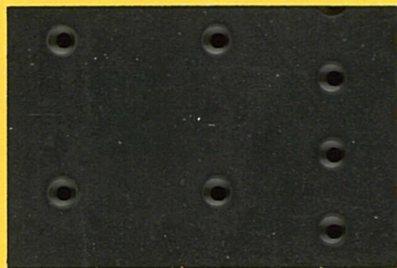
European Community competition policy

1994



European Community competition policy

EUROPEAN COMMISSION

Directorate-General IV — Competition

Cataloguing data can be found at the end of this publication.
Luxembourg: Office for Official Publications of the European Communities, 1995
ISBN 92-827-0265-0
© ECSC-EC-EAEC, Brussels • Luxembourg, 1995
Reproduction is authorized, except for commercial purposes, provided the source is acknowledged.

Printed in Germany

INTRODUCTION BY KAREL VAN MIERT,
Commissioner responsible for competition policy

In 1994 the Commission placed two objectives at the heart of its enforcement of competition policy: consumer protection on the one hand, and employment and competitiveness on the other.

In the final analysis, all the various elements that make up the Community's competition policy have the aim of protecting EU citizens: citizens as consumers, as employees and employers, and as shareholders. Thus, for example, agreements fixing prices and quotas, or artificially dividing the Community with the objective of preventing competition, result in increased prices and reduced choice for the consumer. Indeed, such agreements prejudice the basic aims of the Community in establishing the common market in the first place: a wider market and more choice. The same holds true where companies abuse a dominant position by, for example, artificially excluding competitors. These reasons alone would provide every justification for vigorously combating such practices.

But such practices also harm our industry. Artificially limiting competition between Community firms means that they will become isolated from exactly those pressures that lead them to innovate, both in terms of product development, and with respect to the introduction of more efficient production processes. They also lead to more expensive raw materials and components for the Community firms that buy from these producers. In today's market place, Community industry simply cannot afford this luxury. In the long term, such practices will lead to a loss of competitiveness and, in an ever-globalizing marketplace, the loss of jobs.

In 1994, therefore, more cartel decisions were taken than ever before, in the cement, steel beams and cartonboard sectors, and record fines were imposed. A prohibition decision was also adopted in a case regarding restraints on parallel trade between Member States. In other cases, the Commission prohibited companies from abusing their dominant positions by artificially attempting to exclude competitors from the market.

Of course, this does not mean that the focusing of our competition policy results in all agreements between competitors being prohibited. It means, rather, a clear line being drawn between those that prejudice the interests of Community citizens and those that are beneficial in overall terms. It then requires us to take resolute action against the former and efficiently approve the latter. Indeed, the goals of growth, competitiveness and employment have led the Commission to take a positive approach to many agreements between companies in 1994: those which help them to increase their competitiveness by collaborating closely with their competitors, distributors or licensees. The Commission fully recognizes and accepts that in many agreements – joint research and development or joint production, for example – such collaborative arrangements are vital to enable our companies to compete effectively. While such agreements will not get a *carte blanche* from the Commission – they may not result, for example, in price-fixing or the division of the Community into completely protected territories – they are viewed positively. This is reflected in the number of positive decisions adopted in 1994, more than in any previous year. Furthermore, while in 19 cases formal deci-

sions were adopted involving such forms of collaboration, this statistic is only the tip of the iceberg. Many more such agreements notified to the Commission were quickly and effectively approved by comfort letter – in 1994 a total of 197 cases were dealt with by comfort letter, and many of these cases concerned such agreements.

In the area of merger control, the Commission also successfully handled a record number of cases in 1994, up from 48 in 1993 to 95 in 1994. In this area, the pursuance of the dual objectives of the protection of consumers and citizens, and the maintenance of EU competitiveness can most clearly be seen. The Commission's central objective in carrying out its responsibilities under the Merger Regulation is to prevent the creation or strengthening of dominant positions. The fact that companies enjoying dominance will charge higher prices and invest less in research and development than companies facing active competition is well documented. The Commission's approach, therefore, in this – as in previous years – plays a central role in the achievement of our underlying objective.

The year saw a number of spectacular State aid decisions, particularly those relating to the restructuring of the steel industry, and of the public enterprises, Air France and Bull. However, the Commission also took more than 500 other decisions (excluding aid in agriculture, fisheries, transport and the coal industry) on individual cases or on aid schemes providing assistance for firms; it adopted guidelines on State aid for rescuing and restructuring firms in difficulty, the main principles of which were upheld by the Court of Justice of the European Communities in a judgment delivered in September; it began consultations on draft guidelines on aid to employment and a revised version of the 1986 guidelines on State aid for research and development, and prepared the fourth survey on State aid in the Community, which will be published in 1995. The Commission also drew up a detailed manual of State aid procedures, which it adopted in December and which will also be published in 1995.

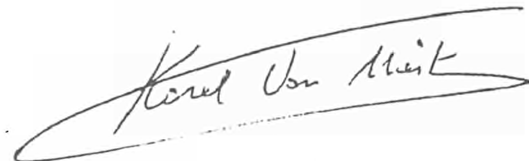
In 1994 the Commission also devoted a substantial part of its resources to monitoring the conditions imposed in its decisions (notably those relating to the restructuring of the steel industry and the large Italian public sector groups), examining the restructuring and privatization operations carried out by the Treuhandanstalt, and scrutinizing the annual reports on financial relationships between Member States and their large public enterprises in the manufacturing sector. The Commission also worked closely with the EFTA Surveillance Authority, which is responsible for monitoring State aid in the EFTA countries, and prepared the way for the accession of three EFTA countries to the European Union, notably by examining the maps of the regions eligible for regional aid and by adopting a new regional aid eligibility criterion based on low population density so as to take account of the particular geographical characteristics of some of the new member countries.

State aid, whatever its form and whatever the national, regional or local authority granting it, must be notified to the Commission and authorized by it before being implemented. More than 10% of aid registered in 1994 did not comply with this rule, which is essential in ensuring that State aid is transparent and, in particular, in preventing aid that is incompatible with the common market from adversely affecting competition. To encourage strict compliance with this rule, which is at present the only State aid rule that has direct effect before national courts, the Commission is drawing up two notices, one on cooperation with national courts and the other on the recovery of aid disbursed without awaiting the Commission's approval.

Finally, significant progress was once again made in 1994 in liberalizing sectors previously the exclusive preserve of State monopolies. The telecommunications sector merits special mention here. This sector is of crucial importance for the Community. If our

telecommunications infrastructure is less competitive than that in other parts of the world, this will not only lead to higher prices and poorer service for consumers, but will also impact on the competitiveness of other EU industries that rely on cheap and effective communications as key ingredients for their success. Furthermore, experience elsewhere in the world has demonstrated that following liberalization the telecommunications sector grows rapidly as consumers take advantage of the wider choice of products that quickly become available, and the lower prices. For many years the Community has lagged behind its major rivals in opening up its telecommunications industry to open and free competition. With the measures now planned, which will enter into force over the coming years, this is no longer the case, and I believe that, through the common action of the Commission, the Parliament and the Council, we have now laid the foundations for a truly competitive European telecommunications industry which will play a leading worldwide role. Furthermore, the manner in which the Community has adopted the measures necessary to achieve these goals – the phased opening-up of services to free competition – is one that has enabled us to ensure that the measures have not, and will not, prejudice the basic precondition for liberalization: the continuation of a universal service – all Community citizens must continue to receive a quality telephone service at reasonable prices.

Thus, applying these objectives to all our activities has produced many positive results, both in terms of the number of decisions taken and, more importantly, in terms of quality. The Commission's continuing commitment to provide a service of the highest quality, first and foremost to consumers but also to European industry, provides an excellent foundation for us to meet the important and difficult challenges that will face us over the coming years.



CONTENTS

Antitrust: Articles 85 and 86 9

Prohibition decisions 9

Cartels 9

Agreements preventing parallel trade 11

Agreements and practices preventing or limiting access to markets by competitors 12

Approval decisions 14

Strategic alliances 14

R&D and production joint ventures 15

Transport cases 17

Legislative developments 20

Decentralization of the competition rules 23

Statistical overview 24

Monopoly rights and competition policy: Article 90 27

Introduction 27

Telecommunications 28

Energy 29

Postal services 30

State aid 31

Concept of State aid falling within the scope of Article 92(1) of the EC Treaty 31

The compatibility of aid with the common market under the derogations provided for in Article 92(2) and (3) 32

Rescue and restructuring aid for firms in difficulty 32

• Privatization aid 32

Regional aid 33

Sectoral aid 33

Horizontal aid 34

Air transport 34

Statistical overview 35

Merger Regulation — 1994 39

Overview 39

Interface with the Member States 41

Decisions following in-depth investigations 42

Increased transparency and efficiency in implementing the Merger Regulation .. 43
Monitoring and evaluation 44
Organization within the Merger Task Force 44

International aspects 45
European Economic Area 45
Central and East European countries 45
Baltic States and new independent States 45
Mediterranean countries 45
North America 46
Pacific countries 46
Multilateral organizations 46

Prohibition decisions

Cartels

Prohibitions were adopted against three major Europe-wide cartels in 1994, more than in any previous year. In addition, higher fines were imposed than ever before. These statistics give rise to some positive and some negative messages. On the positive side, they demonstrate the Commission's ability to detect and investigate effectively such agreements, notwithstanding their clandestine nature. They also demonstrate a determination on the part of the Commission to persuade industry that it is not rational to continue to engage in cartels. On the other hand, the fact that such long-standing and industry-wide cartels were brought to light provides a strong indication that European industry has not yet completely recognized that such practices are out of date and illegal, and must be abandoned. Equally, the Commission is well aware that the imposition of high fines will have two effects. Most importantly, it will convince some companies to abandon existing cartels and deter others from setting up new ones. However, it will also lead those who continue to engage in such practices to make even greater efforts to avoid detection. With the ever-increasing use of computers, the detection of cartels is becoming more and more complicated. Experience in 1994 has shown, however, that the powers of inspection available to the Commission make detection possible, and the Commission must ensure that this will remain the case. In order to meet these challenges, and to increase further the Commission's activity in this area, it was decided in 1994 to set up a specialized cartel unit whose sole task will be the detection of cartels and the preparation of decisions leading to their prohibition and fining. Directorates B, C and D of the Directorate-General for Competition (DG IV) will also continue to deal actively with such matters. The Commission's intention in establishing this new unit is, therefore, to increase its cartel activity and to continue to develop and refine its detection and prosecution skills.

