which are not indispensable to appropriate exploitation of the invention and of the knowhow, the Commission has thus also come out in favour of greater freedom of action for the licensees.

Henceforward, it will be in an enlarged market that the Commission will apply this policy devoted to ensuring maintenance of a competition system free from distortion.

2. Extension of the scope of the competition rules

4. Through application of the principle whereby the acceding countries assume the burden of responsibilities, and enter into enjoyment of the privileges, of the original Community, the competition system of the Community of Nine will be that of the Community of Six. In the free-trade agreements concluded with the other member countries of EFTA, provision should also be made for rules ensuring that trade between the enlarged common market and these countries should develop under conditions of competition which are not distorted by restrictive or improper practices. The geographical scope of the principle of undistorted competition which underlies Articles 85 and 86 of the EEC Treaty is thus considerably extended.

5. From 1 January 1973 onwards, Articles 85 and 86 of the Treaty establishing the EEC, Articles 65 and 66 of the Treaty establishing the ECSC, and the implementing acts adopted by the Council and the Commission have applied to agreements, decisions and concerted practices restraining competition, to the abuse of dominant positions and to mergers which, because of the accession of the new Member States, fall within the scope of the competition rules.

However, for those agreements caught by Article 85(1) of the EEC Treaty as a result of accession, but already in existence on 1 January 1973, the firms concerned will enjoy a six months' period of grace during which they may either discontinue the agreements or adapt them so that they are no longer caught by Article 85(1) or so that they qualify for exemption under one or other of the block exemption regulations, or may notify them to the Commission with a view to obtaining exemption under Article 85(3). As for agreements caught by Article 65 of the ECSC Treaty as a result of accession, but already in existence on 1 January 1973, the period of grace for firms is three months.¹

¹ Article 2 of the Accession Treaty;
Article 29, Annex I, Chapter V, Competition (EEC) and Annex VII, Chapter IV, Competition;
Article 166, Annex II, Chapter V, Competition (ECSC) of the Act concerning the Conditions of Accession and the Adjustments to the Treaties, *OJ* No. L 73, 27 March 1972, pp. 7, 30, 92, and 93, 138, and 45, 126.

6. The free-trade agreements for manufactures, concluded with Austria, Finland, Iceland, Portugal, Sweden and Switzerland include competition rules applying to restrictive and improper practices liable to affect trade within the Community and the countries concerned. Such practices are deemed incompatible with the proper working of these agreements.¹

The inclusion of competition rules in the agreements is due to the fact that the Community's trading partners are mostly highly industrialized countries and that the lack of common rules would entail serious risks of distortion of competition liable to jeopardize the harmonious expansion of trade. The rules are, as to substance, comparable with those on competition in the EEC Treaty. Accordingly, the Community has stated that it would assess restrictive or improper practices incompatible with the competition rules of the free-trade agreements by referring to the criteria deriving from the application of Articles 85 and 86 of the EEC Treaty and Articles 65 and 66(7) of the ECSC Treaty. It should be noted that, as appropriate, the competition rules of the Treaties of Rome and Paris and the corresponding clauses in the Agreements could be applied together. This does not mean, however, that the competition rules are directly applicable to the firms within the free-trade agreement framework. The implementing arrangements for the agreements provide that a contracting party taking the view that a given practice is incompatible with the competition rules will refer to the Joint Committee set up by the agreement with a view to achieving, as appropriate, elimination of the practice challenged. It will therefore be for the contracting party involved to take, autonomously, appropriate measures to ensure termination of the infringement. Each contracting party must therefore ensure that it is in a position to bring about in fact the elimination of incompatible practices, for it cannot invoke the lack of proper powers in order to oppose the implementation of the safeguard clauses.

In the free-trade agreements with Austria, Iceland, Portugal and Sweden, it is stated that Article 60 of the ECSC Treaty (publicity and prohibition of discrimination) and the implementing decisions already adopted by the Community will be extended to cover the sales of Community firms in these four countries. The latter, for their part, have undertaken to ensure, in respect of deliveries made both within their countries and in the Common Market by firms coming under their jurisdiction, that equivalent principles with regard to prices are complied with and to take the necessary action to achieve on a continuous basis the same effects as those obtained by the implementing decisions the Community is taking in this field.

¹ See, as examples: Agreements between the European Economic Community and the Austrian Republic, the Community and the Kingdom of Sweden, the Community and the Swiss Confederation; Articles 23 and 27, *OJ* No. L 300, 31 December 1972, pp. 5, 100 and 192.

As at 1 January 1973, the free-trade agreements for the areas coming under the EEC entered into force in relations between the Community and Austria, the Community and Portugal, the Community and Sweden, and the Community and Switzerland. Consequently, the competition rules have applied to trade between the Community and each of these countries since that date. On the other hand, the Agreements between the European Economic Community and Finland have not yet been ratified and consequently the competition rules are not yet in force for the relevant trade; nor have the ratification procedures been completed for the agreements concerning the ECSC areas.

3. The Commission's activity in the field of regulations

Extension of Regulation No. 67/67/EEC

7. Experience gained on the basis of Regulation No. 67/67/EEC¹ has shown that the arrangements made in this regulation, under which Article 85(1) of the Treaty is declared inapplicable to certain classes of exclusive dealing agreement in the manner provided for in the Regulation are satisfactory and have helped to promote merchandize trade within the Common Market, to strengthen cooperation between firms in the area of distribution and to prevent the creation of economic barriers by the instrument of absolute territorial protection.

The Regulation was due to expire on 31 December 1972, and the Commission therefore decided to extend it for a ten-year period:² this extension has the advantage of providing certainty as to the law and thus enabling managements to make long-term arrangements. It does not hamper the Commission's competition policy, since the Commission retains a right of supervision of the agreements covered by the Regulation and may at any time intervene if any of them show effects incompatible with Article 85(3).³

A durable framework has thus been maintained for firms willing to organize the distribution of their products in compliance with the Treaty's competition rules.

¹ *OJ* No. 57, 25 March 1967, p. 849.

² Regulation No. 2591, 8 December 1972, amending Regulation No. 67/67/EEC, *OJ* No. L 276, 9 December 1972, p. 15, see Annex p. 175.

³ Under Article 7 of Regulation No. 19/65/EEC, read with Article 6 of Regulation No. 67/67/EEC.

Block exemption in the area of specialization

8. The Commission widened the scope for cooperation for small- and medium-sized undertakings by adopting, pursuant to the Council's empowering Regulation No. 2821/71 of 20 December 1972¹, a block exemption regulation for certain specialization agreements² provided the share of the market held by the undertakings participating and their turnovers did not exceed specified ceilings. The adoption of this regulation is based on the consideration that specialization agreements generally contribute to improving the production process and that they are particularly suited to strengthening the competitive position of small- and medium-sized firms. The favourable economic effects of specialization lie in the achievement of economies of scale or, in a wider sense, in rationalization measures which enable the firms to cut costs by concentrating operations; it can be expected that these measures will lead, in conditions of effective competition, to lower prices and will thus benefit the user. The conclusion of such agreements should therefore be facilitated and encouraged. Block exemption will however benefit small- and medium-sized firms only if certain clauses in restraint of competition, necessary to the achievement of specialization, are also exempted. Such clauses can however be allowed only insofar as they are essential for the achievement, for the firms and the users, of the advantages sought. In order to ensure that the maintenance of effective competition is not jeopardized, the scope of the regulation is confined to firms whose overall economic strength, and agreements whose influence on the market, remain limited.

9. The general form of the regulation is comparable to that of Regulation No. 66/67/EEC, exempting certain exclusive dealing agreements.

Only specialization in the manufacture of products is included within the scope of the Regulation, to the exclusion of specialization in distribution or in the supply of services, for in this field, the danger of market sharing is difficult to assess and the Commission's experience insufficient. Such types of specialization must be dealt with by single decisions.

To make clear which agreements it is intended to encourage, the regulation defines the notion of specialization. A commitment to specialization includes a reciprocal obligation not to produce certain items with a view to specializing, which means that a unilateral decision to refrain from production of a specific item does not qualify for block exemption. The commitment can refer only to the nature and not to the quantity of the products, and any quantitative

¹ *OJ* No. L 285, 29 December 1971, p. 46.

² Regulation No. 2779/72/EEC, 21 December 1972, *OJ* No. L 292, 29 December 1972, p. 23.

limitation of production lies outside the scope of the exemption. The wording "or to entrust manufacture of such products to other undertakings" also covers piece work orders made within the specialization arrangements.

The clauses in restraint of competition which may be agreed in connection with a reciprocal specialization agreement on production because they are generally essential to the implementation of such an agreement are the non-competition clause, the commitment to deliver between the parties, the obligation on exclusive supply and the concession of exclusive distribution of the specialized products; obligations which are not definitely known to be in restraint of competition are also mentioned: these are obligations concerning stockage and concerning after-sale service and guarantees.

As part of the specialization arrangement, mutual exclusive concessions between producers are allowed,¹ but on the condition, in parallel with the requirements of Regulation No. 67/67/EEC, that they do not stand in the way of parallel imports. On the other hand, commitments with regard to prices and firms can entail restraints of competition, so that the conditions of exemption must be considered case by case.

10. The regulation being designed as a means of facilitating the cooperation of small- and medium-sized firms, the aim was to ensure that only such firms should benefit from it and that at the same time competition should not be eliminated in respect of a substantial proportion of the products involved. The regulation therefore makes two limitations in respect of the share of the market and of turnover.

- A market share of 10%. The market for the products concerned is the market for the specialized products and the like, the definition of which is the same as that given in Regulation No. 67/67. For practical reasons connected with the difficulties besetting managements in calculating their share of the market, the market chosen has been that represented by a single Member State. This is not the geographical definition of the market but a basis for calculation. A 10% share of such a part of the Common Market may well represent an appreciable position, so that it was undesirable to go beyond this limit.
- A total turnover not exceeding 150 million u.a. for all the firms involved in the specialization agreement, including firms with which they are linked.

The market share and turnover "threshold" are lower than those set by Regulation No. 2822/71 (15% and 200 million u.a. respectively), which dis-

¹ Exclusive concession agreements between competing producers are, however, excluded from the application of Regulation No. 67/67. See *First Report on Competition Policy*, sec 52.

pensed certain specialization agreements from notification.¹ The two regulations are based on the principle that the scope of a regulation having as its purpose a formal arrangement, i.e. notification, must be wider than that of the regulation introducing a rule of substance, that is to say exemption from the ban on restrictive agreements.

The rule stating to what extent firms linked economically must be included in the calculation of the total turnover is similar to that on communication concerning agreements of minor importance not covered by Article 85(1) of the Treaty,² in that both measures are designed to encourage cooperation among small- and medium-sized firms.

11. The duration of the regulation is five years, as for Regulation No. 67/67. Block exemption regulations must not be given too long a life, since the durations are in fact running-in periods. If the regulations subsequently prove satisfactory, they can be extended for a longer time. In addition, specialization agreements meeting the conditions set down and concluded before the entry into force of the regulation also qualify for block exemption.

Since circumstances which may necessitate Commission intervention must be allowed for, it has been decided that benefit of the exemption regulation can be withdrawn, for example if rationalization does not yield appreciable results or if harmful effects are occasioned for the users. Annulment of block exemption in an individual case can only take effect from the date it is decided on.

Amendment of decisions on pricing
(Article 60 of the ECSC Treaty)

12. In the fields covered by the ECSC Treaty, the Commission³, having consulted the Consultative Committee and the Council, decided to amend Decision No. 30/53 relating to discriminatory practices prohibited by Article 60(1) of the ECSC Treaty.⁴

The definition of discriminatory practices given in this Decision is in line with the guidance provided by long administrative experience and with the rulings of the Court of Justice. The innovation consists in the fact that transactions are in principle comparable only when the purchasers are in the situation of competition or where they belong to the same class of user, where they manufacture identical or similar products, or where they have the same commercial functions on the market.

¹ OJ No. L 285, 29 December 1971, p. 49.

² OJ No. C 64, 2 June 1970, p. 1.

³ *First Report on Competition Policy*, secs. 101 to 105.

⁴ Decision of 22 December 1972, OJ No. L 297, 30 December 1972, p. 39.

The new arrangements define the prohibition independently of the rules relating to publication of prices. They enable the firms to adapt their attitudes more fully to the market while complying with Article 60 of the Treaty. In the case of infringement of the pricing rules, they can no longer argue that the exigencies of the market sometimes preclude compliance with these arrangements. On the other hand, a better definition of the prohibition of discrimination will facilitate the Commission's supervision of the firms' compliance with the pricing rules.

The new decision defining the forbidden practices also entailed amendment of Decision No. 4/53 relating to the conditions of publication of price tariffs and sales terms.¹ The question arose as to whether, in certain circumstances, when prices were differentiated by class of consumer without publication, sufficient market transparency between those concerned was always effective. In contrast with the arrangements made for steel (see Decision No. 31/53),² it was decided that publication of such price discrepancies should be compulsory because of the situation on the coal market.

Similarly, Decision No. 3/58³ relating to the alignment of coal sales in the Common Market was adapted to the current situation on the coal market within the energy market. The danger of disturbances on the market entailed by the alignment had diminished, and the Commission therefore eliminated some of the present restrictions on the right of alignment. The few restrictions still maintained relate solely to the uncertainties which may result from the accession of the United Kingdom to the Common Market. Consequently, the new decision provides that: apart from amendments rendered necessary by the accession of the United Kingdom, Ireland and Denmark, the twelve sales areas will be reorganized into eight areas; the limitation of the right of alignment to 20% of tonnage sold in the preceding year in the Common Market has been terminated; the number of firms upon which alignment is authorized is increased; the condition that aligned fuels must be practically identical has been dropped; an obligation to communicate sea transport freight charges has been introduced, where the bids taken into consideration for alignment involve sea transport.

Proposed Regulation providing a period of limitation

13. On 30 December 1971, the Commission laid before the Council a proposed Regulation relating to a period of limitation for prosecution and enforcement in the fields of European Community transport and competition law.⁴

¹ OJ No. L 297, 30 December 1972, p. 44.

² OJ No. L 297, 30 December 1972, p. 42.

³ OJ No. L 297, 30 December 1972, p. 45.

⁴ OJ No. C 43, 29 April 1972, p. 1.

The Economic and Social Committee and the European Parliament were consulted during 1972. The Economic and Social Committee gave its Opinion on 29 April 1972,¹ the European Parliament on 30 November 1972.² Both institutions approved the Commission's proposal, subject to a few comments designed to amplify the text submitted. In view of the results of the consultation procedure, the Commission amended the original version of its proposed Regulation, in accordance with Article 145, subparagraph 2, of the EEC Treaty.

14. The purpose and the content of the Regulation planned can be summarized as follows:

The aim of the Regulation is to fill a gap in Community law: the EEC's transport and competition law confer on the Commission power to impose pecuniary penalties on firms or associations of firms in cases of infringement.³ The rules include, however, no extinctive period of limitation.

In judgments handed down on 15 July 1970⁴ and 14 July 1972⁵ the Court of Justice stated "that if, as it should, it is to provide certainty as to the law, a period of limitation, must be fixed in advance, and the fixing of its length and the terms of its application are a matter for the Community legislator".

The Commission proposes that the principle of a period of limitation should be introduced by creating rules applying both to the power to impose fines (period of limitation on *proceedings*) and to that of enforcing the decisions inflicting fines or penalty payments (period of limitation on *enforcement*).

The rules contemplated include solutions to three types of problem; they provide for the fixing of:

- extinctive periods of limitation;
- the starting point for such periods;
- measures interrupting or suspending the period.

The arrangements worked out in this connection are guided by two requirements. In the first place, firms must be sure as to how they stand with

¹ *OJ* No. C 89, 23 August 1972, p. 21.

² See European Parliament, verbatim report of debates, 13 November 1972, p. 18.

³ See:

Articles 17 and 18 of Council Regulation No. 11 of 27 June 1960, concerning the abolition of discrimination in transport rates and conditions, in implementation of Article 79(3) of the EEC Treaty (*OJ* No. 52, 16 August 1960, p. 1121);

Articles 15 and 16 of Council Regulation No. 17 of 6 February 1962—first Regulation implementing Articles 85 and 86 of the EEC Treaty (*OJ* No. 13, 21 February 1962, p. 204); Articles 22 and 23 of the Council Regulation (EEC) No. 1017/68 of 19 July 1968 on application of rules of competition to transport by rail, road and inland waterway (*OJ* No. L 175, 23 July 1968, p. 1).

⁴ Cases 41, 44 and 45/69—*OJ* No. C 130, 27 October 1970, p. 3.

Recueil 1970, 6, pp. 661, 733 and 769.

⁵ Cases 48, 49 and 51 to 57/69—*OJ* No. C 125, 12 December 1972, p. 17 *et seq.*

regard to the law; secondly, nothing must be done to jeopardize the effectiveness of the Commission's action by introducing a period of limitation which would extinguish offences too easily.

For period of limitation on *proceedings*, the solutions are as follows:

- the time limit would be three years for infringements with regard to information and checking, and five years with regard to infringements of the substantive rules.

However, with regard to infringements which are continuous or persistent, the period would start only on the date on which the infringement was terminated.

- The period is interrupted by any measure taken by the Commission or by a Member State at the request of the Commission with the object of recording the existence of an infringement, provided the measure has been notified to the firm or association of firms concerned.

For the period of limitation on *enforcement*, similar rules have been worked out, taking account of Article 192 of the EEC Treaty concerning the enforcement of decisions entailing a pecuniary obligation against persons other than States.

- The period of limitation is five years.
- The period of limitation starts from the day on which the Commission decision has acquired force of *res judicata*.

The period is interrupted

- by any Commission decision amending the original amount of the fine or penalty payment or dismissing an application to this effect;
- by any measure adopted by the Commission or by a Member State at the request of the Commission for the forced recovery of the fine or penalty payment.

It is suspended

- for any period during which payment facilities are granted;
- for any period for which forced enforcement is suspended pursuant to a decision by the European Court of Justice.

This proposed regulation refers solely to the fields of transport and competition, for so far it is only in these fields covered by the Treaty of Rome that the Community legislator has given the Commission powers to impose fines and penalty payments.

4. Competition policy and current problems

15. The Commission has already stressed the importance it attaches to competition policy in the context of general economic policy as an instrument for fighting inflation, especially now.¹ Furthermore, the difficulties which have arisen as a result of the development of the conditions for certain imports from non-member countries have caused concern on grounds not only of commercial policy but also of competition policy. Difficulties which have been encountered in some sectors and attributed to structural factors may be solved as a result of agreements concerning investments, and this solution must also be considered, in the context of the Community industrial policy, with reference to the competition rules of the Treaties.

Competition and inflation

16. The Commission's measures against restraints of competition liable to maintain prices artificially high are part of the policy which must be pursued both by the countries and at Community level to combat inflation.² Seen from this angle, the competition policy is a tool that must be used to create conditions under which the monetary and budgetary policies can have their full effect. Its first objective is to ensure that the markets within the Community are opened up so that purchasers can operate throughout the Common Market.

The effects of competition policy measures applying to agreements between undertakings and to the behaviour of undertakings enjoying dominant positions are normally felt only in the medium term; some of them may, however, produce short-term effects if they are implemented with great care. This is why the Commission has expressed its determination—noted by the Council—"to strengthen its action against restraints of competition which may derive either from horizontal price agreements, concerted practices with regard to prices and price discriminatory measures applied by undertakings in dominant positions or from market-sharing agreements or other restrictive practices pursued by undertakings the purpose of which is to maintain fragmentation of the markets, or from self-limitation agreements, wherever such agreements hamper the Community's commercial policy".

Self-limitation agreements

17. The self-limitation agreements deserve special mention here: arrangements between undertakings or associations of undertakings curtailing imports

¹ *First Report on Competition Policy*, p. 12.

² Council Resolution of 5 December 1972 on inflation control, item VIII. *OJ* No. C 133, 23 December 1972, p. 14.

on the Community market of items from non-member countries, or controlling these imports, for example in terms of quantity or price, are liable to jeopardize the unity of the market, the competition system, and the Community's commercial policy.

The Commission has published an opinion giving a statement of principle, formulated within the framework of the Treaty of Rome, with regard to practices restraining imports of Japanese products into the Community.¹

From the point of view of competition law, the Opinion recalls that this is prohibited under Article 85(1), even where some or all of the member undertakings have their principal place of business outside of the Community, if the effects extend to the Common Market territory. The Opinion also draws the attention of those concerned to the desirability of notifying in good time any agreements concluded or concerted practices pursued. Only on the basis of notification can it be decided whether, in certain cases, exemption can be granted under Article 85(3).

The Commission believes that any import curtailment measures should be part of the commercial policy, a field which must remain in the hands of the public authorities. Hence it feels that in cases where certain imports from non-member countries are causing or are liable to cause grave difficulties to European manufacturers, such problems should be tackled by the implementation of appropriate commercial policy measures.²

Agreements concerning investments

18. It is also true that in certain sectors the requirements of technical development as to the size of production plants, in addition to the difficulty of accurately predicting demand trends, raise serious problems when investors are working out investment projects and plans to increase production capacity.

At the competition policy level it is necessary to know under what conditions these difficulties can be resolved by an agreement between undertakings in a manner compatible with the Treaty's competition rules. This problem is too delicate to afford grounds for hoping that it can be solved by a general approach. The method of case-by-case examination is unavoidable. No solution could be arrived at in the case that recently came to the Commission's attention because the agreement notified covered a wider field and extended to the production and marketing policies of the firms concerned.³

¹ Commission Opinion relating to imports into the Community of Japanese products coming under the Treaty of Rome, *OJ* No. C 111, 21 October 1972, p. 13.

² See in particular written questions No. 192/72 (*OJ* No. C 122, 24 November 1972, p. 6) and No. 299/72 (*OJ* No. C 138, 31 December 1972, p. 54).

³ Sec. 29.

Accordingly the question remains open as to whether an agreement simply instituting a system of exchanges of information designed to avoid or to reduce surplus production capacity in specific situations can qualify for exemption.

5. Merger control

19. The scale of the industrial combination movement in the Common Market raises the problem of deciding what are the most appropriate facilities for monitoring the trend at Community level.

In this connection the Commission wishes to stress the importance of the judgment handed down by the Court of Justice of the European Communities in the Continental Can Company case on 21 February 1973.¹ The controversial question of the applicability of Article 86 to combinations effected within the common market by firms in a dominant position has thus been clarified. Although, in the above case, the Court of Justice annulled the Commission's decision because the Commission failed adequately to define the market concerned, the Court confirmed the soundness of the interpretation of Article 86 which the Commission had developed in its decision.

20. The Commission is now examining the conclusions regarding combinations which have to be drawn from this judgment for the purposes of its competition policy. However, in view of the fact that the problem of controlling excessive concentration presents itself on a more general level and cannot be considered as wholly settled following the Court's judgment, the Commission, as it has already said, intends to submit proposals to the Council as, for that matter, it was invited to do in the Final Communiqué of the Summit Conference. Stressing the need to provide a single industrial base for the Community, the Summit Conference found that the relevant work should include both:

“The formulation of measures to ensure that mergers involving firms established in the Community are in harmony with the economic and social aims of the Community and the maintenance of fair competition as much within the Common Market as in external markets in conformity with the rules laid down by the Treaties.”²

The Commission therefore already informed the Council on 30 and 31 October 1972 of its intention “to submit, independently of the application of

¹ Judgment of the Court of Justice of 21 February 1973 in Case No. 6/72 (Europemballage Corporation and Continental Can Company Inc. v. Commission).

² Final Communiqué of the Conference of Heads of State or Government of the Member States or States joining the European Communities, sec. 7.

Article 86 to specific cases, proposals for the introduction of more systematic supervision arrangements for mergers reaching a certain scale".¹ The Council noted this statement. The Commission is supported in its viewpoint by the Final Communiqué of the Summit Conference, which mentions the desirability of using Article 235 of the EEC Treaty "as fully as possible". The Treaty could well be used as the basis for proposals based on the same considerations as those incorporated by the European Parliament in its resolution on the rules of competition of 7 June 1971.²

6. Case law of the Court of Justice

The concept of concerted practice

21. The implementation of the ban on restrictive agreements is, however, getting more and more difficult because restraints of competition conflicting directly with this principle are being embodied, increasingly, in discreet forms of concerted behaviour on the market. The Commission has therefore had to show increased vigilance in its supervision of the markets, and firmer evidence has been needed of actual infringements. The guidance given by the Court of Justice in its judgment in the dyestuffs case³ is therefore of fundamental importance in the Community's pursuit of its policy with regard to restrictive agreements: the policy presupposes that the Commission can apply Article 85(1) to a form of coordination between undertakings "which, without having been

¹ Council Resolution of 5 December 1972, quoted above.

² European Parliament, Resolution on the rules of competition and the position of European undertakings in the Common Market and in the world economy, *OJ* No. C 66, 1 July 1971, p. 19.

³ In nine judgments handed down on 14 July 1972, the Court gave rulings on the appeals brought against the Commission's decision of 24 July 1969 (*OJ* No. L 195, 7 August 1969, p. 11) by nine dyestuff manufacturers. In its decision, the Commission had imposed fines of 50 000 units of account on each of the undertakings concerned—except one of them, the ACNA company, which was fined only 40 000 u.a.—for infringements of Article 85(1) of the EEC Treaty through concerted price increases in 1964, 1965 and 1967. The Court dismissed all the appeals and awarded costs against the appellants. However, it reduced to 30 000 u.a. the fine on the ACNA company, which had participated in the concerted practice only in 1964.

See judgments of the Court of Justice of 14 July 1972 in Cases
Nos. 48/69 (*Imperial Chemical Industries Ltd. v. Commission*)
49/69 (*Badische Anilin- und Soda-Fabrik v. Commission*)
51/69 (*Farbenfabriken Bayer AG v. Commission*)
52/69 (*J.R. Geigy AG v. Commission*)
53/69 (*Sandoz AG v. Commission*)
54/69 (*Société française des matières colorantes SA v. Commission*)
55/69 (*Cassella Farbwerke Mainkur AG v. Commission*)
56/69 (*Farbwerke Hoechst AG v. Commission*)
57/69 (*Azienda Colori Nazionali e Affini—ACNA v. Commission*)
OJ No. C 125, 12 December 1972, p. 17, *Recueil*, 1972, 5, pp 619 *et seq.*

taken as far as the establishment of an actual agreement, knowingly substitutes practical cooperation between the undertakings for the hazards of competition”.

22. Interpreting for the first time the concept of “concerted practices” mentioned in Article 85(1), the Court broadly endorsed the Commission’s argument. In its opinion, while parallel behaviour cannot by itself be labelled a concerted practice, it is nevertheless liable to constitute strong circumstantial evidence when it leads to conditions of competition which do not match the normal conditions of the market, having due regard to the nature of the products marketed, the size and number of the undertakings in the industry and the size of the market itself. This will be the case, for example, when parallel behaviour may enable the undertakings concerned to seek out a balance of prices at a level different from that which would have derived from competition, and to establish inflexible situations hampering the free movement of products in the Common Market and the free choice by consumers of their suppliers.

In the case at issue, the problem was to determine, whether there was a concerted practice underlying the general and virtually uniform price increases decided upon simultaneously and made public by the leading dyestuff producers, or whether in fact these were autonomous price increases. The question could be reduced essentially to that of deciding whether, having due regard to the nature of the dyestuffs’ market, manufacturers acting independently could in fact have taken the risk of introducing a general across-the-board price increase in their products.

The Court held that with a group of manufacturers as powerful and numerous as this one, the risk that in times of price increases some of them might deviate from the general movement and endeavour to increase their relative shares of the market by individual pricing was more than negligible. Moreover, the fragmentation of the Common Market into six national markets having differing price levels and structures made a spontaneous and equal price increase on all the national markets unlikely; at the very least, the increases should differ in relation with the differing conditions on each domestic market. Consequently, parallel pricing in different countries over the same range of items, in the same time-period, could hardly be coincidental.

The Court found that the practice adopted by managements of consecutive price increases was evidence of progressive cooperation between them. Each manufacturer prices his own products and for this purpose, can take into account the current or foreseeable behaviour of competitors. However, the Treaty’s competition rules do not allow a producer to cooperate with his competitors—in any way whatever—to work out a coordinated price-increase policy and to ensure the success of the increase by the prior elimination of any uncertainty as to reciprocal behaviour concerning essential aspects such as rates, purpose, timing and location.

The notion of a concerted practice must be considered as sufficiently clearly defined to enable the Commission to apply Article 85(1) of the EEC Treaty effectively.

National agreements to protect markets

23. In a subsequent ruling¹ concerning the appeal against the Commission's decision on the Netherlands cement dealers' agreement,² the Court confirmed that the basis of action adopted by the Commission with regard to national market protection agreements was sound.

It held, in the first place, that an agreement among a large number of dealers established in a given market and supplying this market through imported products affects trade between Member States. The Court felt that an agreement covering the whole of the territory of a Member State has, by its very nature, the effect of consolidating fragmentation coinciding with national frontiers, thus hampering the economic interpenetration aimed at by the Treaty and ensuring protection of domestic production. As to the contents of the agreement itself—in the case at issue, the dealers were operating *inter alia* a target price system—the Court felt that even the fixing of a price which is merely a target price affects competition since it enables all the participants to predict fairly accurately their competitors' price policies.

Application of the competition rules to firms from non-member countries

24. In connection with the judgments it handed down on 14 July 1972 in the "Dyestuffs" cases,³ the Court of Justice commented on the arguments presented by three appellant firms whose head offices were outside the Community and which had asserted that the Commission could not fine them for acts which they had committed outside the Community. The Court held, firstly, that the price increases made in the market related to competition between producers operating in the Common Market, and secondly that the appellants had compulsorily determined prices and other sales conditions for their subsidiaries in the Community. The Court therefore found that the three appellants had in fact been engaged in the concerted practices challenged, within the Common Market.

¹ Judgment of the Court of Justice of 17 October 1972 in Case No. 8-72 (*Vereniging van Cementhandelaren v. Commission*), *OJ* No. C 15, 30 March 1973, p. 13, *Recueil*, 1972, 6, p. 977.

² Commission Decision of 16 December 1971, *OJ* No. L 13, 17 January 1972, p. 34, see *First Report on Competition Policy*, sec. 9.

³ Judgments of the Court of Justice of 14 July 1972, in Cases Nos. 48, 49 and 51 to 57/69, *OJ* No. C 125, 12 December 1972, p. 17; *Recueil*, 1972, 5, pp. 619 to 933.

The Court's judgment of 25 November 1971¹ is relevant in this context: "The fact, for one of the undertakings involved in the agreement, that it is located in a non-member country, is no obstacle to the application of Article 85 where the agreement has effects within the Common Market".

Similarly, the Commission has stated, in commenting as to principle on restrictive practices relating to imports of Japanese products into the Community liable to be caught by Article 85, that "the fact that several or all the undertakings involved have their principal head offices outside the Community is no obstacle to the application of this rule in so far as the agreements, decisions or concerted practices have effects extending to the Common Market".²

25. The Commission's jurisdiction is of great importance in connection with any implementation of the rules of competition to "multinational" undertakings.

In the actual application of the rules of competition, the Commission has so far had no specific difficulties to solve arising from the multinational status of an undertaking when it has acted in connection with infringements committed within the Common Market. Even if undertakings from non-member countries act in the Community through legally separate subsidiaries, the legal separateness of such companies cannot be adduced as evidence that their behaviour on the market, for the purposes of the application of the rules of competition, is not uniform.³

However, the multinational undertakings operate on a world scale, and the Commission, like the Member States, has associated itself with the work undertaken within the OECD, which is studying ways and means of drafting a code of good conduct in matters of competition for these companies and of building up fuller international cooperation to control their behaviour.

¹ Judgment of the Court of Justice of 25 November 1971 in Case 22/71 (Beguelin Import Co), *OJ* No. C 9, 3 February 1972, p. 7. *Recueil* 1971, p. 959.

² Opinion relating to imports into the Community of Japanese products covered by the Treaty of Rome, *OJ* No. C 111, 21 November 1972, p. 13. See also sec. 17.

³ Judgments of the Court of Justice of 14 July 1972 in Cases Nos. 48, 49 and 51 to 57/69 (*dyestuffs*). In another case, the Commission found that an American company and its Italian subsidiary constituted the same corporate enterprise for the purposes of Article 86 (see sec. 47).

Double penalization

26. In its Decision of 25 November 1971 in the Boehringer case,¹ the Commission had declined to offset the enforcement of American anti-trust legislation against a penalty resulting from the application of Community law. The Court of Justice, to which the firm of Boehringer appealed,² confirmed the Commission's decision because the matters in the Commission's case against the appellant were not the same as those complained of by the American authorities: the Court found that whilst the facts underlying the two judgments both originated in the same group of agreements, they were distinguishable, in essence, both in respect of purpose and of territorial location. The Court's judgment is therefore based on the argument that the actions objected to by each of the legislations had not been proved to be the same.

7. Relationships between the competition rules of Community law and national law

27. The problems arising in connection with any simultaneous application of EEC competition rules and the Member States' law relating to the protection of competition have already been touched on in the previous report.³ Restrictive agreements, mergers and the abuse of dominant positions in the coal and steel field must only be assessed in the light of Articles 65 and 66 of the ECSC Treaty, and are therefore solely a matter for the Community's jurisdiction, but similar practices pursued by firms in other industries come under both Community law and the laws of the Member States.

The simultaneous applicability of the competition rules of the Treaty of Rome and of national law is liable to engender conflict between the municipal law of the Member States and Community law. This danger will become apparent, for example, in cases where a set of circumstances are the subject of two parallel proceedings, one before the Community authorities under Articles 85 and 86 of the EEC Treaty, the other before the national authorities under municipal law. Two examples highlight the problem:

- In a decision handed down on 28 November 1967, the Bundeskartellamt fined the German parties to a European dyestuffs agreement under paragraphs 1 and 38, subparagraph 1, of the law against restraints of competition (*Gesetz gegen Wettbewerbsbeschränkungen*).⁴

¹ Decision of the Commission of 25 November 1971, *OJ* No. L 282, 23 December 1971, p. 46.

² Judgment of the Court of Justice, 14 December 1972 in Case 7/72 (*Boehringer v. Commission*), *OJ* No. C 3, 5 February 1973, p. 7, *Recueil*, 1972, p. 1281.

³ *First Report on Competition Policy*, sec. 129.

⁴ Case B3-442100-A-232/67 (*Farbenhersteller*) published in *WuW/E BkartA* No. 1179 — *WuW* 1968, p. 407.

In the same case, the Commission had already opened proceedings with a view to the declaration of infringements of Article 85 of the EEC Treaty. In a decision handed down on 24 July 1969, the Commission fined all the firms involved in the infringement¹, pursuant to Article 15(2) of Regulation No. 17; the decision has since been upheld by the Court of Justice.² However, it has not proved necessary to solve any conflict between the Community rules and the national rules on restrictive agreements, the Bundeskartellamt decision having been quashed on appeal.³

- In decisions handed down on 15 March 1972, the Bundeskartellamt fined several firms whose head offices were in the Federal Republic, pursuant to paragraphs 1 and 38, subparagraph 1 (sec. 1) and subparagraph 4 of the same law.⁴ In one of these decisions (Polyamid)⁵ the Bundeskartellamt found that the firms involved had built up a complex network of restraints of competition under which:
1. European manufactures of Polyamid fibres, acting as a group, had marked out, in agreement with the Japanese manufacturers, areas of interest so as to prevent imports of Japanese fibres into Europe;
 2. The European producers had shared out among themselves the areas of interest so that their national markets were protected against deliveries from other countries,, whilst for deliveries into extra-European markets agreed prices and quotas were to be complied with.
 3. The members of the various national groups are alleged to have undertaken to comply, within their respective markets, with their various agreements covering sales-territory-sharing, prices and rebates, and distribution channels.

Before the Bundeskartellamt decision was taken, the Commission had opened proceedings for an infringement of Article 85 of the EEC Treaty. In this case, as well, therefore, two procedures—a Community procedure and a national procedure—were being conducted against the same restrictive agreement.

The case was also the occasion of contacts between the Commission and the Bundeskartellamt, with a view to a fuller supply of information to the Community authorities from the national authorities.

¹ *OJ* No. L 195, 7 August 1969, p. 11.

² Judgments of 14 July 1972 in Cases 48, 49 and 51 to 57/69, *OJ* No. C 125, 12 December 1972, p. 17 *et seq.*

³ Judgments of the Kammergericht of 28 August 1969, published in the *WuW/E OLG* 1015-*WuW* 1969, p. 763; judgment of the Bundesgerichtshof of 17 December 1970, published in *WuW BCH* 1147 — *WuW* 1971, p. 187.

⁴ Published in *WuW/E BkartA* No. 1383 *et seq.* — *WuW* 1972, p. 525.

⁵ Case B 3-495100-A-21/72.

Although no specific legal difficulties have yet arisen, and the general principles of the rulings handed down by the Court of Justice¹ already offer sound opportunities for solving conflicts between Community rules and national law on competition, the Commission is at present considering whether there is a need for dealing with cases of simultaneous application of Community and national law by introducing a regulation or a directive under Article 87(2) (e) of the EEC Treaty.

¹ Judgment of the Court of Justice of 13 February 1969 in Case 14/68 (Walt Wilhelm and others v. Bundeskartellamt), *OJ* No. C 30, 7 March 1969, p. 2; *Recueil* 1969, 1, p. 1.

CHAPTER II

MAIN DECISIONS TAKEN BY THE COMMISSION

1. Elimination of agreements prohibited under Article 85

Market-sharing agreements, price- and quota-fixing

28. In an important decision, the Commission was compelled to intervene to order the Community's *main sugar producers and distributors* to discontinue the concerted practices they had engaged in since 1 July 1968. These consisted, under the principle of respective market sharing, in making deliveries in the EEC importing countries only with the assent of the main producers in these countries, so as to considerably weaken the competitive pressure which untrammelled sugar imports could have engendered.¹ Market fragmentation along national lines is not only a result of the complete separation of the market but also of protection arrangements designed to ward off any disturbance of the producers' commercial strategies on their respective markets.²

For many years EEC sugar was produced within national market organizations established by the authorities in close cooperation with the home industries. The main result of these arrangements made at official level with the business community was to cut off each of the six Community markets from the others almost completely. On 1 July 1968, national market organizations were replaced by a common market organization³ designed to allow the common sugar market to operate and develop as provided for in Article 38(4) of the Treaty. The market stabilization machinery established by Community regulations in order to guarantee a certain level of income to beet and sugar cane

¹ Commission decision of 2 January 1973, *OJ* No. L 140, 26 May 1973, p. 17. The aspects of the case coming under Article 86 are described below. See also sec. 77.

