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## Introduction

The far-reaching and recurrent consequences of the oil crisis, the upsurge in trade following the acceleration in the dismantling of tariff and non-tariff barriers in international trade and the relatively rapid development of new competitive capacity in the Third World, notably the Far East, have hastened the international division of labour and shown up certain defects in the economic fabric of the Community. It is having to face up not only to a series of structural problems, but also to the need to maintain its still substantial competitiveness, and to take up the challenge presented by the outside world. It is also having to deal with some of its own market operators who are pressing for the retention of traditional structures, an unrealistic improvement of living standards and reliance on State financial intervention and protectionist measures.

This is the climate in which European competition policy has to be determined. Opening up to the world market, even in time of crisis, is fundamental to the sound development of our economy and will ensure maintenance of adequate competitive capacity. Generally speaking, the economic crisis has had least effect in industries where there is effective competition. However, there is no excuse for confusing political constraints with the tenets of free competition, which rule out all restrictions on firms' freedom. Although the Community economy must be placed fairly and squarely on the road to efficiency, fruitful cooperation by means of joint endeavour must be encouraged; particularly in innovative sectors; Community industry must be protected against competitive conduct incompatible with international trade law. The pouring of oil on waters troubled by intolerable social tensions is also part of a healthy competition policy. And this kind of competition policy cannot succeed without a stamp of approval from the social and political forces.

In current circumstances in particular, the Commission's competition policy not only has to sustain effective competition; it has to support an industrial policy which promotes the necessary restructuring.

State aid is one of the requisite instruments of such a policy. However, in keeping with the spirit of a Community approach, cases of application cannot be assessed in a purely national framework; they must be scrutinized solely in the general Community interest. State aid policies must therefore be implemented in strict

accordance with the Community rules designed to prevent any artificial creation of further imbalances likely to place the current and future functioning of the common market at risk. Since observance of these rules is so important, the Commission will remain vigilant, particularly in ensuring that the Member States fulfil their obligations to notify in advance as required by the Treaty.

When the economic and social effects of rationalizing an industry are particularly grave, the Commission introduces measures to deal with the specific circumstances involved, for instance those applied to the synthetic fibres, steel, shipbuilding and textiles industries to help them regain their competitive capacity. The Commission is also always prepared to take a favourable view of aid granted to promote environmental protection, energy-saving, advanced technology, future-oriented industries and small businesses, which are of considerable importance to the Community's economic development and the employment trend.

Different types of public financial intervention have mushroomed and as a result it has become necessary to shed light on the financing of public undertakings and to ensure that they do not receive any direct or indirect advantages tantamount to aid incompatible with the common market. The Commission has accordingly adopted a Directive on the transparency of financial relations between Member States and public undertakings. The Directive is designed to preserve the principle of equal opportunity for competing private and public-sector companies; moreover it is neither intended to nor does it in fact discriminate against public undertakings by imposing particular constraints. Nor can it be interpreted as failure on the part of the Commission to recognize the special role the public undertakings can play in the Community's economic system.

Within the context of the rules of competition applicable to enterprises, major importance has also been attached, in the preparation of Community rules on air and sea transport, to assessing the role played by the Member States. Governments bring their weight to bear, particularly in setting fares and sharing capacity on scheduled air services. In these circumstances, we must determine the role that competition can play in air transport and find a way of stepping it up without compromising the industry's special function. Despite the fact that almost all Member States have been dragging their feet over policy aimed at improving the efficiency of transport, the Commission must cooperate with Parliament and lose no time in working to reach agreement on the necessary changes.

As far as external trade is concerned, the Commission must stress its view that although imports from non-Member States cause problems which have extensive repercussions within the Community with regard to certain products or in certain industries, priority must be given to attempts to find adequate solutions by applying trade policy measures. On no account can private arrangements

organizing trade flows within the common market be entered into between firms in non-Member States, or between such firms and Community firms, without reference to the public authorities.

The Commission has always attached considerable importance to the orderly functioning of distribution. It is accordingly continuing its work on adjusting the rules of competition as applied to exclusive and selective distribution agreements so that they can serve their purpose, yet not be instrumental in market-sharing. The conclusions which the Commission draws from its experience will take account of the consumer's general interest, the principle of free trade within the Community and the particular concern of smaller businesses and industrial users to have access, in so far as possible, to secure and freely-selected sources of supply.

Since the Council has still not adopted a regulation providing for more systematic merger control at Community level, the Commission continues to monitor, pursuant to Article 86, the most significant mergers to see that they do not infringe the ban on abusive strengthening of a pre-existing dominant position. In dealing with various cases during the year, the Commission was able to work out, with the firms concerned, solutions geared both to industrial requirements and the need to maintain adequate competition on the relevant market.

Competition policy overall must constantly endeavour to integrate and harmonize inevitable public intervention with the action needed to ensure that effective competition remains the economy's principal regulating force. The contribution made by a system of undistorted competition framed in this way and applied to the extensive area covered by the common market is essential if the Community is to adjust to present-day economic demands and wage the battle, now more imperative than ever, against inflationist trends which jeopardize the living standards we have attained and the competitiveness of our economy worldwide. Only by sparing no effort to maintain and, if necessary, restore this competitiveness, which must be commensurate with the Community's leading role in world trade, will high and stable employment be ensured throughout the common market.

**Part One**

**Competition policy towards enterprises**

## Chapter I

# Main developments in Community policy

## § 1 — Distribution

### 1 — Exclusive dealing

1. The Commission concluded its work on a new draft block exemption Regulation on exclusive dealing agreements<sup>1</sup> which will replace Regulation 67/67/EEC from 1 January 1983.

2. The Commission's approach to exclusive dealing agreements is largely favourable. However, in the light of experience it feels that a number of amendments must be introduced to forestall any misuse of the block exemption.

Thus, if one manufacturer appoints another manufacturer of competing products to be its exclusive dealer the agreement should not be entitled to exemption if the parties are large undertakings, but should qualify for exemption if one of the parties is a small business. The main aim is to provide encouragement for small and medium-sized firms, either by enabling them to penetrate new markets more easily by using the distribution network of the large undertaking, or to use the products of a larger competitor to complete their own range.

Similarly, the Commission would like to strengthen the provisions designed to forestall market-partitioning. The block exemption should not therefore continue to apply unless parallel imports are genuinely possible. The Commission has always considered that territorial exclusivity must in every case be counterbalanced by the possibility of such imports.

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<sup>1</sup> Ninth Report on Competition Policy, point 4.

3. As regards exclusive supply agreements, the Commission is at present considering whether the appropriate rules for such cases should not preferably form the subject of a separate regulation. Such agreements, particularly when part of a network of similar contracts concluded by one or by a number of producers, can jeopardize the maintenance of effective competition within the Community since they tend to make access to the market more difficult.

4. As required by Council Regulation No 19/65/EEC the Commission decided to refer its latest views and the relevant draft texts to the Advisory Committee on Restrictive Practices and Dominant Positions.

## *2 — Selective distribution*

5. On 16 December 1980 the Commission convened the 31st conference of government experts on restrictive practices, which continued its general discussion on the problems of applying the Community competition rules to selective distribution.

Following the same line as the previous conference,<sup>1</sup> it concluded that it would be advisable to draw up guidelines applicable to all economic activities but that it would be easier to do so when a number of decisions had been taken on individual cases, illustrating in more practical terms the aspects of selective distribution which may and may not be permitted.

However, with regard to the adaptation of generally applicable measures to the specific requirements of a particular industry, the Commission plans to finalize in the near future a draft block exemption regulation for selective distribution systems in the motor industry.

In any event the Commission still considers—in accordance with the case-law of the Court of Justice—that selective distribution systems based on objective criteria of a qualitative nature are not caught by Article 85(1), provided that the criteria relate to the technical qualifications of the dealer and his staff and to the quality of his premises, and provided that they are laid down uniformly for all potential dealers and are not applied in a discriminatory fashion.

<sup>1</sup> Ninth Report on Competition Policy, point 6.

## § 2 — Patent licences

6. The second consultation of the Advisory Committee on Restrictive Practices and Abuse of Dominant Positions on the draft block exemption Regulation on patent licensing agreements mentioned in the Ninth Report on Competition Policy,<sup>1</sup> had to be postponed until 1981.

The Breeders' rights—maize seed case<sup>2</sup> has been before the Court since 1978: There have been four interveners; three governments of Member States (United Kingdom, France and the Federal Republic of Germany) and a plant breeders' association, with the result that no judgment can be expected until 1981. The question at issue is whether and to what extent exclusivity and territorial restrictions in a licence within the Community and related bans imposed on the parties are caught by the Treaty competition rules. The Commission's view as expressed in its Breeders' rights—maize seed Decision,<sup>3</sup> is that they are, because of the obvious risk that such restrictions could isolate national markets. Holders of the opposite view consider that exclusivity and any territorial restriction of the industrial property right that is the subject of the licence relate to the very essence of that right and that therefore as a matter of law the rules of competition do not apply to them or to any contractual export ban designed to maintain the restriction.

In the Commission's opinion this question should be decided in the same way for patents as for breeders' rights. It would accordingly be inadvisable to adopt a regulation before the Court of Justice has taken its decision on this legal issue on which most of the criticism of the Commission's proposal is based.

Nevertheless, there has been an increasing tendency in industrial circles, not only in the Community but also among licensors in non-member countries, to adapt licensing agreements to the draft Regulation.<sup>4</sup> As for the Commission it naturally endeavours to apply the principles contained in the draft in dealing with the cases submitted to it.<sup>5</sup>

The Consumers Consultative Committee gave its view on the draft at the end of the year. The Committee basically shares the Commission's opinion on the application of Article 85(1) to the various clauses mentioned in the draft. However, the Committee feels that the draft is too generous in many respects in granting

<sup>1</sup> Point 11.

<sup>2</sup> Case 258/78: Appeal against Commission Decision of 21.9.1978, Breeders' rights—maize seed: OJ L 286, 12.10.1978; Eighth Report on Competition Policy, point 123.

<sup>3</sup> The same views had already been expressed in the Commission Decision of 2.12.1975, AOIP/ Beyrard: OJ L 6, 13.1.1976; Fifth Report on Competition Policy, point 63.

<sup>4</sup> OJ C 58, 3.3.1979 and OJ C 110, 3.5.1979; Ninth Report on Competition Policy, point 7 *et seq.*

<sup>5</sup> Point 125 *et seq.* of this Report.

exemption under Article 85(3), particularly in relation to the exemption of exclusive manufacturing licences, the lines of demarcation within which exclusive sales licences and analogous prohibitions on exports are exempted, and the treatment of know-how connected with a patent.



### § 3 — Sea and air transport

#### 1 — Sea transport

7. The Commission expected to put to the Council a draft Regulation applying Articles 85 and 86 of the Treaty to sea transport before the end of the year.<sup>1</sup> To this end, it continued exchanging views with the industry's professional bodies (notably, shipowners and shippers) and on two occasions discussed with national experts a preliminary draft Regulation containing provisions of substance and procedure.

The draft had to meet three needs:

- (i) to involve the minimum of procedural requirements for firms;
- (ii) to grant an exemption for liner conferences providing regular services, which, while respecting the Member States' obligations pursuant to the United Nations Code of Conduct for Liner Conferences,<sup>2</sup> would supplement it on certain points by means of Community rules;
- (iii) not to embark as yet on the granting of such exemptions for shipping outside the conference system (e.g. bulk traffic or ferries), in view of a lack of experience in this area.

8. The Commission had prepared a preliminary draft on this basis. Its structure is outlined below.

The procedural provisions were taken over from Regulation No 1017/68 governing the application of Articles 85 and 86 to inland transport,<sup>3</sup> which imposes the minimum of administrative burdens on undertakings.

As regards the substantive provisions, the preliminary draft first specified that certain technical cooperation agreements did not fall within the scope of Article 85(1).

The balance of the rules for liner conferences operating regular services reflected the balance sought by the Commission and the Council when adopting Regulation

<sup>1</sup> Memorandum annexed to the President's address on the programme for 1980.

<sup>2</sup> Council Regulation No 954/79 concerning the ratification by Member States of the United Nations Convention on a Code of Conduct for Liner Conferences: OJ L 121, 17.5.1979; the Code does not yet apply since it has not been ratified by a sufficient number of countries: a minimum of 24 States whose tonnages account for at least 25% of world tonnage.

<sup>3</sup> Regulation No 17 applies to the whole of the economy except transport.

No 954/79 concerning the ratification of the United Nations Code of Conduct for Liner Conferences:

- (i) given their 'stabilizing role' which ensures 'reliable services to shippers',<sup>1</sup> conferences were exempted; the exemption, however, must not go beyond the limits laid down in Article 85(3), as interpreted by the Court, so that certain conditions were attached to the exemption;
- (ii) but in view of the need 'to avoid possible breaches by conferences of the rules of competition laid down in the Treaty',<sup>1</sup> they had to respect certain obligations and remain subject to surveillance for any possible abuses.

Certain of these obligations and conditions were reduced to the essential minimum; some of them only repeated or spelled out provisions already embodied in the United Nations Code or in the general agreements between shippers and conferences.

They were drawn up in the light of the most frequent criticisms levelled at conference practices by shippers and forwarding agents.

Finally, exemption was also granted in respect of agreements between conferences and shippers, or their associations, relating to the quality, rates or terms of liner services.

As regards its field of application, the preliminary draft Regulation only covered international sea transport from or to one or a number of Community ports. It thus already restricted to a certain extent the scope of the 'effect theory' flowing from the Treaty: Articles 85 and 86 apply to all agreements and practices that have economic consequences within the Community by affecting competition and trade, whatever the nationality or location of some or all of the parties.

9. The discussions with national experts revealed that the conditions for submitting a proposal for a Regulation having some likelihood of Council adoption were still not satisfied. The Member States' sea transport experts have so far appeared rather reluctant to contemplate any regulation which does not simply confine itself to endorsing the United Nations Code.

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<sup>1</sup> Last recital of Regulation No 954/79.

10. In these circumstances the Commission decided to postpone presenting its proposal to the Council. The Commission reaffirms the worldwide importance of the Code of Conduct for Liner Conferences to which the Community proposes to accede at a later date.

The Community's policy is to recognize the stabilizing role of liner conferences and at the same time to ensure that they do not infringe the competition rules laid down by the EEC Treaty. In the Commission's view, this policy implies that its proposal:

- (i) without running counter to the rules of the Code of Conduct, must not merely endorse those rules but must, where necessary, explicitly spell out points which the Code does not touch upon or on which its provisions are not mandatory;
- (ii) must obey the principles of the Treaty that apply to the whole economy as regards both the granting of exemptions from the prohibitions laid down in the competition rules and the scope of those rules, whilst possibly providing for procedures to avoid conflicts with the competition legislation of certain non-member countries which might prejudice important commercial and maritime interests of the Community.

These are the bases on which the Community will pursue consultations with the Member States, without prejudice to the normal investigation of certain complaints which may be found to reveal discriminatory practices by liner conferences.

## 2 — Air transport

11. In its Memorandum<sup>1</sup> on the Community contribution to the development of air transport services the Commission explained why it was necessary for the Council to adopt a regulation applying the competition rules to the industry. It undertook<sup>2</sup> to send the Council a proposal to this effect during the course of the year.

On several occasions Parliament emphasized the need for a regulation to confer on the Commission the powers of investigation and sanction necessary for a proper application of Articles 85 and 86 to the industry,<sup>3</sup> although such application should be gradual.

<sup>1</sup> Part 2, points 68 to 75; Ninth Report on Competition Policy, point 12.

<sup>2</sup> Memorandum annexed to the President's address on the programme for 1980.

<sup>3</sup> Notably in the Resolution of 17 October 1980 on restrictions on competition in the air transport sector, paragraph 16.

Furthermore, the Sterling Airways case<sup>1</sup> showed the difficulty the Commission faces without such powers in trying to apply the competition rules merely on the basis of Article 89 of the EEC Treaty.

12. The Commission therefore drew up a draft Regulation, which was discussed with national experts at two multilateral meetings.

As foreshadowed in the abovementioned Memorandum it was a purely procedural Regulation designed to give the Commission its own powers to investigate and punish infringements, powers which it lacks at present. In view of the changing environment of the industry and the need to acquire prior practical experience, the Commission considered it would be ill-advised to embark on granting exemptions for particular forms of agreements or practices.

The national experts attending the two multilateral meetings tended to take a somewhat wait-and-see attitude. However, most of the delegations wanted the Regulation to grant wide-ranging exemptions for scheduled services in regard to agreements on fares, capacity-sharing and even revenue.

13. The Commission has pointed out on several occasions that the scope of the procedural Regulation will have to be limited.

Articles 85 and 86 are directly applicable only to agreements and practices by undertakings arising from the exercise of their unfettered acts. Thus, the Regulation will assist the application of those Articles mainly in those sectors of the air transport market where the airlines appear to possess such freedom (i.e. charter services).

But it is in scheduled services that the competitive situation has given rise to complaints<sup>2</sup> as to its compatibility, particularly with regard to fares, with the provisions of Articles 85, 86 and 90. Governments usually have the final say in setting fares for scheduled services following negotiations between companies as expressly laid down in government agreements, whether the 1967 international agreement on establishing tariffs on scheduled air routes<sup>3</sup> to which most Member States belonging to the European Civil Aviation Conference (ECAC) are parties or, failing that, bilateral agreements between governments on rights of traffic. These negotiations often take place within the International Air Transport Association (IATA); the companies concerned file tariff recommendations with their governments, which are in principle free to adopt them or not.

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<sup>1</sup> Points 136 to 138 of this Report.

<sup>2</sup> By individual users and most recently by the European Bureau of Consumer Unions.

<sup>3</sup> Ratified by all Member States except the Federal Republic of Germany and Luxembourg.

In so far as the airlines' tariff practices merely carry out government instructions, the planned Regulation will not change the present situation, since Articles 85 and 86 cannot be applied directly to airlines. It is the conduct of the Member States involved and not that of the airlines that the Commission will have to challenge, by possibly maintaining that the conduct of the States concerned creates in the relevant market a situation incompatible with the Treaty rules.

The Commission does not exclude *a priori* that such a situation exists in air transport and that, as the sector concerned is one where in the main those undertakings referred to in Article 90(1) (public undertakings or undertakings to which Member States grant special or exclusive rights) operate, action could be taken against the Member States by means of Article 90(3) for infringement of Articles 90(1), 85 and 86.<sup>1</sup> This hypothesis is being tested and no conclusion has yet been reached; it is a complex legal question in view of the significant implications of the hypothesis for other government measures connected with prices.

However, even if the Commission were to come to the conclusion that it should take action under Article 90, it would still have to consider whether national air tariff regulations were contrary to Articles 85 and 86. This would necessitate in particular an extremely detailed study of the merits of the regulations themselves to ascertain whether they could qualify for exemption under Article 85(3) and of the relevant tariff levels in order to assess whether they involve any abuse within the meaning of Article 86. Such an investigation would inevitably take a long time. A comparison restricted to fares on other markets would not, for example, be sufficient to prove any abuse in fares within the Community. Abuse would have to be verified on a route-by-route and possibly fare-by-fare basis, notably by means of comparisons with related costs.<sup>2</sup> Moreover, the Council requested the Commission to look into the various fares charged in the Community to passengers on scheduled flights. This study is still in progress and will contribute valuable information to this assessment.

Finally, if the Commission arrives at the conclusion that the tariff regulations in themselves do not qualify for exemption under Article 85(3), or that the fare levels they set constitute abuse within the meaning of Article 86, the Commission will also have to consider whether such regulations or fare levels are necessary, in the light of Article 90(2), to the performance by the undertakings concerned of the 'particular tasks assigned to them'.

<sup>1</sup> In the case of undertakings not covered by Article 90(1), an Article 169 procedure would have to be used for infringements of Articles 5, 85 and 86.

<sup>2</sup> The number of regular intra-Community air routes alone lies between several hundred and several thousand, according to the category of airport considered; this gives an idea of the administrative problems involved in such a case-by-case examination.

These considerations will of course also have to take account of the special features of the air transport industry, as already mentioned by the Commission in its Memorandum.

14. In these extremely complex circumstances the Commission felt it was advisable to postpone submitting the proposal for a Regulation to the Council until it can take a final decision on possible courses of action open to it with a view to applying the rules of competition to the air transport industry.

#### § 4 — International Energy Agency

15. Since the formation of the International Energy Agency, the Commission has been vigilant to ensure that oil industry participation in the Agency's work and the inter-company cooperation which that implies are compatible with the rules of competition of the EEC Treaty. A specific problem arose in 1980 concerning the settlement by an arbitration centre of disputes that may arise from allocation procedures made in accordance with the International Energy Programme.

16. The Agreement on an International Energy Programme, dated 18 November 1974, provides, *inter alia*, for the establishment of an emergency sharing system as a joint effort of the governments of the participating countries. These governments have undertaken to develop a self-sufficiency in oil supplies in emergencies and to allocate available oil among themselves on an equitable basis during a supply shortage. Twenty-one countries have signed the agreement so far.<sup>1</sup> All Member States of the European Community except France are signatories. The Commission has observer status.

The Agreement also provides for an International Energy Agency which was created within the framework of the Organization for Economic Cooperation and Development.

##### 1 — *The institutional structure of the International Energy Agency*

17. The Agency has the following organs as provided for in Article 49 of the Agreement: a Governing Board, a Management Committee and four Standing Groups concerned with Emergency Questions, Oil Market, Long-term Cooperation and Relations with Producer Countries and Other Consumer Countries.

Detailed discussions mostly take place in the different Standing Groups, where preparations are made for the meetings of the Governing Board. Each Standing Group is composed of one or more representatives of the government of each participating country:

- (i) The Standing Group on Emergency Questions reviews, on a continuing basis, the effectiveness of the measures taken by each participating country to meet its

<sup>1</sup> Australia, Austria, Belgium, Canada, Denmark, Federal Republic of Germany, Greece, Ireland, Italy, Japan, Luxembourg, The Netherlands, New Zealand, Norway, Portugal, Spain, Sweden, Switzerland, Turkey, United Kingdom, United States.

emergency reserve commitments. Since what has been referred to as 'a creeping crisis' started early in 1979, the Group has also regularly monitored the oil supply situation.

- (ii) The Standing Group on the Oil Market deals with the information system on the international oil market. It decides how to present information and statistics on crude oil, and oil products, supply and movement, stocks, level of emergency reserves, availability and utilization of transport facilities and the levels of international supply and demand.

The Agreement provides for consultation with oil companies on any matters within their competence. For that purpose the oil industry has created two advisory bodies: the Industry Working Party and the Industry Advisory Board:

- (i) The Industry Working Party's task has mainly been to work out procedural recommendations in relation to the general information system provided for in the Agreement and to advise the Standing Group on the Oil Market.
- (ii) The Industry Advisory Board (IAB), composed of representatives of 16 major oil companies, has been established to assist the Standing Group on Emergency Questions by providing advice and consultation on emergency oil sharing and related questions; it has sub-committees to study and make recommendations on specific issues (e.g. supply and legal questions) related to the emergency sharing system. In the event of the activation of the system, the IAB will be responsible, through its appropriate *ad hoc* groups, for the practical execution of the allocation programme under the direct and close supervision of the Agency and its Secretariat.

Confidential emergency arrangements have been made for the cooperation of the oil companies in carrying out allocation procedures at international and national levels and these procedures are tested periodically.

## 2 — *The Commission's attitude to the International Energy Programme (IEP)*

18. The participation by the oil industry in the IEP raised questions of compatibility with competition law regimes and the companies themselves were very concerned that their cooperation would not be subject to attack on anti-trust grounds.

The consequences for the EEC competition rules were therefore examined by the Commission in 1976/77. They concluded that the arrangements described above were not in themselves incompatible with the rules of competition.



Two letters were addressed to the Chairman of the Emergency Questions Group, expressing the Commission's view and laying down certain conditions enabling the services of the Commission to make objections to amendments to the Agency rules, should the need arise, and to supervise on a permanent basis the participation by oil companies in the Agency's activities. The terms of the two letters require that the services of the Commission be informed of proposals for meetings of the IAB and its sub-committees, and the topics to be discussed. Its services have the right to be present at all such meetings and to receive record-notes of the meetings.

While these two letters, known as the 'clearance' letters, are sufficient to cover the day-to-day participation by the oil companies in the Agency's work, the involvement of oil company personnel in the periodic testing of allocation procedures at international and national level requires more specific and detailed clearances and these are provided, under appropriate conditions and on an *ad hoc* basis, to meet the needs of the exercise.

Finally it should be noted that by virtue of its observer status, the Commission can attend all Agency meetings, including those at which the IAB is represented, and receives copies of all relevant Agency documents.

### 3 — *Dispute Settlement Centre*

19. A specific legal problem which has arisen within the IEP concerns the solving of disputes arising from allocation procedures. It was felt that an international forum with particular experience in the oil field would be necessary. The services of the Commission participated in the preparatory work for setting up a Dispute Settlement Centre. The Charter for the Dispute Settlement Centre was adopted by the Governing Board on 23 July 1980. The rules of procedure are still under discussion.

The Tribunal set up under the Dispute Settlement Centre is intended to exercise jurisdiction only in disputes arising out of oil supply transactions during implementation of the emergency allocation of oil pursuant to the IEP. The Commission was concerned to ensure that the Tribunal and all awards given by the Tribunal comply with applicable Community law. Article XI of the Charter stipulates that awards are subject to enforcement in accordance with the applicable law of the State where enforcement is sought or in accordance with any applicable international obligation. The last sentence of the article reads: 'Recognition and enforcement of an award may be refused if the award is contrary to the public policy of the State in which recognition or enforcement is sought, including the law

of the European Communities in so far as it forms part of the public policy of that State, being a Member State of the European Communities'.

The Commission also made a statement which was incorporated in the conclusions of the Governing Board meeting, as follows:

'The effect to be given to the Charter and arbitration awards made pursuant to the Charter would depend entirely upon the legislation of each IEA country and, if applicable, its existing international obligations, and [the Commission] wishes to make it clear that Member States of the European Community have no power to exempt an award from any applicable rule of Community law. Indeed, they have a duty to ensure that the implementation of the Charter of the Dispute Settlement Centre is consistent with Community law.

Given the fact that the jurisdiction of the Dispute Settlement Centre is limited, in practice, to commercial matters, the Commission presumes that it is unlikely that awards made by the Dispute Settlement Centre would conflict with rules of Community law if the latter applied. However, if any conflict arose, the Commission would take all necessary measures to ensure continuing compliance with Community law.'

Article XI, and the Commission's statement are of considerable importance. *They express firstly that arbitration, even if set up under public law or under international law, remains subject to applicable Community law. Furthermore they reflect the Commission's view that the competition rules of the Treaty are public policy within the meaning of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 and should be so recognized by the national laws of Member States of the Community. Awards contrary to Community law cannot therefore be legally implemented.*

## § 5 — Merger control in the EEC sphere

20. In this Tenth Report on Competition Policy the Commission must once more refer to its proposal for a Council Regulation on merger control which was submitted to the Council on 20 July 1973.<sup>1</sup> Parliament and the Economic and Social Committee were consulted by the Council and approved the proposal by large majorities on votes taken respectively on 12 and 28 February 1974.<sup>2</sup>

Despite initial progress the Council has still not been able to terminate its work on the proposal. Politically, the major outstanding problems concern:

- (i) the legal basis of any such Regulation which the Commission feels should refer not only to Article 87 but also Article 235 of the EEC Treaty;
- (ii) a clearly-defined sharing of responsibilities between the national and Community authorities in applying the relevant national law and implementing a future Community law;
- (iii) closer association by the Member States in the Commission's decision-making process when establishing that a given merger is incompatible with the common market rules of competition or when granting exemption to these rules on account of other objectives.

The Commission remains convinced that it is essential to introduce an instrument for the more systematic control of large-scale mergers at Community level if the Community as such is to be able to take effective action, when necessary, to deal with changes in structure likely to jeopardize the maintenance of effective competition in the common market. Moreover, it notes that during the preparatory stages a broad consensus emerged within the Council on the principle itself of such a Regulation.

21. Since the Regulation has not been adopted, the Commission, at the request of the firms concerned or acting on its own initiative, continues to monitor, pursuant to Article 86, the main mergers that take place in order to ensure that they do not conflict with the provision prohibiting the abusive strengthening of a pre-existing dominant position.<sup>3</sup>

Developments in Commission decision-making and in the case-law of the Court with regard to the abusive conduct of dominant undertakings provide an indication

<sup>1</sup> Third Report on Competition Policy, point 1.

<sup>2</sup> Fourth Report on Competition Policy, point 17.

<sup>3</sup> See points 150 to 157 of this Report.

of the scope for merger control afforded by the *Continental Can* doctrine, when re-examined in the light of more recent judgments (*Sugar, United Brands, Hugin/Liptons and Hoffmann-La Roche*).

Furthermore, in keeping with the spirit of its proposal for a Regulation which provided that mergers having consequences incompatible with the rules of competition could be exempted on the basis of more important considerations, defined at discussions within the Council as being in particular those pertaining to industrial and social policy, the Commission is examining whether it should take into consideration, within the limits of Article 86, the impact of any prohibition on industrial development and its social consequences.

This problem could arise, especially in current economic circumstances, when assessing whether such provisions should be applied to a firm's merger with a large group in a case where this might prove to be either the only practicable way of forestalling plant closures and redundancies or essential to the continuing profitability of an undertaking located in a depressed area or in an industry encountering difficulties.

## § 6 — Cases decided by the Court of Justice

22. The judgments given by the Court of Justice in 1980 with regard to the competition rules applying to undertakings are of great significance as regards both substantive and procedural matters.

### 1 — *Substantive matters:* *interpretation and application of Article 85*

23. A number of judgments shed fresh light on the scope of Article 85(1) and (3) in general and, more particularly, with regard to selective distribution agreements.

In the former case, two judgments were given in proceedings for the annulment of two Commission Decisions.<sup>1</sup>

In the latter case, four judgments were given in response to references for a preliminary ruling by the Paris Tribunal de Grande Instance,<sup>2</sup> the Paris Tribunal de Commerce,<sup>3</sup> the Haarlem Arrondissementsrechtbank<sup>4</sup> and the Antwerp Rechtbank van Koophandel<sup>5</sup> respectively, in connection with disputes relating to refusals to supply or proceedings to terminate practices involving unfair competition between French manufacturers of perfumery, beauty products and toiletries on the one hand and retailers and wholesalers in France, The Netherlands and Belgium on the other.

On 10 July 1980, the Court delivered three judgments, referred to below as the 'Perfume' decisions, in response to the first three references.<sup>6</sup> The judgment relating to the fourth reference, referred to below as the 'Oréal' decision, was delivered on 11 December 1980.<sup>6</sup>

<sup>1</sup> Joined Cases 209 to 215 and 218/78 *Heintz van Landewyck and Others v Commission*: not yet reported in ECR; see also Commission Decision of 20.7.1978 *Fedetab*: OJ L 224, 15.8.1978; Eighth Report on Competition Policy, points 111 to 113. Case 30/78 *The Distillers Company Ltd v Commission*: not yet reported in ECR; see also Commission Decision of 20.12.1977 *Distillers*: OJ L 50, 22.2.1978; Seventh Report on Competition Policy, point 125.

<sup>2</sup> Joined Cases 253/78 and 1 to 3/79 *Procureur de la République and Others v Guerlain SA, Rochas SA, Lanvin SA and Nina Ricci Sàrl*.

<sup>3</sup> Case 37/79 *Anne Marty SA v Estée Lauder*.

<sup>4</sup> Case 99/79 *Lancôme SA and Cosparfrance Nederland BV v Etos BV and Albert Heijn Supermart BV*.

<sup>5</sup> Case 31/80 *L'Oréal SA v De Nieuwe Amck SPRL*.

<sup>6</sup> Not yet reported in ECR.

## 1. Article 85(1)

### A. General considerations

#### (a) Meaning of restrictive practice

24. In the *Fedetab* case, the question arose of the status of a recommendation from an association of undertakings which was approved and implemented by several of its members.

In its decision, the Commission had considered that this recommendation constituted both an agreement between undertakings and a decision by an association of undertakings. In particular, it had emphasized the binding nature of the recommendation. The applicants had challenged this interpretation.

The Court confirmed the Commission's point of view. It considered that since the undertakings concerned had approved notification of the recommendation and had faithfully adhered to it for several years, the recommendation was an accurate reflection of the undertakings' intended conduct on the market and accordingly satisfied the conditions required for the application of Article 85(1). Like the Commission, the Court did not consider it necessary to draw a clear dividing line between the concepts of agreement, decision or concerted practice.<sup>1</sup>

The Court also considered, as did the Commission, that the recommendation in question, although adopted by a non-profit-making association, could also be described as a decision by an association of undertakings since it was binding on all its members. Even if the recommendation had not been binding Article 85(1) would still have applied to the case in point since the prohibition of restrictive practices also covers the actual conduct of an association or its members to the extent that it tends to give rise to the restrictive effects which this article proscribes.<sup>2</sup>

#### (b) Restriction of competition

25. The *Fedetab* case has again highlighted a problem on which the Court had already given a ruling in the 'Sugar' case,<sup>3</sup> namely the extent to which Article 85

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<sup>1</sup> Ground 86.

<sup>2</sup> See also the judgments of the Court in Cases 67/63 *Sorema* [1964] ECR 321, 347; Case 90/76 *Van Ameyde v UCI* [1977] ECR 1091; Seventh Report on Competition Policy, point 52; Commission Decision *BDS*, point 111 of this Report.

<sup>3</sup> Joined Cases 40 to 48, 50, 54 to 56, 111, 113 and 114/73 *Suiker Unie and Others v Commission* [1975] ECR 1663, 1914 *et seq.*

still applies to restrictive practices relating to a market in which competition is already sharply restricted as a result of measures taken by the public authorities.

According to the Court of Justice, the answer to this question depends on the circumstances of each case. In this connection, it is crucial to establish whether the measures taken by the State neutralize practically all the factors likely to promote effective competition or whether, on the other hand, there is residual though genuine scope for autonomous action on the part of undertakings.

26. Thus in the *Fedetab* case, Belgian tax and price control legislation had virtually excluded any opportunity for undertakings to compete with one another as regards retail selling prices. However, this legislation did not affect competition as regards wholesalers' and retailers' profit margins, end-of-year rebates and terms of payment. It is precisely competition in these areas that the undertakings concerned tended to preclude by means of the restrictive practices complained of by the Commission.

After pointing out that Article 85(1) prohibits any restriction of competition at any level of trade between the manufacturer and the ultimate consumer the Court reached the conclusion that each of the measures in question had restricted competition to an appreciable extent.

27. The Court, moreover, reaffirmed that it was sufficient to establish that the provisions adopted by the undertakings were clearly designed to achieve such restrictions without there being any need to consider whether and to what extent they had been implemented. The Court thus enables the Commission to avoid having to carry out a detailed analysis of the effects of a practice the object of which is indisputably restrictive.

(c) *Effect on trade between Member States*

28. This condition for the application of Article 85(1) has also been considered from a practical angle in recent decisions of the Court.

29. The *Fedetab* judgment defines the scope of the competition rules laid down in the EEC Treaty in a situation where administrative barriers to intra-Community trade exist. The undertakings concerned had maintained that, as a result of the differences in the taxation of manufactured tobacco in the Member States and the

impossibility of effecting parallel imports under the Belgian tax system, their restrictive practices governed only a national situation.

The Court rejected this argument. Referring to its earlier case-law,<sup>1</sup> it considered whether the restrictions of competition in regard to profit margins, end-of-year rebates and terms of payment were likely to deflect trade in manufactured tobacco from the course which it would otherwise have taken. In the present case, the impact on trade was most marked on large-scale imports effected by manufacturers who were members of Fedetab (51% of cigarettes and 12 to 14% of cigars imported into Belgium, or approximately 5% of cigarettes and 10% of cigars sold in Belgium). According to the Court, in taking concerted action on the fundamental aspects of the conditions of sale to be applied to intermediaries, the undertakings had further appreciably reduced any inducement the latter might have to encourage, as consideration for individual pecuniary benefits, the sale of certain imported products as opposed to others.<sup>2</sup>

Consequently, the Court concluded that these restrictions of competition were likely to appreciably affect trade between the Member States.

30. The Distillers judgment clarifies another aspect of the effect of restrictions on intra-Community trade. Even where a product is neither imported from nor exported to another Member State, an agreement relating to the prices charged for that product does not necessarily escape the prohibition laid down in Article 85(1).

Although it is true that that prohibition does not apply to agreements which affect the market only to an insignificant extent, having regard to the weak position which those concerned have in the market in the products in question, the same considerations do not apply in the case of a product of a large undertaking responsible for the entire production.<sup>3</sup>

### *B. Selective distribution agreements*

31. The Lancôme and Oréal cases presented the Court with an opportunity to answer several questions concerning the compatibility of selective distribution systems with Article 85(1).

<sup>1</sup> Case 56/65 *Société technique minière v Maschinenbau Ulm* [1966] ECR 337.

<sup>2</sup> Ground 172.

<sup>3</sup> Ground 28.



The Court recalled firstly that selective distribution systems constituted an aspect of competition which accorded with Article 85(1) provided that resellers were chosen on the basis of objective criteria of a qualitative nature relating to the technical qualifications of the reseller and his staff and the suitability of his trading premises and that such conditions were laid down uniformly for all potential resellers and were not applied in a discriminatory fashion.<sup>1</sup>

In order to determine the precise nature of these 'qualitative' criteria for choosing resellers, it is also necessary to examine whether the properties of the product in question require, for the purpose of preserving its quality and ensuring that it is used correctly, a selective distribution system, and whether these objectives have not already been attained by national legislation on the right to take up the occupation of reseller or by conditions of sale in respect of the product in question. Finally, it is necessary to verify whether the criteria laid down do not go beyond that which is necessary.<sup>2</sup>

According to the Court, the obligation to contribute to the setting up of a distribution system, undertakings regarding turnover and obligations relating to minimum levels of purchases and stocks exceed what is necessary for a selective distribution system based on qualitative requirements.<sup>2</sup>

Agreements laying down a system of selective distribution based on criteria for admission which go beyond a simple objective selection of a qualitative nature exhibit features making them incompatible with Article 85(1) where such agreements, either individually or together with others, in the economic and legal context in which they are concluded and on the basis of a body of objective features of law and fact, are capable of affecting trade between Member States and have as either their object or their effect, the prevention, restriction or distortion of competition.<sup>2</sup>

Translating this principle into practice, the Court of Justice stated that the national court should in particular take into consideration the existence, if any, of similar contracts as well as the consequences of the agreement in question on the possibility of effecting parallel imports.

<sup>1</sup> Ground 20, Case 99/79; see also Case 26/76 *Metro* [1977] ECR 1875.

<sup>2</sup> Ground 16, Case 31/80.

## 2. Article 85(3)

32. Lastly, the Fedetab judgment clarifies the conditions governing exemption from the prohibition of restrictive agreements.