The steel beams cartel

In 1991 the Commission carried out surprise inspections at a number of companies that manufactured and/or distributed steel beams in the Community. On the basis of the documents copied during these inspections, and further evidence obtained by letter, it was confirmed that a cartel had been operating since 1984 (the Commission has the right to require companies to reply to questions addressed to them; fines can be imposed if they fail to reply, or do so incompletely or incorrectly). The companies involved had agreed to fix prices and quotas, and regularly exchanged a wide variety of what would normally be considered highly confidential information in order to ensure that the cartel operated effectively. In all, 17 companies were involved in the agreement, which was implemented via Eurofer, the European steel industry association.

Fines totalling ECU 104.4 million were imposed. When deciding on the amounts of the fines, the Commission took account not only of the gravity and duration of the infringements, but also the estimated profit that the companies would have received from the operation of the cartel and the fact that there had been a deep crisis in the industry between 1980 and 1988. For this period, no fine was imposed.

The cartonboard cartel

Following complaints from British and French trade associations of purchasers of cartonboard, the Commission carried out 16 different but simultaneous surprise inspections involving over 40 inspectors, made up of joint teams of DG IV officials and inspectors from the Member States. These inspections, together with further information received in reply to numerous letters, confirmed the operation of a cartel involving 19 companies covering the whole of the European cartonboard sector. The cartel consisted of agreeing periodic 'price initiatives' (concerted increases) to which all producers

adhered. Furthermore, the main producers also reached a consensus on their respective market shares: they all realized that aggressive attempts to gain market share would undermine the price initiatives which took place every six months. As a result of the cartel, list prices increased by an average of 26% in real terms between 1988 and mid-1991. Fines totalling ECU 132 million were imposed. In setting the fines, the Commission took particular account of the fact that a number of companies cooperated with the Commission. Two companies voluntarily provided information and documents which were important to the Commission's case at an early stage in the investigation, and received a very substantial reduction in the fine that would otherwise have been imposed. Smaller – yet still substantial – reductions were given to companies which did not initially contest the essential facts of the Commission's case but did so only at a later stage in the proceedings.

Cement cartel

In November the Commission adopted a decision imposing a total fine of ECU 248 million on 23 cement producers, eight national cement associations and the European Cement Association. Following a large number of simultaneous surprise inspections throughout the Community, the Commission discovered a 'home market' cartel operating throughout the European Union. In essence, the companies agreed – via their national cement association – not to sell in one another's home market. A widespread exchange of information that would normally be considered company confidential took place to enable the cartel to function. Such practices, which have the sole objective of limiting competition between companies from the different Member States, frustrates the fundamental EU aim of the creation of the single market, and it should be no surprise, therefore, that the total amount of fines imposed in this case was the highest to date.

Transport sector cases

Particular issues arise for the Commission when dealing with wide-ranging collaboration agreements between competitors in the transport sector. It is important for EU citizens that the Community has an integrated and efficient transport network. It is equally important that trans-European networks are developed quickly and effectively. These two priorities mean that in many cases such collaboration between transport companies is not only beneficial but also essential, and the Community therefore generally takes a positive approach to such agreements. This policy stance is reflected in the treatment of individual cases, where exemptions are granted to agreements that give rise to important restrictions of competition if they are necessary to enable competitors to provide the public with an integrated and efficient service.

However, it is important to note that, when examining such matters, the Commission is very careful to ensure that each agreement does not afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question. Thus, the Commission will not tolerate agreements in the shipping industry that aim to exclude competition between conference members and outsiders, thus effectively eliminating all competition on any given route. Nor will it be prepared to approve collaboration agreements in other transport sectors, such as the air transport industry, which effectively exclude active competition on a given route.

This latter approach also explains the Commission's strict attitude towards conference agreements that go further than block exemption Council Regulation (EEC) No 4056/86. This Regulation already allows companies to group together and offer, *de facto,* a service at uniform prices, so it is not surprising that the Commission is reluctant to approve collaboration that is wider in

scope than the Regulation permits. This approach is reflected in the decisions adopted in 1994 as well as in 1993.

Trans-Atlantic Agreement

The Trans-Atlantic Agreement (TAA), concluded between 16 liner shipping companies, concerns the transport of containerized cargo between Northern Europe and the United States of America, a market in which the TAA parties enjoyed a market share of some 70%.

Following an unprecedented number of complaints, the Commission found that a number of the practices engaged in by the parties to the Agreement infringed the competition rules. They neither fell within the scope of the block exemption on liner conferences, nor merited individual exemption. The aspects of the TAA to which the Commission objected were a two-tier price structure, the agreement on non-utilization of capacity and inland rate fixing. The two-tier pricing system enabled the conference to include within its structure companies that wish to charge lower prices than the conference members, and which would, in normal conference arrangements, be the main 'outsiders' or competitors of the conference. The non-utilization of capacity has never been permitted under Community law, especially in conjunction with price-fixing. Agreements on the non-utilization of capacity provide that all members of the conference only use a certain maximum percentage of available capacity for any given sailing. Removing vessels from service is cheaper, and provides savings for customers, but generates less income for the shipping companies. The TAA decision makes clear that the block exemption for liner conferences permits temporary adjustments in the amount of physical capacity made available (taking vessels temporarily out of service), but not capacity non-utilization agreements.

Far Eastern Freight Conference

The block exemption Regulation on liner conferences concerns only the transport of goods by sea. The Far Eastern Freight Conference instituted rules enabling members to fix prices for door-to-door services, thus also including the transport of goods by land. Liner conferences receive favourable treatment under the competition rules because they enable the members to offer a service which is of benefit to consumers. The agreement failed to provide any joint inland activity which could produce benefits to consumers. The agreement was therefore prohibited, and symbolic fines of ECU 10 000 per company were imposed.

Agreements preventing parallel trade

Tretorn

Community competition policy has always recognized that a vital part of many distribution or licensing systems is the allocation of exclusive territories to distributors or licensees, and generally accepts not only exclusivity clauses in such agreements, but also obligations on the distributor or licensee not to advertise or otherwise actively solicit customers outside its allotted territory. However, the Commission and the European Courts have consistently maintained that agreements restricting parallel trade – preventing distributors from selling to third parties who wish to export the produce to another Member State – are illegal and will attract high fines. Such agreements, which have the effect of resealing borders that have been opened by the single market programme, prevent citizens living in countries where prices are high from benefiting from low price imports. In 1994, the Commission adopted a decision in one such case, in which a tennis ball producer (Tretorn) prohibited its exclusive distributors from selling for export, and took a number of measures to ensure that this obligation was complied with. Tretorn was fined ECU 600 000, and its distributors were each fined ECU 10 000.

Agreements and practices preventing or limiting access to markets by competitors

One of the Commission's main tasks in enforcing competition rules is to ensure that companies do not conclude agreements or, where they hold a dominant position, engage in unilateral practices, which have the effect of limiting the ability of other firms – usually those from other Member States taking advantage of the possibilities offered by the single market – to compete. Under Article 85, such agreements may typically consist of networks of distribution agreements whereby incumbent producers tie up all available distributors. Under Article 86, a dominant firm may, for example, attempt to prevent its customers from using different suppliers by means of loyalty rebates, or attempt to remove an existing competitor by predatory pricing. In 1994, two cases of particular importance were dealt with under Article 86, and one case, *Carlsberg/Interbrew,* was dealt with under both Articles 85 and 86.

Microsoft

Following a complaint from a software manufacturer, the Commission investigated whether Microsoft had abused an alleged dominant position in the market for PC operating systems by adopting software licensing arrangements which had the effect of excluding competitors. After investigating the complaint, the Commission was concerned that the use of 'per-processor' and 'per-system' licences (i.e. clauses requiring payment of a royalty on every computer produced by a PC manufacturer regardless of the actual number of computers sold with pre-installed Microsoft software), the duration of Microsoft's licence contracts and the use of 'minimum commitments' in these contracts had the effect of foreclosing the European market for such software. At the same time the United States antitrust authorities were investigating similar concerns. Microsoft consented to the exchange of information between the Commission and the US Department of Justice (DoJ) by waiving its right to secrecy with respect to both authorities. A number of contacts between DG IV and the DoJ then followed in which a coordinated approach to the case was prepared. This joint action was not taken in accordance with the 1991 Cooperation Agreement between the European Commission and the US Government, as this Agreement does not permit such wide-ranging information exchange in the absence of the authorization of the companies concerned.

While the Commission was preparing a statement of objections, Microsoft indicated its willingness to reach a settlement with the authorities concerned. The Commission and the Department of Justice agreed to negotiate jointly with Microsoft, and talks were held both in Brussels and Washington DC. These resulted in an undertaking from Microsoft to the Commission and the US authorities. The undertaking obtained by the Commission provides that Microsoft will not enter into licence contracts with a duration of more than one year, will not impose minimum commitments on licensees and will not use per-processor licences. Per-system licences will be allowed only if licensees are clearly given the freedom to purchase non-Microsoft products. The undertaking will open up the market for operating system software to competition from existing suppliers and potential new entrants.