² Similar arrangements for the protection of national markets were previously dealt with by Commission decisions in the *Quinine* case (implementation of a price agreement and rebates on deliveries exceptionally authorized in the territories of the partners, as a supplementary guarantee of the reservation of the national markets), and in the *Flat glass* and *Sheet glass* cases (conclusion of delivery agreements between producers implicitly excluding any direct export, reciprocal adaptation of national producers' groups to the prices and terms in force on their partners' market). See *First Report on Competition Policy*, secs. 3, 4, and 6.

³ For fuller information concerning relations between this case and the objectives of the common agricultural policy, see sec. 77.

producers while avoiding the emergence of tendencies either to overproduction or to a sugar shortage exert, however, no influence on the free movement of sugar between the Member States or on the free formation of prices between the intervention price and the threshold price.

The various measures taken under the concerted practices engaged in by the sugar producers and their sales organizations in the Community were designed to control sugar trade within the Member States so as to ensure the protection of their respective markets. The deficit situation in certain areas in sugar for human consumption, however, necessitated a number of deliveries between Member States. In order to avoid as far as possible the competitive effects of such intra-Community trade:

- sugar deliveries were made, in general, only from producer to producer or under the producers' direct or indirect control, in order to enable them to resell the imported sugar at the same prices and on the same terms as home-produced sugar (in addition, in Italy, the suppliers, on the one hand, and the purchasers—Italian sugar producers, on the other hand, formed a grouping; imports into this country were subject to a tendering system organized by the Cassa Conguaglio Zucchero);
- deliveries to dealers and customers of the country of destination were refused, or bids were made only at higher prices, adapted to those being charged on the market of the destinee country;
- restrictive clauses were written into the contracts concluded with the national dealers and customers, so as to prevent the latter from disturbing the sales policy pursued by the producers concerned;
- the bids made by the producers—especially the French and Belgian producers—submitted for the auctions organized by the Commission with a view to granting export refunds on exports to non-member countries were concerted so that the quantities of surplus sugar remaining within the Common Market could be controlled and would exert no competitive pressure.

In the decision it adopted, the Commission endeavoured to restore quickly the scope for competition on the European sugar market in favour of the processing industries and of all the consumers in the Common Market. In addition, since sugar is a commodity consumed in large quantities and since the measures taken by those concerned were obviously in conflict with the aim of market integration, the Commission decided to impose on a number of the undertakings fines related to the seriousness and the length of time during which the infringements are committed and to the size of their shares in the market. The highest fine was 1 500 000 u.a. and the other undertakings were fined from 100 000 u.a. to 1 000 000 u.a. The fines totalled 9 000 000 u.a.

No fines were imposed on certain undertakings involved only occasionally or only to a modest extent in the infringements, or which endeavoured to adopt a pattern of behaviour independent of the producers participating in the concerted practices.

The Commission will ensure that its decision does actually have the desired impact, and will carefully examine any implications which it may have for the common sugar market organization.

29. In adopting its decision prohibiting the "Cementregeling voor Nederland —1971" (CRN) agreement,¹ the Commission also freed the Netherlands cement market of the last restraints of competition in trade between Member States, the impact of which, combined with various internal control measures adopted by the organized dealers, had had the effect of eliminating competition on this market for several decades.

The decision, which terminates a protracted procedure, concerns an agreement sharing out the Netherlands market, which still relies on imports to account for about a third of its cement consumption, between the Netherlands, Belgium and German industries, the shares being 69%, 17% and 14% respectively. A quantity varying between 250 000 and 55 000 metric tons per year — the actual quantity depending on the market share accounted for by "outsiders"—was, however, reserved by the members of the agreement for sale in free competition. In addition, the agreements provided for cooperation on research and for mutual information on investments of direct relevance to the supply of the Netherlands market.

In fact, the agreement notified represented a version, amended by those involved, of the old "Noordwijks-cement-acckoord", the main operative clauses of which provided not only for the allocation of quotas for the Netherlands market but also for the application of uniform pricing and sales terms, and which prohibited the construction of new factories. In the course of the proceedings conducted by the Commission, those concerned gradually whittled down their agreements to the terms of the present CRN, since in their original form their purpose and effect had been to eliminate all competition between the groups of Belgian, German and Netherlands producers participating. Moreover, those concerned had sealed off until 30 September 1967 access to the Netherlands market for outside producers or dealers, by establishing collective exclusive dealing relations with the organized Netherlands cement dealers. These restraints, the compatibility of which with Article 85 had been the subject of other proceedings, had been discontinued by those concerned, and in 1971 the Commission had forbidden the dealers' price control arrangements.² Eventually, although they had discontinued common price

¹ Commission Decision of 18 December 1972, *OJ* No. L 303, 31 December 1972, p. 7.

² *First Report on Competition Policy*, sec. 9 and note 1.

fixing and standardized selling terms, the producers involved had applied for exemption for a limited-duration modified quota system, which they wished to maintain for a transitional period, the "CRN-1971".

However, the Commission did not agree that the Netherlands market should remain closed to free imports of cement from other Member States. It felt that exemption from the ban on restrictive agreements could not be granted to an arrangement as restrictive as a quota agreement, the favourable effects of which, within the meaning of Article 85(3), it regarded as extremely doubtful and which, in any case, were apparently not indispensable for the achievement of the objectives pursued by the undertakings concerned. In the absence of any real danger of shortage of supply on the Netherlands markets, despite its dependence on imports, there was no case for waiving the principle established at the time of the inception of the Common Market, under which a system of competition between producers provides the best prospects of satisfactory supplies for the markets of a Member State in products deriving from other Member States. Nor is a quota system better fitted to ensure sufficient production capacity for the Netherlands market, were it only because the situation on this market plays only a secondary role in the investment policies of the Belgian and German manufacturers participating in the contract.

In more general terms, experience has shown that quota agreements are unlikely to solve the capacity surplus problem, since, with a view to strengthening their positions should the existing contracts be extended or after their cancellation, those concerned were endeavouring to step up capacity during the actual lifetime of the contracts. This was acknowledged by the Belgian cement industry, whose agreement had included clauses on this point.

30. In another decision, the principal effect of which is to prevent the producers concerned from eliminating all competition as between themselves in favour of group solidarity for exports within the Common Market, the Commission also refused exemption from the ban of Article 85(1) for the Belgian cement industry agreement: "*La Cimenterie belge—CIMBEL SA*".¹

The market control arrangements established by an agreement among the manufacturers and the Cimbel decisions have been applied, as to their principles, for several decades; even in the present version, which is less restrictive, of the "Coordination 1966", they still entailed serious restraints of competition. Taken as a whole, the purpose and effect of the arrangements was to artificially strengthen the competitive position of Belgian cement producers on export markets by coordinating their behaviour on the domestic market and outside.

¹ Commission Decision of 22 December 1972, *OJ* No. L 303, 31 December 1972, p. 24.

The restraints of competition consist mainly in a uniform price and terms-of-sale agreement for the Belgian market, closely linked with a system of delivery quotas and of income-offsetting rules applying to all the markets inside and outside the EEC. The main aim of the other restraints was to strengthen this system. Although the requirement to comply with fixed prices concerned only the domestic market, export terms had to be approved by the contracting parties for inclusion in the income-offsetting arrangement. The main purpose of the latter was to align export revenues on the generally higher profits accruing from sales on the domestic market.

The quota agreement was underpinned by a mutual information obligation concerning capacity increases, and the establishment of new cement plants was subject to the prior approval of all the contracting parties; in addition, production plants in the BLEU could be sold only provided the seller undertook to subscribe to all the obligations deriving from the agreement, which automatically excluded any competitive effort on the market by a purchaser not party to the agreement. The prices and selling terms agreed for Belgium entailed further special distortions of competition engendered by the granting of preferential prices solely to certain categories of purchasers and by rules with regard to rebates vis-à-vis public undertakings.

The Commission turned down the application for exemption since it found, on the credit side of this agreement, neither an improvement in the production process nor the promotion of technical or economic progress such as would offset beneficially the disadvantages deriving from the quota and price system provided for in the "Coordination 1966": whatever the scale of the investments and of capital as a production factor in the cement industry and the difficulty in achieving accurate adaptation of cement production capacity to demand, the agreement had not solved the overcapacity problem, since it had failed to prevent the establishment and maintenance of excess capacity in the Belgian cement industry. Indeed the Commission was convinced that as a consequence of the decline in the investment risk the agreement had actually helped to boost unneeded capacity and that the only explanation for this was the absence of any penalization due to competition. Moreover, the purely potential danger of cut-throat competition could not justify at the present time the elimination of competition in the field of prices between the members of the agreement. In addition, the objective pursued, of enabling the Belgian cement industry, being relatively small, to "speak with one voice" on export markets, could not rightfully be achieved at the expense of the Belgian cement users and of competitors from other Member States (through the system of private exports subsidies deriving from the income-offsetting arrangement).

31. Preliminary examination of the agreement notified by the *European producers of cut polyester fibres*¹ also showed that this agreement was not liable to lead to the appreciable improvements objectively ascertainable necessary to qualify for exemption under Article 85(3). According to those concerned, the agreement was designed to ensure coordination of investment and rationalization of production with a view to eliminating or to preventing excess capacity in this industry.

There is no doubt that the cut polyester fibre industry labours under heavy surplus capacity. And, because the manufacturers endeavour to scale down their surpluses, pressure is brought to bear on prices.

However, the question as to whether these difficulties, which could well derive not only from factors connected with changes in current economic trends and in techniques, but also from structural considerations, can be solved in a manner compatible with the rules of competition of the EEC Treaty was not settled in this case. Whatever the real situation, the agreement notified failed to meet the conditions set down in Article 85(3), since it covered a wider area and extended to the participants' production and selling policies.²

When the Commission had informed those concerned of the matters to which it had taken objection in the agreement as notified, it was cancelled and the notification withdrawn.

Other methods of protecting the national markets

32. In a decision adopted in association with other measures, the Commission restored undistorted conditions of competition on the Netherlands market in sanitary ware,³ on which several private arrangements were assuring protection of Netherlands producers by hampering the economic integration which is a Treaty objective.

The key element in these arrangements, which ranged from production to installation was the decisions of the Netherlands wholesale association "Vereniging van Groothandelaren in Sanitaire Artikelen—GISA", which controls more than 75% of the sales of the relevant items throughout the Netherlands. Through the fixing of minimum percentages of purchases to be reserved for

¹ The Commission has power to implement Article 15(6) of Regulation No. 17 if it reaches the conclusion, after provisional examination, that the conditions determining the application of Article 85(1) are met and that application of Article 85(3) is not justified. As soon as the Commission has informed the undertakings concerned, the latter are liable to fines, notwithstanding Article 15(5) of the same regulation.

² See, in particular, Oral question No. 16/72 with debate: excess capacity in the European polyester fibre industry (the Commission's reply was published in the "Débats du Parlement européen, No. 154, 10 October 1972, p. 40 *et seq.*).

³ Commission Decision of 22 December 1972, *OJ* No. L 303, 31 December 1972, p. 45.

Netherlands manufacturers, the agreement prevented a large number of Netherlands wholesale dealers from importing freely, in particular from other Common Market countries, the items concerned, and thus restricted the market in the Netherlands for producers from other Member States.

In addition to these partial exclusive purchasing arrangements for national producers, the agreement also provided for the fixing of prices and terms of sale to be applied by the wholesale dealers who were members of the association to their customers. This system, which prevented those concerned from availing themselves of competitive conditions by following their own pricing and selling policy and deprived the manufacturers of the scope for marketing which the free play of competition would have provided for at this level of distribution, concerned not only items manufactured in the Netherlands but also those imported from other Common Market countries. In addition, the GISA. rules fixed selling prices imposed on the member wholesalers, by increasing the manufacturers' gross selling prices by a percentage varying according to the nature and destination of the items. Although the gross selling prices were already established by each manufacturer on the basis of the peculiar nature of the products and his competitive position, the GISA thus implemented, on its own initiative, an increase in the selling prices of the items, which, according to the association, were to be considered as being of better quality. In this way, the rules in force distorted arbitrarily the competitive relationships between the manufacturers to the disadvantage of those producing better quality products, and compelled consumers to pay a higher price than the price they would have paid had the rules not existed.

The Commission's decision was not its first move in this sector of the Netherlands market, which had been subject for several years to agreements ranging from the manufacturers to the installation firms: two agreements concluded by the same association, one with the Netherlands manufacturers (FABRISAN-GISA agreement), and the other with the fitters' associations (GISA fitters' associations agreement), which had been dealt with in separate proceedings, were cancelled without the Commission being obliged to intervene by adopting a decision. The first agreement covered the establishment by the wholesalers' association and the manufacturers' association of agreed prices and other terms of sale and the establishment of a system of accumulated rebate bases between the manufacturers. The second agreement had introduced reciprocal exclusive selling and purchase arrangements between the wholesalers and the fitters members of four associations.¹ Taken together, these agreements

¹ The agreement of the "Vereniging van Handelaren in Bouwmaterialen in Nederland (HIBIN)", which established exclusive reciprocal commercial relations with a number of manufacturers and importers of a construction material was also terminated after intervention by the Commission. See *EC Bulletin*, 5-1972, Part Two, sec. 8.

thus have the effect of consolidating market fragmentation by confirming the principle of national preference.

33. A Commission decision also terminated a private market arrangement in the *central heating industry* in Belgium, which organized exclusive business relations and a system of equipment approval. This was the agreement concluded by the association of Belgian heating equipment manufacturers (“Chambre Syndicale du Matériel de chauffage central et des industries connexes (section chaudières et radiateurs)”) and the association of heating installation engineers “Union Belge des installateurs en chauffage central, ventilation et tuyauteries”.¹ The agreement created an exclusive collective purchasing arrangement for some 600 installation engineers members of the Union and a number of non-member engineers, thus controlling about 70% of the distribution and installation of heating units and radiators on the Belgian market, for the manufacturers participating in the agreement. These manufacturers were virtually all the Belgian manufacturers who are members of the Chambre syndicale and the other manufacturers whose equipment has been recognized, by a Committee composed of representatives of the signatories of the agreement, as complying with the technical standards issued by the Belgian Standardization Institute. On their side, the manufacturers had to comply, under the agreement, with an obligation to sell the approved equipment only to the installation engineers, so that certain classes of purchasers—Belgian building contractors and wholesale dealers—were barred from direct delivery.

The exclusive purchasing right for a very large proportion of purchasers restricted to the manufacturers participating in the agreement, and the obstacles created by the members of the agreements to the participation of manufacturers from other Member States maintained fragmentation of the Belgian market by causing artificial curtailment of trade from other Common Market countries.² No advantage on the credit side was discernible in this private market organization, since the technical standards to which the Approval Committee referred for acceptance purposes were those established by the Belgian Standardization Institute, and the qualifications required for heating installation engineers participating in the agreement were no different from those in the relevant Belgian legislation.

34. The decision adopted with regard to the *Interest Grouping of German ceramic tile manufacturers*³ gave the Commission an opportunity to state its position with regard to aggregated rebates. Under these rulings,⁴ the Com-

¹ Commission Decision of 20 October 1972, *OJ* No. L 264, 23 November 1972, p. 22.

² *First Report on Competition Policy*, sec. 20.

³ Commission Decision of 29 December 1970, *OJ* No. L 10, 13 January 1971, p. 15.

⁴ *First Report on Competition Policy*, sec. 24.

mission succeeded in achieving the termination of a cumulative system of rebates operated by Dutch manufacturers of liquorice.¹

In 1971, one of the German liquorice manufacturers had lodged a complaint against these manufacturers with the Commission, alleging infringement of Article 85. In his opinion, in view of the share of the market held by the members of the agreement, the collective rebate system they used was an obstacle to his sales in the Netherlands, since the Netherlands wholesale dealers and wholesale dealers' associations preferred to obtain their supplies solely from the members of the agreement, in order to be able to claim the higher rebates for which they thus qualified. After studying the particular market, the Commission concluded, confirming a previous ruling, that the cumulative rebate base system was incompatible with Article 85. The manufacturers involved then decided to discontinue any collective rebate system, without any decision being necessary to this effect.

2. Encouragement of permitted forms of cooperation

Specialization agreements

35. The adoption of a block exemption regulation for certain production specialization agreements in order to facilitate cooperation between small and medium-sized firms does not mean, in specific cases, that specialization between large firms may not also qualify for exemption. However, owing to the size of the undertakings concerned, such agreements continue to be subject to the individual exemption procedure and also perhaps to the imposition of appropriate charges and conditions under Regulation No. 17. For example, the Commission continued in 1972 its policy of promoting cooperation by authorizing several specialization agreements under Article 85(3) of the EEC Treaty and 65(2) of the ECSC Treaty.

36. In the first instance, the Commission endorsed under Article 85 a cooperation agreement concluded between the industrial vehicles builders *MAN* (Maschinenfabrik Augsburg-Nürnberg) and *SAVIEM* (Société anonyme de Véhicules industriels et d'Equipements mécaniques).²

The agreement provides that the parties will produce a joint range of industrial vehicles of 7.5 metric tons and over and that they will collaborate on research and development, manufacture, adjustment, assembly, distribution and after-sales service. Cooperation and development of these lorries—for

¹ *EC Bulletin*, 5-1972, Part 2, sec. 9.

² Commission Decision of 17 January 1972, *OJ* No. L 31, 4 February 1972, p. 29.

which SAVIEM will be leader for the medium range up to 12 metric tons total load and MAN for the heavy range from 12 metric tons upwards—are designed to allow of standardization of types of vehicles and to provide the basis for specialization in production. The aim of specialization is to enable large quantities to be produced on each production line; the scope for combination on the basis of an assembly unit system will be increased. Cross-supplies of assembly components from specialized workshops should enable each partner to assemble the entire range and to sell in his own country through the network already established. Normally, in countries other than Germany and France, SAVIEM will export vehicles in the medium range and MAN the heavy vehicles.

The agreement won approval in the first place because specialization helps to bring down unit costs. At the same time, it is reasonable to expect rationalization effects and advantages for the users, thanks to cooperation in development, assembling and distribution of the vehicles. The Commission also took the view that the restraints the partners have accepted in respect of the conclusion of agreements with third parties on purchasing, delivery and cooperation, are essential since their purpose is to strengthen the bonds between the two partners, while the risks inherent in specialization may be offset to some extent by the exclusive selling rights of each partner on his domestic market. Lastly, the Commission felt that the MAN-SAVIEM agreement provided no opportunity for elimination of competition within the Common Market for a substantial share of the equipment concerned, since competing producers and groups of producers, some of them accounting for large shares of the market, will still be operating.

Certain stipulations were attached to the decision ensuring the continuous provision of information on the competitive situation in the industrial vehicles industry and of information as to how the effects of rationalization are expressed in practical terms.

37. The Commission also granted exemption from the ban of Article 85 of the EEC Treaty to an agreement among five French producers of *fine paper*.¹

In the first instance, three of the firms, Papeteries Bolloré, the Société Job and the Société des anciens établissements Braunstein, had concluded an agreement for close cooperation in the production and marketing of fine papers, including cigarette papers and carbon paper. The cooperation arrangement was particularly strictly and rigidly controlled, with quotas and profit distribution through an equalization system, and a joint agency, the Private Fine Paper Office, coordinated commercial policies. Since it led to rigid reciprocal trading positions without providing sufficient incentives to specialization, the

¹ Commission Decision of 26 July 1972, *OJ* No. L 182, 10 August 1972, p. 24.

agreement had been found incompatible with Article 85 and the Commission had sent to those concerned a statement of the matters to which it had taken objection.

Consequently, the firms involved, which had been joined by the Papeteries Mauduit and the S.A. des Papiers Abadie, replaced the old agreement by a new one, containing none of the clauses criticized by the Commission. The new agreement is now concerned only with specialization and trading cooperation in the prospecting and the obtaining of orders in non-European countries. The Commission is of the opinion that these arrangements will help to encourage more efficient production in an industry which is worldfamed for cigarette paper and which exports more than 60% of its output of this kind of paper to non-Community countries located all over the world.

The Commission found that the firms involved had concentrated their efforts to achieve greater specialization on the establishment of much larger production units, enabling wider ranges to be manufactured and costs to be brought down, bringing benefit to the users through lower selling prices. It also took the view that, in contrast with many specialization agreements, this one included no other restraints than that related to the declared intention of those concerned to specialize, such as exclusive territorial arrangements, exclusive supply obligations or the commitment to forego developing new materials of kinds the manufacture of which is the preserve of one or rather of the other participants. In other words, the arrangements made do allow some degree of competition within the agreement. However, in view of the very important position of the agreement within parts of the Common Market for this type of paper, the Commission felt compelled to scrutinize carefully the agreement to ascertain whether specialization, as thus arranged, did not eliminate competition insofar as each member was now specializing in a part of the range of paper concerned. After detailed examination, it concluded that this was not the case, since the German and Italian cigarette paper industries are completely outside the agreement and can therefore compete freely with the members on their own ground, and since potential and actual competition from manufacturers in non-member countries, particularly American and Austrian manufacturers, is effective in the Common Market, freight costs being low.

A last, important, factor is that the member manufacturers are servicing very large purchasers, the French and Italian tobacco monopolies, and, in other countries, the cigarette manufacturers, who are few in number and some of whom belong to large international companies. Consequently, the existence of effective competition in this industry and the favourable impact of the agreement in respect of production and technical progress, from which the users will also draw benefit, enabled the Commission to take a favourable decision.

The Commission attached to its decision a number of stipulations, re-

quiring the firms involved to file, two years after the date of the decision, a report on the working of the specialization agreement and requiring them to notify without delay any acquisition of a holding or establishment of personal relations between the governing bodies of the firms involved and of any planned merger or takeover likely to take place between these firms or between one of them and an outside firm in the fine paper industry.

38. Under Article 65 of the ECSC Treaty, the Commission also authorized a specialization agreement concluded between the *Hoesch Werke Hohenlimburg-Schwerte AG* and the *Benteler Werke AG*, relating to the rolling of steel sheet semi-products.¹

One of the items manufactured by Benteler is steel tubes. The firm has a steel works but has no finishing facilities of its own. It has the steel sheet semi-finished products laminated by the Hoesch Werke.

The main part of the contract includes the following agreements:

- Hoesch undertakes to supply Benteler with input products up to an amount of 15 000 metric tons per month for hot-rolling, on a jobbing basis, at an attractive price, of slabs supplied by Benteler. Benteler will not bring into operation a hot-rolling facility of its own.
- By virtue of Hoesch's commitment, Benteler will cover all its hot-rolled sheet needs from Hoesch, and will make supplementary purchases from other firms only with Hoesch's authorization. Benteler will use the sheets supplied by Hoesch solely for its own processing.
- Hoesch undertakes to procure certain additional quantities of slabs produced by Benteler. Benteler will not supply other firms with slabs.

Although these agreements do restrain competition, the Commission nevertheless felt that without the reciprocal commitments the improvements could not be obtained to the desired degree, particularly in respect of continuous operation of the plants.

Its scrutiny also showed that there will be no impact on the tube market such as might infringe Article 85 of the EEC Treaty.

Other forms of cooperation between undertakings

39. Although it was mainly concerned with establishing the conditions under which firms may be exempted from the ban of Article 85(1) pursuant to Article 85(3) for specialization agreements, the Commission also continued its efforts to achieve legal clarification of the forms of cooperation between firms not caught by Article 85(1).

¹ Commission Decision of 9 November 1972, *OJ* No. L 283, 20 December 1972, p. 17.

For example, the Commission took a favourable decision with regard to a technical cooperation and joint sales promotion agreement for optical microscopes and their accessories concluded by the Wild Paris and Leitz-France companies.¹

The two companies are French subsidiaries marketing in France apparatus manufactured by the respective parent companies, the Swiss Wild Heerbrugg SA and the German Leitz GmbH. The two companies market all the types of microscope manufactured by their parent companies, but the agreement on marketing—including pre- and after sales service and advertizing—concerns, for each company, only those types which, because of their features and applications, cannot be replaced by the partner's microscopes: this is a situation deriving from the peculiar nature of the technical features and ways in which each type of microscope can be used, and derives from the differing results of research carried out in the Wild and Leitz parent companies' factories.

The Commission ascertained that the two companies concerned are not competing between themselves for the items covered by the agreement. They sell in France, without limitation of market outlets, all the equipment manufactured by the respective parent companies, and no other similar agreements are known involving in any way whatever the parent companies or their subsidiaries. The Commission therefore issued negative clearance for this agreement.

3. Application of Article 85 to distribution

Avoiding fragmentation of the national markets

40. Although the Commission's Decision of 23 September 1964 in the Grundig-Consten case and the Court of Justice's judgment of 13 July 1966² confirmed that contractual agreements forbidding exports are a serious infringement of Article 85, firms are still tempted to use this method of preventing trade in original products between Member States. The usual objective is to protect a high level of prices achieved in a Member State against the correcting effect of parallel imports.

Since no firm in the Community can now adduce ignorance of the rule of Community law forbidding contractual restraints on exports, the Commission has recently imposed a fine of 60 000 u.a. as penalty for such a case of restraint.³

¹ Commission Decision of 23 February 1972, OJ No. L 61, 13 March 1972, p. 27.

² *First Report on Competition Policy*, sec. 47.

³ Commission Decision of 22 December 1972, OJ No. L 303, 31 December 1972, p. 52.

The *WEA-Filipacchi Music S.A.* company in Paris had, in February 1972, forbidden its wholesale and retail customers to export light music records which it distributes in France; 18 resale agents had given their consent. This was a method of preventing exports of records sold in France to Germany, where they are distributed by the *WEA-GmbH* company in Hamburg, which belongs to the same group. The price differential between the two markets (the same records of the commonest class were distributed on the German market at a price 50% above that of the French market) had proved an incentive to French resale agents to export to Germany, and the *WEA-Filipacchi* company was anxious to prevent these exports so as to maintain the higher price level in Germany.

In order to restore the competitive effect which the French resale agents could exert by exporting the records to Germany, the Commission ordered the firms concerned to delete the export prohibition clauses and to disregard them in future. In imposing the fine, it bore in mind not only the seriousness and the obvious illegality of the infringement (this had been pointed out to *WEA-Filipacchi Music S.A.* by French resale agents) but also the fact that although the infringement did not last long, it had been discontinued not on the initiative of the firm itself but only through the intervention of the Commission.

This decision is significant in other ways. In the first place, it amplifies the Commission's Communication concerning minor agreements not caught by Article 85(1).¹ The argument adduced by the *WEA-Filipacchi* firm that it held only a small share of the overall record market in France is not pertinent to an assessment of the restraint in question (apart from the fact that the overall turnover of the group to which the firm belongs is well over the threshold of 15 million u.a.), and the Commission found that there is no single market for classical music, light music and "pop" music. In addition, it must be remembered that the records sold by this firm were interpretations by "hit" performers working solely for this firm; these performances are individual and can in no circumstances be regarded, because of their properties or their use, or their price, as similar, for the consumer, to the performance of other artists.

Another interesting aspect of the decision is that it makes it clear that a firm cannot use carefully worded clauses to avoid the ban on agreements contained in Article 85. In this particular case, the *WEA-Filipacchi* company had argued that its circular was only the expression of an opinion and that the consent given by the resale agents, which had signed it and stamped it with their house stamp, was no more than an acknowledgement of receipt. The decision restores these documents to their proper status as agreements between undertakings within the meaning of Article 85(1).

¹ Commission Communication of 27 May 1970, *OJ* No. C 64, 2 June 1970.

41. The Commission also made it clear that 10 years after the entry into force of the Community competition rules, certain undertakings or groups of undertakings constituting economic units cannot be allowed to maintain separate national markets by practices of a nature other than direct export bans but having an effect which is just as incompatible with the proper working of the Common Market. This is the point of the decision on the concerted practice constituted by discriminatory pricing according to country of destination within the Common Market, a practice pursued until recently between the *Pittsburgh Corning Europe S.A.* and the exclusive distributors of its products in Belgium and in the Netherlands, the purpose being to isolate completely the German market in favour of its subsidiary, the *Deutsche Pittsburgh Corning*.¹

Within the context of Article 85, there can be no objection in principle to producers pursuing independent specific supply policies for each EEC member country and adapting their pricing systems to the market and competitive conditions peculiar to each country. But they cannot be allowed to ensure for themselves, through direct or indirect curtailment of the intermediaries' operations, entailing market fragmentation, scope for pursuing sales and pricing policies differing appreciably according to the part of the market in which they are implemented.

The Commission intervened in this question following inquiries showing that the insulating material called cellular glass manufactured in Belgium by PCE and distributed in the Common Market countries through concessionaries had been sold for nearly two years in Germany at the German subsidiary of PCE at prices much higher—up to 40% higher—than in Belgium and in the Netherlands. It became apparent that PCE had endeavoured to control the final destination of the orders to prevent this wide price discrepancy at the same marketing stage from engendering parallel imports into the sales territory reserved for its subsidiary. Having failed to prevent such parallel imports, PCE, working with its Belgian and Netherlands concessionaries, organized and implemented a new sales tariff at much higher prices, but according substantial rebates to the concessionaries provided it was established that the merchandise was not to be exported. The tariff was calculated to make any parallel exports from Belgium and the Netherlands to Germany impossible, and was designed to enable PCE's German subsidiary, DPC, to go on charging high prices.

The Commission took the view that the arguments adduced to justify the protection of the German territory for the DPC subsidiary—including the need to provide German customers with expensive technical assistance—could not justify the granting of exemption from Article 85 for a concerted practice conflicting so strongly with Treaty objectives: the practice consisted in isolating

¹ Commission Decision of 23 November 1972, *OJ* No. L 272, 5 December 1972, p. 35.

a national market within the Common Market in order to exploit it more freely and thus in depriving users of the opportunity of obtaining supplies on better terms in other parts of the Common Market. Manifestly incompatible with Article 85 and having a very appreciable impact on the market, the concerted practice led to a fine of 100 000 u.a. only the PCE was fined, since this was the firm sponsoring the practice wholly in its own interest and that of its subsidiary, DPC.

Another interesting aspect of this decision is that it makes clear in a specific instance the scope of the Communication relating to agency contracts concluded with commercial representatives,¹ which had been relied upon to argue that Article 85 did not apply to the introduction by PCE and its Belgian distributor of the discriminatory price tariff. Now, as concerned relations between PCE and Formica Belgium, it is true that the status of representative was provisionally assigned to this distributor for tax reasons. But in assessing the situation from the angle of Community competition law, the Commission could not simply accept such reported status; it was its duty to go beyond the formal situation and consider the actual relations between PCE and Formica; in this connection, it took the view that the circumstances under which, in accordance with the Communication, Article 85(1) would not be applied, were not the circumstances of the present case.

Adaptation of distribution systems

42. The Commission's consistent practice and the Court's rulings have made clear to what extent an exclusive sales concession can be used within the Common Market. Regulation No. 67/67 has fulfilled its objective to a large extent, which was to provide an incentive to firms to conclude exclusive dealing agreements fulfilling the conditions set out in this Regulation.² Nevertheless, the tendency to keep the national markets separated is still apparent in certain sectors.

For that reason the Commission is pursuing its efforts to ensure that Article 85 is complied with by the elimination of export bans and restrictive practices of equivalent effect still imposed by certain firms when distributing their products in the Common Market.³

The objective is that, in all areas of economic life, dealers or users of any member country should not be prevented from acquiring products elsewhere in the Common Market, if the supply conditions are more favourable there.

¹ Commission Communication of 24 December 1962, *OJ* No. 139, 24 December 1962, p. 2921. See also the decision in the sugar case. Sec. 28.

² *First Report on Competition Policy*, sec. 47.

³ See Commission's reply to written questions No. 378/72, *OJ* No. C 138, 31 December 1972, p. 68.

A large number of procedures are under way in various sectors or industries and the Commission has succeeded in inducing a number of firms to discontinue the restraints of competition.

43. In two cases, it has already stated that it is contemplating favourable decisions. The first case is in the photographic material and products industry, where the ADOX firm has deleted, in standard sales contracts for its products on the German domestic market, the export ban imposed on its customers and the rule forbidding dealers to resell to customers other than consumers.¹ The second case is in the radio and television receivers' industry, in which the SABA firm has adapted its marketing arrangements within the Common Market so that its exclusive concessionaries, both wholesalers and distributors, are authorized to distribute in other EEC countries not only to final consumers but also to SABA resale dealers.²

The Commission has adopted measures the first objective of which is to induce motor vehicle builders to delete export bans expressly written into exclusive dealing agreements applicable in the Common Market. It has notified the "matters to which (it) has taken objection" in the main test cases chosen; one manufacturer has deleted the export bans following the Commission's intervention, without it being necessary to notify the objections. The Commission is now examining the effects of exclusive dealing agreements containing no formal export ban but including clauses (such as those relating to the payment of allowances, to the standard pricing of after-sales services, or to the obligation to notify the producer of all outside-area sales) which may prevent or may hamper purchases by users or resale agents abroad.³

In the tyre industry, most of the manufacturers have also deleted export bans, following intervention by the Commission, without communication of the "objections".

44. In the course of its current investigation of exclusive dealing agreements, the Commission adopted under Article 11(5) of Regulation No. 17 a total of 62 decisions requiring the same number of firms (in a wide range of industries, including foodstuffs, aircraft construction, film equipment, electric equipment, optical equipment, watches and clocks, industrial vehicles) in six Member States to reply to requests for information, failing which fines or periodic penalty payments would be incurred.⁴

¹ Communication made in accordance with Article 19(3), Regulation No. 17 concerning a notification (Adox-Du Pont de Nemours (Deutschland) GmbH), *OJ* No. C 122, 24 November 1972, p. 30.

² *OJ* No. C 116, 7 November 1972, p. 4 (SABA).

³ See Commission's reply to written question No. 557/71, *OJ* No. C 37, 13 April 1972, p. 9.

⁴ Commission Decision of 28 September 1972, *OJ* No. L 267, 28 November 1972, pp. 17 and 20.

The firms concerned had notified the Commission of one or more exclusive dealing agreements, and the Commission, in order to be able to assess the effects of each of these agreements from the angle of the competition rules, had submitted requests for information. Despite reminders, no replies had been received. In the circumstances, the Commission has used its power of compulsory decision, thus emphasizing its intention to use all the instruments available to it, including fines and periodic penalty payments, to prevent firms postponing unduly the submission of the information which the Commission must have if it is to conduct the investigation properly.

4. Application of Article 85 to licensing agreements

45. The first decision in this field concerns a patent knowhow and utility models licence granted by the German subsidiary of the French Raymond firm, the biggest firm in its industry in the Common Market, to the Japanese Nagoya Rubber Co., the biggest sub-contractor in the Japanese motor industry, controlled by the Toyota motor company.¹ The licensee obtains the right to manufacture in Japan and to sell in the Far East, applying the grantor's technique, plastic fixing components used in motor construction; the grantor had undertaken to license no other firms in any part of the territory covered by the agreement.

Granting negative clearance, the Commission accepted the argument that the exclusive nature of the licence and the export ban (under which the licensee may sell only in his own territory) do not affect the competitive situation within the Common Market, given the special features of the particular case: the exclusive dealing arrangement has solely for effect to eliminate potential competitors on the Far East market, and, because of the nature of the items concerned, their export from Japan to the Common Market is virtually ruled out (they are manufactured only to special order in close and constant association with the firm giving the order; if the items covered by the contract are incorporated into the spare parts or the coachwork of Japanese motor vehicles, they can be exported in this state to any country in the world).

An earlier version of the licensing contract provided that any improvements made by Nagoya to the Raymond technique would become the property of Raymond and that Nagoya was required to grant only to Raymond a licence on the ownership rights covering parallel inventions. However, following the Commission's intervention, the parties adjusted these commitments so that Nagoya is now only required to grant to Raymond a non-exclusive licence on

¹ Commission Decision of 9 June 1972, *OJ* No. L 143, 23 June 1972, p. 31.

the patents which it would obtain if improvements or changes were to be made to the Raymond technique.

Nagoya's undertaking not to challenge the validity of Raymond's contractual industrial property rights during the lifetime of the agreement was not found incompatible with Article 85(1), since it seems unlikely that the Japanese licensee would challenge the industrial property rights held by his co-contractor in Europe, since there was little or no possibility of such action succeeding. But, in principle, a non-objection clause of this kind involves a restraint of the freedom of action of the licensee which is not covered by the essential substance of the industrial property right: it prevents him from challenging the validity of the contract in order to reduce the royalties and have certain restrictions discontinued, an action which could strengthen his competitive position while improving that of outside undertakings interested in the manufacture of products under licence, and also improve the position of the users.

On the other hand, it must be possible to include quality control and information exchange within the contractual exploitation of the invention and of the knowhow. Consequently, they do not constitute a restraint of competition covered by Article 85(1).

46. In the other decision adopted in this field, the Commission exempted under Article 85(3) exclusive patent licensing and knowhow concession contracts relating to a process for the manufacture of cushions and arm-rests for motor cars concluded by the American *Davidson Rubber Company* with its licensees in Germany, France and Italy.¹

In this case, the Commission took the view that the exclusive manufacturing and sales rights conferred by Davidson on its licensees, although tempered by a clause under which the items covered by the contract can be sold freely as between EEC Member States, was caught by the ban of Article 85(1), since curtailing the number of suppliers produced a perceptible effect on the play of competition and the development of trade between the Member States: the process concerned may be considered as the most important process for manufacturing arm-rests for motor cars, and Davidson's licensees account for about a third of the market in these items within the EEC.

However, the Commission recognized that the restraint of competition which derives from the Davidson's policy of exploiting its inventions by using exclusive licensees in the countries having large motor industries was a restriction without which the favourable objectives of the patent licences and knowhow concessions could not possibly be achieved: it would not be reasonable to expect the licensees to agree to develop a new process and adapt it to the

¹ Commission Decision of 9 June 1972, OJ No. L 143, 23 June 1972, p. 31.

European market, setting up production facilities and hiring skilled staffs, if they could not be sure that, within the conceded territories, Davidson would not license competitors.