According to the Court, the powers conferred on the Commission under Article 85(3) show that the need to maintain effective competition can be reconciled with the need to safeguard objectives of a different nature and that, to this end, certain restrictions of competition are admissible where they are indispensable to the attainment of those objectives and do not result in the elimination of competition in respect of a substantial part of the common market.<sup>1</sup>

Applying this principle, the Court considered whether the maintenance in Belgium of a traditional very dense distribution network comprising, *inter alia*, 80 000 retailers, which was the agreement's stated objective, constituted a benefit that was sufficient to offset the disadvantages resulting from the severe restrictions of competition, an argument advanced by the undertakings concerned but rejected by the Commission.

The Court considered that the number of intermediaries and brands did not necessarily constitute the essential criterion for improving distribution within the meaning of Article 85(3). The quality of a distribution sector depends mainly on its commercial flexibility and its capacity to react to stimuli from both manufacturers and consumers. As far as the latter point is concerned, effectiveness of distribution implies particularly that it should be able to focus on those products which are most sought after by consumers and also depends on its ability to adjust to new purchasing habits which consumers may adopt.<sup>2</sup>

In view of the fact that sales of cigarettes by supermarkets have grown at a much faster rate than sales by other resellers to consumers, despite the fact that supermarkets stock only a limited number of the full range of cigarette brands sold on the Belgian market, the Court expressed serious doubts as to whether an effective improvement in the distribution of cigarettes would come about as a result of the agreement. It did not, however, give a final ruling on this matter since the agreement enabled the member firms of Fedetab (whose share of total sales of cigarettes in Belgium was over 80%) to eliminate competition in respect of a substantial part of the products in question. Under Article 85(3)(b), this ruled out the granting of exemption.<sup>2</sup>

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<sup>1</sup> Fedetab judgment, Ground 176.

<sup>2</sup> Fedetab judgment, Ground 184.

## 2 — Procedural matters

33. A number of judgments provide considerable clarification of the law of procedure in the field of competition.

The conditions governing notification,<sup>1</sup> its effects,<sup>2</sup> the extent of the Commission's power with regard to inspection,<sup>3</sup> the rules to be complied with in the course of infringement procedures,<sup>4</sup> the legal nature and the effects of letters indicating the Commission's opinion that there is no need for it to take further action,<sup>5</sup> and the circumstances in which the Commission may take interim measures in the event of an alleged infringement of Articles 85 and 86<sup>6</sup> have thus been more clearly defined.

### 1. Notification

#### (a) Obligation to notify

34. The question of whether, for the purpose of obtaining exemption under Article 85(3), the parties must notify their agreement in accordance with Article 4(1) of Regulation 17, or whether the agreement in question need not be notified, pursuant to Article 4(2), is of considerable practical significance.

Article 4(2)(1) provides that there is no obligation to notify agreements to which the only parties are undertakings from one Member State and which do not relate either to imports or to exports between Member States.

Article 4(2)(2) lays down the same provisions in respect of certain vertical agreements to which not more than two undertakings are party.

35. In the *Fedetab* case, the Court confirmed the Commission's view that these two provisions must be interpreted strictly. The Court accordingly held that a decision of an association of undertakings comprising some 150 Belgian manufacturers, importers and distributors of tobacco products and one Luxembourg company, and an agreement entered into by that association and a

<sup>1</sup> *Fedetab* and *Distillers* judgments referred to above.

<sup>2</sup> Case 106/79 *Vereniging ter bevordering van de belangen des boekhandels and Others v Eldi Records*, referred to below as *VBBB* [1980] ECR 1137.

<sup>3</sup> Case 136/79 *National Panasonic (UK) Ltd v Commission*: not yet reported in ECR; see also Ninth Report on Competition Policy, point 137.

<sup>4</sup> *Fedetab* judgment referred to above.

<sup>5</sup> *Perfume* and *Oréal* judgments referred to above.

<sup>6</sup> Court Order in Case 792/79R *Camera Care Ltd v Commission* [1980] ECR 119.

Belgian wholesalers' association were not eligible for exemption under Article 4(2)(1).

The Court also dismissed the argument that the commitments made to Fedetab by its members and the agreements on prices and terms of sale concluded between some of its members and their customers at the instigation of the association should be considered individually and therefore constituted bilateral agreements within the meaning of Article 4(2)(2)(a). The Court held that they were, on the contrary, collective measures to which the undertakings were party through their association, which in fact acted on behalf of its members.

(b) Form of notification

36. The Court also adopted a very narrow interpretation of the prescribed forms of notification.

Article 4 of Commission Regulation No 27/62, as amended by Regulation No 1133/68,<sup>1</sup> provides that 'notifications shall be submitted on Form A/B as shown in the Annex to this Regulation and shall contain the information asked for in Form A/B'. Use of the form is thus obligatory and is an essential prerequisite for the validity of the notification. This requirement takes into account the need expressed in Article 87(2)(b) of the Treaty, as part of the detailed rules for the application of Article 85(3), 'to ensure effective supervision on the one hand, and to simplify administration to the greatest possible extent on the other'.<sup>2</sup>

37. In the Fedetab and Distillers cases, therefore, the Court refused to regard as having been properly notified agreements which had been communicated to the Commission in reply to a request for information pursuant to Article 11(2) of Regulation 17. Since the agreements in question were not exempt from the requirement of notification, the Commission was not required to determine whether or not they fulfilled the basic conditions for exemption.

38. The Court has held, however, that where the full text of an agreement is annexed to the notification form, that agreement is properly notified, even if only some of its articles are referred to on the form. 'By means of the notification, the Commission must be given the information necessary to enable it to take the decisions provided for in Regulation No 17/62. Where the agreement is in writing

<sup>1</sup> OJ L 189, 1.8.1968.

<sup>2</sup> Fedetab judgment, Grounds 61 and 62.

and a copy of the full text is annexed to the form, the sole purpose of the information given on the form is to simplify administration. If the information given is correct and if, in particular, it genuinely relates to the measures which, at the time, were felt to be the most significant, the aims of notification would appear to be achieved. In that case, the agreements must be regarded as having been duly notified as a whole, except where the intention to notify only part of the agreement is clearly apparent from the information given'.<sup>1</sup>

(c) Effects of notification

39. Notification has a threefold significance: where it is obligatory, it is an essential prerequisite for the granting of exemption by the Commission (Articles 4(1) and 5(1) of Regulation 17); undertakings are not subject to the imposition of fines (Article 15(5) of Regulation 17); and, lastly, in accordance with the decisions of the Court, it enables provisional validity to be ascribed to existing agreements.

As regards the last point, it is particularly important to make a clear distinction between existing and new agreements.

40. In the *VBBB* case, the question arose of whether a duly notified agreement can no longer be regarded as an existing agreement on the ground that some of the products covered by the notification were temporarily and deliberately excluded from the scope of the agreement and later re-introduced into it.

Rejecting the interpretation of one of the parties to the dispute before the national court, the Court stated that this was not the case.

41. It must be noted that the Court confined its interpretation strictly to the case in point, namely, the deliberate and temporary limitation of the scope of the agreement notified. It did not rule on whether changes to the agreement had any effect on the validity of the initial notification or the possible provisional validity of the agreement.

The Commission believes that changes which affect the substance of the agreement or make it appreciably more restrictive by broadening its scope require further notification.

<sup>1</sup> Judgment in *VBBB and Others v Eldi Records*, Ground 10.

## 2. Investigation

42. As the Commission indicated in its previous report,<sup>1</sup> it has been increasingly obliged to take formal decisions in regard to investigations<sup>2</sup> under Article 14(3) of Regulation 17 in order to be fully able to investigate possible infringements.

43. In the Panasonic case, the Court had an opportunity to give a ruling on whether the Commission may carry out investigations following a formal decision without having first endeavoured to carry out the investigations using a written authorization given to its officials and without informing the undertakings in question in advance.

The Court gave a positive ruling, confirming the position of the Commission. The Court rejected Panasonic's submission that, by analogy with Article 11 of Regulation 17, investigation must follow a two-stage procedure, in which the informal stage must precede the formal stage.

The Court held that Regulation 17 laid down separate procedures for requests for information and investigations and that these procedures were not subject to the same conditions, since they fulfilled different requirements. While Article 11 gives the Commission the necessary powers to obtain the information it requires in order to take decisions with full knowledge of the facts on cases referred to it, Article 14 enables the Commission to verify the accuracy and scope of information which is already in its possession. In the first case, the cooperation of undertakings is essential, while this is not so in the latter case.

One of the aims in providing for investigations following a formal decision is to avoid the possibility of investigations on the basis of a written authorization being refused. The Court does not regard this procedure as infringing the rights of the party concerned to be heard before a decision adversely affecting him is taken and to organize his defence. It holds that the exercise of such a right of defence is embodied primarily in administrative or court proceedings for the termination of infringements or the establishment of a legal incompatibility.<sup>3</sup> The sole purpose of the investigation procedure, however, is to enable the Commission to obtain the information necessary to verify the accuracy and implications of a particular factual and legal situation.

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<sup>1</sup> Ninth Report on Competition Policy, point 134.

<sup>2</sup> In 1980, the Commission was obliged to take a formal decision in order to carry out investigations in 20 cases.

<sup>3</sup> Respect for the rights of the defence was expressly recognized by the Court as a fundamental principle of Community law (Case 85/76 *Hoffmann-La Roche* [1979] ECR 461, 511; Ninth Report on Competition Policy, point 25).

In the latter case, the right to a prior hearing, as laid down in Article 19(1) of Regulation 17, cannot be invoked.

This provision of Community law is not incompatible with fundamental rights and, in particular, with Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950, which states that: 'Everyone has the right to respect for his private and family life, his home and his correspondence'.

This same article provides for an exception to the principle of non-interference by a public authority with the exercise of this right, where such interference is in accordance with the law and is necessary for the protection of the general interest. The measures taken pursuant to Regulation 17, which are designed to maintain competition as required by the Treaty, are fully consistent with this condition.

### 3. Rules to be followed in the administrative procedure

44. The Fedetab case gave the Court the opportunity to clarify a number of rules designed to ensure the proper functioning of the administrative procedure with due respect, *inter alia*, for the rights of the parties concerned and of third parties to make their views known in regard to the subject matter of the procedure.

The Court held that there is nothing to prevent the Commission from using the same procedure to deal with a number of complaints in regard to a single infringement, which have been filed in succession, or from taking a single decision in regard to all of them. Where a complaint filed subsequently does not incorporate all of the initial complaint but relates only to a point that arises in its general context, it is not necessary, for the purpose of ensuring respect for the rights of the defence, to deliver a new statement of objections. It is sufficient to inform the undertakings concerned of the filing of the second complaint and to obtain their written views on the subject.

45. Confirming its earlier decisions,<sup>1</sup> the Court also emphasized that the statement of objections may be confined to a brief, but clear, statement by the Commission of the essential facts on which its position is based, provided that the Commission furnishes the information necessary for the defence in the course of the administrative procedure. It is not obliged in this respect to forward to the

<sup>1</sup> See, *inter alia*, the recent judgment in Case 85/76 *Hoffmann-La Roche* [1979] ECR 461, 511; Ninth Report on Competition Policy, point 25.

undertakings concerned all the documents on which its objections are based, but only those relating to the essential facts.

46. Where the undertaking concerned wishes to avail itself of the right, pursuant to Article 3(3) of Regulation 99/63/EEC on hearings,<sup>1</sup> to present witnesses who may corroborate the facts set out, it must state this clearly in its written reply to the written statement.

If third parties showing a sufficient interest apply to be heard pursuant to the second sentence of Article 19(2), the Commission's obligations towards them are fulfilled if it affords them the opportunity of making known their views in writing. It is not, in general, obliged to afford them a subsequent oral hearing, except where they are again able to show a legitimate interest in such a hearing.

47. Admittance as parties to the administrative procedure does not, however, confer on third parties, or *inter alia* the complainants, the right to acquire confidential information submitted to the Commission by the undertakings concerned. Even in the course of this procedure, the Commission is obliged to respect the obligation of professional secrecy, pursuant to Article 20(2) of Regulation 17. In this respect, the Court has emphasized that, although information in the nature of a professional secret, when communicated to a trade association by its members, ceases to be so regarded by the members of the association, it remains a professional secret as far as third parties are concerned.<sup>2</sup>

Transmission by the Commission of such information to a complainant third party would, however, entail annulment of the decision only if it were established that, in the absence of such a procedural defect, the substance of the contested decision might have been different.<sup>3</sup>

48. The Court has reaffirmed that the grounds for a decision need not necessarily be a copy of the statement of objections. The Commission must take account of the facts established during the administrative procedure and either drop objections which prove not to be well founded or reinforce and supplement the factual and legal bases of its submissions in support of the objections it maintains.<sup>4</sup>

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<sup>1</sup> OJ 127, 20.8.1963.

<sup>2</sup> *Fedetab* judgment, Ground 46.

<sup>3</sup> *Fedetab* judgment, Ground 47.

<sup>4</sup> *Fedetab* judgment, Ground 68.



The Commission is not obliged to discuss in its decision all the factual and legal points raised by each party. Lastly, it is not obliged to make the file available to the applicant once the decision has been taken.

The Court thus defined the limits to the right to be heard and its exercise in the course of the administrative procedure.

49. Confirming its earlier decisions, which stated that the procedure adopted by the Commission in respect of restrictive practices and dominant positions is administrative rather than judicial in nature, the Court also stressed that, while the Commission is obliged to respect the procedural safeguards laid down in Community law, it cannot be held to be a court within the meaning of Article 6 of the European Convention on Human Rights.<sup>1</sup> It is not, therefore, obliged to organize its procedure in the manner of court proceedings.

#### 4. Letters terminating a procedure

50. In the Perfume and Oreal judgments, the Court gave a ruling on the Commission's standard practice of discontinuing preliminary investigations initiated in respect of restrictive practices which may be caught by the prohibition laid down in Article 85(1) without taking a formal decision, where it considers that, on the basis of the information at its disposal, it should not take action in respect of the restrictive practice in question. In such cases, the Commission informs the undertakings concerned of its opinion in writing, stating that the file on the matter can therefore be formally closed.

51. The Court regards these notifications as being simply administrative letters. Such letters, which are sent to the undertakings concerned by the Directorate-General for Competition without publication of a summary, as laid down in Article 19(3) of Regulation 17, or a decision, as laid down in Article 21(1) of that Regulation, clearly do not constitute either decisions granting negative clearance or decisions pursuant to Article 85(3), as defined in Articles 2 and 6 respectively of Regulation 17.

Such letters, which are based solely on the facts made known to the Commission, cannot be relied upon as against third parties and they do not prevent national courts, when deciding whether the agreements in question are incompatible with

<sup>1</sup> This article states that, in the determination of his civil rights and obligations, everyone is entitled to a fair hearing by an independent and impartial tribunal.

Article 85, from arriving at a different assessment of the agreements concerned in the light of the information available to them. While such letters are not binding on national courts, the opinion expressed therein nevertheless constitutes a matter of fact which the courts may take into account.

The letters do not, moreover, have the effect of suspending, within the meaning of Article 9(3) of Regulation 17, the competence of the national authorities to apply the prohibitions laid down in Articles 85(1) and 86. This provision presupposes that the Commission demonstrates its intention, by an official act, of taking a decision pursuant to the competition rules, whereas letters terminating a procedure indicate that it does not intend to take a decision.

The competence of the civil courts based on the direct effect of the prohibitions is clearly not called into question, since there is no reference to it in Article 9(3) of Regulation 17.<sup>1</sup>

52. Such letters are, however, essential for the proper administration of the competition policy. They also have a direct legal effect, since they terminate the provisional validity accorded to existing agreements upon their notification. While legal certainty in regard to contracts requires that, where an agreement has been notified in accordance with Regulation 17, the court may declare it automatically void only after the Commission has taken a decision pursuant to the regulation, it is no longer justifiable to maintain this protection where the Commission has informed the parties concerned that it has terminated the procedure which relates to them. It is unlikely that the Commission will thereafter exercise its power to grant an exemption, possibly with retroactive effect, in respect of the agreements in question. There is, moreover, nothing to prevent the court in which jurisdiction is again vested from taking into account the opinion of the Commission as well as its decisions in their entirety. In any event, undertakings which have notified their agreements continue to be immune from the payment of fines.

## 5. Interim measures

53. In an increasing number of cases, complainants are referring to the Commission suspected infringements of the competition rules with the request that it intervene quickly in order to safeguard their vital interests. These complaints in general concern contested mergers, refusals to supply or pricing practices which are regarded as unfair.

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<sup>1</sup> This question was resolved in the judgment in Case 127/73 *BRT(I)* [1974] ECR 51.

In view of the inevitable length of the normal administrative procedure leading to a decision on the merits, the Commission can, as a general rule, satisfy this type of request only by taking an interim decision using an accelerated procedure.

The question arises, therefore, of whether and to what extent it has this power under the Community competition rules.

54. Under the third subparagraph of Article 66(5) of the ECSC Treaty, the Commission may at any time take such interim measures of protection as it may consider necessary to safeguard the interests of competing undertakings and of third parties. This power, for which express provision is made only in respect of concentrations between undertakings as laid down in paragraphs 1 to 6 of Article 66, has been accorded recognition by the Court in cases of abuse of a dominant position as defined in Article 66(7).<sup>1</sup>

55. Although the EEC Treaty does not expressly confer such a power upon the Commission, the Court has also recognized its right to take interim measures.<sup>2</sup> This right derives from Article 3 of Regulation 17, which states that where the Commission, upon application or upon its own initiative, finds that there is infringement of Article 85 or Article 86, it may by decision require the undertakings concerned to bring such infringement to an end. The power to take decisions, which is the central element of Article 3, may be exercised in successive stages. The Commission may accordingly take such interim measures as are essential to enable it to carry out its tasks effectively and to ensure, *inter alia*, that any decisions it may take requiring undertakings to bring infringements to an end have the required effect.<sup>3</sup>

Such an interpretation is necessary in order to make competition law effective and safeguard the legitimate interests of the Member States or undertakings concerned. The Court holds that it may be necessary under some circumstances to take protective measures, where the competition practices of certain undertakings are injurious to some Member States or prejudicial to other undertakings, or where they call into question the Community's competition law in a manner that is unacceptable. Under such circumstances, it is essential to avoid irreparable damage being caused during the preliminary investigation stage which cannot be remedied

<sup>1</sup> Order of the President of the Court in Case 109/75R *National Carbonising Co. v Commission* [1975] ECR 1193.

<sup>2</sup> Order of the Court in Case 792/79R *Camera Care* [1980] ECR 119.

<sup>3</sup> Paragraph 18.

by any decision the Commission might take at the end of the administrative procedure.<sup>1</sup>

56. The Court has stated, moreover, that such measures may be taken only in duly established cases of urgency with a view to remedying a situation which may cause serious and irreparable damage to the party who has requested such measures or intolerable harm to the general interest. They must be interim, protective measures and must be confined to what is necessary in that particular situation. In taking such measures, the Commission must respect the essential safeguards accorded to the parties concerned by Regulation 17, *inter alia* the right to a hearing laid down in Article 19. The decisions taken must be in a form which renders them subject to appeal before the Court of Justice by any party who regards himself as being adversely affected.<sup>2</sup>

57. It is the Commission's intention to apply rigorously the criteria thus laid down. For example, it believes that the urgency which would justify the adoption of interim measures can be established only in exceptional circumstances, *inter alia* where the applicant undertaking is in danger of disappearing from the market or incurring a major commercial loss, for which it cannot obtain compensation, or can do so only with considerable difficulty, by means of an action brought before a national court.

The application for interim measures must be made in conjunction with a formal complaint, which must, *prima facie*, appear well founded and which must, therefore, be adequately substantiated and contain as much precise information as possible.

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<sup>1</sup> Paragraph 14.

<sup>2</sup> Paragraph 19.

## *Chapter II*

### **Commission involvement in work concerning restrictive practices in international trade**

58. The Commission continued to play an active part in the work being done by the OECD and UNCTAD on competition matters and, in particular, on restrictive practices in international trade.

It also increased, principally through bilateral contacts, its cooperation with the authorities of non-member countries responsible for competition matters.

#### **§ 1 — OECD**

59. On 6 November 1980 the Working Party on the position of the professions in relation to competition rules held its first meeting, which was devoted to the methods of carrying out the study.

The Working Party set up to study the difficulties encountered in the gathering of information abroad in the field of restrictive practices continued its work. It examined the powers of inquiry which the various authorities possess both at national and at international level and the limits placed on the exercise of such powers in the case of undertakings situated outside the territory of the authorities concerned. The Working Party will try to outline proposals for a solution regarding the latter point.

The report published by the Working Party which considered concentration and competition policy<sup>1</sup> is now available. It recommends, in particular, that member countries be asked to take three series of measures, namely an increase in the amount of data available relating to concentration, publication of international data on concentration and a strengthening, or the more effective implementation,

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<sup>1</sup> OECD, 'Concentration and Competition Policy', 1979, Paris.

of the competition rules of those countries which are concerned at the level of concentration.

The current work of the OECD in this field includes an examination of the feasibility of updating data concerning mergers and concentrations and of the legislative position in this field.

The Working Party which studied the problem of purchasing power submitted its report to the Council, which adopted it and authorized its publication. The report analyses the causes, visible signs and effects of purchasing power, summarizes the methods laid down by law and regulation that are used to combat the harmful effects of this phenomenon and suggests certain measures that might be taken.

## § 2 — UNCTAD

### Principles and rules on restrictive business practices

60. The United Nations Conference on Restrictive Business Practices held its second session from 8 to 22 April 1980.<sup>1</sup> At its closing meeting, on 22 April 1980, it approved a 'Set of multilaterally agreed equitable principles and rules for the control of restrictive business practices' and transmitted it to the General Assembly at its 35th session for its adoption as a resolution. It also recommended that the General Assembly, five years after the adoption of the Set of principles and rules convenes a further United Nations Conference for the purpose of reviewing the Set.

The General Assembly adopted the Set of principles and rules on 5 December 1980.

This world-wide code on restrictive business practices is addressed to States and enterprises. Its principles and rules are not legally binding. Its main objective is to ensure that restrictive business practices do not impede or negate the realization of benefits that should arise from the liberalization of tariff and non-tariff barriers affecting world trade, particularly those practices affecting the trade and development of developing countries, because these countries in general do not dispose of adequate means to control restrictive business practices.

The principles and rules for enterprises apply to all enterprises including those which are under State control or ownership. However, the code does not apply to intergovernmental agreements, nor to restrictive practices caused by such agreements.

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<sup>1</sup> Ninth Report on Competition Policy, points 38 to 40.

In order to ensure the equitable application of the Set of principles and rules States are encouraged to take into account in their control of restrictive business practices the development, financial and trade needs of developing countries. Thus the principle of preferential or differential treatment for developing countries has been recognized without there being an automatic exception in favour of developing countries or their enterprises.

States are also requested to take due account of the extent to which the conduct of enterprises is accepted or required under applicable legislation or regulations of another State. Thus, the principle of 'comitas' should guide the resolution of conflicts of policy between States in their control of restrictive business practices affecting international trade.

According to Section D3 of the code, enterprises, engaged on the market in rival or potentially rival activities, should refrain from agreements or arrangements which limit access to markets or otherwise unduly restrain competition, in particular from price fixing agreements, collusive tendering, market or customer allocation arrangements, allocation of sales and production quotas and concerted refusals to deal.

Under Section D4 enterprises are asked to refrain from abusing a dominant position of market power by way of anti-competitive acts such as predatory or discriminatory pricing, measures to increase their market dominance by way of external growth, vertical price fixing, refusal to deal, tying and imposing restrictions on resale or export.

The principles laid down in Sections D3 and D4 of the code correspond largely to those contained in Articles 85 and 86 of the Treaty of Rome. This is also true with respect to intra-enterprise restrictions to which the code only applies to the extent that there is an abuse of a dominant position of market power such as a practice not appropriate to the allocation of functions within an economic entity and having restrictive effects outside the related enterprises.

States are encouraged to adopt and enforce appropriate legislation for the control of restrictive business practices but also to ensure treatment of enterprises which is fair, non-discriminatory and in accordance with established procedures of law. States are also encouraged to collaborate more effectively in this field at the international level and consult each other in regard to issues of mutual concern.

61. Within the framework of UNCTAD an Intergovernmental Group of Experts on Restrictive Business Practices will be charged with various functions in order to make the Set of principles and rules operative. This institutional machinery may,

however, not act like a tribunal or otherwise pass judgments on the activities or conduct of individual governments or enterprises in specific business transactions.

62. The Set of rules and principles applies to the Community as a regional grouping of States having competence in the area of restrictive business practices in the same manner as to States.

The Commission together with Member States has participated actively and in a positive spirit in the negotiation of this code.

63. The Community has always held the view that the development of international trade should take place under conditions of fair competition and that it is necessary to promote international cooperation in order to control restrictive business practices adversely affecting international trade.

The result of these negotiations, while reflecting the need for compromise, meets the fundamental concerns of the Community for a code respecting fundamental principles of law such as non-discrimination and incorporating rules and principles whose soundness has been established on the basis of experience gained in their application nationally and regionally. It should thus contribute substantially towards amelioration of the international economic order.

#### **International code of conduct on transfer of technology**

64. The third session of the UN Conference on the code of conduct on the transfer of technology took place in Geneva from 21 April to 6 May 1980. There was progress on some parts of the code. Notably, agreement was within reach on the whole text of the important chapter on guarantees and responsibilities. However, the developing countries (Group of 77) did not give their final consent to a compromise text.

The major issues which need to be resolved include the definition of an international transfer of technology, the proposed chapter on applicable law and settlement of disputes and the precise nature of the institutional machinery.

The crucial problem which led to a deadlock of the Conference relates to the 'chapeau' of the chapter on restrictive practices.

The major issues are:



- (i) whether the practices should be judged in terms of their effects on development in the technology-acquiring country or in terms of a more objective 'restraint of trade' or competition test, and
- (ii) to what extent the practices listed are appropriate in a parent/subsidiary relationship and should therefore be considered acceptable under the code.

Also, major differences of opinion persist on the clauses concerning:

- (i) grant-back obligations,
- (ii) export restrictions,
- (iii) use restrictions after the expiration of the arrangement.

A resumed session of the United Nations Conference is scheduled to be held in Geneva from 23 March to 10 April 1981.

### **§ 3 — Cooperation between the Commission and the anti-trust authorities of non-member countries**

65. The Commission intensified its bilateral cooperation with the authorities of non-member countries responsible for competition.

Thus in 1980 bilateral contacts were established with the Japanese authorities responsible for restrictive practices: a delegation from the Fair Trade Commission came to Brussels in January and a delegation from the Directorate-General for Competition went to Tokyo in October 1980. The talks centred mainly on competition policy matters of common interest, including policies governing distribution, the control of oligopolistic behaviour and export cartels.

Bilateral contacts with the Canadian authorities were continued during a visit by those authorities to Brussels at the end of October 1980.

Lastly, a delegation from the Directorate-General for Competition visited Washington in November and discussed with the Justice Department and the Federal Trade Commission the objectives of the policies that were being pursued, *inter alia*, in the fields of distribution, crisis cartels and voluntary restraint agreements. The talks also covered the procedures employed in carrying out examinations and checks, particularly by the Federal Trade Commission.

### *Chapter III*

## **Main developments in national competition policies**

66. The main legislative developments in competition policy in the Member States were the enactment of the Competition Act, 1980 in the United Kingdom and the entry into force of the Act amending the existing competition legislation in the Federal Republic of Germany, the fourth Kartellgesetznovelle. The British Act complements and strengthens the powers of the competition authorities, among other things improving the procedures for controlling the anti-competitive practices of individual firms. The German measure is designed primarily to improve merger control measures, to strengthen supervisory powers over dominant firms, to safeguard competition arising from efficient operation, and to strengthen competition in the field of energy supply.

In France the process of removing restrictions on prices was completed. In Denmark the price freeze was made less stringent, the Profits Limitation Act was finally repealed, and dominant firms were required to notify proposed price increases to the Monopolies Control Authority in advance.

France and the United Kingdom enacted legislation against the extra-territorial effect of foreign laws on actions by their domestic firms, in particular against the communication of information or the supply of documents to foreign authorities. The legislation does not affect the application of the Community competition rules.

National competition laws were enforced in the Member States without giving rise to conflicts with Community law.

### **Belgium**

67. There have been no changes in competition legislation during the period in question. The Act of 27 May 1960 on protection from the abuse of economic power remains applicable.

The review of legislation governing rules on competition in economic affairs is still in progress. An amendment has been drafted with a view to making the law more effective and speeding up the procedure.

68. As regards the procedure relating to information employed by the Commissaire-rapporteur under Article 5 of the Act of 27 May 1960, a royal decree is being drafted under which officials of the Department of Trade with special responsibility for competition matters would be empowered to assist the Commissaire-rapporteur. The royal decree will thus enable the Commissaire-rapporteur to call upon the services of officials of both the Board of Inspectors for Economic Affairs and the Department of Trade.

69. Three cases in which the Commissaire-rapporteur came to the conclusion that there was improper conduct were submitted to the Council for Economic Disputes for its opinion.

*(1) Distribution of newspapers and periodicals*

The findings of the Commissaire-rapporteur establish that a regional consultative committee had given an unfavourable opinion on the question of supplying newspapers and periodicals to a retailer. As a result of that opinion, the publishers and distributors in question refused to supply the complainant, who has no opportunity of obtaining the newspapers through other channels. The refusal is moreover, held to be purely arbitrary.

*(2) Ban on taking part in other exhibitions*

Under the rules of an international trade fair, exhibitors are barred from taking part in other fairs or regional exhibitions. In view of the dominant position of the fair in question, the normal organization of rival exhibitions, trade fairs or shows is restricted to an appreciable and unjustifiable extent.

*(3) Refusal to accept a competitor's advertising*

Advertisements for particular makes of imported electronic equipment, radios and television sets appear regularly in the periodicals of a certain publisher. A parallel importer who had also advertised in the same periodicals had had his advertisements refused since 1977 on the grounds that they were prejudicial to the other importers and manufacturers concerned. The Commissaire-rapporteur

considers that this refusal constitutes abuse of a dominant position in view of the interest of certain categories of readers in these periodicals.

These cases have been submitted to the Council for Economic Disputes for its opinion.

70. In 1980, the Council for Economic Disputes gave its opinion on a complaint made in 1975 by a bookseller in respect of a distributor of newspapers and periodicals for refusal to supply. The opinion was given following the decision by the Minister for Economic Affairs that the Council should investigate the matter. Having found that the conditions for the application of the Act of 27 May 1960 were not fulfilled, the Commissaire-rapporteur decided to propose that the file on the matter be formally closed.

The members of the Council for Economic Disputes felt that they had been able to acquaint themselves with a number of factors that resulted from investigation of the complaint which might have proved useful in determining whether there had, in the case in point, been an abuse of economic power on the ground that the company in question, which had a monopoly or quasi-monopoly, had prejudiced the general interest.

However, since the act which had been condemned as an abuse of economic power in 1975, namely the refusal to supply, had terminated with the supply of the articles requested to the complainant prior to referral of the case to the Council for Economic Disputes, and since there can be no repetition of the refusal to supply by the distributor under the same conditions as those obtaining when the complaint was filed because of the setting up of regional consultative committees which are consulted before any stockist is approved, the Council for Economic Disputes felt that no useful purpose would be served by continuing the investigation in order to obtain all the information required to determine whether, in its opinion, there had been an abuse of economic power at the time.

The Minister for Economic Affairs decided that, in order to remedy the situation, the Commissaire-rapporteur should be requested to initiate the procedure for obtaining information in regard to the distribution of newspapers and periodicals. This procedure is laid down in Article 5 of the Act of 27 May 1960 and consists in the collection of general information on all refusals to supply retailers with newspapers and periodicals and the possible dominant position of the undertaking(s) responsible for such refusals to supply.

The Minister for Economic Affairs also ordered the information procedure to be initiated in regard to the maintenance of heating equipment. The members of a trade organization were, at the instigation of that organization, requiring payment

of a large additional sum on top of the charge for maintaining heating equipment in return for issuing a certificate stating that the equipment functioned properly, as provided for in the Royal Decree of 6 January 1978 on the prevention of atmospheric pollution when heating buildings by means of solid or liquid fuels.

## Denmark

71. With effect from 1 January 1980 the law of 4 November 1979<sup>1</sup> freezing prices and incomes was replaced by a new, less stringent Act, and the Profits Limitation Act, which had been suspended, was finally repealed on the same date. The new Act allowed firms to raise prices to cover increases in the cost of raw materials and other supplies and certain other specified items (including wages, public charges and rents). New features were (a) the provision that about 150 firms deemed to hold a dominant position under the Monopolies Act were required to notify proposed price increases to the Monopolies Control Authority (Monopoltilsynet) in advance, and (b) a special provision for trade in petroleum products, requiring advance approval of price increases by the Authority. The price freeze was one element in the Government's plan for a coordinated economic policy extending over several years; other aspects were laws limiting wage increases and amending the system of cost-of-living increases. Following an agreement between the political parties in May 1980, the range of cost increases which firms may pass on in prices was widened.

In the standing legislation on prices and monopolies,<sup>2</sup> the Prices and Profits Act 1974 was amended to widen public access to information on prices and price differentials.

72. The Monopolies Act does not apply to public undertakings (Section 2 of the Act). But it is not entirely clear when a firm is to be considered a public undertaking. The distinction came to the fore in a case in which it had to be decided whether the State-owned company Dansk Olie-og Naturgas A/S (Danish Petroleum Gas and Natural Gas - DONG) was subject to the Monopolies Act. The company is an ordinary public limited company, in which the State holds the entire share capital. It has the sole right to import natural gas into Denmark. It has also engaged in some buying of crude oil in the producer countries. The Monopolies Control Authority held that for purposes of the Monopolies Act the company was a private enterprise

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<sup>1</sup> Ninth Report on Competition Policy, point 49.

<sup>2</sup> Sixth Report on Competition Policy, points 70 to 75; Seventh Report on Competition Policy, point 77.

on the grounds that it was not under the direction of any political body. The Authority justified this conclusion by reference to the aims of the Act, namely, the freedom of commerce and of competition. The Authority also emphasized that by its activities in the sphere of petroleum gas and natural gas the company could exercise an appreciable influence on the prices and production of these products.

73. Section 6(1) of the Act lays down that agreements which exert or may exert a substantial influence on prices or production conditions must be notified to the Authority. Section 8 of the Act states that agreements which have not been duly notified are not valid or enforceable before the courts. In 1977 the only two Danish producers of railway rolling stock, A/S Frichs and Scandia-Randers A/S, concluded an agreement under which Frichs was to cease production and not to resume for a period of 20 years. A declaration to this effect was registered against Frichs' factory properties. The agreement was concluded against a background of difficult economic conditions obtaining at that time in the production of railway vehicles. This agreement was not notified to the Monopolies Control Authority, as the firms did not feel that any appreciable restriction of competition was involved. The firms argued that they were not in competition with one another, one concentrating on motive power and the other on unpowered rolling stock, both passenger and goods wagons. After going bankrupt, Frichs was taken over by another firm which was prevented by the declaration from resuming production of rolling stock. The Monopolies Control Authority found that the agreement between the two firms was caught by the obligation to notify imposed by Section 6(1) of the Act, as it could exert a substantial influence on prices and production conditions for rolling stock. Scandia-Randers has challenged the Authority's decision before the Monopolies Appeal Tribunal (Monopolankenævnet).

74. Over the last 10 years a range of new retail distribution channels, such as discount houses, do-it-yourself supermarkets, and mail-order firms, has been growing in importance. In many cases these have met with opposition both from organizations representing the established specialist trade and to some extent from manufacturers. The Monopolies Control Authority's policy has been to apply Sections 11 and 12 of the Monopolies Act to help to open the market to these new channels:

- (a) In June 1979, under Section 12(3) of the Act, the Authority ordered Sportgoods A/S, the supplier of 'Adidas' sports equipment, to supply the Bilka chain of discount houses, owned by Dansk Supermarked A/S. Sportgoods appealed to the Monopolies Appeal Tribunal, which upheld the Authority's order. The Tribunal found that Bilka had declared itself willing to fulfil Sportgoods' conditions for recognition as a dealer, and must be assumed to be capable of

doing so. The Tribunal further found that to sell 'Adidas' equipment properly it was not necessary that the dealer possess the same capacity to provide expert customer service and the like as in the case of radio and television equipment where the Tribunal had in 1974 annulled an order to supply made by the Authority.<sup>1</sup> Sportgoods has appealed against this ruling to the High Court (Landsret).

- (b) In October 1979, under Section 12(2) of the Act, the Authority ordered Rørforeningen, the plumbing equipment wholesalers' association, to delete certain clauses in its rules which made it difficult for do-it-yourself supermarkets to obtain supplies of plumbing equipment. Rørforeningen challenged the decision before the Monopolies Appeal Tribunal, which annulled the Authority's order. The Tribunal found that certain of the clauses involved could not be held to have the harmful effects referred to in the Monopolies Act, and that for the others the information before the Tribunal was not sufficient to enable the restrictive effects to be assessed.
- (c) The Authority is at present engaged in a study of the ironmongery trade. Preliminary investigation has suggested that efforts have been made in the industry to ensure that only retailers of the traditional kind sell ironmongery. The study is still in progress.

The Monopolies Appeal Tribunal has made a ruling in the A/S Ferrosan (contraceptive pills) case, discussed in the last report,<sup>2</sup> in which the Authority had ordered a 30% reduction in prices. On the basis in particular of a comparison with the prices obtaining abroad, the Tribunal lowered the price reduction required to 20%. Ferrosan has challenged the Tribunal's ruling before the High Court.

### **Federal Republic of Germany**

75. The Federal Government's fourth Kartellgesetznovelle<sup>3</sup> which came into force on 1 May 1980, introduced further improvements to the existing competition legislation and provides for stronger measures against concentration and the abuse of economic power. The new legislation is designed primarily to improve merger control measures, to strengthen supervisory powers over dominant firms and to safeguard the competition that arises from efficient operation by means of the existing ban on discrimination and by providing for a special power of prohibition

<sup>1</sup> Seventh Report on Competition Policy, point 78(c).

<sup>2</sup> Ninth Report on Competition Policy, point 52.

<sup>3</sup> BGBL I, p. 458.

so as to give the cartel authorities a wider scope to prohibit systematic predatory practices by dominant firms. New rules were also introduced in respect of the special field of energy supply, to strengthen competition in that sector. The new rules are designed in particular to improve market opportunities for small and medium-sized firms and so to keep markets in general open and flexible to enable the process of adaptation to continue.

76. The Monopolies Commission published its third main advisory opinion entitled 'Merger control remains a priority' (Fusionskontrolle bleibt vorrangig). In the face of the growing tendency towards concentration, the Monopolies Commission stresses in particular the need to apply the more effective merger control measures introduced by the fourth Kartellgesetznovelle. At the same time its proposals on the subject of deconcentration are designed to focus discussion on the possibilities and limitations of such measures.

77. As regards merger control, the Federal Cartel Office has banned nine mergers as at the end of November 1980, including two in the press industry. One ban already has legal force; appeals have been lodged with the Berlin Court of Appeal in respect of the others. In 12 cases, the firms in question dropped their merger plans because of objections raised by the Cartel Office.