HOV-SVZ/MCN

Following investigations based on a complaint, the Commission discovered that Deutsche Bundesbahn (DB) charged companies using German ports less for equivalent rail services than those using Belgian or Dutch ports. It was also concluded that DB held a dominant position (as the monopoly provider of rail services in Germany) and had abused this position through its discriminatory policy. This policy artificially encouraged companies to use German ports

and thus DB's services for the entire rail journey to German destinations, even if it would, in normal circumstances, be more economic (a lesser distance) to use Belgian or Dutch ports and the services of both the Belgian/Dutch and German railway companies. The Commission fined DB ECU 11 million. The decision does not question the right of DB to act as a monopoly provider of rail transport services in Germany: it makes clear, however, that a legal monopoly cannot be used to favour the activities of associated companies at the expense of competitors.

Carlsberg/Interbrew

In 1989, Carlsberg, the largest Danish brewer, concluded an exclusive distribution agreement with Interbrew, the largest Belgian brewer. Interbrew was given the exclusive right to sell 'Carlsberg' and 'Tuborg' beer in Belgium and Luxembourg. The Commission objected to the agreement, as it effectively excluded competition between these two major European brewers for luxury 'pils' beer in a country where the licensee was in a predominant position.

The Commission's action against the exclusive arrangement between Carlsberg and Interbrew was in line with the conclusions of the 1991 EC beer review, which announced that licensing agreements between major breweries would be examined by the Commission to see whether they were being used as vehicles for market-sharing or the control of imports. The Commission accepts that production and distribution agreements between breweries established in different Member States may benefit consumers. Such agreements may enable small specialized breweries to sell their products outside their domestic markets or they may provide a springboard for independent operations by a large brewery in another geographic market. However, disadvantages in terms of competition must not outweigh such potential benefits. This is the case where an exclusive right is granted to a domestic brewery which, as in the case of Interbrew, has a clearly predominant position on its own domestic market. Cooperation between the relevant breweries can then serve as an instrument for sharing markets, resulting in the reinforcement of an existing dominant position – in this case in Belgium – to the detriment of other, mostly small, breweries and independent beer suppliers.

During the course of the proceedings, the two companies amended their agreement to bring it into line with the competition rules. In essence, Carlsberg agreed to set up a new joint venture with a Belgian beer wholesaler, which will distribute its products in competition with Interbrew, which retains a non-exclusive licence. By its action, the Commission ensured that Belgian beer consumers would be able to choose between suppliers of luxury beers, and that competition for the sale of such products would be active, resulting in lower prices.

Approval decisions

Where companies collaborate in an area in which they have previously competed independently with one another, they obviously restrict competition between them. None the less, the Commission is aware that, particularly in globalizing markets, such collaboration may be vital to enable firms to exploit the economies of scale necessary to compete. By collaborating, they may be able to improve the efficiency of their research and development (R&D) efforts, or reduce production or distribution costs, thus increasing their competitiveness. As a consequence of these considerations, the Commission generally takes a positive approach to research and development or joint production agreements between companies, providing, of course, that they do not lead to the elimination of effective competition in the Community, one of the preconditions for the granting of an exemption from Article 85(1).

Decisions adopted in 1994 by the Commission reflect this approach. They also illustrate the attitude that has been taken by the Commission in many further cases of less legal, economic or political importance, which were settled by comfort letter and are not covered in this survey.

Strategic alliances

In markets such as telecommunications, which is globalizing rapidly due to technical progress and liberalization, companies may choose to collaborate on a wide range of matters, usually accompanied by the acquisition of shares by one or both of the companies in their partners. Such operations pose particular difficulties for the competition authorities – the nature of the future range of collaboration is sometimes imprecise, and yet the quasi-structural nature of the operation requires an analysis based not only on the effects of the specific collaboration identified at the time the operation is notified, but also the likely long-term structural effects of the deal. Nevertheless, in globalizing markets, the Commission does, in principle, view such agreements positively. This approach can be seen in both the *BT/MCI* and *Olivetti/Digital* cases.

BT/MCI

British Telecommunications (United Kingdom) acquired a 20% share of MCI (United States), and the two companies agreed to set up a joint venture, named Concert, which will provide enhanced and value-added global telecommunications services to multinational or large regional companies. The two companies contributed most of their existing activities in this field to the joint venture. Although the Commission found that the operation resulted in a restriction of competition – BT and MCI were at least potential competitors not only in the overall market for telecommunications, but also in the specific market segment targeted by Concert – it concluded that an exemption could be granted, as the benefits resulting from the operation would outweigh these negative effects.

In particular, it was considered that Concert will develop a set of new advanced global services more quickly than either BT or MCI would be capable of providing alone. By creating Concert, each parent will also substantially reduce the costs and risks inherently associated with the offering of such services on the scale and with the particular features required by international companies. However, the exemption was only granted once assurances were received that, despite the appointment of BT as exclusive distributor in the European Economic Area (EEA), any customer in this area can obtain Concert's services through MCI instead of BT, and also once the parties amended a provision intended to dissuade MCI from entering some sectors of the telecommunications market in the EEA.

Olivetti/Digital

These two computer companies agreed that Digital would provide Olivetti with its Alpha AXP technology (which is used in computers to increase processing speed), and in return Olivetti would use only Digital's licensed technology in certain products, and, furthermore, would purchase certain AXP components from Digital. Digital agreed to continue purchasing Intel-based PCs from Olivetti for its European sales operations. Although the agreement was originally accompanied by the acquisition by Digital of 8% of Olivetti's share capital, these shares were subsequently sold.

The Commission exempted the operation, as it concluded that its restrictive effects were outweighed by benefits resulting from the increased dissemination of Digital's advanced Alpha AXP technology, which will promote technical progress, and because there are several competing technologies available on the market.

R&D and production joint ventures

Fujitsu/AMD

Fujitsu (Japan) and Advanced Micro Devices (AMD – US) set up a joint venture, Fujitsu AMD, which will manufacture advanced microchips for use in the next generation of high-tech products. The market for such products is very dynamic. In particular, the segment for flash memories (one of the microchips which will be produced by the joint venture) is forecast to increase tenfold between 1992 and 1996. This is expected to lead to lower prices and the more widespread use of these high-tech products. The Commission concluded that the establishment of the joint venture falls within the scope of Article 85(1) because it restricts competition between the parties, who are competitors in this field. A territorial restriction included in the Technology Cross-licence Agreement reserving, for five years, to Fujitsu, the right to sell actively in the United Kingdom and Ireland, and to AMD to sell actively in the rest of the EEA, was also found to fall under Article 85(1). However, the Commission considered that an individual exemption could be granted because the restrictive effects were outweighed by the resultant benefits. In particular, it concluded that the dissemination of a new generation of semiconductors would lead to technical and economic progress by making possible the production of increasingly smaller, faster, and more reliable electronic products ranging from computers to portable telephones.

International Private Satellite Partners

Nine companies, which are mostly active in the telecommunications equipment or aerospace sectors, set up a joint venture to provide international telecommunications services via satellite to companies in Europe and the United States. The joint venture will own two satellites, the first of which was launched in November 1994. The Commission granted negative clearance, because it concluded that the companies were not competitors of one another in this market – none of them could have undertaken the project on their own. Furthermore, it considered that the project would increase competition on the market for such services and for satellite transmission capacity: the joint venture will be a new competitor of the big strategic alliances being established and, moreover, will sell spare capacity on the satellite to third parties.

Exxon/Shell

The Commission granted an exemption to the agreements between these American and Anglo/Dutch companies establishing a production joint venture which will produce linear polyethylene for its parents. Following action by the Commission, the companies modified their original agreements, increasing the freedom of each party to supplement independently their original investment in

the joint venture. The modified agreements also result in increased independence for the management of the joint venture and permits each party to use part of the capacity dedicated to the other, in the event that the latter fails to take all its allotted share. These measures are intended to limit, as far as possible, the effects of the collaboration on the competitive relationship between the parties.

The market in question was considered to have oligopolistic characteristics, and thus the compatibility of such a joint venture between two major competitors with the competition rules was far from evident. None the less, the operation was exempted for 10 years mainly because the restrictions resulting from the joint venture were the minimum possible to enable the project to succeed, and because, as the plant would use the latest production technology, the linear polyethylene would be produced very efficiently, enabling the sale of this product at very competitive prices.

Pasteur Mérieux/Merck

In October, the Commission exempted a joint venture between Merck (United States) and Pasteur Mérieux Sérums et Vaccins, a subsidiary of Rhône Poulenc (France). The joint venture will take over all the human vaccine activities of the two companies. A major objective of the joint venture is the creation and development of new multivalent vaccines – the combination of several antigens in one vaccine. The joint venture will accelerate the availability of such multivalent vaccines as it will have a large portfolio of monovalent vaccines for combination. This will lead to important public health benefits, in particular for paediatric vaccination. Children will benefit from the availability of a single 'cocktail' injection, for immunization against a whole range of diseases including diphtheria, tetanus, pertussis, polio, hepatitis B and haemophilus influenza B (one of the causes of meningitis). The joint venture will also stimulate competition for more and better new monovalent vaccines and contribute to a net improvement in distribution of existing and future Merck-origin vaccines.

In granting an exemption, the Commission also took account of the fact that, although the parties are both among the leading worldwide vaccine producers, Merck has an extremely limited European presence outside Germany, despite entering the European vaccine markets at the beginning of the 1970s. Moreover, as the parties' European vaccine portfolios are to a large extent complementary, there are only a few overlaps between the parties' vaccines on specific national vaccine markets. In order to limit further any anticompetitive effect of the agreement, the parties furthermore agreed to amend their agreement as originally notified in relation to the French measles/mumps/rubella vaccine markets, the French, German and Scandinavian EFTA countries' monovalent Hib (haemophilus influenza B) markets and the cooperation agreements with Behringwerke AG, the German distributor of Merck's vaccines. The restrictions of competition accordingly became very limited.