Although the position held by the licensees within the EEC was an important one, the Commission found that the agreements did not enable them to eliminate competition to a substantial extent, not only because there are other arm-rest and cushion manufacturers in the Common Market also accounting (together) for a third of the total production of these items, but also because the motor manufacturers, who themselves use various arm-rest shaping processes, account for about a third of their needs from their own resources and have a bargaining position in relation with their suppliers strong enough to avoid any one-sided imposition of terms.

Another important factor in the Commission's assessment was that, even if each licensee normally supplies the firms having their principal places of business in the territory assigned to him, competition between the licensees is not eliminated, since they are not prevented from selling, and since they do in fact make sales of these items outside the territories for which they are more especially responsible.

In the same context, the decision points out that the clause, deleted during the investigation but contained in the original version of the knowhow concession contract which one of the licensees had been instructed to conclude with the others, forbidding each party to export the items concerned to the territories of the other, would have stood in the way of exemption under Article 85(3).

Before exempting the agreements, the Commission had also required the deletion of the non-objection clause, which prevented the licensees from availing themselves of the opportunities provided to them by their national laws for escaping, through proceedings for annulment, from commitments to which they were held by their contracts; there was no evidence that the favourable objectives of the contracts could not be achieved without this clause.

5. The abuse of dominant positions (Article 86)

47. In a further decision implementing Article 86 of the EEC Treaty, the Commission recorded its finding that a dominant position was being abused in that a firm holding a *de facto* monopoly for an intermediary product had discontinued supplying a firm acting on the market for a final product derived from the intermediary product. This action was liable to lead to the elimination of one of the few producers on the market in question and thus severely impair competitive conditions in the Common Market.

The decision was adopted against the United States Commercial Solvents Corporation (CSC) and its Italian subsidiary Istituto Chemioterapico Italiano (ICI)¹. The Commission adopted the decision after finding that CSC had a *de facto* world monopoly for the manufacture and sale of nitropropane and aminobutanol, chemical substances which are an essential raw material for a drug in ordinary use at the present time for treating tuberculosis and which, as such, is of great importance for public health and represents an important market in the EEC and non-member countries.

The Commission's investigations show that until 1970 CSC delivered this raw material to the Common Market through independent distributors or subsidiaries, chiefly through its Italian subsidiary, ICI. ICI sold the products to various manufacturers of the speciality, including one of the leading EEC firms in the field, ZOJA ("Laboratorio Chimico Farmaceutico Giorgio Zoja Spa"), which was supplied in large quantities for four years (1966-1970). Following the failure of a takeover of ZOJA through ICI, CSC instructed ICI to enter directly on the market for the drug and discontinued provision of intermediary products for sale, supplying it only with the quantities necessary for its own production. At the same time, CSC took measures, for the EEC markets and the markets of non-member countries, designed to prevent supplies becoming available for the manufacture of the drug, so that ZOJA was no longer able to obtain supplies either in the Common Market or from non-member countries. For ZOJA, which, in April 1971, had filed a complaint with the Commission, the situation could entail its early elimination from this market, and perhaps from all markets, since the bulk of its operations consists in the production of ethambutol.

The Commission ruled that, in these circumstances, the decision to discontinue supplies to ZOJA constituted abuse of a dominant position by CSC and ICI.

The importance of the decision resides first and foremost in that it establishes for the first time the principle that a *de facto* monopolist's decision to discontinue supplies, so as to eliminate competition, constitutes an abuse of a dominant position within the meaning of Article 86. In order to ensure the re-establishment and the maintenance of effective competitive conditions, the Commission ordered CSC and ICI to supply ZOJA immediately with enough of the raw material to satisfy its most urgent needs, and to submit to the Commission a plan for the provision of further supplies. The Commission also used, for the first time, its right to impose periodic penalty payments, so as to ensure that the obligations were met on schedule. It also decided, in view of the im-

¹ Commission Decision of 14 December 1972, OJ No. L 299, 31 December 1972, p. 51.

portance and the circumstances of the infringement established, to impose a fine of 200 000 u.a. jointly on CSC and ICI.

The decision also develops the Commission's rulings on the relationships between parent companies and subsidiaries.¹ The Commission ruled that the ownership of 51% of the corporate capital of ICI by CSC and the fact that five of the ten members of the ICI Board of Directors also had duties in CSC, that the Chairman of CSC was also Chairman of the ICI Board of Directors, and that of the six members of the ICI Board of Management, three were also servants of CSC, taken with other circumstances, showed that CSC had power of control over ICI and actually exercised such control, at least in respect of ICI's relations with ZOJA.

The two companies, in their relations with ZOJA and for the purposes of the implementation of Article 86, were therefore to be regarded as constituting only one economic undertaking.

48. The Commission also found that concerted practices between the main sugar producers and sellers on the European sugar market, intended to secure for them control of the marketing of this commodity on their respective national markets, had been underpinned by measures taken by the firms concerned vis-à-vis their national customers to prevent the latter from influencing the sales policy agreed by the parties to the practice.² It having been recognized that some of these firms held dominant positions on the markets involved, the Commission also applied Article 86, which was relevant since there was an abuse of a dominant position.

On the Belgo-Luxembourg market, the Raffinerie Tirlemontoise compelled exporting wholesalers, through contractual clauses and the exercise of business pressure, to resell the sugar delivered to them only for the purposes fixed by the refinery. This was also the case, on the Netherlands market, for the group formed by Suiker Unie and Centrale Suiker Maatschappij, which, in the 1969/70 season, had compelled the main Netherlands importers to comply with its main distribution policy, by threatening to eliminate them from the market by charging exceptionally low prices. On the South German market, the Südzucker Verkaufsgesellschaft compelled regional reselling agents to import sugar only on its approval and, by granting fidelity rebates, prevented the processing firms from obtaining supplies freely on external markets.

In this last respect, the Commission held that the granting of fidelity rebates entails an unjustified disadvantage for the purchasers, who, in addition to home produce, also purchase imports: the disadvantage suffered through the loss of

¹ Christiani & Nielsen and Kodak cases. See also *First Report on Competition Policy*, sec. 5.

² Sec. 28.

the fidelity rebate soon more than offsets any benefit obtained by purchasing sugar from "outsiders", even if the latter quote lower prices. This is typically the situation of a supplier dominating the market when the purchasers have no opportunity to use other suppliers—for example, because they are obliged to account for part of their requirements from neighbouring national refineries—and must therefore comply with his terms. The payment of a fidelity rebate by a firm enjoying a dominant position in order to curtail import opportunities even further and to strengthen and extend the dominant position constitutes objectively abuse of that dominant position within the meaning of Article 86.

49. Last year, the Commission had reported that it was examining, at the request of the *Gesellschaft für musikalische Aufführungs-und mechanische Vervielfältigungsrechte (GEMA)* how far freedom to split rights must be enlarged where the minimum period of membership is lengthened beyond one year.¹

In a new decision,² that of 2 June 1971 was supplemented so that GEMA can extend to three years the minimum membership period provided it also grants its members the right to dispose separately of the various forms of exercise of copyright which, from the economic point of view, can be split throughout the world.

In the Commission's view, any assessment of the length of a member's commitment and any fixing of a time-limit beyond which a further commitment would involve abuse, depend on the scope of the commitment. If the minimum membership period is raised to three years, balance between length in time and the scope of the commitment is maintained if greater freedom is allowed for the members in disposing of their copyright.

The Commission was therefore in a position to grant GEMA the opportunity it sought, for economic reasons, to provide a solution alternative to that foreseen in the first decision to the abusive practice consisting in GEMA imposing excessive obligations on its members.

¹ *First Report on Competition Policy*, sec. 83 and note 1.

² Commission Decision of 6 July 1972, *OJ* No. L 166 of 24 July 1972, p. 22.

CHAPTER III

IMPLEMENTATION OF THE COMPETITION RULES IN INDIVIDUAL SECTORS AND INDUSTRIES

50. In the resolution it adopted following the Commission's First Report on competition policy, the European Parliament invited the Commission to "include in future competition policy reports data relating to competition on the fuel and power market and in certain services industries".

The Commission welcomes this request, being well aware that application of the competition rules must take account of the peculiar characteristics of certain industries or must constitute one of the components of a common policy defined for a specific industry. However, except for agriculture and the road, rail and inland waterway transport sector, for which special regulations have been adopted, the Commission's basic principle is that the Treaty's rules of competition and the implementing regulations are of general application.

1. Banking

51. Starting from the principle that normally Article 85(1) must be applied, the Commission, both in consulting the Monetary Committee and in discussion with the Member States and the European Banking Federation, has endeavoured to determine whether, and if so to what extent, monetary policy requirements might necessitate use of Article 87(2) (c) to delimit, in the banking sector, the scope of Articles 85 and 86, where Article 85(3) or Article 90(2) are found to be inapplicable. The question as to whether, and if so how far, certain banking agreements should be treated as "monetary policy instruments" of the Member States arises in respect of agreements on interest rates, authorized or approved by the national monetary authorities, and also perhaps in respect of other banking agreements which could be considered as being an essential aspect of interest rate arrangements. The Commission has always argued that obligations arising under Regulation No. 17 remained valid unless and until special regulations were made on the basis of Article 87(2) (c). It has received some notifications from the banking sector.

52. The question does not arise for inter-bank agreements, whose relevance to monetary policy can be almost definitely ruled out. The Commission adopted this attitude with regard to the investigation of a case concerning the standard “*general terms*” recommended by a national banking association and applied by its members to their customers, whether nationals or foreigners: the “general terms” govern solely civil-law problems relating to the allocation of responsibility between the banks and their customers in connection with transactions carried out by the banks on the instructions of and on behalf of the customers. In this case, the association of banks concerned, though challenging the principle of the applicability of Article 85 to the banking sector, agreed to amend those clauses in the general terms which, in the original version, were unfavourable, in the Commission’s opinion, to the users. The procedure was therefore discontinued and no formal decision was necessary.¹

53. The recent trend towards the conclusion of *transnational cooperation agreements* between the large banks in the Community countries is also being examined by the Commission from the point of view of the competition rules.

So far, four cooperation groups of this kind have been established. Generally speaking, one or, at most, two banks from an EEC country are members of the groups. Banks which, though large, were until now only of national importance have decided to join one or other of the cooperation groups in order to be able to operate at international level. The European banks—in contrast with certain American banks—have not availed themselves of the opportunity of making their structures multinational by systematically extending their networks of subsidiaries outside their own countries, although a few establishments have been set up in neighbouring countries.

In the establishment of banking cooperation groups (the practice has recently become common), more is concerned than the simple continuation of cooperation arrangements already made in one form or another in the past between the large banks of the various countries for international business. For cooperation between banks chosen at international level had previously been pursued only with a view to the execution of specific business operations, such as the issue of international loans or financing through consortia, and for international trade.

When submitting the revised general conditions to their customers, the banks concerned stated, on the advice of their Association, that the “revision has been made after consultation of the Commission of the European Communities, in order to eliminate any doubt concerning any possible incompatibility of the current general conditions with the requirements of the EEC Treaty”.

In addition to the development of the Euro-dollar and Euro-currency markets, banking cooperation groups are being established mainly to meet the requirements of the large multinational industrial and commercial undertakings, which require a diversified range of services and credits from the banking system. Only by adapting to this trend can the banks expect to retain their status as acceptable partners for their customers. The cooperation arrangements constitute one of the ways of building up the financial and other services rendered by the banking system to the scale of the multinational units, since mergers are not yet possible and interlocking holdings between banks are subject to certain limitations. Another facility will be placed at the disposal of the banks through the coordination of the banking legislation of the Member States: now under study within the Commission, coordination will facilitate the direct access to other Community countries of each bank having its principal place of business in a Community country, for example through branches. It will provide the banks with new opportunities for operating throughout the Common Market.

The Commission is at present examining whether the establishment and the operation of banking cooperation groups are compatible with the provisions of Article 85.

2. Insurance

54. In insurance, certain problems derive from the establishment by the official control authorities of conditions governing the right to become a member of the profession and to operate, and of conditions governing policies. Obviously, in these circumstances, uniform conditions are not the result of any agreement, decision or concerted practice; the imposition of standard policy terms fixed officially is not a matter for Article 85(1) (subject to the applicability of Article 90(1)). But the approval or the authorization of policy terms by national control authorities is not to be treated as if it were the same as the fixing of terms by the same authorities: in the former case, the standardized terms are agreed by the insurance companies and are not a result of the intervention of the control authorities.

55. This was the Commission's attitude in connection with determining whether one result of the uniform tariff system in *motor insurance* followed in a Member State was not discrimination against imported cars as compared with home-produced cars, and therefore whether there was not a restraint of competition caught by Article 85: while in some respects the insurance companies involved could not change the general tariff level without authorization by the

authorities, they were free to determine the structure of the tariff,¹ and indeed, in another area, to fix both the structure and the level of their tariff, the authorities merely being informed. So that it could be argued that there was an agreement between insurance undertakings or, in any case, a concerted practice, restraining appreciably competition on the motor insurance market. However, in the case at issue, a substantial change in the tariffs applied occurred during the investigation and under pressure brought to bear by the Commission, so that there was no longer any case for taking the view that there was a discrimination against imported motor vehicles.

56. Subject to a solution of this question, the information at present available to the Commission is not such as to lead to the conclusion that Article 87(2) (c) should be relied upon in the insurance sector. Any agreements concluded between insuring, co-assuring or re-assuring companies are subject to the obligations deriving from Regulation No. 17 and their compatibility with Article 85 must be studied. For example, the Commission investigated an agreement concluded between their national associations by firms of four Member States operating in a specialized insurance branch: the insurance of the hulls of inland waterway vessels.² In its original version, the agreement included tariffs for supplementary premia which the insurer taking over a policy taken out previously in another country should apply to the premium charged by the preceding insurer; these tariffs had been discarded after the Commission's first intervention. The agreement still provided, however, for extensive exchanges of information where cover was transferred from one country to another. It included an obligation for the insurer approached to request, and for the previous insurer to provide, information which normally constitutes business secrets not exchanged between genuine competitors (rate of premium charged, actual premium received, financial background of contract to be taken over). Such provision of information being liable to curtail the scope for competitive action between insurers in this specialized branch and to jeopardize the freedom of intra-Community trade with regard to offers and supplies of insurance services, the Commission obtained complete revocation of the agreement, without needing to adopt a decision.

57. A special and new problem in the insurance sector is that of the "atomic pools". The Commission, having received a few notifications of this sector, has begun examining them. Assessment of the "atomic pools" means that the examination of the private agreements which govern them must be conducted in the light of the international treaties in this field: the Paris Convention

¹ If the measures had ranked as official, they would have constituted measures of effect equivalent to quantitative restrictions, covered by Articles 30 *et seq.*

² *EC Bulletin*, No. 5-1969, Chapter VI, sec. 5.

(29 July 1960) and the supplementary Brussels Convention (31 January 1963).¹ The organization of the pools includes exclusive responsibility of the grouping for the cover of atomic risks plus some degree of distribution of liability on a national geographic basis between the various groupings; it entails a form of co-insurance within the pools and between the pools and a “total” insurance excluding any possibility of re-insurance.²

Recent development in the work of the “atomic pools” has had the result that “limited” character risks (including isotopic risks) are excluded and that only nuclear risks which may have a “catastrophic” nature—in respect of which complex problems arise—are retained. Having due regard to these developments, the Commission will consider whether the existence and the working of these pools is compatible with Article 85.

3. Fuel and power

The principles set out in the “First guidelines for community energy policy”³ specified how far competition policy measures, consisting in the independent implementation of absolute rules, can and must contribute to the attainment of common energy policy objectives.

Gas

58. With regard to Netherlands natural gas, the Community’s main source of hydrocarbons, the Commission carried out a detailed study of the NAM-Export policy to check that none of the practices pursued were caught by Articles 85 or 86.

59. In respect of the determination of the frontier price, it became clear that the renewal of expiring contracts coming up for renegotiation on a three-year basis of prices and terms of sale had led to the application of new tariffs taking current conditions on the fuel and power market into account.

The Commission is monitoring the application of the new tariffs established for non-Netherlands purchasers.

The companies importing Netherlands gas have diversified the sources of supply and thus reduced their dependence on NAM-Export. In 1975, it is

¹ Under Article 98(1), of the Euratom Treaty “Member States shall take all measures necessary to facilitate the conclusion of insurance covering nuclear risks”.

² Only co-assurance and re-assurance contracts concluded to cover a specific risk and not including other commitments escape Article 85.

³ Commission Memorandum to the Council of 18 December 1968, Supplement to the *EC Bulletin* No. 12/1968.

expected that the share of Netherlands gas in consumption will be only 30% for the whole of the Community (47% for Germany, 36% for France, 17% for Italy). Alone among the Common Market importing countries, Belgium would still depend wholly on Netherlands gas for its supply.

The prices proposed by the other countries supplying gas to the Common Market importing companies are as high and in many cases higher than those charged by NAM-Exports.

60. Lastly, in comparing the selling prices to the consumer charged in the Community, the Commission has found that in each Member State, as in the Netherlands itself, the distributing or selling companies pursue, on the territories in which they operate, their own sales policies related to the particular circumstances in the country or the area. Price discrepancies have been brought to light for the same type of consumer in different parts of the Community, in a study carried out by the Statistical Office of the European Communities on the price of gas in the European Community countries from 1965 to 1970.

The discrepancies are a result of an arrangement tantamount to the actual territorial allocation of the markets among the distributing firms, which have differing supply arrangements and differing price structures.

Petroleum¹

61. On the basis of section 3, paragraph III "Competition rules" of the "First guidelines for the Community energy policy", the Commission's staff are endeavouring, with assistance volunteered by the companies, to establish information on the prices that have actually been charged for petroleum products and other energy sources.

The Commission gave careful attention to price trends when the threats to supply in the course of the second half of 1970 and the winter of 1971 engendered sharp increases in the prices of the main petroleum items, in particular domestic and heavy diesel fuels.

As the Commission is informed, the Tripoli and Teheran Agreements (early 1971) fixed the posted prices for unrefined petroleum which were used as the basis of calculation for the royalties paid to the producing states, but they establish no quota arrangements between the oil companies. It cannot therefore be inferred from these agreements alone that they restrain competition and affect trade between Member States.²

¹ For the application of Article 37 to the French petroleum system, see *First Report on Competition Policy*, sec. 198.

² See Commission's reply to written question No. 11/71, *OJ* No. C 64, 25 June 1971, p. 1.

For, through the play of competition, after supply conditions improved and the sea transport situation reverted to normal towards the end of 1971, diesel oil prices quickly fell back and thereafter continued to fall.¹

However, towards the end of 1972, prices began to rise again, and the Commission is once again watching carefully a very unstable situation.

62. With regard to competition in petroleum products in the Common Market, the Commission has contemplated applying Council Regulation No. 17, particularly Article 12, which provides for investigation by sector, and Articles 13 and 14, which allow investigations within undertakings or associations of undertakings.

Article 12 of Regulation No. 17 cannot be applied unless the trend of trade, price movements or inflexibility of prices suggest that competition is being restricted or distorted by practices conflicting with Articles 85 or 86 of the Treaty. So far, there has been no such presumption. Intra-Community trade considered as a whole has increased slightly more rapidly than the Communities gross domestic consumption, of which it represented 11.65% in 1970, compared with 10.80% in 1965. But the trade trend varies from one country to another within the Common Market, since it is influenced by certain national controls (for example, provision for consumption scheme governed by a law adopted in 1928 in France, control by the administration of refining and storing capacities in Italy).

The difference from country to country in the price trends is a result of the action taken by the central authorities themselves through national price and taxation controls.

For discrepancies between national tax and control arrangements relating to maximum prices can affect market price trends and levels. When the petroleum market situation is normal, competition leads to real market prices generally below the maximum prices fixed under the controls. When, on the other hand, the petroleum market is under strain, the prices charged come nearer the maximum prices and may even be aligned on them.

Consequently, the Commission has not so far begun investigations into the petroleum sector under Article 12 of Regulation No. 17. It remains vigilant and will check any circumstance suggesting that competition is being restricted or distorted in this industry.

63. The only individual cases submitted to the Commission concern a complaint in the liquid petroleum gas sector and a notification of the establishment of joint subsidiaries.

¹ See "*La conjoncture énergétique dans la Communauté, Situation 1971—Perspectives 1972*", p. 21 et seq.

With regard to bottled liquid petroleum gas, thorough verification suggests that there are no agreements or concerted practices in this sector; on the other hand, the general problem of permissible clauses in a series of exclusive dealing contracts with distributors in a single country has been raised. The Commission takes the view¹ that national exclusive dealing agreements are not generally liable to affect trade between Member States and consequently are not generally caught by Article 85(1). This consideration appears to apply in the present case.

64. From the angle of competition policy in the transport of hydrocarbons, the Commission takes the view that the proposed regulation laid before the Council concerning pipelines and gas lines crossing frontiers, particularly Article 2, is an application of the principles contained in the Treaty, particularly Articles 90 and 86.

The proposal is for a scheme requiring the concessionary of a frontier-crossing pipeline to charge non-discriminatory prices as between the pipeline or gas line users.

Electric power

65. Since electric power cannot be supplied without power lines, the undertakings operating the networks inevitably enjoy a position which can be described as dominant in the area covered by the network. Even in the countries where national legislation would allow it, competing networks would be prohibitively expensive, quite apart from the environment problems which an increase in the number of power lines would involve.

Insofar as trade between Member States is liable to be affected by it, Article 86 of the EEC Treaty prohibits the abuse, by one or more undertakings, of a dominant position on the Common Market or in a substantial part of that market. The Commission, which, incidentally, has received no complaint, has so far discovered no such cases of abuse in the electric power field.²

In cases lying outside the scope of Article 86, the problems deriving from the dominant positions of network operators are a matter for the competent authorities of each of the member countries.

66. The Commission gave special attention to the problems raised by the Italian arrangements concerning the private generation of electric power. Given the restrictive interpretation by the Ministry of Industry and by the ENEL of the Law of 6 December 1962 and the Decree of 18 March 1965, Italian industrialists are often refused authorization to avail themselves of rational and eco-

¹ *First Report on Competition Policy*, sec. 52.

² See Commission reply to written question No. 222/72, *OJ* No. C 124, 29 November 1972, p. 5.

nomie private generation potential, and this could well hamper the competitiveness of their products to an extent liable to involve an impact on trade between Member States.

The Commission would intervene under the Treaty competition rules if a specific case justified this. It has also taken the view that an effort should be made to eliminate any distortion of competition by harmonizing laws and regulations governing relations between those operating the networks and undertakings producing their own electric power in the various member countries.

67. Discrepancies have been noted in electricity prices in the various areas of the Common Market. Apparently they are solely due to the fact that although harmonization has been noted in certain areas, each power producer conducts within his territory an independent tariff policy and may even conclude "one-off" contracts for heavy industrial consumers. The Commission would intervene if such contracts were to distort competition between consumers.

68. Trade in electric power between the Community member countries is on only a small scale, but this has not led the Commission to assume that competition was being restricted or distorted within the Common Market. The electric power production and distribution undertakings are public utility service undertakings, and electric power production costs are tending to become uniform within the Common Market, partly because of the decline in the relative importance of hydraulic production, so that it is understandable that the internal needs of each Member State are covered only to a very small extent from power plants located in other member countries; however, as and when coordination at European level of the national development programmes in the electric power sector is achieved, this should lead to a gradual increase in the structural trade in electric power between the member countries.

Coal

Unlike the energy forms referred to above, which are covered by the EEC Treaty competition rules, coal comes under the ECSC Treaty both in respect of agreements and mergers (Article 65 and 66) and in respect of prices (Article 60).

69. The structural crisis on the coal market has led to fundamental changes in the structure of both coal production firms and marketing firms. Most of the old sales cartels of the production firms, once autonomous, have now disappeared, either through closures or by mergers of the remaining firms, so that they are now merely sales organizations of the latter. As part of this change,

the two last great Ruhr sales cartels disappeared when the mining companies, until then independent, contributed their mining assets to the Ruhrkohle AG.¹ These cases no longer involve any kind of restrictive agreement. The Union charbonnière sarro-lorraine and Cobechar are therefore the only firms that can be properly described as applying restrictive agreements.

Complying with the conditions contained in the decision authorizing Ruhrkohle, the latter filed a request for amendment of its commercial regulations, which was authorized by the Commission.

The sales rules include the following changes to the previous situation:

- the sale of a minimum quantity of 6 000 metric tons of Ruhr coal in the Common Market during the preceding coal year, the condition stipulated until then for a dealer to allow him to buy directly, is replaced by the letting of a two-year contract providing for a minimum purchase of 6 000 metric tons per year from Ruhrkohle in coals for domestic hearths and small industry in one of the eight defined sales regions. The right of direct purchase is at the same time valid for the provisioning of industrial consumers. Fuel is delivered by Ruhrkohle AG only to purchasers (resale agents and consumers) established in the sales region for which the dealer is approved.
- the dealer is authorized to supply industrial firms having an annual consumption exceeding 30 000 metric tons with Ruhr fuel only if he provides certain objectively defined services.

Other decisions under Articles 65 and 66 were adopted in 1972 for extending authorizations of the Union charbonnière sarro-lorraine² and of a joint processing organization (Oberrheinische Kohlunion),³ and for the authorization of a wholesale coal dealers' merger (Bayerischer Brennstoffhandel GmbH & Co KG).⁴

4. Transport

70. Because of the special aspects of transport and the fact that the definition of the competition rules applying in this area forms part of the common transport policy and of general economic policy, the Council had decided, under Regulation No. 141 of 26 November 1962,⁵ that Regulation No. 17 would not

¹ This contribution was the subject of authorization under Article 66, by a Commission decision of 27 November 1969. See *Third General Report*, sec. 38.

² *EC Bulletin* 5/1972, Part 2, sec. 12.

³ *EC Bulletin* 6/1972, Part 2, sec. 4.

⁴ *EC Bulletin* 7/1972, Part 2, sec. 2.

⁵ *OJ* No. 124, 28 November 1962, p. 2751.

be applicable in this industry. Council Regulation No. 1017/68,¹ the specific regulation for the application of the competition rules to "land" transport (rail, road and inland waterway), entered into force only on 1 July 1968.

The regulation introduces an exception to the principle of prior notification contained in Regulation No. 17. It lays down the rule that in the first instance the transport firms must assess for themselves what element is the most important in their agreements, the effects restraining competition or the effects of economic benefit, and assess for themselves, on their own responsibility, the legality of the agreement; thus it does not impose compulsory notification of agreements, though this means that agreements examined by the Commission (following a complaint or on the Commission's own initiative) are liable to be declared void with retroactive effect, but does not prevent their being retroactively declared lawful in the event of such subsequent examination.² The firms and association of firms can, however, apply to the Commission, if they wish to avail themselves under Article 12 of the provisions of Article 5 of the Regulation in favour of an agreement.

71. No such application has yet been sent to the Commission, although it has drawn the attention of those firms which have notified agreements under Regulation No. 17 to the existence of this possibility, for any action they might wish to take.

72. The Commission, has, of its own motion, made various requests for information under Article 19 of the regulation. The replies received have not so far led it to institute proceedings to bring about the termination of an infringement.

73. Also on the Commission's own initiative, its staff has examined, from the angle of the competition rules established by Regulation No. 1017/68, and on the basis of information provided only by the pools and conventions concerned, the working of five Rhine navigation pools and conventions: the Duisburg Freight Convention, the French Rhine Traffic Convention, the Kettwig Pool, the Rhine Container-Linie, and the Rhine Grain Shipping Convention.

Since these pools and conventions include restraints of competition covered by Article 2 of Regulation No. 1017/68, the prohibition as to principle can be declared inapplicable only if they meet the conditions for exemption set down in Article 5 of the same regulation.

In this regard, one of the questions arising is whether they help to promote on an inland waterway market subject to wide fluctuations in supply and

¹ OJ No. L 175, 23 July 1968, p. 1.

² See 14th and 15th points of the preamble of Council Regulation (EEC) No. 1017/68.

demand, improved continuity and stability in the satisfaction of transport requirements, having due regard, to a fair extent, to the interests of the users. All of them establish transport rates not subject to business fluctuations or to weather variation; moreover, in certain cases, they ensure the availability of hold space in line with users' needs.

Another condition is that the restrictions imposed on pool and convention members must in fact be indispensable for the attainment of the objectives described as favourable. In certain cases—the Kettwig Pool and the French Rhine Traffic Convention in respect of potash and sodium—quotas were fixed by shipping company concerned. This system is described, in respect of these conventions, as essential to their working, since the conventions assume responsibility for the proper implementation of contracts freely concluded by any of their members, whatever the tonnage involved, even if it exceeds the contractor's transport capacity.

The last question arising is whether the pools and conventions allow effective competition to continue on the transport markets concerned. The shipping companies and boatmen not signing the conventions and the other modes of transport—road and rail—still account—in respect of the products and routes covered by each of the pools and conventions—for a large share of the transport. Nonetheless, it is difficult to assess, on the basis of the information at present available to the Commission, what real degree of competition survives, according to product and route.

The vertical agreements binding certain conventions to certain shipping or forwarding agents were also examined: the Duisburg Freight Convention with the chemicals and iron and steel industries, the French Rhine Traffic Convention with French forwarding agents. Under these agreements, the shipping or forwarding agents make an undertaking to deal with all the merchandise covered by the agreement should it be transported by waterway.

The Commission has not so far decided to institute proceedings with a view to the termination of infringements arising from the Rhine pools and conventions.

5. Agriculture

74. The establishment of arrangements ensuring that competition is not distorted and the introduction of a common agricultural policy are two general Treaty objectives of equal status. However, in view of the particular importance which the Treaty attaches to the latter objective, the competition rules apply to agricultural produce only insofar as determined by the Council, having due regard to the objectives of Article 39. The Court of Justice has already stated

its position on the *relations between the common agricultural policy and the competition rules*. It has stated¹ that the implementation of safeguard measures in the form of a curb on imports from non-member countries may be necessary to forestall serious disturbances on the farm produce market liable to endanger the achievement of the objectives of Article 39: in these circumstances, explicit explanation of the reasons for such measures, in the light of Articles 85 and 86, is not indispensable. Moreover, as stressed in the same judgment, while it is true that a system of import certificates issued in relation to reference quantities may affect competition by leading to inflexibility in the pre-existing commercial relations with non-member countries, it is also true that determining, on the basis of objective criteria, quantities the import of which is authorized, serves to prevent discrimination against those who, because of formerly existing trade relations with non-member countries, qualify for import certificates. The Court concluded that this system is the one liable to distort competition least.

75. The Council regulation² implementing Article 42 of the EEC Treaty, established a general system of exemptions from Article 85(1) for agreements relating to agricultural products but forming an integral part of a national market organization or which are necessary for the attainment of the objectives set out in Article 39 of the Treaty. The Commission has sole power to determine which agreements fulfil these conditions. The first exception provided for in Article 2 of Regulation No. 26 is in line with Articles 40 to 46 of the Treaty, which provide for the replacement of the national organizations by a common organization of the agricultural markets and authorize the maintenance of these national organizations, if necessary through waivers to the principles of the Treaty, until such replacement has taken place; only agreements which are an integral part of a national market organization still existing in a field in which the common organization has not yet been established qualify for exemption. As to the second exception, the third recital of Regulation No. 26 shows that the intention of the Council was to bar application of Article 85(1) only in those cases where implementation of the Article would prevent the common agricultural policy from achieving its objectives.³

¹ Judgment of the Court of Justice of 13 May 1971 in joint Cases 41 to 44/70 (N.V. International Fruit Company v. Commission), *Recueil*, 1971, p. 411. Cf. *Fifth General Report*, sec. 611.

² Council Regulation No. 26 of 4 April 1962 applying certain rules of competition to production of and trade in agricultural products, amended by Council Regulation No. 49 of 29 June 1962. (*OJ* No. 30, 20 April 1962, p. 993 and *OJ* No. 53, 1 July 1962, p. 1571.)

³ As a special case in the general scheme provided for by Article 2(1), first sentence, of Regulation No. 26, the Council established, in the second sentence, an exception for certain agreements, decisions and practices of farmers (essentially cooperatives), provided they meet the *de facto* requirements set out in the Article, and provided that the Commission does not ascertain that the agreement, decision or concerted practice endangers attainment of the objectives of Article 39 or, precludes competition.

76. This last exception would apply, for example, in the case of the *groups of producers and of their unions* provided for in the proposed regulation laid before the Council by the Commission on 29 April 1970,¹ insofar as associations of producers are assigned a role in the common agricultural policy. The Commission stressed the importance it attaches to their value as an instrument in the promotion of joint adaptation, by the farmers, of their output to market requirements.

The third recital of the draft regulation on groupings and unions thereof states that the "grouping of farmers within organizations requiring their members to accept joint discipline *is necessary for the attainment of the objectives of Article 39 of the Treaty*; and these objectives can be pursued not only by the grouping of isolated farmers within producers' groupings, but also by the formation of unions of these groupings."

Consequently, if a grouping, or a union, in addition to contributing to the attainment of the objectives of Article 39, as provided for in Article 7 subparagraph (a) of the draft regulation, meets all the other conditions established by Article 7 and is thus recognized, it will comply with the wishes of the Council expressed by the regulation and will be considered as necessary to the attainment of the objectives of Article 39. As a result, any agreements, decisions and practices enabling it to be set up and operate will be exempted from Article 85(1) of the Treaty by virtue of Article 2(1) first sentence of Regulation No. 26. This will be the case, in particular, for common production and marketing rules applied by the grouping or the union, provided such rules comply with the criteria adopted pursuant to Article 7, subparagraph (b) of the draft. On the other hand, the Commission will have to assess the impact on competition of any agreements, decisions or practices other than those necessary to enable the grouping to be established and to operate, in particular, if this arises, in respect of supplementary common rules applied without complying with the above-mentioned criteria or in respect of agreements concluded with outside parties.

Neither the proposed regulation concerning groupings of producers and unions thereof, nor Regulation No. 26, provide for any exception as to the applicability of Article 86 on the abuse of dominant positions.

77. The Commission will also be required to consider, under proceedings initiated in accordance with Regulation No. 17, whether the agreements and practices forbidden by Article 85(1) of the Treaty may qualify for exemption under Article 2(1) first sentence, of Regulation No. 26. This has already happened in the European *sugar industry case*,² in which it was acknowledged that

¹ Amended proposal for an (EEC) Council Regulation concerning grouping of producers and unions thereof, *OJ* No. C 70, 12 June 1970, p. 31.

² Commission Decision of 2 January 1973, *OJ* No. 140, 26 May 1973, p. 17. See also sec. 28.

the first of these exceptions could not be invoked in respect of a Common Market organization replacing the national market organizations, and defined in Council Regulation No. 1009/67 of 18 December 1967.¹ Nor was the second of the exceptions applicable, since there was no evidence that prohibiting the agreements and practices would have jeopardized the attainment of the objectives of the common agricultural policy in the sugar sector.

Now, apart from the fact that the agreements and practices in question were established with aims completely alien to these objectives, they were also completely foreign to the context of the facilities provided, for this purpose, by Community arrangements; in some ways they actually conflicted with these arrangements and sharply curtailed the scope developed by the Community sugar market organization for free intra-Community trade.

¹ *OJ* No. 308, 18 December 1967, p. 1

Part two

Competition policy and government assistance to undertakings

CHAPTER I

STATE AIDS

SECTION 1

APPLICATION OF THE EEC TREATY

1. General

78. In its first report on competition policy,¹ the Commission explained its general interpretation of the Treaty rules on aids and its approach to their application. It showed that there were no inconsistencies between competition policy and the various structural policies—industrial, regional or social—since policy with regard to aids is designed just as much to ensure a more orderly structural development of the Community as to assure effective competition. This approach was unchanged in 1972.

The Commission also stressed in the first competition report the difficulties it had encountered or which still persisted. In this connection, progress made in the actual application of some general principles stated in previous years (with regard to regional aids, for example), and general policy positions adopted by the Commission in 1972 with regard to Government intervention still lying outside Community rules (concerning general aid schemes or temporary Government intervention with regard to the corporate capital of certain firms), will help to eliminate some remaining difficulties.

79. In view of the trend of the general economic situation in the Community, the Commission feels bound to emphasize this year that State aid policy can either help to control or help to aggravate the inflationary strains now besetting the European economy.

The policy will help to control inflation if the aids facilitate changes likely to resolve situations engendering strain by ensuring greater mobility or greater effectiveness of available factors of production and by eliminating outmoded structures in favour of more competitive structures; aids will then constitute an effective instrument for price stabilization.

¹ Secs. 132 to 139.

80. However, aids can feed inflation if they are merely transfers of financial facilities without real counterpart, even in the long term. This is the case with purely "conservational" aids (operating aids) designed to ensure the survival of industries or undertakings which cannot be expected to cope with national, Community and international competition or to play a constructive role in the growth of the Community economy. In these cases, the social problems or the problems connected with security of supplies which would arise if the aid was not provided are sometimes overestimated. Apart from the fact that such aids permanently immobilize factors of production in less productive, and therefore less remunerative employment than that to which those factors could be assigned, they also encourage inflation directly by burdening the budgets and indirectly by correspondingly saddling industries with extra costs in fiscal terms.

The same applies to State aids, the value and need for which have not been proved, in cases where the aim is to promote certain prestige operations whose industrial future is by no means assured.

Last but not least, certain forms of aid feed inflation by shielding firms from the impact of the price increases they must support in respect of the factors of production they use (guarantees to export prices); the result of this is that the firms are no longer encouraged to resist the pressures brought to bear upon them.

81. The Commission is therefore helping to control inflation by applying, in its supervision of aids granted by the Member States, principles which it has always followed and which entail its disapproval of aids which do not have as their basis and objective the structural adaptation which is genuinely necessary. The same applies in respect of its efforts to harmonize and control national aids with the object of reducing them to the level justified by the seriousness of the problems to be solved. In this way it prevents budgetary costs from rising as a result of senseless bids and counter-bids. Under the present circumstances this work must be pressed forward vigorously, and the Commission gave it full attention in 1972 as in the past.

2. Aid schemes for regional purposes

82. The first report on competition policy described the coordination principles¹ applying, from 1 January 1972 onwards, to regional aid granted by the Member States in the central regions of the Community. The principles stated,

¹ Secs. 143 to 153.

however, that implementation would be gradual. For this purposes, 1972 was, as intended, a transitional year used to carry out the technical work needed for the full implementation of the principles. In addition, the Commission expressed its views in a number of specific cases in respect of regional aids established in Germany, Belgium and Italy.

