

EUROPEAN COAL AND STEEL COMMUNITY
EUROPEAN ECONOMIC COMMUNITY
EUROPEAN ATOMIC ENERGY COMMUNITY

COMMISSION

Sixth Report on Competition Policy

(Published in conjunction with the
'Tenth General Report on the activities
of the Communities')

BRUSSELS LUXEMBOURG April 1977

**This report on Competition Policy is published in six languages:
Danish, German, English, French, Italian and Dutch.**

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Introduction

In 1976 the European economy suffered, to differing degrees among the Member States, from persisting and in some cases worsening inflation, unemployment, monetary disturbances and balance-of-payments disequilibria.

In the last few years the acquisition of Europe's supplies of energy have undergone a major upheaval. A general dialogue has begun between countries rich in technology to establish a new and more equitable economic order. Willingly or unwillingly, Europe is in the throes of a long-term process of structural transformation and must somehow restore some kind of equilibrium within a new international division of labour.

In their attempts to solve the most pressing problems, above all that of reconciling stability with full employment, the Community institutions, the Governments of the Member States, business and the trade unions must remember the need for Europe to keep its frontiers open when planning for the future. The emerging industrial structures and new technologies must therefore be competitive. The preservation of the unity of the common market is and remains the basis for all new activities in the field of competition. The illusion that economic and social problems can be solved either by Community or national protectionism, jeopardizing the unity of the common market, cannot be maintained.

Competition policy is one of the fundamental means for preserving the unity of the market. Its aim is to ensure that business operates along competitive lines, while protecting the consumer by making goods and services available on the most favourable terms possible. It therefore endeavours to cut monopoly profits, to ensure that the economy remains adaptable to circumstances and to stimulate innovation.

In Community terms competition policy has to play an ancillary role to other policies, essentially to preserve or restore conditions in which competition can flourish. The fourth medium-term economic policy programme, for example, calls for 'an active competition policy' which can 'improve the effectiveness of the instruments of overall demand management'. Although competition cannot take the place of economic or social policy, it is nevertheless essential to the preservation of the flexibility which the economy must have if it is to remain adaptable.

The principle of competition, so basic to the common market, is therefore by no means rigid or dogmatic. It should not be regarded as the negation of a structural planning policy, as long as such a policy takes the unity of the common market as a basis and aims not to protect industries ill-equipped to meet competition, but to develop competitive activities.

The Commission consequently pays special attention to ensuring that its policies in specific areas do not render competition inoperative. The unity of the market and the structural changes which are needed if competitive business is to be developed must not be jeopardized by agreements entered into between private undertakings, and tolerated or even encouraged by the authorities.

Nevertheless, developments in competition policy go hand in hand with developments in other policies. This means that, in a multiplicity of economic situations, competition policy can fulfil both its role of establishing a competitive environment and of supporting other measures.

In the field of transport, for instance, the Commission has continued its work on the preparation of regulations applying the rules of competition to shipping and aviation. In conjunction with industrial policy, competition policy has continued its endeavours to promote cross-frontier cooperation between Community firms, particularly small- and medium-sized firms. They will thus be at less of a disadvantage against large enterprises, for which cooperation with other enterprises, in internal and external growth, and the development and management of new technology poses less serious problems.

In relation to State aids the role of competition policy has been not only to ensure that States take action only where there is a real need, but also to give added efficacy to the social and regional policies of the Community countries. The Commission's preference has been firmly in favour of aids which will solve long-term social problems, as against measures which do no more than preserve the *status quo* and put off decisions which will inevitably have to be taken.

Similarly, in dealing with regional aids, the Commission's attention has been directed primarily to the interests of the poorest regions, which are particularly vulnerable to overbidding for new investment between regions and Member States. The Commission has, therefore, given priority to the technical tasks necessary for the full application of the principles of coordination adopted in 1975, in order to submit all regional aids granted by Member States to Community discipline. At the same time it has continued the systematic examination of national schemes of regional aid, its overall approach facilitating a Community-oriented analysis.

The same desire for consistency has led the Commission to specify the rules to

be complied with by Member States when they are involved in the direct or indirect confrontation between firms in competition through public corporations over which they exercise management or control. The Commission is in this respect pursuing a request made by the European Parliament for the equal application of the rules of competition to all firms with due respect for the neutral approach of the Treaty to public and private ownership of companies and for the constraints imposed by the special responsibilities frequently assigned to undertakings.

In the direct application of the rules of competition to enterprises, the Commission made nine formal decisions under Articles 85 and 86 of the EEC Treaty, and twenty-eight under Articles 65 and 66 of the ECSC Treaty. As the Commission's practice becomes more definitive and the jurisdiction of the Court of Justice in references for interpretation grows, it increasingly suffices to draw a firm's attention to actual or possible infringements of the rules of competition for the offending practice to be voluntarily terminated. In the past year some 380 cases were dealt with in this way. In cases of particular importance, either because of the points of law which were raised or because of the economic power of the firms involved, the Commission issued press releases. It is much to be regretted that the Commission still has to issue decisions imposing prohibitions and fines in respect of export bans, for the position on such practices is abundantly clear from a long line of decisions.

The Commission has given priority to cases involving the conduct of firms in industries whose structure is such that any lessening of competitive pressures is likely to harm the consumers' interest. Such is the case where firms acquire market power through mergers, specialization, technological advance or by any other means. The Commission has also pursued its endeavours to apply Article 86 more systematically to enterprises in a dominant position and prohibited one such enterprise from operating an infringing system of rebates.

As regards prices charged by firms, the Commission has clarified its attitude to price information agreements. It has also begun considering the compatibility of spatial pricing systems with the rules of competition.

The fact that prices for a certain number of goods and services continue to vary sharply from one Member State to another is a continuing cause for concern. The differences may partly be explained by objective factors such as price control, prices imposed by the authorities, currency fluctuations and distribution characteristics. But in other cases they are the result of anticompetitive collusion or abuse of a dominant position. The Commission is of the opinion that it is abnormal in a market, supposedly a single entity, for major differences between prices for identical goods or services to persist over a lengthy period. The various national authorities should, therefore, be made aware of this phenomenon and its scale

gradually reduced. For its part, the Commission attaches great importance to analysing the causes of such differences and has extended its programme of studies on concentration, particularly to ascertain the relationship, if any, between the degree of concentration in a given industry and the level of prices charged.

In the steel industry the Commission has endeavoured to help firms to overcome the critical situation which has confronted them since 1975. But the Commission's action cannot be taken as a commitment to defend or protect the industry, either within the common market or as against the outside world, from the structural changes necessary for the future. The Community steel industry must remain competitive and will have to accept some degree of structural change. Consequently, the Commission has pursued its policy of promoting groupings of firms, and rationalization and specialization arrangements, which might help to achieve more competitive structures. It authorized a series of rationalization agreements combining a large number of German and Luxembourg steel firms. Several mergers were also authorized, some on a very large scale.

Of the outstanding questions which still remain to be settled under Article 85 of the EEC Treaty, the problems arising from joint ventures represented a substantial proportion in the past year. This is an area where a general approach is hardly possible; case-by-case scrutiny is the only satisfactory means of giving due consideration to the diversity of economic situations which may arise.

As regards industrial and commercial property rights, on the other hand, the Commission, with the experience of several individual decisions behind it, is preparing a draft regulation for a block exemption of certain patent licensing agreements. The regulation will reflect, among other things, the interest of small- and medium-sized firms in promoting the transfer of technology. The Commission has also prepared a draft notice to publicize its attitude to subcontracts in industry. Such agreements frequently provide a link between large firms which have work done outside the concern—frequently transferring knowhow for the purpose—and small- and medium-sized firms. Finally, the Commission has begun work on a revision of the Notice of 1970 on Agreements of Minor Importance.

All of these documents take special account of the interests of small- and medium-sized firms. The Commission's aim is not only an increase in the certainty of the law, but also to reduce the formalities which may operate as a barrier to this category of enterprises. The Commission also wishes to have a precise and effective body of Community rules of competition adequately reflecting current competitive structures.

It is all the more regrettable that the Council's work on the proposed merger-control regulation is proceeding so slowly. The Commission's proposal has been

before the Council since July 1973 and the broadly favourable opinions of Parliament and the Economic and Social Committee were published in February 1974. It is important that the Community should have the instruments it needs to preserve a competitive structure in the common market for the future. National merger-control rules, be they already in force or still at the drafting stage, are not enough: the Community must set itself a common objective and common rules to deal with mergers on a European scale.

Part One

Competition policy towards enterprises

Chapter I

Main developments in Community policy

§ 1 — New regulations and interpretation of existing regulations

1. Patent licensing agreements

1. In the First Report on Competition Policy the Commission referred¹ to the possibility of a block exemption for patent licensing agreements under Regulation No 19/65/EEC.² Parliament has suggested this on a number of occasions,³ and Community industry has regularly expressed interest in the idea.

2. In December 1974 the Commission and government experts from the Member States discussed the main problems arising from the application of the competition rules to patent licences.⁴ At the conference of the Member States to prepare for the signing of the Convention for the European Patent for the Common Market⁵ the Commission stated that no later than the date of entry into force of the Convention it would propose a regulation granting block exemption for patent licensing agreements. In the memorandum annexed to the address on the programme for 1976 the Commission stated that a draft would be presented to the Member States before the end of the year.⁶

3. The draft regulation on the application of Article 85(3) of the Treaty to certain categories of patent licensing agreements has since been referred to the Advisory Committee on Restrictive Practices and Dominant Positions, which first discussed it at a meeting on 8 and 9 December 1976. Because the matter is so

¹ Point 80.

² Council Regulation No 19/65/EEC of 2 March 1965 on the application of Article 85(3) of the Treaty to certain categories of agreements and concerted practices: OJ 36 of 6.3.1965.

³ Resolution on the First Report on Competition Policy, paragraph 6: OJ C 14 of 27.3.1973; Resolution on the Second Report on Competition Policy, paragraph 6: OJ C 11 of 7.2.1974; Resolution on the Third Report on Competition Policy, paragraph 6: OJ C 140 of 13.11.1974; Resolution on the Fifth Report on Competition Policy, paragraph 8: OJ C 238 of 11.10.1976.

⁴ Fourth Report on Competition Policy, point 21.

⁵ OJ L 17 of 26.1.1976.

⁶ Ninth General Report on the Activities of the European Communities, 1975, p. XLVI.

complex and there are so many questions to consider, consultations will continue early in 1977.

4. The draft is inspired by the principles emerging from Commission decisions taken from 1972 onwards in a series of individual cases.¹ It assumes that Article 85(1) of the Treaty applies to licences granting an exclusive territory for the manufacture and sale of patented goods. Exclusive manufacturing licences qualify for exemption provided the licensed territory is not too large. Exclusive sales licences qualify for exemption during a limited period where small- and medium-sized firms are concerned; Parliament was insistent on the need for this. As required by Article 1(2)(a) and (b) of Regulation No 19/65/EEC, the draft lists the restrictions and clauses which do not qualify for exemption and the other conditions which must be fulfilled.

The Commission stands by the views which it has already expressed² on Article 43 of the Convention for the European Patent for the Common Market.

2. Subcontracts

5. The Commission shares the concern of industrial circles and political authorities in the Community that legal uncertainty as to the application of the rules on competition in the Treaties must not be allowed to stand in the way of the growing tendency for large firms in the modern economy to have certain work done for them by others, particularly as this can be highly advantageous to small- and medium-sized firms.

6. Accordingly it has submitted the broad lines of a notice on subcontracting agreements to the government experts of the Member States. The Commission envisages the establishment by means of the notice of guidelines which, though not exhaustive, will assist firms to understand the meaning of the Treaty provisions, chiefly, Article 85(1) of the EEC and Article 65(1) of the ECSC Treaty, relating to subcontracting. Particular attention is paid to a number of clauses which are frequently found in subcontracts.

¹ Decision of 9 June 1972 (Davidson Rubber): OJ L 143 of 23.6.1972; Second Report on Competition Policy, point 46. Decision of 9 June 1972 (Raymond/Nagoya): OJ L 143 of 23.6.1972; Second Report on Competition Policy, point 45. Decision of 18 July 1975 (Kabelmetal/Luchaire): OJ L 222 of 22.8.1975; Fifth Report on Competition Policy, point 66. Decision of 25 July 1975 (Bronbemaling/Heidemaatschappij): OJ L 249 of 25.9.1975; Fifth Report on Competition Policy, point 67. Decision of 2 December 1975 (AOIP/Beyrard): OJ L 6 of 13.1.1976; Fifth Report on Competition Policy, point 63.

² Fifth Report on Competition Policy, point 11.

7. The proposed notice will be a first attempt to clarify the legal status of sub-contracts under the Treaty rules of competition. The basic problem is the compatibility with Article 85 of specific obligations imposed in subcontracts by reason of the prime contractor's interest in the performance of the order. Assessing these conditions therefore requires the specific nature of these contracts to be taken into account. Subcontracts differ from licensing agreements in that the knowhow, processes or information protected by patent or otherwise, made available to the subcontractor by the prime contractor is provided for the sole purpose of enabling the subcontractor to meet the order. It therefore follows that restrictions on the subcontractor, which in a licensing agreement might infringe Article 85, should not be prohibited in a subcontract, provided the subcontracted goods incorporate a substantial portion of the prime contractor's knowhow. These considerations are chiefly relevant to clauses restricting the subcontractor from using the prime contractor's knowhow for his own purposes or imposing an obligation to deliver the products of its application to the prime contractor only.

8. As regards other clauses commonly found in subcontracts, such as the obligation not to divulge knowhow to third parties, the use after the agreement has terminated of knowhow received by the subcontractor during the currency of the agreement and the use of inventions, patentable or not, made by the subcontractor during the course of the work, the Commission will follow similar considerations to those which have previously guided its scrutiny of patent and knowhow licensing agreements.¹

9. In view of the close link between this field and patent licensing, consultations on this notice will proceed in the same way as on the regulation mentioned above.²

3. Amendment of Regulation No 67/67/EEC

10. The Commission is proposing amendments to a number of Articles in Regulation No 67/67/EEC of 22 March 1967 on the application of Article 85(3) of the Treaty to certain categories of exclusive distribution agreements³ to bring them into line with developments in Community law, particularly as expounded by the Court of Justice.

11. The first amendment concerns Article 1(1) of the Regulation, which declares Article 85(1) of the Treaty to be inapplicable to exclusive supply and purchasing

¹ See, for instance, the Kabelmetal/Luchaire Decision: OJ L 222 of 22.8.1975; Fifth Report on Competition Policy, point 66.

² Point 3 of this Report.

³ OJ 57 of 25.3.1967, amended by Commission Regulation (EEC) No 2591/72 of 8 December 1972: OJ L 276 of 9.12.1972.

commitments in relation to specified goods for resale. As regards the exclusive supply commitment, Article 1(1)(a) states that the resale must be 'within a defined area of the common market'. The group exemption applies only where exclusive rights are given in respect of a specific territory. But Article 1(1)(b), dealing with exclusive purchasing commitments, does not make this point. The Commission feels that the latter provision must be amended to preclude any misunderstanding.

Application of Regulation No 67/67 has also revealed the need for a tighter definition of what constitutes a 'defined area of the common market'. In practice more and more exclusive distribution agreements are being made to cover the entire territory of the Community with the exception of one small country. Although such agreements conform to the letter of the Regulation they are incompatible with its spirit. Both the wording of Article 1(1) and the recitals to the Regulation show that the aim of Community law was to give the benefit of the group exemption only to exclusive distribution agreements covering a part of the common market. The appraisal of agreements allotting all, or virtually all, of the territory of the Community to a dealer should therefore be a matter for individual decisions.¹

The definition of the allotted territory in Regulation No 67/67 should be consistent with the definition in the proposed group exemption for patent licensing agreements.² In the interests of competition the exclusive territory allotted by the manufacturer to his dealer must not represent too large a proportion of the Community market as a whole.

12. The question of changing the law as it now stands also arises in respect of Article 1(2) of the Regulation, under which the group exemption does not apply to agreements between undertakings from one Member State only and which concern the resale of goods within that Member State. Hitherto the Commission had interpreted this as excluding all purely 'national' exclusive distribution agreements from the scope of Regulation No 67/67. It therefore regarded these agreements, where they were within the prohibition of Article 85(1) as eligible for exemption under Article 85(3) only by means of an individual decision.³ The Court of Justice has taken a different view, holding that the group exemption is also available for contracts 'which, although concluded between two undertakings from one Member State, may nevertheless by way of exception significantly affect trade between Member States but which, in addition, satisfy all the conditions laid down in Article 1 of Regulation No 67/67'.⁴ The Commission is currently considering

¹ Duro-Dyne/Europair Decision: OJ L 29 of 3.2.1975; Fourth Report on Competition Policy, points 102 to 104.

² Point 4 of this Report.

³ Goodyear Italiana/Euram Decision: OJ L 38 of 12.2.1975; Fourth Report on Competition Policy, point 98.

⁴ CJEC 3.2.1976 (Fonderies Roubaix v Fonderies Roux), 63/75: [1976] ECR 111, 119 and 120; point 35 of this Report.

whether the change in the legal situation brought about by this judgment requires another amendment of the regulation. It may be that Article 1(2) will simply have to be deleted.

13. Finally, it would seem opportune to redefine the limits of the group exemption more tightly. Above all, Article 3(a) requires amendment. The new wording must make it clear that contracts between competing producers which impose exclusive supply or purchase obligations in no case qualify for the group exemption, whether the obligations are unilateral or reciprocal being immaterial.

14. Acting under Article 6(1)(a) of Regulation No 19/65/EEC¹ the Commission for the first time consulted the Advisory Committee as to the proposed amendments on 10 December 1976. There will be further consultations in the first part of 1977.

4. *The proposed merger control regulation*

15. In 1976 the Council Working Party on Economic Questions held only one meeting—on 23 March—to consider the Commission proposal transmitted to the Council on 20 July 1973,² approved by Parliament on 12 February 1974³ and by the Economic and Social Committee on 28 February 1974.⁴ It submitted an interim report to the Permanent Representatives Committee on how work should proceed on the five following problems: the principle of premerger control and the legal basis of the proposed regulation, the field of application, the possibility of derogations from any prohibition, the notification of planned mergers and the decision-making procedure. The Committee was unable to come to any decision this year.

5. *Proposed regulations applying the rules of competition to sea and air transport*

16. The Commission has pursued its work on a regulation applying the rules of competition to air transport.⁵ Views and information have been exchanged with the Member States.

Replying to a Commission questionnaire, the national authorities responsible have provided detailed information on the following subjects: laws, regulations and administrative provisions governing competition in air transport and their application by national authorities and courts; the number, field of activity, economic

¹ OJ 36 of 6.3.1965.

² OJ C 92 of 31.10.1973.

³ OJ C 23 of 8.3.1974.

⁴ OJ C 88 of 26.7.1974.

⁵ Fifth Report on Competition Policy, point 14.

size and services of airlines established in the various Member States, including both scheduled and non-scheduled flights; relations between Member States and airlines and international organizations; multilateral and bilateral air transport agreements entered into by the Member States; agreements for technical and economic cooperation between airlines; and relations between airlines and transport auxiliaries.

Analysis of replies to the questionnaire has again highlighted the main difficulty faced by the proposed regulation; for the special aspects of the air transport industry should be taken into account but not in such a way as to jeopardize the direct operation of Articles 85, 86 and 90 of the EEC Treaty. The Commission's solution is to adopt a regulation based *inter alia* on Article 87(2)(c) of the EEC Treaty.

17. The preliminary draft of the regulation to be proposed by the Commission will contain both substantive and procedural rules.

As regards the substantive rules, the preliminary draft will define the regulation's field of application and reaffirm the principles laid down by the EEC Treaty as regards competition. The draft provides for an exception in respect of agreements solely governing technical cooperation between airlines. The Commission is also considering what other forms of cooperation—route-pooling agreements and agreements concerning fares and terms of carriage concluded in IATA, for instance—may be the subject of a block exemption and to what extent.

Little difficulty is expected with procedural rules since in virtually every case the provisions of Regulation No 17/62 or of Regulation (EEC) No 1017/68 can be taken over. The Commission will refer the preliminary draft to government experts from the Member States for new consultations in 1977.

18. The Commission has also continued its investigation of conditions on the shipping market.¹ In view of the economic difficulties facing this industry, requiring re-examination of policies, and of the uncertainty surrounding the United Nations Code of Conduct for Liner Conferences, preparatory work on a regulation applying the rules of competition to sea transport will require more time.

6. *The regulation of periods of limitation for proceedings and enforcement under the ECSC Treaty*

19. The Commission has adopted the draft of a general decision concerning periods of limitation for proceedings and the enforcement of sanctions under the

¹ Fifth Report on Competition Policy, point 15.

rules of the ECSC Treaty and has referred it to the Consultative Committee and to the Council.

In thus initiating the legislative procedure of the ECSC Treaty the Commission is following up a suggestion made by the European Parliament. In its deliberations on Council Regulation (EEC) No 2988/74¹ Parliament called for the adoption of similar rules of limitation in other areas of Community law.

20. Rules concerning periods of limitation for proceedings and the enforcement of sanctions under the ECSC Treaty are necessary as a means of ensuring certainty in the law. A large number of provisions in the ECSC Treaty (Articles 47, 54, 58, 59, 60 to 64, 65, 66, 68 and the first and second paragraphs of Article 95) empower the Commission to impose pecuniary sanctions in the forms of fines and periodic penalty payments on firms that contravene Community law. The sanctions are designed to enforce compliance with rules in a number of different areas, such as breaches of the rules governing the provision of information and checks (Article 47), investment (Article 54), measures taken to deal with crises (Articles 58 and 59), prices (Articles 60 to 64), competition (Articles 65 and 66), wages and welfare benefits (Article 68) and other matters (Article 95, first and second paragraphs). Individual Commission decisions imposing fines or periodic penalty payments are enforceable under Article 92. But neither the Treaty nor the rules adopted for its implementation specify the period of time within which the sanctions may be imposed or their enforcement may be sought. There is thus a lacuna in the legal system of the ECSC Treaty that can be filled in only by the Community's legislative processes.

21. The proposed decision will be based on the first two paragraphs of Article 95 of the ECSC Treaty, under which the Commission may take any decision which is necessary to attain one of the objectives of the Community in the common market for coal and steel in cases not provided for by the Treaty. The decision requires the unanimous assent of the Council and a reference to the Consultative Committee.

The structure and content of the draft decision broadly correspond to Council Regulation No 2988/74.² Limitation periods will apply chiefly to the Commission's power to impose (limitation periods in proceedings), and to the enforcement of fines and periodic penalty payments imposed (limitation periods in enforcement). The draft defines the relevant limitation periods, the time from which they run and the events which interrupt or suspend them.

¹ Council Regulation (EEC) No 2988/74 of 26 November 1974 concerning limitation periods in proceedings and the enforcement of sanctions under the rules of the European Economic Community relating to transport and competition (OJ L 319 of 29.11.1974).

² Fourth Report on Competition Policy, points 48 to 50.

Limitation periods in proceedings have been set in relation to the nature and gravity of the infringements. There is a three-year limitation period as regards infringement of the rules relating to information and checks and a five-year period for infringements of substantive rules. Time runs from the date when the infringement was committed, but where the infringement is continuing or repeated, time runs from the day on which the infringement ceases. The limitation period in enforcement is set at a uniform five years from the date when the decision became final.

Rules concerning the interruption or suspension of periods of limitation are identical to those of Council Regulation No 2988/74.

§ 2 — Cases decided by the Court of Justice

1. EMI v CBS

22. A series of references for preliminary rulings gave the Court an opportunity to complete and to clarify its jurisprudence as to the limits imposed by Community law on the exercise of industrial and commercial property rights.¹

23. The judgments of 15 June 1976 in the cases between EMI and CBS² deal chiefly with the question whether the principles applicable to trademark rights of common origin, which have evolved for the common market,³ can be extended to relations between the Community and non-member countries.

The English company EMI Records Ltd, which owns the 'Columbia' trademark in all Community countries, relied on its trademark rights in several actions against the American group CBS Inc. CBS had imported into the Community records bearing the same label manufactured in the United States and distributed through its subsidiaries. Initially the Columbia label was held by an American firm throughout the world. In 1917 it transferred its assets and goodwill in several European countries, together with the trademark rights held there, to its British subsidiary. However, it retained all rights for the United States and certain other countries. The American label has since changed hands several times, and now belongs to CBS, which has no legal or economic link with EMI, the owner of the mark in Europe.

24. The Court of Justice, following the Commission's arguments, held that the provisions of the Treaty relating to the free movement of goods, and notably the prohibition of measures having equivalent effect to quantitative restrictions (Article 30), normally apply only to trade between Member States. The exercise of a trademark right in order to block sales under an identical trademark of goods imported from a non-member country is without effect on intra-Community trade since it does not jeopardize the unity of the common market.

There is no need to consider whether the trademarks share a common origin with an identical trademark registered in a non-member country. This would be significant only if it were necessary to consider whether there was the possibility of

¹ Fourth Report on Competition Policy, points 60 and 61.

² EMI Records Ltd v CBS United Kingdom Ltd, CBS Grammfon A/S and CBS Schallplatten GmbH, 51, 86 and 96/75: [1976] ECR 811, 871 and 913.

³ CJEC 3.7.1974 (Van Zuylen Frères v Hag AG), 192/73: [1974] ECR 731, 745: 'To prohibit the marketing in one Member State of a product legally bearing a trademark in another Member State for the sole reason that an identical trademark, having the same origin, exists in the first is incompatible with the provisions for the free movement of goods within the common market'.

partitioning markets within the Community. The question does not arise where a single owner has the same trademark rights for the same product in all Member States. This conclusion is not invalidated by the provisions of the Treaty relating to the admission to free circulation of goods coming from non-member countries (Articles 9(2) and 10), nor by the rules on the common commercial policy (Article 110 *et seq*). But the Court did not consider the question whether these principles also apply where the trademark rights are not held by the same person in all the Member States. Here, the exercise of the trademark right would tend to divide the Community into separate national markets.

25. The Court also confirmed the Commission's opinion that in cases such as this the applicability of Articles 85 and 86 has to be considered.

If the exercise of the trademark right served to isolate the whole of the common market it could be caught by the prohibition in Article 85 if it were the object, the means or the consequence of a restrictive agreement. The mere fact of a restriction on the supply in the Community of goods originating in a non-member country, but similar to those protected by a trademark in the Community, could adversely affect the conditions of competition in the common market. In cases where the owner of the disputed trademark in the non-member country has several subsidiaries established in different Member States of the Community, who can market the relevant goods in the common market, the segregation of national markets is also liable to affect trade between Member States.

In the case in question, there had been an agreement between the American and European trademark owners to share world markets in gramophone records. The agreement had been terminated several years before litigation commenced.

The question was therefore whether the agreement continued to have any effect after its formal termination, for this would make Article 85 applicable.

Since the question had been referred for a preliminary ruling the Court was able to do no more than answer this question in the abstract. It nevertheless seemed inclined to reject that Article 85 was applicable in this case. In its judgment the Court stressed that a restrictive agreement is deemed to produce effects only if the conduct of the firms concerned justifies an inference of concerted action and coordination consistent with the agreement and produces the same result intended by the agreement. The Court also held that this would not be the case where the effects did not exceed those normally attached to the exercise of national trademark rights.

In this connection the Court recalled that the American firm could penetrate the common market even without using the Columbia label. The need for the

proprietor of an identical trademark in a non-member country to obliterate the trademark from the relevant goods when exported to the protected market and to inscribe some other trademark would therefore be one of the acceptable consequences of the protection given to the trademark.

26. As regards Article 86 the Court confirmed an earlier ruling to the effect that the trademark right does not of itself confer a dominant position on the proprietor. It further held that to use a trademark to impede imports of products bearing an identical trademark into the protected territory was not to abuse a dominant position for the purpose of Article 86.

27. In general terms the EMI v CBS ruling again reaffirms the significance of Community competition policy in relation to industrial and commercial property rights. In relations with non-member countries, where Article 30 *et seq* of the Treaty (providing for the free movement of goods) are not as a rule applicable, the rules of competition are the foremost means of removing barriers to trade erected by such rights.

2. Terrapin v Terranova

28. The judgment of 22 June 1976 in Terrapin v Terranova¹ chiefly concerns the question of trademarks which are not of the same origin but are identical or similar enough to be capable of confusion. The plaintiff in the main action, a German company, markets finished plaster for facades and other construction materials under the registered trademarks 'Terra', 'Terra-Fabrikate' and, most important of all, 'Terranova'. The defendant, an English company, manufactures and sells prefabricated houses and components for the construction of such houses. It sells them under the name 'Terrapin', which is also its business name. The object of the action was to have the defendant prohibited from using the name 'Terrapin' in the Federal Republic of Germany.

29. The Bundesgerichtshof, the highest national court, found that the products distributed by the two parties were similar and that use of the words 'Terra' and 'Terranova', on the one hand, and 'Terrapin' on the other could give rise to confusion. It therefore concluded that the action for infringement brought by the plaintiff was well-founded in German law. However, it asked the Court of Justice whether this exercise of a trademark right under national law was contrary to the rules on freedom of movement in the common market.

¹ Case 119/75: [1976] ECR 1039.

30. The Court of Justice replied that it was not, holding that it was compatible with the provisions of the EEC Treaty on free movement of goods for a firm established in one Member State, by virtue of a right to a trademark and a right to a business name protected by the legislation of that State, to prevent the importation of products of a firm established in another Member State and bearing under the legislation of that State a name giving rise to confusion. It added a proviso to the effect that there must be no agreements restricting competition, nor legal or economic ties between the undertakings, and that their respective rights must have risen independently of one another.

The Court referred expressly to 'the present state of Community law' and to the 'particular situation', so that the judgment does not resolve the matter definitively. Indeed the Commission has also stressed that the current legal situation is hardly satisfactory and that a single, uniform trademark law must be created for the Community.¹ The national courts must further ascertain, in the light of the second sentence of Article 36 of the Treaty, whether the exercise of industrial and commercial property rights in a given case, while necessary in order to guarantee the very existence of those rights, does not constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.

31. As it has not yet been asked for a preliminary ruling on the matter, the Court has not had to pronounce upon the highly controversial question whether the similarity between the products of two parties and the possibility of confusion are to be regarded in the light of national law only or whether the principles of Article 36 also apply. But it did hold that 'an allegation by one undertaking as to the similarity of products originating in different Member States and the risk of confusion of trademarks or [business] names legally protected in these States may perhaps involve the application of Community law...'

3. Centrafarm

32. Here it is also worth mentioning the Centrafarm judgment, given on 20 May 1976,² which illustrates the similarity between market-sharing through an extended exercise of industrial and commercial property rights, and market segregation resulting from technical barriers to trade. After obtaining confirmation from the Court of Justice³ that the rules on free movement of goods prevail over attempts to separate national markets through parallel industrial and commercial property

¹ In August 1976 the Commission published a memorandum proposing that an EEC trademark should be established (Supplement 8/76 - Bull. EC).

² Adriaan de Peijper, Managing Director of Centrafarm BV, 104/75: [1976] ECR 613.

³ CJEC 31.10.1974 (Centrafarm BV and Adriaan de Peijper v Sterling Drug Inc. (parallel patents) and Winthrop (trademarks)), 15 and 16/74: [1974] ECR 1147 and 1183; Fourth Report on Competition Policy, point 61.

rights, the Dutch firm Centrafarm was confronted by another barrier to imports in the form of legal requirements as to pharmaceutical preparations. The importer of medicines is required to furnish documents relating to the manufacturing process, and qualitative and quantitative composition of the products. The documents were not available to it and, furthermore, had already been submitted to the relevant authorities by the manufacturer or first authorized importer.

33. The Court of Justice held that national rules or practices which result in imports being channelled through certain traders only and excluding other traders, constitute measures having an effect equivalent to a quantitative restriction within the meaning of Article 30 of the Treaty. They cannot come within the exceptions specified in Article 36 of the Treaty, unless it is clearly proved that human life and health cannot be protected as effectively by other measures having a lesser effect on intra-Community trade or that any other rules or practices would obviously be beyond an administration operating in a normal manner. Where necessary the national authorities should endeavour to obtain from the manufacturer, his official representative or the appropriate health authority in the exporting country, information establishing whether the imported medicine is actually the same as that for which they already have information.

4. Roux v Roubaix

34. Giving judgment on 3 February 1976 in Case 63/75 (*Fonderies Roubaix v Fonderies Roux*)¹ the Court ruled on the scope of the provisions of Regulation No 17 relating to notification and on the interpretation of Regulation No 67/67/EEC on the application of Article 85(3) of the Treaty to certain categories of exclusive distribution agreements.

The judgment was given on a request for a preliminary ruling by the Paris Court of Appeal. The case concerned the validity of an unnotified exclusive distribution agreement between two French firms concerning the marketing in France of certain goods imported from Germany. The French Court's question was whether contracts of this type relate to imports or exports between Member States and are therefore notifiable under Article 4(1) of Regulation No 17.

The Court's answer was in the negative:

'to the extent to which it exempts from notification agreements which do not relate either to imports or to exports, Article 4(2)(1) of Council Regulation No 17 must be interpreted as extending to agreements granting exclusive sales concessions in relation to the marketing of goods, where the marketing

¹ [1976] ECR 111.

envisaged by the agreement takes place solely within the territory of the Member State to whose law the undertakings are subject, even if the goods in question have at a former stage been imported from another Member State'.

35. The Court further confirmed that national courts had jurisdiction to find that such contracts are caught by the prohibition in Article 85(1) of the Treaty and to determine whether they qualify for the group exemption given by Regulation No 67/67/EEC.

Departing from the line hitherto taken by the Commission,¹ the Court considered that it was both possible and necessary to apply Regulation No 67/67/EEC to 'national' exclusive distribution agreements. Article 1(2) of the Regulation, under which the exemption does not apply to agreements to which undertakings from one Member State only are party and which concern the resale of goods within that Member State, does not debar application of the law in this way. The effect of Article 1(2) is to exclude from the prohibition in Article 85(1) and therefore from the scope of Regulation No 67/67/EEC exclusive distribution agreements which are purely national in character and which are not liable to have any appreciable effect on trade between Member States. But it does not have the effect of precluding the benefit of the group exemption for agreements which, although concluded between two undertakings in the same Member State, may nevertheless by way of exception significantly affect trade between Member States and which, in addition, satisfy all the conditions laid down in Article 1 of Regulation No 67/67/EEC.

36. As stated above² the Commission is now considering the practical implications of this judgment.

¹ Goodyear Italiana/Euram Decision: OJ L 38 of 12.2.1975; Fourth Report on Competition Policy, point 98.

² Point 12 of this Report.

§ 3 — The rules of competition in the international context

1. Application of rules of competition to undertakings from non-member countries

37. Two recent decisions (*United Brands*¹ and *Hoffmann-La Roche*²) have again shown that the fact that an undertaking has its headquarters outside the Community does not exclude it from the scope of the Community rules governing competition within the common market. In its Second Report on Competition Policy, the Commission stated³ that it and the Court of Justice both considered that the Community had power to act against a non-Community undertaking under Article 85 wherever the effects of the restrictive practice were felt within the common market.

In terms of legislation, administrative practice and court rulings, the legal theory here—the ‘effects’ theory⁴—is based on a broad interpretation of the principle that the authorities can act against restrictions of competition whose effects are felt within the territory under their jurisdiction, even if the companies involved are located and doing business outside that territory, are of foreign nationality, have no link with that territory and are acting under an agreement governed by a foreign law.

38. In practice the cases so far brought before the Commission and the Court of Justice have always had some link with the Community. In its very first decision under Article 85⁵ the Commission considered the effect in the common market of an exclusive distribution agreement that contained a prohibition on re-imports into the common market, concluded by a French manufacturer with a Swiss dealer in respect of sales in Switzerland.

In the *Béguelin* case⁶ the converse applied: an exclusive agency was given by a Japanese producer to a Franco-Belgian firm for sales in Belgium and France, and the agreement fell within the broader context of a group of exclusive distribution agreements with other agents in other parts of the common market.

¹ Fifth Report on Competition Policy, point 71.

² Point 170 of this Report.

³ Second Report on Competition Policy, point 24.

⁴ This theory is also recognized by the laws of several Member States. The German Act against Restraints of Competition of 1957, for instance, states at Section 98(2): ‘This act shall apply to all restraints of competition which have effect in the area in which this act applies, even if they originate outside such area’.

⁵ *Grosfillex-Fillistorf*: OJ 58 of 9.4.1964; First Report on Competition Policy, point 51.

⁶ CJEC 25.11.1971, 22/71: [1971] ECR 959; Second Report on Competition Policy, point 24.

In an action arising from parallel imports into France the Court held that the fact that one of the undertakings involved was established in a non-member country did not debar the application of Article 85 provided the agreement produced its effects in Community territory.

The Dyestuffs cases¹ concerned firms domiciled in non-member countries—ICI in the United Kingdom (before accession) and Ciba-Geigy and Sandoz in Switzerland—which all had subsidiaries in the common market. To prove that it had jurisdiction over the parent companies the Commission invoked the restrictions created in the common market by the concerted practices in which those companies were involved. It also found that instructions to raise prices given by the parent companies outside the common market were binding on the subsidiaries, so that the parent companies and not the subsidiaries were to be blamed for the restrictions of competition. In its judgments² the Court of Justice held that the parent companies, through their subsidiaries (whose conduct they controlled) had themselves acted in the common market. It therefore considered that the separate legal personality of parent company and subsidiary could not be taken to counteract the assumption that on the market they acted as one. In these cases, therefore, the Court did not have to invoke the effects theory.

In subsequent cases,³ dealing now with Article 86 of the Treaty, the Court confirmed its jurisprudence as to the economic unity and unity of conduct on the part of parent company and subsidiary.

39. The principles of law which thus emerge from this line of cases give substance to the economic unity theory, which to some extent supplements the effects theory and is of particular importance in relation to multinational companies. It underlines the solutions found to problems arising in scrutiny, notification and enforcement where cases involve non-Community undertakings linked with Community undertakings.

The notion of the economic entity, however, does not always involve imputing the subsidiary's conduct to the parent company, or assuming that subsidiaries incorporated under the company law of the country where they are in business, are necessarily incapable of acting independently of the parent company. Indeed, subsidiaries in the common market may on occasion be found to be directly responsible for a practice prohibited by Article 85. That Article may thus apply even to restrictive agreements between companies of the same group. The Court

¹ Commission Decision of 24.7.1969: OJ L 195 of 7.8.1969, p. 11; First Report on Competition Policy, point 7.

² Cases 48, 52 and 53/69: [1972] ECR 619, 787 and 845.

³ Continental Can, 6/72: [1973] ECR 215; Commercial Solvents, 6 and 7/73: [1974] ECR 223; Centrafarm v Sterling Drug, 15/74: [1974] ECR 1147.

of Justice has held that 'Article 85 of the Treaty is not concerned with agreements or concerted practices between undertakings belonging to the same concern and having the status of parent company and subsidiary, if the undertakings form an economic unit within which the subsidiary has no real freedom to determine its course of action on the market, and if the agreements or practices are concerned merely with the internal allocation of tasks as between the undertakings'.¹

2. Restrictive practices in international trade

(a) OECD

40. The Commission has continued² to take an active part in the work of international organizations concerned with issues affecting competition.

41. It is represented on a number of specialist working groups in OECD currently examining, among other things, various aspects of the restrictive business practices operated by some multinational enterprises, as well as restrictions of competition in the field of trademarks. The Commission also participated in the work which resulted in the publication by OECD in June 1976 of a Declaration on international investment and multinational enterprises. In a series of recommendations, of which one whole section is concerned specifically with restrictive business practices, the Declaration established voluntary guidelines for multinationals. The application of these guidelines in practice is to be kept under review in OECD.

The OECD initiative reflects the very widespread concern currently felt about the economic power of multinational enterprises, whose activities may frequently be obscure because of their complexity and diversity and may exceed the control of any one national authority. For this reason the guidelines emphasize as a matter of general policy the responsibility of multinationals to comply with official competition rules and established policies of the countries in which they operate and to be ready to consult and cooperate with national authorities responsible for competition issues and investigations—for example by providing information, subject to the safeguards normally applicable.