Philips/Osram

The Commission exempted an agreement between Philips (Netherlands) and Osram, a subsidiary of Siemens (Germany), to combine all their activities in the manufacture and sale of lead glass used for lamp manufacture. Osram's glassmaking facilities, based in Berlin, had reached the end of their economic life and were due to be closed. The joint venture would therefore be based in Philips' existing facilities in Lommel, Belgium, which would be extended. This would enable the joint project to benefit from important economies of scale. The output from the joint venture would be supplied to the parent companies and to other lamp manufacturers.

Although it was considered that the agreement restricted competition and thus fell within Article 85(1), an individual exemp-

tion was granted in the light of the efficiencies resulting from the project, and the fact that several alternative sources of supply exist both within and outside the European Union. Another important element that led the Commission to grant an exemption in this case was the environmental benefits likely to result from the project. First, unlike the Berlin plant of Osram, Philips' Lommel factory is fitted with advanced equipment to reduce the emission problems inherent in the manufacture of lead glass. Second, one of the major tasks of the joint venture will be to develop lead-free products for use in lamps. Such progress would provide significant environmental benefits in terms of air pollution.

Saint-Gobain/Asahi Glass

In December, the Commission exempted a number of agreements concluded between Saint-Gobain Vitrage International (France) and Asahi Glass Company Ltd (Japan) relating to joint research and the development of bi-layer products intended mainly for the manufacture of glass for motor vehicles. Essentially, the agreement sets up a joint venture between Saint-Gobain and Asahi Glass which will pool their know-how and research capacities in these new technologies.

The Commission was particularly aware of the benefits in terms of safety which consumers would derive from technical cooperation between a Community firm and a Japanese firm that already has advanced know-how in this field. Motor vehicle windshields using this technology are made by laminating mineral glass with polyurethane film, the combination of which allows better mechanical energy absorption. These products are supposed to provide better protection for vehicle occupants, greater resistance to impact and a reduced risk of injuries in the event of collision. The parties have reached a comparable level of knowledge, and in the field of bi-layer technology this knowledge is largely complementary. Exemption was granted after the parties had amended their agreement in such a way that the period covered will expire at the end of a five-year term starting on the date on which commercial production begins in the Community, and at any rate by the year 2005.

Transport cases

In 1994, the Commission adopted four exemption decisions relating to international rail transport. All four cases concerned the joint marketing of new international services, and three of these concerned services between the United Kingdom and continental Europe resulting from the opening of the Channel Tunnel. All these cases involved agreements between companies which are the owners of the railway infrastructure in their respective countries or which are the only suppliers of rail traction services. These companies, therefore, own essential facilities, access to which is indispensable to the provision of international transport services. It is important that the Commission examines such agreements carefully, as cooperation between these companies, which has the aim of enabling them to enter jointly newly emerging international transport markets, could further reinforce their already dominant position on their respective national markets and make access by competing transport providers either impossible or extremely difficult. On the other hand, entry into these new markets, many of which are central to the creation of effective trans-European networks, requires considerable investment in transport equipment and fixed installations and the economic viability of such new activities is uncertain. Therefore, the rapid promotion of these new services for the benefit of European industry and consumers can, in certain cases, only occur as a result of cooperation between the national rail companies. The decisions adopted by the Commission in 1994 in this area demonstrate its approach in balancing these important considerations. Furthermore, when analysing such cases, the Commission has to take into account that Coun-

cil Directive 91/440/EEC of 29 July 1991, which liberalizes international rail transport services, provides, under certain conditions, access by any EU rail company to the railway infrastructure in all Member States. The Directive is also applicable to the railway infrastructure of the Channel Tunnel which is owned by Eurotunnel. The Commission has to ensure that collaborative agreements, particularly those that provide for the reservation of a certain proportion of available infrastructure to any given company or grouping of companies, are not contrary to competition law and do not frustrate the aims of this Directive.

Eurotunnel

The Eurotunnel decision concerned an agreement concluded between Eurotunnel, British Rail and SNCF. The agreement reserves part of the Tunnel's infrastructure capacity (the 'slots' when trains can use the Tunnel) to British Rail and SNCF, to the exclusion of Eurotunnel itself and all other rail transport companies. This severely limits competition between the parties and has a significant foreclosure effect towards third parties. However, taking into account the special nature of the Channel Tunnel project, the construction and operation of which involves an exceptionally high investment and risk, the Commission granted an exemption for 30 years, subject to certain conditions designed to minimize the negative effects on competition. These conditions limit the amount of the available capacity in the Tunnel that is reserved to British Rail/SNCF, and ensure that other competing railway undertakings will be able to obtain access to the Tunnel infrastructure to operate competing international transport services.

Allied Continental Intermodal Services (ACI)

British Rail, SNCF and Intercontainer (a combined transport operator owned by 24 railway undertakings) agreed to market jointly international combined transport services by train between the United Kingdom and continental Europe via the Channel Tunnel through a newly created joint venture (ACI). Combined transport services involve journeys made up of two different transport modes: in this case, train and road transport.

The Commission considered that British Rail, SNCF and Intercontainer were potential competitors on this market and, therefore, the joint service eliminated competition between them. Furthermore, it concluded that the joint venture may impede access to the market by competing transport operators.

As the two railway undertakings now have an interest in one specific company offering combined transport services, the risk exists that they would be less willing to provide access to their networks or rail services to companies offering competing services. None the less, the Commission exempted the ACI joint venture for a transitional period of five years given the specific features of the case: the service provided by ACI is completely new and involves considerable financial risks. The Commission imposed certain conditions to limit the restrictions and to guarantee market access for other combined transport operators. In particular, the Commission obliged British Rail and SNCF to supply to competing transport operators the same rail services as they supply to their joint venture, ACI, on a non-discriminatory basis.

Night Services

Four public railway undertakings (British Rail, SNCF, Deutsche Bundesbahn and Nederlandse Spoorwegen) agreed to set up a joint venture which will operate night passenger trains on four routes between the United Kingdom and continental Europe via the Channel Tunnel. This case raised the same issues as the *ACI* case and was exempted by the Commission for a transitional period of eight years under similar conditions as the ACI joint venture.

The *ACI* and *Night Services* decisions demonstrate the importance the Commission attaches to the introduction of new high-quality transport services by rail to accompany the opening of the Channel Tunnel. These new transport services provide a substitute for traditional transport services by sea or air and, therefore, increase competition between modes of transport.

Communautés d'intérêts automobiles (CIA)

The Commission approved a framework Cooperation Agreement between 13 railway companies relating to the international carriage of new motor vehicles between assembly plants and distribution centres. The aim of the cooperation is to increase the use of rail travel for such operations, an objective that is encouraged by the EU common transport policy. The cooperation involved the adoption of a common marketing strategy and a common tariff structure, but the parties abandoned the fixing of common transport tariffs, at the Commission's insistence. The tariffs are fixed by the companies directly involved for each international route. Although the Commission concluded that this cooperation restricted competition between the rail companies, including competition on prices, it exempted the cooperation because of its positive effects on quality of service and promotion of rail transport.

Legislative developments

The objectives underlying the Commission's legislative initiatives with respect to Articles 85 and 86 in 1994 were:

(i) the continuation of a process that has now been active for a number of years – the reduction of the costs of complying with the Community rules, and particularly so for Community SMEs;

(ii) ensuring not only that the rights of defence of companies are respected during Community competition proceedings, but also that this requirement is achieved in a manner that is simple and, above all, manifestly fair and objective;

(iii) transparency – ensuring that the Commission's approach is well known by EU industry; and

(iv) ensuring that the Community's competition policy is always based on a sound economic analysis of the market in which the agreement or practice in question operates.

Although all these objectives can be seen in each of the legislative projects undertaken this year, the first (reduction of regulatory costs) and fourth (ensuring that decisions are based on a full assessment of the market) are particularly relevant to the revision of form A/B and the *de minimis* notice.

Form A/B is the form that must be used for notifying agreements to the Commission when applying for exemption or negative clearance. The new version was adopted by the Commission at the end of 1994 following detailed and widespread consultation, which led the Commission to make substantial changes to its original proposal. The final version contains two separate sections, one shorter version for 'standard' notifications; the other, far more detailed, for cooperative joint ventures, which benefit from accelerated treatment by the Commission's departments. (In 1992, the Commission announced that it would endeavour, henceforth, to send either a comfort letter or a warning letter within two months from the receipt of a complete notification of a cooperative joint venture involving structural change.) It is hoped that the new form will reduce regulatory costs in two ways.

(i) It should be simpler to complete than the previous version, as the instructions and questions are more straightforward. This should assist companies in limiting the need for external legal advice when submitting notifications.

(ii) A provision has been introduced whereby the Commission can 'waive' the obligation to provide all the information requested by the form. The purpose of this is to allow companies to contact the Commission when they believe that some of the information requested in the form is not relevant or necessary in their particular case. If the Commission agrees, the notification will be considered complete notwithstanding the failure to provide all the details required by the form.

In addition to this, it is expected that the revision will assist companies to make clearer, more targeted notifications, avoiding irrelevant and unnecessary information, while, on the other hand, ensuring that they provide all the information essential for the Commission to begin its investigations. This should help the Commission in its continuing efforts to deal more quickly with all types of notifications, and reduce the number of occasions where it is obliged to request further information from the companies concerned once a notification has been received.