TECHNICAL WORK RELATING TO THE COORDINATION PRINCIPLES

83. The time available to the Member States and the Commission to prepare for the full implementation of the coordination principles was used for the following purposes:

- (i) Internal administrative measures adopted by the Member States;
- (ii) Establishment of a method of supervising the application of the coordination principles;
- (iii) Technical work designed to make certain types of aid easier to investigate;
- (iv) Technical work concerning the establishment of information on the impact on individual industries of regional aids.

The results obtained in the various fields, will, as planned, be discussed in a Commission report to the Council and the other Community institutions on the implementation of the coordination principles. The following summary information can already be given:

Administrative measures adopted by the Member States

84. At national level, instructions have been given to all the authorities involved in the granting of regional aids to ensure compliance with the coordination principles, and information work has been undertaken to familiarize the decentralized authorities and administrations, as far as this proves necessary, with certain technical aspects of the principles (common method of assessing aids).

Such in depth information work must inevitably take time to bear fruit; it is essential if the method of supervising the implementation of the coordination principles is to be properly established.

Supervision method

85. The coordination principles provide that the supervision of their implementation shall be carried out by the Commission by means of the *a posteriori*

communication to it of significant cases applying. It will be a supervision limited to the most important cases and not general oversight. Work has had to be carried out with the experts of the Member States to establish, in relation with the size of investments, the thresholds above which it will be generally accepted that cases are significant. These thresholds must be low enough to ensure the effectiveness of the supervision but high enough to keep the number of cases within reasonable limits.

The following thresholds are the ones eventually chosen:

- 4 000 000
u.a. for setting up and extension investments for establishments entailing the creation of new jobs in the regions concerned;
- 3 000 000
u.a. for other types of investment assisted.

Of course these thresholds cannot be fixed for all time. They will have to be reviewed in the light of experience.

The work also established the details of the communication of these cases, their frequency and the contents of the information to be supplied.

In order to facilitate the collection of information essential to the functioning of the supervision system in certain Member States with more decentralized structures, the Commission proposed that the Council adopt, on the basis of Article 94 of the EEC Treaty, a regulation making the procedure compulsory in all its parts throughout the Community in respect of central regions. At the level of individual cases the Commission's supervision will therefore become effective only from 1973 onwards.

Making certain types of aid easier to investigate

86. Progress has been made in this field, although it proved impossible to complete the work. For certain types of non-transparent aid (for example, fiscal aid), it was agreed that the means of making them measurable would consist in fixing for each aid instrument of this type a standard ceiling in subsidy equivalents which could not be exceeded.

In practice, this method raises three types of problem:

- (i) If the maximum ceiling is chosen in advance, the aid schemes being modified along these lines, an element of rigidity is introduced which may hamper the combined or cumulative application of several types of aid;
- (ii) If, on the other hand, the maximum aid is fixed only for each case applied the aid scheme must be modified to allow of the modulation, it being established that this would be carried out in such a way as to comply with the 20% ceiling in net subsidy equivalent;

- (iii) Whatever the arrangement chosen, an administrative problem arises for the Member States in the verification in practice that the ceiling is not exceeded, even if the granting of the fiscal aid extends over several financial years.

The Member States whose regional aid schemes include such fiscal aids undertook the studies needed to enable the measures required to be taken so as to make the aids more "transparent".

Progress was also made in respect of other types of opaque aids (including aids to building sites and aids to building), but the implementation of the solutions envisaged can only be implemented experimentally in connection with the application of the supervision method described above. Lastly, in respect of other non-transparent aids (for example guarantees), work is still needed.

Impact on individual industries of general regional aids

87. As explained in the first competition policy report, regional aid schemes are generally not concerned with specific industries, i.e., they can be applied without distinction, to all industries. It is therefore impossible to assess their impact on any one industry. This is why the establishment of a procedure enabling effects on given industries to be understood and assessed has been included among the coordination principles of the general regional aid schemes.¹

Working in close association with the Government experts, the Commission has therefore endeavoured to work out a method of analysis by which to grasp, on the basis of statistical data broken down by industry, the significant problems of competition, arising at industry or branch of industry level as a result of the application of the general regional aid schemes. Agreement was finally reached on the principles of a method which will become operational in 1973 and which will use the statistics concerning the application of regional aids during the years 1969-71.

The method is devised so as to show in succession:

- (i) The industries or branches of industry in which, at EEC level, the use of regional aid schemes is proving the most extensive.
- (ii) Among these, the industries or branches of industry in which application of aids entails the greatest hazards from the point of view of Community trade and competition.
- (iii) The Member State or States in which the use of regional aid could engender problems in these industries or branches of industry.

¹ *First Report on Competition Policy*, sec. 152.

(iv) The possible causes of the situations thus diagnosed.

The method of analysis is based on two complementary measures:

The first of these is a *quantitative* measure based on a statistical exercise.

The second is *qualitative* and based on a set of criteria which at present are not quantifiable or are purely quantitative, intended to weight and interpret the statistics.

This instrument of analysis, which will be developed as time goes on, will lead, if appropriate, to intervention by the Community to correct any distorting incidence on various industries caused by regional aid. The framework and nature of such intervention have not yet been finalized.

88. Lastly, it was during this transitional year for the application of the coordination principles that the Accession Treaty was signed with Denmark, Ireland and the United Kingdom.

At Article 154, the Treaty confirms that the principles, as "acquis communautaire", will apply to the new Member States, at the latest from 1 July 1973 onwards. The six months' period of grace was established to enable the Commission's memorandum to the Council and the first resolution of the Member States' meeting within the Council on regional aids to be adjusted in so far as the enlargement requires this.

Preparatory work was therefore begun at administrative level on a bilateral basis with each of the acceding States, the first phase being devoted to obtaining fuller information on regional aid schemes in the relevant countries.

This preliminary work was made more difficult than expected by the fact that in two States, Denmark and the United Kingdom, new aid schemes were brought in during the period.

SPECIFIC STATEMENTS OF VIEW

Pursuant to Articles 92 *et seq.* of the EEC Treaty and the abovementioned coordination principles, the Commission expressed its views on aid schemes instituted in the Federal Republic of Germany, Belgium, France and Italy.

Investment bonuses in the German coal areas

89. Further to the Commission's decision of 17 February 1971,¹ the Federal Republic of Germany was required to terminate without delay, in the mining

¹ OJ No L 57, 10 March 1971, p. 19.

regions of Land North Rhine/Westphalia, the award of investment bonuses granted because of the extension beyond 31 December 1969 of Article 32 of the law on the adaptation and reorganization of the coal mines and the German mining areas (Kohlegesetz), unless the aids were limited selectively to those areas only in which they were justified, the areas to be determined on the basis of objective criteria to be agreed with the Commission. An agreement¹ was reached on area demarcation, but differences of view emerged between the Commission and the German Government on the problem of outstanding aid applications ("Altanträge") submitted under the extended aid scheme.

The German authorities argue that the outstanding applications are not affected by the Commission's decision, no matter where the investments are located. The Commission argues that the ban contained in its decision of 17 February 1971 does not apply to those outstanding applications where the investments involved were begun before 20 August 1970 or where the application filed under Article 32 reached the granting authority before that date, for the proceedings provided for under Article 93(2) of the EEC Treaty were started in respect of the scheme challenged on 30 July 1970, and the notice published in the *Official Journal of the European Communities*—the purpose of which was to inform the parties concerned of the incompatibility of the aids and to elicit their comments—appeared in *OJ* No C 104/1 of 14 August 1970. By establishing the date as 20 August 1970, six days after publication of the notice, the Commission wished to consider the interests of investors, who, before such publication, could not know that the aids were liable to be found incompatible with the common market although, from the formal point of view, the decision of 17 February 1971 had terminated the granting of such aids from 24 February 1971 onwards.

The German authorities felt entitled to process all the outstanding applications (Altanträge) without distinction and, from 24 February 1971 onwards, they granted aids against applications filed after 20 August 1970 in areas in which, under the objective criteria agreed with the Commission, such aids were no longer justified. Accordingly, the Commission decided on 26 July 1972 to refer the matter directly to the Court of Justice, as provided for in Article 93(2) second subparagraph, asking the Court to declare an infringement, with a view to obtaining an annulment by the German Government of the aid grant decisions in the cases challenged.

Belgian economic growth law

90. Under the procedure provided for in Article 93(2) of the EEC Treaty which the Commission had opened in June 1970 in respect of the Belgian draft law on

¹ *First Report on Competition Policy*, sec. 157.

economic growth, the Belgian Government submitted to the Commission a draft amendment changing the criteria for demarcation of the regional aid grant areas, and a draft establishing new areas with the social and economic criteria and background arguments leading to this selection.¹

In a decision adopted on 26 April 1972,² the Commission decided that Belgium should, in the first place, limit the granting of the regional aids provided for in the economic growth law to those regions and areas designated provisionally for two years, and in the second place classify the development areas in two categories graduated according to the severity of the problems in the regions concerned. The maximum intensity of the aids should be varied according to category.

In adopting this decision, the Commission was applying the principle of regional specificity, under which aids should vary in intensity according to the nature, the gravity and the urgency of the regional development problems that the authorities are tackling. With this in mind, the Commission took account of all the social and economic criteria underlying the law of 30 December 1970 and treated with all appropriate care the data provided by the Belgian Government (current and foreseeable unemployment, the decline of certain activities, average incomes per inhabitant and the growth rate).

On the basis of these considerations, the Commission reached the conclusion that, in present circumstances, aids could be deemed compatible with the Common Market in a number of regions listed in its decision, it being understood that it will be for the Belgian Government to determine the location and size of the aid areas within these regions.

The Commission also decided that the granting of the aids for individual industries provided for by the law outside development areas must be made subject to certain conditions which will enable the Commission to state its views in advance on the cases of granting of such aids.³

In general, the Commission decision has had the effect of terminating the procedure which the Commission had opened under Article 93(2) of the EEC Treaty. It does not concern the problem raised by Article 36 of the economic growth law relating to the rule that foreign companies must advise the Belgian Government of any large holdings they may intend to acquire in companies located in Belgium: this problem is being dealt with under a special procedure started under Article 169 of the EEC Treaty for infringement of Article 67 of the Treaty, relating to the free movement of capital, and Article 221, which provides that Member States must grant the same treatment regarding financial

¹ *First Report on Competition Policy*, sec. 163.

² *OJ* No L 105, 4 May 1972 and No L 106, 5 May 1972.

³ Sec. 118.

participation by the nationals of other Member States in corporate capital as they grant to their own nationals.

In accordance with the decision of 25 April 1972, the Belgian Government submitted to the Commission three preliminary draft Royal Decrees implementing the law in question, and the Commission did not object to implementation of the decrees, subject to a number of amendments and adjustments.

New French regional bonus scheme

91. On 29 June 1972, the Commission initiated the procedure provided for in Article 93(2) of the EEC Treaty against a new regional aid scheme which was established in France before the Commission could make comments as provided for in Article 93(3) of the EEC Treaty. The scheme comprises a regional development bonus ("prime de développement régionale"—PDR), and a location bonus for certain services,¹ which take the place of the old industrial development and adaptation bonuses.

Although it appreciates the nature and dimensions of certain structural problems arising in a number of main French regions, the Commission initiated the procedure against the new rules because of the lack of economic and social evidence to justify the demarcation of the aid areas provided for and the lack of regional specificity in the scaling of the bonus rates. In addition, the new scheme provides for the granting of "pinpoint" aids outside the areas anywhere in France (except in the Paris and Lyons areas). Lastly, as regards the geographical scope of the location bonus for certain service activities, no reasons have been given as to why the areas concerned do not coincide with those qualifying for the regional development bonus.

Under the Treaty procedure, the French authorities have forwarded to the Commission supplementary information to justify the regional case for the bonus areas. The Commission is now studying this information.

In order to take account of the new bonus scheme, the French authorities have also sent the Commission a draft decree designed to adapt the scope of the tax abatements foreseen for regional development (total or partial exemption from business tax (patent), reduction of transfer duty, and exceptional depreciation rules) to the new bonus areas mentioned above: the scope of these tax abatements has always partly coincided with the areas in which regional aids are granted in the form of bonuses.

¹ Decree No 72-270, 11 April 1972, and Decree No 72-271, 11 April 1972, *Journal Officiel de la République française*, 12 April 1972.

*Italy: assistance to industrial undertakings in the autonomous region of
Friuli-Venezia Giulia*

92. The Commission has commented on two draft laws for the Friuli-Venezia Giulia autonomous region amending aid schemes previously established and increasing the funds originally appropriated for their implementation. The Commission had already endorsed the two laws. One provides for construction loan interest subsidies, and the extension and modernization of industrial establishments; the other provides for subsidies for the setting-up of new industrial establishments in hill and mountain areas. The new amendments do not alter the scope of the current aids.

However, one of the amendments specified that, in the granting of aids, preference would be given to undertakings with majority Italian ownership. This provision conflicted with the EEC Treaty right of establishment rule (Articles 52 to 58, which are, incidentally, an application of the general rule of Article 7 banning all discrimination based on nationality). The Commission ordered that the clause in question be deleted.

In addition, without altering its general endorsement of the two laws given the situation and problems of the region, the Commission reconsidered its position, on receiving the two drafts, in the light of the coordination principles for general regional aid schemes.

On the question of the standard ceiling for intensity of aids in the Community's "central regions", the Commission asked the Italian Government to ensure not only that the ceiling is in fact complied with by the Region, but also that it is not exceeded by the simultaneous application of aid schemes handled by the Region and regional aids granted under national statutes.

Lastly, since one of the regional laws has general scope because the aid measures it provides for can be applied anywhere in the Region, the Commission demanded that regional specificity be introduced into it.

3. Aid schemes for individual industries

93. The general policy lines described in the first report on competition policy¹ have been given practical expression in new developments whose effect will be to make Member States' industrial action more consistent overall and to lead gradually to real Community policies for a number of industries.

¹ Secs. 164 to 186.

Shipbuilding

94. Since the first report on competition policy,¹ two major agreements have been established which should appreciably alter the conditions of competition on the shipbuilding market: in the first place, a directive was adopted on 20 July 1972 by the Council of the European Communities concerning shipbuilding aids² and, secondly, a general arrangement was agreed by the OECD Council on 20 October 1972 with regard to the gradual elimination of obstacles to the achievement of normal conditions of competition with respect to shipbuilding.

The main innovation in the two agreements is that they will not only affect shipbuilding aids but will also forestall supply trends liable to jeopardize equilibrium with demand on the market. In other words, the aim is to strengthen measures whose purpose is to bring competition conditions back to normal by also tackling, directly, the problem of production capacity.

95. The second directive of the Council of the European Communities should be seen as a transitional measure, designed to coordinate provisionally—until 31 December 1978—shipbuilding aids, until such time as fresh Community measures can be prepared covering all the problems arising in this industry.

In the first place the directive cuts the Community ceiling for shipbuilding aids; it thus forms part of the general aid dismantlement movement recently confirmed by the general OECD arrangements mentioned above. The ceiling, which had been 10% under the first Community directive, was reduced for 1972 to 5% and for 1973 to 4% of the selling price of ships for all aids other than credit facilities to sales. But the facilities themselves must be granted within the restrictions imposed by the ship export credit arrangement deriving from the OECD Council resolution of 16 December 1970, under which credit may not be provided at a rate below 7.5%.

Secondly, the aim of the directive is to strengthen this aid harmonization within the Community by taking into account all support measures in the industry, whether direct or indirect or granted for specific purposes or pursuant to general aid schemes. However, only an agreement of principle was achieved in this connection, several types of aid having been provisionally excepted by the second directive. Nonetheless, it provides that the Council, on a proposal from the Commission, will take a decision before the end of 1973, on a new directive designed to coordinate all shipbuilding aids and subsidies. The necessary preparatory work has already begun, and national experts are providing assistance.

¹ Secs. 168 to 170.

² *OJ* No L 169, 27 July 1972, p. 30.

Finally, the directive of 20 July 1972 provides that the Commission should, without delay, and assisted by the Member States, study the various factors accounting for supply/demand disequilibria in the shipbuilding market, profiting *inter alia*, from studies carried out by other international organizations, i.e. the OECD. The Council will take decisions on relevant proposals, if possible at the same time as it adopts the new directive relating to shipbuilding aids and, in any case, at the latest by the end of 1973.

The recent developments in the shipbuilding aid problem should help towards the gradual establishment of a real Community policy for this industry.

96. Objectives similar to those in the Community directive have been written into the abovementioned OECD general arrangements, concluded on 20 October 1972. This was done at the insistence of the original and new Community Member States. The nine countries also insisted—through common declarations made at the time of the adoption of the arrangement by the OECD Council and in OECD Working Party No 6 (“shipbuilding”) at its Tokyo meeting on 7 November 1972—that the progress made in bringing conditions of competition back to normal should include arrangements ensuring some measure of equilibrium between demand and supply on the international ship market. At the Tokyo meeting, it was also agreed that the subgroup examining these arrangements will begin work as soon as possible, so as to submit findings within the next few months.

Of course, the Commission of the Member States will continue the studies on production capacity provided for by the directive of 20 July 1972, in close association with the OECD work, since at the present time the OECD is apparently the most appropriate forum within which to seek out a solution to the problem at world level.

Textiles

97. Aware of the structural difficulties which have prevailed for several years in the textile industry and the concomitant tendency for most of the Member States to provide assistance, the Commission took the initiative, on 20 July 1971, with a measure designed to provide “framework arrangements”¹ to coordinate national aids to the industry and, consequently, to prevent any escalation in this area. The “framework arrangements” specify the limits beyond which textile aids must not go and the conditions upon which they may be granted.

In order to ensure compliance with these guidelines, the Commission, helped by Government experts, made an inventory in 1972 of all the aids the textile industry may qualify for in the Member States, on whatever grounds,

¹ *First Report on Competition Policy*, secs. 171 and 172.

whether the aids are granted under aid schemes specifically available to the industry or schemes which may cover all industries within a specific region or more generally. The inventory brought to light the wide diversity of support measures that can be mobilized in favour of textiles and the difficulty of grasping and comparing the actual uses of these aids.

It was therefore agreed to introduce the following arrangements:

- (i) Any specific assistance for the textile industry (special terms or conditions of qualification, application under agreements between the textile processing industry and the central authority) included in aid schemes which are otherwise not specific to the industry (general aids, regional aids), will be submitted in advance to the Commission for Community examination from the point of view of the textile industry;
- (ii) A bilateral, or even multilateral, consultation procedure will be organized by the Commission to consider all properly motivated complaints received from the national Governments against cases of aids to textile firms liable to seriously affect trade and competition in the Community. In this connection, no distinction will be made between aids accorded under specifically textile schemes or aids under schemes of wider scope;
- (iii) The inventory of aids available to the textile industry will be brought up to date annually. A statistical return will be attached, showing, for each financial year, all the investments assisted and all the aids from which the investments have benefited, whatever the scheme under which the aids have been granted. As far as possible, the return will be broken down between the various branches of the industry.

In addition, the Commission has continued to implement the principles it had set out in the "framework arrangement", for textile aids. For example, it had commented on two Italian aid schemes.

98. In its decision of 27 May 1970¹ the Commission stated its views on certain aspects of the draft Italian law for the restructuring, reorganization and conversion of the textile industry, in respect of which it instituted proceedings, in 1969, under Article 93(2) of the EEC Treaty. The draft provided for various aids:

- (i) Credit facilities and tax abatements to assist the financing of restructuring, modernization and conversion operations for textile firms;
- (ii) Credit facilities for the establishment or the extension, in the same areas, of industrial activities in other industries;

¹ *First Report on Competition Policy*, sec. 173.

- (iii) Ten-year exemptions from all direct taxes on incomes deriving from investments made as part of these operations in the "textiles" areas.

This partial decision concerned the withdrawal of the operating aid constituted by the ten-year income tax exemption and the need, for the authorities, to take into account, not only from the national point of view but also from the Community point of view, excess capacity problems, when granting investment aids. The Italian Government has borne this decision in mind, in particular when it published this draft as Law No 1101, of 1 December 1971. However, this is a framework law, the criteria for which (notably the geographical criteria and those applying to specific industries) and the terms for implementation in successive stages according to procedures included in the law itself, are worked out by the Italian authorities. The Commission therefore adopted at the end of 1972 a new interim comment on the law and on some of the implementing texts, subject to further comments it may make. The substance of the latest comment is as follows:

(a) As regards investment aids, the problems raised by the demarcation of the beneficiary industries and branches of industry and areas and by any overlapping with aids provided for under other schemes, are well on the way to being solved. The Commission has noticed, in particular, the ban on any plurality of aids under the textile law and those provided for by other laws, stressing, however, that since the firms can choose between the two types of advantage, the use of other aid schemes for textile firms should also be subject to the general guidelines laid down for the application of the textile law.

It also reminded the Italian authorities that they must submit in advance to the economic planning committees (CIPE) arrangements for specific definition of criteria determining textile activity, operation schemes and the location of benefiting investment, and for sharing out available credits (Lit 200 000 million in subsidized credit) between conversion operations and restructuring operations. Only with this information to hand can the Commission reach a proper assessment of the impact on the textile industry.

The Commission also advised the Italian Government that it has no objection to make in respect of the eight textile areas defined by the interministerial decrees of 31 July and 21 August 1972; the strong predominance of textile activities and serious employment problems are the main economic features of these areas.

(b) During the Parliamentary procedure for the adoption of the law, a new aid rule for textile and garment firms was introduced without prior notification to the Commission, this being temporary fiscalization (for three years) and partial reduction in the rate (from 15 to 10%) of the social costs relating to family allowances. According to the Italian authorities, the measure would

reduce the costs borne by the firms concerned by nearly Lit 31 000 million, a figure which is about 0.8% of their turnover. It would therefore have an appreciable effect on intra-Community trade and competition, this being an industry in which competition is very keen and trade on a large scale. The Commission decided to persist in its efforts to have the measure deleted, since it was a purely operating aid barred by the Community framework arrangements from textile aids. Being granted automatically to firms, it was also not likely to provide an effective remedy to the structural difficulties besetting the industry.

99. A similar problem arose in connection with the Italian law designed to extend for a further year the abatement of social dues payable, for very small, small and medium-sized firms.¹ The abatement is a 5% reduction in the basis on which the unemployment insurance contribution is calculated, up to a limit not exceeding the pay of 300 workers. Although this is a measure designed to boost economic activity, its scope is wider for the textile industry, since the ordinary law rule that firms must not employ more than 500 persons to qualify is not applied to textile firms.

For the very reasons set out in the preceding section, the Commission, on 31 July 1972, opened the proceedings provided for in Article 93(2) of the EEC Treaty against this specific assistance to the textile industry. The Italian Government reacted on 9 August 1972 by referring the matter to the Council under the exceptional procedure provided for in Article 93(2), subparagraph 3, by virtue of which "on application by a Member State, the Council may, acting unanimously, decide that aid which that State is granting or intends to grant shall be considered to be compatible with the Common Market, in derogation of the provisions of Article 92". But the Council gave no ruling on the matter within the three-month period provided for in the Treaty, and the Commission is therefore continuing the procedure.

Aircraft production

100. As stated in the *First Report on Competition Policy*,² the Commission has before the Council a memorandum on the "industrial and technology policy measures to be adopted in the aircraft production industry". On this occasion, the Commission advised the Member States of the forms and methods it felt should be used in aids to this industry and to which it would give favourable consideration when, under the powers conferred upon it by Articles 92 and 93 of the Treaty, it is called upon to comment on aid schemes in force or planned

¹ Sec. 120.

² *First Report on Competition Policy*, secs. 176 to 178.

in the Member States. The Commission's aims here are to guide the Member States in planning their schemes and to provide itself with general guidelines for their case by case assessment.

The "framework arrangements" for the aids have been designed with proper regard to the very special features of the aeronautical industry and are therefore without prejudice to the Commission's views on aids to other industries.

The special features can be summarized as follows:

- (a) The modest position of the Community industry not only on the world market but also on the Community market, entailing "relative underdevelopment";
- (b) Importance of the industry for the economic development and general technical progress of the Community, one aspect being the likelihood of a very sharp increase in air transport;
- (c) Increased recourse to public support in all the manufacturing countries because of the scale of capital requirements, of the length of the production cycle and of the danger of failure;
- (d) Unsuitability of a single country, in terms of size, to provide facilities enabling manufacturers to reach a level of competitiveness matching technological, industrial and commercial requirements;
- (e) Distortions of competition besetting the Community industry in comparison with the manufacturers in certain non-member countries, who also serve large domestic markets which are dynamic, unified, and protected.

101. In view of this situation, the European industry, pending a reorganization operation necessarily involving cross-frontier mergers, have no choice but to cooperate if they wish to achieve a sufficient level of competitiveness. Cooperation will enable them to carry out more expensive and more hazardous schemes, to prepare more lasting regrouping operations, to raise the technological level of the various partners and to widen their market.

In most European manufacturing countries, the central authorities provide large-scale support, but in varying degrees and in ways that are not always the same, for the development and production of aeronautical equipment. Such diversity is in itself liable to affect competition and trade in this industry. Moreover, the maintenance of purely national aid schemes will contribute, unless they are properly coordinated in design and implementation, to the fragmentation of industrial structures and of the market in the Community, while discouraging firms from cooperation or hampering the execution of the programmes coming under cooperation. Though still indispensable, national aids are there-

fore likely to have distorting effects jeopardizing the positive results planned. The establishment of a harmonized framework under which such aids are granted could on the other hand enhance their effectiveness and encourage the development of cooperation.

The Commission's aim is to eliminate such disadvantages by defining which national aids the transnational civil aircraft production programmes executed in the Community should qualify for, i.e. the programmes executed by associated or multinational companies operating in two or more Member States and within which each of the cooperating parties assumes a share of the technical, industrial and commercial risks of the full project.

102. The Commission believes that aids should, first and foremost facilitate the implementation of such programmes and be mainly concentrated on research and development and investment.

R and D aids should consist in advance credits of up to the total amount of the R and D costs and be reimbursable from the yield on sales when the aircraft are marketed. R and D costs should be taken to include all expenditure—including expenditure on initial production pooling—occasioned by the implementation of the programmes up to flight worthiness certification (construction of prototypes and tests).

To facilitate for the aircraft constructors investment for production series, guarantees of the loans contracted by the firms to finance the relevant investment could be provided.

Within each cooperation programme, aids should be so devised that each cooperating party shares, in balanced conditions, by obtaining equivalent benefits from the public authorities of its country. The prospects of successful cooperation would thus be enhanced and competition problems would be solved at the same time.

In addition, in view of the way the aids are designed, the intervention of the authorities would be of a supplementary nature only, leaving maximum responsibility in the hands of the manufacturers. It should, moreover, be scaled down as Community manufacturers are gradually in a better position to cope with their competitors.

103. The Commission has further noted that serious financial problems also arise at the marketing stage, whether the problem is that of providing all potential customers with credit terms matching those offered by competitors in non-member countries or that of maintaining firm prices despite abnormal upward movements engendered by production cost increases or alterations in exchange rate.

There is no denying the fact that manufacturers in certain non-member countries receive direct aids, in the form of very favourable credit terms, for

their sales abroad, and can thus offer financing terms well below the lowest rates in the Community. At the same time, because of the suspension of the Common Customs Tariff duties, manufacturers established in the Community face the same conditions for sales in the Common Market as for those on external markets and have a less favourable position than that enjoyed by producers in certain non-member countries, although these enjoy a dominant position on their own domestic markets.

The attention of the Commission has also been drawn by European industry to difficulties encountered because of the disparities between, or the absence of, guarantees provided by the Member States against the dangers of abnormal upward movements in prime costs or against exchange risks. The difficulties are particularly troublesome in the aircraft production industry because the production cycle is so long, the markets are so big and manufacturers must propose firm sales prices five or six years in advance. They are also apparent in relations between firms cooperating on the same programme, since the relations between cooperating parties can be markedly disturbed by price exchange rate variations.

Accordingly, the Commission has taken the view that it should make an exception to the general principles precluding aids to production and export aids in intra-Community relations. On the basis of Article 92(3) (b) of the EEC Treaty, under which "aid to promote the execution of an important project of common European interest" can be considered compatible with the Common Market, it has therefore empowered the Member States to grant aid for the marketing of aircraft and aircraft parts within the Community, provided that:

- (a) Such aids apply to sales of civil aircraft manufactured under European transnational programmes;
- (b) Such aids constitute a joint and harmonized support provided by the Governments concerned to the programme;
- (c) Their purpose is to place Community manufacturers in a situation as favourable as that enjoyed by competitors in non-member countries;
- (d) The programmes concerned can be considered as important for the common interest from the angle of the development of the European aeronautical industry or of air transport in the Community.

These marketing aids may consist in assistance for the supplier or purchaser taking the form of:

- (i) long-term credit with or without interest rebates;
- (ii) insurance against the commercial risk;
- (iii) guarantees against exchange fluctuations or, where circumstances so require, guarantees against abnormal and unforeseeable upward costs movements during the period between the conclusion of the contract and the delivery of the aircraft.

It goes without saying, nonetheless, that the Commission will pronounce case by case under the procedures provided for this purpose by the Treaty on the compatibility of such aids with the Common Market.

Electronic data processing

104. This is an industry of great importance to the Community, because:

- (a) of the role it plays in industrial activity and of its rapid growth both of the hardware side and in respect of operations connected with the preparation of software and with leasing;
- (b) of its effects in boosting other industries, particularly electronics;
- (c) of the more and more common incorporation of numerically controlled tools in the engineering industry and of the construction of complete production command units using computers;
- (d) of the applied research such an industry induces;
- (e) of the fact that the development of the use of electronic data processing allows for better employment of the production factors, more efficient corporate management, rationalization of public services and the development of scientific research.

For all these reasons the Community industry must be able to compete on the world market.

105. However, European manufacturers attempting to find a place on this market, which is very much dominated by non-member country companies, are hampered not only by technological backwardness but also by the lack of funds. A hardware manufacturing firm providing a wide enough range of computers is profitable only beginning from a certain output figure. In the meanwhile, for a period which could well last for ten years, it must tie up the large amounts of capital which a continuous research and development effort, hardware production investment, the preparation of software libraries and the constitution of a range of computers for rental all require.

Consequently, the granting of State aids may be justified in this context and may help to solve the difficulties encountered by the firms concerned in their attempts to mobilize private capital. However, although it is true that national aids can provide proper support for the operations of Community firms, they must not help to maintain fragmentation of the structures of the European industry, since only grouping operations would enable it to solve the current problems. The Commission must therefore regret that the measures adopted by the countries are not fitted more carefully into a Community

framework which would enable the human, financial and scientific resources mobilized—which are necessarily limited—to be used more rationally and more effectively. It is aware of the need to develop a genuine Community approach to the problems of the industry and it is now working on such an approach.

106. In this context, the Commission has endorsed two national aid schemes in the electronic data processing industry.

In *France*, the Government signed a new agreement in 1971 with the Compagnie internationale pour l'informatique (CII), a private firm, which includes a number of assistance measures for the 1971-75 period. What the French Government is trying to do is to develop a production potential which is competitive at international level and is independent of the non-member countries' groups. This does not preclude closer relations with other European firms, and practical progress has recently been made along these lines. The assistance to the CII consists in:

- (a) the financing of survey contracts in an amount of FF 150 million per year of interest-free credit reimbursable only if the venture succeeds; part of these contracts will go to the CII's software divisions, the other French firms belonging to this branch of the industry qualifying for the loans reimbursable in case of success provided for by the French research and development aid scheme, which has more general scope;
- (b) Five-year credits from the economic and social development fund at low interest rates, to help the CII to finance its industrial immobilizations; the ceiling has been set at FF 40 million per year;
- (c) Preferential access to public contracts whenever CII equipment is competitive in technical and economic terms.

The Commission has called upon the French Government to discontinue this last practice, finding it incompatible with the principles of the Treaty relating to free movement of goods and services and to freedom of establishment.

In *Germany*, the second "Datenverarbeitungsprogramm" (2 DV Programme) will make DM 800 million available in credits over the same 1971-75 period, for assistance going well beyond industrial framework, since education and the use of computers in medicine and the public administrative services are also included.

The German Government's objectives are as follows:

- (a) Fuller and wider application of EDP in the economic and scientific field as an instrument for rationalization and improved productivity;
- (b) Mastery of one of the most significant key technologies;
- (c) Establishment of more balanced competitive conditions on a rapidly expanding EDP market which is dominated by firms from non-member

countries which have benefited at home from major development and procurement contracts let by the authorities.

The aids to the specifically industrial EDP sector will take the form of:

- (a) Subsidies to long-term research and development work up to 50% of cost;
- (b) Credits reimbursable in case of success for development work of more direct relevance to production and the market, such credits to cover up to 25 to 35% of costs;
- (c) Subsidies to the development of software, utilization ranging up to 40% of cost.

The aids will be granted on condition that the bulk of the production or research operations of the applicant firm is carried out in Germany, but this does not bar German subsidiaries of firms having their head offices in other Community Member States.

Films

107. The *First Report on Competition Policy*¹ outlined the problems in this industry and the action the Commission had taken with regard to aids with the twofold objective of eliminating certain distortions of competition and of conferring on the Community film industry structures enabling it to draw more benefit from the European scale of activity. These measures led to a closer alignment of Government intervention, in respect both of rates and methods, and some measure of entitlement to the benefit of the aids accorded by one Member State to the work being carried out in the other Member State.

In view of the progress already made and the prospects offered by the enlargement of the Community, the Community film industry should now aim:

- (a) at establishing firmer bases by stepping up financing resources for the production of feature films;
- (b) improving the profitability of its productions by extending their commercial distribution beyond the national frontiers throughout the whole Community.

As a contribution to the achievement of these two objectives, the Commission examined with the Member States, on the basis of the proposals it had already made with regard to blanket availability of all national aids to all Community productions, the possibility that open access should be granted for feature films:

¹ *First Report on Competition Policy*, secs. 174 and 175.

- (a) produced with the financial coparticipation of the producers of more than one Member State;
- (b) and which would be assured, within the framework of the distribution contracts, of marketing throughout the Common Market.

The producers would thus be encouraged to enlarge both their sources of finance and their market prospects.

Aid systems financed from quasi-fiscal charges

108. Implementing its general policy standpoint,¹ confirmed by the Court of Justice on 25 June 1970, that the financing of national aids by the Member States from the yield on quasi-fiscal charges levied not only on domestic items but also on those imported from other Member States is incompatible with the Common Market, the Commission has stated its views on several aid systems financed from such charges.

The Commission raised no objection to the implementation of some of these systems, since they are financed from charges from which items imported from other Member States are exempt, while the aids they provide for are likely to encourage the reorganization of the industries concerned. This was the case for certain French aids to the furnishing and footwear industry. The limited credits appropriated (10 million FF for four years and 5 million FF for three years respectively) will be provided by a charge levied only on domestic products. They will serve to finance the renovation of industrial structures and the promotion of sales and economic or social survey work.

In several other cases, however, the Commission challenged the compatibility of the aid systems, objecting in some cases solely to the financing method and in other cases to the financing method and other procedures.

109. In France "occupational technical centres" in certain industries such as clocks and watches and hides and leather help the firms in the industries, in the form of technical assistance, technical research and standardization. Some of the financial resources of these centres derive from the levying of a quasi-fiscal charge on sales in France of the products of these industries, whether they are manufactured in the country or imported from abroad.

While the assistance provided to the national industries by these occupational technical centres does not take the form of direct aids to firms, its objective and effect are nonetheless to improve competitive capacity by relieving

¹ *First Report on Competition Policy*, secs. 181 to 183.

the firms of certain tasks, including applied research, which they would normally have to assume and which they would not be in a position to carry out or which would represent appreciable costs. Consequently, this assistance constitutes State aids liable to affect trade and competition in the meaning of the EEC Treaty, and can be considered compatible with the Common Market only if the quasi-fiscal charges entailed are no longer levied on items imported from the other Member States.

The Commission has therefore made representations to the French Government, but the latter has argued in response that the work of the occupational centres could not be regarded as aids to French firms, since the results of the work carried out is accessible to all Community firms on a non-discriminatory basis.

The Commission felt, however, that it could not change its position. In the first place, firms from other Member States seldom have recourse to the French centres, since they already dispose, at national level, of similar agencies which they finance themselves. Secondly, the work of the French centres is normally concerned with areas related to the specific needs of French firms and therefore not necessarily corresponding to the needs of other Community firms. This means that the other Community firms, when paying the charge to which their products are subject when imported into France, are bearing a burden which does not have the same counterpart as it does for the French firms. The Commission therefore initiated the procedure of Article 93(2) in respect of the aid schemes constituted by these centres.

110. In Italy the Ente Nazionale per la Cellulosa e la Carta (ENCC), a semi-governmental agency, provides support to newspapers in the form of a bonus calculated from the quantities of paper they use to print daily papers and reviews in Italy; paper imported directly from abroad without going through the ENCC is, however, not counted for the calculation of the bonus.

The aim of this arrangement, which is part of an information policy, is to use the aids to facilitate the dissemination of the Italian press. The ENCC also grants aid for paper and forestry research and for reafforestation. All these aids are financed by the yield from two quasi-fiscal charges, one of which is levied on paper and cardboard and the other chemical pulp consumed in Italy, whether these products are produced there or imported.

The aids to the press are liable to affect intra-Community trade and competition, since they enable Italian firms to obtain supplies on favourable terms, while a major percentage of intra-Community trade in newspapers and periodicals is accounted for by Italian exports to France (50% in 1970) of newspapers and periodicals printed in Italy, often in French. The Commission took the view that aids to paper and forestry research and to reafforestation could have the same effect.

Accordingly, the Commission took the following position as part of the procedure it had opened against this aid scheme in accordance with Article 93(2) of the EEC Treaty:

In the first place, relying on the principles recalled above, it asked the Italian Government to provide that the quasi-fiscal charges used to finance ENCC aids should no longer be levied on paper, cardboard and paper pulp imported from the other Member States.

It also requested that paper imported directly from the other Member States by Italian newspaper firms, without going through the ENCC, should from now on be counted for the calculation of the bonuses to be paid to the press, the exclusion of this paper is not justified in relation with the objectives of this aid, which is to support the Italian press and to improve the flow of information in Italy. Indeed, it hampers achievement of this objective by curtailing competition between the suppliers of printing firms, while having a protective effect for Italian newsprint producers.