78. As regards the control of abuse by dominant firms, the proceedings against Hoffmann-La Roche, ordered by the Cartel Office in 1974 to cut its manufacturer's sales prices for Valium and Librium, have finally been settled in favour of Hoffmann-La Roche after a five-year legal battle.<sup>1</sup>

The Federal Supreme Court confirmed that it is permissible to determine that an abuse has been committed by comparing the price demanded by a dominant firm with a price obtaining on another comparable market where competition is more intense (the concept of a geographically comparable market); differences between the market can be offset by appropriate additions and deductions. In the present case, however, the Federal Supreme Court did not uphold the Court of Appeal's finding that the comparable price afforded evidence of unfair pricing. The deciding factor was that the Netherlands pharmaceutical firm, Centrafarm, which the Court of Appeal used for comparison, had a market share of only 0.7% on the comparable market, and the additions and deductions regarded as necessary by the Court of Appeal were higher in total than the comparable price. The Federal Supreme Court held that in this situation the market could no longer be regarded as

<sup>1</sup> Sixth Report on Competition Policy, point 80; Seventh Report on Competition Policy, point 82; Eighth Report on Competition Policy, point 59; Ninth Report on Competition Policy, point 55.



comparable. Since the Court of Appeal had from the outset used only the Netherlands firm's price as the basis for comparison, the Federal Supreme Court did not further consider the other standards of comparison invoked by the Cartel Office. It did, however, express doubts as to whether the concept of setting a limit to acceptable profit was an appropriate method of determining whether a particular pricing policy constituted an abuse of a dominant position.

79. In order to clarify its policies in regard to cooperation between small and medium-sized firms, the Cartel Office has published guidelines explaining its practice whereby proceedings are not initiated in respect of cooperation agreements which only slightly restrict competition. Under these guidelines, the Cartel Office does not as a rule take proceedings against restrictions of competition where they concern cooperation between firms aimed at increasing efficiency by coordinating company functions, and involve only a small number of small and medium-sized firms which are legally and economically independent and whose total share of the market is not more than 5%. It should be noted that concertation on pricing, quotas and territories is not as such regarded as a means of cooperation aimed at increasing efficiency.

80. On the assessment of cartels involving rebates on aggregate turnover, the Cartel Office continued the practice introduced in 1977. In that year the Cartel Office modified its legal opinion of such cartels and now takes the view that rebates of this kind cannot properly be regarded as remuneration for services rendered, so that the clause exempting rebate cartels from the general ban on cartels does not apply to them. Implementing its new interpretation, the Cartel Office declared four cartels of this kind to be null and void. It had raised no objection when these cartels were notified several years before and they had since been operating without opposition. Appeals were lodged with the Court of Appeal against the four prohibition orders. The Court of Appeal made it clear that it shares the doubt of the Federal Cartel Office on whether rebates of this kind can properly be regarded as remuneration for services rendered, but it set two of the prohibition orders aside on the basis of the protection of legitimate expectations. Following an appeal by the Cartel Office, the Federal Supreme Court set aside the judgments of the Court of Appeal and ruled that a rebate cartel, even after it has been operating for 10 years, can still be declared null and void by a cartel authority following a change in the legal interpretation of the conditions for exemption. The case was remitted to the Court of Appeal for a re-hearing and a decision on whether rebates of this kind are genuine remuneration for services rendered within the meaning of the conditions for exemption.

## France

81. The process of removing restrictions on prices which was begun in 1978<sup>1</sup> was completed in 1980 with its extension to the distribution and services sectors. Under the agreements concluded between the Minister for Economic Affairs and the trade organizations in the distribution sector, the latter have undertaken to promote competition and to apply to retailing certain specific measures relating to information and consumer protection. The Ministerial Decree of 13 May 1980 laid down the principle that prices for the provision of services should be freely determined and that sole liability should rest with the persons providing the services, subject to the obligation of moderation, where appropriate; the only exceptions to this rule are some services, the prices for which are fixed by decree or determined by agreement ratified by decree.

82. Two major legislative measures were taken in 1980, one on the communication of information abroad and the other on the practice of loss-leading.

The Act of 16 July 1980 prohibits, subject to the provisions of treaties or international agreements, the communication of economic, commercial, industrial, financial or technical documents or information to public authorities in other countries in so far as such action might be prejudicial to the sovereignty, security or essential economic interests of France or to public policy. The Act also prohibits the seeking out and communication of information for use as evidence in judicial or administrative proceedings in other countries. This prohibition, which does not, of course, apply to Community procedures under the Treaty of Rome, is designed to safeguard French sovereignty and protect French undertakings. It does not, however, constitute an impediment to the desired development, in particular in the competition sector, of inter-State cooperation on either a bilateral or a multilateral basis.

On 22 September 1980, having obtained the opinion of the Competition Commission and consulted numerous trade organizations and consumer associations, the Minister for Economic Affairs published a circular on loss-leading designed to remedy this improper practice and enable the machinery of competition to function in accordance with the principles of fair trade. The circular laid down that the simultaneous fulfilment of three objective criteria was necessary in order to establish loss-leading:

<sup>1</sup> Eighth Report on Competition Policy, point 60; Ninth Report on Competition Policy, point 58.

- (i) a promotion campaign undertaken by a distributor in regard to the price of a given product;
- (ii) a supply of products for sale which is inadequate in terms of the magnitude of the promotion campaign;
- (iii) discriminatory price-cutting whereby the trader applies to the product in question a margin which is markedly lower than that applied to equivalent alternative products.

This procedure, the direct result of which is the diversion of sales, namely the orientation of customers attracted by such advertising towards the purchase of equivalent alternative or comparable products of different brands, is injurious to the manufacturer whose brand is thus misused and abuses the good faith of consumers. Consumers must, therefore, be able to defend themselves, and the circular points out the various remedies available to manufacturers, traders and consumers who are victims of such practices. It is possible to bring actions for damages under both criminal and civil law. Any manufacturer may, in addition, refuse to supply any distributor who markets one of his products as a loss-leader: in this case, the dealer is acting in bad faith and the refusal to supply, which is normally prohibited, becomes legitimate.

83. As regards the application of the competition rules relating to individual restrictive practices, intervention, which has generally been on the basis of complaints lodged, has been concentrated in particular on refusals to supply, discrimination and bonus-assisted sales. Local services have also focused their attention on ensuring that the ban on recommended prices for the sale to the public of certain products is observed.<sup>1</sup>

For the most part, however, the emphasis has been on the dissemination of information and advice to traders, to enable them to become more familiar with the competition rules to be observed and thereby to avoid the need for enforcement proceedings.

From January to mid-December 1980, the Minister took eleven decisions on restrictive practices and dominant positions, having first obtained the opinion of the Competition Commission.

Some of these decisions are particularly significant. One such case is that concerning the domestic electrical appliances and electro-acoustics sector, in which fines of from FF 25 000 to FF 2 500 000 were imposed on 13 major manufacturers

<sup>1</sup> Ninth Report on Competition Policy, point 60.

and distributors guilty of concerted practices in resisting a reduction in the selling price of products in order to protect profit margins. Severe measures were also taken—the cases in question were referred to the Public Prosecutor with a view to action in the courts—against anti-competitive practices on the part of drainage construction companies operating in the Paris region. The companies complained of had entered into agreements for the geographical apportionment of the market and, when tendering for various contracts, had made bids which were deliberately non-competitive. Several of these companies belonging to the same group, which was in a dominant position, had also simulated competition by not informing potential customers of the financial links between them. These proceedings are part of the constant programme of action undertaken by the competent authorities to improve the conditions under which contracts are awarded and thus protect the public interest.

The Minister ordered the principal company in the street-furniture market and its subsidiaries, on pain of periodic penalty payments, to limit the period of exclusive dealing laid down in contracts entered into with local authorities to a maximum of 12 years or, in exceptional cases, 15 years where this is justified by the cost of street furniture not used for advertising.

The other cases are concerned with the industrial sector (wood preservatives, dispersants for oil pollution control, temperature control equipment, foot-and-mouth vaccines) and foodstuffs (nougat), the provision of services (building insurance, issue of luncheon vouchers) and activities combining the provision of goods and services (marketing of spectacles). The cases were, in particular, directed against anti-competitive practices such as pricing agreements, agreements designed to bar new competitors from entering the market and arrangements for the exchange of trade information designed to monitor market-sharing. Depending on the seriousness of the facts taken into account in each case, the Minister imposed fines, made orders to restore satisfactory competition or gave a warning to the traders in question.

On two occasions, the Minister used the simplified procedure under which he may, after consulting only the Chairman of the Competition Commission, impose fines of up to FF 200 000 on any company or legal person that has infringed Article 50 of Order No 45-1483 on restrictive practices and abuse of a dominant position. The first decision was directed against the setting up of a commercial interest group of quarry owners in the same region, which resulted in artificial price rises; the second against a departmental trade association which had encouraged its members in the automobile, cycle and motor-cycle trades to adopt uniform prices.

84. In its capacity as adviser to the government and parliament on all matters relating to competition, the Competition Commission delivered an opinion on two

legislative measures, one submitted by the Minister and the other by a parliamentary committee.

85. As regards court proceedings, in a judgment handed down by the court of last instance, a number of carriers of perishable goods (largely meat) operating in central France were ordered to pay fines of from FF 1 000 to FF 12 000. They were found guilty of entering into an unlawful agreement to fix scheduled charges and not to encroach upon their colleagues' customers and routes.

The courts also condemned restrictive practices in regard to public contracts, where collusive tendering was found to have taken place (road works<sup>1</sup> and restoration of historic monuments).

## **Ireland**

86. The basic legislation relating to restrictive practices has not altered in the course of 1980.

87. Since last year, 33 proposed mergers have been notified. Thirteen of these did not fall within the scope of the Act. In one case the proposed merger did not receive any further consideration as the deal fell through. Decisions have yet to be reached in two cases. Seventeen proposed mergers were considered and cleared. Manufacturing industry accounted for eight cases, services for six, the distribution sector for two, and energy supply sector for one.

The 17 proposals cleared include two which were notified pursuant to the Mergers, Take-overs and Monopolies (Newspaper) Order, 1979.

The Minister for Industry, Commerce and Tourism referred two proposed mergers to the Examiner of Restrictive Practices for investigation under Section 8 of the Act. These mergers concerned the building supply and energy sectors. Having considered the Examiner's report in each case, the Minister decided not to make an Order under Section 9 of the Act in relation to either of the proposals.

There have been no enquiries into apparent monopolies under Section 10 of the Act.

One of the statutory orders relating to the supply and distribution of particular classes of goods, made under the Restrictive Practices Act, 1972, has been amended.

<sup>1</sup> Judgment delivered at the end of December 1979.

On 23 May 1980 the Minister for Industry, Commerce and Tourism made the Restrictive Practices (Motor Spirit) Order, 1980. This Order amended Article 3 of the Restrictive Trade Practices (Motor Spirit) Order, 1972 (as later amended). It extended by six months to eight years and six months the provision which prohibits petrol companies from operating additional retail outlets.

88. Certain developments early in 1980 necessitated the reopening of public hearings in the enquiry held by the Restrictive Practices Commission in 1979 into certain aspects of the petroleum distribution trade. The Commission submitted the report of enquiry to the Minister in June, 1980. It is expected that the Minister will publish the report early in 1981 together with his decisions in relation to the recommendations made therein.

The Commission submitted the report of its enquiry into the practice of under-cost-selling in the grocery trade to the Minister during the year.

Discussions are continuing between the Commission and various interests in the cinema trade in connection with the preparation of fair-practice rules for the regulation of the supply and distribution of cinema films.

Public hearings of the enquiry into restrictions on conveyancing and on advertising by solicitors commenced during the year and are continuing.

Owing to the pressure of other matters the Commission has been unable to set a date for the commencement of their enquiry into restrictions into the provision of travel agency services.

89. The Examiner of Restrictive Practices concluded his analysis of the information obtained during the investigation into the operation of the Restrictive Trade Practices (Cookers and Ranges) Order, 1962 which regulates the supply and distribution of cookers and ranges using solid fuel and liquid petroleum gas. The analysis revealed that the Order was operating effectively.

The Examiner also investigated complaints of unfair practices in the provision of various services and in the supply and distribution of various goods. These included road materials, slates, footwear, jewellery, motor-vehicles, vehicle spares, computers, newspapers, customs charges, credit union membership, dental prostheses, groceries, liquid petroleum gas, intoxicating liquor, medical appliances and pharmaceuticals.

## **Italy**

90. There was no change in Italian competition legislation during the report period.

## **Luxembourg**

91. Application of the anti-trust legislation continued. The Restrictive Trade Practices Commission examined various cases, notably involving discrimination in distribution and the abuse of buying power.

In one specific case the Commission came to the conclusion that the rules on restrictive trade practices do not apply when economic issues are not involved.

The Luxembourg Government still has facilities for controlling prices with a view to stabilizing them at consumer level. In practice, the price of basic essentials may be fixed by the Minister for Economic Affairs or his delegate. Special rules also enable control to be exercised on the price of imported goods. The Prices Office deals with any complaints. Representatives of consumer organizations take part, together with dealers and manufacturers, in the Price Commission's discussions on the application of pricing systems; the Office subsequently takes the relevant decision. Price control has played and still does play, therefore, a rather important complementary rôle in competition policy.

## **The Netherlands**

92. The Bill introduced in December 1977, aimed at establishing a system of authorization for price fixing and resale price maintenance agreements and conferring powers on the Minister of Economic Affairs to issue minimum price regulations, is still before Parliament. The Government has not yet submitted its memorandum of reply in response to the interim report delivered at an earlier stage by the Second Chamber's standing committee on economic affairs; it is expected to do so shortly.

Work on the preparation of the Bill to give public access to the register of restrictive agreements has now advanced to the point where it can be expected to be introduced in Parliament shortly.

On his own behalf and on behalf of the Ministers for Justice and for Foreign Affairs, the Minister for Economic Affairs has sought the opinion of the Economic

Competition Board on a proposed order under the Economic Competition Act which would declare unenforceable all clauses giving effect to foreign boycott measures in restrictive agreements or decisions. The object of the projected declaration would be to limit the impact of such clauses where they might result in unacceptable disturbance of the terms of competition in The Netherlands. The proposal is a result of the consultations which took place between the Second Chamber and the Government regarding the effects of Arab boycott measures against Israel on Dutch law and the terms of competition in The Netherlands.

On 3 October 1979 the Ministers for Economic Affairs and for Agriculture and Fisheries extended for a further 18 months the declaration making an agreement on the minimum consumer price for sugar generally applicable. The agreement sets the minimum price at the level of the cost price to non-integrated retail businesses (plus turnover tax). The minimum price does not apply to imported sugar.

93. Work is continuing on the preparation of legislation in the field dealt with by the Social and Economic Council in its Opinion on legal premerger control measures and statutory authority for its own merger code.

94. Hoffmann-La Roche BV, of Mijdrecht, has initiated proceedings against the State of The Netherlands before the District Court of The Hague. Roche is seeking compensation for the damage it claims it suffered as a result of three orders, issued in 1977 and 1978, which set maximum prices for Valium and Librium. On 24 July 1979 the College van Beroep voor het Bedrijfsleven (Business Appeals Tribunal) annulled the three orders. The orders had been made under Section 24 of the Economic Competition Act (which deals with the abuse of a dominant position), and required Roche to reduce the prices charged for Valium and Librium marketed in The Netherlands; the second and third orders somewhat increased the maximum prices imposed on Roche by the first one.

## **United Kingdom**

95. This year has seen an important development in the UK's competition policy with the enactment on 3 April of the Competition Act, 1980. Amongst other things, the Act introduces new procedures for controlling the anti-competitive practices of individual firms. The powers given to the Director-General of Fair Trading (DGFT) in this regard complement those which he already possesses by virtue of legislation such as the Fair Trading Act, 1973 and the Restrictive Trade Practices Act, 1976 and together they provide a framework within which competition in



industry and commerce is encouraged to develop. The provisions of the Act dealing with anti-competitive practices came into force on 12 August 1980.

96. The DGFT announced his first two investigations under the Act as soon as the relevant provisions of the legislation came into force. One of those concerned the criteria used by TI Raleigh Industries Limited and TI Raleigh Limited in deciding whether to supply bicycles to retailers and whether the application of some or all of those criteria amounted to an anti-competitive practice. The other was concerned with whether Petter Refrigeration Limited induced or attempted to induce persons who service, repair or sell commercial vehicle or container refrigeration equipment, including spare parts, not to service, repair or sell equipment which was manufactured or supplied by Petter's competitors and, if so, whether this conduct was anti-competitive. The procedure for carrying out an investigation under the Act was explained in the previous Report.<sup>1</sup>

97. The Act also confers on the Secretary of State for Trade the power to refer to the Monopolies and Mergers Commission (MMC) for investigation, any question relating to the efficiency and costs of, the service provided by, or the possible abuse of, a monopoly position by nationalized industries and certain other public-sector bodies. Since the measures came into force on 4 April, he has made three references to the MMC, namely: London and South-Eastern Commuter Rail Services, the Central Electricity Generating Board and the Severn Trent Water Authority.

98. Additionally, the Act makes several amendments to the Restrictive Trade Practices Act, 1976. These include provision for the suspension of the operation of declarations of the Restrictive Trade Practices Court pending an appeal or the revision of the agreements concerned; for the exemption retrospectively from registration of copyright licences and certain similar agreements; and the extension of the category of persons to whose interests the Court must have regard when deciding whether or not an agreement containing restrictions is against the public interest.

99. Since 1976 when the legislation on restrictive trade practices was extended to services, some 450 agreements in this class have been registered; to date some 55 of these have been brought to an end; 30 have had their restrictive clauses removed and in 69 cases representations were made by the DGFT to the Secretary of State that no action should be taken as the restrictions in issue were insignificant.

To date five agreements have been referred to the Court. Of these, the agreements of the Aerodrome Owners' Association and the Society of West End Theatre Owners were referred since the last Report. The Court's decisions on all of these

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<sup>1</sup> Ninth Report on Competition Policy, point 76.

agreements are still awaited. During this period the Court also considered the question whether there was a registrable agreement operating between those persons licensed by the stewards of the National Greyhound Racing Club and ruled that there was not. An appeal on the Court's decision is pending. It would be convenient to mention here that the examination of service agreements has proved far more complex than goods agreements and generally requires a great deal of correspondence and discussion, but in general, the aim has been to persuade organizations to abandon the restrictions in order to avoid being brought before the Court.

100. Collusive tendering has continued to be a feature of several agreements which have been uncovered. In its second report<sup>1</sup> the interdepartmental committee which reviewed the UK's competition policy examined the problems which were raised by this practice and proposed that the possibility of introducing criminal sanctions should be considered. A consultative document has since been circulated by the Department of Trade.

101. In May the DGFT instituted proceedings against four manufacturers of concrete pipes for contempt of court on the grounds that they had entered into an agreement between 1974 and 1978 with restrictions to the like effect of those condemned by the Court in 1965 and had therefore contravened their undertaking to the Court. After a hearing in July the Court found all four parties guilty and imposed fines ranging from UKL 5 000 to UKL 100 000. At the Court's request, proceedings are now being taken against another manufacturer for its participation in the same agreement.

102. In the period since the last report and up to 31 October, the DGFT has made one further reference to the MMC under the Fair Trading Act, 1973, namely: the supply of ready-mixed concrete. There were, however, three MMC reports—all of which have been accepted by the responsible Minister—published during this period. These related to the supply of certain gas appliances;<sup>2</sup> the supply of tampons;<sup>3</sup> and the supply of credit-card franchises.<sup>4</sup> As regards gas appliances, the MMC found that the British Gas Corporation's (BGC) monopoly in retailing these appliances operated against the public interest as did certain other practices which were followed by all manufacturers of the relevant goods. The MMC

<sup>1</sup> 'A review of restrictive trade practices policy' published by HM Stationery Office (HMSO) — Cmnd 7512.

<sup>2</sup> 'A report on the supply of certain domestic gas appliances in the United Kingdom' — HC 703 (Session 1979-80) (HMSO) 29 July 1980.

<sup>3</sup> 'A report on the supply in the United Kingdom of tampons — Cmnd 8049 (HMSO) 8 October 1980.

<sup>4</sup> 'A report on the supply of credit-card franchise services in the United Kingdom — Cmnd 8034 (HMSO) 17 September 1980.

recommended a number of alternative courses for remedying the detrimental effects of BGC's monopoly, and these are now being considered by the Government with a view to further action. In the tampons investigation, the MMC found that the pricing practices of the two monopoly suppliers, namely Tampax Limited and Southhall (Birmingham) Ltd, operated against the public interest. It recommended, however, that in the present situation where a new entrant was trying to establish itself in the market, no direct immediate action should be taken. It did, however, recommend that the DGFT should keep the market under review with a view to making a further reference after two years if the entry of another supplier had not resulted in an improved competitive situation. In its examination of the credit-card franchise services, the MMC found that the 'no-discrimination' policy of the major credit-card companies (whereby retailers were bound to offer the same prices to credit-card customers as to cash customers) operated against the public interest and recommended that this policy should be abandoned. The DGFT is consulting interested parties about the implementation of the MMC's recommendations in this case. The MMC also recommended that the market be kept under review in view of the evidence that some credit-card companies had been earning high profits.

103. The DGFT made recommendations to the Secretary of State for Trade on 185 mergers and prospective mergers. While this figure is lower than the 248 which were considered in the preceding period, it should be noted that from 12 April there was an increase from UKL 5 million to UKL 15 million in the size-of-assets criterion for mergers qualifying for investigation under the Act. The Secretary of State referred five cases to the MMC, namely Compagnie Internationale Europcar and the short-term rental business of Godfrey Davis Limited; Hiram Walker—Gooderham Worts Limited and Highland Distilleries Company Limited; Blue Circle Industries Limited and Armitage Shanks Limited; S & W Berisford Limited and British Sugar Corporation Limited; and Grand Metropolitan Limited and Coral Leisure Group Limited. The MMC has so far reported on the Blue Circle/Armitage Shanks and the Hiram Walker/Highland Distilleries merger proposals, finding that the latter would be expected to operate against the public interest. This was, therefore, not allowed to proceed. Grand Metropolitan abandoned its proposal following reference to the MMC; two reports are still awaited.

## Chapter IV

### Main decisions and measures taken by the Commission

104. In 1980 the Commission took 9 decisions applying Articles 85 and 86 of the EEC Treaty and 16 applying Articles 65 and 66 of the ECSC Treaty. In proceedings under the EEC Treaty 183 cases were settled without a decision being taken because the agreements were brought into line with the rules on competition in the Treaty, were terminated or expired. As in previous years, most of these were distribution agreements, the cases generally being terminated after amendments were made to conform to the block exemption Regulation No 67/67/EEC.

On 31 December there were in all 4 203 pending cases, of which 3 775 were applications or notifications, 233 were complaints from firms and 195 were proceedings on the Commission's own initiative. Of the applications and notifications pending before the Commission 64% concerned licensing agreements, 25% concerned distribution agreements and 11% concerned horizontal agreements.

105. The Advisory Committee on Restrictive Practices and Dominant Positions, which has to be consulted on any decision that Articles 85 or 86 of the Treaty has been infringed, that gives negative clearance or that gives exemption under Article 85(3), met 8 times in 1980 and gave opinions on 9 cases.

#### **§ 1 — Article 85(1) of the EEC Treaty and Article 65 of the ECSC Treaty applied to restrictive practices**

##### *Restrictive practices in imports*

##### **IMA rules**

106. The Commission confirmed its opposition to any form of market-sharing, particularly national agreements imposing exclusive obligations which, by

safeguarding members' respective positions hamper other dealers' access to the various stages of distribution.

107. Under Article 85(1) of the Treaty<sup>1</sup> the Commission adopted a Decision concerning practices by 20 Dutch plywood-importing firms which were likely to affect trade between Member States.

The firms concerned were 11 importers and 9 exclusive agents which, together with other firms, fixed their business relations in an agreement known as the IMA (Importateurs/Agents) rules. The IMA rules were based on the principle that their members should safeguard each other's position in the Dutch plywood import trade. Under the rules IMA importers could obtain their supplies only from IMA agents working for foreign plywood manufacturers while IMA agents could only supply IMA imports. In addition, the rules laid down restrictive conditions for admission to the cartel, designed to keep small firms and newcomers out of the trade. The cartel also involved a complete separation of market functions between agents, importers and wholesalers.

The exclusive obligations between IMA members infringed Article 85(1), as did the obligations—in order to ensure compliance with the exclusive obligations between the members of the agreement—to provide the IMA supervisory bureau at regular intervals with detailed particulars of supply contracts entered into by them, to allow the IMA supervisory bureau to carry out checks at their business premises and to abide by decisions of IMA bodies imposing contractual penalties to ensure fulfilment of the exclusive obligations between the members.

The offending obligations in the IMA rules (which had been duly notified to the Commission by the parties) did not qualify for exemption under Article 85(1) since the Commission found no evidence that they improved the distribution of goods. They also imposed on the firms involved restrictions not indispensable for the attainment of any beneficial effects.

The Commission therefore ordered the firms concerned to terminate forthwith the infringement found, if they had not already done so voluntarily. If the infringing firms failed to comply with the Decision within two months of its notification, they were to be subject after the expiry of that period to penalty payments of between 100 and 300 EUA per day, depending on their importance.

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<sup>1</sup> Decision of 18.9.1980, *IMA Statuut*: OJ L 318, 26.11.1980.

## Quota-fixing agreements

### Cast glass

108. The Commission also established that quota-fixing agreements in the Italian glass industry were incompatible with the EEC Treaty competition rules. Such agreements were applied between 1976 and 1978 by the major Italian manufacturers of cast glass (non-transparent glass, used mainly in the Industrial, agricultural, construction and furniture sectors): Fabbrica Pisana, Pisa (a member of the Saint-Gobain group), SIV (Società Italiana Vetro), San Salvo, Chieti (a State-controlled company) and Fabbrica Lastre di Vetro Pietro Sciarra, Rome. Implementation was organized by Unione Fiduciaria (FIDES), Milan, a firm providing management and accountancy services.<sup>1</sup>

The Commission became aware of the offending agreements following investigations carried out at FIDES; then, it had adopted a Decision requiring FIDES to submit to the investigations<sup>2</sup> and imposed a fine of 5 000 u.a. each on Fabbrica Pisana and Fabbrica Sciarra for submitting incomplete documents.<sup>3</sup>

The agreements, in the guise of specialization contracts, were designed to enable the firms involved to retain their shares of the cast-glass market. This involved sharing out sales of the various types of cast glass on the Italian market, the notification of data relating to the production and marketing of the relevant products and supervision by FIDES of the proper implementation of these measures.

The agreements caused serious restrictions of competition on the Italian cast-glass market because the parties' share of the market was more than 50% and because they made access to the Italian market more difficult for cast glass manufactured in other Member States.

On account of the nature of the clauses concerned and the significant volume of business by the firms concerned, the Commission considered that the agreements did not qualify for the general exemption laid down in Regulation 2779/72,<sup>4</sup> amended by Regulation 2903/77,<sup>5</sup> for certain categories of specialization agreements. The Decision gives firms a clearer idea of the Regulation's scope.

<sup>1</sup> Decision of 17.12.1980: not yet published in OJ.

<sup>2</sup> Decision of 21.1.1979: OJ L 57, 8.3.1979; Ninth Report on Competition Policy, point 135.

<sup>3</sup> Commission Decisions of 20.12.1979: OJ L 75, 21.3.1980; Ninth Report on Competition Policy, point 138.

<sup>4</sup> OJ L 292, 29.12.1972.

<sup>5</sup> OJ L 338, 28.12.1977.

The Decision is also of interest from another angle. The firms involved had entrusted FIDES, a firm providing management and accountancy services, with the task of implementing their cartel and the restrictions which they had agreed on. FIDES was responsible for collecting the business information to be supplied by the cast-glass manufacturers and for checking that they observed the mutual commitments they had entered into. By including FIDES in its procedure, the Commission intended, firstly, to make it clear to firms that even where they entrust third parties with the task of implementing their restrictive agreements they still remain responsible for them and, secondly, to dissuade these third party firms from helping to implement cartels prohibited by the Treaty on pain of being accused of joint responsibility with the parties to such cartels.

### *Quota and price-fixing agreements*

#### **French and German special steel producers**

109. The Commission took three Decisions under Article 65 of the ECSC Treaty condemning quota agreements and concerted pricing practices operated by the main producers in the French and German special steel industries and fined the undertakings concerned a total of 900 000 EUA.<sup>1</sup>

The main features of the activities condemned by the three Decisions are described below:

- (i) The French case: five of the principal French special steel producers jointly fixed prices for special constructional steels in 1974 and 1975. Two of these undertakings also participated, at least for some time, in a quota agreement operated between 1970 and 1974 by French producers, which regulated their deliveries of special constructional steels on the French market.
- (ii) The German case: eight of the principal German special steel producers operated a quota agreement for their deliveries of special constructional steel and bearing steel in the German market in 1971 and 1972. Three of them operated a similar quota agreement for stainless flat products in 1971. In addition, certain producers jointly fixed prices for most types of special steel in 1973 and 1974.
- (iii) The Franco-German case: most of the French and German producers operated an interpenetration agreement which tended to limit the quantity of

<sup>1</sup> Commission Decisions of 27.3.1980.

constructional alloy steels which they delivered into each other's home market, during at least six of the eight years 1967 to 1974; the same parties also engaged in certain restrictive pricing practices in 1974.

110. When fixing the level of the fines the Commission took into account the present financial position of the French and German steel industries. However, poor demand and excess capacity do not justify producers breaking the competition rules of the ECSC Treaty. The legitimate regulation of the steel market under rules and limits fixed by the Commission in the exercise of its powers under the Treaty, such as the current crisis measures designed to help the steel industry to survive during a difficult period but with proper safeguards for the consumer, does not give the undertakings grounds for applying quota agreements and concerted pricing practices, thereby illegitimately regulating the market and usurping the powers of the Community; it is up to the Commission to determine the measures required to deal with any particular situation.

### *Pricing information system*

#### **Bundesverband Deutscher Stahlhandel eV (BDS)**

111. By another Decision under Article 65 of the ECSC Treaty the Commission required the Bundesverband Deutscher Stahlhandel eV (BDS), an association embracing virtually all German steel stockholders, to terminate concerted practices in relation to the fixing of ex-stock selling prices for rolled products.<sup>1</sup> This class of transaction covers all sales from stocks of products held at stockholders' depots which account for roughly one-third of all sales of steel products on the German market.

By this Decision the Commission applied to the steel industry the principles which, in line with the case-law of the Court of Justice,<sup>2</sup> it has developed to deal with the exchange of information on prices in areas covered by the EEC Treaty.<sup>3</sup>

The offending practices mainly involved compilation by BDS or with its assistance of detailed costing schedules and distribution to all members, on the association's initiative, of the major stockholding firms' new price lists before they became

<sup>1</sup> Commission Decision of 8.2.1980: OJ L 62, 7.3.1980.

<sup>2</sup> See in particular Joined Cases 40 to 48, 50, 54 to 56, 111, 113 and 114/73 *Coöperatieve vereniging 'Suiker Unie' UA and Others v Commission* [1975] ECR 1663, 1942; Case 8/72 *Vereeniging van Cementhandelaren v Commission of the European Communities* [1972] ECR 977, 989.

<sup>3</sup> See in particular Seventh Report on Competition Policy, points 5 to 8.



operative. These practices tended to create concerted pricing at regional level by encouraging the stockholders to align their ex-stock selling prices on those of regional price leaders.

There can be no justification for this type of private, detailed information system on ex-stock selling prices. Neither the need to ensure market transparency, nor the rules on advance publication of steel producers' price lists, nor the Commission's anti-crisis measures, provide grounds for stockholders to concert in establishing price lists or in fixing actual selling prices.

The Decision does not affect stockholders' rights to establish and publish independently individual price lists; however, the object, means or consequences of exercising this right may not involve any agreement prohibited by Article 65. The Decision also indicated rules to be observed by associations of steel stockholders in connection with technical assistance to members on costing and information. The point is that the Commission can allow such associations to help small undertakings to calculate their costs accurately and fix rational selling prices, but this must not lead to a uniform pricing policy.<sup>1</sup>

## § 2 — Permitted forms of cooperation

### *Joint buying agreements*

#### National Sulphuric Acid Association

112. Further clarifying its policy on joint buying agreements, the Commission decided that 19 companies which ensure the bulk of the United Kingdom and Ireland's sulphuric acid output could continue to buy imported raw sulphur via a joint buying pool for a period of eight years.<sup>2</sup>

However, the Commission insisted on a number of amendments to the pool rules, since the version notified contained restrictions which infringed the rules of competition.

The main problem was an exclusive purchase clause obliging all pool members to purchase their total requirements of imported sulphur for sulphuric acid

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<sup>1</sup> Notice concerning cooperation agreements, Chapter II(1): OJ C 75, 29.7.1968, corrected by OJ C 84, 28.8.1968.

<sup>2</sup> Decision of 9.7.1979: OJ L 260, 3.10.1980.

manufacture through the pool. This restriction of competition was particularly significant in that the members produce over 80% of the UK and 100% of the Irish output of sulphuric acid.

The pool's status as exclusive supplier to its members was abolished. Members may now buy up to 75% of their total needs elsewhere, while the pool still purchases at least the remaining 25%. This percentage enables the group to maintain the strength of its negotiating position with the major suppliers (only eight worldwide, including one in the Community, the French company Elf Aquitaine). The cost and distribution benefits obtained via pool membership by members in general and those requiring small amounts of sulphur in particular are thus ensured. Since sulphur accounts for up to 80% of sulphuric acid production costs these cost savings are reflected in the price by consumers of sulphuric acid and of the many products which require sulphuric acid in their manufacturing processes.

Other restrictions on pool members concerning the use and resale of sulphur have also been abandoned.

113. By this Decision the Commission made clear under what conditions and to what extent a joint buying pool—made up of companies varying greatly in size, producing nearly all the output in question in two Member States and in the face of a small number of suppliers on the world market—is compatible with the Community competition rules.

### *Technical cooperation agreements*

#### **Solnhofener Natursteinplatten**

114. Spelling out once again the conditions for cooperation between small businesses consistent with the rules of competition, the Commission adopted a Decision granting negative clearance to the articles of association of the Industrieverband Solnhofener eV, set up on 30 June 1980 and replacing a previous association 'Exportkartel Solnhofener Natursteinplatten'.<sup>1</sup>

115. The object of the earlier association, comprising some 30 members, all small or medium-sized producers from the region of Solnhofen in the Federal Republic of Germany, was to promote exports of the natural stone found there. Their

<sup>1</sup> Decision of 16.10.1980: OJ L 318, 26.11.1980.

agreement provided for collectively fixed prices, discounts and conditions of sale for export business and, in order to enforce compliance, for supervisory measures and penalties. The Commission took the view that the restrictions of competition caused by this price cartel, which had been notified, fell into the category of manifest infringements under Article 85(1) which is almost always impossible to exempt under Article 85(3) because of the total lack of benefit to the consumer. Unlike certain collective purchasing or selling agreements, these restrictions do not contribute to rationalizing production or distribution.

Following Commission intervention the cartel was dissolved and replaced by the new association, whose articles no longer contain provisions involving restrictions of competition likely to affect trade between Member States. Cooperation between members is now restricted to:

- (i) quality control of the natural stone sold by members;
- (ii) sales promotion by means of advertising;
- (iii) training of skilled labour;
- (iv) technical, economic and legal assistance to members;
- (v) measures designed to facilitate within the industry cross-deliveries of finished stone between producers and the purchase of unfinished stone from independent quarry-owners so that each producer can offer a full range of products.

### *ECSC: Joint financial arrangement*

#### **Equalization fund in the UK coal industry**

116. Following reference to the Consultative Committee and the Council, the Commission approved the establishment of an equalization fund by the Chamber of Coal Traders, an organization representing wholesalers, and the National Coal Board (NCB).<sup>1</sup> This financial arrangement is intended to reduce the price of certain domestic fuels coming from abroad.

Despite domestic output of some 4.5 million tonnes of smokeless fuels, there is a shortfall of anthracite-based products on the market in the United Kingdom. The

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<sup>1</sup> Commission Decision of 19.12.1980: OJ L 374, 31.12.1980.

leading producer, NCB, has made the investments needed to increase production, but it will be several years before the plant concerned becomes fully operational.

To meet the shortfall in the meantime some 235 000 tonnes of such products would have to be imported from Community and non-Community countries between 1 April 1980 and 31 March 1981 for distribution on the British market. The average delivered price of such fuel free of UK port is at present around UKL 15 more than the comparable NCB price. The parties concerned therefore intend to arrange for imports and establish an equalization fund in order to cut the selling price of imported fuel and make a commercial proposition. A levy is to be introduced for the 1980/81 coal year in order to provide resources for the fund. The levy will initially be imposed at a rate of UKL 0.90/tonne on all the NCB's smokeless domestic fuels (some 3.55 million tonnes).

Prior Commission approval under Article 53 of the ECSC Treaty is necessary for such financial arrangements common to several undertakings. They must also be compatible with the provisions of Article 65. The Commission authorized this operation since it was considered in keeping with the objectives of the Treaty concerning orderly supplies to the common market and the maintenance of conditions which will encourage undertakings to expand and improve their production potential (Article 3(a) and (d)).

The authorization applies only to the year ending on 31 March 1981, but may be extended beyond that.

### § 3 — Article 85 applied to distribution

#### *Export ban*

#### **Johnson & Johnson**

117. The Commission imposed a total fine of 200 000 EUA (UKL 112 894.20 or DM 510 476) on Johnson & Johnson Inc., New Brunswick, USA, one of the largest manufacturers of pharmaceuticals in the world and three of its subsidiaries, Ortho Pharmaceuticals Ltd, High Wycombe, UK, Cilag Chemie GmbH, Alsbach, Federal Republic of Germany, and Cilag Chemie AG, Schaffhausen, Switzerland, for having imposed on their United Kingdom and German dealers a ban on exporting 'Gravindex' pregnancy tests, and for having continued to restrict exports

from the United Kingdom to the Federal Republic after the formal export ban was lifted.<sup>1</sup>

The Commission acted following a complaint by a German importer, Eurim Pharm GmbH, Piding, which had tried to obtain 'Gravindex' pregnancy tests from UK chemists, where the trade price was two-fifths of that in the Federal Republic.

The Commission's investigations revealed that, at the request of Cilag Germany and Cilag Switzerland and with their assistance, Ortho tried to stop exports of 'Gravindex' pregnancy tests from the United Kingdom to the Federal Republic. The firms had tried to dissuade the German importer from buying from British chemists on the grounds that exports by chemists were contrary to Ortho's terms of sale. Even after Ortho lifted the formal export ban in January 1977, the various Johnson & Johnson group companies continued their action to prevent exports from the United Kingdom to the Federal Republic.

Ortho threatened to cut off one chemist's supplies and marked goods delivered to him with a special code to permit identification; it did in fact stop exportable supplies to certain chemists by totally withholding supplies or substantially restricting them.