The *de minimis* notice was also revised in 1994. This notice was conceived in 1970 as a measure to benefit SMEs. Agreements between such companies rarely have economic consequences which affect the Community as a whole, and, therefore it was thought appropriate to provide clear criteria

to enable SMEs to determine whether their agreements fall outside the scope of the Community's competition rules. This rationale still remains highly appropriate, and it was decided to increase the thresholds set out in the notice to take account of inflation and growth in gross domestic product (GDP). The new notice specifies that where companies sign agreements which restrict competition, but none the less the criteria set out in the notice are met, no notification is necessary, and the Commission will not challenge the agreement. Thus, an agreement will be considered to be 'automatically' *de minimis* if:

(i) the combined global turnover of the groups to which the parties belong does not exceed ECU 300 million, and

(ii) the combined market share of the groups to which the parties belong does not exceed 5% of the relevant market.

The third major legislative project undertaken in this area by the Commission in 1994 concerns the revision of the mandate of the Hearing Officer. The Hearing Officer is a Commission official, but one who is administratively separate from the Directorate-General for Competition. He or she is quasi-independent – the Hearing Officer can only be removed by a vote of the college of Commissioners. The function of the Hearing Officer is essentially to ensure that the rights of defence of companies involved in competition proceedings are respected, and, in particular, to 'ensure that the (oral) hearing is properly conducted and thus contribute to the objectivity of the hearing itself and of any decision taken subsequently. The Hearing Officer shall seek to ensure in particular that in the preparation of draft Commission decisions in competition due account is taken of all the relevant facts, whether favourable or unfavourable to the parties concerned' (Article 2(1) of the Hearing Officer's mandate). Since the creation of this post in 1982, the role of the Hearing Officer has been universally applauded. The Commission therefore decided to extend the role of the Hearing Officer to cover the following areas:

Deadline for reply to the statement of objections: An undertaking may consider that the deadline imposed upon it for reply to the statement of objections is too short. In such a case, the Hearing Officer will decide whether or not an extension to this deadline should be granted.

Access to relevant information: It is important that undertakings should be confident that the Commission carries out its responsibilities regarding access to files carefully, fairly and objectively, and, subject to the obligations imposed upon it regarding confidentiality, discloses all documents that may be favourable to the undertakings concerned in preparing their defence. Thus, it was decided that if a company believed that the Commission has not provided it with all the documents necessary for its defence, the Hearing Officer should examine any such claim and decide on its merits.

Hearings: Since the Hearing Officer is responsible for organizing hearings, the Commission decided that he or she should also have the task of deciding who is to be allowed to speak at these events. In particular, the Hearing Officer should also be given the right to decide whether third parties should be allowed to intervene.

Business secrets and other confidential information: In performing the abovementioned tasks, the Hearing Officer should also be able to decide which items of information supplied by a firm and contained in the Commission's file can be communicated to other firms or published.

In 1994, the Commission also continued its consultations regarding the review of its block exemption on intellectual property licensing. It published for consultation a draft Regulation that combines the two previous patent and know-how Regulations and also proposed the inclusion of market-share thresholds, effectively excluding from the

scope of the Regulation agreements between companies holding very significant market shares (over 40%), or holding significant market shares in oligopolistic markets. On the other hand, the draft Regulation proposed a reduction in the list of 'blacklisted' clauses whose inclusion in an agreement would result in it being unable to benefit from the Regulation.

This approach results from the concern of the Commission that the present block exemption Regulations treat a licensing agreement between companies holding a dominant position in the same manner as an agreement between small companies with minimal market shares. Clearly, the former is far more likely to result in important restrictions of competition than the latter. However, during the consultation process with industry and consumer groups, it became clear there was very general concern that the introduction of such thresholds would lead to increased regulatory costs and legal uncertainty. The balance of these two conflicting consequences in the Commission's proposed approach is a difficult and important exercise. It was therefore decided to roll over the existing patent licensing Regulation (which expired in 1994) to enable further consideration and consultation.

Consultations were also begun regarding the renewal of the Commission's block exemption Regulation on selective distribution for automobiles. In the revised draft Regulation, which was published for comments, the Commission takes the view that car dealership arrangements, which are traditional in the Community, continue to merit exemption, but under strict conditions. Thus, while it is proposed that car manufacturers may grant dealers an exclusive territory and require all dealers to meet certain minimum quality standards, they may not, for example, take measures preventing Community citizens from purchasing cars in the Member States where they are the cheapest. The new draft Regulation envisages a number of changes from the existing Regulation aimed at increasing the commercial freedom of dealers, thus ensuring that increased benefits resulting from the distribution system are passed to the consumer. It is expected that the Commission will adopt the final version of the Regulation in 1995 following widespread consultations.

Finally, the Commission adopted a draft notice on the application of the EU competition rules to cross-border credit transfers. The draft notice is part of a wider package of measures, including a proposal for a Directive, whose aim is to improve cross-border payments. The draft notice sets out the approach the Commission intends to take when assessing the compatibility of cross-border credit transfer systems with the EU competition rules. Guidance is given as to non-price competition aspects (membership rules and operational rules) and price competition aspects. An important part of the draft notice relates to a collectively agreed interbank fee. The Commission considers that where agreements on multilateral interchange fees are shown to be actually necessary for the successful implementation of certain forms of cooperation, positive in themselves, between a number of banks, agreements on interchange fees may be eligible for exemption under Article 85(3). Where banks introduce interchange-fee arrangements, the Commission will examine the economic benefit which these arrangements seek to achieve and consider whether consumers will receive a fair share of the resulting benefit and whether the particular interchange-fee arrangements are actually necessary as a means to achieve that benefit.

Decentralization of the competition rules

The Commission held discussions in 1994 with the national cartel authorities on ways and means of increasing their involvement in the application of the Community competition rules, in the same way that the national courts have the power to apply the Community competition rules in cases appearing before them. The conclusions reached in such discussions will be set out in a communication which the Commission will draw up in collaboration with the national authorities.

The objective in introducing some decentralization in the application of the Community competition rules is to make the rules more effective at national level without increasing monitoring costs or diminishing the benefits to industry of the existence of uniform competition rules within the common market. The decentralization aimed at must establish the right balance between the general trend towards subsidiarity, on the one hand, and the maintenance of a system of uniform protection of competition for all firms within the common market (level playing-field), on the other. The Commission believes that the application of the same rules of substance by 15 national authorities and itself will be a major factor in the integration of the common market which can increase the level of competition, and will thereby enhance the competitiveness of European industry.

In order to achieve this objective, it is proposed that the application of the Community competition rules be decentralized where three conditions are met:

(i) the case essentially involves a single Member State;

(ii) there is a clear infringement of the Community rules;

(iii) the infringement has no chance of being exempted by the Commission on grounds which are provided for in Community law and for whose implementation the Commission is solely responsible.

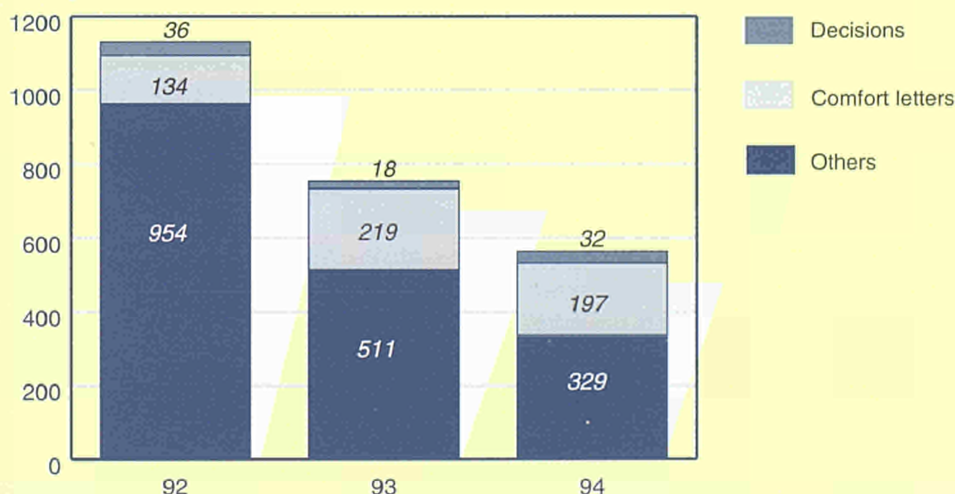
Such decentralization will ensure that cases are dealt with by a single cartel authority at the most appropriate level and is in line with the spirit behind the provisions in the Merger Regulation allowing merger cases to be referred to a Member State.

Statistical overview

In almost all respects, 1994 was an excellent year for the Commission with regard to the number and efficiency with which cases were handled. First, it should be noted that a greater number of formal decisions were adopted than ever before.

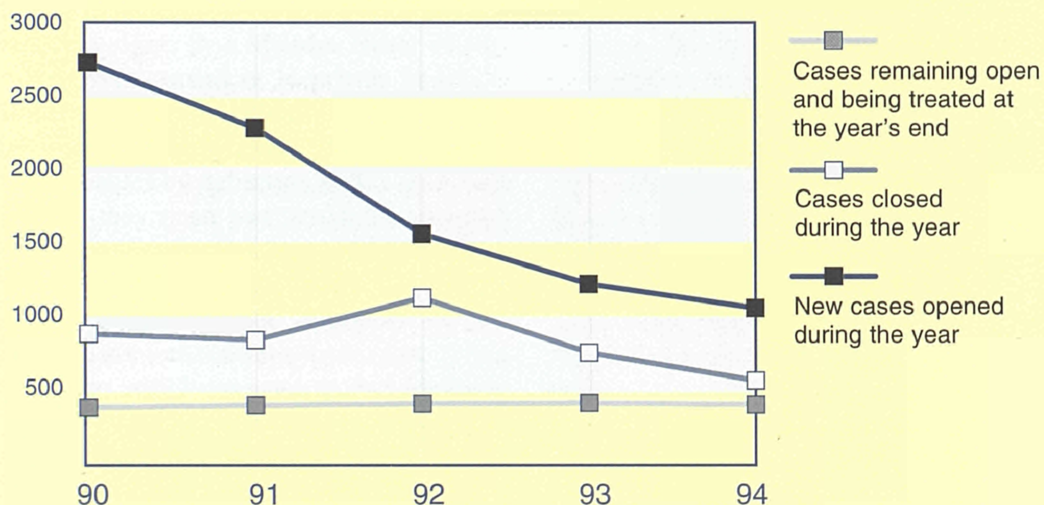
This is very encouraging and represents the fruits of continuing efforts to rationalize and streamline internal procedures; when the importance and complexity of the cases adopted is taken into account, this figure is particularly satisfying. Second, the stock of cases remaining open at the end of the year has again been reduced and is now 1 058. This compares with over 3 000 cases that remained open at the end of the 1980s, and a reduction of 168 compared with the end of 1993. As a result of the intensive efforts to reduce the backlog over the previous years, almost all the 'simple' cases (presenting little or no substantive problems) have now been closed, and the number of cases remaining open is now approaching that which represents the cases being actively treated. For this reason, the net reduction in the stock of cases achieved in 1994 was less than in previous years. In the future, further significant reductions will be progressively more difficult to achieve. None the less, the Commission remains committed to its attempts to reduce continually the number of cases remaining open.