The Commission also took the view that the payment of the bonus for the printing in Italy of newspapers and periodicals in other Community languages was out of line with the objective of providing a better flow of information in Italy.

On the other hand, the Commission accepted that the reforestation aids are compatible with the Common Market, since the levying of a quasi-fiscal charge is not liable, in this instance, to increase the impact of the aids on competition and trade, since the link between the items taxed and the items assisted is very indirect.

III. In April 1968 the French Government notified the Commission of a new aid scheme for the paper pulp industry. This scheme was to supersede aid measures from which this industry had already benefited between 1960 and 1968, and which the Council of Ministers had declared compatible with the Common Market, on the basis of Article 93(2), third sentence, of the EEC Treaty.¹ The intention of the Council was to take account of the adaptation problems which the French industry had to face because of tariff cuts following the introduction of the Common External Tariff or to be expected from the Kennedy Round.

The aids under this scheme are of several kinds: paper pulp production bonuses, aids for research into paper in an occupational technical centre,

¹ Under this provision "on application by a Member State, the Council, may, acting unanimously, decide that aid which that State is granting or intends to grant shall be considered to be compatible with the Common Market, in derogation from the provisions of Article 92..."

investment aids designed to curb pollution and protect the environment, forestry and reforestation research aids. They were to be financed from a quasi-fiscal charge levied on all paper and cardboard consumed in France, whether imported or not.

The Commission initiated the procedure of Article 93(2) against this scheme for two main reasons. The first was the method of financing the aids, and the second was the paper pulp production aids themselves; the latter, calculated in relation to the quantities and types of pulp produced by each firm were subject neither to an adequate scaling down coefficient nor linked with specific commitments by the beneficiary firms as to the rationalization of their structures. They were therefore not likely to provide an effective incentive to these firms to carry out necessary adaptation and were purely operating aids to which the Commission is opposed in principle.¹

After talks with the French authorities, which led the latter to discontinue the granting of production bonuses from 1 January 1971 onwards, the Commission eventually closed the procedure opened in 1968 by adopting a final decision in December 1972² relating to the scheme in question. The effect of this decision is that:

- (a) The French Government must not resume payment of the paper pulp production bonuses, since these aids do not qualify from any of the derogations provided for in the Treaty with regard to incompatible aids;
- (b) While aids to paper research and aids to the protection of the environment and the reduction of pollution are liable to affect intra-Community trade and competition and while, nevertheless, they can be regarded as likely to facilitate the development of the industry concerned without distorting trade to a degree conflicting with the common interest, they cannot be financed through the levying of a quasi-fiscal charge on paper and cardboard imported from the other Member States.

4. Export aids

112. The Commission has consistently maintained that export aids are incompatible in intra-Community relations with the general principles of the Common Market, and particularly with that of free movement. There can be no exception to this rule. The Commission's position has been affirmed on many occasions without distinction as to the form, degree or motivation, regional or otherwise, of the aids concerned; the Commission has thus de-

¹ *First Report on Competition Policy*, sec. 165, second indent.

² OJ No L 297, 30 December 1972.

mandated that a number of export aid schemes be discontinued in Community relations.¹

113. In 1972, the Commission received complaints which led it to study a French fiscal measure. Under Article 39(viii) of the General Tax Code, and further to the amendment of this article made by Article 34 of Law No 65-566 of 12 July 1965, French firms and groups may, with the approval of the Ministry of Economic and Financial Affairs, definitively deduct from their taxable profits in France certain operating expenditures and costs relating to sales establishments, survey offices or information offices, industrial establishments and construction sites they set up abroad, for the first three financial years.

This tax concession is not justified since French firms can make this deduction although the incomes of the establishments concerned are taxable not in France but abroad, where the operating costs of the establishments have already been counted, from the tax point of view, before determination of the taxable income. The result is the possibility of double deduction of costs which has effects similar to those of a non-reimbursable bonus subsidizing the setting up of establishments abroad. The bonus, which facilitates goods and services export operations or the establishment of French firms in other Member States, constitutes an aid within the meaning of Article 92(1) of the EEC Treaty.

This aid also conflicts with the general principle applying in matters of right of establishment that Member States must refrain from facilitating through aids the establishment of their nationals in other Member States. Moreover, there is no way of calculating the size of the tax concession beforehand. As it can be granted to large firms as well as to small- and medium-sized ones, it may involve quite large sums. Lastly, the approval procedure enables the authorities to encourage only certain firms and, by the same token, certain production branches only. This enables the authorities to influence the industrial pattern of the establishments set up abroad by French firms.

114. The Commission therefore decided to open the procedure under Article 93(2) of the EEC Treaty against the application of the measure in question in intra-Community relations, in which it had enabled the authorities to facilitate, in certain industries, the establishment of French firms on the markets of the other Member States.

In June 1972 the French Government informed the Commission that this fiscal measure would be discontinued and that, for this purpose, it was laying before Parliament a measure to harmonize the provisions challenged with

¹ *First Report on Competition Policy*, secs. 187 and 189.

the Treaty rules. The abovementioned tax concessions were to be abolished and replaced by a scheme for carrying forward losses; this is the right granted to French firms to constitute, tax-free, a reserve of the same amount as the losses suffered in the first five years of operation of their establishments or subsidiaries abroad. The reserves deducted would be carried forward, in equal fractions, against the taxable profits of the five consecutive financial years from the sixth onwards. From the angle of competition, such a rule allowing losses to be carried forward is neutral and consequently would entail no objection under the Treaty.

The Commission had not yet seen the measure amending the law challenged and is therefore not yet in a position to close the procedure opened under Article 93(2) EEC.

5. New areas of action

115. The Commission is aware that the progress made in the coordination of regional aids and aids for individual industries would lose much of its value if other forms of intervention which can be used by the States for the same purposes still escaped its control: if this were so, the national authorities might be tempted to replace regional or individual industry aids by such interventions, where they intend to provide support to industrial firms. The Commission has therefore acted in new fields: that of "general" aid schemes and that of the temporary acquisitions of holdings by the authorities in firms.

"General aid" schemes

116. In addition to "individual industry" or "regional" aid schemes, there are others known as "general aid" schemes in the Member States¹ because, under the discretionary powers conferred on the competent national authorities, the relevant aids can be provided to assist industrial investment whatever the location or the business of the firms concerned. These schemes, which can have an important influence because of the large sums involved, usually have one of the following objectives: "general economic growth", "modernization of the national economy", "restructuring of firms beset by adaptation difficulties".

These schemes are not in line with Community aid requirements for three main reasons:

¹ *First Report on Competition Policy*, sec. 164, third paragraph.

- (a) Legally, because they have no specific relationship to given industries or given regions and cannot normally qualify for the derogations from the aid incompatibility rule provided for in Article 92(3) of the EEC Treaty for aids designed to help the development of "certain" activities or "certain" regions,
- (b) Secondly, the Commission has no means of assessing their impact on competition and trade: it has no way of determining, on an examination of the rules governing the scheme in question, what areas or industries benefit from the aids, nor is it informed, at least *a priori*, as to when, where or to what industry the aids are granted,
- (c) In addition, these aids can jeopardize the Community arrangements gradually worked out for national aids which have definite specific objectives in respect of given industries or regions. Although they can be used to help to further any of these objectives, they nonetheless do not come under the arrangements,
- (d) Lastly, whereas a Member State wishing to establish an aid scheme with a specific individual industry or regional objective is subject to the procedures provided for in Article 93 of the EEC Treaty, another Member State, using a general aid scheme, can pursue the same work under cover of this scheme while escaping the Treaty provisions, the result being an unjustifiable discrepancy in treatment.

117. Full application of the Treaty and of the Community principles with regard to aids implies that the Commission should demand the abolition of these schemes in their present form, though the Member States could, as appropriate, replace them with other schemes specifying the objectives with regard to particular industries or regions. It must not, however, be forgotten that the Member States may need to possess facilities enabling them to intervene in economic activity as soon as this becomes necessary, and without being bound in advance to respect certain limits as to specific industry or to specific geographic areas.

To reconcile this necessity felt by the Member States with Community requirements with regard to aids, the Commission has taken the view that the best solution would consist in allowing the schemes to continue provided the Member States apply them henceforward under programmes having an individual industry or regional nature in line with Treaty requirements as to the specific character of aids. These programmes would be defined gradually as needs emerged, and submitted in advance to the Commission. Should certain Member States feel that they could not undertake a breakdown of general aids in relation with specific industries or specific regions, other solutions would have to be found. These could well consist, for example, in prior submission

to the Commission of the concrete cases of implementation of the aids which appear most significant.

The two alternatives (submission of implementing programmes or of significant practical cases) have equivalent merits when viewed from the standpoint of Treaty requirements, since they would both enable the Commission to assess the impact of the aids on competition and trade. However, the "implementing programme" approach would be certainly easier to apply from the political and practical points of view and more rational from the economic point of view—it is already used by certain Member States for the administration of their general aids.

118. Recently, the Commission has achieved acceptance of this principle in respect of several general aid schemes:

- (a) Either by challenging the compatibility of the aid scheme itself, as in its decision 72/34 EEC, of 15 December 1971,¹ discontinuing conservation aids granted by Belgium to firms in difficulties. In this decision, the Commission stressed that merely because these aids can be applied to all economic activities and throughout Belgium, these aids cannot qualify for one of the derogations from the incompatibility rule,
- (b) Or in that it has made the effective granting of aids provided for in such a scheme subject to the submission of the individual industry programmes or of the individual significant cases of application. This was the position it took, in its Decision 72/173 EEC,² of 26 April 1972, in respect of aids, which the Belgian Law of 30 December 1970 on economic growth provides for, in addition to regional aids, for "achievements in individual industries or technological achievements of special interest" (Article 5 of the Law).

119. For the same reasons, the Commission opened the procedure of Article 93(2) in respect of:

- (a) Aids provided for in Article 9 of the Italian draft law No. 231/72. Apart from certain changes to the social benefits granted to workers dismissed or placed on short time, and on which the Commission naturally could only look with favour, the draft also provides, in Article 9, that benefits, in the shape of tax exemptions or low-interest credits, can be granted to encourage the restructuring of certain firms, without specifying any geographic or individual-industry scope,
- (b) The scheme under which loans on preferential terms—mainly in respect of interest rates, duration and reimbursement requirements—are granted

¹ *First Report on Competition Policy*, sec. 186.

² Sec. 90.

in France to encourage “the conversion, the adaptation, the specialization and the concentration of industrial undertakings”. The loans are granted through the Economic and Social Development Fund (FDES) either to facilitate the achievement of the industrial objectives set out in the modernization and equipment Plans or to enable specific industrial modernization operations to be implemented. These involve hundreds of millions of French francs annually.

In opening these procedures, the Commission does not wish to see the schemes abolished but to require the Member States to submit in advance, as indicated above, either—and preferably—the practical implementing programmes under which the aids will be applied, or significant cases of application. Similar aid schemes exist in other original or new Member States; in due course the Commission will take identical action on these.

120. The Commission’s position of principle does not, however, preclude in certain exceptional circumstances, the acceptance of general aids for very short periods, provided that, as laid down in Article 92(3)(b), the aim is to remedy serious disturbances occurring in the economy of a Member State.

For example, in July 1971, the Italian Government adopted a series of decree laws as emergency measures to deal with the serious difficulties then besetting the national economy (decline of activity, increasing unemployment, slowdown in investment). The measures taken were of three kinds:

- (i) Increase in financial endowments for the implementation of various existing aid schemes under which credit facilities could be granted to firms. The Commission made no objection to these measures;
- (ii) Very appreciable increase and extension until 1980 of the abatement of welfare charges paid by small craft and industrial firms in the South of Italy. As these are large-scale operating aids, the Commission could not approve them as compatible with the Common Market, but the problems they raise will be solved subsequently as part of work relating to the search for an appropriate solution for the coordination of regional aids granted in the peripheral areas of the Community¹;
- (iii) Institution of a temporary (one year) abatement and partial abatement (exemption in respect of 5% of remunerations subject to unemployment insurance contribution) of welfare charges, for crafts firms and small- and medium-sized industrial firms and for all textile firms, the abatement to apply throughout Italy.

The Commission, having due regard to the special situation in Italy, took the view that this last category of benefits, given their short duration,

¹ *First Report on Competition Policy*, sec. 147.

could be considered compatible with the Common Market, since they were likely to help remedy a "grave disturbance" to the economy, and to boost activity. The Commission stated, however, it could not allow the systematic use of operating aids to combat temporary business situations, which must be handled by overall economic policy instruments. It therefore informed the Italian Government, that saving exceptional circumstances, an extension of this form of aid beyond the one-year period set, could not be accepted and that in no circumstances could such an extension be granted to the textile industry, for which the Community framework arrangement for textile aids¹ had forbidden all operating aids.

Nonetheless, without informing the Commission in advance, Italy extended until 30 June 1973, by decree of 1 July 1972, the abatement in welfare charges. Since the business recovery had not met forecasts, the Commission accepted this extension. It did not accept, however, the implementing methods for the abatement peculiar to the textile industry.²

121. In Decision 72/261, adopted on 28 June 1972,³ the Commission also stated its position on the aids established by Italian Law No. 471 of 14 July 1969. These aids consist in low interest credits for the import—by industrial undertakings as well as agencies of public interest—of scientific instruments and sophisticated technology apparatus, where such items are not manufactured in Italy.

In 1971 the Commission had initiated the procedure of Article 93(2) against this arrangement, making a distinction between aids given to agencies engaged in research on a non-profit making basis (universities for example) and to firms. Only in the latter case are the aids caught by Article 92(1) of the Treaty. By favouring Italian industry taken as a whole in comparison with the other industries of the Common Market not qualifying for such benefits for their equipment, the aids distort competition and affect trade in industrial goods manufactured with this equipment. They are also of a general nature, since there are no rules as to region or as to specific industry governing their grant.

In its final decision, the Commission's position was not the same for items whose import was facilitated but which were intended for research enterprises as it was for items intended for utilization in the production process of the firms. In the first case, the Commission, which has adopted a favourable attitude to aids designed to facilitate research and development work, autho-

¹ *First Report on Competition Policy*, sec. 172.

² Sec. 98.

³ *OJ* No. L 166, 24 July 1972, p. 12.

rized the maintenance of the aids. In the second case, it ruled that they must be discontinued.

Temporary official acquisitions of corporate capital by the State

122. When it was examining Italian Law No. 184 of 22 March 1971, providing for Government intervention “to encourage the restructuring and the conversion of certain industrial undertakings”, the Commission had an opportunity to define its position on the work of certain financial agencies set up by the Member States with direct or indirect Government financial support, to make temporary acquisitions of capital in firms facing problems of various kinds: for example, firms whose failure to adapt to changing conditions is jeopardizing their future, and dynamic firms suffering from “growth pains”.

In the law in question, the Italian Government thought to facilitate the restructuring, reorganization and conversion of industrial undertakings suffering from adaptation or management difficulties. With a view to the maintenance of employment, the policy goal was, in particular, to provide a remedy to the financial difficulties of small- and medium-sized undertakings which had suffered from the difficulties besetting the Italian economy since 1970. There were two kinds of measure:

- (i) The Istituto Mobiliare Italiano (IMI) was to facilitate the implementation of restructuring programmes for the modernization or the merger of industrial undertakings or groups of undertakings. The IMI contributions—from a Lit 40 000 million revolving fund provided by the central government—may take the form either of preferential credits for these programmes (whether for new investment, the adjustment of commercial structures, the acquisition of production units of existing firms or the purchases of holdings in such firms) or temporary purchases of holdings by the IMI in the firms concerned;
- (ii) Measures—entrusted to a new financial company, the GEPI (Gestione e Partecipazioni Industriali) set up by various semi-public groups (IRI, ENI, IMI, EFIM)—designed to help by reorganization or conversion plans, to put on a sound footing industrial undertakings facing temporary finance or management difficulties. For this purpose, thanks to a financial grant from the central government—originally Lit. 60 000 million, raised subsequently to Lit 111 000 million—the GEPI will be able to acquire under the instructions of the Interministerial Committee for Economic Planning (CIPE) temporary holdings in companies and grant credit, with or without reduced interest rates.

In assessing this, the Commission distinguished between IMI and GEPI intervention in the form of temporary holdings and intervention in the shape of preferential credit.

123. On the question of preferential credit, it noted that such credit was of general scope and could be granted to encourage investment by firms completely irrespective of their location or of the industry to which they belong. These are therefore general aids, and the Commission ought to have considered them incompatible with the Common Market, saving prior supervision of their application either by a study of practical cases, or of the programmes setting out the objectives for which the aids were granted.¹ Nevertheless, the Commission felt that it should take account of the general context of the Italian economy underlying the Government's decisions. The small- and medium-sized undertakings which receive these credits on a priority basis face structural difficulties which have become harder to cope with since the business slowdown at the end of 1970 and an increase in wage costs which in some cases has proved hard to finance. These factors have made necessary restructuring operations more difficult to carry out (from the financing point of view) at a time when certain strains were already discouraging firms from embarking on new capital ventures. Without assistance from the central authorities to help them carry out reorganization operations, the firms concerned might have been forced to scale down operations or even, in some cases, to close down altogether; this would have been bound to worsen further an economic and social climate which is already unfavourable.

In view of this situation, the Commission ruled, in line with previous rulings concerning other Italian measures to encourage activity,² that the measures in question could be considered as designed "to remedy a serious disturbance in the economy of a Member State" and that it could therefore rule them compatible with the Common Market, as provided for in Article 92(3)(b) of the Treaty; this ruling was for a period of one year, expiring in April 1973, since the aim is to cope with essentially transitional difficulties which should disappear once the economic recovery expected is under way.

124. On the question of acquisitions of temporary holdings by IMI and GEPI in certain firms, the Commission took the view that the principle of neutrality set out by the EEC Treaty (Article 222) with regard to ownership arrangements in the Member States prevents the latter from using their power to intervene in the ownership of production facilities to take measures which, if other intervention techniques were used, would be incompatible with Ar-

¹ Secs. 116 and 119.

² Sec. 122.

ticle 92 *et seq.*, since these distort intra-Community competition and trade. Any other interpretation would entail unacceptable discrimination between Member States or between the differing measures adopted by the same Member State, but in fact having the same objectives.

But it was not necessary to consider all the aspects of what is known as State capitalism. In certain cases (establishment by a central government of new undertakings, acquisition of non-precarious holdings in firms already existing or to be set up in association with private interests), the central government normally assumes the role of entrepreneur or venture capital investor. Although the official measure is normally dictated by exigencies going beyond the profit motive, this factor is inherent in the public ownership, the existence and the special nature of which is confirmed by Article 222, and it could not be used alone to justify the bringing into play of the Treaty rules on aids.

This is not the case, however, where the central authority, through financial agencies it sets up at its initiative and with its financial support, confines itself to the acquisition in certain firms of holdings which by their special nature (e.g. duration, purpose, terms) show clearly what the aim of the acquisition is to help the firms until such time as they will have overcome temporary difficulties. In addition, certain industrial or regional priorities are often assigned to the agencies in question. Lastly, from the point of view of the beneficiary firms, the holdings are an advantage which may range from a mere improvement in their credit to the obtaining of new financial resources not to be come by elsewhere.

Because of this similarity (both in respect of the objectives aimed at by the central authority and in respect of the interest of the beneficiary firms) with other official measures which have always been regarded as constituting aids within the meaning of the EEC Treaty, the work of these agencies must also be considered in the light of the Treaty rules, in so far as it is liable to affect intra-Community trade and competition. This does not mean, however, that their work is necessarily and automatically to be treated as that of an aid scheme. Generally only the actual working of the agencies considered brings out aid effects, discernable on the basis of concordant evidence, such as, for example:

- (a) that the acquisitions of holdings are used as an alternative to or a factor strengthening traditional forms;
- (b) that they are provided for firms in liquidation which would disappear from the market without such assistance;
- (c) or, lastly, that the purchases of holdings do not ensure normal remuneration of the capital committed or that they are eventually sold to the partners falling short of the acquisition price.

Only *post facto* knowledge of the actual work of the agencies can therefore enable the Commission to determine whether the acquisitions do in fact have the effect of aids and only then will it be in a position, if necessary, to stipulate conditions and limits in respect of the future activities of the agencies.

In the light of the foregoing, the Commission ruled, under arrangements for the continuous monitoring of State aids carried out under Article 93(1), that the Italian Government should submit regular reports showing, with regard to IMI and GEPI acquisitions of holdings:

- (a) the firms having benefited from intervention, their location and the industry to which they belong, their economic and financial situation at the time of the purchase and the terms on which this was made;
- (b) the manner in which IMI and GEPI acquisitions were eventually liquidated and the development of the financial situations of the firms concerned during the period of the IMI and GEPI holdings; any other advantages the firms may have gained elsewhere from the public influence of IMI and GEPI.

125. It goes without saying that the Commission had to make the same stipulations in respect of similar financial agencies in other Member States. The stipulations were stressed in respect of:

- (a) The "Institut de développement industrielle (IDI)" for France; the IDI is a private-law financial establishment 39.1% of whose capital (FF 333 million) is held by the State itself and 54.6% by various semi-public financial establishments.

Its task is to "encourage the increase in the growth rate of the French economy by contributing, through temporary intervention, to strengthening the financial basis of firms lacking own funds". While it helps only firms which have a reasonably secure profitability outlook, the IDI must also take into account the Government's priority requirements in the choice of areas or regions or industries in which it intervenes;

- (b) The Société Nationale d'investissement (SNI) for Belgium; the SNI's capital (BFrs 3 500 million) is held by the State (37.7%) and by various semi-public financial establishments (45.7%); its objective is to encourage, in the interests of the Belgian economy, the establishment, organization or extension of industrial or commercial undertakings by pursuing the following aims: to reorientate the national economy towards industries with sophisticated technology and a high risk rate which discouragé private investors, and to facilitate the financing through own resources of small- and medium-sized firms;
- (c) The Friulia. This is a financial company set up in 1966 by the autonomous region of Friuli-Venezia-Giulia. Its aim is to use temporary acquisitions

of holdings in firms, with, as appropriate, other benefits, to facilitate the industrial development of the region. The region set up special funds in 1970 to cover losses incurred by the company through its operations. Considering, therefore, that the machinery could be used to keep alive non-competitive firms having no sufficient prospect of sound reorganization, the Commission opened the procedure under Article 93(2) of the EEC Treaty and stipulated as conditions for the continuation of intervention by the Friulia not only the submission of reports on its operations but also that the Friulia should discontinue salvage operations.

SECTION 2

APPLICATION OF THE ECSC TREATY TO STATE AIDS TO THE IRON AND STEEL INDUSTRIES

126. Because of the inadequate information provided by certain Member States on aids granted in the past to their iron and steel industries, the Commission has had to implement the infringement procedure provided for in Article 88 of the ECSC Treaty against two of these. On 3 July 1972 it adopted a reasoned decision under this procedure, establishing that Belgium and Italy had failed to meet their obligations under Articles 86, subparagraph 1 and 47, subparagraph 1, of the ECSC Treaty. The two Member States subsequently supplied the information to the Commission. The procedure against Belgium was thus closed, and additional time was given to Italy, as this country was submitting the further data requested by the Commission.

The Commission also again approached the Member States for information concerning aids granted to the iron and steel industries in 1971.

All this information collected by the Commission should enable it, through analysis and comparison, to check that no specific aid prohibited by Article 4(c) of the ECSC Treaty is being granted to the iron and steel industry and that, in respect of aid schemes for regional or more general purposes, aids to the industry granted in conditions similar to those granted to others are not liable to lead to the serious imbalances referred to in Article 67 of the ECSC Treaty.

CHAPTER II
PUBLIC UNDERTAKINGS

GENERAL

127. The Commission is continuing its analysis of the problems which may arise from the existence of undertakings with which the Member States have special links (whether they are public undertakings or undertakings to which the States grant special or exclusive rights, in keeping with the spirit of Article 90(1)).¹

One aim of this analysis is to meet the European Parliament's request "that the Commission should study the relationship between the State and the public undertakings, so as to be in a position to work out directives and decisions enabling distortions of competition as between public and private undertakings to be eliminated". However, the elimination of distortions of competition as between public and private undertakings cannot be the only objective of such an analysis.

128. Article 90(1) of the EEC Treaty forbids the Member States to enact or maintain in force measures contrary to the Treaty in respect of the undertakings to which the Article refers. On these grounds the Commission ensures that the behaviour of such undertakings, and that of the Member States towards them, do not break the Treaty rules binding both the undertakings and the Member States, and in particular the rules on competition.

For instance, the Commission sees to it that the undertakings in question do not contravene the provisions of Article 86 by abuse of a dominant position.² It has to ensure that the Member States do not grant these undertakings aids incompatible with the common market—aids which may be difficult to detect, masked as they are by the special relations between the Member States and the undertakings. The Commission has also made arrangements for ascertaining that the Member States do not grant what amounts to aid to these undertakings by acquiring temporary capital holdings in them.³

¹ See *First Report on Competition Policy*, sec. 192 *et seq.*

² Sec. 58.

³ Secs. 124 and 125.

129. Furthermore, the Commission considers that Article 90 is not merely meant to prevent the undertakings concerned and the Member States from evading the Treaty rules, which apply absolutely generally to both parties individually. Its object is also to prevent the Member States from evading these rules under cover of the apparently spontaneous behaviour of the undertakings with special status or prerogatives. Because of this special status or these special prerogatives—from which the undertakings may derive certain advantages (monopolistic situation in some cases, easier access to credit in others) granted by the State, the Member States have special responsibilities with regard to these undertakings. Accordingly, they also have the means and the duty to act in such a way that the undertakings' behaviour does not produce effects which, if they resulted from actions by the States themselves, would constitute a violation of the Treaty.

It is on these grounds that the Commission is now examining the possibility of demanding (by appropriate directives or decisions under Article 90(3)) that the Member States, in certain fields where the risk of such behaviour is apparent, should take the necessary steps to stop the undertakings referred to in Article 90(1) from excluding all or some of the products or services of the other Member States when placing their contracts. For it is inadmissible that such actions, which would be caught by Article 30 of the EEC Treaty if they were performed by the State itself, should continue to be performed by these undertakings.

130. For the better accomplishment of these various tasks, the Commission has endeavoured to assemble the essential data providing an overall view of the public sector in each Member State and to assess its impact on the economy.

The brief description given below is necessarily incomplete. As existing sources emphasize¹ the inadequacy of the available data makes accurate description of the public sector, of its share in the various industries, and particularly of its financing structure, extremely difficult.

The definition of the public sector raises a difficult problem: its extension and content differ widely when defined in legal terms from when defined in

¹ The statistics and other information published below are drawn from a limited number of official documents or studies relating to the public undertakings of each Member State. The references are given at the beginning of the part relating to each country.

Only one of the sources used concerns the public undertakings of the six Member States. This is the "*L'évolution des entreprises publiques dans la Communauté européenne au cours des dernières années*", published by the Centre européen des Entreprises publiques, CEEP (1971). The CEEP's analysis goes only as far as 1968 or 1969 according to case. The CEEP, which is preparing an up-to-date version, has been good enough to transmit to the Commission certain data referring to the more recent years.

The CEEP publication was the only source available covering public undertakings in the Benelux countries.

economic terms, if the principle is one of absolute dependence on the public authorities or not, if only firms controlled by the central authorities are included or if the definition is extended to firms controlled by the local authorities. The description of the sector in a given country is difficult but a description at Community level is an even more complex undertaking. To give only one example, the main sources concerning the French public sector do not cover the subsidiaries of public undertakings.

In Italy, on the other hand, the available sources include in their calculations all the holdings which the State has in a large number of undertakings where such holdings confer control.¹

131. The following plan has been adopted for the description of the public sector of each country:

- (a) a demarcation of the sector is provided by the accepted definition of a public undertaking. Because of the difficulties referred to, the definition has been worked out for each country, on the basis of available information. As far as possible, only undertakings controlled by the central public authority have been included (in the wide sense, including any agency, even lacking legal personality, engaged in production and/or sales of goods or services, except farms, and in certain cases, financial undertakings). This has, however, not always been possible (see the case of the Federal Republic of Germany). Because of the differences—in some cases major ones—between the data relating to the various countries, and because of deficiencies in the sources used, both an assessment of the public sector in the economy of each country and comparison between the six public sectors must be made with the greatest caution.
- (b) An overall description of the public sector of each country is made by providing (for a reference period varying according to the information available) data relating to:
 - numbers employed,
 - turnover and/or added value,
 - investments,
 - finance sources and instruments.

For each of these values, the share of public undertakings in the economy as a whole (without agriculture) of the country concerned is given.

¹ A sufficiently uniform definition cannot be based on the CEEP publication either (see preceding note), in which the discrepancies between the national sources also appear. For France, for example, the CEEP refers—like the INSEE—to the national accounting nomenclature, which excludes subsidiaries, whereas, for Italy, the definition adopted is much wider, even including firms controlled by the communes.

- (c) The information also shows—through the most significant data relating to the values under (b) above—which are the industries in which public undertakings are particularly strong.

132. The following description leads to a number of general comments on the development of the public sector in the six Member States; the lack of statistics on specific points and the difficulty of comparing data from country to country should, however, be stressed.

Nonetheless, it can be stated that while certain data recorded stress the special importance of public undertakings (this is the case, in particular, for the percentages relating to investment in France and in Italy, which were respectively 24.2% and 31% of the national total in 1971), in other cases, there are no very wide disparities from one member country to another.

A second point is that while the growth trend of the public sector, expressed in absolute values, shows, in general, a tendency to mark time or increase slightly, its relative share in the economy as a whole is tending to contract in most of the member countries. The main key to this trend is the increase, in recent years, in the growth rates of industries in which public undertakings have always been poorly represented. In certain cases, for example in the Federal Republic of Germany, the decline in the number of persons employed has been a result of the adoption of streamlining measures by certain major public undertakings. In France, the pressure on the charges that can be levied by the main public services has helped to curb the increase in added value.

It is, however, not certain—in view of the fact that the public undertakings are required by the authorities to assume special responsibilities—that their relative decline is also due to any change in official attitudes to them.

On the question of the application of the Treaty rules, the information obtained so far by the Commission under the analysis it is carrying out does not alter the standpoint it has always maintained, as to the need to ensure that the same principles and same rules are applied to all undertakings, whether public or private, and to all the Member States, in respect of measures they implement with regard to undertakings.

FRANCE

Definition of a public undertaking and sources

133. The definition of public undertaking used here is that adopted for national accounting purposes, which is the one to which the main sources used also

refer:¹ the definition includes all nationalized undertakings and national semi-public companies, plus industrial and commercial public services (Atomic Energy Commissariat, the Post Office, Tobacco and Matches Industrial Operation Department, etc.) and certain intervention agencies.² As mentioned above, the definition does not include the subsidiaries of public undertakings.³ Most farms and financial undertakings are also excluded.

General description

134. An analysis of trends in the French public sector in recent years shows balanced growth with the maintenance of the positions that have long been strong in certain industries. However, the position of the public undertakings in the economy as a whole is tending to contract slowly but steadily.

In recent years there has also been a far-reaching review of relations between the central authority and the public enterprises; a number of basic principles have been affirmed on several occasions by the authorities with regard to the control, management and financing of these undertakings. Some of the principles have been implemented through the adoption of practical measures which have perceptively changed the relations between the authorities and certain undertakings.

This review process got underway after the publication in 1967 of the "Nora" report, released by the *Working Party of the Interministerial Committee on Public Undertakings*. The report recommended less supervision and more autonomy for all the public firms—i.e., for the non-competitive as well as for the competitive sector—arguing that this was indispensable if efficiency was to be stepped up. Another important criterion recommended by the report was the offsetting of costs incurred through constraints of public interest or of other kinds imposed by the State.

Discussing undertakings "with serious public interest constraints", the non-competitive sector undertakings, the report recommended that,

¹ In addition to the CEEP publication, the main source used here is: Huret, Keller, Honoré et Rivier: "*Les entreprises publiques de 1959 à 1969*". This work published by INSEE (Institut national de la statistique et des études économiques), as No. 52, 1972. The INSEE made available to the Commission the figures relating to 1970 and 1971.

The following sources have also been used: The XII General Report of the Auditors of public undertakings (1971), the XVII report of the FDES (1971-72; Le Pors, *Transferts Etats-Industrie*, Statistiques et études financières (Ministry for Economic and Financial Affairs), 1971, No. 2.

² For a complete list see *Méthodes de la comptabilité nationale*, Etudes et conjoncture 1966, No. 3, p. 191.

³ For this reason the CEEP stressed that the percentages it published concerning the public sector share should be raised from 15 to 20%.

without prejudice to the principle of autonomy, the authorities should take powers to fix the objectives the undertakings must aim at and to supervise their operations. Guided by this proposal, the authorities redefined their relations with certain undertakings responsible for major services (the Electricity Board, the French state railways, Coalmines, Radio and Television), by means of "programme contracts".

As for competitive sector undertakings belonging to the State or in which the State owns holdings, the report recommended the same treatment in all respects as that meted out to private undertakings. It stressed that where a Government contributed new funds for growth purposes, it should also require normal market returns on its capital and its loans. The report also raised the question as to whether the authorities should not pursue a more active policy in the matter of holdings and should not take the necessary powers for this purpose.

Numbers employed

The numbers employed in public undertakings have increased only slightly in recent years: they rose from 1.41 million in 1959 to 1.53 million in 1969. The figure remained virtually unchanged in 1970 and 1971. With the numbers employed in all undertakings (except farming and financial undertakings) rising steeply over the same period, the percentage accounted for by the public sector of the total has declined: it fell from 14.8% in 1959 to 12.9% in 1969, and to about 10.6% in 1971.¹

Value added and turnover

The share of gross value added accounted for by public undertakings as a proportion of that of the economy as a whole has also declined, the figures developing from FF 27 500 million in 1959 (13.3% of all non-farming and non-financial undertakings) to FF 65 300 million in 1969 (11.8%).² In 1970 and 1971 the figures were FF 73 400 million (11.8%) and FF 79 400 million (11.5%)³ respectively.

¹ Source: INSEE, the CEEP figures are slightly different: FF 1.37 million in 1963 (12.6% of all non-agricultural and non-financial undertakings), 1.41 million in 1969 (11.5%).

² Source: CEEP.

³ Source: INSEE.

The decline is due not only to the decline in the relative share of the public sector but also to an appreciable fall in relative prices (as compared with average prices of gross domestic production) of the main public services.¹

Investment

The distinction made in the available sources between *gross fixed asset formation* (namely the productive investment of non-financial undertakings, housing and other investment) and the narrower concept of *productive investment* should be borne in mind.

The gross fixed asset formation of public undertakings rose from FF 26 500 million in 1966 to FF 35 000 million in 1971. The share of public undertakings in the total for non-financial and non-agricultural undertakings developed as follows over the same period:

1966	1967	1968	1969	1970	1971 ²
33.3%	33.2%	31.9%	28.9%	26.1%	24.2%

The data on productive investment confirm the contraction in the share of public undertaking, which fell from 36.7% (for all non-agricultural undertakings) in 1959 to 33.5% in 1963, and to 25.3% in 1969 (Source: CEEP). In 1970/71 the percentage (as a proportion of all non-financial undertakings) was 18.9% and 17.8% respectively.

Financing

The following main trends are revealed by a study of financing sources and methods (see Table below):

(a) *Self-financing and subsidies*

The rate of self-financing by public undertakings varies (both in absolute values and as a percentage of all finances), and is evolving very differently according to whether we include or not—in the computation of undertakings' own resources, State subsidies, granted under various heads to several public undertakings.

Thus, according to the INSEE, which defines self-financing as the total of gross savings minus operating and equipment subsidies, the rate declined

¹ See INSEE, p. 10; CEEP, p. 100.

² Source: INSEE. According to the CEEP, the percentages are slightly different: 29.6% in 1967, 29.3% in 1968, 27.5% in 1969.

steadily from 1959 (26.1%) to 1969 (13.2%) for all public undertakings. The corresponding absolute values were about FF 4 200 million and about FF 5 000 million. On the other hand, according to CEEP, which includes subsidies in own resources, self-financing has increased appreciably, from 50% in 1959 to almost 65% ten years later. (In absolute values, from more than FF 7 000 million to about FF 22 000 million over the same period.)

The scale and the destination of the subsidies are therefore worth examining. According to "Transferts Etats-Industrie",¹ all the subsidies paid by the central authority to public undertakings totalled about FF 20 000 million in 1968. After deduction of the "compensation" subsidies, which are accorded for certain specific aims,² the amount is FF 14 600 million.

A detailed account of the subsidies provided by the central government to the main public undertakings is given—for the area of which it is responsible—by the Audit Board for public undertakings.³ This shows that, for the majority of the most important public undertakings in the non-competitive sector,⁴ the subsidies provided under various heads by the central government have contributed appreciably to bringing about a financial recovery; but the undertakings have generally continued to operate at a loss. The Audit Board spotlights the particularly difficult situation of the coal mines, the State Railways and the Paris underground, which accounted for 94% of total aid from public funds in the period from 1967 to 1969.⁴

Lastly, in the reference ten-year period, the rate of self-financing *minus subsidies* of private undertakings was much higher than that of public undertakings, rising from 51.6% in 1961 to 61% in 1969. (With subsidies included, the percentages are 57.3% and 67.2% respectively.)⁵

(b) Several conclusions may be drawn about *external financing*:

- (i) From 1965 onwards, the contributions to the capital of public undertakings increased appreciably, in 1968, reaching 5.2%, of all sources of financing (about 1% in previous years);

¹ P. 42.

² For example FF 621 700 000 were paid to the French State Railways in the period from 1967 to 1969 "for refraining from increasing tariffs" (see Commission, p. 67).

³ Twelfth Report, p. 65 *et seq.*

⁴ Coalmines, French State Railways, Paris underground, Air France, Air Inter, Paris Airport, Compagnie Generale Transatlantique, Compagnie des Messageries Maritimes, autonomous ports.

⁵ For the undertakings listed in footnote 4, subsidies paid in 1967, 1968 and 1969 totalled FF 23 000 million. The three undertakings named accounted for FF 22 000 million by themselves.

⁶ Subsidies to private firms rose from FF 2 200 million in 1962 to FF 4 500 million in 1968 (Transferts Etats-Industrie), *op. cit.*, p. 43). According to another source (*Enterprise*, No. 1131, 26 April 1971) they rose in 1969 to about FF 2 500 million.