42. The Commission is still represented in the working group which is charged with the review of the operation of the two recommendations adopted by the

¹ Abovementioned Case 15/74.

² Fifth Report on Competition Policy, points 16 to 18.

OECD Council on cooperation in the field of restrictive business practices affecting international trade on 10 October 1967 and 3 July 1973.¹

(b) UNCTAD

43. The Commission has continued to participate in the UNCTAD Committee on Manufactures, especially in the third group of experts on restrictive business practices set up under Resolution 96 (IV), which was adopted by the fourth UNCTAD at Nairobi. This expert group has been given the responsibility of preparing proposals and recommendations with the objective of formulating a set of multilaterally agreed equitable principles and rules for the control of restrictive business practices having adverse effects on international trade, particularly that of developing countries. The first meeting of the group of experts was devoted to defining the aims which such rules and principles are intended to realize. At least two more meetings are planned for 1977, in order to reach agreement if possible upon rules and principles which would apply to States as well as to enterprises, and upon the universal and voluntary character of such provisions.

44. The fourth UNCTAD at Nairobi in May 1976 called for the continuation of work on drafting a code of conduct with the underlying aim of facilitating the transfer of technology.² In this context competition and restrictive business practices are among a number of aspects of technology transactions under consideration. These also include:

the need for regulatory action,
access to technology for developing countries at fair and reasonable prices,
special treatment for developing countries,
settlement of disputes.

The group of experts convoked by UNCTAD has already begun a series of meetings which are programmed to continue throughout 1977. As matters stand at present, two proposals have been made. The Community has taken part in the formulation of the draft outline for a code of conduct submitted by the developed countries. It consists of voluntary guidelines addressed to governments and enterprises. The developing countries, on the other hand, want a legally binding code. This difference of approach is the most important of the many issues which have yet to be decided.

As to their scope, both proposals are for a code which would have universal application, rather than one confined to developing countries, and could include plant, machinery and equipment within their terms, in addition to the transfer of rights in patents and knowhow.

¹ Third Report on Competition Policy, points 39 and 40.

² Fifth Report on Competition Policy, point 18; UNCTAD Resolution 89 (IV).

§ 4 — Price disparities in the Community

45. The following section gives an outline of the Commission's activities to help eliminate price disparities in the Community. Quite apart from its direct application of the rules on competition, the Commission has carried out studies on matters such as the causes of differing prices for identical products, investigations into the possible relationship between the position of certain firms on the market and their pricing policy, a more theoretical study of the effects of spatial pricing systems on competition and, finally, legislative activity.

1. Differing prices for identical products

46. So far none of the studies carried out in various industries where sharply differing prices between Member States were found to exist¹ has shown that the differences resulted from restrictive agreements or concerted practices within the meaning of Article 85 of the Treaty, or from abuse of dominant positions within the meaning of Article 86.

It has been found that, apart from purely competitive factors, there are a large number of other factors which may help to provoke or maintain price differentiation. The degree and extent of differentiation in certain industries may be influenced by price regulations in certain countries, price cuts ordered by the authorities, differences between national laws on marketing, and fluctuations in currency exchange rates. In other industries, price differences were found to be largely attributable to distribution costs which were much higher in one country than in another, the manufacturers not being involved at this stage.

The Commission has made no attempt to establish general criteria for all cases to determine whether the pricing policy of dominant firms constitutes abuse.

But it has taken action where it found persisting, major differences in prices for which there were no objective justifications. Decisions in certain cases are planned, like the decision already taken in the case of United Brands Corporation (Chiquita Bananas).²

2. Price analysis in the programme of studies on concentration

47. Studies on the evolution of concentration in different manufacturing industries³ inevitably have to consider the basic factors of international trade, dealing

¹ Fourth Report on Competition Policy, points 1 to 10.

² Commission Decision of 17 December 1975: OJ L 95 of 9.4.1976; Fifth Report on Competition Policy, point 71.

³ Part Three of this Report.

both with trade between Member States and trade between the Community and the rest of the world.

By extending the field of study to distribution the Commission is aiming to establish significant relationships between the structure of international trade and comparative trends in retail prices, depending on the point of manufacture or origin.

This is mainly a question of determining whether the price to consumers for imported goods rises more or less quickly than the price of domestic products. Does an increase in the price of a domestic product actually encourage imports of competing products? Do the retail prices of imported goods align on the retail prices of similar domestic goods or do the latter tend to fall under the impact of imports? Do the relations and reactions between the prices of imported and of domestic goods find uniform and simultaneous expression or are there major differences according to the country (and region) and sales point for the sample of products?

With its expanded study programme the Commission also seeks to analyse the problem of increased purchasing power.

3. *Spatial pricing systems*

48. The operation of certain spatial pricing systems may affect the working of competition.

For the coal and steel industries, Article 60 of the ECSC Treaty defines the pricing system which is compatible with the unity and smooth operation of the common market. The High Authority issued a number of decisions on this, and many of them eventually went to the Court of Justice.¹

In the area covered by the EEC Treaty, the Commission has frequently had to deal with certain price-fixing arrangements.²

49. To clarify the competition aspects of spatial pricing, a theoretical study has been made for the Commission.³ It considers the question of the compatibility

¹ First Report on Competition Policy, point 101; Second Report on Competition Policy, point 12.

² Commission Decisions of 6 November 1968—Comptoir français de l'azote and Comptoir belge de l'azote: OJ L 276 of 14.11.1968; First Report on Competition Policy, points 11 to 13. Commission Decision of 23 December 1971—Nederlandse Cement-Handelsmaatschappij OJ L 22 of 26.1.1972. Commission Decision of 18 December 1972—Cementregeling voor Nederland: OJ L 303 of 31.12.1972. Commission Decision of 22 December 1972—Cimenteries Belges: OJ L 303 of 31.12.1972; Second Report on Competition Policy, points 29 and 30. Commission Decision of 15 May 1974—Glass containers: OJ L 160 of 17.6.1974; Fourth Report on Competition Policy, points 62 to 64.

³ L. Philips, *Spatial Pricing and Competition: (Competition—Approximation of legislation) Series, No 29, 1976).*

with the competitive market set up within the European Communities of the operation in industry of certain delivered pricing systems.

The author concludes that 'these spatial pricing systems cannot be interpreted as being terms of sale derived from the specific trade usage of certain regions and certain industries, as having no implications for active competition and economic efficiency. In reality their impact is profound. Any competition policy which claims to be effective overlooks them at its peril'. He recommends that ex-works prices be the general terms of sale, with the seller paying the freight costs on occasion.

50. The Commission is currently considering how far the results of this study can be used in individual cases to establish whether spatial pricing systems are compatible with the rules on competition.

4. Price investigations

51. In parallel with its investigations and studies on price differentiation for certain products and on the repercussions of the pricing policies of certain firms on competition, the Commission has continued its endeavours to make available to the consumer extra information on prices and country-to-country price differences.¹

The aim is to increase price transparency in markets within the Community through the publication of surveys of prices for certain products or services. This should enable distributors and consumers to take advantage of differences in prices between one region and another. The differences are still quite considerable for certain products or services. The anticipated result is a general fall in prices and a narrowing of the differences between prices from Member State to Member State.

52. The Commission had initially planned to deal with the price surveys by means of a regulation. But in the course of talks with experts from the Member States, major technical difficulties have been found. These relate, among other things, to the definition of products, the survey methods and timing, fluctuations in exchange rates and the time that would elapse between the survey itself and the publication of its results.

New discussions are planned. They will deal with the facilities available to the Member States for carrying out price surveys and with the possibility of Community coordination of national initiatives through a committee to be set up for the purpose. A possible alternative would be to harmonize national rules applying in this field.

¹ Fourth Report on Competition Policy, point 10.

§ 5 — Joint ventures

53. Through its decisions in individual cases the Commission has continued to develop its policy on joint ventures.¹ It has reached the conclusion after dealing with a large number of cases that the question whether the formation of a joint venture is to be taken as a type of restrictive practice or as a merger can only be settled in the light of specific circumstances on a case by case basis. Joint ventures may amount either to a form of restrictive practice or to a merger. In complex cases both Article 85 and Article 86 of the Treaty may be applicable.

54. The Commission has always pointed out that the application of the Community competition rules does not depend on the legal form which may have been chosen by the firms concerned, but on the economic realities of their situation. Joint ventures with the sole object of combining certain functions of the firms involved, as in the case of joint buying organizations, joint selling agencies and joint R & D companies, have been held to amount to agreements. Article 85 applies to such combinations where the agreements between the relevant firms may appreciably affect competition in the common market and trade between Member States.

55. Nevertheless the prohibition in Article 85(1) can equally apply when the formation of a joint venture creates an independent economic entity with all the characteristics of a company in itself. The decisive question then is whether cooperation through the joint venture will have the object or effect of appreciably restricting competition between the parent companies or between them and other companies.

For the prohibition on restrictive practices to be applicable in respect of such a formation, the parent companies of the joint venture must at least have been potential competitors.

However, the prohibition will not in general be taken to apply to cases in which the parent companies transfer all their assets to the joint venture and themselves become no more than holding companies. Such a situation will usually be considered to constitute a merger.

Even where the transfer of assets is limited only to a part of the total business previously engaged in independently by the parent companies, the transfer may in exceptional cases be treated in the same way as a merger. But such exceptional cases can be taken to arise only where the parent companies completely and

¹ Fourth Report on Competition Policy, points 37 to 42.

irreversibly abandon business in the area covered by the joint venture, and provided that the pooling of certain areas of business does not weaken competition in other areas, and particularly in related areas, where the firms involved remain formally independent of each other.

56. Since 1975 the Commission has given practical expression to these principles in three decisions.

In the SHV/Chevron case¹ it authorized a partial merger affecting only the marketing of certain petroleum products, for the companies concerned had pooled their distribution networks and all related assets, withdrawing entirely from the market in which the joint venture operated. SHV and Chevron were still competitors on the markets in related products. But these related products were technically and economically distinct from the market in which the joint venture operated and independent of that market. The Commission therefore concluded that it was most unlikely that cooperation through the joint venture would noticeably affect the conduct of the parent firms as regards competition in other products. Accordingly, a negative clearance was given in this case.

In the Bayer/Gist case² the Commission opposed the formation of joint ventures which would have restricted competition between the parent companies to an extent contrary to Article 85. Under the initial agreements the facilities of the two parties for the manufacture of two products (raw penicillin and the intermediate product 6-amino-penicillanic acid) were to be transferred to the respective joint ventures, in which the parents were to be equally represented financially and in terms of staff. This would have led not only to joint control over investment and production in relation to the two products but also, in view of the economic importance of earlier production stages, to cooperation between the parent companies on the markets for processed penicillin and final products. The Commission was therefore unable to grant an exemption under Article 85(3) in respect of the joint venture arrangement.

In the KEWA case³ the formation of a joint venture by Bayer, Hoechst, Gelsenberg and Nukem was exempted under Article 85(3), subject to certain conditions and obligations. The business objective of KEWA is to construct and operate a large-scale nuclear fuel reprocessing plant and to market the reprocessed products. The parent companies undertook not to do business in these fields, except through the joint venture. The Commission regarded the agreement as restrictive of competition, since the four companies are all expert in reprocessing technology and must therefore be regarded as at least potential competitors.

¹ OJ L 38 of 12.2.1975; Fourth Report on Competition Policy, points 114 to 119.

² OJ L 30 of 25.2.1976; Fifth Report on Competition Policy, points 48 to 50.

³ OJ L 51 of 26.2.1976; Fifth Report on Competition Policy, points 44 to 47.

57. A similar line of reasoning was applied to the Vacuum Interrupters case,¹ decided early in 1977, in which the Commission found a restrictive agreement within the terms of Article 85. Here two major firms in the heavy electrical engineering industry—Associated Electrical Industries Ltd and Reyrolle Parsons Ltd—set up a joint venture to develop, manufacture and market a new type of interrupter. The Commission concluded that, at least in the medium term, each of the two parent companies was capable of doing business separately within the field given to the joint venture.

58. In order to determine whether Article 85(3) applies the main question is whether the joint venture offers substantial objective benefits to offset the disadvantages for competition. During the period covered by this report the Commission took the view in two decisions that this was not the case where in view of the size of the companies and the oligopolistic structure of the markets, the agreements were likely to eliminate competition in respect of a substantial part of the relevant products.² In a third case (Vacuum Interrupters) the Commission granted an exemption, and in a fourth (de Laval/Stork)³ has issued a notice under Article 19(3) of Regulation No 17 of an intended favourable decision.

59. From the decisions taken by the Commission so far, the following conclusions can be drawn: the Commission will refuse to grant exemption under Article 85(3) wherever the formation of a joint venture does not offer substantial economic benefits and wherever there is a chance that competition on the relevant market may be appreciably reduced. The Commission will, therefore, generally tend to take an unfavourable view wherever joint ventures are formed by large firms in different Member States with the object or effect of coordinating their conduct in the market. Exemption will also be refused where there is no need for close cooperation between the firms to take the form of a joint venture, as where the benefits of an agreement could be achieved by less restrictive means. In such cases, however, before refusing exemption, the Commission will generally consider whether the imposition of obligations and conditions can reduce the restriction of competition to the minimum indispensable to attain the objectives of the agreement.

The duration of the exemption will depend on the individual circumstances of each case. The Commission may confine its authorization to a relatively brief period (between five and ten years) to stress the provisional nature of the cooperation in a joint venture. This would apply notably where the joint venture is formed to enable one of the parent companies to enter production more quickly

¹ Commission Decision of 20.1.1977; OJ L 48 of 19.2.1977; point 175 of this Report.

² Points 177 and 179 of this Report.

³ Point 176 of this Report.

by having access to the knowhow and experience of the other. It could also apply where serious technical difficulties or particularly grave financial risks stand in the way of the development or manufacture of new products so that cooperation between two or more firms is necessary for a transitional period, as in the case of Vacuum Interrupters. In contrast, in other cases the circumstances may be such that the objectives of cooperation can be attained only in the long term, and exemption would not achieve the required result unless it is given for a relatively long term. In the KEWA case, the Commission fixed this period at 15 years.

§ 6 — Agreements not to compete

60. The Commission has made clear its position on the application of Community competition law to non-competition clauses.

By their very nature these clauses are manifest restraints of competition. There is no doubt as to their incompatibility with Article 85(1) wherever they substantially affect the operation of the market within the Community and trade between Member States. This rule applies to all agreements in which non-competition clauses have their own distinct legal and economic effect. On the other hand a more flexible approach is required where such clauses are stipulated in mergers or upon the sale of a business. Here the question is whether the clause is acceptable as an integral part of the legitimate purpose of the main agreement.

61. The Commission has already pronounced on this point on a previous occasion. In the SHV/Chevron decision¹ it did not oppose an agreement entered into by the parent companies not to compete on their joint subsidiary's market. The agreement provided SHV with the assurance that Chevron would not reduce the value of the assets it transferred by competing with the joint venture. The agreement not to compete was a condition precedent to the formation of the joint venture. In the KEWA case,² on the other hand, the Commission regarded the commitment by the parent companies not to do business in the same field as the joint venture as a restriction of competition caught by Article 85, for the economic situation was different. The Commission considered in the SHV/Chevron case that the parent companies were unlikely ever again to compete in the relevant market, whereas the possibility *was* present in the KEWA case. For these reasons the first case was regarded as a merger and the second as a restrictive agreement.

Where a non-competition clause agreed by parent companies does not concern a joint venture's area of activity, it is generally to be considered a restriction of competition within the meaning of Article 85(1), whether the joint venture is regarded as a restrictive agreement or as a merger. In SHV/Chevron, for instance, the Commission agreed to give negative clearance on condition that the firms concerned abandoned a clause of this kind.

62. In 1976 the Commission made its first decision on the acceptability of non-competition clauses in connection with an agreement for the sale of a busi-

¹ OJ L 38 of 12.2.1975; Fourth Report on Competition Policy, points 114 to 119.

² OJ L 51 of 26.2.1976; Fifth Report on Competition Policy, points 44 to 47.

ness. In its Reuter/BASF decision¹ it found that such clauses are not prohibited by Article 85 where they are necessary to guarantee that the entire business assets will be transferred to the purchaser. The clause in such a case is ancillary to the agreement for sale of the business and for the purposes of the law of competition is regarded as being part of that agreement. The decision stresses, however, that the seller may be subjected only to restrictions which are indispensable to attain the objective of the sale. Nor must the duration of such restrictions exceed the minimum required by the purchaser to take over the business. The Commission considers that non-competition clauses escape the prohibition in Article 85 only where the assets transferred consist chiefly of goodwill or knowhow, these being the only areas where the buyer requires protection from the seller by reason of the knowledge in the seller's possession. The scope of the ban on competition must furthermore be confined to activities which directly affect competition, such as manufacturing, applications and sales. The seller may not be prohibited, as he was in the Reuter/BASF case, from all activities in the field covered by the contract, including research and development. The Commission treated this limitation as being void *ab initio*.

63. As regards the precise acceptable duration of the agreement not to compete, the Commission has not yet finally established its policy.

In the Reuter/BASF case the parties had implemented the clause for five years before the Commission's decision was made. The Commission considered that the period indispensable for attaining the objective of the agreement was already exceeded.

¹ OJ L 254 of 17.9.1976; points 137 to 139 of this Report.

§ 7 — Authorization of two new cooperation agreements in the steel industry

64. At the end of 1976 the Commission authorized two rationalization and specialization agreements involving the Northern Group and Southern Group of German steel firms, as a result of which the firms concerned will be able to improve coordination of their endeavours to find joint solutions to problems concerning production, the supply of preliminary products, specialization and rationalization. Such agreements may, especially at times of economic difficulty, make for more efficient use of production facilities available in the Community. The authorizations, which were conditional, will expire on 31 December 1981.¹

In these two decisions the Commission stated that when it sets overall supply objectives for firms under the Community steel policy, such objectives may be set for these groups as authorized.² The members of the groups may then allocate orders and coordinate sales within the group. The advantage of this is that the firms concerned are left with the responsibility in operational terms of adapting supply to sales possibilities.

65. The European steel industry has felt the need to adapt its trade representation to the scale of the problems facing it. On 9 December it set up the European Association of Iron and Steel Industries (Eurofer), headquartered in Luxembourg, on the basis of Article 48 of the ECSC Treaty, which recognizes the right of undertakings to form associations provided membership is voluntary and the association engages in no activity which is contrary to the Treaty. The main function of the new Association will be to represent the common interests of its members in relations with the Commission.

The same basis was taken for the formation of an international association by steel trade associations and firms in Northern Europe early in 1976. This association was the target of heavy criticism as a potential threat to the unity of the Community steel market.

¹ Points 140 to 143 of this Report.

² OJ C 303 of 23.12.1976.

Chapter II

Main developments in national policies

66. Since the Treaties entered into force the Commission has paid close attention to the development of national competition policies, seeking particularly to avoid conflict between national and Community law.

As requested by Parliament, a brief outline of developments in the competition policy of Member States during 1976 is given below. Most of the information is taken from reports from the Member States to the Commission. In addition to new provisions of law, this survey also sets out plans for significant changes in the law and the main developments in the courts and in administrative practice. Since this is the first survey of national policies, the report for each country is preceded by a brief introduction to its competition law.

67. There are substantial differences in the legal treatment of competition policies resulting from differences in legal traditions and degrees of industrialization and concentration, and from the competing priorities of competition, industrial and structural policies. However, this survey also shows that, despite differences of degree, there is a general tendency for all the Member States to strengthen their competition policy to safeguard active competition. For instance, the principle of abuse is being dropped in favour of the principle of prohibition, resale price maintenance is being banned and merger control is becoming more stringent. The fact that Member States are improving their own merger control machinery highlights the need for rapid introduction of merger control at Community level.

Belgium

68. In Belgium the basic law on competition is the Act of 27 May 1960 for the protection against abuse of economic power. Belgian law does not regard monopolies and restrictive practices as dangerous and harmful *per se*. It is limited to suppressing abuse of economic power.

69. However, the Belgian Government is proposing to lay before Parliament a bill on competition, the broad lines of which are as follows:

The bill will apply to enterprises engaged in industrial, commercial, financial or agricultural business. Public services are excluded, but public enterprise (*organismes d'intérêt public*) are within the law, unless this would prevent them from exercising their function. Restrictive practices, dominant positions and mergers authorized by statute or statutory procedure would also be excluded to that extent.

The bill provides for preventive action, and is inspired by Community legislation. The rules on restrictive practices and dominant positions resemble those of Articles 85 and 86 of the EEC Treaty. However, they depart from Community rules at least to all appearances, in that restrictive practices and dominant firms with a turnover or market share below certain specified thresholds are not affected.

Certain specific provisions deserve special attention. One, for instance, provides for block exemptions for certain practices, while another would authorize the Minister of Economic Affairs to prohibit certain types of practice if there are serious grounds for believing that market conditions and competition in a given industry are affected by the dominant position of one or more undertakings.

Mergers involving enterprises with a turnover or market share above a certain threshold will require prior authorization. In the absence of a decision by the Minister of Economic Affairs within a specified period, the merger will be deemed to be authorized.

Scrutiny will be in the hands of a special department empowered to commence proceedings.

The Council for Competition will have two roles: to decide whether a given restrictive practice falls within the statutory prohibition and to advise the Minister on authorizations. However, it will have an advisory role only for mergers.

The Council will be composed of judges, civil servants and other persons with special qualifications in the field of competition. The Chairman will be a judge.

The final decision on authorization will rest with the Minister.

Infringements of the statutory prohibitions will be punishable by fines if shown to be deliberate.

In cases where a fine is imposed an appeal lies to the Council of State, which will have full jurisdiction on appeal.

The bill contains provisions on residual jurisdiction and on the assistance which can be requested from national authorities under the Treaty of Rome and its implementing regulations.

Individual Acts regulating specified industries remain applicable. For example, the Act of 14 July 1976 relating to public works, supply and services contracts

prohibits any act, agreement or collusive practice which may distort normal conditions of competition (Article 7). Tenders submitted by virtue of such an act, agreement or practice must be disregarded. If the act, agreement or practice leads to the award of a public contract, its performance must be halted unless the appropriate authority, giving reasons, decides otherwise.

Denmark

70. The basic law governing competition in Denmark is the Monopolies and Restrictive Practices Control Act of 1955, which has been amended several times. With the exception of resale price maintenance the Act does not prohibit any market position or practice. It is based on the principle of supervision and public knowledge. It subjects agreements and decisions to notification to the Monopolies Control Authority (MCA) if they exert or may exert a substantial influence on price, production, distribution or transport conditions either throughout Denmark or in local markets. At the request of the MCA, individual enterprises and combinations which have or may have a substantial influence are also subject to notification; and so are restrictive business terms stipulated by these enterprises or combinations. Restrictive agreements or decisions which are not notified within eight days after they are made are invalid. The notifications are entered on a public register and extracts are published in the State Gazette.

71. The MCA consists of a Board and a Directorate. The Board deals with all cases of general interest, while the Directorate prepares the cases for the Board, carries out its decisions and takes decisions in minor cases delegated to it by the Board.

The MCA has considerable powers of intervention which it may exercise if it finds that a restriction on competition results in, or may be assumed to result in, unreasonable prices or terms of business, unreasonable restraint of freedom of trade or unreasonable inequality in the conditions of trade. Where such restrictive practices cannot be brought to an end by negotiation, the MCA can issue an order which may:

- cancel, wholly or in part, the agreements, decisions or terms of business;
- prescribe that the prices, composition, weight or dimensions of articles be indicated on the product;
- prescribe alterations in prices, margins and terms of business, or fix maximum prices and margins;
- order a firm to sell to specified buyers.

72. The question of what is 'reasonable' is to be decided largely on a case by case basis. In judging whether prices are reasonable, the MCA must refer to the standards of enterprises operated with appropriate technical and commercial efficiency. Price-fixing in general is deemed unreasonable while recommended prices are acceptable. Agreements on quotas have been considered unreasonable where they prevented a shift of production from less efficient to more efficient undertakings. Different rates of discount or bonus are allowed if based on turnover and if they follow objective and consistently maintained lines. Agreements establishing unilateral or bilateral exclusive dealing arrangements between large groups of suppliers and buyers have as a rule been regarded as harmful. The MCA has in general disallowed collective refusals to deal. Competition rules made by trade organizations have been cancelled or reduced to the status of recommendations where they had harmful effects. The MCA has frequently intervened to supervise the terms of distributorship agreements. It has as a rule tolerated qualitative conditions set by undertakings for the appointment of distributors where they were justified on objective grounds. However, where such qualitative conditions have been applied in an arbitrary fashion or where the appointment of a distributor was based on the supplier's need rather than objective qualifications, the MCA has tended to intervene.

73. While there is no power given to intervene in planned mergers, the MCA can demand notification of a merger and its provisions on competition after the merger has been effected.

74. Further powers are given to the MCA by the Competitive Tendering Act 1966 and by the Prices and Profits Act 1974. Some provisional amendments have been made to the Prices and Profits Act 1974. They will come into force in March 1977, when the Profits Freeze and Price Curbing Agreements Act expires. The scope of the Act will be extended to include incomes policy as well as merely prices policy. Price supervision will be directed especially towards branches of trade protected from foreign competition, i.e. retail trade, construction and repair work and services.

75. The new Drug Act, which came into force on 1 January 1976, transferred most of the control of drug prices from the National Health Service to the MCA, which put great emphasis on supervising the prices charged by manufacturers, importers and wholesalers of drugs. With respect to certain sedatives the MCA found that the prices charged by manufacturers and importers for sales to wholesalers were unreasonable. It took the view that there must be limits to the profits on successful products after they had been on the market for a sufficiently long period of time to cover the necessary costs, including those of research. Accord-

ingly, the MCA ordered the prices of certain drugs to be reduced by 20% as a temporary measure. The enterprises concerned, Dumex, Roche and Pharma, appealed to the Monopolies Appeal Tribunal, which ruled that the price reductions should not become effective until a decision had been reached on the merits. The Tribunal said, among other things, that there were considerable price differences between the products of the appellants, while the percentage price reduction would be the same for all of them.

Federal Republic of Germany

76. The basis for the competition policy of the Federal Republic of Germany is the Act against Restraints of Competition of 1957. This initially prohibited horizontal agreements, subject to limited exceptions, and created more flexible control of vertical agreements restricting competition and of abuse of a dominant position. As amended in 1973, the Act extends the prohibition to concerted practices, declares resale price maintenance agreements to be void, strengthens the control of abuse of dominant positions and establishes preventive control of mergers.

The authority chiefly concerned is the Federal Cartel Office (Bundeskartellamt) in Berlin, together with authorities in the Länder. As regards merger control, the Federal Minister of Economic Affairs has major powers in addition to those of the Cartel Office. He may authorize a merger prohibited by the Cartel Office where there are compelling reasons for doing so to safeguard the public interest. The Act of 1973 also set up a Monopolies Commission with five independent members. Its role is to publish periodic reports on the trend of business concentration and on the application of the rules relating to firms in a dominant position and to merger control.

77. On 28 January 1976 the control of press mergers came into operation with the Third Act to amend the Act against Restraints of Competition. The new Act adapts the general merger control provisions to the special structure of the press sector.

78. In 1976 the Monopolies Commission submitted its first biennial report. It concluded that since 1960 not only had there been a sharp increase in business concentration but also a widening of the disparities in size between firms. In nearly half the mergers notified the acquiring firm was one of the hundred largest in the country and it was generally small- and medium-sized businesses that were acquired. The Monopolies Commission also reported that competition in banking and energy deserves special attention. It considers that the merger control arran-

gements deal inadequately with restrictions of competition resulting from mergers between banks and non-banking firms. In the field of energy the Commission considered the priority of competition policy should be to promote the development of the various producers along the most independent lines possible and to prevent concentration through interlocking shareholdings.

79. In 1976 the Cartel Office prohibited two mergers and one planned merger.

Mergers involving firms in financial difficulties represent a growing proportion of the decisions involved in merger control. This was indeed the crucial aspect of the merger between Karstadt, Europe's largest department store group, and Neckermann, the third largest mail-order house in Germany, which was ultimately permitted. The Cartel Office took into account that if Neckermann collapsed, 20 000 employees would be made redundant, and also that, even if the merger were prohibited, competition would probably be weakened in the long term.

In the context of pre-merger control the Cartel Office blocked the plan for the sale of Sachs AG to Guest, Keen & Nettlefolds, on the grounds of the financial power of the combined group, but its decision was overruled by the Berlin Kammergericht (Court of Appeal).

The current economic downturn and excessive competitive pressures have from time to time caused competition to be substantially distorted. In particular, more intensive competition at the distribution stage has led major firms increasingly to take advantage of the increased purchasing power they have acquired at a time of economic depression in order to extract special and unwarranted advantages from their suppliers. The means available under the law of competition are often inadequate to control firms exercising power on the demand side of the scale. For example, their market share may not be large enough to constitute a position of dominance. The rule against discrimination generally provides the best means of dealing with the problem of purchasing power, but a number of individual decisions are still necessary in order to clarify the scope of the rule.

80. An important decision on control of the abuse of a dominant position is the judgment of the Federal Court of Justice in the vitamin B 12 case. In that case the Federal Cartel Office ruled that the firm Merck should reduce by 60%, and in certain cases by as much as 70%, the price of the vitamin B 12 which it manufactures. On appeal the Kammergericht upheld the main part of the Cartel Office's ruling, altering only the threshold at which prices were considered excessive. The Federal Court reversed the ruling on the grounds that Merck did not have a dominant position. The Court confirmed that the term 'dominant position' (*uberragende Marktstellung*) should not be interpreted as meaning that a firm had no competition of any importance. The existence of a dominant posi-

tion depended upon competitive conditions on the relevant market. The Federal Court also confirmed that the control of abuse of a dominant position under competition law does extend to excessive pricing.

In 1974, in another case concerning excessive pricing in the pharmaceutical industry, the Cartel Office instructed Hoffmann-La Roche to reduce its wholesale price for Valium by 40% and for Librium by 35%.

This decision was upheld by the Kammergericht, though the required reduction was reduced from 40% to 28%.

81. In the new edition of its handbook on cooperation (*Kooperationsfibel*) published in March 1976, the Federal Ministry of Economic Affairs mentioned the extensive opportunities for cooperation available chiefly to small- and medium-sized businesses under the Act against Restraints of Competition. In 1976 firms took greater advantage than in the preceding year of these possibilities under the new restrictive practices law of 1973.

82. The Cartel Office stated its views on price information agreements in industry in the form of a circular addressed to all those concerned. Recent decisions of the Federal Court of Justice had indicated the need for control of such arrangements. In its decision relating to aluminium semi-manufactures the Court found that price information agreements infringed both the prohibition against restrictive practices and against resale price maintenance where the figures exchanged concerned the prices charged in individual, specified dealings, for this went against the need for secrecy which is inherent in competition. The Cartel Office circular is not aimed at conventional market statistics.

The Cartel Office has continued its successful action against infringements taking the form of price recommendations. Largely owing to the Cartel Office's efforts, the problem of advertising which misleads the consumer by offering discounts on unrealistically high recommended prices (*Mondpreisempfehlungen*) can be regarded as virtually solved.

83. To improve the application of national competition law to cases having international ramifications, the governments of Germany and the United States have entered into a cooperation agreement on restrictive business practices, which entered into force on 11 September 1976. The agreement provides for mutual assistance between the two countries as regards investigations and proceedings, competition policy studies and possible changes in restrictive practice legislation; also concerned are activities related to the work on restrictive business practices of international organizations of which both parties are members.

France

84. The main provisions currently in force are contained in:

the Decree of 9 August 1953, replaced virtually unchanged by the Decree of 24 June 1959 and the Order of 28 September 1967;

Articles 3 and 4 of the Finance Act of 2 July 1963;

the Act of 27 December 1973 regulating Trade and *Artisanat*.

These laws comprise two categories of provision.

First, are provisions prohibiting certain specific practices by one firm or a number of firms. These are:

unwarranted refusal to meet a customer's order;

unwarranted trade discrimination;

making the sale of a product subject to the purchase of another or of a minimum quantity;

resale price maintenance.

Second, there are provisions governing restrictive agreements and the abuse of a dominant position.

Agreements restricting competition are illegal and declared void, unless they qualify as one of the statutory exceptions.

Any activity by one or more enterprises in a dominant position having the object or effect of distorting the normal operation of the market is also prohibited.

85. Competition policy in 1976 was marked by the following developments.

Firstly, following the principles set out in the 'Fontanet Circular', the authorities remained as active as ever in combating restrictive business practices such as resale price maintenance, refusal to deal and discrimination as to prices or terms of sale. The rules on the last of these points, having been stiffened by the Act of 27 December 1973, were applied more frequently and more systematically.

Two individual cases merit special attention. An arrangement was negotiated to reduce the scope of the refusal to deal by firms in the luxury industries of jewellery and perfumes, which were employing excessively selective distribution methods. In both cases it was accepted that, in view of the status and reputation of the relevant products and brands, there were grounds for at least some selection of sales points. Precise qualitative and quantitative criteria were laid down so that selection could be made on an entirely non-arbitrary basis.

86. Secondly, the control of restrictive agreements has been stepped up. The Technical Commission on Restrictive Practices and Dominant Positions issued seven opinions in the first six months of 1976, as compared with seven in 1975 and six in 1974. Both the Commission and the Minister of Economic and Financial Affairs have taken a more rigorous approach in assessing agreements. Since 1975, three cases have been referred to the criminal courts, and for the first time, the Minister decided to take criminal proceedings against the recommendation of the Technical Commission. This trend towards a tougher approach to restrictive practices was also reflected in the drafting and tabling of a bill to stiffen the applicable penalties.

87. Efforts on the part of the authorities to stimulate competition were accompanied by a sustained move to ensure fair trading and to persuade business to accept certain constraints. The aim has been to establish a satisfactory balance of power both vertically, between firms operating at successive stages of economic activity, and horizontally between competitors at the same stage.

88. On 11 June the Government tabled before the National Assembly a bill for the control of economic concentration, and the suppression of unlawful restrictive practices and abuse of dominant positions. The aim is to supplement existing legislation by establishing merger control and by reorganizing the existing procedures and penalties so as to make them more effective. The bill defines very broadly the actions and agreements subject to control. The bill does not apply unless a transaction creates a market share above a certain threshold, namely 40% of the relevant market or markets in the case of horizontal mergers and 25% in the case of vertical mergers. The government has dismissed the idea of compulsory prior notification. The bill gives companies the option between submitting voluntarily to premerger control or being subject to postmerger control at the initiative of the authorities. In both cases, the authorities will be able to give a ruling only after seeking the advice of the Technical Commission, which is bound to take account of the social and economic interests at stake.

89. But, far from passively awaiting these new provisions, the authorities have sought to establish equal opportunities for all distributors by such measures as controlling investments in certain areas (supermarkets and so on), outlawing discriminatory terms of supply and, in an extreme case, restricting discounts (petrol).

In its concern to ensure fair competition the authorities have continued to apply the powers to improve trade practices acquired early in June 1970 and explained in the Circular of 30 May 1970. There has been more activity than ever in attempts to prevent sales below cost, loss-leaders and misleading discount advertisements.

Apart from purely preventive measures, the Government attaches special importance to providing consumers with better information, education and protection. The creation of a department of State with responsibility for consumer affairs and also for competition, by Decree of 14 October 1976, is evidence of this concern, as is the Government's approval of a programme of action on 26 May 1976, to which priority has been attached under the VIIth Plan. This move to organize and promote the interests of consumers so as to achieve a better balance of power between manufacturers and sellers, on the one side, and consumers and users on the other is an integral part of French competition policy.

Ireland

90. The basic Irish legislation in the area of competition is the Restrictive Practices Act, 1972 repealing and replacing the Restrictive Trade Practices Act, 1953 and the Restrictive Trade Practices (Amendment) Act, 1959.

This Act leaves untouched the old law's main principles and does not expressly declare any type of restrictive business practices to be illegal but provides a means for bringing them under public scrutiny in order to prevent abuses. However, it extends the scope of the earlier legislation to cover investigation into the provision of services as well as into the supply of goods. Banking, electricity and transport services are excluded.

91. The 1972 Act also brought about significant institutional and procedural changes. The old Fair Trading Commission was replaced and its functions were divided between the newly created position of the Examiner of Restrictive Practices and the Restrictive Practices Commission. The Examiner initiates investigations into suspected restrictive practices and to this extent has wide power relating to the inspection of premises and records and the obtaining of information by authorized officers. The Examiner can also recommend fair practice rules to the Commission and supervises their operation. The Commission's function is more of an adjudicatory nature. It holds public inquiries and submits to the Minister for Industry and Commerce a report of every inquiry, following which the Minister may prohibit certain restrictive or unfair practices by statutory order. The Commission itself is empowered to set fair practice rules which are not legally binding but serve as important points of reference for the Examiner. In addition the Commission has the general duty of studying and analysing the effect on the common good of methods of competition, types of restrictive practices, monopolies, market structures and the operation of multinational enterprises.

92. A bill to control mergers, takeovers and monopolies, revised in 1974, is still before Parliament. It provides for prior notification to the Minister of any

proposed merger or takeover where the value of the gross assets or the annual turnover of any enterprise proposed to be merged or taken over is not less than £500 000 or £1 000 000 respectively. The Minister has discretion to clear the proposal or to refer it for investigation to the Examiner and (after receiving the Examiner's report) to the Restrictive Practices Commission. A proposal referred to them will be examined by the Commission in relation to certain criteria set out in the schedule to the bill. Having considered a report of the Commission the Minister is empowered to make an order prohibiting the proposed merger or takeover or prohibiting it except on specified conditions. The bill also proposes so to extend the powers provided for in the Restrictive Practices Act 1972, dealing with the abuse of its position by a monopoly as to permit it actually to be broken up. Proposed amendments to the bill are at present being drafted.

93. In 1976 competition policy in Ireland has been in a state of evolution. There has been increasing emphasis in the work of the Restrictive Practices Commission on analytical studies on issues of pressing public concern. Cases investigated by the Examiner of Restrictive Practices concerned a variety of areas such as the operation of restrictive trade practices, orders relating to intoxicating liquor and soft drinks, motor spirits, building materials and radio and television sets, as well as investigations not involving statutory orders into such areas as the supply and distribution of newspapers and magazines, certain licence agreements between oil companies and motor spirit retailers, premium rates for motor insurance and the distribution of cinema films.

Italy

94. In Italy there is no effective control at present in the field of competition. Act No 834 of 16 June 1932 laid down specific rules governing the formation of and government control over trade associations. However, for lack of implementing provisions this legislation has largely remained a dead letter.

Current Italian legal regulation of competition and trade associations depends on certain Articles of the Civil Code, which goes back to 1942. These Articles are based on the principle that free competition must be subordinated to the public interest, a principle inherited from the days of the corporate State but confirmed by Article 41 of the present Italian Constitution. In consequence, Italian law disallows agreements in restraint of competition only if they are contrary to the public interest or if they do not satisfy certain specific rules laid down by the law. In particular, restrictive agreements must be in writing, their duration must not exceed five years, and they must be limited to a specific area or branch of activity. Legal monopolies are obliged to enter into contract with, and to supply goods or services to any customer in a non-discriminatory way.

A number of Articles contain the legal requirements for trade associations.

After the Second World War several bills concerning the control of cartels and monopolies (dominant positions) were presented to Parliament. However, none of them has been adopted and they have since lapsed.

Community rules of competition thus present virtually the only legal standards in this domain to be applied by Italian courts.

Luxembourg

95. Several different measures enable the Government to take action under its competition policy. The legislation concerned covers price control (Act of 30 June 1961), the Grand Ducal Regulation of 9 December 1965 on resale price maintenance and refusal to deal and the Restrictive Trade Practices Act of 17 June 1970.

96. The Act of 30 June 1961 is the basis for intervention on prices. The main aim is to protect the consumer. The concept of a 'normal' price provides the general test where prices are not set by the Government. In case of dispute it is for the Minister of Economic Affairs and the courts to decide what is a normal price.

General decisions on prices are taken by way of Grand Ducal Regulation. In urgent cases decisions may be made by Ministerial Order, though confirmation by Grand Ducal Regulation is still necessary. The Minister may take individual price measures. An important function is that entrusted to the Prices Office, an executive body which has powers of investigation, verification and surveillance. Staff of the Prices Office and the police and gendarmerie are empowered to report offences against the price control regulations.