The export restrictions were undoubtedly intended to protect the high price levels in other Member States, notably the Federal Republic of Germany, against competition from UK dealers. The actions of Johnson & Johnson and its subsidiaries prevented those dealers from satisfying orders from other Member States, especially from the German importer Eurim Pharm, whose trade prices for 'Gravindex' in the Federal Republic were 25% lower than Cilag's.

By this decision to impose for the first time a fine for an export ban in the pharmaceuticals industry,<sup>2</sup> the Commission confirmed its determination to severely penalize this particularly serious form of market-sharing and also to ensure that pharmaceutical products, like others, can be freely traded throughout the common market.

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<sup>1</sup> Decision of 25.11.1980: OJ L 377, 31.12.1980.

<sup>2</sup> The Commission has previously condemned anti-competitive practices in this industry by decisions imposing fines which were wholly or partially upheld by the Court of Justice: *Quinine* Decision of 16.7.1969: OJ L 192, 5.8.1969 and [1970] ECR 661, 733, 769; *Commercial Solvents* Decision of 14.12.1972: OJ L 299, 31.12.1972 and [1974] ECR 2213; *Hoffmann-La Roche (Vitamins)* Decision of 9.6.1976: OJ L 223, 16.8.1976 and [1979] ECR 461.

## *Export ban and price-fixing*

### **Hennessy/Henkell**

118. The Commission also took action against the exclusive dealing agreement between Jas. Hennessy & Co., Cognac, France and Henkell & Co., Wiesbaden, Federal Republic of Germany concerning the distribution of Hennessy cognac in the Federal Republic.<sup>1</sup>

The agreement, which had been notified, restricted competition in the common market and appreciably affected trade between Member States, for Hennessy is the world's third biggest producer of cognac and the Federal Republic is the third biggest market for the product.

The Commission considered that the agreement did not qualify for exemption from Article 85(1) of the EEC Treaty.

It was also ineligible for the block exemption for exclusive dealing agreements provided for by Commission Regulation No 67/67 on certain categories of exclusive dealing agreements since it included a number of restrictions not covered by this Regulation: protecting the territory of the exclusive dealer from parallel imports and limiting his freedom to fix resale prices. Similarly, the agreement did not qualify for exemption by individual decision. On account of the combination of these two restrictions as well as the exclusive sales and purchase and non-competition clauses the agreement did not improve distribution for the consumer's benefit, moreover the restrictions it imposed on the firms concerned were not necessary to the attainment of any beneficial effects.

The Commission considered irrelevant Hennessy's arguments claiming exemption as a special case because of the long duration of the agreement (25 years) and the luxury nature of the products in question.

This is the first time since entry into force of Regulation No 67/67 that the Commission has refused to apply Article 85(3) to an exclusive dealing agreement for distribution which did not comply with the Regulation and was not amended voluntarily to the parties concerned.

<sup>1</sup> Decision of 11.12.1980: not yet published in OJ.

## *Advertising restrictions*

### **Boat equipment**

119. Barriers raised by means of pressure from competing firms in relation to access to certain facilities which a manufacturer in one Member State would like to use to provide information on his product in another Member State may constitute appreciable restrictions of competition.

120. This was the thinking behind the Commission's action on a complaint filed by a British supplier of boat equipment when in March 1979, the only two Belgian specialist journals in this field, *Sur l'eau* and *Ik vaar*, which belong to the same group, had refused to continue to carry advertisements similar to those published in the past. The journals had been approached by Belgian manufacturers who alleged that they were competing under serious cost and tax disadvantages.

The British supplier complained that his sales in Belgium had suffered seriously as a result and boat equipment purchasers in Belgium had also been deprived of access to a cheaper and wider source of supply in another Member State.

In response to Commission representations the journals agreed to accept advertisements from suppliers in other Member States on the same basis as from their Belgian competitors.

### *Guarantee*

### **Moulinex and Bauknecht**

121. As it had announced after adopting a favourable Decision on guarantee terms offered by the Italian group Zanussi to buyers of its domestic electrical appliances in the common market,<sup>1</sup> the Commission continued its scrutiny, pursuant to the rules of competition, of guarantee schemes applied by other domestic appliance manufacturers, with the aim of persuading those who do not already do so to extend the guarantee given in the Member States where they organize the distribution of their products to all appliances which bear their trademark, wherever they come from.

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<sup>1</sup> Decision of 23.10.1978, *Zanussi*: OJ L 322, 16.11.1978; Eighth Report on Competition Policy, points 116 and 117.

Progress was made, in connection with Moulinex and Bauknecht appliances.

Moulinex, one of the largest European manufacturers of small domestic appliances, initially provided only a national guarantee, giving as its reasons the differences between the safety requirements and technical standards in force in the various Member States. At the Commission's request, the firm extended its guarantee terms to provide coverage throughout the Community. The Moulinex organization in a country where one of its appliances is used provides the guarantee in accordance with local conditions, even where the appliance in question has been imported. Appliances supplied in another country not complying with that country's safety standards are also covered by the guarantee, on condition that the purchaser is prepared to bear the cost of adapting the appliance to local safety requirements.

Similarly the Commission persuaded the various Community distributors of domestic appliances manufactured by the German company Bauknecht to alter their sale and guarantee terms so as to extend their guarantee in respect of appliances sold by them to Bauknecht appliances coming from other Member States, provided that they had been brought into line with local technical safety standards in the country where the guarantee claim is made. Formerly the guarantee was limited to appliances purchased on the home market from official Bauknecht distributors, which might have dissuaded consumers from buying appliances of this make abroad or from parallel importers.

### *Standard distribution contract*

#### **Krupps**

122. The Commission took a negative clearance Decision on a standard distribution contract operated by the German firm Robert Krups of Solingen.<sup>1</sup>

Robert Krups manufactures electrical domestic appliances, personal-care appliances, clocks and kitchen and bathroom scales. It established a distribution network to handle the distribution of its products in the common market. It was not a closed system in the sense of allowing access to the relevant products only to authorized dealers. When Krups appliances are sold neither Krups itself nor its appointed dealers are subject to any restrictions and Krups actually supplies its

<sup>1</sup> Decision of 17.4.1980: OJ L 120, 13.5.1980.



appliances to dealers who do not belong to its distribution network. Access to the relevant goods is thus available to all dealers who wish to handle them.

Membership of the Krups distribution network confers on appointed dealers no decisive competitive advantages over other dealers in the resale business. The sales promotion services offered by Krups to its appointed dealers, which are important to competitive trading—a wide range of international consumer advertising, international after-sales service, a policy on prices and terms adapted to market conditions, quality and modern design—benefit both member and non-member dealers, so consumers can derive their share of the resulting benefit also by purchasing from dealers outside the network.

The standard contract contains no obligations constituting appreciable restrictions of competition.

### *Duty-free distribution*

#### **Distillers — Victuallers**

123. The Commission also found, on the basis of information available to it, that it had no grounds to act against a notified standard agreement on the basis of which subsidiaries of the United Kingdom firm The Distillers Co. Ltd (DCL) supplied Scotch whisky for consumption free of duty and tax.<sup>1</sup>

The 41 subsidiaries of the DCL group have concluded agreements of this type with some 500 victuallers in the Community.

The main activity of the victuallers is duty-free trade, i.e. the supply of products intended for duty-free consumption, in particular to international shipping lines and airlines and embassies in accordance with the conditions and limits laid down by law. Scotch whiskies supplied to victuallers on the basis of the agreement in question are often labelled in such a way as to indicate their tax-free designation, typical words being 'for duty-free sales only'.

The standard agreement imposes no obligations on the victualler other than that of selling the whiskies supplied on the basis of this agreement only to customers who are known or may be supposed to use them for consumption free of duty and taxes. This obligation has to be passed on to all subsequent purchasers.

<sup>1</sup> Decision of 22.7.1980: OJ L 233, 4.9.1980.

A victualler is thereby prohibited from providing whiskies supplied on the basis of this agreement to wholesalers, supermarkets, retailers or final consumers who sell or consume products on which duty and taxes have to be paid. However, the provision of supplies to such purchasers is not normally part of a victualler's business. Consequently, the obligation does not in practice form a genuine obstacle to the freedom of action of victuallers in carrying out their normal activities and does not constitute a significant restriction of competition within the meaning of Article 85(1) calling for action on the part of the Commission.

The Commission will be in a position to consider, in the light of this decision, a number of agreements of the same type entered into by other producers of spirits.

### *Distribution system*

#### SEITA

124. Continuing its examination of conditions of competition in respect of the distribution of manufactured tobacco in all Member States,<sup>1</sup> the Commission took action against SEITA (Service d'exploitation industrielle des tabacs et des allumettes, now called SEITA, Société nationale d'exploitation industrielle des tabacs et des allumettes), which has a monopoly in the production of manufactured tobacco in France. In response to the Commission's representations SEITA amended from 1 January 1981 the conditions under which it opens up its distribution network to other Community producers of manufactured tobacco marketing their products in France; compliance with the EEC Treaty rules of competition is thus ensured.

The Commission stepped in following a complaint under Articles 85 and 86 of the Treaty against the standard exclusive dealing agreement which SEITA offered foreign manufacturers wishing to have their products imported into France and distributed to wholesalers.

After scrutinizing the complaint the Commission informed SEITA that the standard agreement in question raised problems with regard to the rules of competition on the following counts:

<sup>1</sup> The Commission previously took action in this field with respect to the distribution system of Fedetab in Belgium, Decision of 20.7.1978: OJ L 224, 15.8.1978; Eighth Report on Competition Policy, point 111, upheld by the Court of Justice on 29.10.1980.

- (i) its effect, on account of circumstances of fact and law prevailing on the French market, was to exclude any parallel import into France of products from other Member States;
- (ii) on account of its duration the Commission took the view that it was likely to strengthen SEITA's dominant position on the French market and deprive foreign manufacturers of any opportunity of setting up their own import and wholesale distribution networks;
- (iii) changes became even more necessary following adoption by the French authorities, wishing to comply with Article 37 of the EEC Treaty, of the Act of 24 May 1976 adjusting the importing and wholesaling monopoly in manufactured tobacco, thereby freeing other Community producers from the obligations to import and distribute their products through SEITA; they could therefore set up their own wholesale networks in France.

Following the Commission's representations SEITA decided to withdraw the offending standard agreement, which had been notified in the meantime, and to replace it by two new types of agreement, leaving the option open to foreign producers wishing to continue to deal through SEITA with effect from 1 January 1981.

The first option, a five-year group agreement, provides for the exclusive distribution of all present and future products of all companies belonging to the given group. The second, a company agreement, is entered into for only two years and provides for the exclusive distribution only of certain products as specified by the contracting company.

The Commission approved the new arrangements, which will allow foreign manufacturers who so wish gradually to set up their own distribution networks; the proceedings against SEITA were therefore terminated.

However, the Commission will continue to keep a close watch on developments in the tobacco market in France as well as to monitor the implementation of contracts signed on the basis of the above standard agreements.

It will also continue its efforts to seek a solution to outstanding problems on the French market including:

- (i) adjustment of the retail marketing monopoly held by the French State. The appropriate reasoned opinion was sent to the French Republic on 15 July 1980;
- (ii) retail prices for manufactured tobaccos are still set by the State despite the Council Directive of 19 December 1972 on the harmonization of tobacco tax

structures and subsequent directives; on 5 June 1979 the Commission therefore initiated proceedings against France under Article 169 of the Treaty;

- (iii) producers in other Member States consider that prices of certain products manufactured by SEITA are artificially low; the Commission is now investigating the complaint. A reasoned opinion was sent to the French Republic on 31 October 1980.

#### **§ 4 — Article 85 applied to agreements related to industrial and commercial property rights and copyright**

125. The Commission took action on a number of occasions in order to have removed from such agreements obligations it regarded as restrictions of competition contrary to Article 85. Since the firms concerned agreed to comply with the Commission's requests, it was not necessary to take formal proceedings.

#### **Patents**

##### *Payment of royalties after expiry of patents*

#### **Preflex/Lipski**

126. In line with previous policy<sup>1</sup> and also Articles 3, 4 and 12 of its draft block exemption regulation on patent licensing agreements,<sup>2</sup> the Commission pointed out<sup>3</sup> that the obligation on a licensee or assignee to continue paying royalties after a patent had expired constituted a restriction of competition under Article 85(1) in that the licensee or assignee was at a disadvantage because his manufacturing costs included the unwarranted burden constituted by the continued payment of royalties.

The opportunity to issue this reminder was provided by certain litigation involving the inventor of a process for making a new type of prestressed reinforced concrete girder and the company to which he had, according to the contract in question,

<sup>1</sup> AOIP/Beyrard Decision of 2.12.1975: OJ L 6, 13.1.1976; Fifth Report on Competition Policy, point 63.

<sup>2</sup> OJ C 58, 3.3.1979.

<sup>3</sup> Bull. EC 5-1980, point 2.1.15.

assigned the ownership of his Belgian and foreign patents for a consideration consisting of a percentage of the turnover during the currency of the contract.

The assignee unilaterally decided to stop paying the royalties when the basic patent expired. The dispute went to arbitration where it was decided that the royalties had to be paid so long as the patented processes were still being worked, irrespective of whether the inventions covered had fallen into the public domain. A national court dismissed the assignee's claim that Community law had been violated and upheld the arbitrators' decision.<sup>1</sup>

The Commission then received a complaint from the assignee; it came to the conclusion that both the terms for payment of the consideration and the reservations entered by the assignor regarding the definitive transfer of ownership of the assigned patents were such that the agreement partook of the nature and effects of a licensing agreement and should accordingly be assessed in the light of the rules of competition. The Commission pointed out that the clause at issue was contrary to Article 85; the parties accepted this view and subscribed to an amicable settlement that put an end to the dispute.

### *Ownership and joint ownership of improvement patents*

#### **Nodet-Gougis/Lamazou**

127. In 1972 the Commission issued a Decision requiring withdrawal of a clause obliging the licensee to assign to the licensor ownership of patents relating to improvements developed exclusively by the former.<sup>2</sup> This principle reappears in Article 3(12) of the Commission's draft block exemption regulation for patent licences. The Commission adopts the same approach towards an obligation for a licensee to make the licensor the joint owner of any such improvement patents. Any licensor obtaining such rights would enjoy an unjustifiable advantage as regards competition, notably after expiry of the contract, since he could prevent—or at least hinder—the licensee's autonomous exploitation of his own invention.

This was the outcome of an agreement by virtue of which a large agricultural machinery manufacturer in France obtained an exclusive licence from independent

<sup>1</sup> Arbitrators' award made on 23 August 1971; judgment given by the Tribunal de première instance, Brussels, on 15 October 1975 (Journal des Tribunaux No 4964, 18.9.1976; 8 International Review of Industrial Property and Copyright Law 473 (1977); 1977 Gewerblicher Rechtsschutz und Urheberrecht, Int. Teil 276).

<sup>2</sup> *Raymond/Nagoya* Decision: OJ L 143, 23.6.1972; Second Report on Competition Policy, point 45.

inventors to exploit two patents concerning systems for distributing seeds in seed-drills.<sup>1</sup> The contract specified, *inter alia*, that patents concerning improvements developed solely by the licensee should be taken out in the joint names of the licensors and the licensee.

A patent was taken out in application of this clause.

At the Commission's request the licensors agreed to waive all rights arising under their joint ownership to the extent that the improvement patent was jointly owned merely as a result of the abovementioned obligation in the contract.<sup>2</sup>

### *Restriction of competition between joint inventors*

#### **Bramley/Gilbert**

128. A complaint by a patentee enabled the Commission to give its opinion on restrictions in a patent licence where the licensor and the licensee both claimed to have contributed to the discovery of the patented invention, in this case electrified flexible sheep netting. As patentee, the complainant had granted a manufacturing licence; the licensee had agreed to sell all his production to the licensor and the licensor had agreed to buy only from the licensee.

The Commission pointed out that it is not contrary to Article 85(1) for a licensor to require a subcontractor to sell only to him the goods manufactured on the basis of the licensor's patent;<sup>3</sup> however, an exclusive supply obligation may restrict competition where the licensee has made a sufficient contribution to the development of the invention covered by the patent for him to be regarded as a joint inventor with enforceable rights in this respect against the patentee.

The Commission also felt that the obligation on the licensor to purchase his requirements only from the licensee was a restriction that could not be justified by

<sup>1</sup> The law applicable in this case (Article 42 of the French Act of 2 January 1968, amended by the Act of 13 July 1978) lays down that the joint owner of a patent who does not exploit it personally may require payments from the joint owner who does exploit the patent personally or who grants a licence for his own benefit to a third party. Moreover, before granting a licence he must give any other joint owners the opportunity to buy his share. In the case of an exclusive licence, he must in any event obtain the agreement of all other joint owners.

<sup>2</sup> However, proceedings are still under way before the French courts as to the question whether the licensors did in fact make some inventive contribution to the development of the improvement patent.

<sup>3</sup> Commission Notice of 18 December 1978 concerning the assessment of subcontracting agreements under Article 85(1) of the EEC Treaty: OJ C 1, 3.1.1979; Eighth Report on Competition Policy, points 5 to 7.

the fact that the licensee claimed to be joint inventor. A joint inventor's interest can be protected in other less restrictive ways, such as payment of royalties proportionate to the value of his contribution to the invention.

In accordance with this view the parties settled their dispute by an arrangement under which the agreement at issue was treated as unenforceable and each party was enabled to manufacture and sell netting of the type in question independently of the other.

### **Know-how**

#### *Use of secret know-how after expiry of licensing agreement*

### **Cartoux/Terrapin**

129. Following Commission action arising from a complaint, a former licensor agreed to alter a post-term ban on the use of its know-how in relation to unit building systems for light prefabricated buildings so as to permit the former licensee to continue such use against the payment of reasonable fees for a reasonable period in respect of any such know-how as remained secret.<sup>1</sup>

As is indicated by Article 3(10) of the draft Regulation for exemption of certain categories of patent licensing agreements, the latter type of obligation in a mixed patent and know-how licence does not normally raise any difficulties from the point of view of the rules of competition.

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<sup>1</sup> The former licensee also maintained that, in any event, the former licensor's know-how had fallen into the public domain. However, this is a question that will have to be settled by the national courts.

## Trade-marks

### *Right of licensee to sell in all Member States*

#### Poroton

130. Two French firms complained to the Commission about the German association of Poroton insulating brick manufacturers.

In addition to the standards certificate for materials issued by the German authorities, which the French firms had obtained, the German manufacturers established a joint quality label guaranteeing that the bricks satisfied certain requirements. The two French firms had concluded a licensing agreement with the inventor of the manufacturing process to manufacture and distribute the bricks under the Poroton trade-mark. So long as the patents covering these products were applicable (they have in the meantime expired both in the Federal Republic of Germany and France) the firms were expressly authorized to distribute the products under this trade-mark in the Federal Republic where they acquired an increasing share of the market.

131. In pursuing their business they later came up against various obstacles on the German market: the legality of their using the Poroton trade-mark was disputed, they were required to pay a membership fee to join the association which they considered prohibitive and discriminatory, and proceedings were brought against them before the German courts for unfair competition, notably for having used details on the standards certificate in a manner likely to cause confusion.

The Commission accepted the complaint that barriers had been raised by the association's members against the two French firms' marketing activities in the Federal Republic. The parties came to an arrangement which acknowledged the complainants' right to use the trade-mark, while they in turn undertook to ensure that there was no likelihood of confusion in the details on the standards certificates; they also withdrew from the association, considering that membership was no longer necessary to their activities in the Federal Republic.

132. The Commission is normally concerned to see that firms in all Member States may subscribe to joint label schemes on equitable conditions, where membership is necessary for the economic success of commercial activities on the relevant market.



In the case in question, however, it appeared that the barriers were not sufficiently serious to warrant proceedings leading to imposition of a fine.

## **Designated wines and trade-marks**

### *Free movement of designated wines within the Community*

#### **Winniger Domgarten**

133. The German wine protection association lodged two complaints with the Commission on behalf of the owners of the 'Winniger Domgarten' vineyard on the Moselle.

The British firm which is proprietor in the United Kingdom of the trade-marks 'Domgarten' and 'Domgarden' markets under these trade-marks, in conjunction with another British associated firm, a white wine bottled by a German firm.

The two British firms threatened to take trade-mark infringement proceedings against the imports into the United Kingdom of 'Winniger Domgarten'. The UK Patent Office, as national trade-mark authority, had ruled that the 'Domgarden' and 'Winniger Domgarten' trade-marks could not be confused. The complainant considered that these threats constituted an infringement of the rules of the Treaty concerning free movement of goods and competition.

134. The Commission considered that the mere threat of infringement proceedings did not warrant its intervention. However, it shared the complainants' point of view based on the principle of the free movement of goods pursuant to Article 30 of the Treaty. Using the British 'Domgarten' trade-mark to prevent imports into the United Kingdom would constitute an infringement of Council Regulation No 355/79<sup>1</sup> laying down general rules for the description and presentation of wines, which constitute the basis of the relevant Community law.

Since the complainant obtained satisfaction by putting forward these arguments, the Commission did not pursue its investigation under Article 85.

However, this case shows that the Commission is watchful in regard to the observance of Article 85 by firms which could attempt to solve the difficulties

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<sup>1</sup> OJ L 54, 6.3.1979.

arising from the existence of two identical or confusingly similar designations, by agreements or practices restricting the free movement of goods beyond the scope of the exceptions to the principle of free movement permitted by Article 36.

### **Plant breeders' rights and trade-marks**

*Varietal name registered as a trade-mark by a person other than the proprietor of the plant breeder's right in a country applying for Community membership*

135. The Commission was informed that third parties in Spain systematically register as trade-marks varietal names of plants appearing in the common catalogue of varieties of agricultural plant species.<sup>1</sup> This practice is prohibited in all Member States belonging to the International Union for the Protection of New Varieties of Plants (UPOV)<sup>2</sup> since varietal names of plants are generic names and so cannot be registered as trade-marks. A third party holding an identical trade-mark in Spain could represent a substantial barrier to the free movement of goods and competition when that country accedes to the Community.

The proprietor of a trade-mark could use it to keep out of the Spanish market seeds or plants moving freely throughout the Community. By means of agreements that are restrictive within the meaning of Article 85 he could regulate terms of access to the Spanish market for these products. The venal aim of such practices is to make the proprietor of the plant breeder's right purchase the trade-mark for a substantial sum.

The Commission informed the Spanish authorities of its reservations on these practices. Its views were based in particular on rulings of French and German courts which consider that registration of a trade-mark for the sole purpose of making access to a market more difficult for a third party constitutes unfair competition.

<sup>1</sup> Common catalogue of varieties of agricultural plant species, sixth complete edition: OJ C 330, 31.12.1979.

<sup>2</sup> The International Union for the Protection of New Varieties was set up by the Paris Convention of 2 December 1961.

**§ 5 — Article 86 applied to abuse of dominant position****Sterling Airways**

136. In the field of air transport the Commission does not have any power of its own to investigate and impose penalties similar to that conferred on it by Regulation No 17;<sup>1</sup> in order to investigate complaints made by a Danish private airline, Sterling Airways, therefore, it acted under Article 89 of the EEC Treaty, which enables it to call upon the assistance of the competent authorities of the Member State concerned. The complaints were lodged with the Commission between June 1975 and May 1979. They were made against Scandinavian Airlines System (SAS) and the Danish Government; the main allegations were:

- (a) because of SAS's monopoly, Sterling Airways had been denied entry to the international scheduled flights market in general and the Copenhagen-London route in particular, and to certain sectors of the charter market;
- (b) by approving the fares in question, the Danish Government had allowed SAS to abuse its dominant position by charging excessive fares on the Copenhagen-London route; this constituted an infringement of Article 86(a).

137. As regards the alleged abuse of a dominant position within the meaning of Article 86, Sterling Airways pointed out that on 1 November 1977 a standard Copenhagen-London economy-class return ticket cost DKR 2 560, while Sterling Airways undertook to provide a daily return service for DKR 600, still making a profit of DKR 45 per passenger with a load factor of 50%.

The Commission found, first of all, that as a result of prorating arrangements<sup>2</sup> SAS's average revenue per passenger is far below the standard economy-class fare.

Furthermore, there were numerous obstacles to the establishment of a valid comparison between companies:

- (i) firstly, the service offered is not necessarily the same; in the case in question, Sterling Airways proposed to provide the service under certain restrictive conditions; there was to be no advance booking, for example, and only one flight a day. This arrangement holds little attraction for those passengers who

<sup>1</sup> Points 11 to 14 of this Report.

<sup>2</sup> Prorating occurs where several airlines share the revenue of a through non-stop ticket when the passenger completes his journey in stages, travelling on aircraft belonging to different companies.

attach great importance to advance booking and the possibility of changing their flight;

- (ii) secondly, it would be dangerous to compare the recorded figures actually obtained by one company with the hypothetical figures put forward by another company seeking entry to the market;
- (iii) lastly, even if the services provided were identical, and the data comparable, the difference in price would not necessarily establish that an abuse of a dominant position existed. It might well reflect the higher cost of the established company, obliging it to charge prices higher than those of the newcomer.

For these reasons the Commission examined SAS's cost/revenue ratio in order to determine whether or not SAS fares on the Copenhagen-London route constitute an abuse within the meaning of Article 86(a). The Court of Justice had previously held that a price is excessive where it has no reasonable relation to the economic value of the product or service.<sup>1</sup>

The Commission at first experienced some difficulty in obtaining the information it required from the Danish Government; after a certain amount of delay this obstacle was overcome and information covering the years 1977-80 was supplied.

Upon analysing this information, the Commission came to two conclusions:

- (i) In 1977 and 1978 the very high level of fares on the Copenhagen-London route compared with those charged for equivalent distances and the very high profitability of the route might indicate prima facie an infringement of Article 86. The Commission notified the Danish Government and SAS of its findings and asked for their comments.
- (ii) Thereafter, the level of SAS's fares on that route dropped considerably in comparison with its other international routes. This can be explained by the fact that later proposals to put up fares on the Copenhagen-London route were for the most part turned down by the Danish Government.

The Commission therefore felt that, in the light of the latest information to hand, the fares were no longer unreasonably high and that, since any infringement of Article 86 had ceased, there were no longer any grounds for it to consider further action.

<sup>1</sup> Case 26/75 *General Motors Continental* [1975] ECR 1367, and Fifth Report on Competition Policy, point 25; Case 27/76 *United Brands* [1978] ECR 207, and Eighth Report on Competition Policy, point 21.

138. The matter of the right of entry to the international scheduled flights market, which was also raised in the Sterling Airways complaints, is closely linked to the question whether there are limits to the power of Member States to grant rights concerning the transport of passengers by air on certain routes within the Community which are tantamount to denying other airlines access to the part of the market in question.

Since the Chicago Convention of 1944 the international air transport market has developed on a bilateral basis. The jurisdiction of States extends to the airspace above their territory, and they therefore claim the right to designate the airlines providing flights between their territory and the territory of other States. In the bilateral air service agreements it concluded, the Danish Government designated SAS for this purpose, thus granting it special or exclusive rights.

Article 90(1) of the EEC Treaty states that 'in the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in this Treaty, in particular to those rules provided for in Article 7 and Articles 85 to 94'. This provision thus permits Member States to grant special or exclusive rights.

Article 61(1) provides, moreover, that freedom to provide services in the field of transport shall be governed by the provisions of the Title relating to transport. This means that such freedom to provide services must be introduced by means of measures taken by the Council pursuant to Article 84(2).

On the basis of that Article the Commission is actively preparing proposals to the Council, specified in more detail in its Memorandum,<sup>1</sup> aimed at gradually changing the present system of exclusive rights granted on the basis of bilateral intergovernmental agreements, with the objective of creating a more flexible system.

Nevertheless, in the prevailing legal situation and in the light of the information it had at its disposal, the Commission did not feel that it would be appropriate to dispute the legality, in terms of Community law, of the grant of special or exclusive rights to SAS or of the refusal to grant them to Sterling Airways.

<sup>1</sup> Contribution of the European Communities to the development of air transport services (July 1979), points 52 to 64.

## § 6 — Joint ventures

### Vacuum Interrupters

139. Under Article 85(3) the Commission issued a favourable Decision concerning the agreement entered into in 1978 by the United Kingdom companies Associated Electrical Industries Ltd (AEI), Reyrolle Parsons Ltd (RP), Brush Switchgear Ltd (Brush) and Vacuum Interrupters Ltd (VIL) concerning the joint shareholding of the first three companies in their subsidiary VIL.<sup>1</sup>

This agreement, which had been notified, amends and replaces, as the principal agreement, the 1970 agreement under which AEI and RP acquired a joint shareholding in VIL and which had already been exempted by the Commission.<sup>2</sup> The new agreement allows Brush a shareholding in VIL and reorganizes the management of VIL and the relationship between the parent companies within the joint venture.

The vacuum interrupter is a sophisticated type of circuit breaker designed for use in complex switchgear apparatus. Although it cannot compete with conventional oil and compressed-air interrupters because of its high production costs, the advantages it affords of reliability and durability have encouraged a number of manufacturers throughout the world, particularly in the United States and Japan, to continue researching and marketing the product.

The technical and economic problems encountered by VIL in manufacturing the product led the companies which had set it up in 1970 to seek the collaboration of another company, Brush, which would strengthen VIL's financial position and, in particular, provide an important technical contribution.

The Commission considered that the new agreement, like its predecessor, was caught by the prohibition in Article 85 of the Treaty, since the companies in question compete with each other on the electrical goods markets. The agreement was also likely to have an appreciable effect on trade between the Member States, notably in view of the parent companies' activity in the field of electrical interrupters in general, which made them potential major purchasers of vacuum interrupters.

However, the Commission noted that ten years after its formation VIL had not yet overcome completely the technical and economic barriers to the optimum

<sup>1</sup> Decision of 11.12.1980, *Vacuum Interrupters Ltd*: not yet published in OJ.

<sup>2</sup> Decision of 20.1.1977: OJ L 48, 19.2.1977; Sixth Report on Competition Policy, point 175.

performance of the vacuum interrupter. It therefore exempted the agreement in question from the prohibition in Article 85(1) from the date of notification, 12 May 1978, until 31 March 1988, considering that this was the time needed to enable the collaboration between VIL's parent companies to produce the desired results.

Aiming to keep new developments arising in that period under constant review, however, the Commission made the exemption conditional upon the provision of information, including the periodical submission of technical reports.

## **§ 7 — Merger control (Article 66 ECSC and Article 86 EEC)**

### *Merger control in the steel industry*

#### **Continued restructuring<sup>1</sup>**

140. The Community steel industry continued to deal with the two-fold need to improve its market competitiveness and to muster for this purpose the financial resources required for modernization.

Major reorganization plans involving amalgamations, pursuant to the restructuring of the Belgian steel industry carried out with government financial participation, were authorized in 1980 under Article 66 of the ECSC Treaty (ALZ/Klöckner/Belgian State and Kempense Investeringsvennootschap and Tubemeuse/Belgian State/Benteler group).<sup>2</sup>

In view of the steel undertakings' current financial situations and not wishing to stand in the way of the desired restructuring operations, the Commission raised no objection in these cases to the fact that part of the shareholding in question was acquired by means of a share transfer. However, the outcome of the transaction had to remain a minority shareholding. In line with its policy of avoiding personal links between steel groups, the Commission insisted that this holding should not involve representation on the other undertaking's management bodies, since this was not warranted on economic grounds.

Pursuant to cooperation on restructuring by the Belgian and Luxembourg steel industries, the Commission also authorized the joint establishment by the Cockerill

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<sup>1</sup> Ninth Report on Competition Policy, point 121.

<sup>2</sup> Points 143 and 144 of this Report.

and Arbed groups of Galvalange,<sup>1</sup> a sheet-coating undertaking, thus enabling the two firms to share the risks involved in introducing a new product; a relatively small share of total Community coated-sheet production is involved.

The Commission also authorized vertical integration in the steel scrap processing and dealing sector by the main Dutch steel producer (Hollandia/Hoogovens).<sup>2</sup>

141. The Commission also authorized the steel-making aspects of mergers by steel-processing undertakings under Article 66 of the ECSC Treaty but first made sure that the transactions did not lead to any abuse of dominant position in respect of non-ECSC products within the meaning of Article 86 of the EEC Treaty (mergers of handling and transport equipment and nut, bolt and screw manufacturers, notably involving the steel producers Arbed and Otto Wolff).<sup>3</sup>

142. The Commission also keeps a close watch, pursuant to Article 66, on the consequences of mergers by major steel producing groups and independent stockholders and developments on their relevant markets. The Commission has so far not had to take any action to ensure that such transactions comply with the rules. In such circumstances the Commission makes sure that the integrated stockholding of the various producers remains fairly well-balanced and that no links are created at distribution level between major steel-producing groups. In 1980 the Commission was thus able to authorize the Arbed group's acquisition of the Lommaert network of stockholders in The Netherlands, Belgium and the Federal Republic of Germany where it had previously had no direct representation.<sup>4</sup>

#### ALZ/Klöckner/Belgian State/KIV

143. The Commission authorized the establishment of joint control over the Belgian steel company ALZ NV, Genk, by the German steel producer Klöckner-Werke AG, the Belgian State and Kempense Investeringsvennootschap NV (KIV) which acquired shareholdings in ALZ of 48%, 24% and 28% respectively after an increase in share capital.<sup>5</sup>

<sup>1</sup> Point 145 of this Report.

<sup>2</sup> Point 146 of this Report.

<sup>3</sup> Points 147 and 148 of this Report.

<sup>4</sup> Point 149 of this Report.

<sup>5</sup> Commission Decision of 25.2.1980: Bull. EC 2-1980, point 2.1.18.



This undertaking produces stainless steel cold-rolled sheets; the main shareholder had been Cockerill SA.

As part of the plan for restructuring the Belgian steel industry, ALZ's capital was increased by a Belgian State holding and an additional holding by an existing minority shareholder KIV. Cockerill transferred its shareholding in ALZ in exchange for a minority shareholding in Klöckner, not involving representation on any of the undertakings' management bodies.

The transaction therefore satisfied the tests of Article 66. Klöckner had not hitherto been a producer of stainless cold-rolled sheet, so consumers can still make their choice from the same number of producers. ALZ accounts for some 7% of Community output of this product and competes with larger integrated producers in France, the Federal Republic of Germany, Italy and the United Kingdom.

#### **Tubemeuse/Belgian State/Benteler group**

144. In another transaction pursuant to the restructuring of the Belgian steel industry, the Commission authorized the Belgian State and the German tube producer Benteler to jointly take over control of the Société Anonyme des Usines à Tubes de la Meuse (Tubemeuse).<sup>1</sup>

This undertaking produces steel tubes; its shares were previously jointly held by the French tube producer Vallourec and the Belgian steel group, Cockerill, which decided to withdraw in view of the cost of putting the undertaking back on its feet.

The transfer of control satisfied the tests of Article 66 as regards the semis for steel tubes which are covered by the ECSC Treaty. Moreover, the merger of Benteler and Tubemeuse, in that it concerns mainly tubes which are covered by the EEC Treaty, was not regarded as abuse of a dominant position within the meaning of Article 86, notably because there are four major Community tube producers (Mannesmann, Finsider, Vallourec and the British Steel Corporation) whose output is far greater than the combined production of Benteler and Tubemeuse.

#### **Galvalange**

145. The Commission also authorized the joint establishment by Arbed SA and Cockerill SA of an undertaking known as Galvalange Sàrl, Luxembourg.<sup>2</sup> The

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<sup>1</sup> Commission Decision of 2.12.1980: Bull. EC 12-1980, point 2.1.35.

<sup>2</sup> Commission Decision of 24.7.1980: Bull. EC 7/8-1980, point 2.1.33.

main activity of the new undertaking will be the operation of a line for coating both faces of cold-rolled sheet, involving in particular the introduction of a new product (Galvalum sheet, coated with a zinc/aluminium alloy). Galvalange's initial production capacity of 100 000 tonnes per year will, depending on market trends, be increased in a second stage to 150 000 tonnes per year.

This transaction also forms part of the plan for restructuring the Belgian steel industry and represents a significant investment in an area particularly hard-hit by the effects of the steel crisis.

The Commission took the view that this joint transaction by Cockerill, the leading European producer of coated sheet, and Arbed, which has only a small output in this sector, satisfied the tests of Article 66. An additional effect will be the appearance of a new product apt to compete with existing products on the Community coated-sheet market, where other major integrated steel-making groups are also represented. According to the stages envisaged for the project, the production capacity of the new undertaking will represent only 2% to 3% of all coated sheet produced in the Community.

### **Hollandia/Hoogovens**

146. The Commission authorized Hoogovens IJmuiden BV (Hoogovens), the main Dutch steel producer, to acquire the entire share capital of IJzerhandel Hollandia BV, Amsterdam (Hollandia), a steel scrap and processing company.<sup>1</sup>

Hollandia, together with the scrap dealing company Verenigde Utrechtse IJzerhandel BV, which is already controlled by Hoogovens, provides over half of total deliveries of scrap by Dutch scrap merchants. However, the relevant market is not confined to The Netherlands. The country's scrap exports are twice that of home consumption of bought scrap; the scrap market is international. Scrap is freely traded within the Community and prices tend to be determined by the interplay of supply and demand on the world market.

By obtaining control of Hollandia, Hoogovens acquired for the first time a major processor of scrap and thereby brought itself into line with several major steel producers elsewhere in the Community who already own important scrap-processing companies.

In the circumstances the Commission concluded that the transaction satisfied the tests of Article 66(2) of the ECSC Treaty.

<sup>1</sup> Commission Decision of 14.3.1980: OJ L 85, 29.3.1980.

### **Merger of handling and transport equipment and nut, bolt and screw manufacturers**

147. The Commission authorized Arbed SA and Otto Wolff AG to merge their respective handling and transport equipment subsidiaries into a single unit: Pohligh-Heckel-Bleichert Vereinigte Maschinenfabriken AG, (PHB) Cologne, and Weserhütte AG, Bad Oeynhausen.<sup>1</sup>

The new unit will be jointly controlled by Arbed and Otto Wolff and its main object will be to manufacture and sell handling, transport, transshipment and open-cast mining equipment.

As a result the companies concerned should have a better chance of competing with large Community manufacturers and they should also be big enough to undertake major projects in their respective fields, which can only be undertaken by firms with considerable financial and industrial resources.

148. The Commission also authorized Arbed SA to merge into a single unit its subsidiary Karcher Schraubenwerke GmbH, Bekingen/Saarland, its own nut, bolt and screw works at Ghent, and Kommanditgesellschaft Bauer & Schaurte (B & S), Neuss.<sup>2</sup>

The new firm will mainly use wire rod—an ECSC product of which Arbed is a major producer—to manufacture screws, nuts and bolts. It will be jointly controlled by Arbed and B & S's principal shareholder. The undertakings hope that this merger, by making full use of their existing synergic and complementary capabilities, will enable them to rationalize their nut, bolt and screw business and to offer a full range of products.