	1961	%	1962	%	1963	%	1964	%	1965	%	1966	%	1967	%	1968	%	1969	%	1970	%
(a) External financing																				
Long-term loans	5 166	34.2	5 061	29.4	5 663	28.3	6 873	29.9	5 901	23.4	6 518	22.9	7 658	25	7 861	24.3				
Medium-term loans	29	0.2	240	1.4	80	0.4	65	0.2	-94	0.4	-198	0.5	656	2.1	332	1				
Bonds	1 240	18.2	1 370	7.9	1 428	7.1	1 539	6.7	2 476	9.8	2 351	8.2	2 944	9.6	1 626	5				
Capital increases	183	1.2	124	0.7	333	1.6	170	0.8	1 292	5.2	1 396	4.9	1 428	4.7	1 669	5.2				
Insurance compensation	23	0.2	81	0.4	29	0.2	37	0.2	40	0.2	39	0.1	39	0.1	39	0.1				
Total external resources	6 641	44	6 876	39.8	7 533	37.6	8 684	37.8	9 615	38.2	10 106	35.6	12 725	41.5	11 527	35.7				
(b) Self-financing (including subsidies)	8 456	56	10 347	60.2	12 570	62.4	14 285	62.2	15 562	61.8	13 286	64.4	18 866	58.5	20 693	64.3				

(Source: CEEP)

The inclusion or exclusion of subsidies in own resources makes an appreciable difference. If the subsidies are left out, the self-financing trend is as follows:

	1961	%	1962	%	1963	%	1964	%	1965	%	1966	%	1967	%	1968	%	1969	%	1970	%
	3 968	23.9	3 395	20.2	3 316	14.9	3 792	15.6	4 253	15.7	5 162	17.1	4 853	14.7	1 277	3.6	4 955	13.2		

(Source: INSEE)

- (ii) The share of long-term loans declined sharply, particularly after 1965; this was mainly due to a decrease in loans from the Economic and Social Development Fund;
- (iii) The share of bonds contracted sharply over the reference ten-year period, declining from 10.1% in 1961 to 5% in 1968.

Finally, comparison of public undertakings and private firms shows that the main difference lies in the role played by long- and short-term credit in financing them. Long-term credit is of great importance for public undertakings, accounting for virtually all their external resources, whereas short-term credit is to all intents and purposes negligible. For private firms, the opposite is the case.

Individual industries

135. The above summary account of the economic impact of public undertakings shows that their share in the economy has been steadily declining in recent years, particularly in the last ten years. This development is apparently due to the fact that French public undertakings have always been of great importance in a few industries (power and energy industries and communications, for example), the growth of which is tending to slow down, while other sectors (such as wholesale and retail trading), in which public activity is on a much smaller scale, are expanding much faster.

Broadly speaking, the public undertakings play a prominent part in the power and fuel, transport and telecommunications industries.¹ Some essential data on undertakings in these industries have been communicated by the IMSEE and are given in the following table.

¹ The undertakings are the following: French Coalmines, French Electric Power Board, French Gas Board, Rhone National Company, Petroleum Research and Operations Corporation, ELF Company for Research and Development of Oil and Gas, National Aquitaine Petroleum Company, Company for Petroleum Exploration and Development in Alsace, Petroleum Development Company, Company for the Transport of Petroleum by Pipeline, Paris Airport, French State Railways, Paris Underground, Compagnie générale transatlantique, Messageries maritimes, Air France, Independent Commune and Department Transport Boards, Post Office, French official cable service.

Industries	Value added					Gross fixed asset formation					Numbers employed							
	1969	%	1970	%	1971	%	1969	%	1970	%	1971	%	1969	%	1970	%	1971	
Coal and coke	3 606		4 155		4 138		843		973		893		139.9		} 249.1		—	
Electricity																		—
Gas	12 323		13 939		15 149		7 846		7 750		7 688		122.5					—
Petroleum	1 082		1 058		1 153		462		345		350		7.7		7.7		figures not available	
Transport	12 828		13 650		14 316		5 709		5 824		6 071		403.7		394.2		—	
Post Office	11 101		12 347		14 098		3 688		4 160		4 632		372.1		383.6		—	
Total	40 940	7.3	45 149	7.2	48 854	7	18 548	16.5	19 052	14.4	19 634	13.5	1 045.9	7.4	1 034.6	7.2	—	

The percentages as a proportion of all non-financial and non-agricultural firms are given alongside the absolute values.

ITALY

Definition of a public undertaking and sources

136. The definition of a public undertaking used generally covers companies in which the central authority has a controlling interest (i.e., all the undertakings covered by the annual report to Parliament, by the Minister of State-Subsidized Industries) and ENEL (the National Electricity Board).

As far as available information has permitted, data relating to the main "*aziende autonome*" of the State have been added. These are agencies belonging to the administration—not normally having a legal personality of their own—which, because of their economic importance, have special legal status. (They are the Italian State Railways, the State Monopoly Corporation, the National Autonomous Road Corporation, the Forestry Corporation and the Post Office.)

This delimitation is largely dictated by the sources used, which include, besides the CEEP, the Report of the Governor of the Bank of Italy for 1971 and the reports by the Minister of State—Subsidized Industries Report (particularly those for 1972).¹

General description

137. The outstanding feature of the Italian public sector is the organic arrangement combining the State's holdings in a large number of firms operating in almost all the industries. The State-holding system has been applied in a growing number of firms and is now the basis for intervention by the public authorities.

This has led to the development of forms of intervention which are very hard to summarize briefly and the most recent changes in which are also difficult to pinpoint. The tendency for the authorities to intervene generally in the economy, either through undertakings partly owned by the State or outside these, by using traditional facilities, has blurred the usual distinctions between the public sector and the private sector.

Indeed, the common distinction made, within the public sector, between competitive undertakings and non-competitive undertakings or undertakings of general interest also seems to be disappearing in Italy. As the undertakings which are partly publicly owned, nearly all of which belong to the competitive sector, are gradually given responsibilities of general economic interest and

¹ The *General Report on the Economic Situation of the Country* (for 1971), presented by the Minister of Budget and Planning and by the Minister of the Treasury, has also been used.

become—by express declaration of the public authorities—a privileged instrument of intervention, management on the basis of economic administration (which is in principle legally required) raises difficult problems.

The figures on numbers employed and value added are not sufficient by themselves to give an idea of the scale of the operations of undertakings partly owned by the State; they suggest that the public sector in Italy is not much larger than that in the other Member States. The role played by these undertakings is highlighted by the figures for their shares in total corporate investment and for the corresponding increase in the financial facilities placed at their disposal by the authorities. It is true, however, that the role played by the public undertakings in very recent years has been of particular importance because of the present period of slack economic activity in the country.

The trends mentioned above have led to two contrasting developments. The strengthening of the financial basis of the State partial-ownership system raises again the problem of the danger of distortion of competition to the detriment of private firms, though this, even more than in the past, must be considered in the light of the public interest constraints to which the undertakings are subjected. Secondly, the support provided by the public authorities—often through State acquisitions in firms—at national and at local level, designed to contribute to the solution of regional problems, problems concerning individual industries or general problems, reduces or dispels altogether the danger of distortions.

Despite the varied complexity of the Italian public sector, a few general trends have become discernible of late. In the first place, it is evident that the traditional use of the public holding in a private undertaking as a means of contributing to the solution of problems raised by regional disequilibria has increased.

In some industries, it would seem that the public sector has started a support or recovery operation in view of certain difficulties, both managerial and financial, besetting private industry.

Lastly, it would seem that the tendency to regard the system of state participations more and more as a weapon against the economic and social problems engendered by the existence of firms that have run into difficulties is growing stronger, encouraged by the large number of factors bound up—at least in part—with the present difficult business situation which has been known for some years.

Numbers employed

The numbers employed in public undertakings have not varied to any great extent in recent years. In absolute figures, they increased from 460 000

in 1966 to 637 000 in 1971. As a percentage of the labour force (excluding farming and housing) the figure rose from about 4% in 1966 to about 5% in 1971.

These data do not include persons employed in the autonomous undertakings ("Aziende autonome dello Stato"), in respect of whom no complete information is available. The numbers employed in the monopolies administration, the railways and the Post Office were 325 000 in 1968.

Value added and turnover

Available sources on value added do not give information for all the public undertakings and this gives rise to statistical difficulties. For undertakings partly owned by the State, the value added for the industrial sectors, which was Lit. 1 090 000 million in 1968 and Lit. 1 231 000 million in 1969, rose to Lit. 1 486 000 million in 1970 (an increase of 20.7% over 1969). As a percentage of the whole of the national industrial sector the proportion rose from 8.8% to 9.2%.

The rise from 1969 to 1970 was 12.6%. The average of these percentages in comparison with the corresponding national totals is 11.1% in 1968, 11.3% in 1969 and 11.6% in 1970.

The turnover of the public undertakings (State holdings plus ENEL) is as follows:

Lit. 4 600 000 million in 1968,
Lit. 5 250 000 million in 1969,
Lit. 6 200 000 million in 1970,
Lit. 6 950 000 million in 1971.

Available statistics are not full enough to show the relationship between these figures and the national totals.

Investments

Investments by the State-participation undertakings and ENEL (gross fixed asset formation and stock variation) total Lit. 2 230 000 million in 1970. This was about 16.9% of overall fixed asset formation (Lit. 13 206 000 million).

The gross fixed asset formation of public undertakings accounted for 29.6% of the national investment total, in the same year, in the industrial, transport and communication, wholesale and resale distribution, credit and services sectors.

For 1971, the figures are as follows: Lit 2 638 000 million (gross fixed asset formation and changes in stocks of public undertakings), which is 20.7% of overall fixed asset formation (Lit 12 750 000 million). In relation to all investments in the industrial, transport and communications, retail and wholesale distribution, credit and services sectors, this was 31%.

The increase in investment by public undertakings was therefore particularly sharp for 1971. In the recession period then occurring in the overall economy at that time, the role of the public undertakings was thus of special importance.

When the figures for the "Aziende autonome" are added to the above data, the result is that, as a proportion of overall investment by firms (excluding farming, housing and investment by the public authorities), the percentage accounted for by the public undertakings was 39% in 1970 and 40% in 1971.

Financing

Both the public undertakings and the private sector have tended to increase their indebtedness in recent years. The share of equity and holdings (including capital endowments) fell for all firms from 47.4% of total liabilities (in 1963) to 25.7% (in 1971). The annual percentage, over borrowings, of shares, holdings and contributions has shown little exchange in recent years. Since the share of new venture capital has remained the same and profits have fallen, there has been an increase in borrowed capital to 73.6% in 1971. In this context it should be noted that the public undertakings have enjoyed a share increase in capital endowments, which rose from Lit 211 000 million in 1970 to Lit 597 000 million in 1971.

These funds, with shares and holdings, account for 25.6% of all the funds available to public undertakings in 1971. The corresponding item (i.e. shares and holdings) for private undertakings was 16.5%.

In other words, the sharp increase in capital officially provided to public undertakings enabled them to curb their indebtedness, which fell from 59.9% in 1970 to 54.7% in 1971.

A study carried by the Banca d'Italia, confined to the borrowings of capital goods undertakings, shows that the bank borrowing of private firms in its various forms accounts for about 80% of financing, while the corresponding item for public undertakings is about 60%.

In summary, the percentages of the various finance components of the public undertakings were as follows in 1971:

	1965		1966		1967		1968		1969		1970		1971	
	in Lit. '000 mil- lion	%	in Lit. '000 mil- lion	%	in Lit. '000 mil- lion	%	in Lit. '000 mil- lion	%	in Lit. '000 mil- lion	%	in Lit. '000 mil- lion	%	in Lit. '000 mil- lion	%
State provided capital	109.6	13.4	57.4	7	108.4	11.7	275.7	30.0	205.3	18.6	165.2	9.8	550.1	23
Realization of assets	12.6	1.6	3.8	0.4	26.1	2.8	4.5	0.5	19.2	1.8	33.7	2.-	11.-	0.4
Shareholders' contributions	9.7	1.2	64.8	7.9	6.2	0.7	21.9	2.4	33.2	3.-	27.2	1.6	36.-	1.5
Bonds	259.8	31.8	40.8	5.-	156.9	16.9	100.4	10.9	131.1	11.9	-32.7	-1.9	-17.7	-0.7
Medium- and long-term borrowing	116.3	14.3	128.1	15.5	146.9	15.9	142.9	15.5	188.6	17.1	371.9	22.2	828.4	34.7
Short-term borrowing	54.7	6.7	226.4	27.5	136.1	14.7	-37.8	-4.1	26.2	2.4	631.7	37.6	535.2	22.4
Total	562.7	69.-	521.3	63.3	580.6	62.7	507.6	55.2	603.6	54.8	1 197.-	71.3	1 943.-	81.3
Self-financing	253.3	31.-	301.9	36.7	345.9	37.3	411.4	44.8	498.3	45.2	481.2	28.7	445.7	18.7
Grand Total	816.-	100.-	823.2	100.-	926.5	100.-	919.-	100.-	1101.9	100.-	1 678.2	100.-	2 388.7	100.-

— self-financing	23.4%
— capital provided by the Treasury	18.5%
— borrowing	54.7%
— other	3.4%

More detailed information is given in the table on p. 126. However, it covers only State-participation undertakings, which accounts for a slight discrepancy with the data given above.

FEDERAL REPUBLIC OF GERMANY

Definition of a public undertaking and sources

138. The data available for the FRG give a general picture of the public sector without distinction between undertakings controlled by the central authority (Bund) and the local authorities (Länder and municipalities). The figures refer neither to farming nor to the credit, insurance and retail and wholesale distribution sectors.

The main source is the CEEP.

An annual Ministry of Finance report (*Beteiligungen des Bundes, Anhang zum Finanzbericht*) gives information on State (Bund) holdings in the industrial field. It describes the economic situation of the *Konzerne* and companies in which the State has majority holdings.

In view of the considerable importance in the FRG of firms controlled by the local authorities, it has been decided here not to confine information to the firms covered by the abovementioned report. This would have given a very unrealistic picture of the German public sector.

General description

139. The data given below show that the impact of the German public sector on the economy at large is limited. Nor is there any evidence that the sector is used to any great extent for particular purposes by the authorities, for example by systematic deployment for the attainment of general economic objectives: No overall approach has been worked out in this respect. Although there was talk at one time for the reorganization of federal industrial holdings (including the idea of establishing a public holding company), no actual measures have so far been adopted.

It should be remembered that the municipalities and the *Länder* have holdings in public utilities (gas, water, and electricity) and transport, whereas the central authorities' main holdings are in industry.

The central authorities' industrial undertakings are represented in the FRG by seven *Konzerne* in which the *Bund* has holdings; in 1970 they were as follows:

	Corporate capital (in DM million)	Share of the <i>Bund</i> in corporate capital (%)
— Volkswagenwerk AG	900	16 ¹
— VEBA AG	825	40.23
— Saarbergwerke AG	350	74
— Salzgitter AG	300	100
— Vereinigte Industrie-Unternehmungen AG (VIAG)	304	83.56
— Industrieverwaltungsgesellschaft mbH (IVG)	50	100
— Deutsche Industrieanlagen GmbH (DIAG)	65	90 ²

¹ The "Land" of Lower Saxony has a 20% holding.

² Through the special "ERP" fund.

Numbers employed

The numbers employed in all undertakings (except credit establishments, insurance companies, farming and retail and wholesale trade) in which the authorities (Bund, Länder and municipalities) owned holdings or majority voting rights were 1 770 000 in 1963 (8.3% of all persons in paid employment) and 1 500 000 in 1968 (7.4%): the decline was accounted for mainly by rationalization operations, affecting transport in particular.¹ More than half of these persons are employed in the Post Office and the Federal Railways. The figures include the employees of two companies, Volkswagen and VEBA, in which public participation is less than 50%.

Turnover and value added

In 1968, total turnover for public undertakings was about DM 70 000 million, accounting for 13.3% of total turnover achieved by firms in the FRG. In 1963, the figure had been about 13.5%.

¹ See CEEP, p. 19.

The share enjoyed by public undertakings is high only in the water, gas, electricity supply and transport sectors; in 1968 the overall turnover of these public undertakings was DM 17 000 million, 85.1% of total turnover in the relevant industries.

The value added by public undertakings (except housing) was DM 34 400 million in 1963 and DM 43 500 million in 1968, accounting for 11.8% and 10.9% respectively of value added for the whole German economy (except housing).

Investments

The share accounted for by public undertakings in total investment (except housing) of all FRG firms in 1968 was 17.6% (DM 13 000 million). In 1963 the corresponding figures were 17.2% and DM 10 300 million.

For the seven industrial *Konzerne* (see above), the total turnover (for 1969) was less than 5% of that for all industry. The figure for investment was 2.5%. Numbers employed as a percentage of all persons in paid employment was about 1.4%.

Financing

(a) *Self financing*

The rate of self financing by public undertakings has increased: it was 48.73% of all funds available in 1963, and 72.74% in 1968.

(b) *External financing*

The share of capital increases in the total of funds available varies fairly widely: 1.43% in 1963, 13.76% in 1965 and 4.31% in 1968.

Other sources of finance are mainly long-term credit, which fell sharply from 1963 (44.79%) to 1968 (19.33%).

As for financing in the private sector, an analysis of data published by the German Statistical Office¹ relating to joint-stock companies shows a self-financing rate of 77.1% of all long-term financing facilities in 1968; the share of capital increases is 12.3%, and long-term credit accounted for 10.6% of the total.

¹ Source: *Statistik des Bundesamtes, Reihe 2, 1968. Unternehmen und Arbeitsstätten; Kapitalgesellschaften.*

Individual industries

140. The following information on certain industries shows shares accounted for by state-controlled undertakings in national production:

Sectors	1968	1969	1970
Aluminium	74.9%	74.5%	70.9%
Iron ore	44.8%	44.8%	76.7%*
Shipbuilding	36.1%	39.8%	28.1%
Coal	16.4%	9.9%	9.5%
Coke	11.6%	5.4%	5.7%
Petroleum	8.5%	8.5%	8.4%
Electric Power	6.2%	5.9%	6.3%
Crude Iron	6.0%	10.5%	11.3%
Crude Steel	4.9%	9.1%	9.7%
Lignite	4.7%	5.1%	5.1%

* The percentage increase is due to the merger of the Salzgitter AG metal-processing plants with the Ilseder Hütte (Source: Beteiligungen des Bundes, op. cit. For shipbuilding: Commission figures).

The figures show that state industrial undertakings have a very high stake in national production of only aluminium and iron ores. Imports are heavy in these two industries, so that the figures do not mean that the public sector also enjoys a large share of the market.

Because of the criterion selected (Federal majority holding), the above table does not give a clear idea of the scale of the public sectors: with regard to electric power, the table excludes the production of the Rheinisch-Westfälisches Elektrizitätswerk AG which, with about 40% of German production, is the leading firm of this industry in the country but only 31.2% of whose corporate capital is owned by the municipalities.

Owning plural voting shares, the municipalities, nonetheless, have control of the company.

Similarly, the share of public undertakings in the lignite industry is found to be much larger than the above table suggests (in fact, about 90%), if the output of electric power undertakings, particularly the RWE is counted in.

BELGIUM

Definition of a public undertaking and sources

141. The public sector has a proportionately more modest position in the economies of Belgium, the Netherlands and the Grand Duchy of Luxembourg than in the three other Member States. So far, at least, the tendency for different legal types to be developed and for subsidiaries to be established—a key feature of the Italian and French public sectors—is unknown in Benelux.

Hence, the definition of a public undertaking does not raise the same difficulties, and is indeed—perhaps—not as important as in the other three countries.

By adopting the criterion of the national status of the public undertaking, the CEEP (which is, as indicated above, the only source used here) has confined its analysis to a very small number of undertakings and other agencies: 46 for Belgium, 29 for the Netherlands and 6 for Luxembourg.¹

Overall data covering local as well as national public undertakings are available only for Belgium. Because the series are very far from complete (particularly for Netherlands and Luxembourg undertakings), the brief description given below is useful only as general guidance.

General description

Numbers employed

142. It is estimated that numbers employed by the main Belgian public undertakings were about 170 000 in 1968, rather less than 5% of all persons in paid employment. The figure was much the same in the two preceding years.

Turnover and value added

The total turnover of the main Belgian public undertakings rose from nearly Bfrs. 64 000 million in 1966 to Bfrs. 71 900 million in 1967 and Bfrs. 78 900 million in 1968. The lack of statistics makes it difficult to assess accurately the scale of the public sector in terms of turnover; it is safe to assume, however, that it accounts for about 5% of the total national turnover.

Gross value added in 1956 was 5.65% of Gross National Product (without farming), and the percentage rose to 5.70% in 1967 and to 5.83% in 1968 (this information includes local public undertakings; see CEEP, p. 59).

¹ For a complete list, see CEEP, page 87.

Investments

The gross fixed asset formation of Belgian public undertakings was Bfrs. 30 000 million in 1968 (as against Bfrs. 28 000 million in 1967 and Bfrs. 24 000 million in 1966), 13.15% of the total (as against 12.5% of the total in 1967, and 11.3% in 1966).

Financing

Available documentation yields no useful information on this subject.

Individual industries

143. The public undertakings are major operators in the traditional industries of transport and communications. The following figures (for 1968) may be quoted: 55% of the persons employed in the industries concerned, 48.2% of value added and 75% of investment.

The share of Belgian public undertakings is also large in electric power, gas and water industries: 56.3% of persons employed, 47.4 % of value added and 49.3% of investments. The credit, insurance, and real estate industries also merit mention: 12.8% of persons employed and 10.3% of value added.

NETHERLANDS

Definition of a public undertaking and sources

144. See sec. 141.

General description

Numbers employed

145. There is a tendency towards a decline, which can be put at over 5% (information available is not complete) in the numbers employed by public undertakings as a proportion of the labour force. Numbers employed fell from 164 000 in 1966 to about 154 000 in 1968.

Turnover and value added

The turnover of Netherlands public undertakings rose from nearly Fl. 5 900 million in 1966 to nearly Fl. 8 400 million in 1968. Available information is not sufficient to provide reliable guidance on value added.

Investment

Gross fixed asset formation by Netherlands public undertakings (excluding the financial sector) was more than Fl. 2 000 million in 1968, a figure which was 8.3% of the total for all undertakings (other than financial undertakings and farming).

Financing

See comment under sec. 142.

Individual industries

146. In the Netherlands, the share of public undertakings in transport and communications is very large, as it is in gas, electric power and water (which are wholly publicly owned through local undertakings).

In a number of industries—particularly transport, communications and the financial sector—with heavy state participation, the data available are not sufficient for an assessment of scale in relationship with that of the private sector.

LUXEMBOURG

Definition of a public undertaking and sources

147. See sec. 141.

General description

Numbers employed

148. About 5 700 persons are employed by Luxembourg public undertakings out of a total number of persons in paid employment of 122 000. The proportion is less than 5%.

Turnover and value added

Between 1966 and 1968, the turnover of Luxembourg public undertakings rose from Lfrs. 2 340 million to Lfrs. 2 600 million, an increase of a little less than 12%. No information is available on the value added.

Investments

Gross fixed asset formation of the six Luxembourg public undertakings was about Lfrs. 490 millions in 1968 (5.5% of the national total), as against about Lfrs. 385 million in 1967 (4.3% of the total).

Financing

See comment under sec. 142.

Individual industries

149. No information is available to provide useful guidance on this subject.

CHAPTER III

THE ADJUSTMENT OF NATIONAL COMMERCIAL MONOPOLIES

150. In 1972, the Commission continued its examination of progress being made in the adjustment of national commercial monopolies. It ascertained that, in several cases, measures of discrimination which it had previously noted¹ had not been terminated. It therefore instituted the proceedings for infringement of the EEC Treaty provided for in Article 169 against the French alcohol, basic slag and matches monopolies, and the Italian matches monopoly. As part of the procedure the two Governments have submitted comments. With regard to the alcohol monopoly, the French Government has stated that adjustments to the present arrangements have been prepared and should enter into force early in 1973. An assurance has been given that these measures will terminate the discriminatory effects noted by the Commission, caused by the discrepancy between the surcharge on the imports of certain foreign spirituous beverages and the due chargeable on like national products. The proceedings for infringement have therefore not been continued.

The adoption of measures allowing the free import and marketing in France of basic slag from the other Member States, and export to these States, is also planned. The Commission has drawn the attention of the French Government to the fact that, in view of the direct applicability of Article 37, the monopoly arrangement cannot be allowed to hamper free import and marketing or export, even if the amendments to the laws or regulations complained of have not yet been implemented. The procedure is following its normal course.

A law of 4 December 1972² terminated the import monopoly for matches from other Member States, and this enabled the Commission to close the procedure against France.

The Italian Government has answered the Commission's arguments concerning the match monopoly with legal objections based mainly on the derogation provided for in Article 90(2) of the EEC Treaty for monopolies of a revenue-producing character. It has also emphasized the serious difficulties which many small- and medium-sized Italian match firms, often located in backward areas, would have if the Italian match market were opened.

¹ *First Report on Competition Policy*, secs. 195 to 202.

² *Journal Officiel de la République Française*, 5 December 1972.

The Commission has taken the view that the Italian Government's objections did not preclude an adjustment of the monopoly in accordance with Article 37. The procedure for infringement initiated against Italy therefore continues.

151. The procedure provided for in Article 169 has also been initiated by the Commission against the French *manufactured tobacco* monopoly. The Commission has ascertained the SEITA (Service d'Exploitation Industrielle des Tabacs et Allumettes) is still applying measures restraining the introduction and distribution in France of foreign blends of manufactured tobacco, although the Commission had already designated these measures as being discriminatory. New arrangements were also made by the French Government and the SEITA in June and July 1972. They include the charging of a standard amount for distribution expenses and a change in the manufactured tobacco price scales. The Commission has taken the view that these arrangements have special disadvantages for foreign manufacturers and are therefore discriminatory. The SEITA has agreed to adjust some of the measures challenged so that the infringement can be discontinued.

The Italian *manufactured tobacco* monopoly has been examined once again by the Commission, which has asked the Italian Government to provide supplementary information. The Italian reply is now being studied by the Commission.

152. The situation with regard to the other monopolies can be summarized as follows.

The French Government has notified the Commission that measures are in preparation to enable the *potash* monopoly to be brought fully into line with the Treaty. The French Government commitment no longer concerns only the scheme for *compound fertilizers* containing potash,¹ but now also covers pure potash, or potassium salts.

The Commission has been regularly examining the situation of the French petroleum products arrangements in the light of the requirements of Article 37 of the EEC Treaty taken in conjunction with other Treaty clauses.²

The termination of the Italian *salt* and *cigarette paper* monopolies, due under the fiscal reform in progress in Italy, has been put off³ because of the postponement of the introduction of VAT and should therefore take place

¹ *First Report on Competition Policy*, sec. 201.

² See written question No. 135/71 from Mr Westerterp to the Commission concerning the French compulsory petrol sales cartel, and Commission reply; *OJ*, No. 53, 27 May 1972, p. 2 *et seq.*

³ *First Report on Competition Policy*, sec. 201.

in 1973. The Commission has noted the connection made by the Italian Government between the fiscal aspect of the problem and the adjustment of the monopoly, but has stressed that, pending adaptation of the measures planned, no obstacle should now be placed in the way of imports and marketing of the products in question.

The flints monopoly ended on 21 April 1972, under a rule contained in the decree concerning abolition of the *cigarette lighters* monopoly, which entered into force in 1971.¹

¹ *First Report on Competition Policy*, sec. 201.

Part three

The development of concentration within the Community

**1. Trends in international interpenetration
and concentration movements in the Community up to 1971**

*Comparison of international operations in the EEC in 1971
with the trend from 1966 to 1970*

153. The information on international operations in the EEC in 1971 has been obtained, as in the First report, by a systematic scrutiny of international acquisitions of holdings and creations of subsidiary reports in the specialized press.¹ Information on merger movements within the various member countries, and the quantitative data enabling the economic implications of the various operations to be assessed, are therefore not available. However, since no change has been made to the methods used for previous surveys, the patterns presented should reflect the actual situation fairly accurately.

154. Table 1 shows international operations in the Community both as a whole and broken down by types of operation, for 1966, 1970 and 1971. Between 1970 and 1971, there was again an increase in international operations in the EEC. Compared with the growth rate, as an annual average, for the period from 1966 to 1971, the number of operations carried out between 1970 and 1971, of whatever form, increased to a greater extent. For 1971 as compared with 1970, the number of purchases of holdings increased by 12.5% (against 8.3% on average for the 1966-71 period), the number of new joint subsidiaries by 10.7% (against 5.2% on average), the number of new non-joint subsidiaries by 17.4% (against 12.6%), and the number of operations as a whole by 15.3% (against 10.0%).

155. In respect of types of operation, the tendency noted from 1966 to 1970 for unilateral operations to increase has continued, i.e., the increase in the number of non-joint subsidiaries. The index rose from 100 in 1966 to 154 in 1970, to reach 180 in 1971. Again in 1971, the increase in the number of new holdings was heavier (as compared with the basic year 1966, index 1971 = 145) and for the establishment of joint subsidiaries (as compared with the basic year 1966, index 1971 = 121). Bilateral operations increased by 9% from 1970 to 1971, and multinational operations increased by as much as 27.1%. Now, in comparison with the basic year 1966, the 1971 index for the multinational

¹ *First Report on Competition Policy*, secs. 217 to 242.

TABLE 1
International operations in the EEC in 1966, 1970 and 1971

Year	Operations broken down by type						Total operations		Operations broken down by number of participants		
	New participations		New joint subsidiaries		New non-joint subsidiaries						
	Number of operations	Number of participations	Number of operations	Number of participations	Number of operations	Number of participations	Number of operations	Number of participations	Unilateral operations	Bilateral operations	Multi-lateral operations
1966	254	535	315	959	781	781	1 350	2 275	781	461	108
1970	327	642	345	977	1 199	1 199	1 871	2 818	1 199	576	96
1971	368	741	382	954	1 408	1 408	2 158	3 103	1 408	628	122

type of operation is only 113 whereas for the bilateral type it reaches 136. However, it would seem that this is in fact an adaptation process rather than a reversal of trend. This presumption is supported by the fact that, as before, the number of participants in international operations is declining. In 1966, on average, 1.69 firms were still participating in an international operation in the EEC (2.11 in a holding, 3.04 in the establishment of a joint subsidiary), whereas in 1971 this was the case with only 1.44 firms (2.01 in a holding, 2.50 in the establishment of a joint subsidiary).

156. The growing desire to establish non-joint subsidiaries is reflected in the pattern which has, on the whole, shown little change, in international operations broken down by type. If they are classified according to shares in the total of operations, the establishment of non-joint subsidiaries or unilateral operations retained the lead in 1971 with a figure of 65% (as against 58% in 1966 and 64% in 1970). They are followed by new-joint subsidiaries with 18% (23% in 1966 and 18% also in 1970), and new holdings with 17% (19% in 1966 and 18% in 1970). The share of bilateral operations fell from 34% in 1966 to 31% in 1970 and 29% in 1971. Multinational operations, after declining from 8% in 1966 to 5% in 1970, staged a modest recovery, to reach a figure of 6%.

Breakdown of international operations in the EEC by regions

157. The breakdown of international operations in the EEC into operations between firms from the Member countries and operations in which firms from non-member countries participate (see Table 2) confirms for 1971 the tendency, discerned for 1966-70, for firms from the member countries to increase operations. It is true that the share of firms from non-member countries in all the international operations in the EEC remained in 1971, higher at 59%, than the share of the member countries. But, while in 1966 it was still 1.9 times the figure for EEC internal operations, it fell to 1.7 times this figure in 1970, and to only 1.5 times in 1971.

In comparison with the base year (1966 = 100), the index for international operations solely between member countries rose to 187 in 1971, while the index for international operations involving firms from non-member countries reached only 146. The increase in international activity between member country firms is noted for all forms of operation.

158. Out of the total of involvements in international operations in the EEC, member country firms also took the largest share in 1971 (55%). But the number of participants fell—from 58% in 1966 to 56% in 1970. It is true that the growth

TABLE 2

Regional breakdown of international operations and of the forms of operation in the EEC countries and in non-member countries, 1966, 1970 and 1971

Year	Number of operations								Number of participations in the operations							
	New holdings		Setting up of joint subsidiaries		Setting up of non-joint subsidiaries		Total		New holdings		Setting up of joint subsidiaries		Setting up of non-joint subsidiaries		Total	
	EEC	NMC	EEC	NMC	EEC	NMC	EEC	NMC	EEC	NMC	EEC	NMC	EEC	NMC	EEC	NMC
1966	33	67	34	66	35	65	35	65	67	33	72	28	35	65	58	42
1970	35	65	34	66	39	61	38	62	67	33	69	31	39	61	56	44
1971	39	61	35	65	42	58	41	59	70	30	62	38	42	58	55	45

NB. As a percentage of each form of operation; EEC = operations solely between member country firms
NMC = operations in which non-member country firms are involved.

rates for the number of new non-joint subsidiaries (base index 1966 = 100, 1971 = 215, against 161 for firms from non-member countries) and for new holdings (base index 1966 = 100, in 1971 = 145, comparing with 125 for non-member country firms) are higher than for the firms from non-member countries.

159. In the regional breakdown of international operations by type of operation in the various member countries, the leading place is taken for the three years by new non-joint subsidiaries. In the three "large" partner countries, and for the first time in 1971 for the Netherlands as well, new holdings were more numerous than the establishment of joint subsidiaries, while in Belgium and in Luxembourg new joint subsidiaries are more common than new holdings.

160. Although the basic statistics are not completely reliable guide—it is probable that the sample covers international operations unevenly from region

TABLE 3

Regional distribution of international operations in the EEC 1966, 1970 and 1971

Year	Regional distribution (%)						
	FRG	F	I	N	B	L	EEC
1966	22	19	13	16	24	6	100
1970	24	22	12	13	22	7	100
1971	22	24	11	12	24	7	100

to region—it is clear that international operations are tending to increase in number in France (see Table 3). Compared with the other Member States, France was third in 1966, second in 1970 and first in 1971, in respect of frequency of international operations. In 1966, Germany occupied the second place, in 1970 the first, and in 1971 the third. Belgium, which had been top of the table in 1966, was third in 1970, but rose again to second place in 1971. During these three years, the Netherlands was fourth, Italy fifth and Luxembourg sixth. The 1966 = 100 index rose by 1971 to 201 for France, 179 for Luxembourg, 161 for Belgium, 159 for Germany, 136 for Italy, and 122 for the Netherlands.

161. If an attempt is made to eliminate the impact on the figures of the differences in size of the countries by weighting the number of operations by the ratio between the share of the various member countries against the total number of firms, the result confirms an increased frequency of international operations in France. In this corrected "league table", France was still fifth in 1966 but second in 1971. Chronologically, Belgium retains the leadership and Italy still brings up the rear. Germany falls from fourth to fifth place, the Netherlands from third to fourth, and Luxembourg from second to third.

162. The data available concerning the nationality of those involved in international operations of the EEC throw light on the respective shares taken by firms from various non-member countries (see Table 4). In the three reference years, American firms were the outsiders most frequently involved in international operations in the EEC.

TABLE 4
Shares of the various non-member countries in the number of involvements
in international operations in the EEC in 1966, 1970 and 1971

(%)

Year	EEC	US	UK	Switzerland	OC (a)	SC (b)	Japan	Total
1966	58	21	9	5	4	3	—	100
1970	56	18	10	7	5	3	1	100
1971	55	17	10	7	5	4	2	100

(a) OC = Other countries.

(b) SC = Scandinavian countries.

Next in line were United Kingdom firms, Swiss firms, firms of other non-member countries, firms of Scandinavian countries, and, in 1970 and 1971, Japanese firms. From 1966 to 1971, American influence declined appreciably. On the other hand, the shares of the other non-member countries grew. From 1970

to 1971, Japanese firms stepped up their operations in Europe by 100%. As compared with 1966, involvements in international operations in the EEC were twice as frequent for Scandinavian firms, 1.9 times as frequent for Swiss firms, 1.7 times as frequent for firms from other non-member countries, 1.5 times as frequent for British firms, but only 1.1 times as frequent for American firms.

International operations in the EEC: breakdown by industry

163. The metal-using industry accounted for the largest share in international operations in the EEC in the three reference years (see Table 5). Services came second in each year, and fuel and power last. Chemicals and other manufacturing industries were in the top half of the table, textiles and food-processing in the lower half.

TABLE 5
International operations within the EEC in 1966, 1970 and 1971: breakdown by industry (%)

Year	Metal-using industries	Fuel and Power	Chemicals	Textiles	Other manufacturing industries	Food processing	Services	Total
1966	43	3	15	6	12	3	18	100
1970	36	1	11	6	13	7	26	100
1971	39	1	11	5	14	5	25	100

The highest growth rates in time for international operations were recorded in the food-processing industry (236 in 1971 over the base index of 100 for 1966) and services (1971 = 217). In the industries in which international operations expanded sharply the other manufacturing industries are also included (1971 = 188) and to a lesser extent also the metal-using industries (1971 = 147). Developments tended to mark time in chemicals (1971 = 107) and there was a decline in the fuel and power sector (1971 = 70).

164. Even after the number of international operations has been weighted by the number of firms in the industry—excluding services, however—the metal-using industries still take first place in 1966 and 1971 for international operations in the EEC, chemicals coming second on each occasion. Textiles are still fifth ahead of food processing. The other manufacturing industries improve their position (they were fourth in 1966, and third in 1971), but fuel and power shows a decline (third in 1966, fourth in 1971).

Summary of results

165. An analysis of the international operations in the EEC in 1971 shows that the patterns and trends recorded from 1966 to 1970 in fact gathered strength. In particular, there was:

- (i) A sharp increase in activity in respect of international operations;
- (ii) Further progress in financial interpenetration between the countries (new holdings, setting-up of joint subsidiaries);
- (iii) A more and more active involvement of firms from the member countries in international operations in comparison with that of firms from non-member countries;
- (iv) A definite increase in international operations in France, the country which had previously been less concerned in international activity;
- (v) An increase in international operations in the services sector.