The main measures are as follows:

Maximum prices

As a rule maximum prices may be set individually for a given firm, article or industry.

Notification of increases

The general scheme of control provides for compulsory notification in advance of price increases.

Rules concerning the normal price of imported goods

A general regulation lays down standards for establishing the prices of imported,

branded products and articles by reference to the consumer prices for the same items in the country of origin.

Resale price maintenance is generally prohibited, though certain exceptions are allowed by the regulation. Refusals to deal are prohibited if they serve as a means of circumventing the prohibition on resale price maintenance.

97. The Restrictive Trade Practices Act of 17 June 1970 has enabled action to be taken against practices restrictive of competition, which are recognized as being contrary to the public interest.

The Act does not extend to agreements, decisions by associations of undertakings and concerted practices which derive from a statutory provision or regulation. The basic principles are in many ways similar to those of Articles 85 and 86 of the EEC Treaty.

Netherlands

98. Dutch competition policy is based on the 1956 Economic Competition Act, which provides for control of infringements in the form both of agreements restricting competition and abuse of dominant position. A dominant position may result from a monopoly or oligopoly situation, a restrictive agreement, a concerted practice or conscious parallelism.

In both cases, the basis for intervention is a conflict with the public interest. Where the public interest so requires, certain clauses in restrictive agreements may be declared unenforceable by reason of their nature or of their objectives. Thus, collective resale price maintenance and individual resale price maintenance in respect of certain consumer durables have been prohibited.

Before applying the Act, the Minister of Economic Affairs must first consult the Economic Competition Board, an expert body whose advice is not binding. An appeal against individual decisions lies to the College van beroep voor het bedrijfsleven (Business Appeals Tribunal). All restrictive agreements are notifiable, with the exception of agreements of minor significance and agreements in respect of export markets. They are entered on a register of restrictive practices, which is not open to public examination.

99. The Minister of Economic Affairs is currently preparing two changes to the law. The first will replace the system of control of infringements by an authorization system. The need for this derives, among other things, from the need to harmonize Dutch competition policy with the Community policy. The political and legal problems raised by a change of this nature are such that it is necessary

to decide what agreements will be subject to authorization. In this respect the Minister believes that the regulation of horizontal and vertical price maintenance must be given priority.

The terms on which pricing agreements may be authorized will vary, depending on whether the agreement is horizontal or vertical.

Horizontal agreements may be authorized where:

they are necessary as a means of ensuring that a fall in prices will not threaten the survival of efficient firms to the detriment of customers;

they are the necessary means of an appreciable rationalization or improvement in the structure of an industry;

they are necessary in order to promote cooperation to the ultimate benefit of the customer;

they are necessary to enable the firms concerned to exert countervailing power against a dominant buyer on the relevant market;

they are in the public interest in some other way that clearly offsets restraint on the freedom to establish prices;

the restriction entailed by the agreement is of minor importance.

Vertical agreements may be authorized where:

the relevant goods are regularly sold at a loss;

the agreement is an essential factor in broader cooperation between the firms;

the absence of the agreement would restrict supplies to the consumer.

The second modification would give the public access to registered agreements. There will be provisions in certain cases enabling firms to apply for total or partial exemption from the requirement of publicity.

100. The Economic Competition Board has issued an opinion on Hoffmann-La Roche's prices for Valium and Librium, as requested by the Minister.

At the end of 1975, the Board completed the inquiry begun in 1971 into collusive tendering. It stated that price-fixing agreements are virtually inevitable where contracts are put out on tender, since the tenderer is in a particularly vulnerable position. In the long term, the Board feels that there should be a special Commission to undertake more detailed scrutiny of the broad problem of the structure of the construction market and the system of tenders. In the short term, it considers that certain aspects of the agreements currently operating conflict with the public interest and should be declared unenforceable if the firms involved were unwilling to change them. The Board is particularly concerned with the amendment of prices by tenderers, preference given to one tenderer and reimbursement of costs incurred by those whose tenders are not accepted.

Numerous complaints have been received concerning refusal to deal. In the majority of cases, firms terminated these practices after consultation without a formal order being necessary.

United Kingdom

101. The competition policy of the United Kingdom has been reflected in a series of laws enacted between 1948 and 1973. The Monopolies and Restrictive Practices (Inquiry and Control) Act 1948 established an independent Commission (the Monopolies and Restrictive Practices Commission) to investigate matters referred to it by the (then) Board of Trade. On a reference the Commission investigated whether a monopoly situation existed. Restrictive agreements relating to the supply of goods were withdrawn from the Commission's competence by the Restrictive Trade Practices Act 1956. The Monopolies and Mergers Act 1965 widened the powers of the Commission, in particular to enable questions involving the supply of services to be referred to it and to include the investigation of mergers. The law relating to monopolies and mergers was consolidated in the Fair Trading Act 1973.

102. The Monopolies and Mergers Commission (as it is now called) is an independent investigatory body whose members are appointed by the Secretary of State for Prices and Consumer Protection. It has no executive power but has the principal function of investigating and reporting on the following matters in particular instances referred to it:

- (a) the existence, or possible existence, of a 'monopoly situation';
- (b) the creation, or possible creation, of a 'merger situation';
- (c) the transfer of a newspaper or of newspaper assets.

The Commission may also report on the general effect of classes of practices which are commonly the result of, or preserve, monopoly situations, or which are uncompetitive (e.g. parallel pricing).

A monopoly situation exists in the supply of a particular description of goods or services if either:

- (a) a person supplies at least a quarter of the goods or services of that description which are supplied in the United Kingdom, or in part of the United Kingdom; or
- (b) two or more persons who supply at least a quarter of the goods or services of that description which are supplied in the United Kingdom, or in part of the

United Kingdom, so conduct their affairs as to prevent, restrict or distort competition either between themselves or between persons to whom they supply. (This is known as a 'complex monopoly situation'.)

A merger situation may be investigated where it creates or enhances a monopoly situation in the United Kingdom (or in a substantial part of it) or where the value of the assets taken exceeds £5 million. Special provisions deal with monopoly situations in relation to exports, and to newspaper mergers.

103. The Fair Trading Act 1973 gave powers (with certain exceptions) to the Director-General of Fair Trading (who is appointed by the Secretary of State for Prices and Consumer Protection) to initiate monopoly investigations by the Commission. However, merger references are still made by Ministers, and Ministers also retain the power (in relation to nationalized industries and in certain other cases, the sole power) to make monopoly references. On a monopoly reference the Commission may be asked to limit their report to the facts, or to consider whether the monopoly situation or practices of the monopolist operate, or might be expected to operate, against the public interest (as defined in the Act).

The Commission presents its report to the Secretary of State (or to the Minister or to the Ministers by whom the reference was made). He has the discretion to accept or reject the recommendations made by the Commission and to enforce them by order if necessary. In practice, where he wishes to implement a report he asks the Director-General to negotiate undertakings with the firms concerned. It is only exceptionally that he makes a statutory order pursuant to a report. The observance of undertakings or orders is supervised by the Director-General, who generally keeps commercial activities in the United Kingdom under review, with a view to becoming aware of, and ascertaining the circumstances relating to, monopoly situations or uncompetitive practices. Orders are subject to Parliamentary approval.

104. The Restrictive Trade Practices Act 1956 required restrictive agreements relating to the supply or acquisition of goods to be entered on a public register and subsequently to be examined by a new court, the Restrictive Practices Court, to establish whether they were in the public interest in the light of criteria laid down in the Act. The Restrictive Trade Practices Act 1968 made provision for certain types of information agreement to be called up for registration. These powers have only been used in relation to information agreements about prices and about terms and conditions upon which goods are to be supplied. The 1968 Act also made provision for certain agreements to be exempted, in particular those of importance to the national economy and those holding down prices. It also enabled agreements containing only insignificant restrictions to be continued without reference to the Restrictive Practices Court. Further amendments were

made to the restrictive practices legislation by the Fair Trading Act 1973. Most important, the 1973 Act took the scheme laid down in the 1956 Act one step further by providing for the calling-up for registration of restrictive trading agreements relating to the supply or acquisition of services. Professional services were, however, excluded.

While horizontal price fixing and collective resale price maintenance (which was banned) were dealt with by the Restrictive Trade Practices Act 1956, individual vertical resale price maintenance was not brought under control until the passing of the Resale Prices Act 1964. This Act prohibited the enforcement of minimum resale prices unless the Restrictive Practices Court found that such a practice was justifiable in relation to a particular class of goods. The Court has made an exception only in the case of books and medicaments. Thus, individual minimum price maintenance is no longer legal in the case of all other goods.

The law relating to restrictive trade practices and resale prices has been consolidated in 1976 by means of the Restrictive Trade Practices Act 1976, the Restrictive Practices Court Act 1976 and the Resale Prices Act 1976.

105. The main development in United Kingdom competition policy during 1976 was the exercise of the powers given by the Fair Trading Act 1973 to extend the restrictive trade practices legislation to agreements relating to the supply or acquisition of services. This was done by the Restrictive Trade Practices (Services) Order 1976 (1976 No 98). The Order relates to all services, with the exception of agreements relating to certain professional services and certain agreements in other fields where special considerations arise (these include certain agreements relating to international shipping, aviation, road passenger transport, insurance and certain financial matters). Thus, restrictive trade agreements concerning the supply or acquisition of the majority of services are now required to be registered with the Office of Fair Trading as in the case of agreements relating to the supply or acquisition of goods, and in the same way may be subjected to judicial examination by the Restrictive Practices Court in order to determine whether they are consistent with the public interest. The Order came into operation on 22 March 1976 and required service agreements to be entered by 21 June 1976 unless brought to an end before that date.

106. One interesting question of interpretation of the Order has already been decided by the Restrictive Practices Court when a leading property company sought a declaration that the Restrictive Trade Practices Act did not apply to certain underleases and licences which were not subject to registration under the Services Order. The Court decided that the grant of a lease does not constitute in itself the supply of services within the meaning of the legislation and that only rarely will covenants in leases involve restrictions.

107. No other case has been decided by the Restrictive Practices Court during the course of 1976, but two cases arising in the second half of 1975 are of some interest. In July 1975 the Restrictive Practices Court granted an application for the discharge of earlier Orders which restrained certain fishery associations in Scotland from operating minimum price and certain other agreements, to the extent of enabling the parties to be at liberty to participate fully as members of producers' organizations established pursuant to Regulation (EEC) 2142/70 (now replaced by Regulation (EEC) 100/76). This Regulation provides for the common organization of the Community market in fishery products.

In November 1975 the Restrictive Practices Court ordered that four telephone-cable manufacturing companies concerned with certain agreements relating to tenders to the Post Office should be restrained from giving effect to the agreements and should also be restrained from giving effect to or purporting to enforce any other registrable agreement unless it had been furnished for registration in due time. Such an order exposes the parties to the risk of action for contempt of court if they should fail at any time in the future to offer for registration in due time any registrable agreement relating to any matter.

108. During 1976 the Director-General of Fair Trading initiated a number of references to the Monopolies and Mergers Commission, requiring it to investigate the wholesale supply of petrol, of national newspapers and periodicals and metal fasteners for industrial use.

109. During the year reports by the Commission were published on such matters as the supply of building bricks, of frozen foods for human consumption and of various services.

Chapter III

Relationship between Community and national competition law

§ 1 — Parallel application of Community and national competition law

110. The proposed merger between Guest, Keen & Nettlefolds Ltd (GKN) and the German firm Sachs AG gave rise to two parallel merger control procedures in the course of last year. On the one side was the German Federal Cartel Office acting under German law and, on the other, the Commission acting under the Community rules of competition.

111. The German Cartel Office was required by Section 24 of the Act against Restraints of Competition to rule on the compatibility of the planned merger with German competition law. Under Section 24 a merger may be prohibited if it can be expected to create or reinforce a dominant market position, unless the merging firms prove that the merger will improve the conditions of competition in such a way as to offset the disadvantages stemming from market dominance. The Cartel Office decided that Section 24 was applicable in this case and prohibited the GKN/Sachs merger. The main ground for its decision was that Sachs dominated the German market for certain components for clutches supplied to German motor manufacturers. Its dominant position would be considerably strengthened by the merger with GKN, even if this did not directly raise Sach's market share, and that the increased market dominance for the purpose of Section 24 resulted from the sole fact that in future Sachs would belong to a group with far greater financial power, GKN.¹

112. The same merger proposal was submitted for the Commission's authorization under Article 66 of the ECSC Treaty.² Scrutiny of the plan showed that the implications for the Community steel market were not such as to give rise to any objection under the rules of competition. The Commission also considered

¹ The Cartel Office's order was annulled by the Kammergericht. The judgment is not yet final.

² Points 181 and 182 of this Report.

whether, in view of the effect of the merger on the market for clutches, there was abuse of a dominant position within the meaning of Article 86 of the EEC Treaty. It concluded that, although Sachs dominated the market for clutches in Germany, and hence in a substantial part of the common market, the dominant position would not be reinforced by the merger with GKN to such an extent as appreciably to affect competition. The Commission therefore decided that it had no objection to the proposed merger under Article 86 of the EEC Treaty and gave authorization under Article 66 of the ECSC Treaty.

113. The two procedures thus resulted in diametrically opposite decisions. One and the same merger was authorized by the Commission and at first instance prohibited by the German competition authorities. And yet it cannot be said that this is a conflict between Community law and the internal competition law of a Member State to be solved by application of the rule that Community law prevails.

In its decision authorizing the merger under Article 66 of the ECSC Treaty, all the Commission considered was the potential restriction on competition in the steel market. The Federal Cartel Office, on the other hand, considered the situation as regards competition on markets not covered by the ECSC Treaty. This, therefore, gave it the power to prohibit the merger without infringing the rule that Community law prevails. The Commission did not act under the rules of competition in the EEC Treaty, which would have restricted the freedom of the national authority to apply its own law. Its decision to refrain from action under Article 86 of the EEC Treaty in no way restricts the application of national law.

Nor does the authorization given under Article 66 of the ECSC Treaty prevent the Federal Cartel Office from prohibiting the merger. Admittedly, the Commission's decision must be regarded as a positive, though indirect, measure to attain the general objectives of the Treaty, and thus prevails over conflicting measures taken by the national authorities. However, in this case the authorization was given after analysis of only a minor aspect of the merger, so that the Cartel Office's decision to prohibit the merger could not create a situation of conflict requiring application of the principle that Community law prevails.

§ 2 — Cooperation between the Commission and the competition authorities of Member States

114. At a meeting held late in 1974, the Commission and government experts from the Member States considered in detail the problems arising from the relationship between Community and national competition rules. They concluded that there was no need for a regulation under Article 87(2)(e) of the EEC Treaty,

but they agreed to increase the exchange of information between national authorities and the Commission, to consult each other where both Community and national law applied to the same case and to reduce the risk of conflict in individual cases through more intensive efforts to bring Community and national competition policies closer together.¹

115. The Commission has subsequently worked out guidelines to facilitate the attainment of these objectives.

If there is to be a smoother exchange of information between the Commission and national competition authorities, practical measures of organization are required. The scope and content of the information to be supplied and the manner in which it is to be supplied have both to be clarified for this purpose.

The Commission's obligations as to information for national authorities in the course of its proceedings are specified in Regulations Nos 17 and 1017/68. The Commission has specifically enumerated these requirements, whereby all formal legal or procedural acts must be notified to the national authorities. The Commission has also expressed willingness to give those authorities full and timely information on proceeding under the ECSC Treaty, for which no obligation exists to provide information.

The national authorities are under an obligation to inform the Commission whenever they themselves apply Articles 85 and 86 of the EEC Treaty or are aware that proceedings involving the EEC rules of competition are pending before national courts, or where they apply national law to situations which also require to be examined under Community law.

Other rules exist to improve the mutual process of consultation, one of the aims being to ensure that, in cases where both national and Community law are applicable, consultations will be held at the earliest possible moment.

116. These proposals were discussed with the government experts on 9 December 1976 and the principles approved by them. More detailed consideration will take place at another meeting, in 1977, when the possibility of closer cooperation in competition investigations will be examined.

¹ Fourth Report on Competition Policy, points 43 to 47.

Chapter IV

Main decisions and measures taken by the Commission

§ 1 — Article 85(1) applied to restrictive practices

Horizontal market-sharing agreements

Bureau national interprofessionnel de l'armagnac

117. The Commission made a ruling on a decision taken by an association of undertakings having legal personality and entrusted with a number of statutory duties.¹ This association was the Bureau national interprofessionnel de l'armagnac (BNIA), Eauze, France.

The BNIA represents the interests of armagnac producers, cooperatives, distillers and dealers. It has statutory legal personality and is responsible for quality control. Its members are appointed by the Minister of Agriculture and its decisions are taken in the presence of a government representative. The association in a general meeting had decided to ban deliveries of bulk armagnac aged four years or more. BNIA contended that this decision did not infringe Article 85, that it could not be regarded as a private association of undertakings for the purpose of that Article and that its temporary prohibition on supplies was in the public interest, since its purpose was to improve quality control and to suppress false indications of quality which had often occurred previously.

The Commission however decided that the BNIA was indeed an association of undertakings and that it had acted outside the powers conferred on it by decree. The measure in question was of a private nature and was not connected with quality control; any improvement in quality control was the result of other measures taken by the BNIA, in particular the more stringent examination of indications of quality through sample testing.

¹ Commission Decision of 26 July 1976: OJ L 231 of 21.8.1976.

118. The Commission demonstrated in this decision that where associations of undertakings entrusted with certain statutory duties act beyond their powers and take measures to regulate the market, the object or effect of which is to promote the uniform conduct of its members, and thereby restrict competition, they cannot evade the rules of competition and hold the State responsible for their actions.

Restrictive agreement relating to herbage seed

119. At the request of three Member States, the Commission intervened in another case involving trade associations, on this occasion of an uncontested private nature, and ordered the Union interprofessionnelle des semences fourragères (UISF), Paris, to abandon its restrictive measures in relation to herbage seed imports from the other Member States.

The UISF had concluded an agreement with its five member associations and five other French trade associations representing producers, breeders, distributors and importers of herbage seed. The agreement was based on a system of minimum guaranteed prices for breeders, threshold prices for imports of each variety and a range of levies in amounts varying according to variety. The levies broadly corresponded to the difference between the higher home-market prices and the substantially lower prices charged by producers in other Member States. The result was to align the price of imported seeds to the French-produced seed domestic price, and imports from the other Member States were thereby substantially impeded.

In response to Commission representations, UISF immediately terminated the system. The amounts levied during the sowing season in which it operated (autumn and winter 1975) were around FF 2.5 million. UISF used the money for purposes of general interest to the seeds industry—for instance, by subsidizing agricultural training centres and by making contributions to relieve the effects of the drought in the summer of 1976.

Agreement between Dutch transport insurers

120. Companies engaged in insurance, co-insurance and reinsurance are subject to the rules of competition of the EEC Treaty in the same way as other undertakings.¹

¹ Second Report on Competition Policy, points 54 to 57. In April 1976 the Court of Justice received from the civil and criminal court of Milan a request for a preliminary ruling concerning competition between firms engaged in the settling of claims in respect of accidents caused by foreign vehicles—Case 90/76.

As a result of *ex officio* enquiries, the Commission requested the Vereeniging van Transportassuradeuren in Nederland, an association comprising the major transport insurers in the Netherlands, to abandon certain restrictions of competition arising from two rulings by the association directly or indirectly affecting insurance contracts in respect of risks located in other Member States. The first ruling prohibited the members from entering into reinsurance contracts with Dutch competitors not belonging to the association (notably mutual insurance companies), while the second imposed a requirement on the members to the effect that, where maritime insurance contracts were transferred from one member to another, the new insurer must obtain the approval of the earlier insurer both when accepting a contract in a new form and when continuing or varying an existing contract.

121. The Commission considers that any restriction of competition by undertakings engaging in insurance which serves to intensify the continuing isolation of national markets under current national legislation requires close examination under the competition rules of the EEC Treaty. Efforts are being made within the Community to harmonize the legislation in question.¹

Agreement between sand producers

122. The Commission has also intervened with regard to a market-sharing agreement between competing manufacturers of homogeneous products.

Two important producers of sand and operators of sand quarries in the Community, British Industrial Sand Ltd (BIS), a subsidiary of Hepworth Ceramic Holdings Ltd, and Sablières et Carrières Réunies (SCR), a Belgian limited company, abandoned a long-term agreement which had been notified to the Commission after the Commission had informed them that the agreement infringed the provisions of Article 85(1) in a number of respects.

123. The stated object of the agreement was to share markets between competitors in the Community. The agreement accorded exclusivity to BIS in the United Kingdom and to SCR in the remainder of Europe for sales of certain kinds of sand. Each party had also agreed that it would not supply certain machinery for the production of sand or operate quarries for the excavation of sand in the other's territory.

In addition, BIS, which is itself a producer of glass-making sand, was committed to purchase from SCR minimum quantities of such sand, for a period of at least 33 years from the date of the agreement. The minimum quantities were to be

¹ Tenth General Report, points 173 to 177.

annually adjusted to amount to not less than one third of BIS's total annual sales in the United Kingdom. In the view of the Commission, this commitment restricted BIS in its own production and its access to alternative sources of supply.

If the minimum purchase requirement under the agreement had been expressed in absolute quantities, rather than as a proportion of BIS's total requirements, BIS would have been in a position to increase the proportionate share of its own or of alternative supplies over those from SCR in any expansion of its total needs of glass-making sand. This provision could therefore be seen as a particularly serious limitation on production and markets within the meaning of Article 85(1)(b).

124. Purchases between competitors of homogeneous products, such as sand, are likely to result, regardless of cost differences, in an upward alignment of prices on the part of the purchaser, as between his reselling price of the purchased products and the price of the products made by himself. These considerations gave the Commission another ground to take exception to the notified agreement.

125. The agreement further made provision for the maintenance of interlocking directorships between themselves. This exchange of directors enabled the parties to keep in close contact with each other for the duration of the agreement. This arrangement meant that the parties were at all times able to ensure that each was complying with its obligations and that the parties had continuing opportunities and inducements to reveal their business policies and decisions to each other and to influence each other's conduct, so as to concert their trading practices.¹

Agreement between manufacturers of nitrogenous fertilizers

126. In the course of a review of the competitive situation in the Community fertilizer market² the Commission found that the Belgian manufacturer Fison-UCB SA and the German manufacturers Ruhrstickstoff AG and Hoechst were operating a reciprocal supply arrangement. The Commission concluded that the arrangement was incompatible with Article 85 of the EEC Treaty, and the companies concerned have terminated the arrangement.

¹ See the judgment given by the Court of Justice on 16 December 1975 in the 'sugar' case that every trader must independently decide the policy he proposes to follow in the common market. Although this requirement does not deny traders the right to adapt intelligently to the way their competitors are behaving or can be expected to behave, it is completely opposed to any direct or indirect contact between traders where the object or effect of such contact is either to influence the market conduct of an existing or potential competitor or to reveal to him market policy decisions and intentions. See also Fifth Report on Competition Policy, point 22.

² Fourth Report on Competition Policy, point 145; request for information addressed by the Commission to the Dutch selling agency CSV on 26 June 1976: OJ L 192 of 16.7.1976; points 188 to 191 of this Report.

The companies are major manufacturers of nitrogenous fertilizers, and particularly of the most widely used simple nitrogenous fertilizer in the Community, calcium ammonium nitrate.

Calcium ammonium nitrate is sold in Belgium and Germany by the companies in question and their competitors at list prices which include the cost of carriage to the station or port of destination. The manufacturers grant rebates on these prices at rates which are in practice uniform, so that the same net price is charged throughout each of the two countries. German prices are between 12 and 13% higher than Belgian prices.

127. The reciprocal supply arrangement operated as follows:

Every month Fison-UCB sold Ruhrstickstoff an agreed quantity of calcium ammonium nitrate. The fertilizer was delivered, not in Germany, but to Ruhrstickstoff's Belgian customers. The sacks in which it was packed bore Ruhrstickstoff's name. Ruhrstickstoff sold Fison-UCB equivalent quantities which were supplied in Fison-UCB's sacks to Fison's customers in Germany. The price for these reciprocal sales was the same; it was calculated from the Belgian price which, as seen above, was lower than the German price. The two parties were free to determine the price for sales to their own customers, but in practice the price was always the same as, or only very slightly below, that charged in the country of destination. Actual freight costs were compared with the higher costs which would have been incurred if each company had sold direct, and the two companies shared the difference.

Fison-UCB and Hoechst operated a similar system, although for smaller quantities.

In the 1975/76 agricultural marketing year the volumes traded under the system represented roughly one-third of the total quantity of calcium ammonium nitrate exported by the firms concerned and roughly a quarter of all exports to Germany and to Belgium. Fison-UCB and Ruhrstickstoff AG had intended the system to continue to operate in 1976/77 and to increase the quantities.

128. The parties alleged that in the absence of the system, the cost of freight and small profit margin would have prevented them from supplying their export customers. They also alleged that their freedom to set their own prices remained intact.

The Commission held that the system restricted trade between Belgium and Germany, and considered it quite inconceivable for long-term reciprocal supplies between competing manufacturers to continue if one of the two parties were to compete with the other on the latter's domestic market so as to cause fear for part of its market share. Even in the absence of formal price collusion, the Com-

mission considered that the system led to coordination between the companies on distribution policy, and had adverse effects on trade between Member States.

Agreements restricting the use of goods

Beecham Pharma - Hoechst

129. As a result of representations made by the Commission, two undertakings—Hoechst AG, Germany and Beecham Pharma GmbH, a German subsidiary of Beecham Ltd, UK—amended certain restrictive provisions of a supply agreement which had been notified to the Commission. The agreement was for the supply of bulk ampicillin by Beecham Pharma to Hoechst. Ampicillin is a raw material used in the manufacture of pharmaceutical specialities (antibiotics). The agreement originally provided that the ampicillin was to be resold only in the form of medicines packaged for consumer sale, so that bulk resales were in effect prohibited; furthermore, the medicines could be sold only for human consumption and only in the Federal Republic of Germany and in Austria.

130. The prohibition of bulk resales was a substantial barrier to entry by competitors to the Community ampicillin market. Hoechst was denied the opportunity of disposing of these goods as it wished and of processing these goods in Community countries other than Germany. Similarly, other undertakings which had the capability to process ampicillin and might have obtained it from Hoechst were also deprived of the opportunity to penetrate the relevant market or to improve their competitive position in the market.

131. The obligation to sell the medicines solely for human consumption and the corresponding prohibition on manufacture and sales for veterinary purposes amounted to an unjustifiable restriction on Hoechst's freedom of use of goods which it had bought. Finally, the obligation to confine its sales within the EEC to the German market was in effect an export prohibition.

132. These three provisions gave the seller complete control over the use of the product by the buyer. In the Commission's view, already expressed on several occasions,¹ restrictions on the form in which a raw material may be resold or on the uses to which it may be put are quite as prejudicial to the maintenance of free competition in the Community as geographical market sharing.

¹ Commission Decisions in the European sugar industry case (OJ L 140 of 26.5.1973; Second Report on Competition Policy, point 28); the Chiquita case (OJ L 95 of 9.4.1976; Fifth Report on Competition Policy, point 71); and the Brazilian coffee case (Fifth Report on Competition Policy, point 33).

133. In view of the scale of the restrictions, the Commission informed the two parties that it intended to adopt a provisional decision under Article 15(6) of Regulation No 17, requiring them immediately to abandon the restrictions on pain of fines. The agreement was amended in response to the Commission's objections, and Hoechst is now free to dispose of the ampicillin it buys from Beecham Pharma in accordance with its own business policy. The Commission therefore concluded that there was no need for a formal decision.

Information agreements

European paper machine wire manufacturers

134. As a result of representations from the Commission, European manufacturers of metal and plastic paper machine wires used for draining off water from pulp, organized in national associations in Germany, France and the United Kingdom and in the International Association of Paper Machine Wire Manufacturers (OFITOMEPE), deleted a number of restrictive provisions from an information agreement entered into at the end of 1972.

135. Under the agreement in its original form the members undertook to send the following documents, through any existing national association, to the OFITOMEPE Secretariat-General:

- (i) lists of prices and discounts and terms of delivery and payment, to be sent two to three weeks from the submission of these documents to the customer or from their entry into force. The Secretary-General was authorized to distribute these lists to other members;
- (ii) copies of invoices for deliveries to all countries except the USA, within ten days of issue, giving the name of the customer, the type of wire, the measurements and price of the wire, and any discount or favourable terms. Subsequent discounts or favourable terms similarly to be notified as soon as they were granted.

The OFITOMEPE Secretariat-General was authorized to use this information to prepare market statistics and, at the request of a national association or a member firm, to inform it if a particular price had been paid by a particular customer for a given type of wire, in order to prevent users of paper machine wires from playing one supplier off against another.

Such a system, in which the data needed for independent price formation are not compiled individually by firms but are supplied collectively to the firms concerned, established links of commercial solidarity and interdependence with regard to prices which would not have existed in a genuinely competitive market.

136. After hearing the Commission's objections to the agreement, the firms involved agreed to stop informing each other of price lists, discounts and terms of sale, to send their copies of invoices to OFITOMEF or to the national association without giving the name and address of the customer and to use these copies in future solely for the preparation of statistics.

This action against an information agreement is another illustration of the Commission's opposition to 'open price systems'.¹

Restraint of trade clause

Agreement between Reuter and BASF

137. This case required the Commission to examine the compatibility of a restraint of trade clause on the assignment of a business with the rules of competition of the Community.²

138. Acting on a complaint from Mr Gottfried Reuter, a research chemist and entrepreneur, the Commission decided³ that the contractual restraint on competition imposed on him when he sold the Elastomer Group to BASF infringed Article 85(1) of the EEC Treaty.⁴

The Decision was based on the following facts. Between 1969 and 1971 Mr Reuter, of Lemförde, near Hannover, sold his entire shareholding in the Swiss limited company Elastomer AG, which he owned, to BASF AG, Ludwigshafen. Elastomer was the holding company of a group of firms with plants in several countries both within and outside the Community.

The group manufactures polyurethanes, which are synthetic substances increasingly used in a large number of industries for the production of various finished goods. The commercial value of the group consisted primarily of the knowhow and goodwill developed by Mr Reuter.

In the contract of sale dated 25 June 1971 Mr Reuter undertook that for a period of eight years he would refrain from engaging in any direct or indirect activities in the field covered by the contract, whether in Germany or elsewhere. All activities relating to polyurethanes, research and development, manufacture, industrial

¹ Dutch sporting cartridges agreement (Third Report on Competition Policy, point 55); Non-ferrous semi-manufactures and Ships' cables (Fifth Report on Competition Policy, points 39 and 40).

² Points 60 to 63 of this Report.

³ Commission Decision of 26 July 1976: OJ L 254 of 17.9.1976.

⁴ BASF has appealed against this Decision to the Court of Justice (Case 96/76): OJ C 254 of 27.10.1976.

application and marketing were included in this restraint. Every form of activity was prohibited, including the holding of shares in other undertakings and the making of association and consultancy agreements.

139. The Commission found that the restriction on research and development was intended to eliminate Mr Reuter as a potential competitor from the polyurethane market, and was thereby a clear infringement of Community competition law.

The restriction on commercial activities—manufacture, application of knowhow and sales—which taken separately might have been acceptable subject to certain conditions, such as being for a reasonable duration, was considered by the Commission to have become unlawful by the time of the Commission Decision, five years after the business had been transferred.

§ 2 — Authorization of cooperation and rationalization agreements

140. The Commission gave authorization¹ under Article 65 of the ECSC Treaty to two cooperation and rationalization agreements in the steel industry. The agreements, referred to the Commission in June, were to supersede the agreements expiring on 31 December 1976.² In July 1971 the Commission had authorized four specialization agreements, being the successors to four joint sales agencies (Walzstahlkontore) which had been authorized by the High Authority in March 1967. These four specialization agreements, made for the manufacture of laminated products as well as the purchase and sale of a limited number of products, had been concluded between four groups of steel producers in the Federal Republic of Germany. The four groups consisted of the following undertakings: the Western Group—Thyssen, Krupp, Wuppermann, Ibach, Rötzel and Lauchenthal;

the Northern Group—Maximilianshütte, Klöckner-Werke and Peine-Salzgitter;

the Westphalia Group—Hoesch, Rhein Stahl, Witten and Siegener AG;

the Southern Group—Dillingen, Schwäbische Hüttenwerke, the undertakings of the Otto Wolff Group and Arbed plants in Germany.

With the exception of the Westphalia Group these specialization groups had discontinued the joint sales carried on by the four agencies, setting up instead investment consultation and coordination procedures; the Southern Group organ-

¹ By Decision of 20 December 1976: OJ L 45 of 17.2.1977.

² OJ L 201 of 5.9.1971; OJ L 95 of 9.4.1976; OJ L 270 of 2.10.1976.

ized joint buying of raw materials, the Northern Group had an office for the allocation of orders and the Westphalia Group was engaged in joint sales as in the time of the earlier agencies. However, the main provisions of the agreements concerned rationalization and specialization.

On 31 March 1974 Thyssen and Rheinstahl withdrew from their respective groups, in order to satisfy a condition imposed by the Commission when authorizing their merger on 20 December 1973.

All that remained from 1 January 1975 were the Northern and Southern Groups. At the request of the members the Commission extended its authorization for two six-month periods ultimately expiring on 31 December 1976 whilst the new agreements were examined.

141. The two agreements authorized by the Commission involve two distinct groups of undertakings:

I. A 'Northern Group' which embraces the following concerns:

Eisen- und Stahlwalzwerke Rötzel GmbH,
Eisenwerk-Gesellschaft Maximilianshütte mbH,
Fried. Krupp Hüttenwerke AG,
Klöckner-Werke AG,
Siegener AG,
Stahlwerke Peine-Salzgitter AG,
Stahlwerke Südwestfalen AG,
Theodor Wuppermann GmbH.

Rötzel, Krupp, Südwestfalen, Siegener and Wuppermann are new members of the Group.

These eight companies, all of them German-based, vary considerably in size. Krupp (with its subsidiary Südwestfalen), Klöckner, Peine-Salzgitter and Maxhütte offer a relatively wide range of products. Rötzel, Siegener and Wuppermann are small, each of them specializing in a single product.

The authorization relates in the main to agreements on joint production of a variety of steel products:

agreements on joint galvanization between Maxhütte, Klöckner and Peine-Salzgitter,

agreements on joint production of coated sheet between Klöckner and Siegener,

agreements on deliveries of intermediate products between Krupp and Rötzel,

agreements on deliveries of intermediate products between Peine-Salzgitter and Maxhütte,

agreements on deliveries of intermediate products between Krupp and Wuppermann.

Krupp, Klöckner and Peine-Salzgitter are also planning to coordinate their production programmes more closely in the interests of rationalization.

Together, members of this group account for some 29% of German crude steel production and 9.4% of Community output.

II. A 'Southern Group' consisting of the following concerns:

Aktiengesellschaft der Dillinger Hüttenwerke, -

ARBED—Aciéries réunies de Burbach-Eich-Dudelange SA, Luxembourg, acting on its own account and for the account of:

ARBED—Felten & Guillaume Drahtwerke GmbH and
Eschweiler Bergwerksverein,

Stahlwerke Röchling-Burbach GmbH,

Otto Wolff AG, acting on behalf of:

Rasselstein AG and
Stahlwerke Bochum AG,

Neunkircher Eisenwerk AG.

With the exception of ARBED all of these are medium-sized companies based in Germany. By reason of the financial links between them, the above companies constitute no more than three entities:

1. the ARBED Group, including ARBED-Luxembourg (new member of the Southern Group), Felten & Guillaume, Eschweiler and Röchling-Burbach, in which ARBED has a 50% interest;
2. the Otto Wolff Group, comprising Rasselstein, Bochum and Neunkirchen;
3. Aktiengesellschaft der Dillinger Hüttenwerke, which is controlled by the Marine-Wendel Group.

In addition to specializing in finished and final rolled products and attempting to find a mutual basis for producing pig iron, crude steel and semi-finished products, the companies concerned intend to expand their joint purchasing of iron ore.

In this group, the works located in Germany account for about 11.5% of crude steel production in the Federal Republic of Germany. With ARBED-Luxembourg, the group represents 7.4% of Community production.

142. Under the common steel policy the Commission has decided that in periods of seriously reduced economic activity delivery objectives by product group will be set for groups of undertakings depending on a common centre of decision, for groupings authorized under Article 65 of the EEC Treaty or for individual undertakings.

143. At times when the system is in operation, at the instance of the Commission, therefore, overall delivery objectives will be set for the groups now authorized. Under their agreement they will then proceed to allocate orders and coordinate sales within these limits. At other times they will have to market their own production through their own sales organization.

The Federal Republic of Germany is the main sales territory for these companies. On this market they will be competing with other large German or Community undertakings, such as the companies belonging to the Thyssen Group (which accounts for 10% of Community crude steel output), the Marine-Wendel Group (8.3%), Estel (7.7%), Denain-Nord-Est Longwy (6.5%) and Cockerill (4.6%). Other competitors are the more specialized concerns like those in the Korf Group, other small- and medium-sized producers in France and Belgium and producers from outside the Community, which are very active in this market.

In these circumstances, the Commission considered that the agreements are not such as to give the companies in question the power to determine prices, to control or restrict production, or to shield them from effective competition from other companies in the common market. The agreements were therefore authorized.

§ 3 — Article 85 applied to distribution

Junghans distribution system

144. The *Junghans* decision¹ was one in a series of Commission decisions on various distribution systems. It applies to clocks and watches the principles set out by the Commission in its decisions on the motor industry,² consumer electronics³ and perfumes⁴ and clarifies the Commission's views on systems based on distribution through the specialist trade.

145. Gebrüder Junghans GmbH, Schramberg, a subsidiary of Karl Diehl, Nuremberg, manufactures Junghans and Diehl clocks and watches. It sells them in all

¹ Decision of 21.12.1976: OJ L 30 of 2.2.1977.

² BMW: OJ L 29 of 3.2.1975; Fourth Report on Competition Policy, point 86.

³ SABA: OJ L 28 of 3.2.1976; Fifth Report on Competition Policy, point 54.

⁴ Dior and Lancôme: Fourth Report on Competition Policy, point 93.

the Community countries through a network of approved dealers, consisting of wholesalers and retailers in the Federal Republic of Germany and of sole distributors and retailers in the other Member States.

To promote the sale of its products, Junghans set up a uniform distribution system operating throughout the common market.

The main features of the system are the application of specific criteria for admission of specialist retailers to the network and for determining distribution channels; the legal basis is provided by a standard form agreement on distribution by sole distributors and wholesalers and a standard form agreement on distribution by retailers.

The agreements require Junghans not to supply distributors who are outside its distribution system. For their part, distributors are not allowed to supply unauthorized retailers. At the first level of distribution all wholesalers as a rule qualify for approval, no conditions being attached. Thereafter, retailers are selected on objective, non-discriminatory criteria: all retailers may be approved if they have qualified staff and suitable premises and can offer the customer a specialist service including adequate repair facilities.

146. The Commission decided that this obligation to work solely through the specialist trade was not in restraint of competition for the purpose of Article 85(1). The only dealers excluded from the system are those who are not capable of selling watches and clocks in a manner satisfactory from the customer's point of view or of providing the necessary ancillary services.

147. The Commission also decided that the prohibition on exports of the relevant goods to non-EEC countries by Junghans distributors did not appreciably restrict competition within the common market. Since customs duties will be levied twice when goods cross the Community's customs frontier, Junghans distributors and customers in the Community will as a rule have no interest in obtaining from a non-member country goods exported there by another Junghans distributor. However, the Commission stated that this view applied only until 1 July 1977 as regards exports to countries with which the Community has free-trade agreements since, after that date, imports and exports between the Community and such countries will no longer be subject to customs duties.

148. As for the obligation for German wholesalers to pursue no active sales policy outside Germany, exemption under Article 85(3) was available only for those of Junghans' sole distributors that are established in countries where Junghans' products account only for a very small share of the market.