Graph 1
Cases dealt with

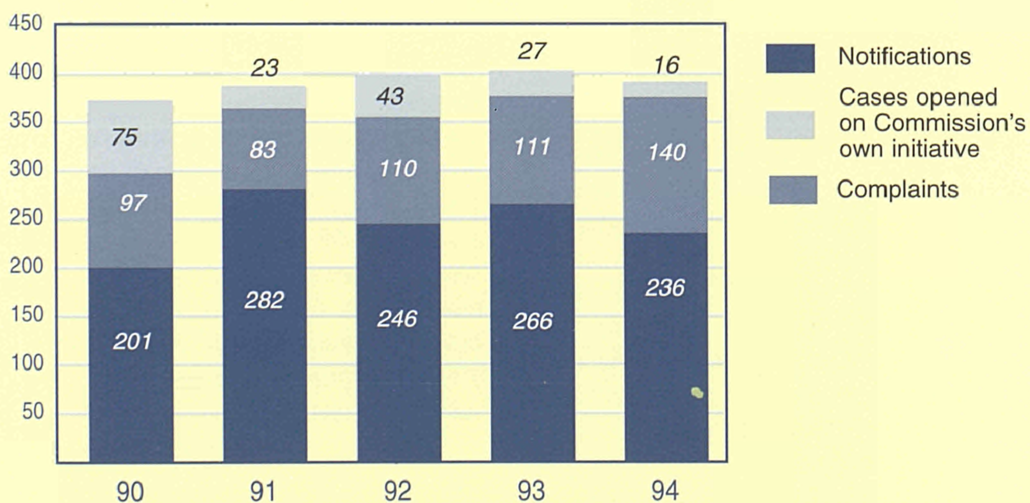


Others: cases closed because the agreements were no longer in force, the impact was too slight to warrant further investigation, because complaints had become moot or because investigations had not revealed any anticompetitive practice.

Graph 2
Cases



Graph 3
New cases



MONOPOLY RIGHTS AND COMPETITION POLICY: ARTICLE 90

Introduction

Article 90 is based on the underlying principle that an undertaking that has been granted monopoly rights by a Member State, whether it be State-owned or in private hands, is subject to the competition rules in the same way as any other company. Thus, as monopoly companies by definition hold a dominant position, they must pay particular attention not to engage in abusive activities. They may not, for example, engage in 'tying': refusing to provide the monopoly service unless customers also purchase other goods or services which are open to free competition. Equally, they must be careful not to use revenue from their monopoly activities to subsidize sales in other markets, thereby artificially disadvantaging their competitors. This flows from Articles 85 and 86, which apply to undertakings irrespective of their statute.

Article 90 of the Treaty complements this basic rule, providing specific provisions concerning State measures taken with respect to companies that have been granted State monopoly rights. It recognizes not only the particular competition problems that may be created by such measures, but also the need to take account of the specific tasks and objectives that such companies are often entrusted with. Article 90 contains a basic principle, and an exception. Its basic principle is that Member States must respect the underlying rule that companies granted monopoly rights must, in principle, comply with the Treaty's rules, and must not, therefore, act to undermine this.

This means not only that they may not take measures that will lead companies granted monopoly rights to infringe the competition rules by, for example, tying, but, furthermore, it means that in certain circumstances the grant or maintenance of a monopoly right can in itself infringe the Treaty provisions on competition and free movement and therefore be illegal.

It is logical that the competition rules should require the careful examination of monopoly rights. The effect of such measures is to frustrate all the most basic aims of the single market process, such as the free movement of goods and services. Member States may be tempted to grant domestic companies limited or even complete monopoly powers in order to protect them from the intensifying competition from firms based in other Member States. The Commission's powers in this area are therefore parallel to and complement those which enable it to act against other trade barriers imposed by Member States, such as hidden quotas and excise duties.

The exception contained in Article 90 results from the fact that State monopolies are usually entrusted with some public service function. They are normally required to perform a specific (and sometimes unprofitable) service in the public interest. Actions taken to meet these public service obligations can be immune from the competition and other Treaty rules, providing that they are truly indispensable to meet such legitimate aims. This exemption from the Treaty rules is, however, strictly applied: there must be no other reasonable and less-restrictive manner of meeting the objectives in question. For example, the national postal services are entrusted with the public service function of providing a basic collection and delivery service to all citizens at a uniform price. Using revenue generated from profitable local deliveries to finance more remote, loss-making, deliveries could be immune from the competition rules as a result of the Article 90 exception. Using revenue generated by monopoly activities to undercut competitors in other markets – such as banking – would not, however, be immune. The former action is necessary to achieve the public service objectives, the latter is not.

Although the exception applies to specific actions of State-granted monopolies which would in normal circumstances infringe the competition rules as well as the question of the legality of the grant or maintenance of

monopoly rights as such, it is, in fact, more important with respect to the latter than the former. In the past, the Commission has dealt with a number of cases where a State monopoly was engaging in an activity that normally constitutes an abuse of a dominant position – tying, discriminating, or refusing to supply, for example. The companies in question argued that the conduct was justified by the existence of public service obligations. In every case this argument was rejected, because it was possible to demonstrate that either there was no direct link between the abuse and the achievement of the public service objective, or that an alternative and less-restrictive manner of achieving the objective could reasonably have been chosen. On the other hand, the Commission has accepted that in some circumstances the grant or maintenance of monopoly rights may be the only reasonable manner to achieve public service objectives.

In order to enforce Article 90, the Commission may adopt decisions or directives addressed to Member States stating that a given measure infringes the Treaty and must be terminated. To companies, it addresses decisions under Articles 85(1) and 86 stating that their actions infringe the competition rules and cannot be defended by recourse to the Article 90 exception by virtue of their public service obligations.

Although at first sight such directives addressed to Member States may appear legislative in nature, and it may therefore be surprising that the Commission has exclusive jurisdiction to adopt them, in fact Article 90 directives are not legislative; they are simply the clarification, or explicit statement and enforcement, of existing legal rules set out in the Treaty. However, the Commission is well aware of the importance and impact of such directives, not only in legal and economic terms, but also politically and socially. It is therefore committed to exercising its authority to adopt decisions or directives liberalizing previously monopolized sectors only following wide-ranging discussion and debate with industry, consumer groups, the Member States and Parliament.

Telecommunications

An essential precondition to liberalization is that the opening-up of the market in question to competition will not make it impossible for legitimate public service objectives to continue to be met. Partly as a consequence of this concern, liberalization of the telecommunications sector in other parts of the world, notably the United States, has been achieved well in advance of Europe. However, over the past seven years, the Community has carried out a step-by-step programme of liberalization that will lead to the full opening of the telecommunications services markets to competition by 1998.

The first step was taken in 1988 with the telecommunications terminal equipment Directive. This required the Member States to terminate monopolies granted to their national telecommunications operators for the sale of equipment such as telephones, modems and fax machines. The second and most important step was in 1990, when the Commission adopted a Directive requiring the abolition of monopoly rights for the provision of all telecommunications services, subject to four significant exceptions:

(i) voice telephone services to the general public,

(ii) satellite services,

(iii) mobile telephone and paging services, and

(iv) radio and television broadcasting services to the public.

The 1990 Directive, however, required the Commission to draw up a review paper in 1992, to determine to what extent technological and economic developments meant that some or all of these services could and should be liberalized without endangering

the universal service obligation. It was already clear at that stage that the telecommunications sector had been developing very quickly and, partly as a result of this and partly due to the favourable results of the existing liberalization measures, one of the options put forward in the review was that previously 'reserved' areas could be progressively liberalized. The review was the subject of wide consultation and discussion with industry, consumer groups, Parliament and the Council and led to a large degree of consensus on this option. This resulted in the Council calling on the Commission to take the steps necessary to provide for the full liberalization of the voice telephony service in the European Union by 1 January 1998, subject to transitional arrangements for certain Member States. In 1994, therefore, the Commission was preparing the groundwork for this programme of liberalization.

First, it adopted a Directive regarding satellite communications. This opens up the sale of satellite equipment (satellites and ground stations) and the provision of satellite services to free competition. The Directive will stimulate greater and more efficient use of business satellite communications, bridging the widening gap between the price and quality of services available in the Union and those which are enjoyed by US-based companies.

Second, the Commission also issued a draft Directive for public consultation which, if finally adopted, will lift restrictions on the use of cable-television networks for the carriage of all liberalized telecommunications services. In the future, EU citizens should be able to receive such services from a wide range of different competing suppliers. The main aim of this draft Directive is to foster initiatives in the area of multimedia throughout the European Union from 1 January 1996. Most of these involve the transmission of moving pictures which the traditional telecommunications networks are not designed to – and in many cases cannot – carry.