2. Concentration trends in certain Community industries from 1962 to 1969

166. The table below showing concentration trends in certain Community industries is based on a preliminary examination of the studies carried out under a Commission research programme¹ on concentration.²

Methods used

167. The presentation includes only the industries in respect of which final reports from at least two member countries are available. This means, on each occasion, three branches of the textiles industry and of the chemicals industry, two branches of the paper and paper goods industry and a subsector of the transport equipment construction industry. Table 6 shows their specific designation and the national breakdown. The studies were carried out by the following research institutes and experts:

- (i) Federal Republic of Germany: Kienbaum Unternehmensberatung, Gummersbach;
- (ii) France: GREFI of the University of Rennes, Prof. Gilles Y. Bertin;
- (iii) Italy: FIS—Divisione ATOR Consulenza Aziendale, Milan (transport equipment construction and chemicals); SORIS Studi economici Ricerche di mercato, Turin (Textiles, paper and paper goods industry);

¹ *First Report on Competition Policy*, secs. 204 to 216.

² The Commission will publish the complete reports separately.

- (iv) Netherlands: Stichting voor Economisch Onderzoek der Universiteit van Amsterdam, Prof. H. W. de Jong, A. H. Smolders;
- (v) Belgium: STUDIA VZWD Brussels

TABLE 6
Studies processed for the concentration analysis

Industries (NICE nomenclature)	G	F	I	N	B
23 Manufacture of textiles					
232 Manufacture and processing of textile materials on wool machinery	×	×	×		×
233 Manufacture and processing of textile materials on cotton machinery	×	×	×		×
237 Manufacture of knitted and crocheted goods	×	×	×		×
38 Manufacture of transport equipment					
385.1 Manufacture of motorcycles, cycles and power-assisted cycles	× ¹	×	×	×	
27 Paper industry and manufacture of paper products					
271 Manufacture of pulp, paper and paperboard	×	×	×		
272 Processing of paper and paperboard, etc.	×	×	×		
31 Chemical industry					
313.1 Specialized manufacture of pharmaceutical products in bulk or put up in wrapping			×	×	×
313.2 Manufacture of photographic products			×	×	×
313.5 Manufacture of cleaning and maintenance products (waxes, polishes, metal polishes, etc.)			×	×	×

¹ In Germany, the industry was subdivided into cycles on the one hand and motorcycles and power-assisted cycles on the other.

168. This report cannot include details of the peculiar features and individual trends in each industry in the various countries and data for all the economic aspects studied. For one thing, the usual practical difficulties arose in making comparisons between one country and another and between one industry and another which prevented certain variables from being compared at European level.

Secondly, the data chosen on the number of firms, numbers employed and turnover supply an adequate basis for a description of the state and trend of concentration. The number of variables included, is, however, widened for analysis of the processes, in order to provide examples (see sec. 185).

TABLE 7

The number of firms and their development in certain industries
and certain Community countries and industries in 1962, 1966 and 1969

23 Manufacture of textiles

Industries (NICE nomenclature)	Year	G		F		I		B	
		absolute	1962 = 100	absolute	1962 = 100	absolute	1962 = 100	absolute	1962 = 100
232 Wool	1962	441	100	1 008	100	1 470	100	162	100
	1966	333	76	886	88	1 551	106	156	96
	1969	292	66	750	75	1 620	110	144	89
233 Cotton	1962	474	100	1 048	100	644	100	345	100
	1966	435	92	920	88	592	92	310	99
	1969	380	80	522	50	560	87	264	77
237 Knitted and crocheted goods	1962	1 388	100	1 240	100	1 180	100	420	100
	1966	1 168	84	976	79	1 301	110	427	102
	1969	1 100	79	888	72	1 664	141	400	95

38 Manufacture of transport equipment

Industries	Year	G		F		I		N	
		absolute	1962 = 100	absolute	1962 = 100	absolute	1962 = 100	absolute	1962 = 100
385.1 Cycles	1962	47	100	380	100	72	100	19	100
	1966	39	83	270	71	75	104	17	89
	1969	31	66	251	66	77	107	15	79
Motorcycles Power-assisted cycles	1962	7	100						
	1966	5	71						
	1969	5	71						

27 Paper industry and manufacture of paper products

Industries	Year	G		F		I			
		absolute	1962 = 100	absolute	1962 = 100	absolute	1962 = 100	absolute	1962 = 100
271 Manufacture of pulp, paper and paperboard	1962	253	100	280	100	598	100		
	1966	226	89	247	88	559	94		
	1969	191	76	203	73	532	89		
272 Processing of paper and paperboard, etc.	1962	1 346	100	1 470	100	700	100		
	1966	1 183	87	1 288	88	700	100		
	1969	1 120	82	1 350	92	700	100		

(Table continues on p. 150)

Industries	Year	I		N		B	
313.1 Pharmaceutical products	1962	653	100	26	100	87	100
	1966	638	98	27	104	78	90
	1969	539	83	25	96	75	86
313.2 Photographic products	1962	2	100	3	100	1	100
	1966	2	100	3	100	1	100
	1969	2	100	3	100	1	100
313.5 Cleaning and maintenance products	1962	—	—	2	100	16	100
	1966	—	—	2	100	16	100
	1969	—	—	2	100	16	100

— : no data available.

169. A careful selection must be made among the concentration indices calculated. Quite apart from the qualitative factors involved in any concentration process, there is no index which takes sufficient account of all the quantitatively ascertainable data, and consequently any more detailed empirical analysis of concentration always requires the calculation of differing concentration indices. Three have been used in the presentation of this summary:

- (a) The Herfindahl-Hirschman indices for the general description of the degree of concentration of an industry;
- (b) Concentration rates to determine the percentages which the four or eight largest firms account for in employment and in the turnover of the industries;
- (c) The Linda indices weighted in relation to the number of the largest firms in an industry with a view to determining the deviations from size equilibrium among these firms.

Changes in the number of firms

170. The number and size of firms are relevant to the degree of economic concentration of an industry. A decline in the number of firms and/or faster growth by the big firms than by the small firms will entail growing concentration.

171. Table 7 shows the number of firms for the industries chosen, for 1962 (Netherlands 1963), 1966 and 1969 and changes over the period (1962=100). Of the 31 cases, six maintained the same number of firms throughout the three reference years, four had already had so small a number of firms that

a further decline was unlikely, given the very high degree of concentration (photographic products industry in Belgium with one firm, in Italy with two, in the Netherlands with three, and cleaning and maintenance products industry in the Netherlands with two firms). The other two cases are based on estimates (paper industry and manufacture of paper products in Italy and cleaning and maintenance products in Belgium). Of the 31 cases studied only three showed a steady increase in the number of firms from 1962 to 1969 (knitted and crocheted goods, wool and motorcycles, cycles and power-assisted cycles in Italy). In 19 cases there is a steady decline in the number of units, and in three cases the decline appears only in the years 1962 and 1969.

172. Apart from differences of structure from industry to industry among those chosen in the various countries, the general table illustrating changes in the numbers of firms reflects a generally growing process of concentration in the Community from 1962 to 1969.

173. The absolute figures on the number of firms in Table 7 cannot easily be compared country by country and industry by industry, because they are based on differing demarcation criteria. They concern:

- (i) In Germany, firms employing 10 persons and more for textiles and paper, and firms employing 50 persons and more for transport equipment manufacture;
- (ii) In France, all firms in all cases;
- (iii) In Italy, all firms except those manufacturing knitted and crocheted goods and the estimates for the paper and paper products industry (10 persons employed and more). The data concerning the number of firms in the Italian cleaning and maintenance products industry could not be obtained;
- (iv) In Belgium, all firms in all industries, the figures for the cleaning and maintenance products industry being estimates;
- (v) In the Netherlands, in all cases firms employing 50 persons and more.

In accordance with the definition established by the Statistical Office of the European Communities (SOEC), a firm is defined as "the smallest legally independent unit ... having a separate balance sheet".¹ The firms manufacturing more than one product are assigned to the industry corresponding to their main product or products.

¹ Statistical Office of the European Communities, *General Nomenclature of economic activities in the European Communities—NACE 1970*, Luxembourg 1970.

Changes in the degree of concentration

174. Since the degree of concentration of an industry depends not only on the number of firms but also on their differences of size, concentration yardsticks covering both factors must be used. The Herfindahl-Hirschman index allows of this "overall" measurement. The greater the number of firms in an industry and the smaller the difference of size between the firms, the lower the degree of concentration as measured by the Herfindahl-Hirschman index. The highest figure the index can reach is 1 000 (monopoly).

175. For the industries selected, Table 8 gives the Herfindahl-Hirschman indices calculated on the basis of numbers employed and turnover. The number of firms in the various industries and countries has not been recorded in a uniform way. Moreover, the differences of size of the member countries affect the number of firms operating there. Industry by industry and country by country comparisons of the degree of concentration based on Herfindahl-Hirschman indices given in the table would therefore reflect not only the genuine facts concerning concentration but also discrepancies in the way the data had been recorded and in the sizes of the countries. Nonetheless, reliable conclusions can be arrived at concerning concentration trends within the industries.

176. Among the industries on which adequate information is available in the various countries (31 cases) and in which the number of competitors is not already very low (motorcycles, cycles and power-assisted cycles in Germany, photographic products in Italy, the Netherlands and Belgium, cleaning and maintenance products in the Netherlands), only four—all of them in Italy—show a decline in concentration as calculated on the basis of numbers employed and turnover (wool, knitted and crocheted goods, cycle industry, paper industry and manufacture of paper products). Despite the differences from country to country and from industry to industry, an empirical examination of the sample does therefore reveal a definite tendency for concentration to increase in the Community over the period 1962 to 1969. Indeed, a comparison of growth rates in the two periods 1962 to 1966 and 1966 to 1969 shows clearly that concentration growth is gathering momentum.

177. Study of the trend of concentration in terms of numbers employed and turnover during the reference period shows that only in the paper and paper products manufacturing industry in Italy was there a discrepancy between the chronological rates of these two variables. Concentration calculated on the basis of numbers employed fell slightly, while concentration calculated on the basis of turnover showed an increase.

TABLE 8
Concentration in the Community industries and countries in 1962,
1966 and 1969 (Herfindahl-Hirschman indices)

23 Manufacture of textiles

Industries (NICE nomenclature)	Year	G		F		I		B	
		Numbers employed	Turnover	Numbers employed	Turnover	Numbers employed	Turnover	Numbers employed	Turnover
232 Wool	1962	—	9	18	—	21	19	27	35
	1966	12	10	17	—	15	17	38	44
	1969	15	14	19	—	12	14	40	47
233 Cotton	1962	—	14	7	—	8	9	15	14
	1966	13	15	6	—	9	10	25	18
	1969	22	20	8	—	12	13	45	56
237 Knitted and crocheted goods	1962	—	8	4	—	4	7	5	6
	1966	10	11	6	—	3	5	6	7
	1969	12	16	6	—	3	4	8	10

38 Manufacture of transport equipment

Industries	Year	G		F		I		N							
385.1 Cycles	1962	64	69	} 115	—	} 316	276	} 91	101						
	1966	91	87							} 121	—	} 232	216	} 121	151
	1969	149	120							} 132	—	} 257	245	} 157	163
Motorcycles Power-assisted cycles	1962	341	316	}	—	}		}							
	1966	306	275												
	1969	309	297												

27 Paper industry and manufacture of paper products

Industries	Year	G		F		N			
271 Manufacture of pulp, paper and paperboard	1962	26	45	14	—	21	24		
	1966	23	53	14	—	23	25		
	1969	32	68	16	—	20	25		
272 Processing of paper and paperboard, etc.	1962	14	22	2	—	4	8		
	1966	14	24	3	—	3	6		
	1969	17	29	4	—	3	5		

(Table continues on p. 154)

Industries	Year	I		N		B	
313.1	1962	24	25	152	108	46	46
Pharmaceutical products	1966	21	24	138	115	102	103
	1969	27	35	173	142	83	83
313.2	1962	..	..	581	431	..	..
Photographic products	1966	..	..	615	534	..	..
	1969	..	..	644	635	..	..
313.5	1962	—	—	..	..	—	81
Cleaning and maintenance products	1966	—	—	..	..	135	134
	1969	—	—	..	..	209	164

—: No data available

..: Impossible to calculate for logical reasons

Where, in a given industry, concentration calculated on the basis of turnover exceeds concentration calculated on the basis of numbers employed, it is clear that the larger firms are achieving a greater turnover per person employed than the smaller ones. A problem to be studied as the programme goes forward is whether rationalization and automation are the factors generally enabling big firms to substitute capital for labour more extensively than small firms. In the 22 comparable cases, there are 12 cases of fuller concentration related to turnover in 1962, 1966 and 1969 (wool in Belgium, cotton in Italy, knitted and crocheted goods in Germany, Italy and Belgium, cycles in the Netherlands, paper manufacture and processing in Germany and Italy, pharmaceutical products in Italy and Belgium). In 5 cases, concentration on the basis of numbers employed is stronger than concentration on the basis of turnover (wool in Germany, cycles in Italy, motorcycles and power-assisted cycles in Germany, pharmaceutical and photographic products in the Netherlands). In the 5 remaining industries, concentration measured by numbers employed and concentration measured by turnover involve changes of position in the statistical comparison.

Industry to industry and country to country differences in the degree of concentration in 1969

178. The rates of concentration supply information at a particular point in time and place on the degree and status of concentration. For the industries studied, they show the percentages of persons employed and of turnover in the four or eight largest firms (Table 9). Though quite clear, the indices allow of only an approximate description of the actual status of concentration, since they reflect neither the number nor the breakdown by size of the remaining

TABLE 9

Share of employment and turnover accounted for by the four or eight largest firms in certain Community industries and countries in 1962, 1966 and 1969 (rate of concentration)

23 Manufacture of textiles

Industries (NICE nomenclature)	Year	G				F				I				B			
		Numbers employed		Turnover		Numbers employed		Turnover		Numbers employed		Turnover		Numbers employed		Turnover	
		4	8	4	8	4	8	4	8	4	8	4	8	4	8	4	8
232 Wool	1962	—	—	—	—	20	29	—	—	23	28	22	28	26	39	30	44
	1966	15	25	13	22	21	29	—	—	19	24	21	26	31	47	33	49
	1969	18	29	15	25	20	29	—	—	17	22	18	24	32	48	34	51
233 Cotton	1962	—	—	—	—	13	19	—	—	11	18	13	21	19	26	18	25
	1966	17	28	19	32	14	20	—	—	11	19	13	20	25	33	21	29
	1969	23	37	17	30	15	22	—	—	14	23	15	25	28	35	32	39
237 Knitted and crocheted goods	1962	—	—	—	—	11	19	—	—	4	6	7	10	9	14	10	15
	1966	16	24	21	31	13	19	—	—	3	5	6	9	9	15	10	16
	1969	17	27	20	31	14	22	—	—	3	6	6	9	11	19	13	22

38 Manufacture and transport equipment

Industries	Year	G				F				I				N			
		4	8	4	8	4	8	4	8	4	8	4	8	4	8	4	8
385.1 Cycles	1962	46	55	45	54	62	75	—	—	72	82	70	82	51	—	58	—
	1966	55	69	54	67	63	76	—	—	65	77	63	77	61	—	75	—
	1969	66	77	63	78	63	75	—	—	66	77	65	79	71	—	78	—
Motorcycles Power- assisted cycles	1962	94	..	99	..												
	1966	99	..	99	..												
	1969	98	..	98	..												

27 Paper industry and manufacture of paper products

Industries	Year	G				F				N							
		4	8	4	8	4	8	4	8	4	8	4	8				
271 Manufacture of pulp, paper and paperboard	1962	23	37	30	43	20	30	—	—	20	29	25	35				
	1966	23	34	34	47	19	29	—	—	22	32	24	36				
	1969	26	37	40	54	20	31	—	—	22	32	23	37				
272 Processing of paper and paperboard, etc.	1962	18	21	20	26	7	13	—	—	6	10	12	19				
	1966	18	22	24	29	6	11	—	—	5	8	9	16				
	1969	20	25	28	34	8	14	—	—	5	8	8	15				

(Table continues on p. 156.)

Industries	Year	I				N				B			
313.1 Pharmaceutical products	1962	24	31	26	36	73	87	57	76	34	52	34	52
	1966	22	30	25	34	69	83	59	81	47	65	47	65
	1969	28	37	32	43	74	—	72	—	43	64	43	64
			1		1			1			1		1
313.2 ¹ Photographic products	1962	98	..	97	..	74	..	59	..	100	..	100	..
	1966	98	..	98	..	77	..	70	..	100	..	100	..
	1969	98	..	98	..	79	..	78	..	100	..	100	..
315.5 Cleaning and maintenance products	1962	—	—	—	—	..	..	..	..	45	52	45	64
	1966	—	—	—	—	..	..	..	..	66	84	66	83
	1969	—	—	—	—	..	..	..	..	84	98	74	89

¹ Share of the largest firm in each case.

— : no data available. .. Impossible to calculate for logical reasons.

units of the industry concerned. Nevertheless, the rates of concentration calculated fully confirm the table showing the trend from 1962 to 1969 and the relationship between concentration measured by numbers employed and concentration measured by turnover.

179. It is in fact because of their methodological shortcomings that the concentration rates do not raise to the same extent as the Herfindahl-Hirschman indices the difficulties referred to in connection with the collecting of data in the various industries and in the various countries. On the basis of the example of the percentages of persons employed in the four largest firms, the industry to industry and country to country differences in the degree of concentration should therefore be studied in somewhat fuller detail.

180. An analysis of the degree of concentration of the industries shows that processing of paper and paper board, and knitted and crocheted goods, are the least concentrated. These are followed by wool and cotton. Manufacture of pulp, paper and paperboard is in the middle, well below the pharmaceutical industry, which is already very concentrated. Cycles are on the lowest rung of the highly concentrated group. The leaders in this group are cleaning and maintenance products and photographic products.

181. In the country to country comparison, the Netherlands and Belgium have the highest degrees of concentration in the industries studied. Germany comes third. France is well behind and Italy, also well behind, is at the very bottom of the international scale of concentration in the Community.

TABLE 10

Disparities between the largest firms in the Community industries and countries
in 1962, 1966 and 1969 (weighted Linda indices)

23 Manufacture of textiles

Industries (NICE nomenclature)	Year	G		F		I		B	
		Numbers employed	Turnover	Numbers employed	Turnover	Numbers employed	Turnover	Numbers employed	Turnover
232 Wool	1962	0.11	0.18	0.23	—	0.37	0.32	0.23	0.25
	1966	0.17	0.14	0.21	—	0.34	0.32	0.23	0.25
	1969	0.28	0.28	0.21	0.30	0.31	0.29	0.24	0.25
233 Cotton	1962	—	—	0.14	—	0.14	0.13	0.32	0.33
	1966	—	0.15	0.14	—	0.12	0.13	0.36	0.36
	1969	0.27	0.24	0.14	—	0.14	0.16	0.61	0.72
237 Knitted and crocheted goods	1962	—	0.33	0.11	—	0.26	0.27	0.22	0.23
	1966	—	0.20	0.14	—	0.21	0.22	0.22	0.22
	1969	—	0.33	0.45	—	0.19	0.20	0.20	0.20

38 Manufacture of transport equipment

Industries	Year	G		F		I		N							
385.1 Cycles	1962	0.36	0.40	0.38	—	1.28	1.27	0.52	0.50						
	1966	0.42	0.41							0.39	—	1.05	1.01	0.49	0.39
	1969	0.65	0.51							0.42	—	1.28	1.20	0.63	0.50
Motorcycles Power-assisted cycles	1962	1.19	0.60	0.38	—	1.28	1.27	0.52	0.50						
	1966	0.72	0.53							0.39	—	1.05	1.01	0.49	0.39
	1969	0.56	0.50							0.42	—	1.28	1.20	0.63	0.50

27 Paper industry and manufacture of paper products

Industries	Year	G		F		I		N	
271 Manufacture of pulp, paper and paperboard	1962	0.24	0.34	0.54	0.38	0.34	0.28		
	1966	0.26	0.33	0.51	0.36	0.27	0.23		
	1969	0.31	0.34	0.42	0.36	0.24	0.21		
272 Processing of paper and paperboard, etc.	1962	0.44	0.44	0.10	—	0.34	0.26		
	1966	0.41	0.42	0.09	—	0.20	0.25		
	1969	0.39	0.38	0.10	—	0.17	0.20		

(Table continues on p. 158.)

Industries	Year	I		N		B	
313.1	1962	0.24	0.21	0.48	0.54	0.20	0.20
Pharmaceutical products	1966	0.21	0.20	0.46	0.51	0.42	0.42
	1969	0.21	0.20	0.63	0.45	0.36	0.36
313.2	1962	..	..	1.85	1.08	..	..
Photographic products	1966	..	..	2.50	1.12	..	..
	1969	..	..	3.03	2.52	..	..
313.5	1962	—	—	..	..	0.56	0.52
Cleaning and maintenance products	1966	—	—	..	..	0.51	0.51
	1969	—	—	..	..	0.46	0.45

— : no data available. ..Impossible to calculate for logical reasons.

Disparities between the largest firms and the trends

182. For a rather fuller analysis of concentration in the industries chosen, it will suffice to consider the difference of size between the largest firms in each industry. For this purpose, the weighted Linda indices are used as gauges (see Table 10).

Just as for the Herfindahl-Hirschman index, the level of this index is determined by the differences of size and number among the firms included in the calculation. There is no upward limit; the downward limit is $1:n$ (where n is only the number of the largest firms in an industry). The number is not fixed arbitrarily in advance. It is derived, for each industry, from the structure of the sizes noted and is taken at the point on the distribution curve from which disparities between the firms become smaller. Up to this point, the disparities between the largest firms, thus defined, are analysed. High index values mean wide disparities between the leading firms.

183. A comparison for 1962 and 1969 of the data handled in the previous paragraphs, taking account of the number of firms, concentration based on numbers employed in all the industries and on the disparities between the largest firms, shows that of 26 comparable cases, twelve show an increase in concentration with at the same time a growing disparity between the largest firms in parallel with a decline in the number of firms (wool and cotton in Germany and Belgium; knitted and crocheted goods in France; cycles in Germany, France and the Netherlands; manufacture of pulp, paper and paperboard in Germany; pharmaceutical products in the Netherlands and Belgium; photographic products in the Netherlands). It can therefore be seen that in these industries, side by side with the concentration process, disparities

TABLE 11

An example of the concentration process (weighted Linda indices)

23 Manufacture of textiles

Industries (NICE Nomenclature)	Year	I						B					
		Numbers employed	Turnover	Invest- ment	Net profits	Cash flow	Own capital	Numbers employed	Turnover	Invest- ment	Net profits	Cash flow	Own capital
233 Cotton	1962	0.14	0.13	0.22	0.88	0.24	0.18	0.33	0.33	0.49	0.58	0.48	0.50
	1963	0.13	0.14	0.32	0.73	0.22	0.17	0.33	0.33	0.53	0.47	0.46	0.50
	1964	0.14	0.15	0.27	1.11	0.29	0.16	0.33	0.32	0.50	0.50	0.48	0.49
	1965	0.14	0.14	0.49	1.18	0.43	0.18	0.35	0.34	0.63	0.54	0.53	0.54
	1966	0.12	0.13	0.18	1.49	0.26	0.17	0.36	0.36	0.59	0.51	0.57	0.47
	1967	0.14	0.14	0.22	1.03	0.37	0.17	0.54	0.62	0.68	0.44	0.52	0.79
	1968	0.14	0.14	0.59	0.98	0.39	0.20	0.54	0.62	0.57	0.47	0.54	0.79
	1969	0.14	0.16	0.29	0.85	0.36	0.22	0.61	0.73	0.54	0.56	0.59	0.95

31 Chemical industry

Industries	Year	I						B					
		Numbers employed	Turnover	Invest- ment	Net profits	Cash flow	Own capital	Numbers employed	Turnover	Invest- ment	Net profits	Cash flow	Own capital
313.1 Pharma- ceutical products	1962	0.24	0.21	0.39	0.28	0.33	0.31	0.20	0.20	0.36	0.45	0.66	0.55
	1963	0.22	0.22	0.36	0.27	0.32	0.28	0.31	0.31	0.61	0.43	0.50	0.32
	1964	0.21	0.21	0.35	0.28	0.37	0.29	0.43	0.42	0.41	0.33	0.40	0.33
	1965	0.20	0.21	0.40	0.28	0.34	0.24	0.43	0.43	0.41	0.25	0.30	0.28
	1966	0.21	0.20	0.35	0.25	0.26	0.27	0.42	0.42	0.39	0.29	0.35	0.26
	1967	0.19	0.19	0.27	0.37	0.30	0.34	0.42	0.42	0.49	0.43	0.36	0.26
	1968	0.20	0.20	0.30	0.39	0.29	0.33	0.36	0.36	0.78	0.45	0.40	0.26
	1969	0.21	0.20	0.38	0.34	0.27	0.32	0.36	0.36	0.36	0.44	0.42	0.28

(Table continues on p. 160.)

38 Manufacture of transport equipment

(Table 11 cont.)

Industries	Year	I						N					
385.1	1962	1.58	1.27	0.46	1.53	1.80	0.35	—	—	—	—	—	—
Motor-	1963	1.38	1.28	2.20	7.51	6.27	0.72	0.52	0.50	0.92	—	—	—
cycles,	1964	1.38	1.34	1.20	7.78	4.82	0.72	0.52	0.54	0.80	—	—	—
cycles and	1965	1.19	1.30	0.42	1.39	5.01	1.10	0.55	0.49	0.58	—	—	—
power	1966	1.12	1.06	1.15	2.68	1.72	0.95	0.49	0.39	1.16	—	—	—
assisted	1967	1.12	1.05	1.45	1.75	8.34	0.96	0.52	0.39	0.64	—	—	—
cycles	1968	1.20	1.20	2.33	37.86	12.50	0.96	0.57	0.45	0.99	—	—	—
	1969	1.28	1.21	2.91	3.11	8.01	1.03	0.68	0.50	0.56	—	—	—

between the largest firms have been widening. In four industries where there is an appreciable increase in concentration, the decline in the number of firms led to no change in disparities between the large firms (cotton in France and Italy; cycles in Italy; processing of paper and paperboard in France). In six other cases, the number of firms declined and concentration advanced as the disparities between the biggest firms narrowed down (wool in France; knitted and crocheted goods in Belgium; manufacture of pulp, paper and paperboard in France; processing of paper and paperboard in Germany; pharmaceutical products in Italy; cleaning and maintenance products in Belgium).

In four cases, there was growing equilibrium between the largest firms as concentration within the industry diminished and where the trend in the number of firms is different (in Italy in the wool industry, knitted and crocheted goods, and manufacture and processing of paper and paperboard).

184. As explained, in some of the industries studied, growing concentration tends to narrow down or eliminate differences of size between the leading firms. It may well be that this entails a temporary strengthening of competition.

185. Other information is revealed when the study is extended to all the years and to all the variables used. We shall give an example of this below for three industries and two countries (see Table 11).

186. A comparison of the weighted Linda indices used shows that the disparities between the largest firms differ in size according to the variables considered. On average, for the eight years the widest disparities are noted in investment, net profits and cash flow. This means that, among the big firms in the three industries, the largest invest more, draw higher profits and have a heavier cash flow than their competitors. The disparities are narrower for the own-capital, numbers-employed and turnover variables.

Summary of results

187. The representativeness of the studies made is open to question. Nonetheless, the results lead to the following findings:

- (i) in the Community, the degree of concentration varies widely from industry to industry and country to country;
- (ii) from 1962 to 1969 a process of concentration occurred in almost all countries and industries, and gradually gathered momentum. The number of competitors declined.

Part four

Consumer protection

The Heads of State or Government of the Member States and States joining the European Communities came out very strongly, at their Paris Summit Conference of 19–21 October 1972, in favour of a consumer protection policy, and invited the institutions to draw up, before 1 January 1974, a social programme including measures to strengthen and coordinate action to protect consumers. The Commission intends to establish such a programme early in 1973.

This direct call to embark on definite and specific measures was accompanied by other statements and basic agreements on other fields closely related to consumer interests, such as environment and the control of inflation. In line with the policy goals set at the Summit, and in response to public opinion, the Community must give special attention to improving the consumer's quality of life. The next problem is inflation control and the return to moderation in the upward movement of prices, so that the consumers—and particularly the poorest consumers—are not deprived of the benefits of economic integration.

The Commission intends to act on the basis of these fundamental principles with the aim of ensuring that the consumer is accorded his rightful place in the European integration process.

1. Influence of the common market on the consumer

Quality of life

188. In its Sixth General Report on the Activities of the Communities,¹ the Commission quoted a number of economic indicators to illustrate the improvement in consumers' living standards and the influence of European economic integration on these standards.

However, the improvement in standards can also be measured by the expansion of the consumption of certain goods or services whose growth constitutes a contribution to the improvement of the qualitative standard of living.

¹ *Sixth General Report on the Activities of the Communities*, sec. 159.

These are items which could be described as “dynamic” because of the needs and aspirations for which they stand and the social and political choices they entail at national and Community level. They are substantially in line with the general objectives on social development on which the Community’s third medium-term economic policy programme¹ had laid the stress, and for the attainment of which it had laid down Community policy principles.

189. A closer examination of certain dynamic components of private consumers’ expenditure shows that spending on personal and health needs expanded between 1960 and 1971 by about 3.75 times, which represents an average annual increase of about 11.5%, compared with an average increase of 9.32% of all private consumers’ expenditures. In addition, the rate of increase of this demand component rose from 10.36% between 1969 and 1970 to 12.21% for 1971.² As for the trend in health care expenditure proper, it is on the cards that final demand for health care will, in the longer run be about 20% of overall resources (public and private) allocated to this component. The result will be a qualitative improvement in the consumers’ living standards.

190. Expenditure on transport and communications increased by about 3.6 times between 1960 and 1971, an average increase of 11.30%, compared with an average of 9.32% for all private consumers’ expenditure. The rate of increase for this item rose from 13.9% between 1969 and 1970 to 14.92% for 1970/71.²

This is a particularly important development for the consumer, since there seems to be a trend towards an increase in the use of collective transport facilities. As there is some evidence that this trend will continue, the Community and the public authorities should encourage this by certain technical decisions harmonized at European level.

191. Expenditure on “education, entertainment and leisure” grew by about 2.75 times between 1960 and 1971, which corresponds to an average increase of 9.35%, comparing with an average increase in private consumers’ expenditure of 9.32%. This group of items also expanded by 11.18% between 1969 and 1970, and by 8.99% between 1970 and 1971. This trend points to a more dynamic expansion of consumption in this area and important policy choices along these lines.

192. What is discernible therefore, in the various Community countries, is a tendency for the allocation of resources to the main functions such as food,

¹ OJ No. L 49, 1 March 1971, p. 10.

² Source SOEC.

health, transport and communications, etc., to come closer together, which would seem to suggest an alignment of ways of life and a growing osmosis of collective desires and needs in the member countries.

Consumer purchasing power

193. The annual report on the economic situation of the Community¹ expresses satisfaction as to the outlook with regard to the improvement of living standards in the Community, but sounds a warning on inflation and the danger that price increases can become a matter of habit.

For there is no doubt that the consumers—and particularly the poorest consumers—are those hardest hit by the steady upward movements, and in any case, any sharp readjustment, however necessary, to the economy would be expensive for them. While the upward price push for 1972 was between 6.5% and 7.0%, the resolution of 31 October adopted by the Council of Ministers² called on the Member States to curb the consumer price increase to 4% between December 1972 and the end of 1972.

194. The action the Commission has endeavoured to put in hand throughout 1972 with a view to protecting consumer purchasing power was guided by this approach.

(a) The Commission's competition policy helped to throw light on certain reasons for price disparities for identical or similar items as between different member countries. Whenever such discrepancies were due to a restrictive practice or a market sharing agreement, the Commission intervened to restore normal competitive conditions and thus influenced the artificial upward movement of prices and the price discrepancies.³ For example, in 1972 several restraints having a direct impact on the consumer were pinpointed and eliminated.

(i) Through market sharing and market fragmentation agreements, the Community's main sugar producers had succeeded in shielding their selling prices to the food processing industries and to the consumers from the competition effect which could have derived from free imports.⁴

(ii) Certain practices were designed to maintain price discrepancies artificially within the Community for insulating materials (on the

¹ *OJ* No. C 133, 23 December 1972, p. 1.

² *OJ* No. C 133, 23 December 1972, p. 12.

³ For technical reasons, the Commission has been unable to make full use of the 1971 SOEC survey on retail prices. This will not be the case for the 1972 survey.

⁴ *Industrie européenne du sucre*, sec. 28.

German market the price discrepancy as against the Belgian and the Netherlands markets could range up to 40% and more).¹

- (iii) Distribution agreements prohibiting exports of gramophone records to another Member State made possible the maintenance in that State of high prices which could not be corrected by parallel imports.²

The Commission feels, nonetheless, that price discrepancies, other than those due to infringements of the Treaty's competition rules, will in fact continue within the Common Market. The discrepancies are not necessarily in conflict with the notion of integration of the markets. They will persist until certain structural differences between the markets (for example in taxation, consumer habits, incomes, distribution channels) have been eliminated, through common policies in particular (for example, on taxation) or until incomes, and with them living standards, have made further progress towards alignment.

- (i) In 1972 the Commission adopted two regulations on block exemption of certain specialization agreements and for the extension of the regulation concerning exemption from the ban on restrictive agreements for certain categories of exclusive dealing agreements. In the first case, the aim is to strengthen the competitive power of small- and medium-sized enterprises by making it easier for them to reorganize and achieve rationalization and, consequently, economies of scale, so that they can cut production costs and thus consumer prices.³ The second regulation is also designed to serve the consumers' interests, since they can gain from the advantages of exclusive distribution without being cut off from better supply sources.⁴ In both cases it should be possible to pass on to the consumer part of the firms' productivity gains.
- (ii) The maintenance of a balanced relationship between the growth rate of the gross domestic product and the expansion of public spending will also contribute to curbing inflation. The Commission had this aspect of its competition policy in mind when it eliminated State aids liable to maintain obsolete structures and when it gave favourable treatment to those which can play a constructive role in economic growth, for example through the optimum allocation of production factors and through the passing on of productivity gains to the consumer.⁵

¹ Pittsburgh Corning Europe, sec. 41.

² WEA—Filipacchi Music SA, sec. 40.

³ OJ No. L 292, 29 December 1972, p. 23.

⁴ OJ No. L 276, 9 December 1972, p. 15.

⁵ *Sixth General Report on the Activities of the Communities*, sec. 84.

(iii) The Commission's work on the adjustment of national commercial monopolies fits into this context. Some of the monopolies are more particularly harmful for the consumer in that they maintain outdated structures and artificially high prices for end products consumed in large quantities.¹

(b) Fiscal policy is also a major field in which official action can help to defend the consumer.

In 1972, the Commission completed work on establishing a uniform basis for VAT. These arrangements are, of course, part of the tax harmonization field; but in so far as they constitute a step towards bringing indirect taxation rates closer together they are bound to facilitate the narrowing down of price discrepancies for similar products between the Member States and thus benefit the consumer.

(c) To ensure retail beef and veal prices not exceeding acceptable limits and to help the general campaign against inflation, the Community suspended Common Customs Tariff duties and levies in this sector for the first time in June 1972 and, in October 1972 reduced beef and veal duties by 50%.

2. General information for the consumer

195. The Commission has continued work to provide consumers with adequate and objective information on their rights and means of defence.

The ill-informed consumer, particularly those lacking resources, must submit to the law of the strongest, sellers who have a range of material and psychological weapons sufficient to bring pressure to bear and impose choices in line with their interests. In this field, the Commission has continued to be active. It held two meetings in 1972 with consumer organizations and television, at which the discussion on the bases of European information for the consumer was pursued.

3. Participation in the work of international organizations

196. The Commission maintained its active participation in the work of certain international organizations in the field of consumer information and protection. The OECD began its study of safety and labelling of consumer

¹ *Sixth General Report on the Activities of the Communities*, sec. 84.

products, except food and pharmaceuticals. The Council of Europe has begun work on door to door selling and judicial or quasi-judicial arrangements for safeguarding the rights of the consumer.

4. The consumer's interests and the Commission's work

197. As part of work on the elimination of technical obstacles to trade, the Commission has laid before the Council a number of proposed directives of great importance for the consumer. They include proposals concerning the first stages of preparation for sale in volume of certain pre-packaged liquids, the introduction of safety windows of laminated glass for motor cars, cosmetic products and bread.

It is, however, true that the mere adoption of these proposed directives, is only a first step towards consumer protection. The Commission is well aware that other measures will be needed in these fields.

For example, the proposed directive concerning the first stages of preparation for sale of certain pre-packaged liquids will at some time in the future have to be amplified by rules concerning unit prices, and the ranges of nominal weights will have to be appreciably narrowed if the consumers' interests are really to be protected. Again, the rules in the draft directive on safety glass will have to be extended to windows other than the windshield. As for the proposed directive on cosmetics, based on the principle of a negative list, it will have to be amended in coming years to include a positive list of substances that may be used in cosmetics; the Commission is in full agreement on this point with the experts of the Member States' Governments.

198. The Council of Ministers has adopted a number of important directives including directives on detergents, classification, packing and labelling of dangerous substances, and dangerous preparations (solvents).

In the area of harmonization of legislation, the Commission has held its first meeting with experts of the Member States on unfair competition. The relevance of this field to consumer protection was stressed by most of the participants. A study of the following problems was regarded as meriting priority: advertizing (including problems connected with deceitful advertising and rules entitling consumer groups to sue in the courts), sales with bonuses and rebates, and, finally, indications of provenance and appellations of origin.

199. Several Members of the European Parliament have called upon the Commission to improve its cooperation arrangements with consumer orga-

nizations and to strengthen efforts to build up a consumer policy.¹ The Commission² had explained that the “questions affecting the consumer” department included at present only three A-category officials, including the head of service plus one official of the B-category.

On 28 June 1972, the Commission decided, following the dissolution of the Consumer Contact Committee, to consult the various European organizations which had been members of this Committee and the trade union liaison bureau—CGT-CGIL—to place at the disposal of these organizations for 1973 a sum of Bfrs. 7 million enabling them to participate more actively in the Commission’s work of concern to them, and to strengthen its consumer department.

¹ Written questions No. 633/71, 13 March 1972 and No. 2/72, 22 March 1972, *OJ* No. 63, 15 June 1972, pp. 2 and 3.

² Commission reply to written question No. 200/72, 4 July 1972, *OJ* No. C 105, 10 October 1972, p. 14.

Annex

LIST

of individual decisions of the Commission and rulings of the Court of Justice and text of regulations and regulatory decisions of the Commission made in 1972 concerning the application of articles 85 and 86 of the EEC Treaty and of articles 60 and 65 of the ECSC Treaty.