Export prohibitions and similar measures

Theal/Watts

149. In this case, which was very similar to the *Grundig-Consten* case,¹ the Commission fined a British firm and a Dutch firm for using trademark rights and export bans in order to protect an exclusive dealing agreement.² The firms are Cecil E. Watts Ltd, Sunbury-on-Thames, which manufactures devices for cleaning and maintaining records, and its Dutch sole distributor Theal BV (now known as Tepea BV), Amsterdam.

In 1972 Dutch wholesalers decided to take advantage of the fact that prices in the United Kingdom were lower than Dutch prices by effecting parallel imports of Watts products into the Netherlands although Watts had prohibited its British wholesalers from exporting.

Between 1972 and 1975 Theal brought court proceedings against four Dutch retailers, one of whom—Mr J.D. Wilkes—made an application to the Commission in 1974.

On Theal's application the court issued orders enjoining each retailer from selling goods manufactured by Watts which were not obtained from Theal. The injunctions were based on the fact that the sales infringed Theal's rights in respect of the trademarks borne by Watts' goods.

The goods were genuine Watts products and the trademarks were lawfully affixed in the country of origin. Theal also threatened other retailers with proceedings on the same grounds.

150. Apart from the fine of 10 000 u.a. imposed on each of the firms for its infringement of clearly established rules of competition, the Commission also fined Theal 5 000 u.a. for providing incorrect information. When notifying the exclusive dealing agreement Theal had omitted to mention its right to use Watts trademarks.

Miller International

151. Miller International Schallplatten, Quickborn, near Hamburg, was also fined 70 000 u.a. (DM 256 200) for prohibiting exports.³

¹ First Report on Competition Policy, point 47.

² Decision of 21.12.1976: OJ L 37 of 10.2.1977. Theal has appealed against this decision to the Court of Justice.

Decision of 1.12.1976: OJ L 357 of 29.12.1976. Miller has appealed against this decision to the Court of Justice: Case 19/77.

Miller, a subsidiary of the American corporation MCA Records Inc., itself controlled by MCA Inc., Universal City, manufactures records, tapes and cassettes which it distributes under the Europa and Sonic labels.

The terms of sale for these goods applying to German and other buyers and the exclusive dealing agreement with the French sole distributor contained express export prohibitions in respect of the relevant goods.

Miller was seeking thereby to protect exclusive importers or licensees in other countries, notably in the Community.

After the Commission objected to the export prohibitions as a result of a complaint, Miller stated that it would no longer impose the prohibitions and would absolve its customers from the obligation to comply with them where they were still contained in old agreements.

152. The Commission nevertheless fined Miller, since its infringement of the rules of competition was deliberate: the attitude of the Commission to export prohibitions has become well known. In the record industry itself WEA-Filipacchi Music SA has already been fined for the same reason.¹

Dutch Publishers' Association

153. Commission inquiries carried out in 1974 in response to a parliamentary question² revealed that several members of the Koninklijke Nederlandse Uitgevers Bond (Royal Dutch Publishers' Association) imposed on their Dutch customers a condition prohibiting the export of their books to Belgium and the reimport of such books from Belgium to the Netherlands. This resulted in an artificial barrier to trade between the Dutch and Belgian markets. In particular, parallel imports to Belgium which might have been economically significant became impossible, which provided the Dutch publishers' subsidiaries and sole distributors in Belgium with absolute territorial protection.

154. In 1975 most of the publishers concerned responded to the Commission's objections by deleting the offending clause from their terms of sale of their own accord. Only Elsevier Nederland, Agon Elsevier and Deltos Elsevier, all members of the Elsevier Group, retained the clause and notified their terms of sale to the Commission.

Following preliminary examination the Commission informed these companies that the prohibitions on exports and reimports infringed Article 85 of the EEC

¹ Decision of 22.12.1972: OJ L 303 of 31.12.1972; Second Report on Competition Policy, point 40.

² Written Question No 26/73 by Mr Vredeling: OJ C 80 of 9.7.1974.

Treaty and did not qualify for exemption; the companies thereupon also agreed to delete them. Since the offending terms had been notified, no fines were imposed.

155. By taking this action, the Commission not only made cross-frontier trade in books between the Netherlands and Belgium easier but also substantially broadened the range of choice available to Dutch and Belgian book buyers. This matter is of considerable practical significance, since there are no language barriers between the Netherlands and parts of Belgium.

French mineral water producers

156. The Commission also acted to improve trade in mineral waters between Member States. The three main French producers—the Perrier-Vichy Group, SA des eaux minérales d'Evian-les-Bains and Société générale des eaux minérales de Vittel—accounting for an aggregate 95% or so of the French market (Perrier approximately 47%, Evian approximately 26% and Vittel approximately 22%), dropped the export prohibition which they had imposed on French wholesalers. Furthermore, they no longer refuse to act for their French customers who re-export in obtaining reimbursement of the duties levied on beverages consumed in France but not payable on exports. Although French regulations provide that only producers may obtain reimbursement—for they alone are able to make the necessary application to the revenue authorities—French wholesalers are in practice no longer obliged to pay the duty when they export mineral water.

Export prohibition and minimum resale price maintenance

General terms of sale of Gerofabriek

157. The Commission by decision declared unlawful the general terms of sale notified by Gerofabriek, Zeist, Netherlands, which produces silver-plated and stainless-steel tableware and particularly stainless cutlery.¹

The general terms of sale which Gerofabriek applied for the distribution of its products contained serious restrictions of competition.

Gerofabriek required dealers to sell only at the retail level, thus preventing them from supplying other dealers at the same level of distribution who might have been able to sell the goods on different terms, perhaps more favourable to the consumer.

¹ Decision of 22.12.1976: OJ L 16 of 19.1.1977.

Benelux dealers were prohibited from selling in other Member States without Gerofabriek's consent, this being tantamount to an export prohibition. Finally, Gerofabriek required its dealers to maintain minimum resale prices in Belgium and the Netherlands. The prices which it imposed differed between the two Member States, being higher in Belgium than in the Netherlands.

Apart from the export prohibitions, resale price maintenance was liable to influence trade between Member States by deflecting the natural flow of trade from the direction which it might have taken if dealers had been free to set their own prices.

158. By this decision, which is in accordance with judgments given by the Court of Justice,¹ the Commission has again demonstrated its opposition to systems of minimum resale price maintenance imposed by a producer on dealers.

§ 4 — Article 85 applied to agreements relating to industrial and commercial property rights

Patent licensing

Agreement between Peugeot and Zimmern

159. The Commission has reasserted its views on a number of anticompetitive clauses in patent licensing agreements. This case concerned the 1963 agreement between the motor manufacturers Peugeot, Paris, and two French inventors, Fernand and Bernard Zimmern, in respect of patents for single-screw rotary compressors. The agreement was notified in 1974.

The original version of the agreement contained, among others, the following restrictions of competition:

- (i) indefinite extension of the agreement through the lodging of every fresh improvement patent;
- (ii) exclusive manufacturing rights in the EEC countries where the inventors currently hold patents (France, Germany, Italy and the Netherlands);
- (iii) exclusive sales rights in those countries and in Belgium, Denmark and Luxembourg, with a prohibition for the licensors, their other licensees and

¹ See e.g., judgment of 17.10.1972 in VCH (8/72): [1972] ECR 977; Second Report on Competition Policy, point 23 and judgment of 26.11.1975 in Papiers peints (73/74): [1975] ECR 1491; Fifth Report on Competition Policy, point 26.

- the American firm Marc Wood International, Inc., assignee of the British patents, to export to Peugeot's exclusive territory;
- (iv) prohibition for Peugeot to export to the United Kingdom, the territory covered by the assigned patent.

160. The Commission had already stated in earlier decisions¹ that an exclusive manufacturing licence for a specified territory within the EEC might in certain circumstances qualify for exemption under Article 85(3). Such was the case here, where the licensee had an incentive to make the investment required for the development of the licensed technology; this contributed to promoting technical and economic progress. The Commission had already stated also² that an export ban might be exempted where it involved no more than temporary protection for the parties to the contract or for several licensees against each other and such protection was necessary in order to reduce the risk inherent in the investments required for penetration of a new market.

161. In the present case the exclusive rights and export ban did not qualify for authorization, however. Their indefinite duration and territorial scope raised a substantial barrier to entry to the Community market by other technologically competent firms.

The restrictions were of particular importance in that, apart from piston and blade compressors, the licensed technique is the only one which can compete with the double-screw compressor technique of the Swedish group Svenska Rotor Maskinen, so widespread both in the Community and elsewhere.

In response to Commission objections the agreement was replaced by a non-exclusive licence for manufacturing in France and for sales throughout the Community, including the United Kingdom. The parties have also the right to withdraw from the agreement: the licensee may give a short period of notice and the licensors may invoke insufficient working of the licensed technique.

Copyright licences

162. In the British Broadcasting Corporation and the Old Man and the Sea cases, dealing with copyright, the Commission stated that in the matter of copyright licences it would apply the same principles as with patent licences. In these two cases it concluded that the rules on competition were infringed by clauses directly or indirectly restricting exports.

¹ Davidson Rubber: OJ L 143 of 23.6.1972; Second Report on Competition Policy, point 46. Kabel-metal/Luchaire: OJ L 222 of 22.8.1975; Fifth Report on Competition Policy, point 66.

² AOIP/Beyrard: OJ L 6 of 13.1.1976; Fifth Report on Competition Policy, point 63.

BBC

163. The BBC had a licence from a Dutch company to broadcast its animated cartoons for children. Like other television companies in the Community the BBC granted sublicences to toy manufacturers and printing works to manufacture associated products to meet demand from children generated by the broadcast. The Valley Printing Company Ltd, a Yorkshire firm, had a sublicense of this kind from the BBC. It wished to sell its products in the Netherlands, but the BBC attempted to prevent this at the Dutch licensor's request.

In response to a complaint filed with the Commission by the Bradford Chamber of Commerce on behalf of Valley Printing, the Commission investigated the BBC's conduct in relation to Article 85 of the EEC Treaty. Thereupon the BBC and the Dutch firm undertook not to impede exports of these copyright products in future; the Commission was therefore able to terminate proceedings without issuing a formal decision.¹

The Old Man and the Sea

164. Here the Commission acted on a complaint from Ireland that the Penguin edition of Hemingway's *The Old Man and the Sea* was available neither in Ireland nor in the United Kingdom although it was freely available in other common market countries.

The licensee of the copyright in this book for the entire common market, Jonathan Cape Ltd, had given Penguin Books Ltd the right to publish a paperback edition in a territory extending to all the Member States with the exception of Ireland and the United Kingdom.

Shortly after the Commission intervened, Jonathan Cape entered into a new agreement with another publisher for Community-wide publication of several of Hemingway's works, including *The Old Man and the Sea*.

The new paperback edition of this book has now been available in Ireland and the United Kingdom since last September. The Commission was therefore able to close its inquiries into this case.

¹ This action by the Commission demonstrates that a public broadcasting company, entrusted with the operation of services of general economic interest within the meaning of Article 90 of the EEC Treaty, is subject to the rules in the Treaty, and notably the rules on competition, in its commercial exploitation of copyright.

Market-sharing through trademarks

Agreement between two manufacturers of knitting yarn

165. In a provisional decision¹ under Article 15(6) of Regulation No 17 the Commission came down against an agreement to share out markets for knitting yarn entered into in 1964 by Sirdar Ltd, Wakefield, Yorkshire, and Fils de Louis Mulliez SA, Roubaix, France. Under the agreement each of the two firms agreed to refrain from using its own trademark in the other's country.

Sirdar nevertheless pursued an action in the English High Court, based largely on the 1964 agreement, although in the course of the proceedings Mr Justice Graham said:

'It seems to me on the basis of previous common market cases already decided in the EEC Court..., the Commission are correct in saying that this agreement offends against Article 85'.²

Sirdar also maintained its opposition to United Kingdom registration of the Phildar trademark by the French firm.

166. The Commission therefore commenced formal proceedings against the two firms under Article 85 of the EEC Treaty, with a view to replacing its provisional decision³ by a final decision under Regulation No 17.

In answer to the argument that the 1964 agreement prevented neither party from exporting to the other's territory under trademarks other than Phildar and Sirdar, the Commission emphasized the practical and commercial difficulties of establishing a new mark, particularly where the existing trademarks are already well established.

It also noted that, in a number of Member and non-Member States other than France and the United Kingdom, the Sirdar and Phildar trademarks existed side by side and knitting yarns were sold under them without apparent difficulties. The 1964 agreement expressly accepted and even encouraged this. The Commission concluded that the purpose of the restrictive clauses relating to France and the United Kingdom was not to avoid confusion between the marks but rather to protect the home market of each of the two firms.

¹ Commission Decision of 5 March 1975: OJ L 125 of 16.5.1975; Fifth Report on Competition Policy, point 68.

² [1975] 1 CMLR 378 to 380.

³ Sirdar applied to the Court of Justice for annulment of the decision on grounds of a procedural defect, but later withdrew its application: Case 34/75, removed from the register by Order of the Court dated 7 April.

In response to Commission objections, the two companies began negotiations which, on 28 January 1976, culminated in the total abandonment of the 1964 agreement and in the withdrawal of the British firm's opposition to registration of the Phildar trademark in the United Kingdom.

The Commission was accordingly able to close its formal proceedings.

Nicholas/Vitapro

167. In one of the first decisions which it ever took under Article 85 of the EEC Treaty¹ the Commission gave approval by way of negative clearance to a 1962 agreement between a French company, Nicholas Frères, and a British company, Vitapro (UK) Ltd. The agreement created a market-sharing arrangement in Vitapointe hairdressing products supported by the assignment of British and Irish trademarks and patents from the French company to the British company. The Commission gave its approval since the French company retained as its market all the original six EEC countries so that at the date of the decision (30 July 1964) the agreement did not split up the then common market into different markets.

168. The entry of Ireland and the United Kingdom into the Community fundamentally altered the situation, since the 1962 agreement became capable of partitioning the enlarged common market. The Commission therefore reopened the case, as it is entitled to do since all negative clearance decisions are based on the facts available at the time. Even so, it was found unnecessary to take further action under Article 85, since in the meantime the interests of both parties in Vitapointe products have been brought together in the hands of one British company, Fisons Ltd, so that the potential barriers to trade between Member States created by the 1962 agreement have been eliminated.

169. Apart from this, just as the Community has in general grown more outward-looking over the last decade, so in particular has the Commission's attitude changed towards agreements of this type which have the effect of isolating the common market from imports from outside the Community.

A recent example is its attack on the former worldwide market-sharing agreements for Columbia gramophone records which came to light in the EMI/CBS cases.² At the Commission's invitation the Court of Justice recognized in its judgment that 'a restrictive agreement between traders within the common market and competitors in third countries that would bring about an isolation of the common

¹ OJ 136 of 26.8.1964; Eighth (EEC) General Report (1965), point 60.

² Cases 51, 86 and 96/75: points 22 to 27 of this Report.

market as a whole which, in the territory of the Community, would reduce the supply of products originating in third countries and similar to those protected by a mark within the Community, might be of such a nature as to affect adversely the conditions of competition within the common market¹.

§ 5 — Article 86 applied to abuse of dominant position

Hoffmann-La Roche

170. The Commission issued a decision¹ under Article 86 of the EEC Treaty against Hoffmann-La Roche (Roche), a multinational group with its headquarters in Switzerland and the world's leading vitamin manufacturer.

Roche had entered into exclusive or preferential supply contracts with a number of major bulk vitamin users who incorporated the vitamins into their own medicines, foods and feedingstuffs.

171. Whether to compensate for the exclusivity or to encourage a preferential link, the contracts provided for fidelity rebates based not on differences in costs related to the quantities supplied by Roche but on the proportion of the customer's requirements covered. Furthermore, the rebates were not calculated separately for each group of vitamins but were aggregated across all purchases from Roche, so that Roche was able to benefit from the fidelity arrangement even in respect of those vitamins for which it does not hold a dominant position on the market. The clause giving Roche the opportunity to align its prices on lower prices charged by competitors could have made the system built upon the contracts somewhat less restrictive, but in fact, as only prices offered by 'reputable' manufacturers in the customer's own country could be considered, the upshot was that Roche was in a position to decide whether or not to bring down its prices and thereby keep the sale.

172. After finding that each group of vitamins constitutes a separate market, since they are hardly if at all interchangeable, the Commission concluded that Roche dominated the common market for the seven relevant groups—Vitamins A, B2, B6, C, E, biotin (H) and pantothenic acid (B3). The principal reasons for the finding of dominance were: the importance of Roche's market shares for individual vitamins (between 47 and 95%); the fact that Roche manufactures a far broader range of vitamins than any of its competitors; the volume of its sales; its technical and commercial advantages over the competition; and the barriers to entry for

¹ Decision of 9 June 1976: OJ L 223 of 16.8.1976. Roche has appealed to the Court of Justice.

new competitors on the vitamins market raised by the scale of investment required and by the need for long-term capacity programming.

The Commission considered that Roche was abusing its dominant position by concluding exclusive or preferential contracts since the effect of the contracts was to tie the most important buyers of bulk vitamins to it and to prevent its chief competitors from supplying them. The decision imposed a fine of 300 000 u.a.—or DM 1 098 000, as Roche has an important subsidiary in the Federal Republic of Germany.

173. The decision follows the policy always taken by the Commission and upheld by the Court of Justice—notably in the ‘Sugar’ case¹—that the grant of fidelity rebates by dominant firms is incompatible with the common market.

Giving judgment on 16 December 1975, the Court stated in this connection² that a fidelity rebate cannot be analysed in the same way as a quantity rebate calculated solely on purchases from the relevant manufacturer but as a form of price concession designed to deter customers from placing orders with competing manufacturers. With fidelity rebates the net prices vary from one customer to the next, even where they buy the same quantity, where one of the customers has also bought supplies from another manufacturer. Fidelity rebates which may reinforce dominance are incompatible with Article 86.

§ 6 — Joint ventures

174. The Commission has developed its case law in a number of cases concerning joint ventures.³

Vacuum Interrupters

175. The first such case concerned Vacuum Interrupters Ltd, a joint subsidiary established by Associated Electrical Industries Ltd and Reyrolle Parsons Ltd to facilitate and accelerate the launching of a new product hitherto manufactured by neither of the two companies. The Commission gave an exemption pursuant to Article 85(3) valid until 1980.⁴

The vacuum interrupter is a particular type of circuit breaker for use in switchgear, and is currently at an early stage of development. It has the advantages of being more efficient and more durable than the liquid and air types now in general use.

¹ Second Report on Competition Policy, point 48; Fifth Report on Competition Policy, point 24.

² International sugar industry cases: [1975] ECR 2007 and 2008.

³ Points 53 to 59 of this Report.

⁴ Commission Decision of 20 January 1977: OJ L 48 of 19.2.1977.

It is because of these advantages that undertakings in Japan, the USA and later the United Kingdom have become interested in this type of switchgear. The two parties in this case considered that if research was to achieve any long-term success the design and development of the device would entail financial and technical resources on a scale that neither of them could undertake separately. They therefore decided to create a joint venture for the development of this device, each of the two parent companies providing finance and personnel. The object of the new company is to develop and manufacture vacuum interrupters for incorporation into switchgear manufactured by the parent companies or by competing heavy electrical engineering companies.

The Commission found that the agreements as notified restricted competition within the meaning of Article 85(1) of the Treaty since, in order to develop a specific product, two major British switchgear manufacturers had chosen to cooperate within a joint venture rather than to compete with each other. In view of the circumstances of the case, however, the Commission gave an exemption from the date of the accession of the United Kingdom to the EEC until 1980. Conditions have been attached to the exemption, requiring notification of all changes in the capital structure and in the business activities of the joint venture.

The Commission decided that the consumer was allowed a fair share of the benefit resulting from formation of the joint venture. Durable, efficient interrupters will become available at a reasonable price. Although these interrupters are currently available only for low-power applications, they should in future be capable of use with higher voltages.

The Commission will review the situation when the exemption expires in 1980.

De Laval/Stork

176. The second case concerned De Laval/Stork, a joint venture of the American De Laval and the Dutch Koninklijke Machinefabrieken Stork BV undertakings, established to develop, manufacture, maintain and sell steam turbines, compressors and pumps. The joint venture will enable Stork to extend its activities and De Laval to undertake production in Europe. De Laval, which is already producing in the United States, will supply the requisite knowhow in return for the provision of premises and labour by Stork. The licences granted to the joint venture are partly exclusive and partly non-exclusive, and each of the parent companies has a 50% shareholding. The sales territory covers the entire Community, most of the rest of Western Europe, the Middle East and South Africa.

Article 85(1) applies to the formation of this joint venture since the result will be coordination of the two partners' commercial activities. The case cannot be considered one of partial merger since the partners continue to be competitors on

the relevant markets. De Laval will continue making the same products in the USA (a near geographical market), whereas Stork will continue producing other types of turbine (a similar product market). In certain circumstances the two partners retain the right to supply their goods on the relevant markets as competitors of the joint subsidiary.

In this case the Commission announced¹ its intention of issuing a favourable decision of limited duration and with certain conditions and obligations attached.

Other cases

177. Other cases were settled without a formal decision being necessary since the undertakings involved responded to Commission objections by abandoning their original schemes.

178. In one such case the two parent companies were to have had an equal shareholding and board representation in a joint venture. One of these undertakings was well established both in other Community countries and in certain non-member countries, whereas the other was a relatively new market entrant although it was already in production. The object of the joint venture was to assist the parent companies to improve their French market share as against their more powerful competitors already present in this market. A trademark was to be adopted in common to ensure adequate publicity. The products themselves were to be substantially the same as the products manufactured and distributed in other countries under the parent companies' own trademarks.

The Commission informed the two undertakings that it had doubts as to the compatibility of these arrangements with Article 85. It was not convinced that two undertakings of that size, already in business as manufacturers and distributors in neighbouring geographical markets, were incapable of expanding their business on the French market otherwise than through a joint venture. The Commission's criticism was directed in particular to the fact that the joint venture's business was to extend to marketing and that the common trademark for distribution in France was different from the trademarks owned individually by the two participating companies. It felt that this would not promote sales at Community level but on the contrary would impede effective competition between the products of the two firms and of the joint venture. This joint venture agreement between competitors for sales in a restricted part of the common market is caught by Article 85(1) and is highly unlikely to qualify for Article 85(3) exemption. The Commission dismissed as not warranting exemption the argument that the plan was necessary in order to balance the market.

¹ OJ C 292 of 11.12.1976.

179. Another case involved an arrangement to set up a joint venture to manufacture certain semi-finished products.

The main distinguishing feature of this case was that the two undertakings were creating additional production capacity on a large scale, representing the equivalent of a substantial proportion of the capacity already operated by one of them. There was to be equal representation in the joint venture. One of the parent companies was to provide knowhow, premises and labour; the other, the larger and more powerful of the two, was to provide the requisite finance. The two parents were to take equal proportions of the joint venture's output at a selling price calculated on a cost-plus basis. The larger of the two was required to use its share of this production chiefly for processing into finished products whereas the other sold its share to outsiders without processing, these sales representing the bulk of its own turnover.

The firms concerned have a substantial share of the Western European market for finished products and a sizeable share of the market for semi-finished products. The Commission informed them that the creation of their joint venture in the form envisaged would constitute a breach of Article 85. In an oligopolistic market the common determination of the joint venture's business policy would inevitably lead to coordination of commercial activities between the parent companies and, in particular, to the alignment of prices.

§ 7 — Merger control (Article 66 of the ECSC Treaty)

Main authorizations given

180. The most important Commission decisions under Article 66 of the ECSC Treaty in relation to the steel industry were those concerning Guest, Keen & Nettlefolds Ltd and Sachs AG, British Steel Corporation and Walter Blume GmbH, British Steel Corporation and Six Hundred Metal Holdings Ltd, the formation of North Sea Iron Company Ltd and Klöckner and Maxhütte.

GKN/Sachs

181. The Commission authorized GKN, Smethwick, Warley, West Midlands, to acquire 75% of the capital of Sachs AG, Munich.¹ The takeover would give GKN the power to control Sachs and the firms under its control.

GKN, which ranks thirteenth among British firms, is a holding company heading a group of more than two hundred firms, several of them covered by Article 80 of the ECSC Treaty. The main activities of this group are, in order of importance, mechanical engineering (automotive components, industrial equipment), structural

¹ Commission Decision of 29 July 1976: Bull. EC 7/8-1976, point 2126.

steel engineering, the manufacture and distribution of iron and steel products and the manufacture of fasteners. In 1974 GKN's consolidated turnover was £1 137 770 000, and its employees at the end of December 1974 totalled 120 340.

As a holding company, Sachs controls ten firms, the most important being Fichtel & Sachs AG, which, with its subsidiaries, mainly produces automotive components, bicycles and motorcycles, stationary engines and agricultural machinery. In 1974 the turnover of the Sachs group was DM 1 052 630 409 (£186 306 267), and its employees totalled 16 898 at the end of that year.

182. The Commission concluded that the main effect of the takeover would be a higher degree of vertical integration and a possible increase in the rate of self-sufficiency in iron and steel products. But the firms concerned would not be enabled to evade the rules of competition under the ECSC Treaty by establishing an artificially privileged position involving a substantial advantage in access to markets. The transaction therefore satisfied the tests for authorization laid down in Article 66(2).

However, the market more particularly affected by the takeover is not the steel market but the market for automotive components, particularly clutches, which is covered by the EEC Treaty. Scrutiny in the light of Article 86 of the EEC Treaty showed that the Commission had no grounds for opposing the takeover on the facts in its possession.¹

BSC/Blume

183. The Commission authorized BSC to acquire 75% of the capital in Blume, steel stockholder of Stuttgart.²

Following this, BSC, whose steel sales in Germany have hitherto been insignificant, will be able to work through Blume's distribution network with its fifteen sales offices, most of them in the Ruhr and the south-west, which account for 2.5% of all German stockholder sales. The arrival of BSC products on the German market—here it has so far had only a small presence—may help to intensify competition.

BSC/Six Hundred Metal Holdings

184. BSC was also authorized to acquire 33.3% of the shares in Six Hundred Metal Holdings Ltd (SHMH), which controls a large number of scrap undertakings.³

¹ Points 110 to 113 of this Report.

² Commission Decision of 30 March 1976: OJ L 94 of 9.4.1976.

³ Commission Decision of 20 July 1976: Bull. EC 7/8-1976, point 2127.

The acquisition will enable BSC to exercise joint control over SHMH with the George Cohen 600 Group Ltd (600 Group), which holds the other 66.7% of the shares in SHMH. The share of the British scrap market controlled by BSC and the 600 Group together will be around 10%.

North Sea Iron Company Ltd

185. A group of companies engaged in production and distribution in the private sector of the steel industry in the United Kingdom was authorized jointly to establish a company to be called North Sea Iron Company Ltd.¹ The object of the joint venture is the construction and operation of an iron ore direct reduction plant on the north-east coast of England.

The companies concerned are: Sheerness Steel Company Ltd, Sheerness, Kent; Consolidated Gold Fields, London, with its subsidiary, Tennant Trading Ltd, a company engaged in the distribution of ferro-alloys; Tube Investments Ltd, Birmingham; and Manchester Steel Ltd, Manchester, a subsidiary of Elkem-Spigerverket (UK) Ltd.

The North Sea Iron Company plant will produce prerduced iron, or sponge iron, which is a high-quality substitute for scrap as a charge for electric steel furnaces. The direct-reduction process is relatively new in the Community, where the only plant already producing sponge iron on a commercial scale is in Germany.

Klöckner/Maxhütte

186. The Commission authorized Klöckner-Werke AG, Duisburg, to acquire a majority holding in Eisenwerk-Gesellschaft Maximilianshütte GmbH, Sulzbach-Rosenberg (Maxhütte).²

This created a new steel-producing group, which ranks fourth in Germany in crude steel production (following Thyssen, Estel (Hoesch/Hoogovens Group) and Krupp-Südwestfalen) and third in rolled products (ahead of Krupp-Südwestfalen). In the Community it ranks thirteenth in the production of pig iron and crude steel and fifth for the two main groups of products (permanent-way material and merchant bars) rolled by the merging companies. The transaction is not important for the special steels sector.

The merger will enable Klöckner-Werke to make up for part of its shortfall in semi-finished products, which exists despite its 49% holding in Hamburger Stahl-

¹ Commission Decision of 12 November 1976: Bull. EC 11-1976, point 2121.

² Commission Decision of 22 December 1976: OJ L 43 of 15.2.1977.

werke (the other 51% being held by Korf), by taking supplies from Maxhütte, which has its own iron ore mines and oxygen steelmaking works. Likewise the merger will assure deliveries of coils from Klöckner-Werke to Maxhütte, which has no wide hot strip mill and covers much of its requirements by purchases from Klöckner. Cooperation between the two companies was hitherto organized on a contractual basis in the context of the Northern rationalization group.

187. Since the new group will not occupy a dominant position in any of the major steel product groups, it will remain within the limits necessary to guarantee that it will not be in a position to conduct a sales and pricing policy which disregards competition from other Community producers and imports from non-Community countries. The transaction, then, does not hinder effective competition within the common market; nor does it affect the degree of vertical integration or the self-sufficiency of the group as a whole to an extent incompatible with the ECSC Treaty.

§ 8 — Procedural questions

188. In scrutinizing the operation of the Dutch straight nitrogenous fertilizers selling agency (Centraal Stikstof Verkoopkantoor BV—CSV), the Commission asked for information on its business activities and on its relations with manufacturers whose products it was selling. The information was needed for an assessment of the effect of the joint sales in the Netherlands and outside the Community on individual exports to Community countries by CSV member manufacturers.

When CSV refused to comply, the Commission ordered it, by decision issued under Article 11(5) of Council Regulation No 17 of 1962 to provide the information within eighty days on pain of a periodic penalty payment of 1 000 u.a. per day of delay.¹

CSV had justified its refusal on the ground that some of the information requested concerned exports made by CSV outside the EEC under an agreement combining all European manufacturers of nitrogenous fertilizers under the control of Nitrex AG, a company formed in Zürich, Switzerland, to supervise the application of the agreement. According to CSV's legal advisers it was quite possible that if officers of CSV who were also directors of Nitrex provided the Commission with the documents requested they would be regarded by the Swiss authorities as

¹ Decision of 25 June 1976: OJ L 192 of 16.7.1976.

having committed an offence punishable by imprisonment and possibly fines under Article 273 of the Swiss Criminal Code.¹

189. In its decision the Commission stated that it needed the information it had asked for to appraise the effects of CSV's conduct on competition within the Community and that the information was available within the Community. Both the Commission as an authority and individual members of its staff were required by the Treaty itself and by Regulation No 17 to refrain from divulging confidential information. The fact that some of the information requested had been communicated to a cartel domiciled in Switzerland and governed by Swiss law did not deprive the Commission of its right to receive it.

190. This, then, establishes the principle that where information obtained or requested by the Commission under Articles 85 and 86 of the Treaty is regarded by the law of a non-member country as a business secret, this is no reason for preventing the Commission from enforcing the rules on competition within the Community.

191. CSV has complied with the Commission decision by providing the relevant information.

¹ Article 273 of the Swiss Criminal Code reads (translation):

'A person who endeavours to discover a manufacturing or business secret in order to pass it on to a public or private foreign organization or to a foreign company or to their staff, and a person who reveals a manufacturing or business secret to a public or private foreign organization or to a foreign company or to their staff, shall be guilty of an offence punishable by imprisonment or, in serious cases, by imprisonment with hard labour. The court may also order payment of a fine.'

Part Two

**Competition policy
and government assistance
to enterprises**

Chapter I

State aids

§ 1 — General

192. In the case of regional aids, one of the Commission's major concerns has been to ensure that the coordination principles it has developed are generally applied. This presupposes that all assistance granted by Member States should be in line with Community requirements, which means that it should be measurable. But some 50% of all regional assistance at present granted by Member States is in forms that cannot be measured. Technical work is now well on the way towards overcoming this problem.

The Commission has continued its systematic examination of national regional aid systems and was able to state its view on the French system. Sufficient progress has now been made to enable it to comment on several other national systems in 1977.

As regards aid to specific industries, the Commission made sure that Member States' measures concerning shipbuilding complied with the provisions of the third Directive adopted by the Council the previous year, and that those for textiles were in line with the objectives set out in its 1971 framework for aids in this sector.

The Commission has also had occasion once again to confirm its general position that applying export aids in intra-Community trade is incompatible with the common market. Finally, in giving its views on a number of cases involving aids to small- and medium-sized businesses it defined its position on aids for these firms.

§ 2 — General regional aid systems

Principles of coordination of national regional aid systems

193. Ensuring general application of the principles of coordination for regional aids adopted by the Commission and communicated to the Council on 26 February 1975¹ involved a certain amount of technical work.

¹ Fifth Report on Competition Policy, points 85 to 87. These coordination principles do not apply to aids provided by these systems if they concern products listed in Annex II to the Treaty.

Two complementary factors in the common method used for evaluating aids in accordance with these principles needed to be adjusted. These were the 'reference rate', corresponding to the rate at which firms can normally borrow to finance their investments, and the 'updating rate', by which the current value of a grant received may be determined over a subsequent period. These rates are required to calculate and compare the intensity of aids such as concessionary loan schemes or interest-relief grants. Once this work is completed, the Commission will be able to apply separate representative reference rates for each Member State; they will also be used as updating rates.

The coordination principles also laid down that the ceilings of intensity of aids applicable to Ireland, Northern Ireland, the Mezzogiorno and West Berlin should be fixed at the maximum theoretical level of intensity attainable by the measurable aids being granted there at 1 January 1975. As will be seen in the sections on each country below, agreement was reached on these ceilings through bilateral negotiations.

194. The main objective of this work was to overcome the difficulties involved in certain opaque regional aids. Point 4 of the principles of coordination, on the transparency of aids, states that 'the Commission will pursue with experts from Member States the technical studies already begun with a view to finding standards of measurement capable of making comparable all forms of regional aids in force in the Community'.

Only certain forms of regional aid can be measured and compared by this common method of assessment, i.e. those which can be expressed as a net grant-equivalent in relation to new investments. The Commission and experts from the Member States therefore tried to work out a method for measuring and making all existing forms of aid comparable, and examined these matters at a multilateral meeting held on 17 November 1976.

The Commission drew up a list of aids which cannot be measured by the existing method—which are known as 'opaque' as opposed to 'transparent' aids. This showed that, though these opaque aids were sometimes of minor importance or were not in fact applied, in all they accounted for almost 50% of the Member States' budgetary expenditure on regional policy. Since these aids are not covered by the principles of coordination at present, a way of measuring them must be found without delay.

195. The list of opaque aids also shows that they are related to many factors other than investment and that some are not at all dependent on investment.

For those dependent on new investment, but not necessarily related to the amount of investment, there are methods which will enable them to be measured and compared with the transparent aids covered by the coordination principles.

A direct method of measurement has been worked out for State guarantees and reductions in rent of industrial property.

However, no advance system of measurement has been found for tax concessions (notably reductions in profits tax) granted at the time of a new investment extending over a number of years, because of the variability of the factors (for example, the amount of profits) to which the aid is related. The Commission therefore suggested that the Member States concerned should themselves measure the aid in each individual case and stop granting it when it reached a certain level.¹

Aids for job creation are another kind of aid that has been considered opaque since they could not be measured in relation to investment. In their regional policy, certain Member States stress the need to make use of unemployed or badly employed working capacity. Aids for job creation in the form, for example, of a fixed amount for each new job created are one of the favourite means used for this purpose—whether for labour-intensive manufacturing firms² or for service industries. Although these aids are usually granted for new investment, this is not a condition. Like investment aids, they aim to stimulate, but unlike them they place a strategic value on employment, so it would seem illogical to base them on the amount of investment.

To measure this type of aid, within the coordination principles, it is planned to introduce two denominators, to be used as points of reference for all aids for new investments. The first denominator would be the existing method of assessment, where aids are expressed as a percentage of new investment; the second, new denominator would enable the aids to be expressed in units of account per job created. All aids for new investment would be measured by reference to one or the other of these two denominators. Existing coordination arrangements would be adjusted and a supplementary ceiling—again tailored to the socio-economic situation of the region concerned—would be set alongside the previous ceiling. One or other of these ceilings would have to be respected.

The final category of aids granted for new investment and considered opaque hitherto are those granted upon the transfer of a firm to an assisted area. When the aid granted is proportional to the number of workers affected, it is planned to measure it by reference to jobs created and treat it as a special case of job creation. When the aid is based on costs incurred by the actual transfer, it will be dealt with in the same way as tax concessions for investment.

¹ Certain other miscellaneous aids granted at the time of an investment but dependent on various other factors could also be measured in this way.

² Aids for job creation in labour-intensive industries correspond to investment aids in capital-intensive industries. They provide relief in respect of the burden arising from use of the main production factor.

196. A way still has to be found to measure aids towards firms' operating costs, i.e. aids not connected with or dependent on new investment. These are mainly intended to reduce labour costs for all or some firms in an assisted area, taking the form either of a fixed weekly or annual amount per worker or of an exemption from a certain percentage of social security contributions; aids for replacement investment in the form of subsidies or tax reliefs for depreciation; or reductions in profits tax in relation to exports. These aids are to be measured by reference to their basis: aids for replacement investments, for example, are to be based on the amount invested.

197. Taking account of the progress made and the administrative and methodological questions which arose at the multilateral meeting on 17 November, the Commission will put forward early in 1977 more detailed proposals on ways of measuring opaque aids and coordinating them.

Specific statements of view on certain national regional aid systems

198. Applying Article 92 *et seq* of the EEC Treaty, the Commission has continued scrutinizing regional aid systems introduced in the Member States to establish whether they are compatible with the common market.

In analysing the socio-economic situation in the several regions, it once again came up against a shortage of regional statistics at the appropriate levels and often a lack of comparability of statistics between one Member State and another. This problem will have to be studied more systematically, and the Commission is currently considering it from all angles.

Federal Republic of Germany

199. The Commission found no reason to object to a number of amendments introduced by the Federal Republic of Germany to the law on assistance for Berlin,¹ namely:

- (i) reducing or discontinuing tax privileges granted in respect of turnover tax for certain products supplied by firms in Berlin to firms in the Federal Republic and increasing them in respect of services;
- (ii) extending to the energy sector the investment premium scheme (at the rate of 25%) already covering Berlin manufacturing firms.

The Commission considered that, in view of Berlin's special situation, these amendments came under the derogation provided for in Article 92(2)(c) of the

¹ Bundesgesetzblatt of 30.12.1975.

EEC Treaty in respect of 'aid granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany'.

Moreover, as has been shown already the coordination principles applying to regional aids lay down that in the case of West Berlin regional aid ceilings would be fixed at the maximum intensity possible for measurable aids being granted at 1 January 1975. Commission and German officials were able to reach agreement on what the ceiling should be, but this does not concern aids covered by the provision in Article 92(2)(c) which are designed to offset the economic disadvantages caused to Berlin by the division of Germany.

200. In their 1975-78 and 1976-79¹ plans the German authorities introduced a new method of designating development regions,² and examination of these general regional aid schemes was continued. The results will be discussed with the German authorities early in 1977.

Belgium

201. The downturn in economic activity in mid-1975 induced the Belgian Government to take steps to stimulate a recovery. It had submitted to the Commission a draft to give effect to the complementary regional aid provided for in the Law on Economic Expansion of 30 December 1970.³ This aid intended to encourage firms to go ahead with investment schemes they would otherwise have tended to postpone because of the economic situation; it was to apply for six months only.⁴ The Commission did not object, and the Belgian authorities brought the measure into operation by a decree on 23 May 1975.⁵ In the face of continuing recession and rising unemployment, the Belgian Government twice extended the scheme for a further six months by the decrees of 31 December 1975 and 15 June 1976. The Commission did not object to these extensions.

202. As regards the Law on Economic Expansion of 30 December 1970, contacts continued between the Belgian authorities and the Commission on the designation of development areas. Under Decision 72/173/EEC of 26 April 1972,⁶ the Belgian Government was to send the Commission a new plan designating these areas.

¹ Bundesdrucksache 7/4742 of 13.2.1976.

² Fifth Report on Competition Policy, point 90.

³ Moniteur belge of 1.1.1971.