The two transactions satisfy the tests for authorization under Article 66 and, in the light of the merging companies' positions in branches covered by the EEC Treaty, also satisfy the tests of Article 86.

### **Lommaert/Arbed**

149. The Commission authorized TradeArbed Participations, a company controlled by Arbed SA, to acquire the entire share capital of Lommaert-ODS International BV (Lommaert), Rotterdam.<sup>3</sup>

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<sup>1</sup> Commission Decision of 29.5.1980: Bull. EC 5-1980, point 2.1.17.

<sup>2</sup> Commission Decision of 29.5.1980: Bull. EC 5-1980, point 2.1.80.

<sup>3</sup> Commission Decision of 10.10.1980: Bull. EC 10-1980, point 2.1.27.

Lommaert, a holding company, controls, *inter alia*, steel stockholders in Belgium, the Federal Republic of Germany and The Netherlands.

These stockholders mainly deal in beams, concrete reinforcing bars, merchant bars and hot-rolled and cold-rolled products; in 1978 their shares of the market in these products were estimated at 4%, 17% and 0.4% of the Belgian, Dutch and German stockholder markets respectively.

Since the Arbed group did not control any stockholders in those countries, it was not directly represented in those markets. However, the producer undertakings of the Arbed group had for a long time been the principal suppliers of stockholders in the Lommaert group and covered almost 40% of their requirements of the products in question.

As a result of these mergers, existing trade relations will be consolidated; the Arbed group will gain access to the Belgian, Dutch and German stockholder markets and will also be assured of a broader trading base in an area where its competitors have long been established.

### *Scrutiny of mergers for compatibility with Article 86 EEC*

150. The Council has still not adopted a merger control Regulation,<sup>1</sup> so the Commission has to scrutinize individual mergers which could, following the judgment of the Court of Justice in the Continental Can case<sup>2</sup> lead to an abusive strengthening of a dominant position by certain firms within the meaning of Article 86. In assessing conditions for applying Article 86 to mergers, particularly as regards the concepts of dominant position and abuse, the Commission also based its action on the line taken in later judgments in the United Brands and Hoffmann-La Roche cases.<sup>3</sup>

A dominant position can generally be said to exist once a market share to the order of 40% to 45% is reached.<sup>4</sup> Although this share does not in itself automatically give control of the market, if there are large gaps between the position of the firm concerned and those of its closest competitors and also other factors likely to place it at an advantage as regards competition, a dominant position may well exist. Strengthening by means of merger is likely to constitute an abuse if any distortion of the resulting market structure interferes with the maintenance of remaining

<sup>1</sup> See point 20 of this Report.

<sup>2</sup> Case 6/72 [1973] ECR 215.

<sup>3</sup> Commission answer to Written Question No 67/89 by Mr Bangemann: OJ C 167, 7.7.1980.

<sup>4</sup> A dominant position cannot even be ruled out in respect of market shares between 20% and 40%; Ninth Report on Competition Policy, point 22.

competition (which has already been weakened by the very existence of this dominant position) or its development. Such an effect depends, in particular, on the change in the relative market strength of the participants after the merger, i.e. the position of the new unit in relation to remaining competitors.

Experience of recent cases has confirmed that, even if Article 86 is difficult to apply on account of the conditions for its application, it still enables the Commission to monitor to a certain extent large-scale mergers and, if necessary, to prevent them being carried through or to have changes made which are desirable from the point of view of competition.

151. When dealing with major transactions which could have been caught by Article 86 the Commission has so far been able to work out solutions with the firms concerned which take account of both industrial requirements and the need to maintain adequate competition on the relevant markets.

The transfer of interests from BSN to Pilkington enabled the British manufacturer to acquire flat glass installations in the continental part of the Community and the French group to develop its food business, yet the scope of the transaction could be regarded as compatible with Article 86.<sup>1</sup>

In view of the business links existing between Michelin and Kléber, the changes in their relations, which were dictated by circumstances, were regarded as internal reorganization and therefore consistent with Article 86. Michelin was thus able to integrate Kléber's business into its group and rescue the firm.<sup>2</sup>

Both the Michelin/Kléber-Colombes and Baxter Travenol Laboratories/SmithKline RIT<sup>3</sup> cases and many other significant mergers were scrutinized for compatibility with Article 86 at the request of the firms concerned. Since there is no system of prior notification, the Commission had to take the initiative in other cases by requesting information under Article 11 of Council Regulation No 17.<sup>4</sup> A number of such investigations are in hand.

### **Pilkington/BSN-Gervais-Danone**

152. Following substantial changes to their original plan and undertakings given by the companies concerned, the Commission decided to raise no objection,

<sup>1</sup> Point 152 of this Report.

<sup>2</sup> Point 156 of this Report.

<sup>3</sup> Point 157 of this Report.

<sup>4</sup> Ninth Report on Competition Policy, point 130.

pursuant to the Community competition rules, to the sale of the French group BSN-Gervais-Danone's German interests (Flachglas AG) to the British glass group Pilkington.<sup>1</sup>

Pilkington had originally planned to acquire all BSN's flat glass subsidiaries outside France: Flachglas AG in the Federal Republic of Germany, Glaverbel SA in Belgium and de Maas BV in The Netherlands. This operation could have been caught by Article 86 on account of the abusive strengthening of a dominant position by means of merger. Pilkington already held a dominant position on the British—and possibly also on the Irish and Danish—flat glass markets. The acquisition would have reinforced its dominant position and extended it to neighbouring markets, in The Netherlands and the Federal Republic at least. In the north-west of the Community it would thus have held major market shares (over 80% in the United Kingdom, and between 50% and 60% in Ireland, Denmark, The Netherlands and the Federal Republic), two or three times those of its closest competitor, Saint-Gobain, in this part of the common market.

The Commission sent the firms concerned a warning to this effect.

153. The two parties had in the meantime opened fresh negotiations with a view to finding an alternative which would satisfy the objections raised by the German Federal Cartel Office, which also took the view that the transaction initially planned would establish or strengthen a dominant position on the German market, thereby contravening German competition law. The parties agreed to limit the operation to the purchase of Flachglas and the Commission accordingly assessed the new proposal.

The Commission found that there were no longer grounds for objection under Article 86. The increase in the Pilkington group's share of the relevant flat glass markets in the Community would not be as substantial; the gap between its share and that of its closest competitor, would be markedly reduced, while the next largest competitor, BSN (with Boussois, Glaverbel and de Maas), would have a more substantial share of the relevant market in the north-west of the common market.

The resulting structure of supply would be more balanced and should no longer endanger the undistorted play of competition in the common market, particularly since there were no links between the two companies which might adversely affect competition and infringe Article 85.

<sup>1</sup> Bull. EC 5-1980, point 2.1.16.

154. The Commission then went on to deal with the removal and adaptation of these links. The outcome was essentially as follows:

- (i) the firms gave an undertaking that neither would be represented on the board of the other;
- (ii) BSN will not hold shares in Pilkington made over to it in part-payment for any longer than three years, and will not in the meantime exercise the voting rights attaching to those shares;
- (iii) on completion of the operation, the Pilkington/Flachglas and BSN distribution networks will be completely separate.

155. This case provides an example of possible simultaneous application of national and Community competition law to the same transaction. Two parallel actions may be brought by the relevant national authority and by the Commission in respect of the same merger.

In this case, although the steps taken by the German Federal Cartel Office and the Commission were aimed at different objectives, their development was not contradictory. There was no conflict between Community and national law. Had the two actions led to contrasting decisions, Community law would have prevailed over national law. National authorities would have to comply with a Commission decision establishing that a given merger infringed Article 86. However, if the Commission ruled that a merger did not infringe Article 86, it could not, in current circumstances of the law, raise objections to any prohibition of that merger by a national authority, based on stricter national law.<sup>1</sup>

### **Michelin/Kléber-Colombes**

156. The Compagnie Générale des Établissements Michelin wanted to know whether an operation it envisaged could be considered as an abusive strengthening of a dominant position by means of merger and asked the Commission whether a reorganization of the Kléber-Colombes business within the Michelin group would be caught by Article 86.

Michelin is the EEC's biggest manufacturer and supplier of tyres with a market share of around 40% and the second biggest in the world after Goodyear. Kléber-Colombes' market share of around 5% puts it into fifth place in the EEC, behind

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<sup>1</sup> GKN/Sachs Case, Sixth Report on Competition Policy, points 110 to 113.

Dunlop-Pirelli (18-20%), Continental-Uniroyal (13-15%) and Goodyear Europe (10-12%).

Kléber-Colombes has been in severe financial difficulties for a number of years and in recent months these have worsened. After the failure of several attempts by Michelin to arrange a link-up of Kléber-Colombes with other tyre manufacturers (notably the Austrian firm Semperit between 1973 and 1978 and the Continental-Uniroyal group in June 1980), it seemed that the only way of overcoming Kléber-Colombe's difficulties would be to reorganize its activities within Michelin.

The Commission bore in mind the fact that since 1972 Michelin had held, directly or indirectly, a majority shareholding in Kléber-Colombes—when Michelin was not in a dominant position on the Community tyre market—which, in view of the distribution of the remaining capital, enabled it to control the company.

The reorganization envisaged by Michelin in the present circumstances—like its previous policy of allowing Kléber-Colombes to preserve a certain amount of independence—would therefore amount to no more than an internal organization measure within the group already formed by the two firms. It is consequently not a new merger likely to constitute an abuse of a dominant position within the meaning of Article 86.<sup>1</sup>

From a more general angle this statement of view is interesting in that it goes back to the principle that it is the acquiring of possible control over a firm which substitutes a merger under Article 86.

### **Baxter Travenol Laboratories/SmithKline RIT**

157. At the request of the firm concerned, the Commission also scrutinized, pursuant to Article 86, the proposed sale by SmithKline RIT, the Belgian subsidiary of the US pharmaceuticals group SmithKline Corp., of its perfusions business to Travenol Laboratories SA, the Belgian subsidiary of Baxter Travenol Laboratories Inc.

Baxter is a leading manufacturer of products for hospitals worldwide and ranks second among Community perfusions suppliers. It holds first place on the Belgian market, the area directly concerned by the proposed transaction.

However, on account of the nature of the products concerned, and their manufacturing, shipping and marketing conditions, the Belgian market should not

<sup>1</sup> Bull. EC 11-1980, point 2.1.20.



be considered in isolation from a wider geographical area, the north-west of the common market, where Belgium is centrally situated. Moreover, over one-third of total Belgian consumption of perfusions and other specialist supplies is imported from neighbouring countries.

The Commission found that, on the relevant geographical market as a whole, the shares held by the firms concerned were not such as to allow Baxter to dominate the market or to strengthen dominance by the proposed acquisition of RIT. The Commission therefore informed the parties concerned that it had no reason to take action in respect of their proposed transaction.

**Part Two**

**Competition policy and government  
assistance to enterprises**

## Chapter I

### State aids<sup>1</sup>

#### § 1 — General

158. 1980 saw a continuation and deepening of the economic recession with its consequent pressure on Member States to intervene in their economies through the grant of State aids. From the point of view of the development of the Commission's policy in the field of State aids, 1980 saw the judgment of the Court in the case of Philip Morris (Case 730/79) which clarified the interpretation of application of the Treaty in regard to State aids and in particular to general aid schemes. The implications of this judgment are examined in more detail below (see points 214 to 217). 1980 was notable also in that the Commission took steps to remind Member States of their obligations of prior notification of aid proposals, pursuant to Article 93(3) EEC, and issued its directive on the transparency of the financial relationships between Member States and their public undertakings.<sup>2</sup> This is discussed in detail at point 235 *et seq.* below.

159. The past decade has seen on the one hand a growing number of interventions by Member States on which the Commission has taken a formal position, and on the other the development of a coherent frame of reference of the principles and methods of their application within which the Commission has worked. The table on the following page shows the position as regards the former.

160. The Commission's general approach to the problem of State aids is governed by the basic principle stated in the Treaty, that State aids are incompatible with the common market. The Treaty gives the Commission a discretion to grant a derogation from this principle if the State aid proposed contributes to the

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<sup>1</sup> For State aids concerning the products listed in Annex II to the Treaty, see Fourteenth General Report, point 374.

<sup>2</sup> OJ L 195, 29.7.1980.

Positions taken by the Commission concerning State aids from 1970 to 1980<sup>1</sup>

Year	Total	Of which		Formal negative decisions published in the OJ
		no objection <sup>2</sup>	procedures under Article 93(2) <sup>3</sup>	
1970	21	15	6	1
1971	18	11	7	3
1972	35	24	11	3
1973	22	15	7	4
1974	35	20	15	—
1975	45	29	16	2
1976	47	33	14	2
1977	112	99	13	1
1978	137	118	19	—
1979	133	79	54	3
1980	105	72	33	2

<sup>1</sup> Excludes virtually all agricultural aids.

<sup>2</sup> In most of the cases, subject to conditions and/or modifications of the aid scheme originally notified, after negotiations between the Commission and the Member State concerned.

<sup>3</sup> Opened and closed. During these procedures, proposals may be accepted after further examination, or modified after negotiation. The negotiation may result in the withdrawal of the proposition by the Member State after it has become clear that the proposal is incompatible with the common market.

achievement of the objectives set out in Article 92(3) EEC. In the light of the structure of Article 92 *et seq.* EEC the Commission reacts to proposals to grant or alter the grant of aids notified by Member States. It is not incumbent upon it to put forward policy statements on the application of State aids which might be interpreted as encouraging Member States to implement aid programmes. Nevertheless, the Commission over the past years has made and administered two series of measures, covering on the one hand certain economic sectors which have encountered difficulties in all Member States and where consequently the pressure for State intervention has been greatest, and on the other, areas where State aids may be used to promote Community policies. In such cases a clear statement of the approach the Commission will take in judging proposals has been thought advisable.

In consequence, the Commission has made known its position in policy documents for the following areas:

- (i) the principles of coordination for regional aids;<sup>1</sup>

<sup>1</sup> OJ C 31, 3.2.1979.

## **CORRIGENDUM**

### **Tenth Report on Competition Policy**

*Point 161 should read as follows :*

*161.* The depth of the economic recession has opened up the possibility of using State aids to assist industries with some degree of viability, in one Member State in particular. Searching discussions have been held on such plans.

Its position strengthened by the Court's decision of 17 September 1980 in the Philip Morris case, the Commission considers that the grant of such aids is in principle not compatible with the common interest.

However, the Commission may look favourably on certain measures planned specifically to combat the crisis in certain sectors where, by means of some degree of reorganization, they are capable of helping to adapt existing industrial structures to the new requirements of the world economy. The Commission may also give sympathetic consideration to measures likely to promote policies of common European interest, such as the grant of aids to investments in, for instance, energy conservation, environmental protection, or innovation, etc. which at the same time may contribute to the stimulation of investment in general and the reduction of unemployment.

These are examples of ways in which State aids, under certain conditions, could help in implementing positive adjustment policies now being discussed in many quarters.

- (ii) Commission communication to the Council on general policy on sectoral aid schemes;<sup>1</sup>
- (iii) framework on aid to the textile industry;<sup>2</sup>
- (iv) Fourth Directive on aids to shipbuilding;<sup>3</sup>
- (v) decision on aid to the steel industry;<sup>4</sup>
- (vi) framework on aids for the protection of the environment;<sup>5</sup>
- (vii) Directive on the transparency of the financial relationships between Member States and their public undertakings.<sup>6</sup>

It should be noted that 1980 saw a prolongation of the framework on aids for the protection of the environment, while discussions have been started for a Fifth Directive on aids to shipbuilding.

161. The depth of the economic recession has opened up the possibility of using State aids to assist industries with some degree of viability, in one Member State in particular. Searching discussions have been held on such plans.

Its position strengthened by the Court's decision of 17 September 1980 in the Philip Morris case, the Commission considers that the grant of such aids is compatible with the common interest only in so far as the aids contribute, at Community level, to reducing unemployment or stimulating investment or encouraging restructuring operations.

However, the Commission may look favourably on certain measures planned specifically to combat the crisis in certain sectors where, by means of some degree of reorganization, they are capable of helping to adapt existing industrial structures to the new requirements of the world economy. The Commission may also give sympathetic consideration to measures likely to promote policies of common European interest, such as the grant of aids to investments in, for instance, energy conservation or environmental protection.

These are examples of ways in which State aids, under certain conditions, could help in implementing positive adjustment policies now being discussed in many quarters.

<sup>1</sup> Eighth Report on Competition Policy, points 172 to 179.

<sup>2</sup> SEC (77) 317, 25.1.1977.

<sup>3</sup> OJ L 98, 11.4.1978.

<sup>4</sup> OJ L 29, 6.2.1980.

<sup>5</sup> C (80) 795, 23.6.1980.

<sup>6</sup> OJ L 195, 29.7.1980.

162. The Commission has been giving consideration to the degree of observance by Member States of their obligation to notify proposals to grant or alter the grant of aids. At the 360th meeting of the Council of Ministers on 2 October 1974 the governments of Member States declared that 'the rules of the EEC Treaty regarding aids (Articles 92 and 93) shall be strictly observed both with respect to existing and future aid measures'. Notwithstanding this declaration the Commission has become increasingly aware of a growing tendency, particularly marked in the case of certain Member States, not to fulfil the obligations laid down by Article 93(3) EEC in respect of notification of aid cases and their non-implementation during the time allowed to the Commission to evaluate their compatibility with the Treaty. The Commission considered that in some cases, indeed, the extent of the tendency towards non-notification would appear to indicate the possible existence of a general decision not to respect the provisions in question.

The Commission therefore took a decision to write to all Member States to remind them of their obligation in this respect. The letter was also published in the *Official Journal of the European Communities*.<sup>1</sup> While the majority of cases involved have tended to be in the field of agricultural aids, many of which were of limited duration and regional applicability, there has also appeared to be a tendency in certain Member States to disregard their obligation in respect of notification of individual cases of general aid schemes. These matters are currently the subject of further investigation. The Commission would underline that any aids implemented by Member States without due notification and adoption of a decision by the Commission are paid illegally and may therefore be subject to a decision that repayment be made of the aid in question.

163. The Commission also paid careful attention to the danger of Member States circumventing the control system on national aids by granting aids indirectly. Apart from the area covered by the Directive on transparency of financial relationships between Member States and their public undertakings, the Commission has come across two instances of indirect aids. In one case an aid scheme which the Commission had insisted be terminated was being continued through the national employers organizations using funds contributed and collected 'voluntarily' from firms through the national insurance system. After discussions between the Commission and the organization concerned, this scheme was terminated. In another case a Member State proposed to give fiscal advantages to banks which form consortia to undertake rescue operations of major companies in difficulties. The government in question did not consider this an aid scheme. The Commission intervened. The case is described in detail in point 220 below.

<sup>1</sup> OJ C 252, 30.9.1980.

## § 2 — Regional aid schemes

### *General*

164. In the principles of coordination of regional aids and in various decisions taken on schemes of assistance<sup>1</sup> the Commission has consistently expressed its opposition (although certain exceptions can be made) to the granting of aid which is not conditional on initial investment or the creation of jobs, but is linked to a firm's production and constitutes operating aid. It is difficult to assess and quantify the scope of such assistance which can often conceal the precarious circumstances of the firm in question and the need for corrective action. This lack of transparency makes it impossible to check whether benefits are being granted to viable firms capable in time of facing up to competition. Thus the assistance may create new regional problems in the medium term.

In this respect the decision on the United Kingdom Regional Development Grant (RDG) was an important step forward. The RDG is an investment subsidy granted automatically for any investment (including the renewal of capital goods) and was introduced for an unlimited period. Following lengthy discussions, both bilateral (at different levels between the Commission and the British authorities) and multilateral, the British Government undertook to amend this aid to make it compatible with the rules of the common market.

### *Specific statements on certain national regional aid schemes*

165. The Commission continued scrutinizing certain national regional aid schemes for compatibility with the common market pursuant to Article 92 *et seq.* of the EEC Treaty.

### **Federal Republic of Germany**

166. Following the initiation of the Article 93(2) EEC procedure in January 1979 in respect of certain measures under the German regional aid system,<sup>2</sup> the

<sup>1</sup> The principles do not apply to aids provided for under these schemes which concern the products listed in Annex II to the Treaty.

<sup>2</sup> Ninth Report on Competition Policy, point 142.



Commission decided in July 1980 to extend the procedure to certain new measures introduced under that system.

The measures<sup>1</sup> are based on an Act of 6 October 1969 relating to the joint task for the improvement of regional economic structures;<sup>2</sup> a general plan is adopted jointly by the Federal Government and the *Länder* each year.

The extended procedure is concerned with amendments introduced in particular by the Seventh General Plan which were repeated in the Eighth and Ninth General Plans. In preparing the Seventh General Plan the Federal Government proceeded to update the indications used to designate the 178 labour markets established on the basis of municipalities. The Federal Government and the *Länder* reached no agreement on the outcome of this work. The Federal Government pointed to the general weakness of the economy and uncertainties in calculating the indices to warrant the addition, until 1 January 1981, of five new assisted areas (Aachen, Aschaffenburg, Gummersbach, Kleve-Emmerich and Rosenheim), although existing assisted areas whose overall indicators no longer attained the threshold value for assistance and which in accordance with the Federal Government's method should have their assisted area status, were not excluded.

The Commission also compared regional aids in the Federal Republic of Germany with those in other Member States and came to the conclusions that the amount of regional assistance granted under the joint task and the aid programmes of the *Länder* was excessive.

It accordingly objected to this extension of assisted areas.

The Federal Government has stated that the indicators used up to now will be updated for the Tenth General Plan, so the Commission did not carry out a socio-economic analysis of all the assisted areas, but initiated the Article 93(2) EEC procedure in respect of the continued granting of assistance in five areas with indicators well below the threshold value (Bad Kreuznach, Lingen-Nordhorn-Rheine, Meppen, Sigmaringen and Wilhelmshaven).

167. The Commission also stated its views on a number of changes made by the government of the *Land* of Nordrhein-Westfalen in its regional development programme, which had been notified to the Commission as required by

<sup>1</sup> Bundestagsdrucksachen: 8/2014, 26.7.1978 (Seventh General Plan); 8/2590, 20.2.1979 (Eighth General Plan); 8/3788, 13.3.1980 (Ninth General Plan).

<sup>2</sup> Gesetz über die Gemeinschaftsaufgabe Verbesserung der regionalen Wirtschaftsstruktur (Bundesgesetzblatt I 1969, p. 1861; amended version, 23.12.1971: Bundesgesetzblatt I, p. 2140).

Article 93(3) EEC.<sup>1</sup> The main effect of the amendments was to extend the scheme by the addition of new zones.

In view of the high unemployment rate in these areas, which for a number of years has been far above the national average, and the relatively low rate of assistance, the Commission raised no objection to the introduction of these amendments up to the end of 1980. It will reassess the situation in these areas on the basis of a report on aid granted and will be taking a decision as to whether they may retain their assisted status.

## Belgium

168. Pursuant to Article 2 of the Commission Decision of 26 April 1972<sup>2</sup> on the Economic Expansion Act of 30 December 1970<sup>3</sup> the Belgian Government was to notify a new proposal concerning the scheduling of development areas.

Despite numerous bilateral discussions between the Belgian authorities and the Commission, at the end of 1979 work on the proposal had still not progressed sufficiently and the relevant notification could not be prepared.

However, following the Commission's new analysis of the socio-economic situation in Belgium's regions and repeated reminders, in November 1980 the Belgian Government notified a proposal concerning the scheduling of its development areas.

In December the Commission requested further information, notably the method used to select these areas.

However, on account of the country's current socio-economic situation, the Commission raised no objection to a further extension until 31 December 1980 of the complementary regional aid<sup>4</sup> provided by the Economic Expansion Act implemented by a Royal Decree of 23 May 1975<sup>5</sup> for an initial six-month period.

<sup>1</sup> Richtlinien für die Gewährung von Investitionshilfen zur Verbesserung der regionalen Wirtschaftsstruktur des Landes Nordrhein-Westfalen, Regionales Wirtschaftsförderungsprogramm: Minister for Economic Affairs, Small Businesses and Transport, circular dated 15.8.1978.

<sup>2</sup> OJ L 105, 4.5.1972.

<sup>3</sup> *Moniteur belge*, 1.1.1971.

<sup>4</sup> Ninth Report on Competition Policy, point 144.

<sup>5</sup> *Moniteur belge*, 29.5.1975.

## Denmark

169. The Danish Government requested Commission approval of a proposal extending for a further period of one year, until 31 December 1981, the assisted-area status of the municipality of Kalundborg, West Zealand.

In its decisions on the Danish regional aid system<sup>1</sup> in 1977 the Commission had authorized the Danish Government to schedule this municipality as an assisted area for two years. At the end of 1979 it agreed to the extension requested for the area until the end of 1980.<sup>2</sup>

In arguing their case the Danish authorities stressed the importance of retaining their assisted areas unchanged until the rescheduling planned for 1981 is completed. Moreover, they felt that the three initial years of application were not sufficient to assess the effects of the aid measures in the area in question.

The Commission scrutinized the socio-economic situation in the area again and established that it had improved substantially since 1977. At that time unemployment, a decisive factor in the Commission's decision, had attained a very high level, notably on account of the closure of certain large factories in the area which had caused major redundancies. By 1979 most of the unemployed had been taken on in new activities, and the Commission approved retention of the assisted-area status for one year in order to make sure that the favourable employment trend had not been caused by exceptional circumstances. The rate of employment is now around the Community average.

The Commission accordingly considered that the municipality of Kalundborg should not receive assistance after 1 January 1981 and initiated the Article 93(2) EEC procedure to enable the Danish Government to submit its comments.

## France

170. The Commission stated its views on a number of French aid schemes.

In December 1979 the Article 93(2) procedure was initiated in respect of Article 2 of Act No 79-525 of 3 July 1979<sup>3</sup> concerning assistance for investment in productive industry, a measure permitting an increase in firms' allowable depreciation on fixed assets acquired or created with the aid of a regional

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<sup>1</sup> System set up under Act No 219 of 7.6.1972: *Lovtidende A*, 7.6.1972.

<sup>2</sup> Ninth Report on Competition Policy, point 145.

<sup>3</sup> *Journal officiel de la République française*, 4.7.1979.

development premium (PDR).<sup>1</sup> the Commission took this decision in particular because the assistance was likely to exceed the ceiling laid down by the 1978 principles of coordination.<sup>2</sup> It also asked the French Government to provide information on the socio-economic grounds for the assistance.

In the course of the procedure two Member States declared their support for the Commission's position. Since the French Government did not reply within the allotted time, the Commission notified it that if no reply were received it would be obliged to take a decision forthwith on the compatibility of the measures in question with the common market on the basis of information at its disposal. It also reminded the French Government that the measures could not be applied while the procedure remained open.

171. The Commission also continued its examination of the Special Industrial Conversion Fund (FSAI) which came into force in 1979 and provided for the combined award of State grants and loans in quasi-equity form in certain French industrial conversion areas.<sup>3</sup> Following initiation in 1979 of the Article 93(2) procedure in respect of the FSAI loans with the aim of ensuring their compatibility with the Treaty,<sup>4</sup> many discussions were held and much information passed on by the French authorities. The Commission came to the conclusion that granting of these loans was to be regarded as a measure of regional assistance and that they therefore had to be assessed in the light of 1978 principles of coordination. It therefore worked out, in conjunction with the French authorities, a standard method for calculating the net grant equivalent of the FSAI loans.

The Commission then informed the French Government that it would terminate the procedure when it recorded its agreement on the abovementioned calculation method and on the forwarding of an annual report on the loans actually granted. Moreover, it took note of the French Government's assurances that the aid ceilings laid down by the 1978 principles of coordination would be respected when assistance was granted from the FSAI or when the loans in quasi-equity form were combined with other types of regional assistance.

172. The Commission also authorized the extension of the area covered by the FSAI to the St Etienne employment area in the Loire and the mining areas of Albi-

<sup>1</sup> Ninth Report on Competition Policy, points 148 and 149.

<sup>2</sup> OJ C 31, 3.2.1979; Eighth Report on Competition Policy, points 151 to 156.

<sup>3</sup> Act No 78-741 of 13.7.1978: *Journal officiel de la République française*, 14.7.1978, p. 2802, Articles 30 to 33; Decree No 79-286 of 6.4.1979: *Journal officiel de la République française*, 8.4.1979.

<sup>4</sup> Ninth Report on Competition Policy, point 146.

Carmaux (Tarn), Décazeville (Aveyron) and Alès (Gard), all already receiving PDR at maximum rate. In taking this favourable decision the Commission took account of the small area in question, the deterioration of the socio-economic situation and the low intensity of the increased aid granted from FSAI. However, it reminded the French Government that FSAI assistance in these four areas would have to be granted in accordance with the relevant conditions, which the Commission specified when initiating the procedure in respect of the loans in quasi-equity form.

## **Ireland**

173. In May 1980 the Irish Government notified the Commission of the detailed plans<sup>1</sup> for the withdrawal of Export Sales Relief and Shannon Relief already announced in principle in December 1978. The Commission had made known its objections to these aids because they constitute export and operating aid.

Under Export Sales Relief manufacturing companies could claim relief from corporation tax on profits derived from export sales for 20 years. The legislation governing the system provided that the relief would expire in 1990 regardless of the number of years for which a company had benefited. Export Sales Relief was available throughout Ireland with the exception of the Shannon Free Airport Zone where a similar aid, Shannon Relief, applied. Shannon Relief was available for both manufacturing and non-manufacturing activities and while it too was to terminate in 1990 there was no limitation on the period for which individual companies could benefit.

The plans notified to the Commission provided that the relief would cease to be offered from 1 January 1981. Companies that had already qualified for the relief would, however, continue to do so in accordance with the terms of the existing legislation.<sup>2</sup> The plans also stated that any further companies offered relief before 1 January 1981 would be entitled to the benefit of the existing legislation provided they had contracted by 1 July 1981 to commence their projects.

The Commission decided not to raise any objections under Articles 92 to 94 EEC to these plans. In order to be in a position to supervise the transitional arrangements the Commission will receive a list of projects where offers of relief have been made prior to 1 January 1981 but where the investment has not started.

The notification from the Irish authorities confirmed that the supplementary depreciation allowance of 20% for plant and machinery in the designated, mainly

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<sup>1</sup> Contained in Finance Act, 1980.

<sup>2</sup> Principal laws: Finance (Miscellaneous Provisions) Act, 1956; Finance Act, 1969.

western, areas of the country was withdrawn from 1 January 1981. The Commission had also objected to this aid as it was not limited to initial investment and thus had the character of an operating aid.

With the elimination of these problems the Commission now expects to be able to complete its review of the Irish aid system in 1981.<sup>1</sup>

## Italy

174. Act No 183 of 2 May 1976<sup>2</sup> concerning rules on regional aid in Italy, notably for the Mezzogiorno, for the five-year period from 1976 to 1980 and the implementing Decree No 902 of 9 November 1976<sup>3</sup> introduced a single fund for granting interest relief on loans taken out by industrial firms<sup>4</sup> and set an overall limit on the form and intensity of regional aid throughout the entire country.

Pursuant to the 1978 principles of coordination in the Mezzogiorno and the Community's other less-developed regions an aid ceiling of 25% in net grant-equivalent of initial investment or 4 500 ECU per job created by the investment applies from 1 January 1981 to aid other than that directly linked to initial investment or job creation. In order to make sure that the ceilings are respected, in March 1980 the Commission reminded the Italian authorities to take the steps required to coordinate assistance, both in relation to the various ministries responsible, the central administrative bodies and the administrative bodies in the autonomous regions. The latter are entitled to legislate in the field of aids.

In November 1980 the Italian Government notified the Commission of the definitive demarcation of inadequately developed areas in central and northern Italy, which had been drawn up by the Interministerial Committee on Industrial Planning (CIPI) as required by Decree No 902. In the course of its constant review of existing aid schemes in the Member States pursuant to Article 93(1) EEC the Commission will analyse the socio-economic situation of the assisted areas to check whether they are compatible with the common market rules of competition.

<sup>1</sup> Principal statute: Industrial Development Act, 1969.

<sup>2</sup> *Gazzetta Ufficiale della Repubblica Italiana* No 121, 8.5.1976.

<sup>3</sup> *Gazzetta Ufficiale della Repubblica Italiana* No 8, 11.1.1977.

<sup>4</sup> Seventh Report on Competition Policy, point 180.

## United Kingdom

175. As part of the Article 93(1) EEC review of UK regional aid<sup>1</sup> and the application of the principles of coordination to regional aid schemes the Commission stated its views on one of the scheme's most important measures, the Regional Development Grant (RDG); a decision will be taken in due course on the other measures and the assisted areas.

The RDG is an investment subsidy; some of its features constitute operating aid in that it is granted for all investment (including periodic renewal of plant and machinery) as a quasi-automatic item-based scheme. It has been introduced for an unlimited period.

The Commission has always been opposed in principle to operating aids which neither promote nor facilitate the economic development of regions within the meaning of Article 92(3)(a) and (c). If such assistance is given to cover a firm's production costs (and not to establish, expand or engage in an activity involving a fundamental change) it does not bring to the area concerned any lasting increase in income or reduction in unemployment. By favouring certain firms it is likely to distort competition in intra-Community trade without making any compensatory contribution to regional development.

Following protracted discussions between the British authorities and the Commission the United Kingdom agreed to amend the RDG by 1984 at the latest so as to eliminate its element of operating aid and make it compatible with the rules of the common market.

The British Government undertook that investment in capital equipment made by an existing firm for the purpose of keeping it in business or maintaining its level of business without affecting any basic change would no longer qualify for assistance. The Commission will have to be informed in good time of the practical steps taken to implement this alteration.

However, certain measures will be introduced in 1981: the minimum length of life of machines eligible for RDG will be raised from two to four years and the minimum value from UKL 500 to UKL 1 000, except, as regards the latter, in the case of premises where less than 100 persons are employed.

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<sup>1</sup> Principal statutes: Great Britain—Industry Act, 1972, Local Employment Act, 1972, Scottish Development Agency Act, 1975, Welsh Development Agency Act, 1975; Northern Ireland—Industrial Investment (General Assistance) Acts (Northern Ireland), 1966 and 1971, Industrial Development Acts, 1966 and 1971, Selective Employment Payment Act, 1966.

The Commission decided to raise no objection to the maintenance of the existing total volume of UK regional aid, bearing in mind the amendments notified in 1979,<sup>1</sup> on condition that the aid ceilings laid down by the principles of coordination are respected and that there is no significant improvement in the socio-economic situation of the assisted areas concerned.

176. The Commission also approved the British Government's upgrading of certain assisted areas affected by steel redundancies: Scunthorpe in the Yorkshire and Humberside region, Newport, Pontypool, Port Talbot and Shotton in Wales and Corby in the East Midlands. Aid intensity in these areas was increased as a result of the upgrading and in the Scunthorpe, Newport, Pontypool and Corby areas the ceilings laid down by the principles of coordination were also exceeded.

The Commission took into account the fact that these areas are all highly dependent on the steel industry (the British Steel Corporation in Shotton and Corby) and their rate of unemployment is above the national and Community averages. Moreover, further redundancies are envisaged and the job situation will deteriorate further.

The Commission therefore considered that the planned upgradings were warranted and granted a derogation from the principles of coordination for the areas in question on condition that the Community aid ceilings for Development Areas in Special Development Areas were respected.

177. Similarly, the Commission raised no objection to a relatively slight amendment made by the British Government to its scheme of rent-free factories for industrial and trading firms. Prefabricated buildings are made available without charge to industrial and commercial firms for periods which vary in accordance with the length of time during which the factory in question has remained empty.

178. Finally, the Commission agreed to an application for derogation from the principles of coordination for a regional aid scheme submitted by the British Government, as required by point 7 of the principles.

The application related to the regional aid scheme applicable in the Scottish Highlands and Islands, the part of the country covered by the Highlands and Islands Development Board (HIDB).<sup>2</sup> The ceiling for aid intensity established by the principles of coordination for most of Scotland is 30% of initial investment or 5 500 ECU per job created provided the amount of assistance does not exceed 40%

<sup>1</sup> Ninth Report on Competition Policy, point 152.

<sup>2</sup> Development Board set up by the Highlands and Islands Act, 1965.



of investment; in 1975 and in 1978<sup>1</sup> the HIDB had already obtained derogations so the aid ceiling expressed as a percentage of investment could be exceeded. In 1979 the United Kingdom requested authorization for the HIDB to also increase to 10 000 ECU the alternative ceiling per job created so that it could help small businesses with low investment in fixed assets.

The Commission scrutinized the socio-economic situation in the area and established that, although there had been an improvement in the East, notably on account of North Sea oil, it was still experiencing genuine development difficulties on account of its peripheral location, harsh physical environment, low population in dispersed areas, transport problems, unbalanced industrial structure, outward migration and unemployment.

The Commission also analysed some 20 individual cases of application and noted that in the case of establishments with 20 employees or less, whatever their circumstances, the effects of the aid on competition were extremely slight.

The Commission therefore decided that the HIDB could grant assistance up to a 75% ceiling of initial investment or 10 000 ECU per job created to undertakings employing no more than 10 persons; for those employing more than 10, the HIDB will have to comply with an aid ceiling of 50% of initial investment or 5 500 ECU per job created, except in the Nairn, Lerwick and Kirkwall labour markets in the east of the region where the ceilings for Development Areas and Special Development Areas are applicable. The Commission asked the British Government to notify in advance any project where fixed investment exceeds 600 000 ECU or the rate of assistance exceeds 30%.

## The Netherlands

179. The Commission stated its views on amendments made by the Dutch Government to its aid scheme for Lelystad<sup>2</sup> and its general regional aid scheme (Investeringspremiereregeling—IPR).<sup>3</sup>

The scheme for Lelystad was approved by the Commission in 1974 and introduced a premium per job created in this new town, established in Oosterlijk Flevoland, the area reclaimed from the sea in the 1960s. The proposed amendment involved an increase in the premium and since it was designed merely to compensate for the

<sup>1</sup> Eighth Report on Competition Policy, point 170.

<sup>2</sup> Notice No 680/316 of 23.4.1980: *Staatscourant* No 83, 1980.

<sup>3</sup> Ministerial Notice No 677/341 WJA of 7.6.1977: *Staatscourant* No 109, 8.6.1977.

premium's drop in real value since introduction as a result of inflation, the Commission has no reason to object.

The IPR scheme<sup>1</sup> covers the country's three northern provinces, part of Overijssel and Limburg and a number of development poles throughout the rest of the country. Aid is awarded as a straight cash grant or as a mixed premium (a cash grant and an amount per job created). The proposed amendment would increase the level of the straight grant from 25% to 35% until the end of 1980 in eight areas located in the provinces of Groningen, Drenthe and Limburg; however, the Community ceiling set for these areas would be respected whenever aid was granted.

In five of the areas concerned (the labour exchange office areas of Winschoten, Stadskanaal, Emmen, Coeverden and Oostelijke Mijnstreek in the provinces of Groningen, Drenthe and Limburg) combined regional aid—including that granted under the Investment Account Act<sup>2</sup>—had already attained the 20% net grant-equivalent ceiling laid down by the principles of coordination and approved by the Commission; however, it was decided to raise no objection to the increase since the socio-economic situation of these areas still warranted the granting of regional assistance and there would be virtually no increase in aid.