DECISIONS ON INDIVIDUAL CASES

1. Concerning Articles 85 and 86 of the EEC Treaty

- | | |
|--|--|
| Decision of 17 January 1972 on a proceeding under Article 85 of the Treaty " <i>MAN-SAVIEM</i> " | <i>OJ</i> No. L 31, 4.2.1972, p. 29
IP (72) 16 of 24.1.1972
Bulletin 3-1972, Ch. I, sec. 3 |
| Decision of 23 February 1972 on an application for negative clearance under Article 2 of Council Regulation No. 17 " <i>Wild-Leitz</i> " | <i>OJ</i> No. L 61, 13.3.1972, p. 27
IP (72) 28 of 10.2.1972
Bulletin 4-1972, Ch. I, sec. 7 |
| Decision of 9 June 1972 on a proceeding under Article 85 of the Treaty " <i>Davidson Rubber Co.</i> " | <i>OJ</i> No. L 143, 23.6.1972, p. 31
IP (72) 121 of 23.6.1972
Bulletin 8-1972, Ch. I, sec. 7 |
| Decision of 9 June 1972 on an application for negative clearance under Article 2 of Council Regulation No. 17 " <i>Raymond-Nagoya</i> " | <i>OJ</i> No. L 143, 23.6.1972, p. 39
IP (72) 121 of 23.6.1972
Bulletin 8-1972, Ch. I, sec. 8 |
| Decision of 6 July 1972 on a proceeding under Article 86 of the Treaty " <i>GEMA</i> " | <i>OJ</i> No. L 166, 24.7.1972, p. 22
IP: none
Bulletin 9-1972, Ch. I, sec. 11 |
| Decision of 26 July 1972 on a proceeding under Article 85 of the Treaty " <i>Fine Paper</i> " | <i>OJ</i> No. L 182, 10.8.1972, p. 24
IP (72) 149 of 22.8.1972
Bulletin 9-1972, Ch. I, sec. 13 |
| Decision of 28 September 1972 on a proceeding under Article 85 of the Treaty and Article 11, sec. 5 of Council Regulation No. 17 " <i>Rodenstock</i> " | <i>OJ</i> No. L 267, 28.11.1972, p. 17
IP: none
Bulletin 10-1972, Ch. I, sec. 17 |
| Decision of 28 September 1972 on a proceeding under Article 85 of the Treaty and Article 11, sec. 5 of Council Regulation No. 17 " <i>Misal</i> " | <i>OJ</i> No. L 267, 28.11.1972, p. 20
IP: none
Bulletin 10-1972, Ch. I, sec. 17 |

- Decision of 20 October 1972 on a proceeding under Article 85 of the Treaty "*Central Heating*" OJ No. L 264, 23.11.1972, p. 22
IP (72) 182 of 27.10.1972
Bulletin 10-1972, Ch. I, sec. 16
- Decision of 23 November 1972 on a proceeding under Article 85 of the Treaty "*Pittsburgh Corning Europe - Formica Belgium - Hertel*" OJ No. L 272, 5.12.1972, p. 35
IP (72) 198 of 29.11.1972
Bulletin 11-1972, Ch. I, sec. 6
- Decision of 14 December 1972 on a proceeding under Article 86 of the Treaty "*ZOJA/C.S.C. - I.C.I.*" OJ No. L 299, 31.12.1972, p. 51
IP (72) 218 of 22.12.1972
Bulletin 12-1972, Ch. I, sec. 17
- Decision of 18 December 1972 on a proceeding under Article 85 of the Treaty "*Cementregeling voor Nederland - 1971*" OJ No. L 303, 31.12.1972, p. 7
IP (72) 221 of 22.12.1972
Bulletin 12-1972, Ch. I, sec. 14
- Decision of 22 December 1972 on a proceeding under Article 85 of the Treaty "*CIMBEL*" OJ No. L 303, 31.12.1972, p. 24
IP (73) 3 of 3.1.1973
Bulletin 12-1972, Ch. I, sec. 15
- Decision of 22 December 1972 on a proceeding under Article 85 of the Treaty "*Wea-Filipacchi Music S.A.*" OJ No. L 303, 31.12.1972, p. 52
IP (72) 219 of 22.12.1972
Bulletin 12-1972, Ch. I, sec. 16
- Decision of 22 December 1972 on a proceeding under Article 85 of the Treaty "*Decisions by G.I.S.A.-association*" OJ No. L 303, 31.12.1972, p. 45
IP (73) 4 of 5.1.1973
Bulletin 12-1972, Ch. I, sec. 18
- Decision of 2 January 1973 on a proceeding under Articles 85 and 86 of the Treaty "*European Sugar Industry*" OJ No. L 140, 26.5.1973, p. 17
IP (72) 216 of 18.12.1972
Bulletin 12-1972, Ch. I, sec. 13

2. Concerning Article 65 of the ECSC Treaty

(a) Coal

- Decision No. 72/145/ECSC of 8 March 1972 prorogating authority of the joint sale of fuels of Houillères du bassin de Lorraine and Saarbergwerke AG by "Saarlor" OJ No. L 76 of 29.3.1972, p. 30
- Decision No. 72/192/ECSC of 21 April 1972 relating to the authorization of joint purchase of fuels by wholesale coal dealers in southern Germany by agents of the Oberrheinische Kohlenunion Bettag, Puton und Co., Mannheim OJ No. L 112 of 14.5.1972, p. 22

(b) *Steel*

Decision No. 72/153/ECSC of 22 March 1972 regarding the authorization extended for the joint purchase of rolled steel by wholesale distributors of steel grouped in the company "Stahlring" and "Stahlring GmbH, Stahleinkaufsgesellschaft" *OJ* No. L 85 of 11.4.1972, p. 17

Decision No. 72/413/ECSC of 9 November 1972 authorizing the conclusion of an agreement between Hoesch Werke Hohenlimburg-Schwerte AG and Benteler Werke AG *OJ* No. L 283 of 20.12.1972, p. 17

RULINGS OF THE COURT OF JUSTICE

- Ruling (14 July 1972) in cases
"48/69 Imperial Chemical Industries Ltd
49/69 Badische Anilin- und Soda-Fabrik
51/69 Farbenfabriken Bayer AG
52/69 J. R. Geigy AG
53/69 Sandoz AG
54/69 Société française des matières colorantes SA
55/69 Cassella Farbwerke Mainkur AG
56/69 Farbwerke Hoechst AG
57/69 Azienda Colori Nazionali e Affini-ACNA v. Commission" *OJ* No. C 125, 1.12.1972, p. 17
Bulletin 9/1972, second part, chap. IV, sec. 181
- Ruling (17 October 1972) in case 8/72: "VCH v. Commission" *OJ* No. C 15, 30.3.1973, p. 13
Bulletin 10/1972, second part, chap. IV/CJ, sec. 259
- Ruling (14 December 1972) in case 7/72: "Boehringer v. Commission" *OJ* No. C 3, 5.2.1973, p. 7
Bulletin 12-1972, second part, chap. IV/CJ, sec. 154

REGULATION (EEC) No. 2591/72 OF THE COMMISSION

of 8 December 1972

amending Regulation No. 67/67/EEC of 22 March 1967 concerning application of article 85(3) of the Treaty to certain categories of concerted practices¹

THE COMMISSION OF THE EUROPEAN COMMUNITIES

Having regard to the Treaty establishing the European Economic Community, and in particular Articles 87 and 155 thereof;

Having regard to Article 24 of Regulation No. 17² of 6 February 1962;

Having regard to Regulation No. 19/65/EEC³ of 2 March 1965 on the application of Article 85(3) of the Treaty to certain categories of agreements and concerted practices;

Having regard to the Opinions delivered by the Advisory Committee on Restrictive Practices and Monopolies in accordance with Article 6 of Regulation No. 19/65/EEC;

Whereas under Regulation No. 19/65/EEC the Commission has power to apply Article 85(3) of the Treaty by regulation to certain categories of bilateral exclusive dealing agreements and concerted practices coming within Articles 85(1);

Whereas Commission Regulation No. 67/67/EEC⁴ on the application of Article 85(3) of the Treaty to certain categories of exclusive dealing agreements is valid only until 31 December 1972;

Whereas the experience gained in connection with Regulation No. 67/67/EEC shows that the rule under this Regulation whereby

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Article 85(1) of the Treaty is declared inapplicable to certain categories of exclusive dealing agreements, subjects to the provisions of that Regulation, has proved its value.

Whereas it is therefore expedient to extend the validity of Regulation No. 67/67/EEC; whereas it appears desirable, for the sake of certainty in the law, to extend the period of validity of the Regulation for ten years and so enable undertakings to plan for a long period ahead;

Whereas such extension also appears unobjectionable since under Article 7 of Regulation No. 19/65/EEC in conjunction with Article 6 of Regulation No. 67/67/EEC the Commission may at any time intervene if it finds that the agreements falling within the Regulation have effects that are incompatible with the conditions contained in Article 85(3) of the Treaty;

HAS ADOPTED THIS REGULATION:

Article 1

In Article 1(1) of Regulation No. 67/67/EEC the date "31 December 1982" shall be substituted for the date "31 December 1972".

Article 2

This Regulation shall enter into force on the day of its publication in the *Official Journal of the European Communities*.

¹ OJ No. L 276, 9. 12. 1972, p. 15.

² OJ No. 13, 21. 2. 1962, p. 204/62.

³ OJ No. 36, 6. 3. 1965, p. 533/65.

⁴ OJ No. 57, 25. 3. 1967, p. 849/67.

REGULATION (EEC) No. 2743/72 OF THE COUNCIL
of 19 December 1972

amending Regulation (EEC) No. 2821/71 on the application of Article 85(3)
of the Treaty to categories of agreements, decisions and concerted practices¹

THE COUNCIL OF THE EUROPEAN
COMMUNITIES,

Having regard to the Treaty concerning
the Accession of new Member States to
the European Economic Community and
the European Atomic Energy Community,
signed on 22 January 1972, and in particular
Article 153 of the Act annexed thereto;

Having regard to the proposal from the
Commission;

Whereas Council Regulation (EEC) No.
2821/71² of 10 December 1971, on the
application of Article 85(3) of the Treaty to
categories of agreements, decisions and
concerted practices requires amendments
corresponding to those made to Regulation
No. 19/65/EEC, the amendments to which
are set out in Annex I to the Act of Accession,
so that the agreements which, by virtue of Ac-
cession, come within the scope of Article 85 of
the Treaty establishing the European Econ-
omic Community may benefit from exemp-
tion from the prohibition laid down in
paragraph 1 of the said Article;

HAS ADOPTED THIS REGULATION:

Article 1

Article 4 of Regulation (EEC) No. 2821/71
shall be amended as follows:

This Regulation shall be binding in its entirety and directly applicable in all
Member States.

1. The following is inserted at the end of
paragraph 1:

"A Regulation adopted pursuant to
Article 1 may lay down that the pro-
hibition referred to in Article 85(1) of
the Treaty shall not apply, for the period
fixed in the same Regulation, to agree-
ments and concerted practices which
existed at the date of accession and
which, by virtue of accession, come
within the scope of Article 85 and do not
fulfil the conditions set out in Article
85(3)."

2. Paragraph 2 shall be supplemented by
the following:

"Paragraph 1 shall be applicable to
those agreements and concerted practices
which, by virtue of the accession, come
within the scope of Article 85(1) of
the Treaty and for which notification
before 1 July 1973 is mandatory, in
accordance with Articles 5 and 25 of
Regulation No. 17, only if notification
was given before that date."

Article 2

This Regulation shall enter into force upon
accession.

¹ OJ No. L 291, 28. 12. 1972, p. 144.

² OJ No. L 285, 29. 12. 1971, p. 46.

REGULATION (EEC) No. 2779/72 OF THE COMMISSION
of 21 December 1972
on the application of Article 85(3) of the Treaty to categories of
specialisation agreements¹

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Articles 87 and 155 thereof;

Having regard to Council Regulation (EEC) No. 2821/71 of 20 December 1971² on application of Article 85(3) of the Treaty to categories of agreements, decisions and concerted practices;

Having regard to the Opinions of the Advisory Committee on Restrictive Practices and Monopolies delivered pursuant to Article 6 of Regulation (EEC) No. 2821/71;

Whereas under Regulation (EEC) No. 2821/71 the Commission has power to apply Article 85(3) of the Treaty by regulation to certain categories of agreements, decisions and concerted practices relating to specialisation, including agreements necessary for achieving it, which fall within Article 85(1);

Whereas, since the adoption of such a Regulation would not conflict with the application of Regulation No. 17, the right of undertakings to apply in individual cases to the Commission for a declaration under Article 85(3) of the Treaty would not thereby be affected;

Whereas agreements for the specialisation of production may fall within the prohibition contained in Article 85(1);

Whereas agreements for the specialisation of production lead in general to an improvement in the production or distribution of goods, because the undertakings can concentrate on the manufacture of certain products, thus operate on a more rational basis and offer these products at more favourable prices; whereas it is to be anticipated that, with effective competition, consumers will receive a fair share of the profit resulting therefrom;

Whereas this Regulation must determine what restrictions on competition may be included in a specialisation agreement;

whereas the restrictions on competition provided for in this Regulation are, in general, indispensable for the purpose of ensuring that the desired benefits accrue to undertakings and consumers; whereas it may be left to the contracting parties to decide which of these provisions they include in their agreements;

Whereas in order to ensure that competition is not eliminated in respect of a substantial part of the goods in question, this Regulation applies only if the share of the market held by the participating undertakings and the size of the undertakings themselves do not exceed a specified limit;

Whereas this Regulation should also apply to specialisation agreements made prior to its entry into force;

HAS ADOPTED THIS REGULATION:

Article 1

Pursuant to Article 85(3) it is hereby declared that, subject as provided in this Regulation, until 31 December 1977 Article 85(1) of the Treaty shall not apply to agreements whereby, with the object of specialisation, undertakings mutually bind themselves for the duration of the agreements not to manufacture certain products or cause them to be manufactured by other undertakings, and to leave it to the other contracting parties to manufacture such products or cause them to be manufactured by other undertakings.

Article 2

1. Apart from the obligation referred to in Article 1, no other restriction on competition shall be imposed on the contracting parties save the following:

- (a) the obligation not to conclude with other undertakings specialisation agreements relating to identical products or to products considered by consumers to be similar by reason of their charac-

¹ OJ No. L 292, 29.12.1972, p. 23.

² OJ No. L 285, 29.12.1971, p. 46.

teristics, price or use, except with the consent of the other contracting parties;

- (b) the obligation to supply the other contracting parties with the products which are the subject of specialisation, and in so doing to observe minimum standards of quality;
- (c) the obligation to purchase products which are the subject of specialisation solely from the other contracting parties, except where more favourable terms of purchase are available elsewhere and the other contracting parties are not prepared to offer the same terms;
- (d) the obligation to grant to the other contracting parties the exclusive right to distribute the products which are the subject of specialisation so long as those parties do not—in particular by the exercise of industrial property rights or of other rights and measures—limit the opportunities, for intermediaries or consumers, of purchasing the products to which the agreement relates from other dealers within the common market.

2. Article 1 shall apply notwithstanding that the following obligations are imposed:

- (a) the obligation to maintain minimum stocks of the products which are the subject of specialisation and of replacement parts for them;
- (b) the obligation to provide after-sale and guarantee services for the products which are the subject of specialisation.

Article 3

1. Article 1 shall apply only:
 - (a) if the products which are the subject of specialisation represent in any member country not more than 10 per cent of the volume of business done in identical products or in products considered by consumers to be similar by reason of their characteristics, price or use; and
 - (b) if the aggregate annual turnover of the participating undertakings does not exceed 150 million units of account.
2. For purposes of applying paragraph 1 the unit of account shall be that adopted in drawing up the budget of the Community in accordance with Articles 207 and 209 of the Treaty.

3. Article 1 of this Regulation shall continue to apply notwithstanding that in any two consecutive financial years the share of the market or the turnover is greater than as specified in paragraph 1, provided the excess is not more than 10%.

Article 4

The aggregate turnover within the meaning of Article 3(1)(b) shall be calculated by adding together the turnover achieved during the last financial year in respect of all products and services:

1. by the undertakings which are parties to the agreement;
2. by undertakings in respect of which the undertakings which are parties to the agreement hold:
 - at least 25% of the capital or of the working capital whether directly or indirectly; or
 - at least half the voting rights; or
 - the power to appoint at least half the members of the supervisory board, board of management or bodies legally representing the undertaking; or
 - the right to manage the affairs of the undertaking;
3. by undertakings which hold in an undertaking which is a party to the agreement:
 - at least 25% of the capital or of the working capital whether directly or indirectly; or
 - at least half the voting rights; or
 - the power to appoint at least half the members of the supervisory board, board of management or bodies legally representing the undertaking; or
 - the right to manage the affairs of the undertaking.

In calculating aggregate turnover no account shall be taken of dealings between the undertakings which are parties to the agreement.

Article 5

The Commission shall examine whether Article 7 of Regulation (EEC) No. 2821/71 applies in any specific case, in particular where there is reason to believe that rationali-

sation is not yielding significant results or that consumers are not receiving a fair share of the resulting profit.

Article 6

The non-applicability of Article 85(1) provided for in Article 1 of this Regulation shall have retroactive effect from the time when the conditions requisite for the application of this Regulation were satisfied. In the case of agreements which, prior to 18 January 1972, were compulsorily noti-

fiable, the time aforesaid shall not be earlier than the day of notification.

Article 7

Articles 1 to 6 of this Regulation shall apply by analogy to decisions by associations of undertakings and to concerted practices.

Article 8

This Regulation shall enter into force on 1 January 1973.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

COMMISSION DECISION

of 22 December 1972

amending Decision No. 30-53 of 2 May 1953 on practices prohibited by Article 60(1) of the Treaty in the common market for coal and steel¹

(72/440/ECSC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Coal and Steel Community, and in particular Articles 2 to 5, 60 and 63(2) thereof;

Having regard to High Authority Decision No. 30-53 as amended by Decision No. 19/63 of 11 December 1963;²

After consulting the Consultative Committee and the Council;

Whereas Article 60(1) prohibits discriminatory practices involving, within the common market, the application by one and the same seller of dissimilar conditions to comparable transactions; whereas that provision specifies that the practices which are prohibited may further be defined; whereas the High Authority of the European Coal and Steel Community has in Decision No. 30-53 defined the practices which are prohibited under Article 60(1);

Whereas Article 2 of Decision No. 30-53, as amended by Decision No. 1-54,³ provides that any departure from the price lists constitutes a discriminatory practice, unless the seller shows either that the transaction in question does not fall within the categories of transactions covered by the price list or that the prices or conditions have been departed from uniformly in all comparable transactions;

Whereas experience has shown that under this definition of what constitutes a prohibited discriminatory practice certain essential aspects of the prohibition are not covered; whereas it therefore appears necessary to specify further when transactions are to be considered comparable and in what circumstances conditions are to be considered dissimilar;

Whereas in defining comparable transactions full account must be taken of the protective aim of the prohibition against discrimination; whereas prohibition of discriminatory practices is intended mainly to protect purchases against disadvantages which may result from the application of different prices and conditions; whereas for the purpose of determining whether transactions are comparable, it is necessary to establish whether the position of the purchasers is comparable; whereas this is the case when they compete with one another in distributing their products or when they produce the same or similar goods or carry out similar functions in distribution; whereas, moreover, the prerequisite as regards comparability of transactions is that they involve the same or similar products and that such of their commercial features as may be considered of importance do not essentially differ; whereas transactions concluded at different moments of time are not to be considered comparable when the seller has, in the meantime, altered his prices and conditions generally and not merely on a temporary basis;

Whereas as regards dissimilarity of conditions, if the conditions only make appropriate allowance for differences in the services rendered or in the carrying out of transactions, those conditions are not to be considered dissimilar; whereas where a seller allows periods for payment more favourable than those which he applies generally, this constitutes a dissimilar condition if the advantage so allowed is not offset by an increase in price;

Whereas the facts or circumstances which go to show that transactions are not comparable, or which are of importance in determining whether conditions are to be considered similar, are within the knowledge of the undertakings; whereas the under-

¹ OJ No. L 297, 30. 12. 1972, p. 39.

² OJ No 187, 24. 12. 1963, p. 2969/63.

³ ECSC Gazette No. 1, 13. 1. 1954, p. 217.

takings must therefore be required to produce the relevant evidence;

Whereas the rules on alignment on the lower delivered prices of other undertakings in the common market should be supplemented; whereas in cases where in accordance with the rules on publication of prices, there exists no obligation to publish prices, in respect of certain products or individual groups of purchasers for example, the prices and conditions effectively applied by the competitor are to be taken as the basis for alignment;

HAS ADOPTED THIS DECISION:

Article 1

The following Articles shall be substituted for Article 2 of Decision No. 30-53:

"Article 2

1. It shall be a prohibited practice within the meaning of Article 60(1) of the Treaty for a seller to apply in the common market dissimilar conditions (Article 4) to comparable transactions (Article 3).
2. The preceding paragraph shall be without prejudice to the application of Article 60(2)(b) of the Treaty and of decision adopted in connection therewith.

Article 3

1. Transactions shall be considered comparable within the meaning of Article 60(1) if
 - (a) they are concluded with purchasers,
 - who compete with one another, or
 - who produce the same or similar goods, or
 - who carry out similar functions in distribution,
 - (b) they involve the same or similar products,
 - (c) in addition, their other relevant commercial features do not essentially differ.
2. Transactions shall not be considered comparable within the meaning of Article 60(1) if between the dates of their being agreed upon a lasting change occurred in the seller's prices and conditions of sale.

Article 4

1. Conditions shall not be considered dissimilar within the meaning of Article 60(1) of the Treaty if different conditions, which make appropriate allowance for differences in the services rendered, or in the carrying out of transactions, are applied by a seller to comparable transactions.
2. Conditions shall be considered dissimilar if, without a corresponding increase in price, a seller allows periods for payment more favourable than those generally applied to comparable transactions.

Article 5

Undertakings which allege that transactions are not comparable (Article 3) or that conditions are not to be considered dissimilar (Article 4) shall, at the request of the Commission, set out the facts and circumstances which may justify this."

Article 2

The following shall be substituted for Article 3 of Decision No. 30-53:

"Article 6

1. Where, under Article 60(2)(b) of the Treaty, a seller aligns his quotation on a competitor's price list or, in so far as there exists no obligation or there exists only a limited obligation to publish prices, on the prices and conditions actually applied by a competitor, it shall be a prohibited practice within the meaning of Article 60(1) of the Treaty for him to apply conditions affording the purchaser a delivered price lower than that at which the purchaser could obtain the goods from the competitor.
2. In calculating delivered prices account shall be taken of transport costs, surcharges or taxes borne by the purchaser, less rebates or drawbacks allowed him, in addition to the prices and conditions.
3. Where, under the last subparagraph Article 60(2)(b) of the Treaty, the seller aligns his quotation on the conditions quoted by undertakings outside the Community, the provisions of paragraphs 1 and 2 shall apply correspondingly.

4. Undertakings which allege that pursuant to Article 60(2)(b) they have aligned their quotation on a lower delivered price of a competitor in the common market or an undertaking outside the common market, shall, at the request of the Commission, show that the conditions for alignment had been obtained and that they had complied with the provisions of paragraphs 1 to 3 of this Article in calculating the price.

The condition for alignment under the last subparagraph of Article 60(2)(b) is that alignment has been imposed by the effective competition of the undertaking outside the Community."

Article 3

Articles 4 and 6 of Decision No. 30-53 shall be deleted; Article 5 shall be renumbered 7; Article 7 shall be renumbered 8.

Article 4

1. In Article 8 of Decision No. 3-53:
— in the last sentence of paragraph 1 the words "or the prices" shall be inserted

after "the price lists" and the words "Articles 2 to 7" shall be substituted for "Articles 2 to 6",

- in paragraph 3 the words "the Commission" shall be substituted for "the High Authority".

2. Article 8 as so amended shall be renumbered 9.

Article 5

1. In Article 9 of Decision No. 30-53 the words "Articles 2 to 7" shall be substituted for "Articles 2 to 6".
2. Article 9 as so amended shall be renumbered 10.

Article 6

This Decision shall enter into force on 1 January 1973.

The text of Decision No. 30-53 as amended by the Decision shall be published under information in the *Official Journal of the European Communities*.

COMMISSION DECISION

of 22 December 1972

amending Decision No. 31-53 on the publication of price lists and conditions of sale applied by undertakings in the steel industry¹

(72/441/ECSC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

HAS ADOPTED THIS DECISION:

Article 1

Having regard to the Treaty establishing the European Coal and Steel Community, and in particular Articles 2 to 5, 60 and 63(2) thereof;

Having regard to High Authority Decision No. 31-53, as amended by Decision No. 20-63 of 11 December 1963²;

After consulting the Consultative Committee;

Whereas by Decision No. 72/440³ of 22 December 1972 the Commission redefined discriminatory practices within the meaning of Article 60(1) of the Treaty; whereas undertakings are consequently enabled to vary their prices according to consumer groups without thereby infringing the prohibition on discriminatory practices; whereas in view of the state of the steel market it does not appear to be necessary to require undertakings to publish in their price lists the surcharges or rebates for individual consumer groups; whereas it will be sufficient that undertakings be required to notify the Commission thereof; Whereas provision should be made so that the Commission has power to require undertakings which apply such price differentials to a considerable extent to publish them in their price lists;

Whereas certain steel products may be exempted from the requirements relating to compulsory publication; whereas the products here involved are those for which the number of suppliers and purchasers is small, the position in the market being clear even without publication of prices;

Whereas it appears appropriate to extend the time limit for the application of new price lists from one to two days;

Article 2 of Decision No. 31-53 is amended to read as follows:

"All price lists and conditions of sale published shall contain the following information:

- (a) basic prices according to category of products, or basic prices for each grade and category of products;
- (b) extras which are applied, indicating
 - extras for size and length,
 - extras for grades and quality,
 - quantity extras and rebates for each sample and/or for each specified order,
 - tolerances not liable to surcharge,
 - extras for reduced tolerances;
 - also surcharges and increases normally applied in connection with delivery of the various products;
- (c) place of delivery;
- (d) method of quotation;
- (e) costs in connection with method of shipment;
- (f) where they are applied:
 - quantity rebates granted subsequently in respect of quantities actually supplied over a period of not less than one year;
 - discounts, rebates, premiums or any other kind of benefit to dealers, selling agencies or users;
- (g) terms of payment;
- (h) nature and amount of taxes and other charges additional to the prices on the price lists, under the terms offered to purchasers;
- (i) where the conditions which apply to the transaction relate to the price list

¹ OJ No. L 297, 30. 12. 1972, p. 42.

² OJ No. 187, 24. 12. 1963, p. 2972/63.

³ OJ No. 297, 30. 12. 1972, p. 39.

in force on the day on which the order is placed and may be subject to revision:

- the circumstances in which such revision may occur."

Article 2

Article 3 of Decision No. 31-53 is amended to read as follows:

"Price lists of an undertaking shall not contain prices for products which are not actually offered on the market by that undertaking."

Article 3

Article 4 of Decision No. 31-53 is amended to read as follows:

1. (a) Price lists and conditions of sale shall apply not earlier than two clear days after they have been addressed to the Commission;
 - (b) Sellers shall, upon request, communicate them to anyone interested;
 - (c) The Commission may decide to publish such price lists and conditions of sale by means of a special publication.
2. Paragraph 1 shall apply equally to any amendment of price lists and conditions of sale."

Article 4

The following Article is inserted after Article 4 of Decision No. 31-53:

"Article 5

1. Undertakings in the steel industry need not publish in their price lists price differentials applied to individual consumer groups.
2. Where such differentials are applied, undertakings shall, however, notify them to the Commission. Article 4 of this Decision shall apply.

3. Where it is established that the number or the volume of the differentials make publication necessary, the Commission may require any undertaking in the iron and steel industry to publish in their price lists some or all of the differentials applied."

Article 5

Articles 5 and 6 of Decision No. 31-53 are renumbered 6 and 7 respectively.

Article 6

Article 7 of Decision No. 31-53 is renumbered 8 and is amended to read as follows:

"Article 8

Undertakings in the steel industry need not publish their prices for the following products:

1. Steelmaking pig iron,
2. Single purpose steel sections,
3. Organically coated sheet steel (sheet steel plastic-coated or pre-lacquered),
4. Second class and off-grade products,
5. Steels of non-standard character containing less than 0.6% of carbon, the chemical and mechanical properties of which are not of themselves sufficient to enable comparisons to be made between them;
6. Steels of like character, known as "physical" or "magnetic" steels, having certain electrical and magnetic properties."

Article 7

This Decision shall enter into force on 1 January 1973.

The text of Decision No. 31-53, as amended by this Decision, shall be published by way of Notice in the *Official Journal of the European Communities*.

COMMISSION DECISION

of 22 December 1972

amending Decision No. 4-53 on the publication of price lists and conditions of sale applied by undertakings in the coal and iron-ore industries¹

(72/442/ECSC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Coal and Steel Community, and in particular Articles 2 to 5, 60 and 63(2) thereof;

Having regard to High Authority Decision No. 4-53, as amended by Decision No. 22-63² of 11 December 1963;

After consulting the Consultative Committee;

Whereas by Decision No. 72/440 of 22 December 1972³ the Commission redefined discriminatory practices within the meaning of Article 60(1) of the Treaty; whereas undertakings are consequently enabled to vary their prices according to consumer groups without thereby infringing the prohibition on discriminatory practices;

Whereas, so that the position in the market may be clear, undertakings should be required to publish their increases or reductions in prices;

Whereas quantity and loyalty bonuses are applied extensively in respect of coal sales; whereas so that the market situation be clear, it is appropriate that exemption from compulsory publication be no longer allowed as regards such bonuses;

Whereas, since relations between undertakings in the Community steel and iron-ore industries are such that iron-ore is consumed

almost exclusively by combined undertakings so that virtually no market for Community iron-ore exists, the provisions governing the publication of price lists and conditions of sale applied by the iron-ore industry should be repealed;

HAS ADOPTED THIS DECISION:

Article 1

Decision No. 4-53, as amended on 11 December 1963, is amended as follows:

1. The words "and iron-ore" are deleted from the title and from Article 1(1) and (3).
2. The following is added to Article 2(2):
"(f) price increases and reductions for specific consumer groups;
(g) quantity and loyalty bonuses."
3. Article 2(3) is hereby repealed.
4. The words "large coke and crushed coke" are deleted from point 2 of Article 3, and point 5 is deleted.

Article 2

This Decision shall enter into force on 1 January 1973.

The text of Decision No. 4-53, as amended by this Decision, shall be published by way of Notice in the *Official Journal of the European Communities*.

¹ OJ No. L 297, 30.12.1972, p. 44.

² OJ No. 187, 24.12.1963, p. 2975/63.

³ OJ No. L 297, 30.12.1972, p. 39.

COMMISSION DECISION

of 22 December 1972

on alignment of prices for sales of coal in the common market¹

(72/443/ECSC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Coal and Steel Community, and in particular Articles 60(2)(b) and 47 thereof;

Having regard to Decision No. 30-53² of 2 May 1953 concerning practices prohibited in the common market for coal and steel under Article 60(1) of the Treaty;

Having regard to Decision No. 3-58³ of 18 March 1958 on alignment of prices for sales of coal in the common market;

Having regard to the Decision of the Council of the European Communities of 22 January 1972 concerning the accession of new Member States to the European Coal and Steel Community, and in particular Article 153 of the Act annexed thereto;

After consulting the Consultative Committee;

Whereas, to avoid disturbances of the common market, Decision No. 3-58 restricted the right of undertakings to align prices on a price list established on another basing point and securing for the buyer the most advantageous conditions at the place of delivery;

Whereas since 1958 changes have occurred in the common market for coal; whereas the restrictions on the right of alignment must be adapted to changed circumstances; whereas the accession of the United Kingdom, Denmark and Ireland and its consequences for the coal market must be borne in mind;

Whereas the rules laid down by Decision No. 3-58 must consequently be replaced by new provisions; whereas, under Article 30 of the Act, this must be done in conformity with the guidelines set out in Annex II thereto;

Whereas the right to align must to this end be confined to the price lists of undertakings and selling agencies which, because of the

volume and nature of production, are influential in the formation of prices in the common market; whereas experience since 1958 has shown that this means undertakings which sell on the common market more than one million tons annually of hard coal or products obtained from hard or brown coal of their own production; whereas, moreover, undertakings who are soon to cease production should be taken into consideration;

Whereas, furthermore, the tonnages which undertakings may supply under alignment should be limited; whereas to avoid perceptible alterations to traditional supply channels such limitations should be defined in geographical terms and for the principal groups of products;

Whereas the exercise of the right to align presupposes that the fuels to be supplied are comparable to those in the price list on which alignment is effected;

Whereas in order to prevent illicit underquotation, undertakings are required under Article 3 of Decision No. 30-53 to have regard to all the terms of the competitor's price list when calculating the delivered price;

Whereas, in order that delivered prices may be calculated accurately, undertakings must be required to know the exact amount of the transport costs;

Whereas, to facilitate the verification of authorised alignments where shipping costs are involved, undertakings must supply the Commission with information on the costs taken into account; whereas the Commission may publish the shipping costs used in an appropriate manner for the information of all concerned;

Whereas so that the scale of the transactions carried out by undertakings as a result of alignment may be assessed and so that a check may be kept as to whether this Decision is applied correctly, undertakings

¹ OJ No. L 297, 30.12.72, p. 45.

² ECSC Gazette No. 6, 4.5.1953, p. 109.

³ ECSC Gazette No. 11, 29.3.1958, p. 157/58.

must be required to notify the Commission at regular intervals of the character and amount of the transactions that they carry out under alignment;

HAS ADOPTED THIS DECISION:

Article 1

1. Undertakings in the coal industry may use their right to align their prices on a price list established on another basing point and securing for the buyer more advantageous conditions at the place of delivery only in accordance with the provisions of the following Articles of this Decision.

2. This Decision shall also apply to the selling agencies of undertakings in the coal industry within the meaning of Article 1(2) of Decision No. 30-53.

Article 2

Undertakings in the coal industry shall align their prices on the price lists of none other than the undertakings and selling agencies listed below:

- Aachner Kohlenverkauf GmbH, Aachen,
- Comptoir belge des charbons, Bruxelles,
- Gewerkschaft Auguste-Viktoria, Marl i.W.,
- Houillères du Bassin du Centre et du Midi, Saint-Etienne,
- Houillères du Bassin de Lorraine, Metz,
- Houillères du Bassin du Nord et du Pas-de-Calais, Douai,
- Maatschappij Laura & Vereeniging, Eyselshoven,
- Maatschappij Oranje-Nassau, Heerlen,
- National Coal Board, London,
- Niedersächsischer Kohlen-Verkauf GmbH, Hannover,
- Rheinischer Braunkohlenbrikett-Verkauf GmbH, Köln,
- Ruhrkohle AG, Essen,
- Saarbergwerke AG, Saarbrücken,
- Sophia-Jacoba Handelsgesellschaft mbH, Hückelhoven,
- Verkoopkantoor der Staatsmijnen, Den Haag.

Article 3

1. In each of the sales areas listed below the undertakings listed in Article 2 may align

only up to the tonnage marketed by them in that area during the preceding calendar year.

The sales areas for the purposes of this provision shall be the following:

- (a) Great Britain and Northern Ireland;
- (b) In the Federal Republic of Germany:
 - Lower Saxony, Schleswig-Holstein, Hamburg and Bremen,
 - North-Rhineland-Westphalia, Rhineland-Pfalz and Saarland,
 - Hessen, Baden-Württemberg and Bayern;
- (c) Belgium and Luxemburg;
- (d) In France:
 - the region to the east of and including the departments of Aisne, Seine et Marne, Loiret, Loir-et-Cher, Indre, Haute-Vienne, Dordogne, Lot-et-Garonne, Gers, Hautes-Pyrénées,
 - all other French departments;
- (e) Italy;
- (f) The Netherlands;
- (g) Denmark;
- (h) Ireland.

2. The tonnages referred to in paragraph 1 shall apply separately to each of the following products:

- (a) Hard coal for coke production;
- (b) Hard coal for domestic and small-scale consumption;
- (c) Other hard coals;
- (d) Furnace coke;
- (e) Foundry coke;
- (f) Other coke;
- (g) Hard coal briquettes;
- (h) Brown coal briquettes.

3. Upon receipt of an application setting out the reasons therefor the Commission may, in favour of certain undertakings or selling agencies, increase the maximum tonnages indicated in paragraphs 1 and 2.

Article 4

1. Alignment shall be permitted only if the undertaking is able to ascertain exactly the amount of the transport costs to the place of destination.

2. Where transport costs are not published, the undertaking which is aligning shall, where necessary, ascertain by examining the

actual vouchers that the details supplied by the purchaser or carrier concerning the amount of transport costs are accurate.

Article 5

In calculating the delivery price at the point of destination, undertakings effecting alignment shall take account of all costs to be borne by the consumer such as trade surcharges, price correctives for ash or water content, quality surcharges, and other significant factors (e.g. graining, volatile matter content, heating power, sulphur content, coke-producing capacity).

Article 6

1. Coal industry undertakings shall notify alignments within the common market in which shipping costs are involved. The notification shall specify the level of costs serving as a basis for the reduction caused by alignment.
2. The notification shall be made when the contract is concluded. It shall contain details of the calculation of the aligned price, distinguishing between loading and freight costs (included port fees, insurance and all other costs charged by the loader).
3. The Commission shall communicate on demand to all undertakings concerned the

shipping costs notified to it; it may publish them in an appropriate manner.

Article 7

Undertakings exercising the right to align prices must, on 15 August and 15 February of each year, inform the Commission of the following:

- (a) The tonnages of fuel and the agreed delivery terms for which supply contracts have been concluded under alignment;
- (b) The tonnages of fuel supplied under alignment and on the basis of their own price list in each of the sales areas listed in Article 3(1).

Such information shall be communicated in printed form in a manner to be determined by the Commission.

Article 8

This Decision shall not prevent undertakings from aligning their prices in accordance with the last subparagraph of Article 60(2) on conditions offered by undertakings outside the Community.

Article 9

This Decision shall enter into force on 1 January 1973. Decision No. 3-58 is hereby repealed with effect from the same date.