⁴ Fifth Report on Competition Policy, point 96.

⁵ Moniteur belge of 29.5.1975.

⁶ OJ L 105 of 4.5.1972.

Denmark

203. Examination of the Danish aid scheme introduced by Law No 219 of 7 June 1972¹ on regional development is nearing completion.

This law provides for three types of aid: subsidies (mainly subsidies for investments and for the transfer of firms), concessionary loan schemes and State guarantees; the rules on how these may be coupled together are fairly complicated. The Danish development areas fall into two categories—standard development areas and special development areas; they each cover roughly the same amount of territory and together account for about 50% of the country and about 30% of the population. The investment subsidies may only be granted in the special development areas.

The coordination principles of 1975 established the ceilings applicable at 25% of investment, in net grant-equivalent, for the special areas² and 20% of investment for the standard areas.

Examination of the scheme dealt with the form and intensity of aids, the locations where they could be applied, the observance of Community ceilings and the socio-economic grounds for classifying the regions concerned as assisted areas.

When last contacted, the Danish authorities hoped they could provide quickly additional information before the Commission came to its final decision. The Commission will state its view at the start of 1977 after having examined this information.

204. As regards the question of the German-Danish frontier,³ the Commission was informed that the outcome of the bilateral talks between Danish and German authorities had proved satisfactory to both parties.

France

205. In April 1976 the French Government informed the Commission of a reform of the French regional development premium system which came into force on 15 April 1976.⁴ The procedure under Article 93(2) initiated in 1972 in respect of this system as it existed previously therefore lapsed.

¹ This law does not apply in Greenland; Lovtidende A of 7.6.1972.

² Apart from three areas where the ceiling is 20%.

³ Fifth Report on Competition Policy, point 100.

⁴ Fifth Report on Competition Policy, point 88.

The reform covered the following three categories of aid: the regional development premium (PDR), the premium for the location of certain service industries (PLAT) and the premium for the location of research activities (PLAR).¹

In September 1976 the French Government also informed the Commission of certain changes it had introduced to the geographical locations covered by the PDR and PLAT respectively, and the establishment of a 'special rural aid'² applicable until 31 December 1977.

All these changes conform to the new guidelines of French regional policy. As far as industry is concerned, the policy seems to be to provide further encouragement for job creation, to direct industry towards small- and medium-sized towns and rural areas; it keeps the development of sophisticated service activities mainly for large towns and also aims to ensure that the size of newly established firms fits in with the host environment. As regards services, the new arrangements change the nature of the PLAT from an investment aid to a job-creation aid. This move takes account both of the relatively modest results obtained so far in decentralizing service industries away from the Paris area and the low cost of investments in this sector.

Aid percentages in relation to investment have hardly been altered, but the amount per job created has increased. The former geographical priority areas have generally been retained: the west, the south-west, the Massif Central, areas with predominantly declining industries in the process of conversion, and the border areas in the north and the east.

206. After examining this new scheme the Commission reached a decision on 22 December 1976 and on the basis of Article 92(3)(c) of the EEC Treaty took a generally positive view of this new French system of regional development premiums. A number of conditions were made, however, concerning time limits in classifying certain areas in the east of the country as premium areas, the varying of the premiums according to area, the measurability of some of the premiums and the observance of Community ceilings set for France by the coordination principles of 1975.³

As regards the second feature of the French system of regional development aid—tax concessions—the procedure under Article 93(2) initiated in 1973 is still in operation.⁴ One of the major concessions, exemption from trade tax, cannot at present be measured, and therefore the Commission will only be able to

¹ Decrees Nos 76-325, 76-326 and 76-327 of 14.4.1976, concerning the PDR, PLAT, and PLAR respectively (Journal officiel de la République française of 15.4.1976).

² Decree No 76-795 of 24.8.1976 (Journal officiel de la République française of 25.8.1976).

³ The Commission's study will be outlined in greater detail in the next Report on Competition Policy.

⁴ Fifth Report on Competition Policy, point 88.

state its view on this issue when the technical work on the opaqueness of certain regional aids is completed.

Ireland and the United Kingdom

207. Work has commenced on examining whether the general regional aid schemes in Ireland¹ and the United Kingdom² are compatible with the common market. The bilateral contacts required to determine the maximum possible intensity of measurable aids in operation on 1 January 1975 and consequently the aid ceilings applicable to Ireland and Northern Ireland have been completed. One single ceiling was set for Northern Ireland and eight for Ireland by reference first to four categories of regions—the Gaeltacht, the designated areas (mainly the west of the country), the Shannon area and the non-designated areas (the rest of the country)—and second to the type of operation (the setting-up of firms or the modernization and conversion of firms). There are therefore two ceilings for each category of region.

Italy

208. The Commission had been notified in 1974 of a draft law to reform the aid system for the Mezzogiorno for the period 1975-80.³ It came up against a number of difficulties before becoming law, and it was only when law No 183 of 2 May 1976⁴ was passed that the Italian Government was empowered to take steps to give it effect, which includes certain provisions requested by the Commission: greater transparency, regional specificity of aids and closer coordination with industrial development projects undertaken at national level or by the autonomous regions.

However, the law will not apply until the implementing measures referred to above have been introduced. They will determine the precise nature of the aid for the Mezzogiorno. Discussions on this will continue between the Italian Government and the Commission, which will be stating its view in the light of all these measures as a whole.

As laid down in the coordination principles on regional aid, bilateral contacts on aid for the Mezzogiorno were held to determine the maximum intensity attainable

¹ Principal statutes: Industrial Development Act 1969, Finance (Miscellaneous Provisions) Act 1956, Finance Act 1969.

² Principal statutes: Great Britain—Industry Act 1972, Local Employment Act 1972, Scottish and Welsh Development Agency Acts 1975; Northern Ireland—Industrial Investment Acts (Northern Ireland) 1966-1971, Industrial Development Acts 1966-1971, Selective Employment Payment Act 1966.

³ Fifth Report on Competition Policy, point 95.

⁴ Gazzetta Ufficiale della Repubblica italiana No 121 of 8.5.1976.

by the measurable aids being granted in the Mezzogiorno at 1 January 1975, and this ceiling will now have to be respected for aid to this region. The ceiling differs according to the area, the type of project and the size of the firms involved.

209. The Commission also took a decision on a draft law¹ for the autonomous region of Sicily providing for certain aid measures to promote economic recovery in the sulphur-mining areas of Sicily.

Within the framework of a general development programme for the south-central area of Sicily which, in addition to its main objective, industrial development, will also take in agriculture, tourism and infrastructure, the draft law provides for new aids to be applied alongside those already existing under legislation for the Mezzogiorno as a whole. These aids will encourage the development of new industrial activities in the areas of Sicily affected by the decline in sulphur-mining and maintain the level of income and employment.

Provision is made especially for assistance to small- and medium-sized firms as follows:

- (i) employment premiums, over a period of three years, amounting to Lit 200 000 a year for each new regularly occupied job;
- (ii) supplementary grants, at a rate of 20% of those provided for the same purpose by current national legislation for the Mezzogiorno.²

The table below shows the theoretical incidence of these aggregates of aids:

Size of firm	Grants for fixed investment expenditure on buildings and equipment		
	National Law 853/71 (Cassa)	Additional 20%	Total for mining districts
<i>Small</i> (fixed investment between Lit 100 million and 1 500 million)	35% to 45% ¹	7% 9%	42% 54%
<i>Medium</i> (fixed investment between Lit 1 500 million and 5 000 million)	15% to 20%	3% 4%	18% 24%

¹ The parts of Sicily are all depopulated areas where this 45% rate applies.

¹ Enacted as Law No 42 of 6.6.1975, Gazzetta Ufficiale No 246 of 15.9.1975.

² Although a new law for the benefit of the Mezzogiorno has been promulgated, it is not yet in effect. Current national legislation therefore means Law No 853/71, which was the only one in operation when the Sicilian draft law in question was framed.

210. The Commission examined the socio-economic situation of the Sicilian provinces where the recipient areas are mainly located: Caltanissetta, Enna and Agrigento.

Net *per capita* incomes range between 54% and 66% of the national average. Since this is 65% of the Community average, the net *per capita* incomes only amount to between 35% and 42% of the Community average. For Sicily as a whole net *per capita* income is 46% of the Community average. This figure is below the lowest national net income *per capita* in the Community, i.e. that of Ireland (50%), whose population (approximately 3 million) is smaller than that of Sicily (4.7 million).

The population of the three provinces has declined considerably. Between 1961 and 1971 (census years), a net fall of between 4% and 12% was recorded (the annual average being 0.4% to 1.2%). The population of Sicily as a whole declined by 1% (annual average 0.1%), as against an increase of some 7% in the total population of Italy (annual average 0.7%).

Emigration rates from the provinces of Agrigento, Caltanissetta and Enna (17%, 22%, 24% respectively) for the period 1961-71 were with a few exceptions higher than in any other Italian provinces. The average annual emigration rate for these three comes out as 1.7%, 2.2% and 2.4% respectively, whereas for the whole of Sicily it is 1.3%. This last figure is the highest in the Community and well above those recorded in other regions where the socio-economic conditions closely resemble those of Sicily (Northern Ireland 0.4%, Ireland 0.5%).

Despite this substantial emigration, the employment situation is poor. In 1973 the percentage of persons in employment in Sicily amounted to only 25% of the total population, as against an Italian average of 32%.

In other Community regions with socio-economic conditions similar to those in Sicily, this percentage is higher (Ireland 34%; Northern Ireland 38%). Unemployment is considerable. In 1973 the unemployed totalled 5.7% of the Sicilian labour force, a figure very close to Ireland's approximate 6%, which was the highest in the Community.

The difficulties affecting the sulphur industry in these areas are illustrated by the fact that 36 500 jobs in that sector were lost between 1956 and 1975. Between 1961 and 1971 the hardest-hit communes saw 13 276 jobs disappear, which corresponds to an overall average decline of 27%. Over the same period and in the same communes, the share of each sector in total employment reveals an exceptional decline in agricultural employment (50% and over) and a 20% reduction on average in industrial employment.

These figures on the assisted areas show that the employment situation is even more critical here than in Sicily as a whole. Between 1968 and 1973 agricultural

employment in the region of Sicily dropped from 32% to 26% of the total (Community average 8.1%), while the share of industrial employment stayed much the same—falling from 32% to 31% (Community average 44% in 1973).

211. Having established that the areas involved did indeed have exceptionally low standards of living and serious underemployment, the Commission decided that the supplementary grant provided for by the draft law, although it would be above the intensity ceiling for measurable aids set for the Mezzogiorno by the coordination principles, could be considered compatible with the common market under Article 92(3)(a) of the EEC Treaty. The coordination principles do allow the Commission to grant, in specifically justified cases, exceptions to the ceilings it established.

As regards the employment premium, which is a new form of opaque aid within the meaning of the common method of evaluating aids—the Commission decided not to object to its introduction provided this did not prejudice the outcome of the technical work now in progress on the measurability of aids.

Netherlands

212. In 1975 the Dutch Government modified its general regional aid system.¹ The assisted areas were extended by the setting-up of new growth points in areas in difficulty which had not been included in the traditional assisted areas in the north and south of the country. Aid had already been granted to some of these growth points between 1967 and 1971. A number of changes were also made to the aids themselves and to the terms on which the assistance is granted.

The Dutch authorities have been tackling high and persistent unemployment outside the Randstad for a number of years and felt that they should encourage employment more by slightly increasing the absolute maximum amount of the subsidy granted for investments creating large numbers of jobs. There will now be two options: a 25% investment premium up to a maximum of Fl 3 500 000 with an additional premium of 6 percentage points in the case of the premium being paid over 5 years, or a 15% investment premium plus an additional employment premium of Fl 10 000 per job, the total of both premiums not to exceed 20% of net subsidy-equivalent. A maximum of Fl 4 000 000 will also be set for the second option. In terms of net subsidy-equivalent, there is no difference between these two options.

The Dutch aid scheme has been examined in the light of these changes, and discussions with the Dutch authorities are nearing completion. The Commission will be able to state its view on this scheme early in 1977.

¹ Ministerial Notice No 1275/III/1260 PI POR/REP of 7.5.1975; Staatscourant No 90 of 14.5.1975; Staatscourant No 175 of 11.9.1975.

§ 3 — Aid systems for specific industries

Shipbuilding

213. The decline in new orders and the cancellation of earlier commitments in the shipbuilding industry cannot be regarded solely as conjunctural phenomena; current and prospective new orders indicate that the industry is facing a serious worldwide crisis characterized by a structural surplus of production capacity. The dearth of new orders has led to intense price competition, with the bulk of new orders being taken by the Japanese industry. In these circumstances there is a danger that Member States will individually increase their aids to the industry in an effort to maintain its level of activity and to mitigate the effects on unemployment of the unfavourable conjunctural situation. Such unilateral action, however, would be at least partly at the expense of other Community producers. The Commission has therefore been particularly concerned to ensure that the Member States respect the rules contained in the third Directive of the Council on aids to shipbuilding.¹

Italy

214. The assistance granted to shipbuilding, ship conversion and ship repairing in Italy under Law No 878 of 27 December 1973² was due to expire at the end of 1976. This law provided for grants to be paid at the following rates in 1976:

- 4% of value for shipbuilding (production aids);
- 5% of value for ship conversion and repair (production aids);
- 10% of investment in building and repair yards.

The Italian Government informed the Commission of its intention to extend the aids for shipbuilding, ship conversion and repair up to the end of 1977.

The rate of assistance would be reduced in 1977 to 3.8% for shipbuilding and to 4.8% for conversion and repair. Because of difficulties experienced by yards in raising finance on the capital market and the consequent threat to the rationalization and modernization of the industry, the investment grants would not be extended and assistance would instead be provided in the form of a long-term loan for up to 70% of investment expenditure with a reduction of 5% in the rate of interest. The scheme also included a new production aid in the form of a grant of 5% of the value of materials used in shipyards.

¹ Fifth Report on Competition Policy, points 101 to 104.

² Third Report on Competition Policy, point 98; Gazzetta Ufficiale No 5 of 5.1.1974.

215. Although the Commission understood the reasons which had led the Italian Government to propose these measures, it raised a number of objections to the proposals. First, the Commission noted that the third Directive on aids to shipbuilding, although authorizing Italy to continue to grant production aid for shipbuilding and ship conversion, required that this should be progressively reduced. The new aid for the purchase of materials would more than offset the proposed reduction in existing production grants, so that production aid would in fact be increased. Second, aids should not be granted for investment to increase capacity since this would aggravate the industry's structural problem and would therefore be against the common interest.

In the light of these objections the Italian Government decided to withdraw its proposal to purchases of materials and agreed not to grant aid for investments which would increase capacity in the industry. The Commission was therefore able to inform the Italian Government that it no longer objected to the implementation of the proposals. However, as regards the production aid for ship repair, which is not authorized by the third Directive, the Commission considered that distortions of competition with ship repairers in the Marseilles region could be justified only for a limited period by the disturbances caused by the prolonged closure of the Suez Canal.

United Kingdom

216. In 1975 the United Kingdom decided to introduce a scheme of cost-escalation cover for exports to non-member countries of certain capital goods, including ships. Under the scheme producers would be able, in return for a premium of 1% of the amount covered, to insure themselves against increases in the costs of eligible inputs to the extent that these increases were above the threshold and below the ceiling provided for in the scheme.

Inputs imported from the other Member States and built into ships were not eligible for this cover. The United Kingdom Government subsequently informed the Commission that it proposed to introduce a new aid scheme specifically for the shipbuilding industry. This new proposal involved, in particular, the provision of cost-escalation insurance in respect of sales by British shipyards to national shipowners on the same terms as already existed for sales to non-member countries.

The United Kingdom Government argued that, with respect to the shipbuilding industry, these two cost-escalation schemes were essential so as not to jeopardize the future of the United Kingdom industry. It would be very difficult to introduce restructuring and rationalization programmes after the nationalization of the industry if the temporary loss of orders brought insolvency to yards viable in the medium term. The United Kingdom Government was particularly concerned that

the industry overestimated inflationary trends, with the result that it was quoting unreasonably high fixed prices when bidding for contracts. It was therefore argued that the budgetary cost of the joint schemes would in fact turn out to be relatively small.

217. The Commission's general position on schemes of cost-escalation insurance is that they may not be applied in trade between Member States because this would be incompatible with the Treaty and that they create unacceptable distortions of competition between the Member States in the markets of non-member countries. As regards the latter aspect, the Commission has proposed that the Council issue a directive requiring that, after a transitional period during which the terms of the schemes are made progressively more restrictive, such schemes should be abolished by the end of 1978 in trade with non-member countries.¹

With respect to shipbuilding the Commission noted that the joint cost-escalation scheme could not be approved by it on any of the grounds provided in the Treaty, particularly in view of the fact that the joint schemes involved production aids and could not therefore be considered as facilitating the development of the industry. As was the case with the similar French scheme, the Council alone could grant authorization. However, the Commission was unable to propose an amendment to the third Directive on aids to shipbuilding unless certain conditions were met. In particular, it asked the United Kingdom Government to extend the cost-escalation cover to component products imported from the other Member States and thereby eliminate a discriminatory provision which was incompatible with the Directive and which it had previously required the French Government to abolish.²

218. Following the United Kingdom Government's agreement to modify the joint scheme in this way and to give the Commission details of all cases accepted for cover under it, the Commission was able to propose to the Council an amendment of the third Directive on aids to shipbuilding with a view to authorizing the United Kingdom's joint scheme of cost-escalation insurance until the expiry of the Directive at the end of 1977. As was required in the case of the French scheme, the proposed amendment provided that the terms of the scheme should be made progressively more restrictive. The Council approved the amendment on 18 November 1976.

Offshore installations: United Kingdom

219. Article 93(1) of the EEC Treaty requires the Commission, in collaboration with Member States, to keep under constant review all existing systems of aid and

¹ Bull. EC 5-1976, point 2307.

² Fourth Report on Competition Policy, point 152.

to propose to the Member States any appropriate measures required by the progressive development or by the functioning of the common market. As part of this constant review the Commission examined the aids granted by the United Kingdom in the form of an interest relief grant of 3% annually¹ for up to eight years to finance purchases for use on the United Kingdom Continental Shelf of fixed offshore installations, their component parts and services provided in connection with their manufacture and installation. This aid is only provided in respect of equipment manufactured in the United Kingdom.

The United Kingdom Government had introduced the scheme in order to enable United Kingdom suppliers to compete with those in certain non-member countries who were able to offer export credit on favourable terms.

220. The Commission noted that the scheme could be considered as an aid either to the suppliers or to the purchasers of fixed offshore installations. Considered as an aid to the suppliers it was originally justified by the need to enable the United Kingdom industry to become established in the face of strong competition from certain non-member countries. However, the increasing importance of the offshore supplies sector in the Community and the rapid growth of the UK market for this equipment had resulted in a considerable increase in competition within the Community. The distortions of competition created by these production aids had therefore increased and could no longer be justified on any of the grounds contained in Article 92 of the EEC Treaty.

If on the other hand the scheme was considered to be an aid to the purchasers of the equipment with the objective of accelerating the exploitation of the United Kingdom's hydrocarbon resources it was in line with the Community's policy of increasing its independence in the energy field and it could therefore be considered compatible with the common market provided that the discrimination in favour of United Kingdom suppliers was eliminated since this discrimination was adversely affecting trade to an extent contrary to the common interest and was not contributing towards the said objective.

For these reasons the Commission decided to propose to the United Kingdom Government that the scheme be modified so that aid was also granted in respect of equipment purchased from the other Member States.

221. The United Kingdom Government argued that, since the level of aids had remained unchanged and the share of the other Member States on this market has not fallen since the introduction of the scheme, distortions of competition could not be regarded as having increased. It therefore saw no justification for the modifications proposed by the Commission.

¹ Industry Act, 1972.

After a re-examination of the question the Commission concluded that the points made by the United Kingdom Government could not be considered as refuting its earlier position. Aids whose effects on competition were relatively small when an industry was being established could cause serious distortions once the industry and the market had expanded. Producers in other Member States, even if they maintained their market share, could only do so by accepting lower profit margins, which would leave them in a weaker competitive position.

The Commission therefore decided to initiate the procedure under Article 93(2) of the EEC Treaty in respect of the scheme.

Textiles

222. The need for structural adaptation of the textile industry has been described in previous reports. The ability of this industry to compete in a market characterized by relatively slow growth against highly competitive imports from the developing world and State-trading countries depends critically on the necessary structural and technological transformations being undertaken. However, it should be emphasized that different sectors of the industry are affected by these problems in differing degrees.

These transformations pose a threat to employment in an industry which is a major employer and which tends to be concentrated in areas where it is frequently the only significant employer. Most Member States have, therefore, felt obliged to intervene to avoid or at least to mitigate employment problems. The Commission is, however, aware of the effects of aids granted to the textile industry in one Member State on its competitors in the other Member States. It is therefore concerned to minimize distortions of competition and trade within the common market. To this end it has always sought to ensure that national aids assist rather than frustrate structural change. Thus in 1971 it addressed a communication to Member States¹ in which it set out the principles to which schemes of aid to this industry should conform:

- (i) aids should be such as to assist the adaptation of the industry by facilitating joint research and development activities, by eliminating excess capacity, by converting firms to non-textile activities or by promoting horizontal or vertical integration; aids should not simply seek to maintain uncompetitive production.
- (ii) aids to investment must be warranted by acute employment problems and must be confined to sectors facing serious difficulties of adjustment; they should not lead to an increase in the production capacity of such sectors.

¹ First Report on Competition Policy, point 171.

223. A number of Member States have in recent years shown a tendency to adopt aid schemes for particular sectors of the industry. Thus the United Kingdom has introduced sectoral schemes for the wool textile industry¹ and the clothing industry² and the Netherlands has taken action to assist the wool, cotton, textile printing and clothing sectors.³ The cases described below are further examples of this tendency.

This development has obliged the Commission to take decisions on aids on the basis of more narrowly defined sectoral situations rather than on the basis of a general industry-wide assessment, since the situation in the various sectors of the industry sometimes varies quite markedly.

The Commission is therefore examining, in collaboration with the Member States, how to adapt the existing general principles so as to take account of this factor. It will reaffirm its opposition to aids which increase productive capacity, but only in respect of sectors where there is structural overcapacity or where demand is stagnating.

Further, in sectors where overcapacity and low demand have caused prices throughout the Community to collapse aid should only be granted to companies converting to other activities. In order to encourage increased productivity and competitiveness with imports from non-member countries aids may be given to improve production techniques and for applied research, provided that the results are made available on commercial terms and without discrimination throughout the Community.

Thus modified, the general principles elaborated in 1971 will continue to guide the Member States in the preparation of aid plans for this industry and the Commission in its appraisal of these plans. These principles will also guide the Commission in its assessment of applications for the various forms of Community finance, for instance from the European Regional Fund or the European Investment Bank.

Belgium: Clothing industry

224. The Belgian Government informed the Commission of its intention to intervene to promote the restructuring of the clothing industry, a sector which has been particularly affected throughout the Community by competition from non-member countries.

In order to benefit from the aid, which was to take the form of an interest-free loan of FB 15 000 per employee repayable by the end of 1983, companies must

¹ Fourth Report on Competition Policy, points 153 to 155; Industry Act, 1972.

² Fifth Report on Competition Policy, points 107 to 109; Industry Act, 1972.

³ Fifth Report on Competition Policy, points 110 and 111.

undertake to participate in the State restructuring programmes, must prove their commercial viability and must retain at least 90% of their workforce. Moreover, provided their financial resources are adequate, they would be required to make within one year investments in this or other industries to create new employment.

225. The Commission considered that the selectivity built into the aid scheme, in particular its concentration on viable enterprises, should ensure that the restructuring was successfully carried out and that the industry's viability was increased. As there was no likelihood of any increase in the industry's total productive capacity the Commission decided that the scheme conformed to its general principles as outlined above and raised no objections to it.

Italy: Aid to five companies

226. The Commission regularly examines significant specific cases of aids granted under general aid systems.¹ It receives advance notification of these cases in accordance with arrangements made with the Member States concerned when the Commission is considering general aid systems.

In December 1975 the Italian Government informed the Commission that under Law No 464 of 1972² it intended to grant aid to five companies in the textile and clothing industries. Of the five companies four were medium-sized manufacturers of clothing and were to take over insolvent undertakings. The fifth company, a larger manufacturer of a range of textile products, was to receive assistance to modernize its capital equipment. In all cases the restructuring programmes provided for significant increases in production capacity.

While it was not opposed to the restructuring operation as such the Commission took the view that the increases in capacity were incompatible with its principles on State aids to the textile industry. It therefore initiated the procedure laid down in Article 93(2) of the EEC Treaty in respect of these aids.

As a result the Italian Government agreed to modify its proposals in certain respects so as to prevent any appreciable increases in capacity in some of these cases. It also requested the Commission to take account of the fact that three of the firms were located in an area heavily dependent on the textile industry in which a large number of firms had closed down resulting in significant capacity reductions overall.

The Commission, therefore, decided that it should no longer oppose the aids to four of the companies. For the fifth company, a manufacturer of raincoats, it re-

¹ Second Report on Competition Policy, points 116 to 118 and Fifth Report on Competition Policy, point 135.

² Fourth Report on Competition Policy, point 168. Gazzetta Ufficiale No 218 of 23.8.1972.

quested the Italian Government to modify its proposals so as to avoid any increase in capacity. The Italian Government subsequently informed the Commission that it had modified the company's restructuring programme.

The Netherlands: Cotton and allied textiles

227. The Netherlands Government informed the Commission that, in order in particular to protect employment, it intended to grant aid to the cotton and allied textiles (rayon and linen) sector. This aid would take two forms:

- (i) interest-free loans related to companies' 1974 fiscal depreciation and employment at January 1976. The loans would be repayable in equal instalments in 1980 and 1981, unless the companies presented restructuring programmes, in which case the loans would be converted into grants.
- (ii) investment grants to meet up to 20% of the costs of restructuring programmes proposed in the period 1976-78.

The Netherlands Government indicated that these aids would be used in particular to increase productivity and to improve product quality, and that there would be no overall increase in capacity.

228. An earlier Netherlands aid scheme for restructuring a variety of sectors, including cotton, in the textile industry was described in the Fifth Report on Competition Policy.¹ The Commission did not object to these earlier aids, but requested that the detailed reorganization schemes for each sector be transmitted to it for approval. The Commission therefore had certain doubts about the justification for a further aid scheme for the cotton and allied textile sector particularly as the new scheme was also intended to promote restructuring and since the reorganization schemes, which were to have been prepared without delay, had not yet been transmitted to it for approval.

Moreover, the proposed interest-free loans were not linked to a restructuring programme. For companies which did not subsequently undertake such programmes they would amount to a stop-gap production aid. This would be contrary to the Commission's principles described above on aids to the textile industry. There was a grave risk that measures of this character would affect trading conditions to an extent contrary to the common interest and provoke other Member States to grant further aids to the sector.

For these reasons the Commission decided to initiate the procedure provided for in Article 93(2) of the EEC Treaty in respect of the proposed aids.

¹ Points 110 and 111.

Paper and board industry: The United Kingdom and the Netherlands

229. Although demand for paper and board is likely to continue to expand at a relatively rapid rate in the future, the industry's growth prospects in the Community are threatened by its relatively high dependence on imports of woodpulp. This may pose serious problems if, as is forecast, a shortage of woodpulp materializes in the next decade.

The understandable wish of woodpulp suppliers to sell finished products rather than raw materials will exacerbate the situation. The industry is therefore likely to depend increasingly on indigenous raw materials of which, despite afforestation and reafforestation programmes, waste paper will undoubtedly remain the most important.

230. The paper and board industry in the United Kingdom has been particularly affected by these adverse factors. Between 1965 and 1974 its output remained virtually static while consumption grew by nearly one third. Overseas producers, located principally in Canada and Scandinavia, increased their market share from just over a quarter to just under a half. Although the industry's usage of waste paper increased from 34% of total fibre requirements in 1960 to 45% in 1974, dependence on imported woodpulp remains considerable because of the paucity of forest reserves in the United Kingdom.

In order to assist the industry to reduce its dependence on imported raw materials the United Kingdom Government decided upon a scheme of aid under Section 8 of the Industry Act 1972 involving a total of £23 million. Grants were to be paid to the paper and board industry at a rate of 25% for the installation of new plant and machinery for treating and processing indigenous raw materials, for the construction of storage facilities for waste paper and for significant increases in working capital requirements resulting from the introduction of new manufacturing processes and at a rate of 15% of the cost of new buildings or alterations to existing buildings.

In all cases assistance would only be granted where the project formed part of an overall plan for using indigenous raw materials more efficiently and did not simply involve normal renewal and maintenance. In addition, manufacturers of plant and machinery were to be eligible for grants covering up to 25% of the cost of designing and developing prototype plant and machinery specifically for use in the treatment and processing of indigenous raw materials in the production of paper and board.

Sine the objectives of these measures were in line with its own proposals on the recycling of waste paper¹ and since trade and competition between the United

¹ Bull. EC 3-1974, point 2247.

Kingdom and the other Member States are relatively slight in this field the Commission decided not to raise any objections to the scheme.

231. For the same reasons the Commission raised no objections to the measures to promote the increased usage of waste paper by the paper and board industry of which it was informed by the Netherlands Government. Aids would be given in the form of grants to cover 25% of the costs of investments involving the use of a variety of advanced techniques such as de-inking and dispersion.¹ The budgetary cost of the scheme would be Fl 10.6 million. To be eligible projects should contribute not only to an increased usage of waste paper but also to a reduction in woodpulp requirements or to an improvement in product quality. It was expected that the paper and board industry would, as a result of these aids, increase its consumption of waste paper by around 40%.

Machine tools: The United Kingdom

232. Demand for machine tools is largely dependent on the level of investment in the metal goods industries, which is in turn dependent on the general level of investment. Cyclical fluctuations in the level of investment are further amplified in the consequent fluctuations of the volume of new orders for machine tools. Since there is a lag between changes in the general level of economic activity and changes in the level of investment and a further lag before the latter affects demand for machine tools, the machine tool industry also suffers from difficulties in the recruitment of skilled labour during cyclical upturns.

The machine tool industry can of course take certain counter-cyclical measures itself, particularly in export markets. In the case of the United Kingdom's industry, however, the cyclical problems have been exacerbated by its diminishing competitiveness. Thus between 1966 and 1973 imports rose from 26% to 39% of apparent consumption while its share of the EEC market declined from 26% to 11%. These trends posed a serious threat to the future viability of the industry. The United Kingdom Government had indeed already had to intervene to rescue several companies in serious financial difficulties.

233. The British Government therefore decided to introduce a scheme of assistance² to encourage the industry to modernize and to become more competitive. Under the scheme the following aids were to be provided:

- (i) loans at favourable rates of interest towards the costs of developing new products;

¹ Technique for homogenizing waste paper pulp and other pulp.

² Industry Act, 1972.

- (ii) grants at rates of 20% and 15% after deducting any Regional Development Grants for investment in new plant and machinery or in new buildings or extensions respectively;
- (iii) loans at favourable rates of interest for restructuring operations;
- (iv) loans at favourable rates of interest to finance stockbuilding during the cyclical trough up to 31 December 1976.

234. The Commission did not object to the assistance for the development of new products, for investment and for restructuring as it felt that these aids would enable the industry to increase its competitiveness and thus assure its future commercial viability without affecting trading conditions to an extent contrary to the common interest. It also noted that assistance for the development of new products was given in a number of the other Member States as part of general aid programmes for research and development.

On the other hand, the Commission considered that the proposed aids for stockbuilding would not encourage companies to make the fundamental changes necessary for commercial viability. Indeed the effect might well be the opposite of that desired, since companies would be able to increase their rate of production and the need to change might therefore seem less urgent. Moreover, there was a risk of serious distortions of competition since United Kingdom companies would be able to build up stock relatively cheaply and would be well placed to take advantage of the upturn in demand, thus increasing the difficulties of their competitors in the other Member States who have also suffered from the adverse conjuncture.

In view of the Commission's objections the United Kingdom Government decided not to proceed with the stockbuilding proposal, and the Commission was able to inform the United Kingdom Government that on this basis it had no objections to the scheme.

235. The stockbuilding of machine tools was subsequently undertaken with finance provided by the National Enterprise Board (NEB) on terms different from those originally envisaged in the aid scheme. The Commission will examine this activity in the context of its general appraisal of the NEB.

Electronic data processing

236. In countries with advanced economies electronic data processing has played an increasingly important role in a wide range of activities. The rapid growth experienced in the past is expected to continue. Nevertheless European computer and EDP equipment manufacturers face an uncertain future, since they are too small to be effective competitors in a world market dominated by companies from

non-member countries. This weak competitive position has resulted in inadequate profitability and in consequent difficulties in financing research and development, investment in new equipment and the preparation of software. These difficulties have led to technological backwardness in some areas, which has further weakened their competitiveness.

The Commission therefore considers that aids to assist the development of the European data-processing industry can in general be justified, particularly where they form part of a coordinated European approach. The effects of one Member State's aids on other European producers are, moreover, likely to be relatively small since competition is mainly with producers in non-member countries.

The Commission examined aid measures proposed by the French and German Governments for this sector and in each case sought the views of the other Member States.

France

237. For the reasons set out above the Commission did not raise any objections to the French Government's new strategy for its computer industry. The *Compagnie Internationale pour l'Information (CII)* was to withdraw from *Unidata* and form a joint company, *CII-HB*, with *Honeywell-Bull*, itself a subsidiary of the *Honeywell Group*. In order to enable the merger to overcome the initial difficulties, aid would be provided on a temporary and progressively reduced basis during the period 1976-79. The French Government expected that the new grouping would be commercially viable by the end of this period.

Assistance would be provided in the following ways:

- (i) an annual grant starting at FF 500 million in 1976 falling to FF 100 million in 1979;
- (ii) these annual grants would be reduced if *CII-HB*'s sales to the public and semi-public sector exceeded the levels expected on the basis of the current combined sales of the two companies; alternatively, if sales fell below these levels, the grants would be correspondingly increased;
- (iii) *CII*'s losses in November and December 1975 would be offset by a grant from the State, which would provide a further FF 135 million to cover subsequent losses;
- (iv) *CII-HB* would be eligible for loans on current market terms from the *Fonds de Développement Economique et Social* up to a total of FF 150 million, which would take the place of those previously granted to *CII*.

The Commission requested the French Government to take steps to create conditions favourable to a resumption of European collaboration.

Germany

238. The third German data processing programme¹ provides for aids to encourage:

- (i) the development of data processing applications in education, in research and in administration;
- (ii) research and development by the computer industry;
- (iii) the development of data processing by the Gesellschaft für Mathematik und Datenverarbeitung, a public research establishment.

The State will contribute up to 50% of the cost of research and development projects carried out by the private sector and up to 100% of the cost of work carried out by research establishments or public bodies. Grants to projects considered to be ready for commercial exploitation will be repayable. Repayment will not, however, be necessary if the anticipated results of the projects are not attained or if they turn out not to be commercially viable.

The programme covers the period 1976-79 and involves a total budget of DM 1 575 million, of which more than half will be devoted to promoting the use of data processing and a further third to research and development by the computer industry.

For the reasons set out above the Commission decided not to oppose the implementation of the measures. However, for aids for smaller computers and for computer peripherals, the Commission considered that, in view of the fragmentation of this sector of the industry, there was special need for coordination in the common interest between the Member States in order to avoid a duplication of effort. Such coordination would moreover be in line with the Council Resolution of 15 July 1974.² The Commission therefore made its agreement to the aids for this sector conditional on an undertaking by the German Government to keep it informed of the projects it intended to support. This will enable the Commission to take steps to ensure adequate coordination of the efforts made by Member States in this field.

Aids financed by parafiscal charges

Italy: Aids to the press

239. The Commission considers that aids to the press are not in general incompatible with the common market in terms of Article 92(1) of the EEC Treaty

¹ Second Report on Competition Policy, point 106. Drittes DV-Programm 1976-1979 des Bundesministers für Forschung und Technologie, Bonn.

² OJ C 86 of 20.7.1974.

since this is not a sector where there is competition between the producers in the various Member States. The Commission's principal concern in this area is therefore to ensure that the terms on which such aids are granted do not result in distortions of competition and trade in other ways.

Thus in 1974¹ the Italian Government, following the Commission's intervention, made a number of modifications to its system of aids granted to the press by the Ente Nazionale per la Cellulosa e la Carta (ENCC). In particular the aid granted to newspapers and periodicals in the form of a premium calculated on the basis of the quantities of newsprint used would now be granted also in respect of newsprint imported by printing firms directly from the other Member States without passing through the intermediary of the ENCC.

240. However, without notifying the Commission of its intentions, the Italian Government introduced, by a law of 6 June 1975,² a new system of aids to the press to be administered by the ENCC and apparently involving a similar discrimination against newsprint imported directly from the other Member States. The Commission therefore initiated the procedure provided for in Article 93(2) of the EEC Treaty against this new aid system.³

The Italian Government informed the Commission that there was in fact no discrimination and that the sole object of the procedure for granting the aid through ENCC was to ensure that the newsprint was used for printing newspapers and periodicals.

The Commission nevertheless decided in June 1976⁴ that the Italian Government should publish this statement so that the firms concerned would be aware of their opportunity to qualify for assistance under the law of 6 June 1975 when importing paper directly from the other Member States. The Italian Government subsequently informed the Commission that it had abided by this decision. Letters had been sent to the associations of publishers of newspapers and periodicals and to the ENCC, which had published a copy in its monthly bulletin for September 1976. The Commission decided that it could consider the matter closed.

§ 4 — Aids to exports

241. The Commission has already stated its views on the granting of export aids in trade between Member States in its previous Reports on Competition Policy.⁵ It considers that Member States' action in artificially stimulating sales in other

¹ Fourth Report on Competition Policy, point 161.

² Gazzetta Ufficiale No 149 of 9.6.1975.

³ OJ C 184 of 13.8.1975.

⁴ OJ L 185 of 9.7.1976.

⁵ First Report on Competition Policy, points 187 and 188; Second Report on Competition Policy, points 112 to 114; Third Report on Competition Policy, point 111.

member countries is incompatible with the general principles of a common market where a customs union has existed since 1968 and in particular with the free movement of goods. No derogation can be applied to these aids whatever their intensity, form, grounds or purpose. This view was confirmed by the Court of Justice¹ in its judgment in 1969 on the French preferential rediscount rates outlined below.

242. In the past therefore, the Commission has required abolition in trade between Member States:

- (i) of price guarantee systems that France and Italy applied or might have applied to export transactions;
- (ii) preferential rates which the Belgian and French central banks applied to the rediscount of credits to Belgian and French exporters and also the preferential rate applied by the *Medio Credito Italiano* to medium-term loans granted to Italian exporters.

From 1972 onwards, following complaints, the Commission also looked into tax concessions granted in France to French firms setting up establishments abroad.² Over a three-year period these firms could legally deduct from their taxable profit in France certain operating expenditures and costs relating to the setting-up of study centres, sales offices, construction sites or industrial plants. This income is not taxable in France however, but abroad, where this expenditure may be taken into account for the determination of taxable income.

This opportunity for double deduction was in effect similar to a non-reimbursable grant. It therefore constituted an aid within the meaning of Article 92(1) of the EEC Treaty since it promoted the export of goods and services on the part of French firms to other Member States and moreover, infringed the rules on right of establishment, which lay down that Member States must refrain from facilitating through aids the establishment of their nationals in other Member States. Following initiation by the Commission of the procedure under Article 93(2) of the EEC Treaty, the French Government repealed this measure. However, the action did not entail the immediate abolition of all these aids and the Commission took a decision prohibiting this system.³

243. In 1976 the Commission received a complaint from a trade organization concerning assistance granted by the Italian Government for the promotion of Italian toy sales on the French market. The Commission had not received prior notification of this assistance as laid down in the EEC Treaty.

¹ Joined Cases 6 and 11/69: [1969] ECR 523.

² Second Report on Competition Policy, point 113; Third Report on Competition Policy, point 111.

³ OJ L 253 of 10.9.1973.