Third, the Commission proposed, following consultation on its Green Paper on mobile and personal communications, the lifting of all special and exclusive rights with regard to mobile services and the underlying infrastructure by 1 January 1996. This should transform the mobile telephone sector by the end of the decade from the premium/business service which exists today to a service that will be affordable to all existing telephone users. The Commission will only adopt a final Directive after careful consideration of the comments received during the consultation process.

Finally, work has started on the drafting of a Directive that will provide for the full liberalization of telecommunications services by 1998.

Energy

Electricity in Europe remains considerably more expensive than, for example, in the United States. The competitive handicap that this places on our industry is evident. The Commission has submitted proposals to the Council and Parliament, pursuant to Article 100a of the Treaty, to establish common rules for the electricity and gas industries. These proposals are designed to open up national monopolies so that the internal market may function in the energy sector, while enabling public service obligations to be met. These aims are to be achieved, in particular, through third-party access to electricity and gas networks and the separation of accounts for production, transport and distribution functions. The proposals were amended following the European Parliament's opinion. In November 1994, the Council unanimously adopted conclusions highlighting political agreement on a number of key points, including the necessity to liberalize beyond the level of production; this latter issue has become the subject of detailed analysis and addresses the question of the modalities to be met to introduce in parallel different approaches of liberalization (negotiated third-party access and single-buyer systems).

Postal services

In 1994, the Commission continued to prepare the further measures requested by the Council subsequent to the postal Green Paper. In this framework, studies were commissioned, in particular in the area of cross-border mail.

Concept of State aid falling within the scope of Article 92(1) of the EC Treaty

The first and frequently the most complex step in the Commission's examination is to check whether the aid in question meets the criteria set out in Article 92(1). Application of the market-investor principle to financial transactions by the Spanish State with the firm Inespal, and the bank Banesto, and by the German State with respect to Klöckner Stahl GmbH, prompted the Commission to conclude that no aid was involved for these undertakings. However, the opposite conclusion was drawn in the case of transactions involving the French undertakings Bull and Air France, and the Commission expressed serious doubts when it initiated proceedings with respect to German measures in support of Neue Maxhütte Stahlwerke GmbH. The sale of land by the city of Mainz at a price which was apparently below the market price was deemed possibly to be aid for the German firm Grundstücksverwaltungsgesellschaft Fort Malakoff Mainz mbH & Co. KG. The public guarantee for Altiforni e Ferriere di Servola was considered to constitute an advantage for the firm resulting in a distortion of competition, even if the firm's situation has not yet led it to make use of it. The Commission began work on drawing up a notice on this very frequent type of aid, which can have very substantial harmful effects on competition, particularly where the recipients are firms in difficulty, as is the case with firms receiving assistance under the Prodi Law in Italy and a number of schemes in the German *Länder.*

A number of Commission decisions in 1994 illustrated the distinction between general measures, which apply automatically to the whole of the economy and on which the State does not have any discretionary scope for action, and State aid which favours 'certain undertakings or the production of certain goods'. The application of the general German legislative provisions on bankruptcy to the firm Saarstahl AG i.K without any intervention by the State fell within the first category, whereas the amendment of the Danish Electricity Act, which benefits only the firm SEAS, fell within the second. Similarly, assistance provided by the Fonds national de l'emploi (National Employment Fund) to the firm Kimberly Clark at Sotteville-les-Rouen was deemed by the Commission to be aid since the French State could have exercised discretionary power as to the amount of its contribution to the firm's social plan.

The Commission's monitoring of State aid does not apply only to aid that has an appreciable impact on trade and competition between Member States, a condition which the Commission does not consider to be met if the aid satisfies the criteria set out in the *de minimis* rule adopted in 1992. However, the condition that trade must be affected may be met even where the whole of production is exported outside the Community, as in the case of United Kingdom aid for tin mining in Cornwall.

The compatibility of aid with the common market under the derogations provided for in Article 92(2) and (3)

A number of aid measures were deemed compatible under Article 92(2), for example, Dutch aid to assist flood victims and German aid to restore a rail link in Bavaria that had been severed by the division of Germany. The bulk of the aid which the Commission deemed compatible with the common market was cleared on the basis of the derogations provided for in Article 92(3), particularly the regional derogation provided for in point (a) and the derogation provided for in point (c) for 'aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest'.

Rescue and restructuring aid for firms in difficulty

The large number of strict conditions which the Commission attached to its approval of injections of capital by the French State into the firm Bull illustrates the very strict approach which the Commission codified in July when it adopted the Community guidelines on State aid for rescuing and restructuring firms in difficulty. The aid is limited to the strict minimum necessary and is conditional upon the implementation of a realistic and precise restructuring plan that will ensure the long-term viability of the firm; in particular, Bull is to reduce its production capacity.

The approval of the aid for the social plan of Kimberly Clark, Sotteville-les-Rouen (France), illustrates the favourable approach set out in the guidelines with regard to aid intended to finance social support schemes for workers made redundant by restructuring. However, the Commission initiated detailed investigation proceedings into a number of aid measures that did not seem to fulfil the conditions set out in the guidelines. These included Italian aid for Iritecna SpA, Enichem SpA, and Enichem Agricoltura SpA, where proceedings were initiated with a view to examining the viability of the restructuring plan and assessing the effect of the aid on competition. It also included Spanish aid for Guascor, whose restructuring plan provides for an increase in production capacity, and German aid for Müller/Loesch, FAG Kugelfischer AG, INA Werk Schaeffler KG, Steinbock Boss GmbH Fördertechnik and Jungheinrich AG. In this last case, although the firms operate on markets with overcapacity, the aid does not seem to be linked to any reduction in capacity.

Privatization aid

The Commission extended the proceedings initiated with respect to the aid associated with the liquidation of the Italian public sector group EFIM to include the aid granted prior to the liquidation of its subsidiary Alumix. By contrast, as regards the restructuring and privatization of TeleDanemark A/S, it considered that the Danish State was acting in the same way as a private investor operating in a market economy and that, consequently, the operation did not involve any aid within the meaning of Article 92(1).

The monitoring of privatization operations carried out by the Treuhandanstalt (THA) in Germany continued. A number of important decisions were taken, including decisions to approve the aid for Lausitzer Teppichfaser AG and additional aid provided by Saxony-Anhalt for Mitteldeutsche Erdöl-Raffinerie GmbH. Decisions were also taken to initiate proceedings with respect to aid made available by the THA for the petrochemical firms LEUNA-Werke AG, Buna GmbH and Sächsische Olefinwerke GmbH, and to terminate the proceedings initiated against a presumed abuse of previous aid for LEUNA-Werke AG. Lastly, in anticipation of the winding-up of the THA by the end of 1994, negotiations took place on the procedures and criteria that will have to apply in 1995 to the THA's remaining firms.

Regional aid

The Commission continued the work begun in 1993 on reviewing the maps of regions eligible for national aid, its aim being to reduce the eligible areas in percentage terms of the population and improve consistency with the areas eligible under the regional objectives of the Structural Funds. New maps were adopted for Germany, France (regional planning grant (PAT) scheme) and the part of Belgium eligible under Objective 1 (Hainaut); work is still in progress with respect to Italy, Spain, the Netherlands, Luxembourg and the rest of Belgium. Examination under the State aid rules of the national measures part-financed by the Structural Funds also accounted for a substantial amount of time and resources.

The Commission approved German regional schemes involving aid for restructuring firms in difficulty and employment aid. A positive final decision was taken on subsidized loans for Sicilian firms involved in building and construction and public works, but Sicilian aid to cover the losses of a number of firms operating in the chemicals, cement and engineering industries, granted illegally and deemed incompatible with the common market, will have to be paid back. However, the Commission approved aid in Sicily for small and medium-sized enterprises (SMEs), and concluded that aid in Sicily for the public enterprise Resais and aid to finance infrastructure projects did not fall within the scope of Article 92(1) of the Treaty.

Lastly, the Commission approved changes to the Greek regional aid scheme and to the Portuguese PEDIP programme (strategic programme for dynamizing and modernizing Portuguese industry), which runs until 1999.

Sectoral aid

Having received the unanimous assent of the Council in December 1993, the Commission adopted in April, pursuant to Article 95 of the ECSC Treaty, decisions authorizing aid for the restructuring and privatization of steel companies in Germany (EKO Stahl GmbH and Sächsische Edelstahlwerke Freital), Italy (Ilva), Spain (CSI and Sidenor) and Portugal (Siderurgia Nacional).

The withdrawal of the Italian private sector group Riva in May 1994 led to the restructuring plan for EKO Stahl being abandoned. In December, having received the Council's assent, the Commission approved aid of almost DM 900.62 million for EKO Stahl GmbH for a new restructuring plan involving the Belgian steel company Cockerill Sambre SA. It also approved aid of DM 385 million for the company by way of regional aid.

On 19 December, the Council adopted Directive 94/73/EC amending the seventh Directive on aid to shipbuilding, and the Commission set the 1995 aid ceiling at 9%. In July, negotiations within the Organization for Economic Cooperation and Development (OECD) resulted in an agreement designed to ensure normal conditions of competition in commercial shipbuilding as from 1 January 1996. The agreement was signed by all the parties on 21 December 1994.

A number of aid cases were examined in the light of the 1989 Community guidelines on State aid to the motor vehicle industry. The Commission took the view that aid for investment carried out by FASA-Renault at Valladolid (Castile-Leon, Spain) and by Jaguar at Birmingham, Coventry and Liverpool (United Kingdom) was not disproportionate in view of the structural handicaps of the relevant regions. Since the investment did not result in any increases in capacity at group level, even aid that was slightly in excess of the amount needed to offset structural handicaps was acceptable. However, in a case involving restructuring aid for Volkswagen Sachsen (Germany), the Commission prohibited part of the aid which it deemed excessive in the light of restructuring costs and the reduction in capacity carried out, and it requested repayment of part of the incompatible aid that had been granted unlawfully.