However, the proposed amendment would have led to an increase in the labour exchange office areas of Veendam, Delfzijl and Uithuizen.

The Commission compared the socio-economic situation in these areas with that of the rest of The Netherlands (rates of unemployment and industrialization, gross regional product, *per capita* income) and found that it had not worsened in recent years. It then scrutinized the intensity of regional aid granted on both sides of the German-Dutch border and established that levels were similar or even a little higher on the Dutch side. After carrying out a comparative analysis of the areas on both sides of the border the Commission noted that, although both areas had regional problems, the socio-economic situation was slightly better on the Dutch side.

The Commission therefore considered that while maintenance of regional aid in these three areas could be accepted, no increase was warranted. It accordingly initiated the procedure of Article 93(2) EEC in respect of the increase, thereby suspending introduction of the measures in question.

<sup>1</sup> Eighth Report on Competition Policy, point 167.

<sup>2</sup> Wet Investeringsrekening (WIR): *Staatsblad* No 368, 1978; Eighth Report on Competition Policy, point 166.

### § 3 — Aid schemes for specific industries

#### *Aids to shipbuilding*

##### *General*

180. The Fourth Council Directive on aids to shipbuilding<sup>1</sup> came to the end of its foreseen period of application on 31 December 1980. It had been introduced in 1978, when the full gravity of the crisis facing shipbuilding worldwide, and particularly in Europe, was becoming apparent. The Directive recognized that the Community's shipbuilding industry would need assistance to survive the crisis; but at the same time it sought to ensure that the breathing space provided by the aids which it authorized was used to restructure and adapt the industry so that in due course it could stand on its own feet in the world market without aid. It was made a requirement therefore that aids should be linked with a national programme of restructuring designed to bring capacity more into line with potential demand, and, in order to give the yards an incentive to proceed as quickly as possible with the necessary measures, aids were to be progressively reduced over time. The Commission also had to assure itself that the granting of aids by individual Member States did not distort competition within the Community in this sector to an extent contrary to the common interest.

During the currency of the Fourth Directive a considerable effort was made in most Member States to adapt the industry to the new perspectives of the market. Employment and output were reduced and shipyards attempted to switch production into sectors of the market where demand was least depressed. There was a noticeable trend towards an increase in naval shipbuilding in compensation for job losses in the merchant sector. In general it may be claimed that Member States have recognized the seriousness of the situation and have given evidence of their willingness to take the (often very difficult) decisions which are necessary if their industries are to have a viable future.

Despite these efforts, however, it became clear early in 1980 that market conditions in the early years of the new decade would continue to be as difficult as they had been in the recent past. The familiar problems of low freight rates, weak demand and surplus capacity, with consequent low prices and severe competition from third countries, would persist, so that the European industry would still find aid indispensable for securing orders and continuing its process of adaptation. The

<sup>1</sup> OJ L 98, 11.4.1978.

Commission began, therefore, in consultation with representatives of the Member States, to elaborate a proposal for a new Directive to take over on the expiry of the Fourth, and the proposal was presented to the Council in September 1980.

181. The proposed Fifth Directive<sup>1</sup> retains the spirit of its predecessor in authorizing aids only if they are linked with restructuring proposals and show a progressive reduction over time. In assessing the acceptability of an individual State's restructuring programme, the Commission will take account of what has been achieved in that State in previous years. It recognizes that reductions of capacity and employment effected in recent years as part of restructuring programmes have brought the industry of some Member States close to size limits below which economic viability could be threatened. It is not to be expected, therefore, that in proposing new aid schemes such States could offer restructuring plans of the same type and scale as in the past. In these cases, it will be appropriate to shift the emphasis of the restructuring requirement from simple contraction to other aspects such as regrouping of enterprises, modernization, rationalization of production and so forth.

The main differences between the Fourth Directive and proposed Fifth Directive may be regarded as the consequences of a concern which emerged during the period of the Fourth Directive that some State interventions which were, in practice if not by design, forms of aid to shipbuilding, were unfairly escaping the discipline to which other forms were submitted. The new proposal seeks to resolve this difficulty by adopting a more comprehensive approach which enables the Commission to demand that the common objectives, notably in regard to restructuring and avoidance of distortion of internal competition, should not be endangered in this way. Thus under the proposed Fifth Directive, the Commission would be able to consider whether aids to shipowners are, in present conditions, having an effect similar to aids to shipbuilding and, if so, to take steps to ensure that they do not inhibit restructuring or distort competition. Likewise, if the Commission concludes that various types of financial interventions by States which have been in evidence in recent years (e.g. coverage of losses, contributions to capital reorganization) contain elements of aid to shipbuilding, it would be able to examine the position with the same end in view.

The purpose of these changes is to make it clear that the fairness of the Directive will not be threatened because aids granted in certain forms or by certain mechanisms would be outside its control.

<sup>1</sup> OJ C 261, 8.10.1980.

The new proposal makes provisions similar to those in the Fourth Directive in respect of credit facilities and investment aids. With regard to rescue aids, it aims to prevent these being used, at the moment of the taking of an order, as a means to exceed the normal maximum limit placed on production aid.

The new Directive should have been applied from 1 January 1981. However, as the Council did not take a decision on the Commission proposition in sufficient time, the Commission has proposed that the Fourth Directive be prolonged until 31 March 1981.<sup>1</sup>

### *National measures*

182. Several aid schemes were proposed by individual Member States to help their shipbuilding industries deal with the crisis.

#### **France**

183. The last report<sup>2</sup> outlined the reasons which led the Commission to initiate the procedure of Article 93(2) of the EEC Treaty in respect of the French Government's proposed aid scheme for shipbuilding during 1979 and 1980. In essence these were that the proposed rate of aid, at 30% of the contract price, was too high in comparison with the preceding French scheme and with schemes approved for other Member States in 1979, and that the link between the aid and the attainment of restructuring objectives was inadequate.

During the course of the procedure, the French Government decided to reduce the normal maximum rate of aid to 25% while reserving the possibility to seek authorization for 30% in exceptional cases. It was also agreed that this 25% should include any aid from which particular contracts might benefit under the price guarantee mechanism (a form of insurance against cost increases during the construction period of a ship).

Further information was also provided on the restructuring objectives for the industry, acceptance of which by the yards was to be a condition for their receipt of aid. In particular, the French Government stressed the reductions of productive capacity and employment envisaged during the period of the scheme and in the early 1980s. The Commission had reservations about the French Government's

<sup>1</sup> OJ L 43, 14.2.1981.

<sup>2</sup> Ninth Report on Competition Policy, point 157.

policy of keeping in being all the large shipyards since, in its view, the reduced throughflow of orders these yards could expect would result in an increased burden of fixed charges per contract and would militate against competitiveness.

Nevertheless, the Commission concluded that it could terminate the Article 93(2) EEC procedure on condition that the aid was used to secure a volume of orders not exceeding the restructuring objectives set by the French Government. The Commission also made it clear that the scheme could apply only to orders taken between 27 September 1979 (the date of provision of full information on the scheme) and 31 December 1980.

184. The Commission closed the procedure of Article 93(2) which it had opened earlier against a proposed production aid for the construction of four ships for a Polish owner. The Commission opened the procedure because the aid proposed exceeded very significantly the level regarded as the normal maximum for production aids at this period (25%), and because no extraordinary restructuring effort seemed to be proposed to accompany this exceptional aid. After considering the observations of the French Government, in particular those concerning the restructuring already undertaken in the two yards concerned and the precarious position in which they would be placed without these orders, the Commission decided that the level of production aid which could be authorized in exceptional circumstances under the Fourth Directive (30% of the contract price) could be granted.

It therefore closed the procedure on this condition. This decision meant that a considerable proportion of the aid proposed could not be granted, at least in the form originally intended (production aid). The French Government had argued in its notification that that part of the aid which exceeded the normal maximum should be regarded as a rescue aid and not a production aid. The Commission did not accept this argument and it was in fact problems of this kind which led to the proposal of a more explicit definition of rescue aids for the Fifth Directive.

The Commission indicated, however, that a proposal from the French Government to grant these yards a rescue aid in some other form under Article 5 of the Directive would be considered on its merits.

185. The Commission opened the Article 93(2) procedure in respect of a proposed aid for the construction of four container vessels in a French yard. Again the reason was that the rate of aid was well in excess of the maximum allowed for by the Commission in its approval of the aid scheme described above. The French Government argued that the order was necessary to maintain a minimum viable level of activity at the recipient yard. The Commission felt, however, that the

exceptionally high level of aid proposed required a fuller and more detailed justification. The procedure remained open at the end of the year.

## Italy

186. The Italian Government's aid scheme under law No 231 of 1978 was described in a previous report.<sup>1</sup> It applied to orders taken in the period up to 30 September 1978. The Commission had approved the scheme subject to an aid ceiling of 30% of the contract price, selective use of the aid to promote adaptation of the industry and notification of each individual case. The cases of application of this law mentioned below were considered during the year.

187. The Commission closed an Article 93(2) EEC procedure in respect of one case. The procedure had been opened principally because the level of aid proposed exceeded the limit of 30% of the contract price. The Italian Government, in presenting its observations on the opening of the procedure, indicated that the yard which was to benefit from the aid was undertaking an extensive restructuring programme aimed at converting almost half of its workforce to non-shipbuilding activities. It showed that substantial progress had been made with this programme and that the order in question was important if continuation of this progress was not to be threatened. In the circumstances, the Commission concluded that it would be justified in approving the maximum aid of 30%. As with the French case discussed above, however, the Commission did not accept the argument that the part of the aid in excess of 30% should be regarded as a rescue aid and authorized under Article 5 of the Directive.

188. During the year, the Commission approved 15 cases of application of the aid scheme under law No 231. However, in respect of a further 51 cases, (49 of which were notified simultaneously), it initiated the Article 93(2) EEC procedure. In the majority of these cases, the aid proposed exceeded 30% of the contract price. Further, this aid, when added to that previously disbursed under the scheme, took the total beyond the budgetary allocations for the scheme originally notified by the Italian Government.

The total tonnage of orders aided under law No 231 likewise exceeded the forecasts originally discussed with the Commission. The Commission also considered that, since the aids had been notified up to two years after the taking of the contracts to which they referred (to qualify for aid under law No 231, contracts had to be

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<sup>1</sup> Eighth Report on Competition Policy, point 186.

concluded between April 1977 and September 1978), assessment of the economic effects of these aids at the moment of their influence on the market had been rendered impossible. Finally, the Commission noted an apparently systematic absence of invitations to yards in other Member States to tender for orders placed by Italian shipowners. The Italian Government again advanced the argument that in regard to some of the orders, part of the aid (up to 30%) should be regarded as production aid under Article 6 of the Directive and the rest as rescue aid under Article 5. It also stated that high levels of aid were needed because in the period between the taking of orders and the actual payment of aid, the real value of the aid had been eroded by inflation and by the high interest costs which Italian yards had to pay for bridging finance. The apparent exceeding of the original forecasts of orders to be taken was explained by the fact that about half of the vessels aided were not new orders but had been under construction, on the yard's own initiative, when the law was introduced. The combination of these factors, it was argued, necessarily entailed the increasing of the original budgetary allocations for the scheme. The procedure remained open at the end of the year.

189. The Italian Government put forward a new shipbuilding aid scheme under law No 122 of 1980. This was to apply to contracts taken in 1979 and 1980 and, like its predecessor, was presented as an interim measure pending the adoption by the Italian Parliament of a restructuring plan for the industry.

The scheme proposed production aid to a maximum level of 30%, the precise amount to be determined in each case by means of criteria derived from the type of ship, the delivery period and the particular situation of the yard taking the order. The budget for the scheme was LIT 110 000 million, spread over the two years.

The Commission decided to initiate the procedure of Article 93(2) of the Treaty in respect of this proposal, for the following reasons. The level of aid was higher than that authorized for other Member States whose aid schemes had recently been approved. There was no clear link between the granting of aid and the achievement of restructuring objectives; since the restructuring plan developed by the Italian Government had not been approved by Parliament, it had no official status and it was not clear that the targets it established would be worked towards in return for the aid. Finally, the scheme was notified to the Commission early in 1980, although its period of application also covered the previous year; the Commission felt that the retrospective approval for a period of over a year which it was being asked to give could not be justified unless exceptional grounds could be demonstrated.

### **Federal Republic of Germany**

190. The Federal German Government sought the Commission's approval for the



extension of its aid scheme for a further year, up to the end of 1981. As indicated in the last Report,<sup>1</sup> the scheme had originally been designed to cover the three years 1979 to 1981, but the Commission had approved it only up to 31 December 1980, the date of expiry of the Fourth Directive. The main features of the proposals for 1981 were as described in the last Report: budgetary allocation reduced from DM 240 million to DM 180 million; maximum aid level reduced from 20% of contract price to 15% and average aid from 10% to 7½%.

After consultation with the other Member States, the Commission decided to approve this extension. Since the scheme was to apply in the year 1981 and would therefore be in operation during the proposed period of validity of the Fifth Directive, the Commission took account, in its assessment, of the general principles of that document. Its approval was given provisionally, on the assumption that the proposed Fifth Directive would in time be adopted by the Council.

In coming to its decision, the Commission was influenced by the relatively low rates of aid proposed (which were degressive as compared with earlier years) and by the fact that the scheme was to last for only one year. It also took into account the fact that the restructuring programme proposed for the German shipbuilding industry when the scheme was approved in 1979 had been largely implemented and had indeed in some respects (notably reduction of hours worked) proceeded at a faster rate than originally foreseen. The German Government's assurance that it would monitor the industry's progress towards achievement of the targets set for workforce reduction by 1982 enabled the Commission to accept that there was an adequate link between the proposed aid and the further restructuring of the industry. The Commission asked to be informed of the results of the scheme and it reserved the right to fix a lower aid limit for smaller ships (under 6 000 grt) if evidence emerged that the scheme was causing particular distortions of competition in that sector of the market.

### *Ship repairing*

191. The last Competition Report<sup>2</sup> outlined the problems faced by the ship-repair sector in the Community, as these had been analysed in the report submitted by the Commission to the Council on November 1979. An important conclusion of this study was that, in the existing market conditions, production aid should not be authorized for ship-repair undertakings. *Ad hoc* crisis aids might be considered if there were exceptional reasons for doing so, but if granted, such aid should be

<sup>1</sup> Ninth Report on Competition Policy, point 158.

<sup>2</sup> Ninth Report on Competition Policy, point 161.

required to be linked to a restructuring programme leading to capacity reductions. During the year, the Commission received notification from two Member States, Italy and Belgium, of proposals to provide aid to their ship-repairing industry.

## Italy

192. The Italian proposal provided for a production aid of up to 15% of the contract price of repair or conversion work commenced in 1979 or 1980. The level of aid in such individual cases would be determined in accordance with criteria which had not yet been established when the proposal was notified; the highest rates, however, were to be reserved for undertakings located in the Mezzogiorno. The budget for the scheme was LIT 25 000 million, spread over the two years. The Italian Government considered that the scheme was necessary because competition from third countries in the Mediterranean was endangering the survival of the Italian ship-repair industry.

The Commission opened the Article 93(2) EEC procedure in respect of this scheme. Consultations with other Member States had shown a general opposition to the extension of production aids to this sector, thus confirming the Commission's view as described in the Report to the Council mentioned above. The lack of any restructuring programme in return the aid also made it impossible to justify the scheme in the terms of the Report to the Council. The Commission considered in addition that it had not been proved that ship repair in the Mediterranean area could be considered as a separate entity which was subject to particular pressures and isolated from the rest of the market; on the contrary ship repairing was to be regarded as a single market throughout the Community, so that the Italian proposals would distort competition with the industries of other Member States.

## Belgium

193. The Belgian Government informed the Commission of its intention to provide aid for the ship-repair industry in Antwerp. The two main ship-repair companies in Antwerp, which between them account for about 90% of all ship-repair work done in Belgium, have been experiencing a falling turnover in recent years, largely because their prices have become uncompetitive with those of ship repairers at other major ports in the region. Wage costs represent a major problem for these companies because of the 'agreed work-force' or 'contingent' system, under which workers who are part of the contingent receive a high proportion of their normal wage at times when their services are not required. Furthermore, the practice of employing, at full wage, 'stand-by' workers who may have no work to

do produces a further burden on the costs of the firms. The duplication of services offered by the two companies creates an element of inefficiency in the situation.

It was therefore proposed to set in motion a plan to reduce the agreed workforce, discontinue the stand-by system and so reduce the variable costs falling on the firms. Voluntary early retirement was to be introduced for workers aged 55 and over. Salaries and wages were to be reduced and efforts were to be made to increase the range of skills and the flexibility of the workers. A more thoroughgoing cooperation between the two enterprises was proposed (in the event, a merger was effected) to ensure a more rational utilization of plant and installations and to reduce fixed costs and administrative overheads. The aid which was intended to accompany this programme of reorganization consisted of a loan for one of the firms of BFR 200 million from the National Industrial Credit Corporation at market rates over 15 years (with a 5-year grace period); a further loan, to the single enterprise resulting from the merger, on the same terms, with the amount to be determined; and interest relief grants (given in exchange for convertible bonds issued by the companies) to cover all the interest of these loans. Negotiations were also to be undertaken with the firm's creditors with a view to deferring repayments of existing debts for five years.

The Commission opened the Article 93(2) EEC procedure because it lacked the information to decide whether the proposed aid could be considered compatible with the common market. In particular it required further data on the future prospects of the industry in Antwerp and the trends in the trade of the port. It was therefore not in a position to assess what employment-level ship repairing in Antwerp was likely to be able to support nor whether the 'agreed workforce' foreseen was in line with the real requirements of the enterprise.

### *Iron and steel (application of the ECSC and EEC Treaties)*

194. On 1 February 1980 the Commission adopted Decision No 257/80/ECSC establishing Community rules for specific aids to the steel industry.<sup>1</sup> At the same time and in accordance with the agreed view of the Council and the Commission on the need for all aid to steel to be subject to a coherent Community discipline, the Commission took action to ensure that non-specific aids (i.e. aids not falling within the definition of Article 1(2) of the Decision) would be subject to the same appraisal criteria and examination procedures as apply in the case of specific aids. The legal basis for this latter action was a combined application of Articles 67 of the ECSC Treaty and 92 and 93 of the EEC Treaty. The Commission accordingly informed

<sup>1</sup> OJ L 29, 6.2.1980.

the Member States that they should notify to it all individual proposals for non-specific aid in advance of their implementation. The last Report described these new rules in detail.<sup>1</sup>

In the course of the year the Commission took a position on aid proposals notified by Belgium, Denmark, the Federal Republic of Germany and Italy. A number of other notifications were also received and, apart from one which had been withdrawn, are still being examined.

195. In its examination of these aids the Commission's principal concern was to ensure the achievement of the two objectives of the aids 'discipline', i.e. that aid makes a genuine contribution to the restructuring of the industry and that it does not cause unwarranted distortions of competition.

### *Investment aids*

196. The new rules establish the following criteria for appraisals of investment aids:

- (i) the investment programme must have been notified to the Commission for an opinion pursuant to Article 54 of the ECSC Treaty;
- (ii) the investment programme must take account of the general criteria for the restructuring of the steel industry and of the general objectives for steel; and
- (iii) the amount and intensity of the aid must be justified by the extent of the restructuring effort involved, account being taken of any structural problems in the region concerned.

The criteria were applied in the case of aids for investment programmes in the Federal Republic of Germany and in Italy.

### **Federal Republic of Germany**

197. The Commission was notified of an aid for a project to restructure and modernize a steelworks at Dortmund by replacing open-hearth furnaces by an oxygen plant and an associated continuous caster. The capacity of the new plant would be two-thirds of that of the open-hearth furnaces and the technology adopted would permit a substantially higher than normal scrap input as well as

<sup>1</sup> Ninth Report on Competition Policy, points 165 to 170.

reduced energy consumption. There would be important reductions in employment at the works. The Commission gave a favourable opinion on this investment programme.

The aid for this project would be in the form of a loan at a reduced rate of interest from the Federal and *Land* Governments. The net grant equivalent of the aid was estimated by the Commission to be of the order of 12%. The Federal and *Land* Governments would receive a share of any revenue from the licensing of the technology.

Given the importance of the modernization and the extent of the capacity reduction for liquid steel as well as the existence of certain structural problems in the area concerned, the Commission considered that this aid conformed to the criteria set out above and accordingly decided not to raise any objections to its implementation.

## Italy

198. The Italian Government informed the Commission of its intention to assist restructuring investment by the steel industry (including the restructuring of a steel works near Naples) by using existing general and regional aid regimes.

Regional aid would be available in the Mezzogiorno in the form of grants at a rate of 20% on the basis of law No 183 of 2 May 1976<sup>1</sup> while general aid would be provided under law No 675 of 12 August 1977<sup>2</sup> in the form of interest relief grants or loans of up to 15 years with a 5-year grace period for up to 50% of investment costs. These interest relief grants would reduce the rate of interest to 30% of the reference rate. The combined net grant equivalent of these aids is estimated at 38%.

The Commission examined this proposal in two parts. First, as regards the restructuring of the steelworks near Naples, which involved the installation of continuous casting equipment, the modernization of the works' heavy-section mill and the construction of a hot-wide-strip mill, the Commission had given a favourable opinion under Article 54 of the ECSC Treaty. In view of the importance of the restructuring programme, of its compatibility with the Community's restructuring policy and of the location of the works in an area of the Italian Mezzogiorno suffering from serious structural problems, the Commission considered that aids of this intensity were justifiable and accordingly decided not to raise any objection to their implementation.

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<sup>1</sup> Seventh Report on Competition Policy, point 180.

<sup>2</sup> Seventh Report on Competition Policy, points 225 to 228.

Second, as regards the use of these aid systems to assist other steel investment programmes, the Commission was unable to examine whether these aids met the criteria set out above in the absence of information on the projects that the Italian Government intended to support. This problem was explained to the Italian authorities, who in consequence undertook to notify in advance the other individual cases of application to steel of the aid regimes in question. Accordingly, the Commission considered that this second part of the original notification did not call for any further action at this stage.

### *Aid to continued operation*

#### **Denmark**

199. The Danish Government notified the Commission of its intention to introduce legislation empowering it to provide aid to a steel company to enable the latter to finance the final stages of a major restructuring programme involving a reduction in the capacity of the steelworks. Some aid for this programme had already been provided in 1978 but this had proved to be insufficient to resolve the company's difficulties in financing the restructuring, a failure attributed to the fact that the price of ferrous scrap (the company's main raw material) had risen more rapidly in relation to steel prices than had been expected in 1978.

The new aid to the company would be in the form of a participatory loan of DKR 108 million. This is a long-term unsecured loan which would be remunerated at a rate of interest equal to the rate of dividend on share capital up to 1985 and would thereafter bear a market rate of interest.

The Commission had for some time had some reservations about the company's restructuring plan, in particular because it did not consider it sufficiently far-reaching to secure its long-term competitiveness. Following discussions with the Danish authorities on the aid proposal, the Danish Government gave an undertaking to ensure the closure of the company's medium-section mill by 30 June 1982 at the latest. In view of this undertaking the Commission was in a position fully to approve the restructuring programme. For this reason and in view also of the restructuring investment which the company had to carry out in the period up to 1985 the Commission considered that the aid could be considered an integral part of an approved restructuring programme. It was moreover of limited duration and of reasonable intensity and amount. In this latter connection it should be noted that the aid formed part of a total financial package of DKR 450 million, the rest of which was to be provided by the shareholders and the banks.

Accordingly, the Commission decided that the aid conformed to the criteria of Article 4 of Decision No 257/80/ECSC and did not raise any objection to its implementation.

### Aid programme for the Belgian steel industry

200. In November 1980 the Belgian Government informed the Commission of a number of aid decisions it had taken in the course of the year. The aids notified fall into four categories:

#### (i) *Aids for 'strategic' investment programmes*

These are the more important investment programmes, involving a total capital expenditure of about BFR 22 000 million, and would be aided on the basis of the economic expansion laws of 17 July 1959<sup>1</sup> and 30 December 1970.<sup>2</sup> Nearly all of these investment programmes had been notified to the Commission for an opinion pursuant to Article 54 of the ECSC Treaty. (In two cases the expenditure was below the notification threshold of EUA 5 million.) The following aids would be granted:

- (a) an interest relief grant of 7 percentage points for five years, with three years deferred amortization for three-quarters of project costs, or an equivalent capital grant;
- (b) State guarantees for loans ranging in most cases from 50 to 60% of project costs; and
- (c) accelerated depreciation and exemption for three years from the 'precompte immobilier' (ratés).

The net grant equivalent of these aids varies from project to project between 14% and 17.5% as a percentage of fixed asset costs.

#### (ii) *Aids for 'minor' investment programmes*

These aids would be in the form of interest relief grants and State guarantees of up to 100% of expenditure. The aid intensity would not differ greatly from that for the strategic programmes. These programmes had not been notified for an opinion under Article 54 ECSC since they were below the notification threshold. Total investment expenditure was of the order of BFR 3 500 million.

<sup>1</sup> First Report on Competition Policy, points 184 to 186.

<sup>2</sup> Second Report on Competition Policy, points 90 and 116 to 118; Fifth Report on Competition Policy, point 135.

(iii) *Emergency aids*

These were State guarantees for 15-year loans at a market rate of interest and were required in order to avoid the bankruptcy of three important steel companies. The total guaranteed was about BFR 2 000 million. These aids had already been granted at the time of notification.

(iv) *Social aids*

These aids had been given during the first half of the year in particular to finance payments in respect of early retirements and redundancies and were in the form of interest-free loans for an amount of BFR 1 500 million. They were granted on the basis of agreements reached in June 1978 between the government, the employers and the unions.

201. The Commission examined the conformity of these aids with the new rules for aid to steel. Since the Belgian aids were applications of general and regional aid schemes and were to be granted on the normal conditions of these regimes they were in principle non-specific aids. Accordingly they fell to be examined under the combined application of Articles 67 of the ECSC Treaty and 92 and 93 of the EEC Treaty, but on the basis of the criteria of Decision No 257/80/ECSC.

The Commission examined the investment aids in the context in particular of the restructuring plan for the Belgian steel industry. The aided investment programmes taken as a whole would result in an increase in production capacity even after taking account of the associated closures decided upon by the undertakings. Furthermore, there were serious doubts concerning the effectiveness of the restructuring plan in restoring the financial viability of the industry in the future. For these reasons the Commission considered that the investment aids did not meet the criteria of either Article 2 (for the 'strategic' investment programmes not notified and for the 'minor' investment programmes).

For the emergency aids, the undertakings in question were all important sources of employment in areas suffering from regional problems. The Commission accordingly considered that they were required in order to cope with acute social difficulties pending the implementation of the restructuring plan. In view of their minimal intensity, it therefore raised no objection to these aids.

However, the Commission learned that the Belgian Government had, without any notification, provided further guarantees for loans of up to BFR 1 500 million for undertakings of the 'Triangle de Charleroi'. In view of the effects that further emergency aids of this amount could have on the steel market the Commission considered that this case should be examined more thoroughly, in particular so as



to ensure that the aids would contribute to the attainment of a better equilibrium between supply and demand.

As regards the social aids, the new rules provide for compatibility provided they are linked to total or partial closures. The Member States are required to submit detailed half-yearly reports on aids granted for this purpose (Article 3). The Commission therefore raised no objection to these aids but requested the Belgian Government to supply the information in the form provided for in Decision No 257/80/ECSC.

For these reasons the Commission initiated the procedure of Article 93(2) of the EEC Treaty in respect of the investment aids and of the emergency aids for the undertakings of the 'Triangle de Charleroi'.

The Commission also reminded the Belgian Government of its obligations as regards prior notification of all aids and requested it to confirm that it would in future respect this procedure.

### *Textiles and clothing*

202. The general principles that guide the Commission in its appraisals of aids to the textiles and clothing industry have been described in previous Reports.<sup>1</sup> During the year the Commission applied these principles to aid schemes in The Netherlands and in Belgium and to the French aid scheme financed by a quasi-fiscal charge, which is discussed in a subsequent section of this Report.<sup>2</sup>

### **The Netherlands: cotton and allied textiles and wool**

203. The effects of low-priced imports from outside the Community (a general problem for the textiles and clothing industry) are particularly acute in the cotton and allied textiles sector; these imports concern both final products and yard and cloth, so that production and employment in the sector have fallen sharply in the Community where intra-Community competition is also intense. In The Netherlands employment in the sector fell from 28 000 to 16 000 between 1974 and 1978, and production capacities also declined substantially. (In other Member States the rate of decline has been of a similar order of magnitude.) Since 1975, and

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<sup>1</sup> First Report on Competition Policy, point 171; Sixth Report on Competition Policy, points 222 and 223.

<sup>2</sup> Points 210 and 211.

thus coinciding with this period of decline, The Netherlands cotton and allied textiles sector has been the beneficiary of three aid schemes, which were described in previous Reports,<sup>1</sup> designed to promote its modernization and restructuring. As a result of these schemes the sector has received aid in the form of grants and loans to a total of HFL 139 million.

The wool sector suffers from similar difficulties although perhaps in a rather less acute form. Its rate of decline in The Netherlands does not appear to be very different from that in other Member States, but employment has fallen sharply (from 6 000 in 1975 to 3 700 in 1979) as a result of major restructuring in the sector. This restructuring has been aided by the Netherlands Government under a 1975 aid scheme,<sup>2</sup> as a result of which the sector received loans and grants totalling HFL 12.3 million.

204. The Netherlands Government informed the Commission of a new aid scheme that it proposed to introduce to promote further modernization of these sectors and to encourage exports. The new scheme, with a budgetary allocation of HFL 30 million, would provide aid in the form of grants at a rate of 20% of costs for the purchase of new equipment, for the installation and displacement of equipment and for modifications to buildings. In addition, grants at a rate of 40% (with a maximum of HFL 20 000 per undertaking) would be available for costs incurred in participating in overseas trade fairs and at a rate of 50% of the costs of employing an expert to implement an export promotion policy.

The Commission was concerned that the aids granted by the Netherlands Government to the textile industry, and in particular those for the cotton and allied textiles sector, were assuming the character of production aid. Both the sectors concerned by the new scheme had already received significant aids under the earlier schemes and could be regarded as having been restructured and modernized. The scope for further modernization was very limited indeed and there did not therefore appear to be any justification for aid for this purpose. If the earlier aid schemes had not restored the sector's competitiveness it was improbable that the new scheme could do so. To authorize the grant of further aid in these circumstances to sectors which were technically better equipped than most of their competitors in the other Member States would serve only to increase this disparity and would run the risk that other Member States might feel obliged to intervene in support of their industries, thus leading to an upbidding of aid levels.

<sup>1</sup> Fifth Report on Competition Policy, points 110 and 111; Sixth Report on Competition Policy, points 227 and 228, Seventh Report on Competition Policy, point 205; Ninth Report on Competition Policy, point 177.

<sup>2</sup> Fifth Report on Competition Policy, points 110 and 111.

The Commission was also concerned that the aids to encourage exporting would have a particularly adverse effect on competition and trade between Member States in these sectors. Moreover these aids would be contrary to the Commission's constantly reaffirmed position that export aids for intra-Community trade are incompatible with the common market.<sup>1</sup>

The Commission therefore decided to initiate the procedure of Article 93(2) EEC in respect of this proposed aid scheme.

### Belgium

205. In April 1980 the Commission decided to reopen the procedure of Article 93(2) of the EEC Treaty in respect of a Belgian aid scheme designed to maintain employment in the textiles and clothing industry, during the preparation of a restructuring plan.<sup>2</sup> This procedure had originally been opened in 1978 on the grounds that the link between the aid and the restructuring of the industry was not sufficiently close for the former to be considered other than a production aid, and therefore as contrary to the Commission's general principles on aid to the textiles and clothing industry.

Following a number of modifications to the scheme and in particular an undertaking by the Belgian Government to supply to it an outline restructuring plan for the industry by 15 April 1979, the Commission decided that the aid could be assimilated to an aid for restructuring. Given that the modifications to the scheme meant that the aids would be in line with the general principles for aid to the industry, the Commission accordingly decided in March 1979 to close this procedure.

However, in the event the preparation of the restructuring plan proved to be much slower than expected and the Belgian authorities were unable to respect the deadline for its submission to the Commission. After first granting an extension to this deadline, the Commission felt that the continued grant of a production aid could no longer be justified in view of the delay in restructuring the industry. The Commission reopened the procedure of Article 93(2) EEC in April 1980 giving the Belgian Government up to 31 July 1980 either to supply the detailed restructuring plan or to abolish the aid scheme.

The Belgian Government submitted a restructuring plan within this deadline, and the details of this plan were discussed with the Belgian authorities. The

<sup>1</sup> Sixth Report on Competition Policy, points 241 to 245.

<sup>2</sup> Ninth Report on Competition Policy, points 174 and 175.

Commission was still examining the plan at the end of the year in the light of the additional information supplied during these discussions.

### *Car industry*

206. Economic developments on the car market have led to a worsening in the competitive position of some European car manufacturers, and shown up structural weaknesses in the Community car industry as compared with its competitors in certain non-Community countries. There is a general need for structural adaptation and adjustment, on a large scale in some cases, if the competitiveness of the European car industry as a whole is to be maintained.

The Commission has made arrangements to keep the development of the market under review. It remains of the opinion that ultimately it rests with the firms themselves to make the effort required to achieve the structural adaptation demanded by market developments. It is prepared, nevertheless, to make appropriate use of the rules laid down by the Treaty and in secondary legislation in order to support the industry's efforts, particularly by creating a favourable environment which allows the industry to take full advantage of the Community market and to meet the challenges of competition from non-Community countries.

Thus from the point of view of competition the Commission is prepared to recognize the value of certain forms of cooperation between undertakings, and of certain strictly necessary and temporary aid schemes at the close of which the recipient firm should once again be able to compete normally in the market.

It is this approach which has guided the Commission in its assessment of the national projects submitted to it.

### **Belgium**

207. The Belgian Government informed the Commission of its intention to assist a car firm located in the Antwerp region. After the Commission had studied the project, the Belgian authorities agreed to confine financial assistance to the environmental improvements provided for in the project. The main improvement proposed here was in the firm's painting shops, for which a grant of 15% of qualifying expenditure may be given. The Commission authorized this assistance under the terms of the Community approach to State aids in environmental matters.

## United Kingdom

208. In January 1980 the British Government, since 1975 the main shareholder in British Leyland Ltd, informed the Commission that it wished to increase the capital of the company, under the 1980-85 corporate plan. The increase would amount to UKL 300 million; UKL 225 million would be accounted for by the balance of the total assistance authorized by the Commission. The British authorities further proposed to grant assistance of UKL 130 million for the reorganization needed over the period 1981-83.

In its assessment of the case the Commission took the view that the assistance could be considered compatible with the Treaty, as it was aimed at accelerating the structural adjustments undertaken by the firm. The firm was in the course of making major changes in its product range, which were essential if it was to return to a sound footing, and during the period 1981-83 it would have to bear the additional financial burden of speeding up its rationalization operations.

## The Netherlands

209. In 1977, the Dutch authorities increased their stake in Volvo Car BV from 25% to 45%. With the Commission's agreement they also granted the firm a range of aids towards rationalization and reorganization measures.

In January 1980 the Dutch authorities informed the Commission of their intention to grant Volvo Car BV a further HFL 155 million in the form of grants or debt write-offs.

In its assessment of the measure the Commission found that the agreement between Volvo Car BV and AB Volvo, Sweden, concluded at the same time as the proposal for public assistance was notified, was aimed at consolidation, particularly through the adjustment of production capacity and the development of the product range, and thus at achieving normal viability for the Dutch firm.

In its decision, therefore, the Commission took the view that given the objectives announced, the Dutch authorities, in granting public funds to the firm, were acting essentially in their capacity as shareholders jointly with the other shareholders, who were taking parallel measures.

The Commission also took account of the fact that the aid was intended to help put the final touches to the rationalization and reorganization operation which the Commission had approved in 1977.

## *Aids financed by quasi-fiscal charges*

### **France: textiles and clothing**

210. In 1965 the French Government introduced an aid scheme for the textiles and clothing industry financed by two quasi-fiscal charges. One of these charges was levied on the turnover of French companies in the clothing sector and was allocated to the sector's Technical Centre, which makes studies and carries out research of general interest to the undertakings in the sector. It should be noted that the base for this charge was production in France and that imports were not subject to it. The second quasi-fiscal charge was levied on the textile industry in the same way and at the same time as value-added tax (VAT). The product of the charge was used both to finance the sector's technical centres and to grant aid directly to undertakings, especially to those of small and medium size, for restructuring, modernization and re-equipment.

In 1969 the Commission adopted a decision requiring the French Government to modify the financing mechanism for the second of these charges so as to exclude imports from the other Member States from the tax base.<sup>1</sup> While it had no objection to the aid scheme as such, the Commission considered that the method of financing the scheme which required the competitors of the French industry to contribute to aid granted to it in proportion to their success in penetrating the French market had a protective effect contrary to the common interest.<sup>2</sup> The French Government's appeal against this decision to the Court of Justice was rejected by the latter.<sup>3</sup> Following this judgment the French Government informed the Commission that it had abandoned its practice of levying the charge on products imported from the other Member States.

211. In October 1979 the French Government informed the Commission that it had decided to modify the financing system by abolishing the quasi-fiscal charge on the turnover of the clothing industry and extending the charge levied with VAT to clothing products, again excluding imports from the other Member States. The products of the new single charge would be distributed between the two sectors, but precise details on their shares and on the forms to be taken by the aid had not yet

<sup>1</sup> First Report on Competition Policy, points 182 and 183.

<sup>2</sup> For the Commission's general position on quasi-fiscal charges see First Report on Competition Policy, point 181, Second Report on Competition Policy, points 108 to 111, and Third Report on Competition Policy, points 102 to 104.

<sup>3</sup> Judgment of the Court of Justice of 25.6.1970 in Case 47/69: OJ C 97, 29.7.1970.

been determined. Both the aid scheme and the quasi-fiscal charge posed problems of compatibility with the common market.

For the aid scheme, the Commission noted that the aid for modernization and re-equipment had been granted continuously since 1965 with only a short break in 1975 and 1976 and would, under the new proposals, continue until 1984. While the Commission could accept that temporary aid for the modernization and re-equipment of the textile industry was justified, it considered that there was a serious risk that the continued grant of such aid over a long period would be likely to assist normal replacement investment and thus amount to an operating subsidy. As such it would be contrary to the principles the Commission had developed regarding aid to the textile industry. Accordingly, the Commission decided that it could only authorize the grant of aid for this purpose for a further three years.