After checking on the information provided by the plaintiff, it appeared that this assistance was granted by the ICE (Istituto Nazionale per il Commercio Estero) in the form of a grant covering approximately two-thirds of the expenses for joint sales campaigns covering all information media (television and radio broadcasts, press advertisements, catalogue distribution, posters). These campaigns were to be spread over three years (1975-77).

The French market had been selected by the Italian authorities and businessmen because its population and social and cultural background made it most likely to absorb Italian toys and because it was already a major outlet for this Italian industry whose exports to France were equivalent to 10% of French production and approximately one-third of French purchases of foreign toys.

In view of its general attitude towards export aids in trade between Member States, the Commission decided to initiate the procedure under Article 93(2) in respect of this assistance. By financing a major proportion of advertising expenditure on increasing sales of Italian toys in France, the Italian State was bearing costs which in normal circumstances should be borne by the firms themselves. This assistance amounted to almost 1% of the Italian toy industry's total sales in France. It was decided that it was likely to affect trade and competition between Member States to an extent contrary to the common interest.

244. While dealing with this case, the Commission received complaints and requests for information from certain Member States and other trade organizations questioning further similar measures taken by the ICE involving the markets of other Member States and industries: footwear, clothing and textiles.

Although the sums involved were small, the effects of the assistance could have been particularly harmful for they involved industries experiencing considerable difficulties in marketing both in Europe and in their traditional external markets owing to increasing competition from manufacturers in East Europe and from those with cheap labour sources; they were also having to deal with a drop in demand caused by the recession. These aids might also have magnified the consequences of the devaluation of the lira which were already making Italian competition stiffer on the markets of certain Member States.

The Commission therefore decided to extend the action it had initiated concerning toys by opening a new procedure under Article 93(2) of the EEC Treaty in respect of all the aid systems administered by the ICE for Italian industries. It also took the opportunity¹ of reminding the other Member States of its views on

¹ Shortly before this the Commission had obtained the French Government's agreement to stop granting assistance for similar promotion campaigns for its children's clothing industry on the German market.

this matter and instructed them, if they were applying similar aid schemes, to discontinue them immediately in trade with other Member States.

245. Following initiation of this procedure, the Italian Government made a number of comments to the Commission refuting the fact that this assistance was incompatible with the common market. It held, in particular, that the assistance could not affect competition and trade between Member States since:

- (i) similar measures existed in the other Member States and in non-member countries;
- (ii) the assistance was granted for advertising campaigns promoting Italian toys, footwear or clothing as a whole and not individual products of firms;
- (iii) the aid intensity was very low, in view of the small amounts earmarked for this purpose.

The Italian Government added that the Commission's action could put non-member countries at an advantage for they could continue to use similar measures for their sales within the common market.

The Commission did not find these objections valid. The other Member States had confirmed that they were not applying similar measures in trade between Member States. If it had received a response to the contrary the Commission would have extended its action and not left the Italian scheme in force. Moreover, whether the advertising in question was general or not, the aim and effect of the Italian assistance was to facilitate the penetration of certain Italian products on the markets of other Member States. The Italian Government's action could not be taken any other way. The Italian authorities themselves stressed, at least in one case, toys, that the assistance granted amounted to almost 1% of total annual sales by the Italian industry on the French market; this was not a negligible amount. Since in some cases the industries concerned were experiencing difficulties in the Community, even a limited advantage given to Italian firms could substantially worsen the situation of their Community competitors. Finally, consideration of the fact—which had not been established—that non-member countries could use similar measures to support their sales within the Community would have constituted a precedent and enabled Member States to outbid each other under the pretext of counteracting the measures of non-member countries.

Having taken account of these considerations, the Commission finally adopted on 8 December 1976 a Decision¹ instructing the Italian Government to discontinue, without delay, the financial assistance granted by the ICE for advertising campaigns launched by certain Italian industries on the markets of other Member States, since it was irreconcilable with the principles of a common market, particularly the free movement of goods.

¹ OJ No L 270 of 2.10.1976.

§ 5 — Aids to the environment

246. In November 1974 the Commission sent a memorandum to the Member States setting out the 'Community approach to State aids in environmental matters'.¹ It informed them of the guidelines it intended to apply in assessing the compatibility of this type of assistance. These specified that for a transitional period (1975-80) and to make up for the fact that the Community was lagging behind in matters of environmental protection, the Member States would be able, within certain limits, to grant assistance for investments to combat pollution made by existing firms, without them necessarily being warranted by difficulties experienced by the recipients in fulfilling their obligations. Assistance falling outside these conditions or granted after 1980 would only be permitted if warranted by particular industrial or regional difficulties.

The Commission has had to make use of these guidelines on numerous occasions.

247. The Commission had initiated a procedure under Article 93(2) of the EEC Treaty in respect of a German scheme providing for accelerated tax depreciations in respect of investment to combat pollution made by existing firms,² and had informed the German Government that it could only agree to these arrangements if the aids complied with the guidelines.

As initially proposed, the German scheme broadly complied. The depreciation arrangements were intended to help existing firms with investments carried out to conform to new environmental obligations. The assistance was only to be available for additional investment in plants in operation at 1 January 1975 and the rate under the German accelerated depreciation scheme (approximately 10% of investments in net subsidy-equivalent) was below the ceilings fixed by the guidelines (45% in 1975 and 1976; 30% in 1976 and 1977; 15% in 1979 and 1980). The only problem concerned the period of the scheme's application which had not been fixed at 31 December 1980 as laid down in the guidelines. Since the German Government amended its scheme in this connection, the Commission decided to close the procedure it had initiated.

248. At the same time, the Commission also closed the procedure it had initiated in respect of a Belgian scheme providing for non-reimbursable grants for investments carried out by firms to purify their waste water.³

¹ Fourth Report on Competition Policy, points 180 to 183.

² Fourth Report on Competition Policy, point 183; Drittes Steuerreformgesetz, Article 1(168) of 26.10.1973.

³ Fourth Report on Competition Policy, point 183.

This Belgian scheme was introduced by a Royal Decree¹ under the Belgian law of 26 March 1971² on the protection of surface waters from pollution. Like the German scheme, many of its provisions already complied with the guidelines for the transitional period. The assistance was intended to enable firms to construct purification plants required by obligations under the above law. It would only be granted for additional investments carried out by businesses in operation at 1 January 1975 and the investment had to be completed by 1979 at the latest.

However, although the aid intensity remained within the limits established for the initial years, the 1979 rate was higher than in the guidelines (21% in net subsidy-equivalent instead of 15%).

The Belgian Government had a new Royal Decree published repealing the previous one and changing the rates of aid, thus complying with the Commission's guidelines.

249. The French Government took steps to protect the environment under the agreements concluded with certain sectors of industry. Under these agreements, the firms in the sectors concerned undertook to substantially reduce their harmful effluents. They could then receive certain aids for the investments they would have to make.

The Commission examined the various agreements and found a number of common features. The maximum rate, in net subsidy-equivalent, amounted to approximately 26% of the recipient's investments and included subsidies financed from the State budget and various other forms of assistance (interest-free loans, grants and concessionary loans) granted by the Agences financières de Bassins³ from their charges to water users.

The Commission examined agreements with the following sectors of industry:

Sugar factories: in August 1974, the Commission had initiated the procedure under Article 93(2) of the EEC Treaty in respect of assistance provided for under this agreement in view of the fact that firms normally bear the cost of investments they are obliged to make to comply with laws on the environment and unless it can be proved that this causes difficulties in the industries concerned, assistance cannot be granted to exonerate these firms from all or part of this obligation. Upon examining this assistance again in the light of the guidelines of the Community approach established later, the Commission noted that the aids were within the limits it laid down for the transitional period. The investments eligible

¹ Of 23.1.1974, Moniteur Belge of 15.2.1974.

² Moniteur Belge of 1.5.1971.

³ Public bodies responsible for water management in each of the six 'catchment basins' into which France was divided by Law No 64-1245 of 16.12.1964.

for assistance were part of a programme for reducing pollution caused by waste waters from sugar factories. The aids were to be granted for investments carried out in plants operating at 1 January 1974; they would have to be carried out by 31 December 1976 and the rates of assistance were below the ceiling fixed by the guidelines.

Alcohol distillation; yeast and starch manufacture: the agreements with these industries only differ from the above as regards the period of implementation. The investments receiving assistance had to be carried out by 31 December 1978 and the rates were below the limits laid down by the guidelines. The Commission therefore did not object to them.

Wool washing: the assistance provided for by this agreement exceeded the limits of the guidelines on aids to be granted during the transitional period and there were no justifiable industrial or regional difficulties. The investments eligible for assistance could be carried out until 1 July 1980 and the rate was 26% as against 15% laid down in the guideline on investments to be made in 1979 or 1980.

However, the Commission was able to authorize this assistance for it established that this sector was open to severe competition from certain non-member countries and in difficulty on account of restructuring. Its resources were not sufficiently adequate and it was unable to comply therefore with the stringent obligations imposed by this agreement as regards purification of its effluents.

250. In 1975 the Commission also initiated the procedure under Article 93(2) in respect of the aid provisions in an Italian bill on water protection. Industrial plants operating at the time the law came into force could receive assistance for investments they would have to make to comply with the new obligations imposed by the law. The law merely outlined the type of assistance: guarantees and interest relief grants on loans taken out for these investments. This was general assistance, not required on account of special difficulties experienced by certain sectors or regions, and the Commission therefore decided that it did not comply in all circumstances with its guidelines on aids for environmental purposes. It was not restricted to plants in operation at 1 January 1975 and investments carried out in these plants until 31 December 1980. Moreover, since the other conditions for the granting of this assistance were to be defined at a later date, the Commission could not be sure that the rate would not exceed the ceilings it had established.

However, when the law was finally adopted,¹ the aid scheme concerned had been amended to comply with the Commission's request and the aids were only to be

¹ Law No 319 of 10.5.1976, published in the 'Gazzetta Ufficiale della Repubblica Italiana' No 141 of 29.5.1976.

granted for investments carried out in plants operating at 1 January 1975. All the other conditions concerning the granting of this assistance would be defined in subsequent regional laws and would be in line with the guidelines' remaining provisions.

The Commission therefore decided to close the procedure, but it drew the Italian Government's attention to its obligation to provide prior notification at the planning stage, as laid down in the EEC Treaty, of bills to be drawn up in this connection at regional level.

251. The Danish Government also informed the Commission of a bill designed to facilitate investments carried out by existing firms to adapt their plant to the requirements of the Danish law on environmental protection (Law No 372 of 13 June 1973). The assistance would take the form of interest relief grants, possibly accompanied by a State guarantee, on loans taken out for this purpose, and grants.

The Commission decided that this scheme fell within the bounds of the Commission's guidelines. The assistance was intended to help firms meet the obligations arising out of this law. It would only be granted for additional investments to be carried out in plants in operation at 1 October 1974. However, the bill laid down that the rates of the aids would be established by further legislation and assistance could have been granted for investments carried out after 31 December 1980.

The Danish Government then agreed to include in this legislation the limits fixed in the guidelines on this matter and in February 1976 the Commission decided that it had no objection to the draft law,¹ provided that the Danish Government informed it of this legislation in advance. This condition was fulfilled in March 1976. The Commission was able to establish that the rates of the aids and the deadline for carrying out the investments were in line with the guidelines and definitively confirmed to the Danish Government that it had no objection to the implementation of this planned aid scheme.

252. The Government of the Federal Republic of Germany informed the Commission of a draft law,² which was to come into force on 1 January 1981, providing for a levy on all waste water discharged both by firms and local authorities. The rate would gradually rise from DM 12 per unit of pollution in 1981 to DM 40 from 1986.

¹ Lovtidende A No 682 of 23.12.1975.

² Bundestagsdrucksache 7/5088 of 28.4.1976.

The bill provided for automatic exemption from the levy for three years for all such firms and local authorities undertaking to construct purification plants after 1981 (Article 10(3) of the bill).

The Commission's view, confirmed by the judgment of the Court of Justice in Case 173/73,¹ has always been that exoneration from a compulsory general charge imposed by the State, whether or not of a fiscal nature, constitutes an aid within the meaning of Article 92 *et seq.* of the EEC Treaty. In this case, firms would continue to discharge their waste waters while the purification plant was being constructed, yet they would not have to pay the levy.

This general aid measure did not comply with the Commission's guidelines on environmental protection aids; there were no specific industrial or regional grounds and it would apply after the deadline of 31 December 1980 laid down in the guidelines. The Commission therefore initiated the procedure under Article 93(2) of the EEC Treaty in this connection.

Moreover, the German bill contained other provisions for providing assistance:

- (i) when collection of the levies would have unfavourable consequences on the economic development of those liable. The Federal Government could then authorize by means of decree total or partial exemptions for certain firms or local authorities, industries or regions;
- (ii) proceeds from the levies could be used, on the basis of legislation introduced by the Länder, to finance measures to maintain or improve water protection and possibly take the form of assistance to firms.

The Commission reminded the Federal Government that when the time came it should send prior notification of these provisions in accordance with Article 93(3) of the EEC Treaty.

§ 6 — Aids to small- and medium-sized firms

253. Several comments must be made on assistance to small- and medium-sized firms.

They have a significant and sometimes major role in certain sectors. One of the criteria often used to define small- and medium-sized firms is based on staff numbers: up to 100 persons is a 'small' firm and up to 500 persons is a 'medium-sized' firm. In many branches of industry the majority, even the great majority, of personnel and sales are covered by these two categories of firms.

¹ Fourth Report on Competition Policy, points 156 and 157.

They make an important contribution to stimulating the economy and although there is a trend towards concentration in certain industries, their role will no doubt continue or even expand. New businesses continually spring up to replace or reanimate dying industries and make a substantial contribution to the renewal of economic structures and the maintenance of effective competition. They carry out numerous specialized tasks which—on account of their flexible structures and consequent ease of adaptation—they can better perform than very large companies (highly specialized or diversified production, subcontracting, services, technical innovation or launching of the new products). In many fields the size of these firms is undoubtedly optimum. Finally, the successful outcome of certain policies often depends on a closely-woven fabric of small- and medium-sized firms. As far as regional economies are concerned, this type of fabric is probably the best guarantee of a balanced economic and social development. They also make a worthwhile contribution to the training of labour and managerial staff.

254. However, in trying to carry out their roles properly, they often come up against obstacles peculiar to this type of firm:

- (i) because of their size and sometimes their legal status, small- and medium-sized firms do not usually have the same facilities as regards medium- and long-term finance both on the capital market and from banks. They are often short of capital resources and the usual financial channels cannot provide them with funds because of the risks involved in developing their activities—or cannot provide them without jeopardizing the independence to which the managers of small- and medium-sized firms attach such importance. The memorandum on the Community's industrial policy, presented by the Commission to the Council in 1970 had already drawn attention to these problems;
- (ii) the small size of some of these firms is sometimes caused by a somewhat passive attitude rather than by real economic need. The way out of this impasse, though not necessarily expansion, is at least greater specialization or joint work in certain areas;
- (iii) since their room for manoeuvre and financial resources are more restricted and their activities sometimes less versatile, they cannot easily adapt or convert their facilities to meet the demands of technological, industrial or commercial developments which are a feature of modern life;
- (iv) they must now, therefore, plan and develop their activities in relation no longer to a regional or domestic market but extend it to Community scale and even beyond. This implies acquiring the facilities for obtaining information on this extended market, diversifying production to meet its requirements, setting up the essential marketing network and purchasing the know-how essential for overcoming the technical and legal barriers inherent in international trade.

255. In view of these considerations the Commission's views on assistance to small- and medium-sized firms is summarized below.

No more so than at national level, can an all-purpose definition of small- and medium-sized firms be established at Community level applicable to all Member States, all industries and all their problems. The concept of the small- or medium-sized firm varies in relation to all these aspects and the fact that an aid scheme concerns or does not concern this type of firm can only be assessed by the Commission in each individual case in a pragmatic fashion.

In view of the significance of these firms in certain industries, the Commission, although favourably disposed, cannot exempt national measures taken in favour of small- and medium-sized firms from the general provisions on aid schemes. When national aid schemes involve firms which because of their particular features or small size have little effect on competition or trade between Member States, the Commission may have little cause for concern, for instance in the case of assistance for *artisanat* firms or the professions, or similarly, assistance which because of the small sums in the individual cases or the minor importance of the projects involved only applies to very small firms.

As far as competition is concerned, the small- and medium-sized firms have a specific role to play. The assistance they receive must therefore be designed to enable them to fulfil this role effectively, but must not provide artificial protection which would shield them from the normal play of competition. Receiving operating aids of a conservatory nature would make them 'permanently assisted'; they would fail to make the necessary adjustments and exploit their potential to the full. Such assistance would not only be contrary to the general social and economic interest since it would restrict production to unprofitable tasks but would also be against their own interests.

State aids which enable small- and medium-sized firms to overcome their peculiar difficulties and play their part in competition may receive favourable consideration. They may cover:

- (i) loans at preferential rates or guarantees providing them with credits for their investments, similar to those obtained by larger firms;
- (ii) the public authorities could set up specialized agencies to provide risk capital in the form of temporary shareholdings;¹
- (iii) incentives for research and development in the form of grants—reimbursable or otherwise, setting up technology centres financed, possibly in part, by contributions from firms in the industry concerned and carrying out research and development work for them which they could not do alone;

¹ Fourth Report on Competition Policy, point 171.

(iv) technical assistance with commercial or management policies (market surveys); financial incentives to encourage the use of modern equipment (data processing equipment).

256. In the light of this general approach the Commission has examined, in particular over the past two years, a certain number of proposals amending or setting up aid schemes for *artisanat* and small- and medium-sized firms.

Denmark

257. A Danish bill¹ amended a previously existing aid scheme by which the firms concerned could already obtain low-interest loans for investments required for expansion, modernization or conversion. By granting these loans, the Danish Government intends to make allowances for the fact that these firms are usually short of capital and have difficulty in obtaining help from normal sources of finance (financial market or banks). To be eligible companies must employ no more than 75 persons, while the maximum amount of the loan in each case will be DKr 450 000 (approximately 60 000 u.a.) over 15 years, a two years' period of grace and an interest rate of between 9% and 13%. An annual amount of DKr 40 million (approximately 5 million u.a.) will be set aside for this assistance.

A second Danish bill² stipulates that State guarantees may be provided for *artisanat* and small- and medium-sized firms for bank loans they contract in order to carry out conversion and modernization projects required to put them back on their feet. This will be an exceptional and transitory measure restricted to two years and intended to enable the firms concerned to proceed, despite economic difficulties and when they may no longer use normal banking resources, with restructuring projects already under way (development and commercial launching of new products, research on new outlets, retraining of labour). The total amount of such guarantees is not to exceed DKr 100 million (approximately 1¹ million u.a.) over two years. The firms' staff may not exceed 75 persons and in each case the maximum amount of the loans for which the guarantee may be granted may not exceed DKr 250 000 (approximately 33 000 u.a.).

A third scheme introduces State guarantees for certain financial institutions set up by trade organizations to facilitate investments by small- and medium-sized firms. In the past these guarantees had been limited to the retail trade, but they will now also be extended to *artisanat*, small- and medium-sized businesses and services (notably distribution and road transport). The amount of the guarantee

¹ Law No 211 of 28.5.1975, Lovtidende A-1975.

² Law No 341 of 26.6.1975, Lovtidende A-1975.

granted to any one financial institution may not exceed its own capital and the total of the guarantees is limited to DKr 60 million (approximately 8 million u.a.). They will only apply to firms with less than 75 employees and in each case the maximum amount will be DKr 2 million (approximately 265 000 u.a.).

Ireland

258. Finally, another scheme, in Ireland concerns legislation amending the 1969 Industry Act enabling the Irish Government to grant two new forms of assistance through the Industrial Development Authority (IDA):¹

- (i) a merger/restructuring scheme: interest relief grants and loan guarantees, normally up to a maximum of £500 000 (approximately 800 000 EUA) in each case for loans taken out by small- and medium-sized firms for merger or restructuring projects;
- (ii) an enterprise development programme to encourage qualified individuals to set up new firms: interest relief grants and loan guarantees up to a maximum amount of £150 000 (approximately 250 000 EUA) in each case to help new firms establish their initial working capital.

259. In view of its general position on this type of assistance, the Commission did not object to the aid provided for by these four draft laws since they only concern small- and medium-sized firms and a limited amount in each case and they are only to be granted for structural development, conversion or modernization projects carried out by the firms.

§ 7 — Application of the ECSC Treaty to State aids for the steel industry

260. Faced by the most serious crisis in the steel industry since the war, a number of Member States took steps to assist their industries to overcome acute financial pressures which threatened not only to jeopardize the investment programmes required to maintain the industry's international competitiveness but also, in some cases, the very survival of certain companies. The Belgian, French and United Kingdom Governments notified to the Commission the details of the measures they proposed to take. The Commission examined the compatibility of these measures with the provisions of Articles 4(c) and 67 of the ECSC Treaty.²

¹ Industrial Development Act, 1969, No 32.

² First Report on Competition Policy, points 189 and 190.

Belgium and France

261. The Belgian Government informed the Commission of its intention to grant aid for investments in the steel industry in the form of a five-year exemption from land tax, accelerated depreciation, interest relief grants and, where they were judged necessary, State guarantees. It was also proposed to guarantee loans raised by firms to boost their working capital.

The French Government informed the Commission of its intention to assist investment in the steel industry by granting loans from the Fonds de Développement Economique et Social (FDES). The loans would be granted mainly for investment to modernize plant rather than to increase capacity and would meet rather less than half of the cost of the projects concerned. The terms of these loans would be the normal FDES terms.

262. The Commission determined that, in both the Belgian and French cases, the aids were to be granted under general aid systems and that they involved no discrimination in favour of the steel industry. It therefore concluded that they were not caught by the prohibition contained in Article 4(c) of the ECSC Treaty. The Commission further decided that the measures were not such as to require action pursuant to Article 67 of the ECSC Treaty.

United Kingdom

263. The Commission also examined the United Kingdom Government's measures to finance stockpiling by the British Steel Corporation by means of loans from the National Loans Fund (NLF), a fund which uses the proceeds from State loans to finance the different recipients in the public and semi-public sectors, and additions to the firm's Public Dividend Capital up to a combined total of £70 million. With respect to the NLF loans, the Commission was informed that there would be a departure from the Corporation's normal borrowing period (seventeen years) so as to relate the duration of the loans to the expected life of the stockpile (two years).

After examining the principles governing the operation of the NLF, the Commission concluded that the conditions on which the loan would be granted could not be regarded as a discrimination in favour of the steel industry and that the prohibition contained in Article 4(c) of the ECSC Treaty was therefore inapplicable. It further concluded that the terms of the stockpiling scheme did not require it to take any action under Article 67 of the ECSC Treaty.

Chapter II

Adjustment of State monopolies of a commercial character

264. The Commission continued the work it had been engaged in since the end of the transitional period with respect to State monopolies of a commercial character¹ with a view to the abolition in the Member States of State monopolies' exclusive rights and any other practices restricting the free movement of goods between Member States.

This objective, laid down in Article 37 of the EEC Treaty, has been confirmed by three judgments of the Court of Justice given on 3 and 17 February 1976 in Case 59/75 (Manghera) concerning the Italian manufactured tobacco monopoly and in Cases 45/75 (REWE) and 91/75 (Miritz) concerning the German alcohol monopoly. The Court ruled that Article 37(1) requires the abolition from 31 December 1969 of the exclusive right of a State monopoly of a commercial character to import from other Member States and that the provisions of this Article have been directly applicable in the Member States since that date. The Court also considered discriminatory and therefore incompatible with Article 37 the levying of a countervailing charge on imported products for the purposes of ensuring the sales of national production administered by the monopoly and also the levying of a tax on imported products different from that imposed on similar national products.

As a result of the Commission's action, almost all monopolies have been eliminated throughout the Community.

265. As regards the alcohol monopolies, following the above judgments of the Court, Germany liberalized imports of ethyl alcohol from other Member States. The system of taxes, which varied within Germany according to the size of the distillery, the raw material used and the type of distillery but were uniformly levied on imported products, has been replaced by a standard tax, imposed both

¹ Fifth Report on Competition Policy, point 149 *et seq.*

on German and imported products. The countervailing charge on imported products has been abolished.¹

When imports of ethyl alcohol were liberalized, Germany began importing large quantities, above all from France and Italy. In order to continue marketing domestic production, the German monopoly had to lower its selling prices considerably; the monopoly is therefore suffering losses, since it is obliged to purchase all domestic production at high prices, as before. The monopoly's deficit will be made good by means of a State aid which has been formally notified to the Commission in compliance with Article 93 of the EEC Treaty. In addition, Germany and the Benelux countries have been authorized by the Commission, under Article 46 of the EEC Treaty, to impose countervailing charges on imports of ethyl alcohol from France to compensate for the export aid granted by this Member State.²

France has not yet taken any steps to comply with the provisions of Article 37 of the EEC Treaty and the Court's new ruling. In April 1976 therefore, the Commission initiated the infringement procedure under Article 169 of the EEC Treaty in respect of this Member State. The Commission will refer the matter to the Court of Justice of the European Communities if the French Government fails to introduce measures to ensure the free movement of goods in this connection.

On 1 December 1976 the Commission also adopted an amended proposal for a Council Regulation on the common organization of the market in ethyl alcohol of agricultural origin and additional provisions for certain products containing ethyl alcohol; the draft was presented to the Council on 7 December 1976.³ Council adoption of this Regulation would automatically solve both the problems caused by alcohol monopolies and those connected with the relative taxes.

266. Although France and Italy have taken measures to adjust their respective tobacco monopolies in order to eliminate their exclusive rights concerning import and wholesale marketing of products from other Member States,⁴ they do not seem to comply with Article 37 of the EEC Treaty and the Court of Justice's recent ruling, particularly as regards maintenance of the retail sales monopoly and the two Member States' exclusive right to export, plus certain other aspects

¹ Law of 2.5.1976: Bundesgesetzblatt I of 7.5.1976 and circular of the Minister of Finance of 8.4.1976: Bundesanzeiger of 15.4.1976.

² Commission Regulation (EEC) No 851/76 of 9.4.1976: OJ L 96 of 10.4.1976.

³ OJ C 309 of 31.12.1976.

⁴ Italian Law No 724 of 10.12.1975: Gazzetta Ufficiale of 7.1.1976 and French Law No 76/ 448 of 24.5.1976: Journal Officiel de la République Française of 25.5.1976.

of these new laws, considered incompatible with Article 37. With regard to retail trade in particular, the Court of Justice's recent ruling confirms that Article 37 and the principle of the free movement of goods require that any measure likely to lead to discrimination between domestic and imported goods at any stage between importation and purchase by the consumer, should be eliminated. Although the abolition of the exclusive right to wholesale marketing considerably improves the marketing system, the Commission considers that reserving retail marketing to the State could give rise to discrimination against products from other Member States, which is incompatible with Article 37 of the EEC Treaty. Moreover, tobacconists are not independent *vis-à-vis* the State which retains the exclusive production right in respect of manufactured tobacco; they sell both the State's products and those of its competitors, manufacturers in other Member States.

The Commission therefore is considering whether it should initiate the infringement procedure under Article 169 of the EEC Treaty against the Italian Government and the French Government in this connection.

267. The Commission decided that despite the changes to the Italian match monopoly, the system did not comply with Article 37(1) of the EEC Treaty, since the Consorzio Industrie Fiammiferi was still dealing with taxes, the price fixing system, held to be potentially discriminatory, had not been amended, and the retail monopoly had been retained. The exclusive right of the Amministrazione Autonoma dei Monopoli di Stato (AAMS) for marketing should, under Article 6 of the Decree of 25 June 1973, have been discontinued by 31 December 1975 at the latest at the same time as its exclusive right for wholesaling manufactured tobacco. This, however, was not mentioned in Law No 724 of 10 December 1975 on adjustments to the manufactured tobacco monopoly. The Commission therefore initiated the infringement procedure under Article 169 of the EEC Treaty against the Italian Government.

268. In France no one may import and distribute refined petroleum products on the domestic market unless he holds a 'special permit'. These permits are in fact authorizations to take advantage of the exclusive importation and marketing rights reserved for the State under the oil monopoly introduced by the law of 1928. In awarding them the French Government also specifies the maximum amount of motor fuel that each holder may sell annually on the market, irrespective of whether it has been imported or refined in France, domestically refined fuel being treated in exactly the same way as imported fuel.

Following the complaint of a French oil importer, the Commission informed the French Government that these arrangements for oil no longer complied, in their current form, with the provisions of the EEC Treaty concerning the free move-

ment of goods as interpreted by the Court of Justice¹ and in particular Article 37(1).

269. Following the Court of Justice's ruling, and in particular the judgment in Case 59/75 (Manghera), the Commission considers that:

- (i) Market sharing is contrary to the principle of the free movement of goods, particularly when it takes the form of distribution quotas, allocated in the main to domestic producers, for it is in their interest to promote sales of their own produce; the French Government must therefore discontinue the allocation of maximum amounts of motor-fuel indicated on these permits;
- (ii) Monopolies' exclusive rights to import or market goods constitute discrimination against exporters from other Member States within the meaning of Article 37(1); the French Government must also therefore alter its special permits scheme and restrict it to rules laying down objective standards, concerning the occupation of importer or distributor of oil products.

270. Discussions were opened between the Commission and the French authorities to determine the conditions for the French Government's adjustment of its oil arrangements in order to comply with the Court of Justice's ruling. These discussions will continue.

However, Article 37(1) of the EEC Treaty directly affects the Member States' legal systems and prohibits them from retaining any measure opposing it. It follows therefore that in this case the interested parties have the right to observance of this provision and it is for them to assert it before the competent national courts.

271. The Commission continued its efforts to ensure that the adjustment of monopolies in the original Member States in relation to the new Member States was progressing in accordance with Article 44 of the Act of Accession.

As regards the German alcohol monopoly, the abovementioned measures concerning taxes are applied in full to potable spirits and products from all other Member States. Germany has thus already brought a major portion of its monopoly in line with Article 44 of the Act of Accession and in doing so fulfilled its obligation to gradually adjust this monopoly. However, there is still discrimination against ethyl alcohol imported from the new Member States and this must be eliminated by 31 December 1977 at the latest, i.e. at the end of the transitional period provided for in the Article.

¹ Written Questions Nos 223/76 and 571/76 by Mr Fellermaier: OJ C 224 of 18.10.1976 and C 50 of 28.2.1977.

The Commission noted that the French Government has taken no action on its Recommendation¹ concerning the French alcohol monopoly and adjustment of tax arrangements for potable spirits. Following the recent ruling of the Court of Justice mentioned previously, the Commission addressed a new Recommendation to France. Under Article 44(2) of the Act of Accession, it has been recommended gradually to open its market to ethyl alcohol imports of agricultural and non-agricultural origin from the new Member States and to eliminate the exclusive right to import this alcohol by 31 December 1977 at the latest.² In a covering letter, the Commission also informed the French Government that it would be obliged to initiate the infringement procedure under Article 169 of the EEC Treaty if France failed to fulfil its obligation under Article 44 of the Act of Accession in respect of its alcohol monopoly *vis-à-vis* the new Member States. Failure to introduce measures during the transitional period constituted an infringement of this Article.

¹ OJ L 278 of 15.10.1974.

² OJ L 4 of 6.1.1977.

Chapter III

Public undertakings

272. The Commission has been trying for many years, in pursuance of the Treaty, to eliminate distortions of competition resulting from Member States' intervention in the economy. Among the provisions conferring powers on the Commission in this field, and indeed imposing obligations on it, are those of Article 90.

In the Commission's view the fact that a public sector, which in some cases is very large, exists in the economies of Member States means that the consequences for the States of their responsibility for the behaviour of those undertakings covered by Article 90 must be made as clear as possible. The undertakings in question are public undertakings, undertakings to which Member States grant special or exclusive rights, and those which they entrust with the operation of services of general economic interest or which have the character of a revenue-producing monopoly. These undertakings may belong to the private or to the public sector.¹

After contacts with various interested circles, the Commission has in the last year begun a process of study and clarification with a view to defining the obligations set out in Article 90 more precisely.

273. In the eyes of the Commission Article 90 does not of course limit in any way the principle contained in Article 222, which states that the Treaty shall in no way prejudice the rules in Member States governing the system of property ownership. The Member States remain completely free to determine the extent, composition and internal organization of their public sector, and to introduce whatever reforms they believe necessary in their rules governing property ownership.

Article 90 states:

- (a) first,
in paragraph 1, that Member States may not use their 'public undertakings' to escape from their own obligations under the Treaty, nor cause undertakings to violate theirs; and

¹ For ease of reference, the term 'public undertaking' is employed throughout this text to denote any undertaking covered by Article 90.

- (b) second, in paragraph 2, that 'public undertakings' must respect the rules of the Treaty in the same way as other undertakings, except in so far as this might obstruct them in performing the particular tasks assigned to them.

The Treaty's purpose here is to ensure that the market conduct of these undertakings does not impede the proper application of the rules of the Treaty, either as regards competition or as regards the unity of the market.

This objective is both fair and logical. 'Public undertakings' benefit from the common market as much as other undertakings, and they should comply with the rules in the same way as the others must.

That 'public undertakings' and the Member States should respect the basic principles of the Treaty is particularly important to 'the institution of a system ensuring that competition in the common market is not distorted' (Article 3(f)). For where 'public undertakings' buy or sell goods or services on the market, they are liable to be in direct competition with other firms and their behaviour may affect trade within the Community.

As to the exception provided in Article 90(2) concerning the proper performance by 'public undertakings' of the particular tasks assigned them, the Commission believes that full application of the provisions of the Treaty implies full application of the exceptions expressly provided. On this point it will keep to the administrative practice it follows in the case of other express exceptions, such as those arising directly from Article 36 or those allowed by the Commission under Article 115. This practice is founded on the principle of strict interpretation of these exceptions, a principle upheld by the Court of Justice on many occasions.

This approach, while strict, is in no way restrictive. It allows the Commission to recognize constructively and realistically the legitimate wish of Member States to safeguard the effectiveness of public undertakings assigned particular tasks while at the same time ensuring that the common market functions smoothly. It is in this light that the Commission intends to assess both what is necessary for the performance of any particular task referred to by a Member State and the interest of the Community.¹

274. The Treaty provides the Commission with various ways of applying the principles stated in Article 90.

Articles 85 and 86 allow it to act where an undertaking, whether or not falling within the scope of Article 90, appears to have taken part in an unlawful agreement or to have abused a dominant position of its own accord. If, however, any

¹ Judgment of the Court of Justice of 14 July 1971 in Case 10/71 (Port of Mertz): [1971] ECR.

such behaviour affecting freedom of movement between Member States was ordered or instigated by the State, it will depend on the nature of the State measure involved whether Article 90(3) or the procedure laid down in Article 169 will be used. An example of this would be where a 'public undertaking' is constrained or encouraged systematically to favour domestic suppliers in breach of the provisions of Article 30. Article 92 *et seq* cover State aids granted to public undertakings.

Article 90(3) allows the Commission to act where a Member State, while possessing the necessary authority, fails to cause a 'public undertaking' to put an end to objectionable practices, i.e. practices which, had they been engaged in by the State itself, would have constituted an infringement of the Treaty.

This does not rule out the possibility of injured parties themselves invoking against 'public undertakings' certain directly applicable provisions of the Treaty or instruments giving effect to the Treaty.

Where a Member State has not got the necessary authority to correct objectionable behaviour on the part of a 'public undertaking', the Commission may invoke Article 90 to call on the Member State to fill the gap in its relationship with the undertaking in question. The Member State must then take the necessary powers and use them to end behaviour incompatible with the common market.

This would be the case, to use the example already given, if a 'public undertaking', acting independently in this instance, systematically favoured national suppliers and the Member State did not possess the powers necessary to make the undertaking act in accordance with the principle of the common market.

275. In order to avoid as far as possible situations like those outlined above, the Commission may, under Article 90(3), take preventive steps. It may call on Member States to take such general or specific preventive measures concerning their 'public undertakings' as are needed to ensure that the Treaty is complied with. This means that the Commission can have procedures and approaches initiated which are not necessarily linked to specific departures from the Treaty but which will serve generally to prevent them happening.

In this way it can overcome the difficulties involved in applying the provisions of Article 90 caused by the lack of transparency in the accounts of some 'public undertakings', in particular as regards commercially unjustified costs¹ and any offsetting of them. The Commission must be able to distinguish between legitimate

¹ This expression denotes the costs resulting from burdens imposed by the State on certain undertakings in order to secure its economic and social aims, and which have as their effect a diminution in the profits, or an increase in the losses which would result from purely commercial management of the undertaking.

offsetting of such costs and the granting by a Member State of competitive advantages which are incompatible with the common market.

In the same way the Commission may, where necessary, address appropriate directives, decisions or recommendations to Member States, calling upon them to make 'public undertakings', by sector or separately, take the necessary measures as regards the award of contracts.

276. There can be no doubt whatever that 'public undertakings' may be a particularly useful instrument for securing a country's economic or social policy objectives.

If therefore the importance of the tasks which 'public undertakings' may be called upon to carry out should not be underestimated, it is nevertheless indispensable that the Member States should ensure that the behaviour of these undertakings is consistent with the Treaty. The free movement of goods and services and the unity of the common market would be endangered if the behaviour of certain categories of undertakings could evade the provisions of the Treaty. This applies both to provisions applicable to undertakings and to the rules imposing obligations on the Member States.

The Commission is concerned to do two things: on the one hand, to ensure that 'public undertakings' benefit from an enlarged market in the same way as private undertakings, by buying on the best terms, reducing the burden on the public finances and, where appropriate, also the cost of the services provided and on the other hand, to ensure that productive industries benefit fully from the common market and also consolidate their competitive position *vis-à-vis* non-member countries.

Part Three

**The development of concentration
in the Community**

Introductory remarks

277. As in previous years the Commission is here setting out recent information on national and international mergers, share acquisitions and joint ventures (§ 1) and on the development of concentration in a variety of Community industries and countries (§ 2).

For the first time consideration is given on the basis of empirical research to the relation between size of firm and profitability (§ 3).

Also for the first time, the Commission is publishing an initial batch of results from pilot research projects on the distribution of food products, in particular as regards the level, formation and variation of prices for a number of industrial food products (§ 4).

By way of conclusion there is a summary of the results thus obtained from which a number of criteria for competition analysis can be deduced (§ 5).

§ 1 — National and international mergers, share acquisitions and joint ventures in the Community in 1975

Comparison between national and international operations

278. The figures for the number and type of mergers and similar operations in the Community in 1974 are directly comparable with those for 1974 given in the Fifth Report (points 161 to 169), except as regards banks, insurance companies, holding companies and other services, figures for which were aggregated under 'services' in the Fifth Report.

This more detailed breakdown of services has now become essential in view of the growing number of operations involving banks, insurance companies and holding companies.

279. The figures below relate both to international and to purely domestic operations, though operations consisting of no more than the straightforward establishment of a subsidiary are disregarded. In the absence of more detailed information, the figures concern solely the number of operations and not their economic signi-

finance. No direct relation can therefore be established between the frequency of operations and changes in the degree of concentration.

Table 1 sets out the number of national and international mergers, acquisitions and joint ventures in 1975 (compared with figures for 1974); there is a subsidiary breakdown by number of firms involved into bilateral and multilateral operations. In the breakdown by type of operation the number of firms involved is also given.

When interpreting these figures the reader should remember that the same firm may have been involved in several operations in the same year.

Table 1 expresses purely national operations as a percentage of the total number of operations for each of the two years.

280. Comparison of the 1975 and 1974 figures shows that there was a sharp increase (40%) in the number of takeovers and mergers, and that the increase itself was double the 20% increase in 1974 over 1973. The increase is higher still for share acquisitions (49%). Following the relative stability of 1974, when much the same number of such operations was recorded as in 1973, it can therefore be assumed that in 1975 the share acquisition was the most favoured method of establishing links between companies.

The number of joint ventures established has scarcely moved from the 500 mark, around which it has been hovering for several years now.

As for the total number of operations, all categories combined, there has been an increase of almost one-third (546). It will be seen that the number of firms involved has increased (40%) far more than the number of operations (32%), which means that the average number of firms involved in each operation is rising.

281. As for the relative importance of the individual types of operation, it will be seen that, continuing the past trend, acquisitions increased their share of the total from 59% in 1974 to 65% in 1975 and thus maintained their first-place ranking, whereas the number of joint ventures fell to a little less than a quarter of the total (as against 32% in 1974). Takeovers and mergers maintained their share of 10%.

For joint ventures the number of operations has not risen at all whereas the number of firms involved has risen by some 38%. In the other two categories of operation, the increase in the number of operations is slightly greater than the increase in the number of firms involved (takeovers and mergers: 40% and 35%; acquisitions: 48% and 44%).

282. On the whole, there was a greater increase in the number of national and international operations in 1975 than in 1974, suggesting greater dynamism in the economy. The breakdown by number of firms involved reveals a truly re-

TABLE 1
National and international operations in the Community

	Breakdown of operations and firms involved by type of operation						Totals		Breakdown of operations by number of firms involved	
	Takeovers and mergers		Share acquisitions		Joint ventures					
	Number of operations	Number of firms involved	Number of operations	Number of firms involved	Number of operations	Number of firms involved	Number of operations	Number of firms involved	Bilateral operations	Multilateral operations
1974	165	404	1 018	2 241	552	1 615	1 735	4 260	1 367	368
1975	231	548	1 500	3 221	550	2 201	2 281	5 970	1 872	411
of which purely national operations (%):										
1974	100	100	60	58	27	32	53	52	58	36
1975	100	100	75	73	52	53	69	68	74	48

markable expansion in bilateral operations (up by 37%), far greater than the expansion of multilateral operations (up by 12%). This is even more significant as the percentages for bilateral operations were calculated on a much wider base (1 367 in 1974) than for multilateral operations (368). In absolute terms, the former have increased nearly twelve times faster than the latter (505 against 43) and the ratio between the two types moved from 3.7 : 1 in 1974 to 4.6 : 1 in 1975.

283. In the breakdown between national and international operations, special attention is drawn to the growing importance of purely domestic operations, confirming a trend which began to emerge in 1973. For the last three years the figures for national operations have moved from 40% to 60% and then to 75%, and the figures for joint ventures have moved from 22% to 27% and then to 52%. For the first time there is a clear majority of national over international operations.

Geographical breakdown of international operations

284. As in 1974, a little more than half (54%) of all international operations in 1975 concerned exclusively Community firms (Table 2). But a converse result was obtained as regards the number of firms involved, for the percentage of Community firms fell from nearly 83% in 1974 to roughly 75% in 1975. The sharpest variation concerns the number of non-Community firms involved in share acquisitions, which rose from 9% in 1974 to 24% in 1975.

285. In 1975 Belgium was the most popular terrain for international operations (Table 3). It has overtaken Germany and France at the head of the table. These two countries have fallen to joint second position in the ranking, accounting each for one-fifth of all operations. The United Kingdom also falls by one place to fourth position, and other countries follow suit. It will be noted that the Benelux countries taken together are very close to the star placing occupied in 1973, their share now being 37% (31% in 1974 and 44% in 1973).

286. From information available on the nationality of firms taking part in international operations in the Community, it is possible to determine the share of the total number of firms involved in 1974 and 1975 accounted for by non-member countries (Table 4). As in the past, American firms continued to head the list in 1975, followed by Swiss firms. But the trend to a decline in the American share which began in 1973 has continued. For the first time, firms in the 'others' group have overtaken American firms. The Swiss influence, on the other hand, is gaining, as is that for 'others' which have virtually trebled their share. In the ratio between the EEC and non-member countries, the former has declined and the latter have expanded in equal proportions.

TABLE 2

**Breakdown of international operations and of forms
of operation in member and non-member countries**

(a) Number of operations

Year	Share acquisitions		Joint ventures		Total	
	% EC	% NMC	% EC	% NMC	% EC	% NMC
1974	57	43	52	48	54	46
1975	52	48	55	45	54	46

EC = Operations involving exclusively Community countries.
NMC = Operations also involving firms from non-member countries.

(b) Number of firms involved

Year	Share acquisitions		Joint ventures		Total	
	% EC	% NMC	% EC	% NMC	% EC	% NMC
1974	91	9	72	28	83	17
1975	76	24	77	23	75	25

EC = Firms from Community countries.
NMC = Firms from non-member countries.

TABLE 3

Geographical breakdown of international operations in the Community

(%)

Year	D	F	I	NL	B	L	UK	IRL	DK	Total
1974	22	22	7	8	16	7	16	1	1	100
1975	20	20	4	7	21	9	15	3	1	100

TABLE 4

**Share of Community and non-Community firms involved
in international operations in the Community**

(%)

Year	EC	USA	Switzerland	Japan	Scandinavia	Others	Total
1974	79	10	4	1	3	3	100
1975	77	7	5	1	2	8	100

Breakdown by industry of national and international operations

287. From 1974 to 1975 there were substantial changes in the industry breakdown (Table 5) of national and international operations in the EEC, particularly affecting metal-using industries (whose share of operations rose by one-third from 21% to 28%) and the food industry (which almost doubled its share).

Increases in manufacturing industries were accompanied by falls in the tertiary sector, where there was a decline of almost a third (from 50% to 36%). In order to analyse variations within subsectors of the tertiary sector, the two most important types of financial service have been separated—banking and insurance on the one hand and holding companies on the other. The importance of the distinction is evident in that these two subsectors alone are involved in nearly 40% of the operations involving the tertiary sector (13% in an aggregate 36%).

Of these 40%, banks and insurance companies are involved in three-quarters (10% in an aggregate 13%).

TABLE 5
National and international operations in the Community, by industry

Year	Metal-using industries	Energy	Chemicals	Textiles	Other manufacturing industries	Food industry	Banks and Insurance Companies	Holding Companies	Other	Total
1974	21	3	9	4	9	4	—	—	50 ¹	100
1975	28	2	9	4	14	7	10	3	23	100

¹ All services, including banks, insurance companies and holding companies.

§ 2 — The development of concentration in selected industries and product markets

General survey of research

288. Research into the development of concentration continued, and:

- (i) new industries have been brought in (tyres, certain car accessories, beverages in general and brewing in particular, food distribution);
- (ii) certain earlier industry studies have been updated (paper industry and mechanical engineering in particular);
- (iii) the possible relationship between the size of a firm and its profitability have been considered;

(iv) structural analyses have been supplemented by surveys and pilot studies on the prices of certain goods (notably manufactured food products).

289. As regards the new orientation of these studies, which aim among other things to provide a more detailed analysis of the economic implications of concentration and the practical effects of competition, the reader is referred to the Commission's recent publication: 'Methodology of concentration analysis applied to the study of industries and markets', by Remo Linda (catalogue ref. 8756, September 1976).

290. The broadening of research into concentration can be seen from Table 6, which gives a summary of the studies so far carried out under the Commission's research programme. Certain industries have been reported on twice, the first report covering the period from 1962 to 1970 (reference period for the first round of reports) and the second bringing the picture up to date for subsequent years.

291. The new reports incorporated in Table 6 this year were prepared by the following research institutes and experts:

- Germany:* IFO-Institut für Wirtschaftsforschung, Munich — Breitenacher, E. Greipl, D. Würfl (food industry, brewing and food distribution).
Kienbaum Unternehmensberatung, Gummersbach (paper manufacturing and processing, tyres, car accessories).
- France:* IAM — J.L. Rastoin, G. Ghersi, M. Castagnos and M. Allaya — and INRA — D. Boulet and J.P. Laporte, Montpellier (beverages, brewing, food distribution).
- Italy:* FIS-ATOR Consulenza Aziendale — A. Amaduzzi, R. Camagni and G. Martelli, Milan (tyres, car accessories).
SORIS SpA Studi e ricerche di Economia e Marketing — P. Balliano and R. Lanzetti, Turin (paper industry, office machinery, hoisting and handling equipment, beverages, brewing, food distribution).
- Netherlands:* Prof. H.W. de Jong, Stichting Nijenrode, Breukelen — Maria Brouwer and W.J.C. de Brouwer, Amsterdam (paper processing, beverages, brewing).
- Belgium:* Alex Jacquemin and A. de Ghellinck — CRIDE — Louvain (brewing).
- United Kingdom:* Cranfield School of Management, Cranfield, Bedford — F. Fishwick (tyres).
Development Analysts Ltd, Croydon — R.W. Evely, P.E. Hart and A.J. MacNeary (beverages, food distribution).

M.L.H. Consultants Ltd, London — J.E. Sussams and M.E. Evans (household electrical appliances).

Denmark:

Institute for Future Studies, Copenhagen — T. Kristensen, Th. Herborg Nielsen and J. Vestergaard, Aarhus, and Niels Jorgensen, Odense (food industry, beverages, brewing, food distribution).

TABLE 6
Studies used for analysis of concentration
 (situation at 31 December 1976)

Industry	Country							
	D	F	I	NL	B	UK	IRL	DK
<i>Textile industry</i>								
Wool	x	x+	x		++	x		
Cotton	x	x+	x+		++	x		
Knitted and crocheted goods	x	x	x		++	x		
<i>Paper industry and manufacture of paper products</i>								
Manufacture of paper and cardboard	x+	x+	x+	x		x		
Processing of paper and cardboard	x+	x	x	x+		x		
<i>Chemical industry</i>								
Manufacture of pharmaceutical products	x	x+	x+	x+	++	x		x
<i>Manufacture of machinery other than electric machines</i>								
Agricultural machinery and tractors	x+	x	x			x		
Office machinery	x+	x	x+			x		
Textile machinery	x+	x	x+			x		
Equipment for civil engineering and machinery for the mechanical working of building materials	x+	x				x		
Hoisting and handling equipment	x+	x	x+			x		
<i>Electrical engineering</i>								
Electronic equipment audio equipment, radio and television receivers	x+	x	x+		x			x
Household electrical appliances	x+	x	x+		x	0		x
<i>Manufacture of transport equipment</i>								
Cycles, motorcycles and power-assisted cycles	x+ ¹	x	x+	x				
Tyres for motor vehicles		0	0			0		
Certain car accessories (batteries, sparking plugs)	0		0					
<i>Food industries (excluding beverages)</i>								
	x	x	x	x	x	x	x	0
<i>Beverages in general</i>								
Brewing	0	0	0	0	0	0		0
<i>Distribution of food products and beverages</i>								
	0	0	0			0		0

¹ In Germany the industry was divided into (i) cycles and (ii) motorcycles and mopeds.

x = Given in the Fifth Report on Competition Policy

0 = New studies

+ = Updating of existing studies

Concentration in selected industries

292. Tables 7 and 8 show the development of concentration in a number of industries, with comparisons to 1969/70, 1972 and 1973/74.

The degree of concentration is measured by the pair of indices used in the Fifth Report:

- (i) concentration ratio (C_4), expressing the share of the four largest firms in the aggregate sales of the industry;
- (ii) coefficient of disparity (4L), expressing the degree of unevenness of distribution of the aggregate share between these four firms.

The coefficient of disparity is expressed as a percentage, like the concentration ratio, the maximum concentration ratio (100%) being at the same time the minimum coefficient of disparity. This minimum corresponds to the situation where the four leading firms are of exactly the same size.

Hence the concentration ratio and coefficient of disparity will both be 100% in an industry where there are only four firms and each accounts for exactly the same share of total sales. Where, on the other hand, the size distribution of the four leading firms is sharply asymmetric, the coefficient of disparity will be closer to 400%, and the presumption of a partial and imperfect monopoly situation will become stronger as the coefficient reaches or exceeds 1 000%.¹

293. From the figures in Tables 7 and 8 it can be deduced that:

- (i) concentration is fairly stable;
- (ii) the degree of concentration in a given industry varies considerably from one country to another.

It should be borne in mind that:

- (i) concentration in certain industries or countries frequently does not increase simply because it is already at a very high level;
- (ii) the degree of industry concentration is below the degree of concentration on individual product markets, which are generally oligopolistic and frequently almost monopolistic;
- (iii) of the industries studied, the industry in which concentration has increased most sharply in recent years is food distribution, followed by household electrical appliances.

The high degree of concentration in food distribution together with the tendency for even greater concentration may well pose very serious problems for competition policy, as will be seen at § 4.

¹ See Methodology, *op cit*, and particularly Chapter VII.

TABLE 7

Development of concentration in various Community industries and countries
Concentration ratio (C₄) and coefficient of disparity (4L)

Industry	Country	1969/70		1972		1973/74	
		C ₄	4L	C ₄	4L	C ₄	4L
Wool	F	21	282	29	308	—	342
	B	34	173	36	195	30	127
	UK	41	193	43	210	42	222
Cotton	F	28	197	25	192	—	194
	I	14	144	21	117	22	107
	B	29	546	20	495	18	431
	UK	55	171	57	256	56	235
Paper and cardboard manufacture	D	40	276	40	278	40	294
	F	32	130	32	105	29	116
	I	27	184	28	164	27	180
	UK	50	200	49	200		
Paper and cardboard processing	D	24	274	24	289	24	298
	F	8	185	9	160	10	126
	NL	29	174	29	172	39	276
Pharmaceutical products	F	13	152	13	138	20	147
	I	32	160	31	155		
	NL	72	152	69	154	80	169
	B	43	272	44	243	42	200
	UK	61	358	61	354		
	DK	66	140	65	198	66	221
Agricultural machinery and tractors	D	31	134	37	103		
	UK	81	554	79	450		
Office machinery	D	35	195	64	138		
	I	97	824	97	900	97	796
	UK	74	216	77	382		
Textile machinery	D	26	182	25	142		
	F	23	190	23	137		
	I	18	115	20	116	22	120
	UK	72	145	74	353		
Equipment for civil engineering and machinery for the mechanical working of building materials	D	22	200	26	219		
	UK	52	210	54	230		
Hoisting and handling equipment	D	25	244	25	261		
	I	33	166	31	194	34	287
	UK	42	184	37	200		

TABLE 7 (continued)

Industry	Country	1969/70		1972		1973/74	
		C ₄	4L	C ₄	4L	C ₄	4L
Electronic and audio equipment, radio and television receivers	D	59	140	54	130	51	134
	F	66	132	68	236	—	—
	I	31	183	43	191	45	178
	DK	84	567	76	550	75	403
Household electrical appliances	D	65	256	75	270	73	260
	I	51	182	61	222	62	268
	UK	36	337	50	333	52	357
	DK	94	562	93	315	94	400
Manufacture of: cycles motorcycles and power-assisted cycles cycles, motorcycles and power-assisted cycles together	D	62	148	59	150	55	195
	D	98	169	98	154	98	153
	I	64	592	68	536		
Tyres for motor vehicles	D	71	266	71	208	72	239
	F	87		87		84	
	I	92	417	93	387	94	448
	UK	89	643	92	666	92	670
Food industries	D	5	128	7	187	8	167
	F	8	116	7	130		
	I	10	128	10	115		
	NL	14	245	19	296		
	B	21	248	22	229		
	UK	41	252	39	247		
	IRL	24	140	19	159	21	166
	DK	51	140	50	187	49	158
Beverages	D	7		9	264	9	168
	F	41	108	47	184	45	210
	I	16	138	19	132	17	124
	UK	52	148	62	124	64	142
	NL	60	433			60	410
Brewing	D	9	192	14	264	13	209
	F	56	201	69	481	69	481
	I	58	272	—	—	66	219
	NL	91	682	92	640	92	596
	B	50	369	50	368	50	374
	DK	95	> 1 000	95	1 000	95	> 1 000
Food and beverage distribution	D	27	177	26	195	28	183
	F	31	123	35	132	37	158
	UK	40	200	48	210	60	294
	DK	69	680	70	598	71	714

TABLE 8
Level of concentration in various Community industries and countries
(Ranking and concentration ratio (C₄))

1973/74		Industry and country	1972		1969		
Ranking	C ₄		Ranking	C ₄	Ranking	C ₄	
1	98	Motorcycles	D	1	98	1	98
2	97	Office machinery	I	2	97	2	97
3	95	Brewing	DK	3	95	3	95
4	94	Tyres	I	4	93	5	92
5	94	Household electrical appliances	DK	5	93	4	94
6	92	Tyres	UK	6	92	7	89
7	92	Brewing	NL	7	92	6	91
8	84	Tyres	F	8	87	8	87
9	80	Pharmaceutical products	NL	13	69	10	72
10	75	Electronic and audio equipment, radio & TV receivers	DK	9	76	9	84
11	73	Household electrical appliances	D	10	75	14	65
12	72	Tyres	D	11	71	11	71
13	71	Food and beverage distribution	DK	12	70	12	69
14	69	Brewing	F	14	69	20	56
15	66	Brewing	I	18	60 (E)	19	58
16	66	Pharmaceutical products	DK	16	66	13	66
17	64	Beverages	UK	22	52	16	62
18	62	Household electrical appliances	I	17	61	22	51
19	60	Beverages	NL	19	59	17	60
20	60	Food and beverages distribution	UK	26	48	28	40
21	56	Cotton	UK	20	57	21	55
22	55	Cycles	D	15	69	15	63
23	52	Household electrical appliances	UK	23	50	30	36
24	52	Brewing	B	24	50	24	50
25	51	Electronic and audio equipment, radio & TV receivers	D	21	55	18	59
26	49	Food manufacturing	DK	25	50	23	51
27	45	Electronic and audio equipment, radio & TV receivers	I	29	43	34	31
28	45	Beverages	F	27	47	26	41
29	42	Pharmaceutical products	B	28	44	25	43
30	42	Wool	UK	30	43	27	41
31	40	Electronic and audio equipment, radio & TV receivers	UK	36	30	40	24 (E)
32	40	Paper industry	D	31	40	29	40
33	39	Paper and board processing	NL	37	29	36	29
34	37	Food and beverage distribution	F	33	35	35	31
35	34	Hoisting and handling equipment	I	35	31	32	33
36	30	Wool	B	32	36	31	34
37	29	Manufacture of pulp, paper and paperboard	F	34	32	33	32
38	28	Food and beverage distribution	D	39	26	39	27
39	27	Paper industry	I	38	28	38	27
40	24	Paper and board processing	D	40	24	41	24
41	22	Textile machinery and accessories	I	42	20	43	18
42	22	Cotton	I	41	21	44	14
43	21	Food industries	IRL	44	19	42	24
44	20	Pharmaceutical products	F	47	12	45	13
45	18	Cotton	B	43	20	37	29
46	17	Beverages	I	45	19	47	10
47	13	Brewing	D	46	13 (E)	46	13 (E)
48	10	Paper and cardboard processing	F	48	9	48	8
49	9	Beverages	D	49	9 (E)	49	7 (E)
50	8	Food industries	D	50	7 (E)	50	5

Concentration on product markets

294. A detailed series giving concentration ratios and coefficients of disparity for some 300 product markets in different Community countries was published in Appendix 1 to the Commission's Methodology, already referred to. This report will simply give a few figures for the most recent situation which can be studied (1972/74) in a few important industrial branches in various Member States.

Table 9 gives the simple arithmetic mean both of the concentration ratios (C_4) for 221 product markets and of the coefficients of disparity (4L) for 198 of those markets (it was not possible to ascertain the value of the 4L index for the other 23 markets).

The Table considers only the following major product markets:

textiles;

paper;

pharmaceuticals;

mechanical engineering (manufacture of machinery other than electrical machinery);

electrical engineering;

food industries excluding most beverages (beer, alcoholic beverages, spa and mineral waters, and the like).

295. It must be emphasized that:

- (i) markets were selected and industries were sub-classified in response to practical constraints relating to the collection, analysis and harmonization of figures for the 221 cases;
- (ii) consequently, the individual markets taken within a given industry (e.g. textiles or food industries) are neither identical nor strictly comparable between all Community countries;
- (iii) it is accordingly impossible to conclude that a specific industry is more or less concentrated in one country than in another.

Even so, Table 9 nevertheless constitutes a useful first stage of research to measure the structure of the various markets in a given industry, for the average concentration of the industry (calculated from the average of the degrees of concentration for each market) can then be subjected to consistent historical scrutiny; the resulting figures can be used for various types of comparative study, notably in industry-to-industry and country-to-country terms.

Although Table 9 is really no more than a starting point, its figures eloquently illustrate the degree of oligopolization or even of virtual monopolization which

can be ascertained on a large number of markets in the various Community countries.

One point which merits particular attention is that the very industry where the analysis was made in greatest detail in most of the Member States—the food industry excluding beverages—the average levels of concentration on product markets are the highest (with figures ranging from 54% in Germany to 94%

TABLE 9
Average concentration of the sample of markets for various industries
1972-1974

Industry	Country	Average concentration on markets		Number of markets selected	
		C ₄ %	4L%	C ₄	4L
Textiles	F	88	425	15	4
	I	37	248	3	3
Paper	I	79	452	5	5
	NL	73	213	6	6
	UK	75	315	7	7
Pharmaceuticals	F	64	364	10	9
	NL	63	368	11	11
	UK	80	353	30	30
	DK	84	349	7	7
Mechanical engineering	D	44	180	6	4
	I	76	394	11	3
	UK	73	211	5	5
Electrical engineering	D	59	190	6	6
	I	77	359	6	6
	DK	80	346	7	7
	UK	72	256	8	8
Food industries	D	54	269	14	13
	F	85	579	28	28
	I	62	287	12	12
	UK	94	435	13	13
	DK	77	355	11	11
Average concentration for the sample of markets and aggregates	D	52	213	26	23
	F	79	456	53	41
	I	66	348	37	29
	NL	70	290	17	17
	UK	79	314	63	63
	DK	80	350	25	25
Community aggregate		71	328	221	198

in the United Kingdom), particularly in comparison with concentration indices calculated on the industry as a whole (Table 7 gives relatively low C_4 ratios for 1972, ranging from 7% in Germany to 50% in Denmark).

296. Finally, it can be concluded from the sample survey of industries and markets that Germany is broadly speaking the Community country with the lowest level of industrial concentration.

§ 3 — The relation between size of firm and performance

The measure of efficiency

297. Any economic study of concentration and its effects entails measurement of corporate efficiency, and in particular analysis of the relation between size and profitability. The Commission has consequently adopted an econometric method enabling corporate performance to be measured by expressing the relation between performance in terms of official results and the actual volume of sales and own capital.¹

In this report, this method for measuring comparative corporate performance is applied to all industrial activities taken at Community level. We have considered the financial variables for firms domiciled in any one of the nine Member States and appearing in the 1975 list of the 500 largest European industrial firms published by the magazine *Vision*.²

298. The four performance ratios used are the following:

$$1^r = \frac{\text{net profit}}{\text{sales}} \quad \begin{matrix} (04) \\ (01) \end{matrix} \quad \text{of a given firm expressed as a percentage.}$$

$$2^r = \frac{\text{net profit}}{\text{own capital}} \quad \begin{matrix} (04) \\ (07) \end{matrix} \quad \text{of a given firm expressed as a percentage.}$$

$$3^r = \frac{\text{cash flow}}{\text{sales}} \quad \begin{matrix} (05) \\ (01) \end{matrix} \quad \text{of a given firm expressed as a percentage.}$$

$$4^r = \frac{\text{cash flow}}{\text{own capital}} \quad \begin{matrix} (05) \\ (07) \end{matrix} \quad \text{of a given firm expressed as a percentage.}$$

By adding each firm's ranking on each of these four performance ratios, we obtain the profitability score for each firm expressing its degree of profitability compared with the other sample firms.

¹ A detailed analysis of the method is given in the Methodology, *op cit*, Chapter V, points 32 to 39.

² *Vision*, 52 rue Taitbout, F-75009, Paris.

The measure of efficiency applied to a horizontal cross-section of firms (all industries)

299. The sample drawn from the Vision classification includes only firms that are domiciled in one of the nine Member States and whose four variables (sales (01), net profit (04), cash flow (05) and own capital (07)) are all known.

Only 292 of the 500 firms were therefore selected for the sample, and of these 292:

119.5	are British	(UK)	giving	40.92%
60	are French	(F)	giving	20.55%
57	are German	(D)	giving	19.52%
23	are Dutch	(NL)	giving	7.88%
13	are Belgian	(B)	giving	4.45%
12.5	are Italian	(I)	giving	4.28%
6	are Danish	(DK)	giving	2.06%
1	is Irish	(IRL)	giving	0.34%
<hr/>				
292 ¹				100.00%

300. Table 10 gives the most important figures for the fifty most profitable industrial firms in the Community, ranked in decreasing order of profitability according to the ranking held by each firm in terms of profitability score.

Breakdown by nationality

301. The fifty most profitable firms are broken down by nationality as follows:

25.5	are British	(UK)	giving	51%	+ 10.08 ²
10	are French	(F)	giving	20%	— 0.55
7	are German	(D)	giving	14%	— 5.52
3	are Belgian	(B)	giving	6%	+ 1.55
2.5	are Dutch	(NL)	giving	5%	— 2.88
1	is Italian	(I)	giving	2%	— 22.28
1	is Irish	(IRL)	giving	2%	+ 1.66
0	are Danish	(DK)	giving	0%	— 2.06
<hr/>					
50 ¹				100%	

¹ Firms having dual nationality, such as Royal Dutch/Shell, are recorded as two halves opposite the relevant countries.

² The figures in this column expressed the difference between the percentages and the percentage shares of each nationality in the sample of 292 firms.

Comparison between the two series of percentages (share of each nationality in the sample of 292 firms and then in the sample of the 50 most profitable firms) confirms that British firms are not only in the lead as regards straight technical and financial concentration but are also among the most profitable.

This is further borne out by the fact that of the ten most profitable Community firms six are British. It is necessary to point out however, that 12 subsidiaries of American companies (USA) are included among the 50 most profitable European industrial firms, that is 5 in the United Kingdom, 3 in Germany, 3 in France and 1 in Italy.

Breakdown by industry

302. The most profitable industries seem to be electrical engineering and electronics, which provide eleven of the top fifty, including the first, second and fifth.

There follow the oil, fuel and gas industries, which provide six of the top fifty, including Royal Dutch/Shell, Mobil Oil and Petrofina. From this it can be deduced that the oil crisis has had no apparent serious effect on the profitability and development of the great multinational oil companies.

Finally, highly profitable firms are also to be found in the following industries:

Pharmaceuticals, cosmetics and chemicals:

7 firms (Beecham, Glaxo, Kodak-Pathé, ICI, L'Oréal, Smith & Nephew and Wellcome).

Building materials:

3 firms (Redland, BPB Industries and Consolidated Gold Fields).

Food and beverages:

3 firms (Heinz, Douwe Egberts and Pernod/Ricard).

Paper, stationery and publishing:

4 firms (BPB Industries, Smith & Nephew, Bertelsmann and Bunze Pulp & Paper).

The energy industry, which is represented by five firms, may be singled out for special attention. With the exception of the Irish Electricity Supply Board, which ranks third and also has public works and electrical and electronic engineering interests, these firms, in business solely in electricity generation, would seem to owe their profitability entirely to their monopoly status.

TABLE 10

The 50 most profitable industrial firms in the European Community — 1975
The values are expressed in thousands of dollars

Rank in score	Score	Ratio $\frac{04}{01}$		Ratio $\frac{04}{07}$		Ratio $\frac{05}{01}$		Ratio $\frac{05}{07}$		01 Sales		04 Net profit	
		Rank	Rate	Rank	Rate	Rank	Rate	Rank	Rate	Rank	Value	Rank	Value
1	22	3	9.04	6	27.73	5	28.12	8	86.29	55	1 926 640	9	174 090
2	29	1	12.61	7	27.35	7	28.03	14	60.79	69	1 241 600	11	156 570
3	57	5	8.19	12	22.22	16	18.07	24	49.04	261	292 460	79	23 940
4	79	4	8.84	1	36.81	44	11.26	30	46.88	80	1 146 500	19	101 380
5	85	11	6.60	56	13.55	3	28.76	15	59.05	128	680 550	36	44 910
6	108	19	5.74	21	18.00	28	13.66	40	42.87	213	374 590	85	21 490
7	128	23	5.65	15	20.44	44	11.26	46	40.73	196	406 720	82	22 980
7	128	14	6.40	14	20.48	40	11.48	60	36.75	134	643 080	39	41 140
9	147	24	5.60	4	33.05	98	8.85	21	52.18	290	239 900	123	13 440
9	147	33	4.87	2	35.75	99	8.69	13	63.82	226	341 300	107	16 620
11	154	54	3.88	84	10.91	6	28.11	10	79.00	104	801 300	56	31 090
12	160	39	4.48	32	15.88	42	11.42	47	40.50	18	4 993 730	5	223 630
13	164	44	4.27	26	17.10	55	10.78	39	43.13	250	307 140	127	13 120
13	164	99	2.59	54	13.60	9	27.41	2	144.02	114	749 740	93	19 410
15	169	38	4.61	19	18.22	63	10.10	49	39.92	137	621 480	61	28 640

(Number of firms in the sample : 292)

05 Cash flow		07 Own capital		Name of firm	Rank Vision 1975	Main activities	Country	Notes
Rank	Value	Rank	Value					
16	541 690	45	627 740	IBM-Deutschland	82	Electrical machinery, domestic appliances, electronics	D	(9)
26	347 980	51	572 390	Rank Xerox	115	Electrical machinery, domestic appliances, electronics	UK	(5) (11)
110	52 850	194	107 760	Electricity Supply Board	432	Energy, public works, electrical machinery, electronics	IRL	(7)
54	129 100	98	275 390	Beecham	129	Pharmaceuticals, cosmetics, alcoholic and non-alcoholic beverages	UK	(7)
42	195 720	83	331 420	IBM-Italia	214	Electrical machinery, domestic appliances, electronics	I	(9)
116	51 170	180	119 360	Redland	352	Building materials	UK	(7)
125	45 800	185	112 450	BPB Industries	327	Building materials, paper, packaging	UK	(7)
87	73 820	125	200 890	Glaxo Holdings	221	Pharmaceuticals, cosmetics	UK	(2)
209	21 220	278	40 670	Smith & Nephew	495	Pharmaceuticals, cosmetics, textiles, paper, packaging	UK	
167	29 670	271	46 490	International Harvester	378	Mechanical engineering	D	(5) (14)
36	225 210	95	285 090	IBM-UK	176	Electrical machinery, domestic appliances, electronics	UK	(9)
14	570 220	26	1 407 950	Mannesman	26	Various activities, mechanical engineering, iron and steel	D	
158	33 100	234	76 740	BTR	416	Motor vehicles, motorcycles, accessories, rubber and tyres, plastics	UK	
41	205 480	158	142 670	Mobil-Oil France	189	Oil industry	F	(10)
95	62 760	145	157 220	British Aircraft	225	Aircraft industry	UK	

TABLE 10 (continued)

Rank in score	Score	Ratio $\frac{04}{01}$		Ratio $\frac{04}{07}$		Ratio $\frac{05}{01}$		Ratio $\frac{05}{07}$		01 Sales		04 Net profit	
		Rank	Rate	Rank	Rate	Rank	Rate	Rank	Rate	Rank	Value	Rank	Value
16	171	68	3.58	49	13.85	32	13.15	22	50.92	58	1 710 210	25	61 190
17	172	115	2.29	11	22.74	43	11.28	3	112.12	165	495 100	141	11 330
18	182	61	3.75	17	18.90	78	9.56	26	48.21	116	739 830	63	27 720
19	184	10	6.84	37	14.66	31	13.36	106	28.64	222	354 660	76	24 250
20	185	48	4.07	30	16.04	59	10.27	48	40.47	30	3 710 670	13	151 070
21	187	42	4.45	22	17.90	72	9.74	51	39.19	45	2 427 920	17	108 010
22	200	79	3.13	76	11.57	26	14.44	19	53.30	266	286 220	160	8 970
22	200	12	6.59	20	18.08	60	10.23	108	28.05	81	1 144 400	23	75 430
22	200	15	6.16	64	12.77	25	14.46	96	29.95	14	6 270 740	2	386 480
25	203	69	3.55	99	10.11	15	18.40	20	52.41	142	605 070	86	21 470
26	212	13	6.58	29	16.46	53	10.81	117	27.06	1	29 244 090	1	1 922 810
27	217	57	3.83	69	12.08	38	12.22	53	38.57	167	485 170	98	18 560
28	223	75	3.36	59	13.42	51	10.89	38	43.47	103	810 990	64	27 270
29	226	101	2.54	9	23.66	105	8.38	11	78.06	159	521 620	125	13 240
30	228	110	2.40	3	33.55	111	7.84	4	109.77	132	653 850	112	15 660
31	231	8	7.62	81	11.01	17	17.83	125	25.78	122	699 790	32	53 320

05 Cash flow		07 Own capital		Name of firm	Rank Vision 1975	Main activities	Country	Notes
Rank	Value	Rank	Value					
37	224 950	65	441 800	Thorn Electrical Industries	89	Electrical machinery, domestic appliances, electronics	UK	(7)
105	55 860	265	49 820	Chantiers de L'Atlantique	271	Shipbuilding, mechanical engineering	F	
92	70 700	153	146 640	Bertelsmann	193	Publishing and printing, various activities	D	(2)
122	47 370	140	165 400	Kodak-Pathé	368	Chemicals	F	(5) (13)
21	381 210	33	941 900	Petrofina	44	Oil industry	B	
34	236 460	47	603 360	Ford-Werke	66	Motor vehicles, motorcycles, accessories	D	(8)
134	41 330	232	77 540	Forges de Clabecq	443	Iron and steel	B	(2)
63	117 020	69	417 120	Consolidated Gold Fields	130	Building materials, mining, raw materials	UK	(2)
3	906 520	6	3 027 110	ICI	22	Chemicals, plastics, textiles	UK	
64	111 330	121	212 440	Honeywell Bull	231	Electrical machinery, domestic appliances, electronics	F	(12)
1	3 161 410	1	11 683 330	Royal Dutch/Shell	1	Oil industry, chemicals, mining, raw materials	NL/UK	
100	59 270	146	153 650	ICL, International Computers	275	Electrical machinery, domestic appliances, electronics	UK	(4)
76	88 300	124	203 130	L'Oréal	173	Pharmaceuticals, cosmetics	F	
127	43 690	260	55 970	Routière Colas	259	Civil engineering, public works	F	
115	51 240	270	46 680	Mobil Oil	219	Oil industry	UK	(10)
58	124 800	62	484 180	INTERCOM	204	Energy, power utilities	B	

TABLE 10 (continued)

Rank in score	Score	Ratio $\frac{04}{01}$		Ratio $\frac{04}{07}$		Ratio $\frac{05}{01}$		Ratio $\frac{05}{07}$		01 Sales		04 Net profit	
		Rank	Rate	Rank	Rate	Rank	Rate	Rank	Rate	Rank	Value	Rank	Value
32	232	2	9.27	113	9.38	8	27.49	109	27.81	212	375 270	49	34 780
32	232	93	2.79	103	9.93	20	16.38	16	58.33	12	6 840 620	7	190 820
34	234	63	3.71	46	14.04	69	9.90	56	37.40	228	340 270	132	12 640
34	234	45	4.26	23	17.86	102	8.43	64	35.39	249	311 800	124	13 270
34	234	105	2.45	45	14.05	67	9.95	17	57.08	93	949 180	81	23 240
37	235	21	5.68	50	13.71	48	11.21	116	27.09	234	329 560	95	18 710
38	236	63	3.71	13	22.05	123	7.33	37	43.56	109	774 400	60	28 730
39	237	81	3.09	93	10.36	29	13.62	34	45.71	268	281 740	166	8 700
40	239	60	3.78	16	19.53	113	7.72	50	39.83	89	989 810	45	37 450
41	254	47	4.17	38	14.55	87	9.28	82	32.38	182	433 990	100	18 090
41	254	198	0.93	25	17.70	30	13.44	1	254.86	145	589 490	186	5 500
43	255	43	4.42	57	13.54	64	10.06	91	30.79	270	277 970	134	12 300
44	260	6	7.87	33	15.40	50	10.99	171	21.51	184	430 770	50	33 890
45	264	25	5.48	36	14.95	80	9.49	123	25.92	201	403 190	84	22 080
46	267	30	5.06	27	16.95	103	8.41	107	28.15	151	557 150	62	28 210
47	273	9	6.87	28	16.63	81	9.46	155	22.91	208	382 140	72	26 250

05 Cash flow		07 Own capital		Name of firm	Rank Vision 1975	Main activities	Country	Notes
Rank	Value	Rank	Value					
69	103 160	81	370 980	BEWAG	351	Energy, power utilities	D	(2)
2	1 120 370	16	1 920 870	Elf Aquitaine	19	Oil industry, chemicals, mining, raw materials	F	
156	33 670	216	90 030	H.J. Heinz	381	Food products	UK	(1) (15)
181	26 290	241	74 290	Bunzl Pulp & Paper	414	Paper, packaging, plastics, various activities	UK	
72	94 420	139	165 410	Dassault-Bréguet	153	Aircraft industry	F	
147	36 950	163	136 420	Hoover	387	Electrical machinery, domestic appliances, electronics	UK	(16)
101	56 760	169	130 290	Trafalgar House	183	Construction, various activities	UK	(4)
143	38 370	224	83 940	Moulinex	449	Electrical machinery, domestic appliances, electronics	F	
83	76 380	127	191 780	Thyssen-Bornemisza	148	Shipbuilding, various activities	NL	
136	40 270	173	124 360	Bridon	300	Electrical machinery, domestic appliances, electronics	UK	
79	79 210	282	31 080	South of Scotland Electricity Board	236	Energy and power utilities	UK	
176	27 970	212	90 830	Hepworth Ceramic	452	Glass, pottery, china, plastics	UK	
123	47 350	119	220 100	Wellcome Foundation	307	Pharmaceuticals, cosmetics	UK	(3)
144	38 280	151	147 710	Douwe Egberts	334	Food products, tobacco, alcoholic and non-alcoholic beverages	NL	
124	46 860	138	166 470	Ultramar Group	247	Oil industry	UK	
149	36 160	144	157 860	Gestetner Holdings	346	Various activities	UK	(5)

TABLE 10 (continued)

Rank in score	Score	Ratio $\frac{04}{01}$		Ratio $\frac{04}{07}$		Ratio $\frac{05}{01}$		Ratio $\frac{05}{07}$		01 Sales		04 Net profit	
		Rank	Rate	Rank	Rate	Rank	Rate	Rank	Rate	Rank	Value	Rank	Value
48	276	28	5.18	67	12.34	54	10.80	127	25.70	278	262 520	121	13 610
48	276	7	7.83	79	11.13	21	15.25	169	21.68	225	341 590	67	26 750
48	276	37	4.66	159	5.95	10	27.13	70	34.69	95	924 870	37	43 060

- (1) = Year ended April 1975.
(2) = Year ended June 1975.
(3) = Year ended August 1975.
(4) = Year ended September 1975.
(5) = Year ended October 1975.
(6) = Year ended February 1976.
(7) = Year ended March 1976.
(8) = Controlled by Ford (USA).
(9) = Controlled by IBM (USA).
(10) = Controlled by Mobil Oil (USA).
(11) = Controlled by Xerox (USA).
(12) = Controlled by Honeywell Information Systems (USA).
(13) = Controlled by Eastman Kodak (USA).
(14) = Controlled by International Harvester (USA).
(15) = Controlled by Heinz (USA).
(16) = Controlled by Hoover (USA).

05 Cash flow		07 Own capital		Name of firm	Rank Vision 1975	Main activities	Country	Notes
Rank	Value	Rank	Value					
174	28 350	191	110 310	Ever Ready	475	Electrical machinery, electronics, mechanical engineering	UK	(6)
113	52 100	113	240 290	Pernod Ricard	376	Alcoholic and non-alcoholic beverages	F	
29	250 950	42	723 320	Vereinigte Elektrizitäts- werke Westfalen (VEW)	157	Energy, power utilities	D	

Profitability in relation to sales

303. Of the fifty most profitable firms only six also appear in the top fifty firms ranked by sales. Furthermore, eight of these fifty most profitable firms are to be found among the bottom fifty ranked by sales.

The measure of efficiency applied to the worldwide food industry

304. Our method is also, as we have seen, applied in the Commission's individual research projects on concentration and competition. The food industry is one of those which has been subjected to the most extensive scrutiny.

The hundred largest food groups in Western countries ranked by 1974 sales were analysed in the same way as the 'Vision' list. The sample was reduced from 100 to 64 firms by elimination of those for which one or more of the four variables (sales (01), net profit (04), cash flow (05) and own capital (07)) were unavailable.