For the quasi-fiscal charge, the fact that imports from the other Member States were not taxed at the frontier was not sufficient to ensure that these imports were not subject to the charge at the following stage, since the charge was levied in the same way as VAT. The Commission had already required the French Government to modify its quasi-fiscal charge on the clock and watchmaking industry.<sup>1</sup>

In that case the French Government had agreed not only to exempt imports from the other Member States from the charge at the frontier, but also to reimburse to the importer the tax paid at the subsequent stage. This arrangement had been possible because of the concentration of the industry in one locality. For the textile and clothing industry, which is dispersed around France, it did not seem that such an arrangement could be administered. It therefore appeared to the Commission that the form of the charge would therefore have to be modified so that it was no longer charged in the same way as VAT.

For these reasons the Commission decided to initiate the procedure of Article 93(2) EEC in respect of the French Government's proposals. At the same time it decided to examine whether the existing quasi-fiscal charges effectively exempted intra-Community imports as required by the decision it has taken in 1969.

Following the initiation of this procedure the French Government withdrew its proposals. For the existing charge, the French Government was, moreover, unable to demonstrate that it had effectively abided by the Commission's 1969 decision. After first giving the French Government four weeks within which to modify the basis on which this charge was levied, the Commission decided to bring this infringement of its obligations by the French Government before the Court of Justice.

<sup>1</sup> Eighth Report on Competition Policy, point 217.

#### § 4 — General aid schemes

212. General aid schemes have presented specific problems to the Commission from a control point of view. For reasons which have been explained in previous Reports<sup>1</sup> the Commission is unable to take a definite position on such schemes when officially notified. These schemes comprise aids which are neither sectorally nor regionally specific and are given on the basis of general powers of intervention taken by Member States. Such aids are not covered directly by the provisions in Article 92(3) EEC on account of their lack of specificity. Consequently, the Commission is unable to grant a derogation on the basis of the powers given to it by that article. Economically, this is logical since in the absence of any information on the beneficiaries of aid the Commission cannot determine the likely effects of such general aid schemes on competition and trade. Nevertheless, the Commission has recognized that it would be unreasonable to prohibit the entry into force of the legal basis of such aid schemes in view of the perceived need of Member States to have at their disposal general powers permitting them to take action rapidly in circumstances where they consider this necessary. Accordingly, the Commission has developed the practice of allowing general aid schemes to be introduced while requiring Member States to notify in advance either the sectoral or regional schemes they wish to implement on the basis of the general powers, or failing that significant individual cases of aid.<sup>2</sup> It should be noted that the Commission underlines that raising no objection to the introduction to the general powers does not mean a favourable pre-judgment in respect of regional, sectoral or individual cases of application.

It should also be noted that cases not notified in advance are subject to an *a posteriori* reporting procedure which enables the Commission to keep the position under constant review and propose any appropriate measures.

213. Given the nature of interventions Member States undertake in the framework of their general aid schemes, the Commission has for some time been concerned that in its judgment of the individual cases notified its criteria should be as stringent as those applied to sectoral or regional aid proposals. The lack of specificity in this respect of many interventions under such general aid systems in favour of major investment proposals has made this a difficult task. Different criteria might apply in the case of rescue operations or aid to sectors in difficulty

<sup>1</sup> Second Report on Competition Policy, points 116 to 118; Fifth Report on Competition Policy, point 135.

<sup>2</sup> For current thresholds for notification which are fixed in terms of aid intensity and project size, see Ninth Report on Competition Policy, point 184.



under general aid powers, where the social considerations and consequences of restructuring measures would need to be taken into consideration. In seeking to formulate its position the Commission has developed the concept of compensatory justification, i.e. if the Commission has to use its discretionary power not to raise objection to an aid proposal, it must contain a compensatory justification which takes the form of a contribution by the beneficiary of aid over and above the effects of normal play of market forces to the achievement of Community objectives as contained in derogations of Article 92(3) EEC. The application of this policy is demonstrated in the case of Philip Morris, in which on appeal, the European Court delivered its judgment in September 1980 (Case 730/79).

### *The Philip Morris case*

214. In October 1978 the Netherlands Government notified the Commission of a proposal to grant aid to Philip Morris Holland under Article 6 of the Wet Investeringsrekening (WIR), the aid amounting to HFL 6.2 million (2.3 million EUA). The aid was proposed in the context of plans by Philip Morris to concentrate their cigarette producing activities in Holland in Bergen-op-Zoom, with the corresponding closure of their establishment at Eindhoven. By its decision of 29 July 1979<sup>1</sup> the Commission enjoined the Netherlands Government not to implement the proposal in question. Philip Morris, unsupported by the Netherlands Government, brought proceedings to annul this decision under Article 173 of the Treaty.

Philip Morris maintained that the Commission had infringed Community law as regards the interpretation and application of both paragraphs 1 and 3 of Article 92, had violated one or more general principles of Community law, in particular the principles of good administration, the principle of justified confidence and proportionality and also one or more principles of competition policy. In addition, Philip Morris maintained that the Commission had failed to give sufficient reasons for its decision and had thereby infringed Article 190.

As far as Article 92(1) EEC was concerned, Philip Morris maintained that the economic appraisal given by the Commission in its decision was deficient in that it did not conform to the principles of economic analysis required, in its view, by Articles 85 and 86 of the Treaty. In particular, the Commission had not given a detailed analysis of the market in question, nor of the number and relative strengths of competitors in it. Philip Morris further argued that the Commission had ignored the principle of *de minimis* which, it was alleged, operates in Article 92(1) as in both

<sup>1</sup> Decision 79/743/EEC: OJ L 217, 25.8.1979.

Articles 85 and 86. Since the aid in question had only a marginal effect, it could not in any event be regarded as fulfilling the criteria of Article 92(1). Further, the Commission was alleged to have failed to specify the geographical market and the period of time to which the economic evaluation given related.

As far as the derogations were concerned, the Commission's thesis was set out in decision III(2), namely:

'Exemptions to incompatibility included in Article 92(3) must be strictly interpreted, notably, aid may only be granted when the Commission can establish that it will contribute to the attainment of the objectives specified in the exemption which, under normal market conditions, the recipient firms would not attain by their own actions'.

Philip Morris alleged that not only was this general way of interpreting the Treaty incorrect but that further the Commission had misapplied and misinterpreted each of the individual derogations. In particular, Philip Morris alleged that Article 92(3)(a), (b) and (c) had to be applied objectively and in a neutral fashion and that the only matter to which the Commission could address itself was whether or not the aid promoted the investment in question. The Commission replied that a derogation could only be granted where it manifestly contributed to the attainment of one of the Community objectives. If this was not the case, then a derogation was not justified. Assessment of the fulfilment of the criteria of each derogation had to be looked at not only from the point of view of the project, but from the standpoint of Community interest which, of course, included that of the Member State concerned. Further, the Commission argued, contrary to Philip Morris, that it was entitled and indeed obliged to have regard to the effect which the granting of an aid would probably have on the location of an industry.

### *The judgment*

215. In giving its judgment the Court upheld entirely the decision and arguments of the Commission, dismissing those of Philip Morris.

As far as Article 92(1) EEC is concerned, and the fulfilment of the criteria laid down, the Court decided that:

'If an aid granted by a State strengthens the position of an undertaking in comparison to other undertakings with which it competes in intra-Community trade, the latter can be said to be affected by the aid'.

In this particular case the Court found that since the aid under consideration concerned a company heavily engaged in inter-State trade, and the aid would

contribute to its productive capacity and thus reinforce its position in international trade, the criteria of Article 92(1) were fulfilled. Moreover, the aid diminished the cost of the concentration in question, thus giving the company a competitive advantage over others which have or had the intention of carrying out similar activities at their own expense. For these reasons the Court found that this ground of complaint was unfounded as regards substance and failure to give adequate reasons. The principle of *de minimis* raised by Philip Morris was not taken up by the Court in its judgment.

As far as Article 92(3) EEC was concerned, the Court dismissed Philip Morris's entire submission on the interpretation and application of the derogations and in particular the argument that the Commission has wrongly introduced the notion that derogations could not be granted where normal market forces were sufficient to ensure the investment without State intervention. It said:

'This argument cannot be sustained. On the one hand Article 92(3) EEC contrary to Article 92(2) EEC gives a power of discretion to the Commission in that it foresees that the aid which it lists "may be considered compatible with the common market". On the other hand it would have the result that it allows Member States to undertake actions which lead to an improvement in the final situation of the benefiting undertaking without that being necessary to attain the objectives foreseen in Article 92(3) EEC...

It (the Court) underlines that the Commission in making use of its discretionary power, must exercise its analysis of the economic and social situation in the framework of the Community interest.'

Concerning the details of the particular derogations, the Court found that the Commission had rightly refused a derogation under Article 92(3)(a). There was indeed a level of unemployment in Bergen-op-Zoom higher than that found in the rest of The Netherlands. However, the Commission had correctly assessed that this unemployment did not constitute an abnormally low standard of living or serious underemployment in a Community context. Equally, the Commission had correctly taken into account the displacement effect which the granting of an aid could have in considering whether or not to grant a derogation under Article 92(3)(b). Lastly, the Court found that the Commission was justified to refuse a derogation under Article 92(3)(c) where market forces were sufficient in themselves to secure normal development without intervention of the State and to conclude from these facts that therefore the aid was not designed to 'facilitate' the development of the sector.

216. The Commission considers that the judgment of the Court in the case of Philip Morris has considerably clarified the position in regard to State aids in

general. The position can be summarized as follows: although the Commission has considerable discretionary power given to it by Article 92(3) EEC the basic principles in the Treaty are clear. State aids are in principle incompatible with the common market. The discretionary power of the Commission should only be exercised when the aids proposed by Member States contribute to the achievement of the Community objectives and interest set out in Article 92(3) EEC. The national interest of a Member State or the benefits obtained by the recipient of aid in contributing to the national interest do not by themselves justify the positive exercise of the Commission's discretionary powers.

217. Because of the Philip Morris appeal the Commission delayed its final decision on a number of individual cases of application of general aid schemes, as can be seen from examination of the table at point 218 below. Work is now in hand for the Commission to take final decisions in these cases.

#### *Significant cases of application of general aid schemes*

218. In 1980 the Commission examined 29 individual cases.<sup>1</sup> The table below shows the industries and Member States concerned.

Industrial sector	Member State						Total
	Belgium	FR of Germany	France	Italy	Netherlands	United Kingdom	
Chemicals	1				4	3	8
Mechanical engineering					2		2
Automobiles and spare parts	1				2	1	4
Paper and printing	2			1	1		4
Electronics/Information	1					1	2
Aerospace		1				2	3
Others	1		1		4		6
Total	6	1	1	1	13	7	29

The results of the Commission's examination of these cases are as follows:

<sup>1</sup> This figure excludes cases of shipbuilding and steel-industry aid which are dealt with in the relevant sections of this Report.

	<i>No of cases</i>
Cases examined	29
Decisions to raise no objections	14
Cases withdrawn by Member States after comments by the Commission	3
Initiation of Article 93(2) proceedings	7
Cases still under examination	5

### *Belgium*

219. On 28 November 1980 the Commission took a decision under Article 93(2) of the EEC Treaty requiring the Belgian Government not to grant its intended assistance to certain investments carried out by the Belgian subsidiary of an international oil group at its refinery in Antwerp.<sup>1</sup>

The Commission had previously objected to other aids which the Belgian Government had proposed to grant, on other grounds, to the same refinery. In the case under discussion the Government envisaged aid of about 13% towards investments totalling BFR 1 000 million to allow the refinery to convert heavy refined petroleum products into light refined products (motor spirit, naphtha and distillates); the investments had already been carried out and the new plant was in operation.

The Commission pointed out that the Treaty allowed Member States to grant aids only where in their absence market forces alone would not enable the recipient firms to take measures contributing to the attainment of social or economic objectives desirable both in the national interest and in the common interest. The Commission took the view that the proposed aid did not meet this condition.

The aid could not be considered to contribute to a better regional balance, as the Antwerp area continues to enjoy a better socio-economic situation than that of many other regions in Belgium and in the rest of the Community.

Looking at the position of the industry, the aid was not necessary to facilitate the development of the industry or of the firm, while it would be likely to affect trading conditions to an extent contrary to the common interest.

While the Community refining industry had to convert its production structures as a result of the continuing shift in demand from heavy petroleum products to light products, firms ought to be able to finance the change themselves.

<sup>1</sup> OJL 343, 18.12.1980.

In any case the position of the firm, which had trebled its Antwerp refining capacity several years before, did not justify an exception to the principle. Further confirmation was provided by the fact that the investment to be assisted had already been carried out and the new plant brought into operation before the proposed assistance was notified to the Commission; the firm had stated that it would have carried out the investment in any case with or without aid.

Lastly, given the overcapacity in the refining industry in the Community, the fact that one Member State assisted investment which was indispensable to all firms in the industry was likely to transfer the burden of the inevitable reductions in production capacity to other Member States which did not grant aid of this kind.

*Italy: tax relief for bank consortia reorganizing certain large firms in difficulties*

220. Under Act No 787 of 5 December 1978<sup>1</sup> Italian banks may, within three years from the entry into force of the Act and with the agreement of the Banca d'Italia, set up consortia to acquire interests (shares and convertible bonds) in industrial firms in difficulties which are carrying out reorganization programmes. The holdings must be for a limited duration, however, which may not exceed five years.

To encourage banks to engage in transactions of this kind, the State will grant them certain tax advantages; thus they can deduct from their taxable revenue up to 75% of their stake in the consortium, divided into three annual instalments of no more than 25%. Banks are also entitled to tax relief on the consolidation of loans to industrial firms before 31 July 1978. In order to qualify short or medium-term loans must be converted into loans with a term of more than five years, bearing an interest rate lower than that originally agreed.

For their part, the firms concerned must implement reorganization programmes approved in advance by the Ministry of Industry and by a committee of government ministers.

The Commission took the view that these tax reliefs, although granted directly to banks, nevertheless had the effect of favouring the undertakings concerned for the purposes of Article 92(1) of the EEC Treaty. The reorganization of these undertakings was made possible only by the fact that the State was applying tax measures to encourage the necessary bank operations. The measures allowed

<sup>1</sup> *Gazzetta Ufficiale* No 348, 14.12.1978.

undertakings to avail of capital on which they no longer needed to pay interest, or on which the interest rate was lower than previously, and they could also obtain new capital for reorganization purposes.

As the scheme in the last analysis constituted aid to firms in difficulty, the Commission required the Italian Government to inform it under Article 93(3) EEC of all proposals for the formation of new bank consortia for the reorganization of manufacturing firms, to allow it to give its views on their compatibility with the common market.

Discussions are continuing with the Italian authorities regarding the action to be taken; the Italian Government denies that the measure constitutes an aid within the meaning of Article 92(1) of the EEC Treaty.

### *Italy: relief on certain social security contributions*

221. In order to reduce the cost of labour as a factor of production in industrial firms and certain firms in the services sector, the Italian Government in 1978 introduced a scheme under which the State took over part of the burden of employers' sickness insurance contributions.<sup>1</sup> Although originally intended to run for a temporary six-month period, the scheme was extended several times and finally made permanent in December 1979.<sup>2</sup>

Initially, the reduction in the contribution such employers had to pay in respect of their employees was a standard LIT 24 500 per month for each male employee, while for female employees they were exempt from payments to sickness insurance schemes in respect of the first LIT 400 000 of wages and salaries per person per month; this amounted to a potential reduction of LIT 64 000, since employers' sickness insurance contributions are set at 16% of wages and salaries. When the scheme was made permanent, the level of employers' sickness insurance contributions was reduced by 4 percentage points for male employees and by 10 percentage points for female employees.

The Commission initiated the procedure provided for by Article 93(2) EEC in respect of one feature of the scheme, the higher reduction in employers' contributions for their female workers, on the grounds that this constituted aid within the meaning of Article 92(1) EEC favouring the production of goods in which the use of female labour was particularly important. The main industries involved were textiles, clothing, footwear and leather. Women represented 70% of

<sup>1</sup> Law No 353 of 6.7.1978: *Gazzetta Ufficiale della Repubblica Italiana* No 192, 11.7.1978.

<sup>2</sup> Law No 633 of 30.12.1979: *Gazzetta Ufficiale della Repubblica Italiana* No 355, 31.12.1979.

the labour force in these four industries as against only 25% in Italian industry as a whole. These industries were having difficulty in adapting to the current state of the market throughout the Community, and competition within the Community was stiff.

As the assistance constituted a strictly conservatory operating aid which was not such as to facilitate development within the meaning of Article 92(3)(c) of the Treaty and thus to qualify for the derogation it allows, and moreover was likely adversely to affect trading conditions to an extent contrary to the common interest, the Commission took the view that the measure could not be considered compatible with the common market. On 15 September 1980, accordingly, it took a final Decision<sup>1</sup> on the scheme, requiring the Italian Government within six months expiring on 15 March 1981 to remove any difference in the rate of reduction of employers' sickness insurance contributions as between male and female employees. The Commission stated that it was not opposed to relief on social security contributions as such, provided it was applied uniformly to the whole of industry and did not favour certain firms or the production of certain goods.

## § 5 — Aids for environmental purposes

222. The position of the Commission with regard to aids in this field must be seen in the light of the consideration that in the long term, protection of the environment can only be carried out efficiently and without distorting competition by means of a general application of the 'polluter pays' principle. This is one of the basic principles of the Community policy on environment and implies that the cost required to reduce nuisance and pollution to an acceptable level should normally be borne by the undertakings whose activities are responsible for them. Accordingly, it follows from the general principles in the EEC Treaty concerning State aids that such aids should only be applied in exceptional cases where existing undertakings are not capable of supporting the new costs of investments for environmental protection imposed on them and where social or economic difficulties could arise in certain industries or in certain regions which need State intervention to be avoided.<sup>2</sup>

223. When the protection of the environment became an important policy issue in the first years of the last decade, the Commission realized that the situation in the

<sup>1</sup> Decision 80/932/EEC: OJ L 264, 8.10.1980.

<sup>2</sup> Fourth Report on Competition Policy, points 175 and 176.



Member States was characterized by a comprehensive lack of regulations for improving the quality of the environment and embodying the 'polluter pays' principle. Taking into account the high degree of pollution produced and the costs of purification which had to be defrayed by polluters, it was obvious that the introduction of such regulations could give rise to serious difficulties.<sup>1</sup>

In order to contribute to a solution of this problem the Commission, by a Memorandum of 7 November 1974 to Member States entitled 'Community approach to State aids in environmental matters', declared that for a transitional period from 1 January 1975 to 31 December 1980, it was prepared to authorize aids in favour of investments for the fulfilment of new major environmental obligations which were imposed on existing firms (i.e. firms whose plants were in operation on 1 January 1975) in so far as the aids expressed as a net after-tax subsidy did not exceed certain degressive levels (45% in 1975-76, 30% in 1977-78, and 15% in 1979-80). Such aids, facilitating the introduction of regulations for the improvement of the environment and the progressive application of the 'polluter pays' principle, could qualify for the exemption under Article 92(3)(b) of the EEC Treaty as aids to promote the execution of an important project of common European interest.<sup>2</sup>

As regards aids for the transitional period, which did not satisfy the above conditions, and all aid measures for environmental purposes after this period, the Commission stated in its Memorandum that, according to its general principles based on the exemptions of Article 92(3)(a) or (c) EEC, they would only be authorized if they were necessary for the development of undertakings in a certain regional or sectoral context.<sup>3</sup> In taking this position, the Commission relied on the assumption that the transitional period, ending on 31 December 1980, would be long enough to enable the Member States to adopt regulations ensuring a general application of the 'polluter pays' principle.

224. The Commission has watched closely the developments in the field concerned and has ascertained that, partly as a result of the aids it has authorized,<sup>4</sup> appreciable progress has been achieved. However, it is apparent that the above objective is still far from being attained.

The economic recession which set in at the beginning of the transitional period, coupled with the need for industry to adjust to the new international situation, had

<sup>1</sup> Fourth Report on Competition Policy, points 177 and 178.

<sup>2</sup> Fourth Report on Competition Policy, point 181.

<sup>3</sup> Fourth Report on Competition Policy, point 182.

<sup>4</sup> Sixth Report on Competition Policy, points 247 to 252.

the effect of restricting funds available for environmental protection, and of hampering legislative measures in this context.

Moreover, the Commission became aware that problems relating to the drawing up of the relevant laws and regulations, particularly at Community level and their subsequent national application, had proceeded more slowly than anticipated; that the improvement in the scientific and technological knowledge creates the need for new environmental legislation; and that there was an increasing public demand for action on environmental improvement beyond that so far achieved by governments.

225. In this situation, the Commission considered it should continue to favour aids for environmental protection during an additional transitional period, so as to enable the Member States to put into full effect the 'polluter pays' principle as originally foreseen. This would make it necessary to update the definition of existing undertakings eligible to benefit from the aids and to change certain other conditions for the application of these measures. In particular, the Commission found that assistance should be granted only within the framework of legislation specifying the type of investments required for the pollution control. This would enable the Commission to check that the requirements in question were consistent with the general approach set out in the Community action programmes on the environment and make sure that the assistance granted still justified exemption under Article 92(3)(b) EEC as aid to promote the execution of an important project of common European interest.

226. On the basis of these considerations the Commission, by letter of 7 July 1980 to the Member States, supplemented the 'Community approach to State aids in environmental matters' as follows:<sup>1</sup>

The transitional period will be extended to 31 December 1986. During this period aids for investments designed to implement new environmental standards may qualify for the exemption under Article 92(3)(b) EEC:

- (i) the aids must not exceed 15% in net grant equivalent;<sup>2</sup>
- (ii) only undertakings having installations in operation for at least two years before entry into force of the standards in question may qualify for assistance.

The Member States must send to the Commission an annual report on the implementation of programmes for environmental protection involving the grant

<sup>1</sup> Does not apply to investments related to agricultural production.

<sup>2</sup> The amount of corporation tax is deducted from the gross aid paid to arrive at its net value.

of these aids. Each report must contain statistics on the amount of aid granted in net grant equivalent and on assisted investment broken down by industry, by region, and by the type of pollution prevention pursued (water, atmospheric, noise, solid and effluent waste).

### *Application of the guidelines to certain aids*

#### **Denmark**

227. The Danish Government informed the Commission of a draft law providing for aids to environmental investments carried out during the period from 1 January 1981 to 31 December 1986. These investments should aim at the introduction of less-pollutant technologies than those applied so far; at the implementation of anti-pollution measures which are economically onerous for the undertakings because of the severity of the requirements for environmental protection or because of other particular reasons; and at the connection of undertakings to public sewerage plants.

The aids would be given in the form of grants amounting to 25% of the investments concerned. However, as the grants would be taxable and the company taxation amounts to 40%, the aids calculated in net grant equivalent would not exceed 15%.

The aids could only be granted in favour of private undertakings having installations in operation two years before the environmental requirements were imposed on them. However, in the case that the investment concerned aims at the introduction of less-pollutant technology which generally has an innovative character and does not correspond to specific requirements, the delay of two years needed for qualifying the undertaking as existing should be counted from the date of the investment.

As the duration of this aid scheme, the level of aid and, essentially, the definition of the undertakings eligible to benefit from the aids, complied with the above Community provisions relating to the prolonged transitional period, the Commission decided to make no objection to the entry into force of the Danish draft law.

## Chapter II

### Adjustment of State monopolies of a commercial character

228. The changes the Commission considers necessary to complete the final stage of the adjustment of the remaining State monopolies of a commercial character in the nine Member States pursuant to Article 37 of the EEC Treaty are encountering increasing national resistance. This is no doubt natural, since the monopolies in question are those which for various reasons the Member States concerned regard as most important. Nevertheless, the disregard of time-limits for answering enquiries is causing considerable delays to the Commission's work in this area.

Consequently the adjustment of the remaining State monopolies could not be completed during the reference period. This applies particularly to the French and Italian manufactured tobacco monopolies. Although France, for example, has abolished its exclusive import and wholesale marketing rights in respect of manufactured tobacco from other Member States, some features of the present system have still not been satisfactorily dealt with. The Commission therefore took the infringement procedure initiated in respect of France a stage further and delivered a reasoned opinion on 22 July 1980. One of the features the Commission considers contrary to the Treaty is the requirement that manufactured tobacco wholesalers from other Member States must have a permanent address in France. This would, in principle, constitute a measure having an effect equivalent to a quantitative restriction within the meaning of Article 30 of the EEC Treaty,<sup>1</sup> and it is at variance with Article 37 in that it is associated with a commercial monopoly. France abolished this residence requirement by Ministerial Decree No 80-262 of 3 April 1980,<sup>2</sup> and to that extent put an end to the infringement. Another feature is the requirement that suppliers of manufactured tobacco from other Member States must supply all retailers. Although France is free to impose such an obligation on its own manufacturing monopoly (SEITA), the same requirement applied to small

<sup>1</sup> Article 2(3)(g) of Commission Directive 70/50/EEC of 22 December 1969: OJ L 13, 19.1.1970.

<sup>2</sup> *Journal officiel de la République française*, 13.4.1980, p. 937.

manufacturers from other Member States has the effect of excluding them from the French market as they are unable to supply, as in the case in point, 50 000 retailers.

This provision constitutes a form of discrimination prohibited by Article 37 of the EEC Treaty, which has still not been brought to an end by France. The infringement procedure also concerns the State monopoly represented by the present retail marketing arrangements. Licensed retailers must be French citizens and are classed as public servants ('*préposés de l'administration*') and thereby made subject to disciplinary rules. One of the possible disciplinary measures which may be taken against them is revocation of their licence by the Ministry. The Commission considers that these rules substantially restrict retailers' independence in a way that is contrary to the EEC Treaty, particularly as the State also has a manufacturing monopoly and State-controlled retailers sell both the monopoly's products and competing products from other Member States. As long ago as the SAIL case<sup>1</sup> the Commission took the view that the simultaneous holding of manufacturing and marketing monopolies was intrinsically discriminatory and thus in conflict with Article 37. The two monopolies may remain side by side only where the retailers' independence from the State is safeguarded. The infringement proceedings also concern the State's fixing of retail margins and the rules on advertising. Uniform rates of trade discount for all tobacco products are likely to impair competition.<sup>2</sup> When they are associated, as here, with a retail marketing monopoly, they are also contrary to Article 37. The advertising rules give the Ministry the power to allocate advertising space in retail shops to manufacturers where manufacturers are unable to agree among themselves. Since the same Ministry is also responsible for the State manufacturing monopoly, these arrangements, too, are in conflict with Article 37.

229. The Commission initiated new infringement proceedings against Italy<sup>3</sup> and on 2 April 1980 sent the Italian Government a letter of formal notice. As in the case of France, the main points at issue are the independence of tobacco retailers, including the requirement of Italian nationality, and the uniform rates of trade discount laid down by the State. Moreover, Italy has not yet passed the legislation necessary to introduce new wholesale distribution arrangements following the abolition of the import and wholesale monopoly by Act No 724 of 10 December 1975. An earlier draft of this legislation sent to the Commission by the Italian authorities<sup>3</sup> had been open to objection on many points.

<sup>1</sup> Case 82/71, Judgment given on 21 March 1972: [1972] ECR 119.

<sup>2</sup> See judgment given by CJEC on 29 October 1980 (not yet published) in Cases 209 to 215 and 218/78 (Fedetab).

<sup>3</sup> Ninth Report on Competition Policy, point 201.

The Italian Government replied to the letter giving formal notice on 7 July 1980, enclosing a Ministerial Order that had already been signed but not yet published. This is almost identical to the earlier draft, and is still open to the objection that imported tobacco products are singled out for special treatment. For example, the method of collecting tax by means of tax stamps is applied only to imported products but not to those of the State manufacturing monopoly. The provisions on the packaging of tobacco products and on the purchase and payment of tax stamps also discriminate against imported products in a manner contrary to Article 37. The Commission therefore decided to continue with the infringement proceedings against Italy, and a reasoned opinion was served on the Italian Government on 16 November 1980. Should Italy fail to comply with the opinion, the Commission intends to refer its case, like that of France, to the Court of Justice.

230. Infringement proceedings are also pending against Italy for failure to carry out sufficient adjustment of its matches monopoly. These proceedings were suspended because the State retail marketing monopoly covers both matches and manufactured tobacco and it was desired to combine the two sets of proceedings.<sup>1</sup> The monopoly in the retailing of matches was therefore included in the reasoned opinion served on the Italian Government on 16 November 1980 in respect of the manufactured tobacco monopoly.

231. The Italian saccharin monopoly was abolished by an Act No 297 of 7 July 1980.<sup>2</sup> The adjustment requirement under Article 37 has thus been satisfied.

232. Turning to the French alcohol monopoly, as from 1 January 1980 France altered the selling prices for various types of alcohol to comply with the Court of Justice's ruling in Case 91/78.<sup>3</sup>

The Commission was, however, unable to accept even these prices because spirits of comparable quality from other Member States, in particular wine spirits, were in the meantime being sold at much higher prices. After repeated talks with the French authorities, during which import documents showing the relevant prices were produced, the French Government announced its intention of changing prices again. The new prices entered into force on 1 September 1980. The Commission is keeping a close watch on prices so as to be ready to intervene again if necessary.

<sup>1</sup> Ninth Report on Competition Policy, point 202.

<sup>2</sup> *Gazzetta Ufficiale* No 185 of 8.7.1980, p. 5812.

<sup>3</sup> Judgment of 13 March 1979 (Hansen): [1979] ECR 935.

233. The pricing and sales policy of the German alcohol monopoly is also under continuous review. Although the actual level of prices has not yet given the Commission cause to take action, it has on several occasions made submissions to the European Court of Justice in relation to references for preliminary rulings under Article 177 of the EEC Treaty. However, these were on issues not necessarily connected with the existence of the monopoly, such as the tax advantages granted to very small distilleries and the calculation of production ceilings for entitlement to such, and therefore had to be judged by reference to Article 95 of the EEC Treaty and not Article 37.

234. The Commission carried out a preparatory examination of the State monopolies existing in Greece in preparation for that country's accession. Under Article 40 of the Accession Treaty,<sup>1</sup> Greece is required to abolish immediately all exclusive export rights and some exclusive import rights and to remove the remaining exclusive import and marketing rights in stages by 31 December 1985. The existing Member States have equivalent obligations towards Greece. The Commission is required to make recommendations to the Member States as from 1 January 1981 as to the manner and time-scale of these adjustments.

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<sup>1</sup> OJ L 291, 19.11.1979.

### Chapter III

## Public undertakings

235. On 25 June 1980, the Commission adopted its Directive 80/723/EEC on the transparency of financial relations between Member States and public undertakings.<sup>1</sup> This Directive, as has already been explained<sup>2</sup> imposes upon Member States the obligation to supply information to the Commission should it so request, concerning the nature and effect of their financial links with their public undertakings.

236. The Directive contains principally, apart from the abovementioned obligation:

- (i) a definition of the term 'public undertaking' based on the influence which the particular financial link between State and undertaking allows the former to exert upon the behaviour of the latter;
- (ii) examples of the type of financial relation subject to transparency. These examples cover not only what might be termed 'active' transfers of public funds to public undertakings, (e.g. provision of capital, loss-compensation) but also 'passive' transfers (e.g. the forgoing of profits or of a normal return on the funds used). It was also considered important to cite the example of compensation for financial burdens imposed on these undertakings by public authorities;
- (iii) clauses limiting its scope through both sectoral exclusions and threshold provisions.

<sup>1</sup> OJ L 195, 29.7.1980.

<sup>2</sup> Eighth Report on Competition Policy, points 253 and 254.



237. The Commission action breaks new ground both as regards the object of the directive and the legal basis chosen. Concerning the object, the Commission has on several occasions drawn attention to the problems inherent in ensuring an equitable application of the Treaty rules on State aids to both private and public undertakings<sup>1</sup> because of the particular character of the financial relationship between the State and the latter.

It is a fact that over recent years the import of the aid rules has become much clearer for Member States as a result of Commission decisions, guidelines and explanations and of European Court decisions, and the Commission is satisfied that the obligations arising from Article 92 *et seq.* of the EEC Treaty are well understood by Member States. The problems arise when the State resources are used in ways sanctioned by Article 222 of the EEC Treaty, i.e. for investment, nationalization, participation purposes and so on, but where the dual role of the State as both investor and public authority is liable to cause the typical motivations and responsibilities of one and the other to overlap. At that point, the Member State may well consider that its action can be assimilated to that of a private investor and thus exclude the likelihood of this action having any aid effect liable to notification. In so far as the State resources are clearly being employed in an area outside that covered by the aid rules, this attitude is understandable, but the Commission is having its attention drawn increasingly to cases where it seems unlikely that an investor following standard company practice in a market economy would have acted in a similar way. This is particularly so where rescue operations and replacing of loss-depleted capital are concerned. Without greater transparency, the Commission is unable to determine to what extent the transfers of public funds can be reconciled with Treaty rules.

238. The second innovation springs from the first and concerns the legal basis for the action. Given the situation described above and the fact that Article 90(3) of the EEC Treaty specifically enjoins the Commission to ensure the application of Treaty provisions in the case of public undertakings, the Commission had recourse to one of the two legal instruments which the same paragraph puts at its disposal in this context: the directive. It was in fact the first occasion on which the Commission availed itself of this possibility.

239. In the course of preparing the directive, the Commission had detailed discussions with experts from the Member States and also consulted the European

<sup>1</sup> In particular, Sixth Report on Competition Policy, point 275 and Written Question No 701/77 by Mr Müller-Hermann.

Parliament (which had called for action in this field),<sup>1</sup> the Economic and Social Committee as well as certain other interested organizations. Although almost all the Member States welcome the move towards greater transparency, there is reticence on the part of a minority concerning the legal basis used, France, Italy and the United Kingdom having each brought an action against the Commission requiring that the directive be declared null and void.<sup>2</sup>

<sup>1</sup> Resolution of 13 October 1978, Minutes No 34, p. 9, Document 55.323.

<sup>2</sup> OJ C 273, 22.10.1980 (Cases 188, 189 and 190/80).

**Part Three**

**The development of concentration  
and competition in the Community**

## **Introduction**

240. This part of the Report looks into the present situation with regard to national and international takeovers and mergers, share purchases and new joint ventures; it also reviews the findings of industry and market studies conducted in 1980.

The review applies a set of economic indicators chosen for the programme of studies and designed to analyse how competition operates in the European Economic Community.

### **§ 1 — National and international takeovers and mergers, share purchase and joint ventures in the Community from 1977 to 1979**

241. The systematic gathering of information published in the press on national and international takeovers and mergers, share purchase and joint ventures in the Community continued in 1980. Although the main aim of this exercise was to obtain qualitative data on specific operations of interest in the determination of the Commission's competition policy, the following analysis of the trends in these operations has had to be quantitative.

#### *Trend in the number of operations*

242. While the total number of national and international operations in the Community remained almost the same between 1977 and 1978, they increased in 1979 (Table 1), especially in respect of national operations, which now account for three-quarters of all operations.

Share purchases are increasingly becoming the most common type of operation. In 1979, they accounted for 80% of all operations.

An analysis showed a marked decline in new joint ventures involving international partners, so that for the first time the numbers of national and international operations were equal.

TABLE 1  
National and international operations in the Community, 1977-79

	Total		Share purchase		Joint ventures		Takeovers and mergers		Breakdown of operations by number of firms involved		
	Number (and % change)	%	Number (and % change)	%	Number (and % change)	%	Number (and % change)	%	Bilateral operations	Multilateral operations	
									Number (and % change)	Number (and % change)	
Total (national and international)											
	1977	2 320	100	1 692	100	482	100	146	100	1 948	372
	1978	2 304	100	1 727	100	440	100	137	100	1 988	321
% change 1977 to 1978		-1%		+2%		-9%		-6%		+2%	-14%
	1979	2 927	100	2 342	100	439	100	146	100	2 532	395
% change 1978 to 1979		+27%		+36%		—		+7%		+27%	+23%
National operations											
	1977	1 619	70	1 279	76	194	40	146	100	1 440	179
	1978	1 627	71	1 328	77	162	37	137	100	1 465	161
% change 1977 to 1978		+1%		+4%		-17%		-6%		+2%	-10%
	1979	2 186	75	1 824	78	216	49	146	100	1 936	250
% change 1978 to 1979		+34%		+37%		+33%		+7%		+32%	+55%
International operations											
	1977	701	30	413	24	288	60	—	—	508	193
	1978	677	29	399	23	278	63	—	—	524	160
% change 1977 to 1978		-3%		-3%		-4%		—	—	+3%	-17%
	1979	741	25	518	22	223	51	—	—	596	145
% change 1978 to 1979		+10%		+30%		-20%		—	—	+14%	-9%

A comparison by category of national and international operations shows similar patterns beginning to emerge. Share purchase as a proportion of national operations rose from 79% in 1977 to 83% in 1979, while the proportion of new joint ventures fell from 12% in 1977 to 10% in 1979. At the same time, share purchase as a proportion of international operations increased sharply, from 59% in 1977 to 70% in 1979, while the proportion of new joint ventures fell, similarly, from 41% in 1977 to 30% in 1979.

The number of national takeovers and mergers was the same as in the two previous years, the 6% fall between 1977 and 1978 being offset by an equivalent increase.

A breakdown of operations by number of firms participating shows that those involving two firms (bilateral operations) increased more than those involving more than two firms (multilateral operations). Thus, bilateral operations only accounted for close on 90% of the total.

The breakdown mainly shows that with multilateral operations, the international share has contracted substantially from around one-half in the two previous years to just over one-third in 1979.

This confirms the trend seen above in new international joint ventures.

#### *Trend in the number of firms involved in each operation*

243. In general, the number of firms involved in operations (Table 2) and the number of operations themselves follow the same trend. Both overall and within the individual categories of operation, the number of firms involved was consistently higher in 1979 than in 1978, the sole exception being in the group of international joint ventures.

Nevertheless, in addition to this similarity in trend, three points stand out about the number of firms involved:

- (i) The number involved in international joint ventures was well below that for national joint ventures, although there were more international joint ventures than national ones. This was because, on average, more firms were involved in a national joint venture (3.7 in 1979) than in an international one (2.8 in 1979).
- (ii) The number of firms involved in all takeovers and mergers rose by only 1% in 1979, although the number of such operations increased by 7%. This was due to a fall in the average number of firms involved in such operations.
- (iii) By contrast, the number of firms involved in international multilateral operations in 1979 rose although the number of such operations declined. This

TABLE 2

## Firms involved in national and international operations in the Community, 1977-79

	Total		In share purchase		In joint ventures		In takeovers and mergers		In bilateral operations	In multilateral operations	
	Number (and % change)	%	Number (and % change)	%	Number (and % change)	%	Number (and % change)	%	Number (and % change)	Number (and % change)	
Total firms involved (national and international operations)											
	1977	5 629	100	3 637	100	1 609	100	383	100	3 896	1 733
	1978	5 205	100	3 655	100	1 235	100	315	100	3 976	1 229
% change 1977 to	1978	-8%		+1%		-23%		-8%		+2%	-29%
	1979	6 670	100	4 917	100	1 434	100	319	100	5 064	1 606
% change 1978 to	1979	+28%		+35%		+16%		+1%		+27%	+31%
National operations											
	1977	3 810	68	2 688	74	739	46	383	100	2 880	930
	1978	3 618	70	2 763	76	540	44	315	100	2 930	688
% change 1977 to	1978	-5%		+3%		-27%		-18%		+2%	-26%
	1979	4 911	74	3 793	77	799	56	319	100	3 872	1 039
% change 1978 to	1979	+36%		+37%		+48%		+1%		+32%	+51%
International operations											
	1977	1 819	32	949	26	870	54	—	—	1 016	803
	1978	1 587	30	892	24	695	56	—	—	1 048	539
% change 1977 to	1978	-13%		-6%		-20%		—	—	+3%	-23%
	1979	1 759	26	1 124	23	635	44	—	—	1 192	567
% change 1978 to	1979	+11%		+26%		-9%		—	—	+14%	+5%

Note: Each firm has been counted once each time it was involved in an operation of the kind referred to.

shows that the average number of firms involved in an international multilateral operation increased substantially.

#### *International operations by Member State*

244. In 1979, the majority of international operations in the Community took place, as in previous years, in the Benelux (Table 3), followed by the United Kingdom, France and the Federal Republic of Germany in that order.

There has been a distinct tendency for the number of international operations carried out in the Federal Republic of Germany to decline, both in absolute terms and as a percentage of those in the Community as a whole. By contrast, in Italy, where international operations were at a rather low level in 1977, there was a marked increase in the ensuing two years. The same trend was discernible in France. In the Benelux, on the other hand, the number of international operations tended to fall. No clear trends emerged in the other countries.

#### *Share purchase operations by Member State*

245. With the number of both national and international share purchase operations and of the firms involved growing, an analysis of these operations by Member State is called for (Table 4).

It will be seen that, in 1979, the largest number of share purchase operations, in the Community, was in the United Kingdom. Next came France, then the Federal Republic of Germany and, a long way behind, Belgium, The Netherlands and Italy.

This table also shows the proportion of operations in which only Community firms were involved and a further analysis illustrates the number of operations that concerned only firms from a single Member State.

These figures emphasize the predominant role played by national operations in share purchase operations generally. Apart from such purely national operations, we see that, in the Community, firms from other Member States were more numerous than non-Community firms in share purchase operations.

However, this was not the pattern in the United Kingdom, Italy and The Netherlands, where more non-Community firms took part in international share purchase operations than Community firms.



TABLE 3

## International operations in the Community, by Member State, 1977-79

Year	FR of Germany	France	Italy	The Netherlands	Belgium
Number of operations					
1977	164	97	19	73	135
1978	137	103	25	40	121
1979	101	138	47	74	127
As % of EEC total					
1977	23	14	3	10	19
1978	20	15	4	6	18
1979	14	19	6	10	17

TABLE 4

National and international share purchase operations in the Community in 1979<sup>1</sup>

	Member States in which							
	FR of Germany		France		Italy		The Netherlands	
	Total	%	Total	%	Total	%	Total	%
Total	345	100	418	100	126	100	190	100
of which:								
Firms from Member States	318	92	383	92	107	85	164	86
of which:								
National firms	284	82	323	77	97	77	141	74

<sup>1</sup> A share purchase operation involving only two firms, the one buying the share and the one whose shares are bought, counts as a single operation in both Table 1 and Table 4. An operation in which two or more firms buy a share, still counts as a single operation in Table 1, but in Table 4 each of the purchasing firms is shown as an operation and the operation is recorded under the country in which the firm whose shares are being bought is situated.

Luxembourg	United Kingdom	Ireland	Denmark	EEC total
57	113	32	11	701
68	153	29	1	677
52	157	40	5	741

8	16	5	2	100
10	23	4	—	100
7	21	5	1	100

operations were carried out

Belgium		Luxembourg		United Kingdom		Ireland		Denmark		EEC	
Total	%	Total	%	Total	%	Total	%	Total	%	Total	%
224	100	22	100	1 140	100	57	100	14	100	2 536	100
196	88	16	73	1 083	95	49	86	12	86	2 328	92
134	60	1	5	1 054	92	35	61	10	71	2 079	82

*Share of non-Community firms in international operations in Member States*

246. A comparison of the number of international operations that involved firms from outside the Community with those that did not (Table 5), shows that the observation made about share purchase operations also applies to international operations in general.

In international operations carried out within the Community, firms from Member States outnumbered firms from outside the Community.

This situation is the result of a clear tendency for the number of Community firms involved in international operations to increase between 1977 and 1979.

The comparative equality noted in 1977 has given way to a situation in which international operations that involve Community firms only predominate.

TABLE 5

**International operations in the Community, 1977-79 - Operations involving Community firms only and operations involving non-Community firms**

Year	Type of operation								
	Share purchase			Joint ventures			Total		
	EC <sup>1</sup>	NMC <sup>2</sup>	Total	EC <sup>1</sup>	NMC <sup>2</sup>	Total	EC <sup>1</sup>	NMC <sup>2</sup>	Total
Number of operations									
1977	202	211	413	138	150	288	340	361	701
1978	187	212	399	166	112	278	353	324	677
1979	273	245	518	135	88	223	408	333	741
As percentage of total									
1977	49	51	100	48	52	100	49	51	100
1978	47	53	100	60	40	100	52	48	100
1979	53	47	100	61	39	100	55	45	100

<sup>1</sup> EC: Operations involving Community firms only.

<sup>2</sup> NMC: Operations involving non-Community firms, either exclusively or in combination with Community firms.

TABLE 6

## National and international operations in the Community, by industry, 1977-79

Year	Metal industries				Energy	Chemicals	Textiles	Other manufacturing	Food industry	Services			Total
	Total	of which:								Total	of which:		
		Machinery and mechanical parts	Electrical engineering	Metal goods <sup>1</sup>							Banking and insurance	Holding companies	
<b>Number of operations</b>													
1977	634	—	—	—	52	203	101	379	179	772	243	55	2 320
1978	733	—	—	—	56	176	109	380	194	656	182	58	2 304
1979	881	232	163	160	88	217	146	629	225	741	234	44	2 927
<b>As percentage of total</b>													
1977	27	—	—	—	2	9	5	16	8	33	11	2	100
1978	32	—	—	—	2	8	5	17	8	28	8	3	100
1979	30	8	6	6	3	7	5	22	8	25	8	2	100

<sup>1</sup> Excluding machinery and transport equipment.

### *Industry breakdown of national and international operations in the Community*

247. In 1979 as in 1978, the largest number and the greatest proportion of operations took place in the metal industries, followed by the services industry (Table 6).

Within these two main groups, the most important sectors were those making machines and mechanical parts, on the one hand, and banking and insurance on the other.

However, a comparison between 1978 and 1979 showed that the proportion of operations in the metal industries, the chemical industry and the service sector declined, there had been no change in the proportion in the food industries and in the textiles industries, while the proportion in the energy sector and in other manufacturing industries had increased.

## **§ 2 — Studies on the operation of competition in the Community**

### *Overall view of the present state of competition*

248. Cross-frontier competition actively benefits consumers while it strengthens the Community as an economic entity. Manufacturers adapt to compete in the larger market and organize the marketing of their products to meet the buying power of the major distributors. Production and marketing are thus becoming increasingly complex, as manufacturers find it profitable to switch production of a number of components and parts to non-member countries and subsequently incorporate them into products for sale in the Community.

Since in specific cases it might affect trade between Member States the Commission keeps a watch to see that no unwarranted restriction or distortion of competition takes place.

The Commission realizes that the present trend in the structure of industry means it is sometimes necessary to tolerate restrictions of competition, mainly for technical and financial reasons, so that Community firms, and especially small and medium-sized ones, can become more competitive.

*Findings of these studies*

249. The latest studies conducted by the Commission<sup>1</sup> all highlight two major characteristics of competition today:

- (i) the arrival both of new products and new manufacturers which, together with changes in the market shares of the large firms, has helped to produce a shift in the market patterns for a number of mass-consumer goods;
- (ii) a fall in 'relative prices' (when expressed in real terms) in a large number of these markets.

These developments clearly do not occur simultaneously in all the Member States nor to the same extent everywhere. However, despite the many special aspects involved, a tendency seems to be emerging towards keener competition in the Community.

In some cases, such competition serves to temper the increase in producer prices (e.g. for certain foodstuffs) or to accentuate the tendency towards lower 'relative' prices (as in the case of some radio and TV industry products and hi-fi equipment, together known in the mass market for consumer electronic products as 'brown goods').

Although there is a tendency towards greater concentration in distribution virtually everywhere in the Community, it would seem that distributors' mark-ups are tending to fall. This is confirmed by the examples of the sizes of mark-ups (§ 5(4), Table 9) taken from the studies on food products and beverages and by the information available on the shift in patterns of distribution for electrical equipment (radio, TV, hi-fi, etc.).

*Criteria used in the analyses*

250. Keener competition within the Community is not in itself incompatible with a high degree of concentration and a strong trend towards oligopoly in a number of industries.

In practice an analysis is needed of the many factors that can characterize the way in which competition operates in its various aspects.

<sup>1</sup> In 1980, some 30 reports were published, some in the 'Evolution of concentration and competition' series and the others in the 'Working papers' collection (see Annex).

Accordingly, for the purposes of its programme of studies, the Commission has chosen a set of indicators that make it possible to analyse specific competitive situations.

These indicators can be divided into five categories, relating to:

- (i) the structure of an industry or a market;
- (ii) product definition;
- (iii) price structures;
- (iv) the financial control of firms;
- (v) the sociological factors reflecting the influence exercised by governments on industries and markets.

There follows examples from these studies, demonstrating the first three groups of indicators.

### **§ 3 — The structures of industries and of markets**

251. To study the change in industrial and, above all, market structures, use is made of a set of indicators, reflecting the way in which competition operates. These indicators focus on:

- (i) monopolistic or oligopolistic dominance;
- (ii) trends in market shares;
- (iii) the stability of market shares;
- (iv) oligopolistic market-sharing, with differentiation between:
  - (a) markets for products (qualitative dimension),
  - (b) markets by region (geographic dimension).

In assessing the effective degree of concentration, one should take account of the financial links caused by minority as well as majority holdings that may influence the production and marketing policies of the firms concerned.

In practice there exists a large number of minority holdings which may under special conditions have much the same effect on behaviour as if the groups were holding a position of collective dominance.

From the reports which were published in 1980 we can cite the following industries or markets as examples: the food industry, the plastics industry, the cement industry, the industry for domestic electrical appliances and electronic goods and the market in classical records.

### *The food industry in the Community*

252. In the food industry generally, there is some measure of equilibrium in the power of the major groups, and the pattern of the industry can be described as being a balanced and loose oligopoly; i.e. there is a relatively large number of major firms, dominated as is well-known by Unilever and Nestlé.

Between 1970 and 1977 the market shares in the food industry calculated as a percentage of total industry turnover in the Federal Republic of Germany changed as follows:

(%)

Firms	1970	1977
A	5.3	5.3
B	1.5	2.2
C	1.5	1.9
D	1.9	1.6
E	1.4	1.6
F	1.9	0.9
Total market share of the six largest firms	13.5	13.5

Thus while the market shares of firms A, C, D and E showed some degree of stability, B's share expanded markedly and F's share declined substantially. So that even though the total, overall share of the six largest firms has remained the same, suggesting a tendency towards market equilibrium, there was also distinct evidence that changes had taken place within this basic pattern.

253. The market for products was, however, much more concentrated as can be seen from the following percentages showing the combined market share of the leading four firms in each market in 1977:

- (i) ice-cream: 90%,



- (ii) spaghetti: 75%,
- (iii) margarine: 85 to 90%,
- (iv) potato-based products: 88%.

This can be explained by the complex policies of specialization on the one hand and diversification on the other which are pursued by the leading groups in order to achieve economies of scale in both production and distribution. For example, in the Federal Republic of Germany, the two main groups, Unilever and Nestlé, seldom market the same products.

While this does not hinder competition which can even be in certain cases intense, some firms hold substantial shares in the markets for particular products. The list below gives the most recent shares known for these market leaders:

- (i) margarine: around 30 to 35% in Denmark, 45% in Italy, 50% in the United Kingdom, 65% in France and over 70% in the Federal Republic of Germany;
- (ii) instant coffee: around 40% in the United Kingdom and the Federal Republic of Germany, and 70% in Italy and France;
- (iii) tinned soups: 30% in the Federal Republic of Germany and Italy, 66% in the United Kingdom, and 74% in France;
- (iv) packaged soups: Around 50% in the United Kingdom and Denmark, 60% in the Federal Republic of Germany, 65% in France and 80% in Italy;
- (v) tea: 30 to 35% in the United Kingdom, Italy and France, and 40% in the Federal Republic of Germany;
- (vi) ice-cream: 30% in France, around 40% in Italy and the United Kingdom, 45% in the Federal Republic of Germany and 48% in Denmark;
- (vii) frozen foods: 24% in the Federal Republic of Germany, around 40% in the United Kingdom, 42% in France and 58% in Italy;
- (viii) baby foods: 30% in the Federal Republic of Germany, 50% in Italy and France, and 75% in Denmark.

### *The plastics industry in the Community*

254. An analysis of total production capacities for the various types of plastic in the five leading producer countries in Western Europe, (the United Kingdom, the Federal Republic of Germany, France, Belgium and The Netherlands), shows that in 1977 the four largest groups accounted for around 30% of total capacity for the

major thermoplastics, that is polyethylene (both high-density and low-density), polyvinyl chloride or PVC, polypropylene and polystyrene. In the case of semi-finished or intermediate products, that is ethylene, styrene and vinyl chloride monomer (VCM), they accounted for some 37% of total capacity.

Thus, while at industry level there is a loose oligopoly, the high degree of specialization leads to a more concentrated and less balanced situation when markets are broken down either in terms of specific products or of geographic regions. This is clearly demonstrated in Table 7 showing the position for France.

TABLE 7

Shares of production capacity in France for certain plastics, 1970 and 1977

(%)

Group	Polyvinyl Chloride (PVC)		Low-density polyethylene (LDPE)		Polystyrene (PS)	
	1970	1977	1970	1977	1970	1977
A	48	35			24	
B			56	45	15	41
C	35	27				
D			14	10		
E	6	11	30	37	29	33
F					32	26
G	11	11				
H		16				
I				8		
Total percentage held by these leading groups	100	100	100	100	100	100

In 1977 in the United Kingdom the three largest groups had 92% of production capacity for PVC, the four largest had 100% of the capacity for making LDPE and 97% of the capacity for making PS.

Thus demonstrating:

- (i) the disparity in size that can exist in a market, after the three dominant firms, each of which hold substantial market shares;<sup>1</sup>

<sup>1</sup> Eighth Report on Competition Policy, point 277.

- (ii) the need to analyse the competitive structure which can lead firms to behave in quite different ways.

### *The cement industry in the Community*

255. The production and supply of cement by the industry in the Community is characterized both by a stability of market shares and regional dominance. There is also a tendency in France, the Federal Republic of Germany and Denmark for the market shares of the largest firms to increase.

In Denmark, the market now closely resembles a partial monopoly, while in France the share of the four largest firms rose from 65% to 80% and in the Federal Republic of Germany from 55% to 67% during 1968-75. In the United Kingdom, the largest group has had a share of around 60% since 1970.

The importance of high transport costs should be emphasized together with the imposition of relatively inflexible pricing systems. These are either delivered prices calculated from certain base points or ex-works prices.

### *The domestic appliance industry: electrical and electronic consumer goods*

#### 1. Situation in the Community

256. The industry manufacturing large domestic electrical appliances (mainly refrigerators, dishwashers, freezers and washing machines) in the Community as well as in Switzerland, Sweden and Austria, is dominated by three major groups that each produce over two million items annually and that together have some 33% of this market.<sup>1</sup>

These three groups are followed by five firms, each with an annual production of over one million items, and then by some 10 others, each producing over 300 000 items each year. Next come some 12 smaller firms. The oligopoly in the industry thus comprises some 8 to 15 firms. At the European level, concentration is greater

<sup>1</sup> *Note:* The statement in point 253 of the Ninth Report on Competition Policy to the effect that the Philips Group in The Netherlands dominates the various product markets with the brands mentioned should not have included the brand Bauknecht. Bauknecht, which is 100% family-owned, is independent. The only link between Bauknecht and the Philips Group is through the jointly managed Euro-Hausgeräte GmbH in Neunkirchen, which manufactures dishwashers.

in the markets for specific products. Thus, the three largest firms manufacturing refrigerators account for 45% of the European refrigerators produced while the four largest firms making freezers and washing machines account together for 42% and 38% of these markets. Thus, faced as they are by some 10 to 15 major manufacturers, European consumers have a range of several hundred models to choose from for each type of large electrical appliance.

The effects on competition of the concentration of European production in the 'brown goods' sector (television sets, radio-cassettes, etc.) must be seen in the light of the impact of the substantial volume of imports from non-member countries.

Generally speaking, the situation in the different Member States is one of relatively balanced oligopoly, particularly in the United Kingdom, the Federal Republic of Germany, Italy and the Benelux countries. The situation in France does, however, merit special attention.

## 2. Situation in France

257. In France, this industry which is more highly concentrated than in most other Member States has seen little change in manufacturers' positions in recent years:

- (i) demand for large domestic electrical appliances, a market already saturated, is growing slowly, and foreign competition is virtually non-existent. The quasi-monopolistic position of the largest firm is less evident because its products are distributed under a number of different brands;
- (ii) the market for small domestic electrical appliances, which had a lower level of concentration to begin with as well as some foreign competition, grew less. As demand for these goods is more elastic, sales have suffered from the decline in households' purchasing power;
- (iii) then, consumer electronics has traditionally been characterized by a high level of concentration in radio and television and by competitive conditions in hi-fi equipment. However, recently the scale of foreign competition and a widening of the hi-fi market—reflecting low-pricing policies—have brought about a substantial change in the situation. The largest firms who are in a position to establish assembly lines in the Far East and to negotiate the purchase of (pre-assembled) components from Japan, are best placed to cope on the domestic market with the wave of imports from outside Europe.

Simultaneously, the leading firms (Thomson-Brandt, the Philips Group) have gained an increasing share of the hi-fi market, because by reducing costs they could

lower prices and tap a wider market. One advantage of this has been to curb the quasi-monopolistic position of Japanese imports on the market although this tendency still exists for high-technology products, such as video recorders. However, it has also led to an increase in concentration as smaller competitors face higher production costs because their goods, which are entirely home-produced, are being driven off the market.

For the industry, the concentration of production is thus the price to be paid to maintain a national production capacity at a time of falling demand and intense foreign competition.

Concentration in distribution has increased and the pattern of distribution has changed radically with considerable effect on the relations between manufacturers and distributors.

Acquisitions have been the main cause of this concentration. Between 1973 and 1978 there were 150 such purchases, most of which (two-thirds) were share purchase operations, mainly carried out by chain stores, and supermarket organizations.

Simultaneously, with this trend towards concentration, the commercial policies of the different distributors have influenced their market shares:

- (i) 'Large specialists' (turnover exceeding FF 3 million) between 1974 and 1978 increased their share of the market from 14% to 28% for domestic electrical appliances ('electrical white goods') and their share of consumer electronics ('brown goods') from 12% to 30%.
- (ii) Hypermarkets showed similar increases in the case of 'brown goods' with their market shares up from 1% to 6% but were less successful with 'electrical white goods' (increase from 6% to 9%). This was because their market share for large domestic electrical appliances, which call for large storage space and sophisticated after-sales service, remained stable.
- (iii) Also between 1974 and 1978 the market share of the department stores stayed the same (at 6.5% for 'electrical white goods' and 3.5% for 'brown goods'), while the share of 'small specialists' (turnover of less than FF 1.5 million) in the total market for domestic electrical appliances was almost halved; only their sales of hi-fi equipment held out against this trend.

This greater concentration, which results more from different commercial practices than from any attempts to grow in overall size, has led to increased power for distributors to pitted against the concentrated power of manufacturers.

### 3. Situation in the United Kingdom and in Ireland

258. Surveys conducted by the Commission revealed the existence of a balanced oligopoly for most products. This can be seen from the combined share of the four leading firms for each product held in 1979. They are shown below for the United Kingdom and Ireland:

	<i>United Kingdom</i>	<i>Ireland</i>
Dishwashers	54%	71%
Washing machines	57%	50%
Refrigerators	60%	48%
Upright freezers	61%	64%
Chest freezers	75%	72% <sup>1</sup>
Freezer/refrigerators	42%	56%
Vacuum cleaners	96%	70% <sup>1</sup>
Black-and-white TV sets	55%	55%
Colour TV sets	57%	54%
Stereo music centres	48%	49%
Transistor radios	43%	47% <sup>1</sup>
Cassette recorders	34%	36% <sup>1</sup>

There is little vertical integration of manufacturers and retailers, the only major exception being the Thorn Group in the United Kingdom, which owns a chain of electrical shops and leads the market for television rentals.

Retailers in the United Kingdom constitute a powerful force and so can stand up to multinational manufacturers.

#### § 4 — **Product make-up: domestic electrical and electronic consumer-goods industry**

##### *Definition*

259. 'Product make-up' refers to the way tasks essential for the manufacturing and marketing of a product can be divided between a number of firms and also the diverse changes made to product presentation so as to anticipate future consumer needs. Such organization reflects the new strategies used by oligopolists. Certain

<sup>1</sup> Shares of the three largest firms.

activities that characterize their behaviour in the domestic electrical and electronic goods industry are examined below. These are activities such as oligopolistic function-sharing and product differentiation through multiplication and variation of brands and models.

*Some examples of oligopolistic function-sharing in production and distribution*

260. In the electrical 'white goods' sector, the major components (pumps, compressors, motors, etc.) are manufactured by a small group of industrial firms and sold to various firms who assemble the final products.

Where products are sold under a particular brand name, this does not necessarily imply that they were assembled in a factory of the firm owning that name. Even if this is so, other manufacturers of parts and components may account for a greater proportion of production costs than the firm marketing the finished product.

To take another example, the number of television tube manufacturers in Europe is very small. They supply tubes to a number of television manufacturers, and their sets are then marketed under a wide variety of competing brand names.

*Absence of any systematic link between oligopolistic function-sharing and market-sharing*

261. One important conclusion to be drawn from the studies is that there are two simultaneous but conflicting phenomena:

- (i) first, there is clear evidence of oligopolistic function-sharing in the manufacture of particular products; these may then be sold under different brand names which may be owned by the same oligopolists;
- (ii) second, such function-sharing does not seem to entail any oligopolistic sharing of geographic markets, and firms on these markets generally compete keenly with one another.

*Product multiplicity and variation: brands, types and models*

262. Because of the wide variety of brands and models available, dealers can offer a wide range of goods to cater for diverse consumer needs, but without necessarily providing the consumer with the means to compare the prices for similar products sold under other designations.

The German market provides a number of striking examples. In 1980, the range of products available to consumers under different designations included 540 refrigerators, 256 upright freezers, 433 washing machines, 245 dishwashers and 837 electric cookers. In addition, a large number of new models appear each year to compete with existing ones, some of which may be phased out in many retail outlets.

Surveys conducted in Belgium confirm the wide variety of brands, types and models available and the continuous changes made in them. For example, out of 142 products (both 'white' and 'brown') on which the survey was based in November 1978 only 33 reasonably comparable products (or less than 25%) were still available in November 1979.

A similar situation was found in other countries in which surveys were carried out, notably in Italy, The Netherlands and France.

## § 5 — Price structures

### *Variations and dispersion in prices*

263. One general conclusion can be drawn from the changes in price structures examined in the course of current research: by extending time coverage certain phenomena which might at a given juncture be regarded as 'abnormal' (a marked dispersion in prices and divergent price variations between different shops) are seen, in fact, to stem from competitive forces and also tend to fluctuate over time, affecting different goods to varying degrees.

Thus, a period of price increases for particular products in certain countries can be followed by a period of price stability or even of price reduction for these same products in the same shops.

Usually such changes indicate that competitive pressures are at work, causing the price differences in the first place while subsequently forcing them to level out again. There are, of course, a number of exceptions to this rule, and these are generally found in monopolistic or government-regulated markets. It may be useful to illustrate the above observations with a number of examples.



## *The food industry*

### 1. The United Kingdom

264. The United Kingdom is taken as an example because of its high rate of inflation in the period under investigation (1976-79). The prices of several types of non-alcoholic beverage (coffee, tea, mineral water) rose by some 65% between January 1976 and January 1977 and by nearly 50% in the first half of 1977 alone. For a number of fats, oils and margarines, the corresponding figures were 30% and some 27%.

Even though the prices of other products did not rise quite so sharply, they did rise in most cases. But in spite of this high overall rate of inflation, the prices of certain products were cut in some shops.

The number and the size of the disparate price variations illustrate that:

- (i) changes in manufacturers' prices to dealers tend to affect retail prices to different extents (cf. coffee, tea and chocolate);
- (ii) many shops, whether superstores or even small retail outlets, follow their own independent pricing policies, and adjust so as to try and remain competitive.

A different pattern is observed for other products whose price and price changes tend to be more or less uniform in the United Kingdom. In the main, these include a range of canned foods (fish, peas, meat, etc.) and packaged frozen foods.

The pattern of price changes for the large majority of products lies between these two extremes. Their price variations are sometimes more or less uniform and sometimes both different and disparate. This wide variety or variability in retail price trends for most products covered by the surveys gives further confirmation of the vigour of retail competition.

### 2. International comparisons

265. If it is accepted that reductions in retail prices always indicate that an effective competitive mechanism exists, it would seem useful to carry out a number of international comparisons that shed light on this phenomenon in some Member States.

Below is a list of the price reductions—expressed as a percentage of total price variations (up, unchanged or down)—recorded in the countries cited below during the relevant periods for a sample of shops and products:

#### France

Period: January 1978 to January 1979; total number of cases: 2 497 (i.e. number of products or articles, multiplied by the number of shops covered); *price reductions in 15% of cases.*

#### Federal Republic of Germany

Period: January 1979 to July 1979; total number of cases: 3 894; *price reductions in 14% of cases.*

#### The Netherlands

- (i) Period: February 1978 to August 1978; total number of cases: 2 205; *price reductions in 22% of cases;*
- (ii) Period: August 1978 to March 1979; total number of cases: 1 026; *price reductions in 28% of cases;*
- (iii) Period: March 1979 to August 1979; total number of cases: 769; *price reductions in 14% of cases.*

#### Belgium

Period: February 1979 to July 1979; total number of cases: 3 183; *price reductions in 14% of cases.*

#### Denmark

Period: July 1977 to January 1978; total number of cases: 836; *price reductions in 18% of cases.*

The above figures suggest that, in spite of the numerous complex factors that influence the inflationary process, competition helps to curb inflationary pressures.

TABLE 8  
 Spread of price differences in food and drink distribution by country  
 Three groups: normal, divergent, uniform

Country	Survey dates	Total No of cases	Percentage difference between maximum and minimum price					
			Normal		Divergent		Uniform	
			$\leq 10\% \text{ } \epsilon R_p < 40\%$		$\epsilon R_p \geq 40\%$		$\epsilon R_p < 10\%$	
			No of cases	% of total	No of cases	% of total	No of cases	% of total
France <sup>1</sup>	1976	30	16	54	13	43	1	3
	January 1977	30	20	67	10	33	—	—
	January 1978	167	89	53	62	37	16	10
	June 1978	169	102	60	59	35	8	5
	January 1979	169	101	60	58	34	10	6
Italy	1976	44	24	55	19	43	1	2
	January 1977	46	19	42	25	54	2	4
	July 1979	288	203	70	68	24	17	6
The Netherlands	February 1978	212		48		35		17
	August 1978	229		45		41		14
	March 1979	200		39		34		27
	August 1979	197		42		18		40
Belgium	July 1978	537	257	48	23	4	257	48
	July 1979	645	326	51	53	8	266	41
Luxembourg	July 1978	200	98	49	6	3	96	49
	February 1979	248	114	46	9	3	125	50
	July 1979	250	125	50	11	4	114	46
Denmark	1976	57	27	47	28	49	2	4
	January 1977	72	38	53	25	35	9	12
	July 1978	68	57	84	2	3	9	13
	January 1979	68	52	77	4	6	12	18
Greece	August 1978	35	30	86	3	8	2	6
	January 1979	35	29	83	3	9	3	9

<sup>1</sup> For France, cases have only been included for products where the figures are based on a minimum of five observations, each obtained from at least two consecutive surveys.

### 3. Analysis of price disparities

266. The existence of disparate price variations and the fact that the price of the same product may be raised in some shops while it is lowered in others leads to a range in retail prices for a given food product. Such differences in price at local level can thus be recorded at any given moment. 'Normal' disparity is where the difference between the price charged by the dearest shop and that charged by the cheapest shop for the same product, as a percentage of the price in the cheapest shop, is equal to, or more than, 10%, but less than 40%.<sup>1</sup>

The extremes, i.e. where the difference is either 40% or more ('divergent' case) or less than 10% ('uniform' case), are found far less frequently.

As Table 8 shows, the 'normal' case is the most common.

### 4. Mark-ups

267. The variations in prices and particularly the disparity in variations in price for the same product in different sales outlets are reflected in the retailers' gross mark-ups. The size of mark-ups differs greatly and their structure shows considerable variation over time.

Table 9 shows the pattern of mark-ups in four Member States at two points in time. It should be read with the following points in mind:

- (i) Mark-ups applied by the major retail groups in most Member States are determined according to competitive criteria. The retailers try to maximize overall gross profit on their total receipts and this is achieved by making frequent and substantial adjustments in prices and hence in mark-ups for most products. Such changes are made according to the two following basic principles:
  - (a) a very low mark-up is taken on the sort and type of product where sales can be won from competing outlets;

<sup>1</sup> The formula is:

$$\epsilon R_p = \frac{\text{Maximum price} - \text{minimum price}}{\text{Minimum price}} \times 100$$

- (b) a very high mark-up is taken on other sorts and types of product unless or until other shops begin to compete on price. When this happens, prices and mark-ups will be aligned on such competitors.

The effect of the application of these strategies by the majority of retailers makes for keen competition which manifests itself in the substantial variations of both prices and mark-ups during a given period.

- (ii) Thus, at any moment, one can observe two different phenomena:
  - (a) On the one hand some retailers apply inadequate and even negative mark-ups (e.g. less than 10% of the purchase price) on certain products;
  - (b) on the other hand some retailers may apply excessive mark-ups (over 50% of the purchase price) on other products.

While this distinction remains relatively stable over time, most mark-ups taken by most retailers range between 10% and 30%, this being the mode of the distribution. Thus the current analytical method has provided measurements to confirm the existence of keen and effective competition in the distribution of food and beverages.

TABLE 9

## Structure of mark-ups in the distribution of food products and beverages

(%)

Mark-up <sup>1</sup>	France		Italy	Denmark	FR of Germany	
	January 1978	July 1978	July 1979	July 1979	July 1978	July 1979
70% or more	3	2	4	4	1	1
50 to 70%	9	7	7	9	5	5
30 to 50%	15	14	18	17	22	20
10 to 30%	38	42	47	26	53	52
0 to 10%	27	31	17	21	13	15
0	—	—	1	} 23	—	—
0 to -10%	7	3	4		5	6
Less than -10%	1	1	2	1	2	
	100	100	100	100	100	100

<sup>1</sup> The mark-ups in the table are the percentages added by retailers to their purchase prices to obtain the selling prices to the consumer (exclusive of VAT).

*The domestic appliance industry:  
electrical and electronic consumer goods*

### 1. Situation in the United Kingdom

268. The general level of information available about products marketed by this industry in the United Kingdom amply demonstrates that competition has tended to level out prices both between different retailers and different regions. This is accounted for in part by the fact that the major retailers have branches in each region, and since in some cases they even fix prices centrally, this makes for similar prices in the main commercial centres.

Average price increases in 1978-79 were not excessive, bearing in mind the increases in VAT, which were to some degree absorbed by traders. Thus, margins were squeezed and price rises did not keep pace with the general rate of inflation.

The number of brands and models available is such that retailers are able to stock only a limited range of products and manufacturers who compete fiercely with one another may not impose their recommended prices on retailers. Thus, in some

cases, recommended prices serve as the basis from which retailers calculate their discounts to consumers; in others, there is no recommended price.

## 2. Situation in France

269. In France the large distributors cut prices instead of observing manufacturers' recommended prices. Thus because of their large turnovers, they can afford to reduce mark-ups. This forces out of business other establishments who, while they do offer specialist consumer-oriented services, cannot compete on price.

Another result of this is that these large retailers can now by-pass the wholesale trade and negotiate their prices and terms direct with the makers and thus make a countervailing force to help curb manufacturing power in this concentrated industry.

## 3. Situation in the Federal Republic of Germany

270. The increase in the prices of large domestic electrical appliances almost caught up with the rise in the cost of living in 1980.

In consumer electronics the frequent renaming of models makes it difficult to compare price movements, but there seems no doubt that, at the retail level, price rises were the exception and that for many models average prices have fallen since the autumn of 1979.

Because of excess production and because of extremely stiff retail competition, manufacturers have, on more than one occasion, been obliged to waive price rises previously announced.

In particular, the selling prices of radios, colour television sets and hi-fi systems have fallen substantially since 1978.

The prices of classical records have not varied in recent years either. Given the impact of persistent, albeit low inflation in the Federal Republic of Germany, classical records now cost less in real terms. Indeed, variations in exchange rates and differing price trends in the large Member States have helped to reduce disparities in the prices of classical records in the Community.

In the Federal Republic of Germany, the intensification in competition has led to considerable growth in the market for boxed sets, containing two or more records by one well-known performer, which are the subject of special low-priced offers.

## § 6 — General conclusions

271. By comparison with 1977, the total number of operations, national and international mergers, takeovers, share acquisitions and new joint ventures had remained fairly static in the Community in 1978 and 1979. In 1980, however, they again showed an increase similar to that in the earlier period.

This renewed upward trend reflected the increase in the number of operations involving firms from one Member State, which now account for three-quarters of all such operations.

Share purchases (80% of cases) are increasingly becoming the most common form of operation.

272. Internationally, while the number of share purchase operations rose and the number of new joint ventures fell, the proportion of multinational operations declined sharply.

Once again, the most international operations were carried out in the Benelux and the noticeable fall in such operations in the Federal Republic of Germany was more than offset by increases in other Member States.

While until 1977 there had been increasingly frequent cooperation between firms within and without the Community, the reversal of this trend, first seen in 1978, has accentuated.

Taking all operations, the industry pattern remains virtually unchanged, with the metal industries retaining their dominant position, followed by the services industry.

273. The following conclusions can be drawn from the latest studies on developments in concentration and competition:

- (i) Increasingly keen competition for a number of products has led in many cases to relative falls in the prices of certain mass-consumer goods. This contrasts with the predominantly upward trend in prices, both generally and in the cost of living;
- (ii) The results from these studies, of a sample of markets for mass-consumer goods, indicate that a new pattern of markets is emerging which are competitively open structures. The relatively high level of concentration and the oligopolistic nature of these markets do not impede new entrants and even encourage the development of competitive behaviour.



## Annex

List of individual Decisions of the Commission and Rulings of the Court of Justice made in 1980 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.

List of study reports published in the 'Evolution of concentration and competition' series in 1980.

List of study reports published in the 'Evolution of concentration and competition' series in 1980, 'Working papers' collection.

## List of Decisions and Rulings

### DECISIONS ON INDIVIDUAL CASES

#### 1. Concerning Articles 85 and 86 of the EEC Treaty

- |  |  |
|--|--|
| Decision of 17 April 1980 on a proceeding under Article 85 of the EEC Treaty<br>'Krupps'   | OJ L 120, 13.5.1980, p. 26<br>IP (80) 89, 21.4.1980<br>Bull. EC 4-1980, point 2.1.24     |
| Decision of 9 July 1980 on a proceeding under Article 85 of the EEC Treaty<br>'National Sulphuric Acid Association'                | OJ L 260, 3.10.1980, p. 24.<br>IP (80) 175, 24.7.1980<br>Bull. EC 7/8-1980, point 2.1.30 |
| Decision of 22 July 1980 on a proceeding under Article 85 of the EEC Treaty<br>'The Distillers Company Ltd'                        | OJ L 233, 4.9.1980, p. 43<br>IP (80) 185, 30.7.1980<br>Bull. EC 7/8-1980, point 2.1.32   |
| Decision of 18 September 1980 on a proceeding under Article 85 of the EEC Treaty<br>'IMA-Statuut'                                  | OJ L 318, 26.11.1980, p. 1<br>IP (80) 222, 23.9.1980<br>Bull. EC 9-1980, point 2.1.16    |
| Decision of 16 October 1980 on a proceeding under Article 85 of the EEC Treaty<br>'Industrieverband Solnhofener Natursteinplatten' | OJ L 318, 26.11.1980, p. 32<br>IP (80) 227, 21.10.1980<br>Bull. EC 10-1980, point 2.1.26 |
| Decision of 25 November 1980 on a proceeding under Article 85 of the EEC Treaty<br>'Johnson & Johnson'                             | OJ L 377, 31.12.1980, p. 16<br>IP (80) 286, 27.11.1980<br>Bull. EC 11-1980, point 2.1.17 |
| Decision of 11 December 1980 on a proceeding under Article 85 of the EEC Treaty<br>'Hennessy/Henkell'                              | IP (80) 315, 12.12.1980  |
| Decision of 11 December 1980 on a proceeding under Article 85 of the EEC Treaty<br>'Vacuum Interrupters Ltd'                       |  |
| Decision of 17 December 1980 on a proceeding under Article 85 of the EEC Treaty<br>'Italian cast glass'                            | IP (80) 334, 19.12.1980  |

#### 2. Concerning Articles 65 and 66 of the ECSC Treaty

- Decision of 1 February 1980 on a proceeding under Article 66 of the ECSC Treaty on the acquisition by Gelsenberg Aktiengesellschaft, Essen, of a 50% shareholding in Willy Peters GmbH, coal wholesalers, Hamburg

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Decision 80/257/ECSC of 8 February 1980 on a proceeding under Article 65 of the ECSC Treaty in respect of a price-fixing system for the sale of rolled-steel products ex-stock by stockholders on the German market

OJ L 62, 7.3.1980, p. 28  
Bull. EC 2-1980, point 2.1.17

Decision of 25 February 1980 on a proceeding under Article 66 of the ECSC Treaty authorizing the establishment of a joint control over ALZ NV by Klöckner-Werke AG, the Belgian State and the Kempense Investeringsvenootschap NV

Bull. EC 2-1980, point 2.1.18

Decision 80/364/ECSC of 14 March 1980 on a proceeding under Article 66 of the ECSC Treaty authorizing Hoogovens IJmuiden BV to acquire the entire share capital of IJzerhandel Hollandia BV

OJ L 85, 29.3.1980, p. 47  
Bull. EC 3-1980, point 2.1.31

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Bull. EC 3-1980, point 2.1.30

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Bull. EC 3-1980, point 2.1.30

Decision of 27 March 1980 on a proceeding under Article 65 of the ECSC Treaty concerning an agreement between German and French steel producing undertakings in the market for special constructional steels

Bull. EC 3-1980, point 2.1.30

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Bull. EC 5-1980, point 2.1.18

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Bull. EC 5-1980, point 2.1.17

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