Table 11 gives the most important figures for the 10 most profitable food groups in the world, ranked in decreasing order of profitability according to the ranking held by each firm in terms of profitability score.

Of the 10 most profitable groups, only two appear among the top ten firms ranked by sales. Conversely, these ten groups include the firm which ranks lowest in terms of absolute sales among the 64 firms constituting the sample.

Examination of the profitability score ranking of the ten largest firms ranked by sales in relation to the whole sample is also significant:

Firm	Sales ranking	Profitability score ranking
Unilever	1	36
Nestlé Alimentana	2	31
Swift (Esmark)	3	46
Kraftco	4	49
Beatrice Foods	5	23
Ralston Purina	6	26
General Foods	7	23
CPC International	8	9
Associated British Foods	9	28
Coca-Cola	10	1

TABLE 11

The ten most profitable food firms in the Western nations - 1974
(Value: in thousands of dollars)

(Number of firms in sample: 64)

Ranking in score	Score	Ratio $\frac{04}{01}$		Ratio $\frac{04}{07}$		Ratio $\frac{05}{01}$		Ratio $\frac{05}{07}$		01 - Sales		Firm	Country
		Ranking	Rate	Ranking	Rate	Ranking	Rate	Ranking	Rate	Ranking	Value		
1	23	5	7.77	4	19.18	7	10.10	7	24.94	10	2 522 150	Coca-Cola	USA
2	26	8	7.13	3	20.40	9	8.85	6	25.31	34	1 009 818	Kellogg	USA
3	28	6	7.52	6	18.70	8	9.99	8	24.86	33	1 035 053	Beecham	UK
4	44	3	8.24	9	15.88	4	10.71	28	20.64	29	1 088 557	National Distillers	USA
5	47	15	5.59	5	18.80	17	7.22	10	24.31	36	967 700	Heublein	USA
6	51	11	6.01	13	15.54	10	8.68	17	22.42	46	814 524	Jos. Schlitz Brewing	USA
7	61	14	5.66	12	15.57	14	7.88	21	21.66	48	753 131	Castle & Cook	USA
8	64	23	4.20	11	15.70	21	6.51	9	24.32	12	2 080 759	Pepsico	USA
9	76	25	3.86	8	16.65	31	5.46	12	23.55	8	2 570 273	CPC-International	USA
10	77	1	14.82	27	12.69	1	17.88	48	15.32	64	455 269	Hiram Walker-Gooderham	CAN

Remarks on the profitability of large firms

305. One conclusion seems evident: the largest firms are hardly ever the most profitable (and are unlikely to be the most efficient). There consequently seems to be little point in systematically promoting the formation of giant firms or in encouraging an uncontrolled process of merger and concentration, for it is by no means certain that this would actually help to make Community industry more profitable or more competitive.

§ 4 — Surveys of retail food prices and trading mark-ups

The research programme

306. The survey of food prices in several Member States is part of the Commission's research programme into the evolution of concentration and the workings of competition in the distribution of food products.¹

At the practical level, the following problems of definition arise:

- (i) what samples of products and sales points should be taken into consideration;
- (ii) what data should be recorded;
- (iii) how frequently should the enquiries be carried out?

Sample of products

307. The sample of products was relatively small; all of the products were articles manufactured by the food industry, in fairly common use in the Member States; the type of article, the quantity and the presentation (packaging and trade-mark) could therefore be defined rigorously, and homogeneity was ensured so that comparisons of different prices for each article, in each country and at each selling point, were significant.

Because of differing situations and facilities in the different countries, 51 articles were studied in Germany, 35 in France, 44 in Italy, 57 in Denmark and 154 in the United Kingdom.

All of the articles studied belong to one of the seventeen groups of industrial food products shown in Table 12.

¹ See *Methodology op cit*, Chapter VII, points 60 to 71.

It was also possible—especially in the United Kingdom—to consider a fairly large number of different trademarks and packs (weights or measures) for the same product; this explains the large number of observations in the United Kingdom.

TABLE 12

Groups of food products covered by the price surveys

I	Tinned fish, meat, vegetables and fruit (Con.)
II	Baby foods (Enf.)
III	Soups (Sou.)
IV	Vegetables in packets (Leg.)
V	Meat extracts and aromatic sauces (Epi.)
VI	Oils and fats, margarine (Gra.)
VII	Sweet biscuits, cakes, sweets, chocolates (Bis.)
VIII	Rusks, powdered desserts, flour, salt, sugar and jellies (Far.)
IX	Cereals (Cer.)
X	Jams and marmalades (Mar.)
XI	Drinks, coffee, tea, soft drinks, mineral waters (Boi.)
XII	Dairy products, cheeses, butter, etc. (Lai.)
XIII	Frozen products (including ice-cream) (Fro.)
XIV	Pasta (spaghetti, macaroni, etc.) prepared dishes (pizza, ravioli, etc.) (Spa.)
XV	Beers (Bie.)
XVI	Alcoholic drinks (whisky, brandy, martini, wine) (Alc.)
XVII	Hams, salted and smoked meats (Cha.)

Sample of sales points

308. The following basic criteria governed the choice of sales points:

- (a) *geographical concentration*: The number of sales points is small; only one area or city was chosen (Munich for Germany, Montpellier for France, Greater London for the United Kingdom, Turin for Italy and the Århus/Odense area for Denmark);
- (b) *the sample had to be representative* of the types and structures of business, distributed according to the form of trade and the size and location of the sales points (for example, suburban hypermarkets, small cooperative self-service stores out of town, small independent stores in the town centre, and so on).

We can therefore bring out differences in the levels and variations of prices resulting from the size and the location of each sales point in the sample.

Data to be considered

309. The surveys were not limited to recording the price of each product at each sales point in the small samples considered. Many other data were collected and elaborated:

- (i) the make of the product, and the distinction between manufacturer's make, trademark and distributor's own label;
- (ii) the origin of the product, and the distinction between home-produced articles, imported articles, partly home-produced articles and articles of undetermined origin.

The systematic series of information collected at Community level and classified according to the categories of sales points makes it possible to carry out a significant economic analysis of the workings of competition in a field which is vital to the study of inflation.

Timing of the enquiries

310. Surveys could not be carried out more frequently than every six months; the first was in January 1976, the second in July 1976 and the third in January 1977.

Initial results of surveys of prices and mark-ups

311. It is still too early to assess the outstanding features of the evolution of prices, since the surveys only began in 1976, and since the samples of products and of sales points were too limited for any general conclusions to be drawn. However, the results are striking enough to justify one or two remarks.

Firstly, the methodology drawn up by Commission departments for this research has proved to be applicable and productive.

Secondly, a general operating principle seems to have been proved: since an outstanding feature common to all the regions studied in the various Member States is that relevant price differences exist for the same product between different sales points:

- (a) it would not be feasible to impose single uniform prices on all sales points for the same product or the same make;
- (b) a claim that the phenomenon of inflation was being quantified and analysed on a scientific basis would be unfounded if there had been no prior study of the most important structures and levels of prices at a given moment.

These two points are paramount for competition policy. We must now look more closely at why and how the initial results of these surveys on prices and mark-ups justify our conclusions.

The hypothesis of divergence

312. Our statement that considerable price differences exist between the different sales points was based on a simplifying working hypothesis involving the calculation of the relative percentage deviation between the maximum price recorded for any given product at one sales point and the minimum price recorded for the same product at another sales point.¹

Table 13, which classifies samples into six classes, in descending order, shows that price differences may be considerable in the local samples analysed in the various Community countries, for the articles considered in each country. In Germany, for example, out of 51 articles observed, there are five in class 1 of differences or relative deviations; this means that there were five articles whose price at some sales points was more than twice the minimum price recorded for that product.

In the United Kingdom, the situation is quite different. There are no articles whose price varies in the ratio of 1 to 2 (class 1: $\epsilon R_p \geq 100\%$) from the sales point offering the minimum price to another sales point; one article was, however, offered at 80% higher than the minimum price recorded.

313. The following remarks are based on a second simplifying hypothesis.

It may be supposed, on the basis of certain provisional results of the surveys in progress, that the size and location of the sales points are factors determining the cost of distribution and the profitability of each sales point. The following simplifying hypothesis may be considered justifiable: a small supermarket or an independent town-centre shop may have a cost structure that leaves it no choice but to offer prices up to 40% higher than those offered by an enormous hypermarket on the edge of the town, where land is cheap, near the point where several motorways converge, and where supply and storage costs are therefore low.

On the basis of this simplifying hypothesis, one may postulate a relative deviation as a percentage of the minimum price of some 10% to 40% as being the normal case, since this order of deviation could be due quite simply to the different cost structures characterizing each sales point.

¹ The formula is: $\epsilon R_p = \frac{\text{maximum price} - \text{minimum price}}{\text{minimum price}} \times 100$

TABLE 13
Survey of prices based on a small sample of food products and sales points — January 1976
Price differences between sales points

Class	$\pm R_p$	Germany		Denmark		France		Italy		United Kingdom	
		Number of cases		Number of cases		Number of cases		Number of cases		Number of cases	
		Per class	Cumulative	Per class	Cumulative	Per class	Cumulative	Per class	Cumulative	Per class	Cumulative
1	$\geq 100\%$	5	5	1	1	1	1	1	1	0	0
2	$\geq 80\%$	4	9	9	10	0	1	2	3	1	1
3	$\geq 40\%$	17	26	18	28	14	15	16	19	19	20
4	$\geq 10\%$	24	50	27	55	19	34	24	43	101	121
5	$\geq 0\%$	0	50	2	57	1	35	0	43	23	144
6	0%	1	51	0	57	0	35	1	44	10	154

Thus, on the basis of Table 13, three kinds of price difference may be distinguished:

- (i) The 'normal case', with a difference between the maximum and minimum prices expressed as a percentage of the minimum price of 10% or more, but less than 40% ;
- (ii) The 'divergent case', with a difference of 40% or more;
- (iii) The 'uniform case', with a difference of less than 10%.

314. Table 14 shows that the 'uniform case' is, in fact, the *most rare* (about 10% of cases), which shows how dangerous it would be from the point of view of the inflationary process, to adopt a policy of authoritarian price fixing.

Such a policy of fixing uniform prices would have to align prices either on the low prices of the most efficient sales points, or on the highest prices, offered by the most expensive sales points; the first solution would eliminate the marginal sales points, whose distribution and buying costs are higher; the second would mean, firstly, that consumers would be at a serious economic disadvantage, and, secondly, that the most efficient and least costly sales points would enjoy an additional profit which could hardly be an obstacle to inflationist tendencies.

TABLE 14

The three degrees of price difference: normal case, divergent case and uniform case

Country	Total cases	Normal case $\pm R_p$ between 10% and 40%		Divergent case $\pm R_p >$ 40%		Uniform case $\pm R_p <$ 10%	
		Number of cases	% of total	Number of cases	% of total	Number of cases	% of total
Germany	51	24	47.1	26	51.0	1	2.0
Denmark	57	27	47.4	28	49.1	2	3.5
France	35	19	54.3	15	42.9	1	2.9
Italy	44	24	54.6	19	43.2	1	2.3
United Kingdom	154	101	65.6	20	13.0	33	21.4
Community	341	195	57.2	108	31.7	38	11.1

315. The 'divergent case' (almost 30% of cases) seems very widespread, after the 'normal case' (nearly 60% of cases). The fact that there are great differences in price for the same product is not necessarily a negative indicator of the workings of competition. This statement calls for one or two explanatory remarks:

The 'normal case' (maximum prices from 10 to 40% above minimum prices) may well be due, as noted above, to different cost structures from one sales point to another.

The 'divergent case' (price difference of 40% or more) may be explained in two ways:

- (a) the sales points offering minimum prices are usually either exposed to much more intense competition than the others, or actively engaged in an aggressive competition strategy;
- (b) these sales points belong to groups or retailers' organizations whose power of negotiation with manufacturers and producers is very great; this enables them to obtain exceptionally favourable conditions and cost prices ('power of demand').

These two explanatory remarks show, firstly, that there is an active and intense mechanism of competition, but, secondly, that the final consequences of over-intense competition may not be desirable. Such consequences might be:

- (i) the excessive concentration of distribution, through the massive elimination of too many marginal or costly sales points;
- (ii) a serious disadvantage to the industries supplying the large groups or retailers' chains, in so far as the retailers might abuse their power of negotiation, and succeed in obtaining the various industrial food products at the manufacturing cost, without any guarantee that, in the long term, the sale price to consumers would reflect the reduction in the retailers' purchasing price.

The tendency to a parallel increase in concentration between retailers, which, as remarked in paragraph 2, is marked enough to be worrying, might lead the large retailers to reduce considerably the present level of intensity of competition.

The phenomena and tendencies involved are obviously particularly complex—the situation is different from one member country to another; the Commission intends to study them in depth over the next few years.

Divergent evolution of prices

316. Any conclusions drawn from the evolution of prices from the surveys would be premature; the surveys only began in January 1976. However, the results obtained up to now bring out divergent evolution of prices between:

- products;
- countries;
- sales points.

Bearing in mind the reservations made earlier in connection with the limited nature of the samples of products and sales points, which precludes generalized and definitive conclusions, we may infer from Table 15 that in 1976 the evolution of prices confirmed the divergent case. The table reveals not only divergent evolution between the two countries considered (Germany and the United Kingdom), but also the divergent price tendencies from one group of products to another, with different tendencies in different countries.

These tables show that the analysis of prices and other factors in the inflation process cannot depend on generalizations based on price averages—which do not reflect reality—and that fuller synchronic analyses should be developed.

317. One or two factors that have already emerged are significant for considering the divergent evolution of prices from one sales point to another; they relate to the period January-April 1976 in Germany and France.

TABLE 15
Variations in average price of articles
considered in the limited sample of food products by product groups

Product group		Percentage price variation between January 1976		
		and June/July 1976		and January 1977
		Germany	United Kingdom	United Kingdom
I	Tinned fish, meat, vegetables and fruit (Con.)	+ 4.03	+ 0.50	+ 8.60
II	Baby foods (Enf.)	+ 0.14	+ 17.88	+ 19.24
III	Soups (Sou.)		+ 9.72	+ 20.51
IV	Vegetables in packets (Leg.)	+ 0.15	+ 0.44	+ 19.61
V	Meat extracts and aromatic sauces (Epi.)	- 3.01	+ 20.17	+ 20.49
VI	Oils and fats, margarine (Gra.)	+ 0.06	+ 18.08	+ 29.46
VII	Sweet biscuits, cakes, sweets, chocolates (Bis.)	- 1.83	+ 0.57	+ 9.94
VIII	Rusks, powdered desserts, flour, salt, sugar and jellies (Far.)	- 1.63	+ 8.22	+ 16.69
IX	Cereals (Cer.)	0	+ 6.57	+ 20.84
X	Jams and marmalades (Mar.)	- 0.11	+ 2.94	+ 15.15
XI	Drinks, coffee, tea, soft drinks, mineral waters (Boi.)	+ 5.05	+ 30.23	+ 65.38
XII	Dairy products (cheeses, butter, etc.) (Lai.)	+ 0.02	+ 12.51	+ 15.26
XIII	Frozen products (including ice cream) (Fro.)	- 0.17	- 8.54	+ 24.76
XIV	Pasta (spaghetti, macaroni, etc.) prepared dishes (pizza, ravioli, etc.) (Spa.)	+ 0.04		

Table 16 shows how great was the divergence (in percentage) for the same products between different sales points during this period.¹

The deviation is greater than 20% for 17 articles out of 51 in Germany (33% of the articles considered), and for 23 articles out of 35 (66% of the articles considered) in France.

The wide variability of prices—against the background of a divergent evolution according to the sales point—is an unequivocal indication of vigorous competitive mechanisms. It should be borne in mind, however, that the brevity of the period considered (three months) may also justify another hypothesis: the prices might not be so much evolving in different directions as adjusting and aligning themselves; this process *would not be simultaneous* at the different sales points, but rather spread over a whole quarter.

But if this is indeed the case, it could be argued that the absence of simultaneity or synchronization of the price policy of the retailers in the sample is another manifestation of the competitive mechanism.

Research in progress will supply more details on the outstanding features and the causes of these phenomena.

318. The study of prices and of price formation must be accompanied by the analysis of the recorded gross profit margins (mark-ups) of the retailers considered in the samples. This analysis is a crucial aspect of the highly complex study of the formation of the galaxy of consumer prices for various products.

The analysis of the evolution of these profit margins should also be related to two factors that play an important role in the formation of final prices:

- (i) the concentration of distribution, not only at national level, but also, and especially, at regional level, which may lead to local trade oligopolies, or even structures of domination, that are incompatible with an efficient and lasting competitive mechanism;
- (ii) the balance of power between manufacturers and retailers, and in particular, the general buying and selling strategies, of the large retailers.

The manifold effects of these factors tend to be felt not only on final prices, and thus on consumers—in a very different way depending on the structure of retail trade in the town or region considered—but also on the long-term evolution of the structures of the manufacturing industries of the member countries; these

¹ The deviation ϵA_s is calculated as the difference between the maximum price increase and the minimum increase (or maximum reduction) for the same article. Thus, if the most inflationary firm has increased its price by 50% and the least inflationary by 20%, ϵA_s will equal 30%. If, on the other hand, the latter firm has reduced its price by 20%, ϵA_s will equal 70%.

industries, if they are to survive and develop, must be able to count on their most important customers—the big retailers—for a reasonably long period.

The Commission hopes that information on the level and evolution of gross profit margins will be available in forthcoming reports on competition policy.

TABLE 16A
Maximum and minimum price variations between sales points (εA_s)
 (January 1976 and April 1976 surveys)

By range of variations	France						εA _s absolute deviation in %
	y = number of articles studied	Ranking	Article	Group	Variations (in %)		
					Max.	Min.	
Wide divergence in variations (εA _s) > 20%	30	I	Crackers Ritz	Far.	+ 12.2	- 83.9	96.1
		II	Dessert Mont Blanc	Lai.	+ 51.4	- 23.7	75.1
		III	Moutarde Amora	Epi.	+ 23.5	- 35.8	59.3
		IV	Potage Kubor	Sou.	+ 26.6	- 30.1	56.7
		V	Margarine Astra	Gra.	+ 34.1	- 17.1	51.2
		VI	Eau minérale Évian	Boi.	+ 31.8	- 11.3	43.1
		VII	Purée Mousseline	Leg.	+ 38.2	- 3.2	41.4
		VIII	Macédoine Cassegrain	Con.	+ 24.1	- 15.5	39.6
		IX	Petits pois Cassegrain	Con.	+ 17.2	- 22.0	39.2
		X	Apéritif Martini	Alc.	+ 14.5	- 24.2	38.7
		XI	Bière Kronenbourg	Bie.	+ 23.6	- 10.1	33.7
		XII	Fromage Boursin	Lai.	+ 17.7	- 15.5	33.2
		XIII	Huile Fluidor	Gra.	+ 25.4	- 4.3	29.7
		XIV	Beurre bas de gamme	Gra.	+ 14.1	- 14.2	28.3
		XV	Fromage Suprême	Lai.	+ 19.3	- 5.9	25.2
		XVI	Café soluble Nescafé	Boi.	+ 14.4	- 10.1	24.5
		XVII	Lait en poudre Régilait	Lai.	+ 11.6	- 12.2	23.8
		XVIII	Eau minérale Contrex	Boi.	+ 7.7	- 15.2	22.9
		XIX	Soda Schweppes	Boi.	+ 13.0	- 9.0	22.0
		XX	Lait concentré Gloria	Lai.	+ 18.2	- 3.8	22.0
		XXI	Sucre Saint Louis	Far.	+ 17.5	- 3.6	21.1
		XXII	Pâtes Panzani	Spa.	+ 7.5	- 13.2	20.7
		XXIII	Boisson fruitée Oasis	Boi.	+ 14.3	- 6.0	20.3

TABLE 16B
Maximum and minimum price variations between sales points (ϵA_9)
January 1976 and April 1976 surveys

By range of variations	Germany						ϵA_9 absolute deviation in %
	y = number of articles studied	Ranking	Article	Group	Variations (in %)		
					Max.	Min.	
Wide divergence in variations (ϵA_9) > 20%	51	I	Ketchup von Kraft	Epi.	+ 50.8	- 61.0	111.8
		II	Erdbeer-Marmelade	Mar.	+ 34.5	- 64.6	99.1
		III	Bassermann Gold Kirsch-Marmelade	Mar.	+ 38.5	- 28.2	66.7
		IV	Schwartau Bücklingsfilet von Norda	Con.	+ 57.1	- 6.4	63.5
		V	Klare Fleischsuppe von Maggi	Epi.	+ 27.0	- 28.8	55.8
		VI	Bad Reichenhaller Salz	Far.	+ 32.7	- 18.2	50.9
		VII	Schweinefleisch-konserve Sibiu	Con.	+ 35.4	- 13.2	48.6
		VIII	Rohe Klösse von Pfanni	Leg.	+ 22.2	- 25.1	47.2
		IX	Salat-Mayonnaise von Kraft	Epi.	+ 20.2	- 26.3	46.5
		X	Toast Scheibletten Kraft	Lai.	+ 6.9	- 37.6	44.5
		XI	Butterkeks von Bahlsen	Far.	+ 19.6	- 18.7	38.3
		XII	Karotten und Aprikosen von Gerber	Enf.	+ 33.0	- 1.0	34.0
		XIII	Bauernbröd von Wasa	Far.	+ 12.5	- 19.0	31.5
		XIV	Bauernknäcke von Batscheider	Far.	+ 10.1	- 17.3	27.4
		XV	Flocken Püree von Maggi	Leg.	+ 25.0	- 0.6	25.6
		XVI	Nescafé Gold	Boi.	+ 15.4	- 9.8	25.2
		XVII	Edelweiss Camembert	Lai.	+ 7.8	- 16.5	24.3

§ 5 — Summary and conclusions

319. To sum up, the following conclusions can be drawn from the results so far obtained:

The total number of national and international mergers, share acquisitions and joint ventures increased by more than 30% between 1974 and 1975. Purely national operations seem to be increasing at the expense of international operations.

In 1975, the greatest number of national and international operations was recorded in Belgium, where the increase on 1974 was pronounced; the metallurgy industry was the most affected.

The evolution of concentration in the various industries is generally characterized by a trend towards stability. This remark is particularly true of the industries where concentration is already high. However, distribution of food products and drinks (especially in the United Kingdom and France), and to a slightly lesser degree the electrical home-appliances industry, show a marked tendency towards an increasing degree of concentration.

The analysis of concentration in a number of product markets reveals that on the supply side, the degree of oligopoly power, or even domination, is higher than over the industry as a whole. This is particularly true of the food industry.

The Commission's first study on the relation between the size of a firm and its yield shows that the biggest firms are not necessarily the most profitable. Theoretically, therefore, very large units are not necessary to increase economic efficiency.

The first surveys of retail food prices and mark-ups show that identical products are sold at considerably different prices within the Member States. For about a third of the food products considered, the differences were greater than 40%.

The surveys also show considerable divergence in the evolution of prices over a short period. Frequently, in the same town or region, the price of an article may increase considerably (e.g. by 50%) at one sales point, while it may be considerably reduced elsewhere (e.g. by 60%).

The summary analysis of the initial result confirms the need to continue the systematic and permanent study of the formation of consumer prices, so as to acquire fuller knowledge of the workings of competition at the level of distribution, assessing in particular the effects of increased power of demand; it is also important to make the European consumer more aware of the price differences existing within the Community.

Annex

List of individual Decisions of the Commission and rulings of the Court of Justice made in 1976 concerning the application of Articles 85 and 86 of the EEC Treaty and of Articles 65 and 66 of the ECSC Treaty

Final Decisions given by the Commission under the procedures of Article 93(2) of the EEC Treaty

DECISIONS ON INDIVIDUAL CASES

1. Concerning Articles 85 and 86 of the EEC Treaty

- Decision of 9.6.1976 on a proceeding under Article 86 of the EEC Treaty
'Vitamins'
OJ L 223 of 16.8.1976, p. 27
IP (76) 127 of 10.6.1976
Bull. EC 6-1976, point 2124
- Decision of 25.6.1976 on a proceeding under Article 85 of the EEC Treaty
'CSV'
OJ L 192 of 16.7.1976, p. 27
IP (76) 141 of 2.7.1976
Bull. EC 7/8-1976, point 2123
- Decision of 26.7.1976 on a proceeding under Article 85 of the EEC Treaty
'Pabst & Richarz (BNIA)'
OJ L 231 of 21.8.1976, p. 24
IP (76) 165 of 28.7.1976
Bull. EC 7/8-1976, point 2124
- Decision of 26.7.1976 on a proceeding under Article 85 of the EEC Treaty
'Reuter/BASF'
OJ L 254 of 17.9.1976, p. 40
IP (76) 162 of 28.7.1976
Bull. EC 7/8-1976, point 2125
- Decision of 1.12.1976 on a proceeding under Article 85 of the EEC Treaty
'Miller International'
OJ L 357 of 29.12.1976, p. 1
IP (76) 262 of 14.12.1976
Bull. EC 12-1976, point 2124
- Decision of 22.12.1976 on a proceeding under Article 85 of the EEC Treaty
'Gerofabrik'
OJ L 16 of 19.1.1977, p. 8
IP (76) 275 of 22.12.1976
Bull. EC 12-1976, point 2126
- Decision of 2.12.1976 on a proceeding under Article 85 of the EEC Treaty
'Junghans'
OJ L 30 of 2.2.1977, p. 10
IP (76) 270 of 22.12.1976
Bull. EC 12-1976, point 2123
- Decision of 21.12.1976 on a proceeding under Article 85 of the EEC Treaty
'Theal/Watts'
OJ L 39 of 10.2.1977, p. 19
IP (76) 283 of 22.12.1976
Bull. 12-1976, point 2125
- Decision of 20.1.1977 on a proceeding under Article 85 of the EEC Treaty
'Vacuum Interrupters'
OJ L 48 of 19.2.1977, p. 2
IP (77) 19 of 1.2.1977
Bull. EC 1-1977, point 2.1.18

2. Concerning Articles 65 and 66 of the ECSC Treaty

- Decision of 28 January 1976 on a proceeding under Article 66 of the ECSC Treaty authorizing the acquisition by Sicaworms SA of a majority shareholding in Deblaye SA and Soyez & Fils SA.
Bull. EC 2-1976, point 2113
- Decision No 76/354/ECSC of 13 February 1976 on a proceeding under Article 65 of the ECSC Treaty extending for six months Decision 71/314/ECSC of 27 July 1971 authorizing specialization agreements covering the manufacture of rolled steel products and agreements for the setting up of an agency to allocate orders for merchant steel bars and wire rod between Eisenwerk-Gesellschaft Maximilianshütte mbH, Klöckner-Werke AG and Stahlwerke Peine-Salzgitter AG.
OJ L 95 of 9.4.1976, p. 21
Bull. EC 2-1976, point 2112

- Decision No 76/355/ECSC of 13 February 1976 on a proceeding under Article 65 of the ECSC Treaty extending for six months Decision 71/315/ECSC of 27 July 1971 authorizing specialization agreements covering the manufacture of rolled steel products and the joint buying of iron ore between steel undertakings in south-western Germany
- OJ L 95 of 9.4.1976, p. 23
Bull. EC 2-1976, point 2112
- Decision No 76/356/ECSC of 18 February 1976 on a proceeding under Article 65 of the ECSC Treaty extending the authorization of joint fuel sales for the Belgian mining companies associated within the Comptoir belge des charbons, société Coopérative (Cobechar).
- OJ L 95 of 9.4.1976, p. 25
Bull. EC 2-1976, point 2114
- Decision of 23 February 1976 on a proceeding under Article 66 of the ECSC Treaty authorizing an exception from Article 2(1) of the Decision of 31 July 1969 authorizing the acquisition of shares in SA Métallurgique d'Espérance-Longdoz by SA Cockerill-Ougrée-Providence and in Société de participations industrielles de Winterslag by Société Général de Belgique, Société de Bruxelles pour la Finance et l'Industrie and Compagnie financière et industrielle.
- Decision of 27 February 1976 on a proceeding under Article 66 of the ECSC Treaty authorizing the acquisition of a majority shareholding in Ets Albert Fonlupt Sarl by Cie Française des Ferrailles SA.
- Decision of 1 March 1976 on a proceeding under Article 66 of the ECSC Treaty authorizing the acquisition by Sicaworms SA of a majority shareholding in Etablissements Michon Frères.
- Decision No 76/325/ECSC of 12 March 1976 on a proceeding under Article 65 of the ECSC Treaty extending the authorization of the joint selling of fuels from Houillères du bassin de Lorraine and Saarbergwerke AG by Saarlor.
- OJ L 78 of 25.3.1976, p. 18
Bull. EC 3-1976, point 2112
- Decision of 25 March 1976 on a proceeding under Article 66 of the ECSC Treaty authorizing the acquisition by DEUMU GmbH of 50% of the capital of Schrott-Weiss GmbH & Co. KG and of Karl Weiss GmbH
- Bull. EC 3-1976, point 2110
- Decision No 76/368/ECSC of 30 March 1976 on a proceeding under Article 66 of the ECSC Treaty authorizing the acquisition by the British Steel Corporation of 75% of the capital of Walter Blume GmbH.
- OJ L 94 of 9.4.1976, p. 44
Bull. EC 3-1976, point 2111
- Decision of 14 April 1976 on a proceeding under Article 66 of the ECSC Treaty authorizing an exception in favour of Mr G. Rambaud from Article 2(1) of the Commission Decision of 25 July 1973 authorizing SA Usinor to acquire 50% of the shares in SA Solmer, and approving a draft contract between Sollac, Usinor and Solmer.
- Decision No 76/602/ECSC of 20 May 1976 on a proceeding under Article 65 of the ECSC Treaty authorizing a joint buying agreement in respect of finished rolled steel products between the steel distribution undertakings C. Walker & Sons Ltd, J. Champion SA and NV A. Lommaert.
- OJ L 198 of 23.7.1976, p. 6
Bull. EC 5-1976, point 2113

Decision of 20 July 1976 on a proceeding under Article 66 of the ECSC Treaty authorizing British Steel Corporation to acquire a 33.3% shareholding in Six Hundred Metal Holdings Ltd.

Bull. EC 7/8-1976, point 2127

Decision of 22 July 1976 on a proceeding under Article 66 of the ECSC Treaty authorizing two exceptions from Article 2(1) of the Commission's Decision No 75/298/ECSC of 2 April 1975 authorizing Fried. Krupp Hüttenwerke AG to acquire the majority of the share capital in Stahlwerke Südwestfalen AG.

Decision of 26 July 1976 on a proceeding under Article 66 of the ECSC Treaty on the acquisition of the assets and goodwill of Countrywide Fuels Ltd., wholesale coal trader of Manchester, by National Fuel Distributors Ltd and British Fuel Company, London.

Decision of 26 July 1976 on a proceeding under Article 66 of the ECSC Treaty on the acquisition of Coal Concentration Depot, wholesale coal trader of Fratton, Portsmouth, by Southern Depot Co. Ltd, London.

Decision No 76/775/ECSC of 28 July 1976 on a proceeding under Article 65 of the ECSC Treaty, extending for six months Decision 71/314/ECSC of 27 July 1971, authorizing specialization agreements covering the manufacture of rolled steel products and agreements for the setting up of an agency to allocate orders for merchant steel bars and wire rod between Eisenwerk-Gesellschaft Maximilianshütte mbH, Klöckner-Werke AG and Stahlwerke Peine-Salzgitter AG.

OJ L 270 of 2.10.1976, p. 31

Decision No 76/776/ECSC of 28 July 1976 on a proceeding under Article 65 of the ECSC Treaty extending for six months Decision 71/315/ECSC of 27 July 1971 authorizing specialization agreements covering the manufacture of rolled steel products and the joint buying of iron ore between steel undertakings in south-western Germany

OJ L 270 of 2.10.1976, p. 33

Decision of 29 July 1976 on a proceeding under Article 66 of the ECSC Treaty authorizing the acquisition by Guest, Keen & Nettlefolds Ltd of a majority shareholding in Sachs AG.

Bull. EC 7/8-1976, point 2126

Decision of 29 July 1976 on a proceeding under Article 66 of the ECSC Treaty on the formation by coal distributors of IKO-Kohlenaufbereitung GmbH & Co. KG.

Decision of 20 October 1976 on a proceeding under Article 66 of the ECSC Treaty authorizing the acquisition of 66.5% of the capital of Ressorts du Nord by Marine-Wendel.

Bull. EC 10-1976, point 2113

Decision of 26 October 1976 on a proceeding under Article 66 of the ECSC Treaty authorizing Denain Nord-Est Longwy SA to acquire 85.1% shareholding in Ferembal SA.

Bull. EC 10-1976, point 2114

Decision of 12 November 1976 on a proceeding under Article 66 of the ECSC Treaty approving the joint construction and operation of an iron ore direct reduction

Bull. EC 11-1976, point 2121

plant ('North Sea Iron Company Ltd') by Sheerness Steel Company Ltd, Consolidated Gold Fields Ltd, Tube Investments Ltd and Manchester Steel Ltd.

Decision of 7 December 1976 on a proceeding under Article 66 of the ECSC Treaty authorizing Sicaworms SA to acquire as a going concern the scrap preparation and dealing business of Sometam.

Decision of 7 December 1976 on a proceeding under Article 66 of the ECSC Treaty authorizing Sicaworms SA to acquire a majority shareholding in a scrap dealing undertaking to be formed jointly with Rolanfer SA.

Decision No 77/153/ECSC of 20 December 1976 on a proceeding under Article 65 of the ECSC Treaty authorizing the specialization and cooperation agreements between the following steel-producing undertakings: Eisen- und Stahlwalzwerke Rötzel GmbH, Eisenwerk-Gesellschaft Maximilianshütte mbH, Fried. Krupp Hüttenwerke AG, Klöckner-Werke AG, Stahlwerke Peine-Salzgitter AG, Stahlwerke Südwestfalen AG and Theodor Wuppermann GmbH.

Decision No 77/154/ECSC of 20 December 1976 on a proceeding under Article 65 of the ECSC Treaty relating to specialization agreements concerning the production of finished and final rolled products and to the joint buying of iron ore, involving steel-producing undertakings in south-west Germany and the Grand Duchy of Luxembourg.

Decision No 77/135/ECSC of 22 December 1976 on a proceeding under Article 66 of the ECSC Treaty authorizing the acquisition by Klöckner-Werke AG of a majority holding in Eisenwerk-Gesellschaft Maximilianshütte mbH.

OJ L 45 of 17.2.1977, p. 25
Bull. 12-1976, point 2128

OJ L 45 of 17.2.1977, p. 32
Bull. EC 12-1976, point 2128

OJ L 43 of 15.2.1977, p. 32
Bull. EC 12-1976, point 2129

RULINGS OF THE COURT OF JUSTICE

Ruling (3.2.1976)
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'SA Fonderies Roubaix Watrelos v
Société Nouvelle des Fonderies
A. Roux and Société des Fonderies JOT'

OJ C 104 of 7.5.1976, p. 2
Bull. EC 2-1976, point 2442
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Ruling (20.5.1976)
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Bull. EC 5-1976, point 2447
[1976] ECR 613

Ruling (15.6.1976)
in Case 51/75:
'EMI Records v CBS'

OJ C 214 of 11.9.1976, p. 11
Bull. EC 6-1976, point 2439
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Ruling (15.6.1976)
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'EMI Records v CBS'

OJ C 214 of 11.9.1976, p. 12
Bull. EC 6-1976, point 2439
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Ruling (15.6.1976)
in Case 96/75:
'EMI Records v CBS'

OJ C 214 of 11.9.1976, p. 12
Bull. EC 6-1976, point 2439
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**FINAL DECISIONS GIVEN BY THE COMMISSION
UNDER THE PROCEDURES OF ARTICLE 93(2) OF THE EEC TREATY**

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Decision of 8 March 1961 on a modification of the system of aid applied in Italy in respect of shipbuilding OJ 25 of 8.4.1961, p. 582

Belgium

Decision 64/651/EEC of 28 October 1964 on the abolition by Belgium of the aid granted to Ford Tractor (Belgium) Ltd, Antwerp OJ 195 of 28.11.1964, p. 3257

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Decision 66/556/EEC of 23 September 1966 on the aid instituted by France for the purchase of aircraft OJ 182 of 12.10.1966, p. 3141

France

Decision 69/266/EEC of 18 July 1969 on the French system of aid for the textile industry OJ L 220 of 1.9.1969, p. 1
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Italy

Decision 70/304/EEC of 27 May 1970 on the Italian draft law providing for the restructuring, reorganization and conversion of the textile industry OJ L 128 of 12.6.1970, p. 33
Bull. EC 12-1970, point 7

Germany

Decision 71/121/EEC of 17 February 1971 concerning the law relating to adjustment and reorganization in the German colliery and mining areas OJ L 57 of 10.3.1971, p. 19
Bull. EC 4-1971, point 5

Germany

Decision 71/295/EEC of 23 July 1971 on tax exemptions under the German Law of 28 December 1970, relating to the imposition of a tax on the carriage of goods by road OJ L 179 of 9.8.1971, p. 37

Belgium

Decision 72/34/EEC of 15 December 1971 on the abolition of Belgian aid to undertakings in difficulty OJ L 10 of 13.1.1972, p. 22
Bull. EC 2-1972, point 30

Belgium

Decision 72/173/EEC of 26 April 1972 concerning aid granted pursuant to the Belgian Law of 30 December 1970 on economic expansion OJ L 105 of 4.5.1972, p. 13
Bull. EC 6-1972, point 5

Italy

Decision 72/261/EEC of 28 June 1972 concerning aids granted by Italy under Law No 471 of 14 July 1969 for imports of scientific instruments and advanced technological equipment OJ L 166 of 24.7.1972, p. 12
Bull. EC 8-1972, point 11

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Decision 72/436/EEC of 6 December 1972 on the French system of aid for the production of paper pulp, for paper making and forestry research, and for afforestation OJ L 297 of 30.12.1972, p. 32
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Italy

Decision 73/274/EEC of 25 July 1973 on Article 20 of Italian Law No 1101 of 1 December 1971 on the restructuring, reorganization and conversion of the textile industry

OJ L 254 of 11.9.1973, p. 14
Bull. EC 7/8-1973, point 2114

France

Decision 73/263/EEC of 25 July 1973 on the tax concessions granted, pursuant to Article 34 of French Law No 65-566 of 12 July 1965, to French undertakings setting up businesses abroad

OJ L 253 of 10.9.1973, p. 10
Bull. EC 7/8-1973, point 2117

Belgium

Decision 73/293/EEC of 11 September 1973 on aid which the Belgian Government intends to grant for extending an oil refinery at Antwerp and for setting up a new refinery at Kallo

OJ L 270 of 27.9.1973, p. 22
Bull. EC 9-1973, point 2104

France

Decision* 74/8/EEC of 17 December 1973 on parafiscal taxes financing the 'Technical Centres' for leather and for the clock and watch-making industry

OJ L 14 of 17.1.1974, p. 23
Bull. EC 12-1973, point 2120

Belgium

Decision 75/397/EEC of 17 June 1975 on the aids granted by the Belgian Government pursuant to the Law of 17 July 1959 introducing and coordinating measures to encourage economic expansion and the creation of new industries

OJ L 177 of 8.7.1975, p. 13
Bull. EC 6-1975, point 2119

Belgium

Decision 76/22/EEC of 18 December 1975 amending the Commission Decision of 26 April 1972 on aid granted pursuant to the Belgian Law of 30 December 1970 and the Commission Decision of 17 June 1975 on aid granted pursuant to the Belgian Law of 17 July 1959

OJ L 5 of 10.1.1976, p. 28
Bull. EC 12-1975, point 2119

Italy

Decision 76/574/EEC of 16 June 1976 concerning the Italian scheme of assistance for the press and the paper manufacturing industry granted through the ENCC

OJ L 185 of 9.7.1976, p. 32
Bull. EC 6-1976, point 2126

Italy

Decision 76/780/EEC of 8 September 1976 concerning assistance for expanding the sale of exports by certain Italian industries

OJ L 270 of 2.10.1976, p. 39
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