The Commission once again extended the rules on aid for the synthetic fibres industry until 30 June 1995. Pursuant to such rules, proceedings were initiated against aid for BVBA DS Profil (Belgium) and La Seda de Barcelona SA (Spain), and aid involving new production capacity for Carpets International plc (United Kingdom) was prohibited.

Lastly, the Commission concluded that the foreseeable development of the textile market and the importance of the regional impact of investment carried out by Hualon Corporation in Northern Ireland were sufficient to warrant the aid being deemed compatible.

Horizontal aid

The Commission approved a number of schemes under the Community guidelines on aid for small and medium-sized enterprises (SMEs), with most of the cases being dealt with under the accelerated procedure provided for in the guidelines. The main decisions approving consultancy aid related to Germany and France. Proposed aid for technology parks and for risk capital for innovatory SMEs was approved for Denmark. The Commission also cleared aid for the establishment of an aid fund for SMEs in difficulty in Thuringia (Germany).

The Community guidelines on State aid for research and development have been in force for eight years. The Commission decided to review the guidelines in the light of practical experience, the GATT agreement on subsidies and the objectives of the White Paper on growth, competitiveness, and employment. An initial exchange of views took place with national experts in December. Most of the aid measures examined by the Commission under the existing guidelines were approved, including substantial aid for Glaxo (United Kingdom) in connection with the setting-up of a vaccine research institute and aid for SGS Thompson Microelectronics (France) in the semiconductor field. However, the Commission initiated proceedings in respect of that part of a repayable advance by the Spanish State to CASA (regarding a project relating to the CASA 3000 aircraft) that exceeded the thresholds normally allowed, and in respect of German aid for Raiffeisen Hauptgenossenschaft Nord AG which, coupled with Community aid, amounted to 67% of the costs of a biodiesel production pilot plant.

The year under review was the first year of application of the new Community guidelines on State aid for environmental protection, adopted in December 1993. The Commission examined and approved a wide variety of measures submitted by Member States, including aid measures in Germany to assist energy conservation, waste management and the development of new technologies. It also approved projects in the Netherlands for the treatment of waste oils, ecotax legislation, the development and dissemination of technologies, noise control and the cleaning-up of polluted sites.

Air transport

Transport has traditionally been a sector subject to heavy regulation. Nevertheless, the liberalizing impulse launched within the framework of the internal market programme is starting to have wide-ranging effects. Thus, in aviation, three consecutive liberalization packages have established the internal air transport market as of 1 January 1993. In such a liberalized environment, the effective application of the competition rules becomes increasingly important. This includes both the combat against predatory practices by dominant carriers and the scrutiny of newly emerging alliances and mergers.

At the same time, market liberalization requires a more stringent policy towards State aid granted to financially troubled airlines. The Commission responded to this requirement by adopting new guidelines for the application of the State aid rules in the aviation sector, and by making the approval of aid packages to such carriers as Aer Lingus, Air France, TAP and Olympic Airways subject to a number of strict conditions.

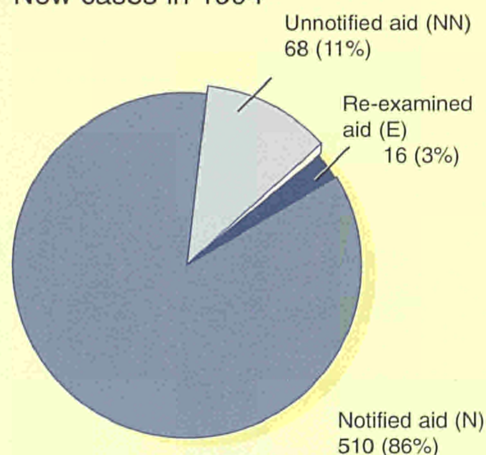
Statistical overview

During the year the Commission registered 594 new cases, including 510 notifications of new aid or changes to existing aid measures, 68 cases of unnotified aid and 16 re-examinations of existing aid. It took 527 decisions in 1994.

In 440 cases, it was decided not to raise any objections; in 40 cases it was decided to initiate proceedings under Article 93(2) of the EC Treaty or Article 6(4) of Decision 3855/91/ECSC. This led to the adoption of 15 positive final decisions, three negative final decisions and two conditional final decisions. The Commission decided to propose appropriate measures pursuant to Article 93(1) of the EC Treaty in respect of 10 existing aid measures.

The high number of cases dealt with in the case of Germany (206) and, to a lesser extent, Spain (88) is due mainly to the decentralized administration of aid in those Member States (table 2).

Graph 4
New cases in 1994



Graph 5
Decisions taken by the Commission

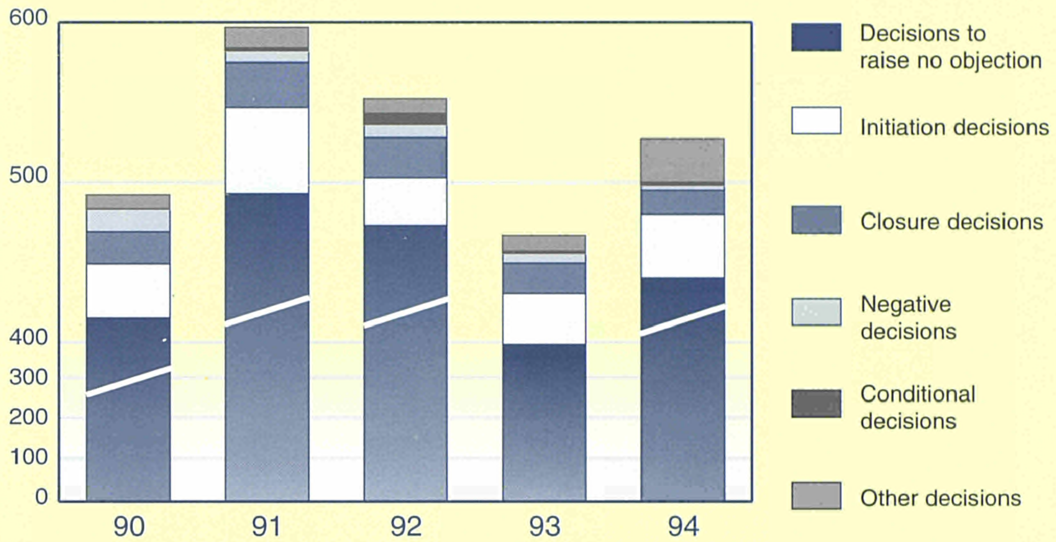
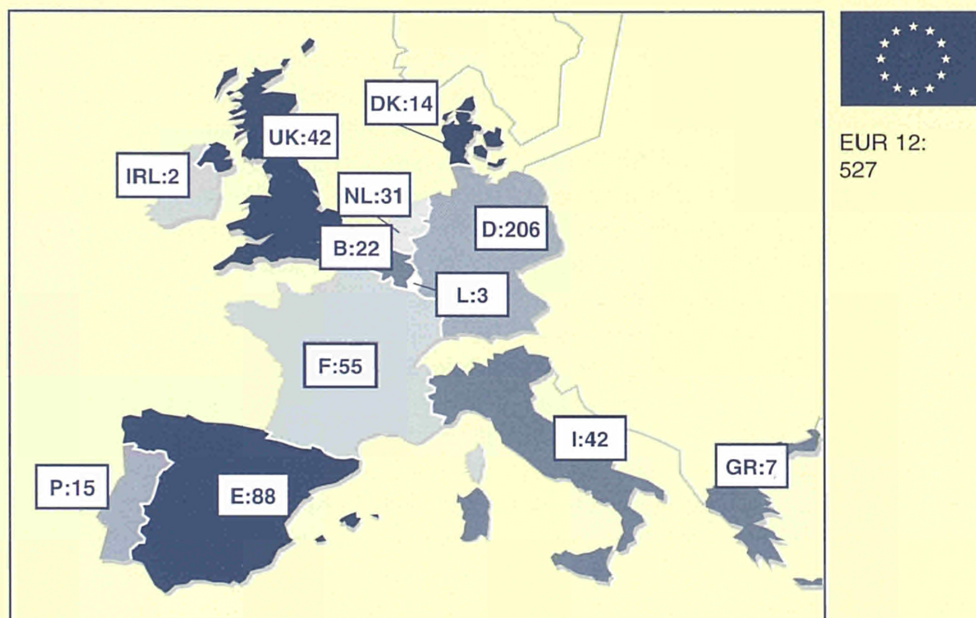


Table 1
Decisions taken by the Commission

	90	91	92	93	94
Decisions to raise no objection	415	493	473	399	440
Initiation decisions	34	54	30	32	40
Closure decisions	20	28	25	19	15
Negative decisions	14	7	8	6	3
Conditional decisions	0	2	7	1	2
Other decisions	9	13	9	10	27

Graph 6
Decisions by Member States



EUR 12:
527

Table 2
Decisions by Member States

	B	DK	D	GR	E	F	IRL	I	L	NL	P	UK	**UE**
Decisions to raise no objection	19	14	162	5	79	48	2	26	1	30	14	40	**440**
Initiation decisions	1	0	18	2	3	5	0	10	1	0	0	0	**40**
Closure decisions	2	0	6	0	1	0	0	3	1	1	0	1	**15**
Negative decisions	0	0	1	0	0	0	0	1	0	0	0	1	**3**
Conditional decisions	0	0	1	0	0	1	0	0	0	0	0	0	**2**
Other decisions	0	0	18	0	5	1	0	2	0	0	1	0	**27**
Total	**22**	**14**	**206**	**7**	**88**	**55**	**2**	**42**	**3**	**31**	**15**	**42**	**527**

MERGER REGULATION – 1994

Overview

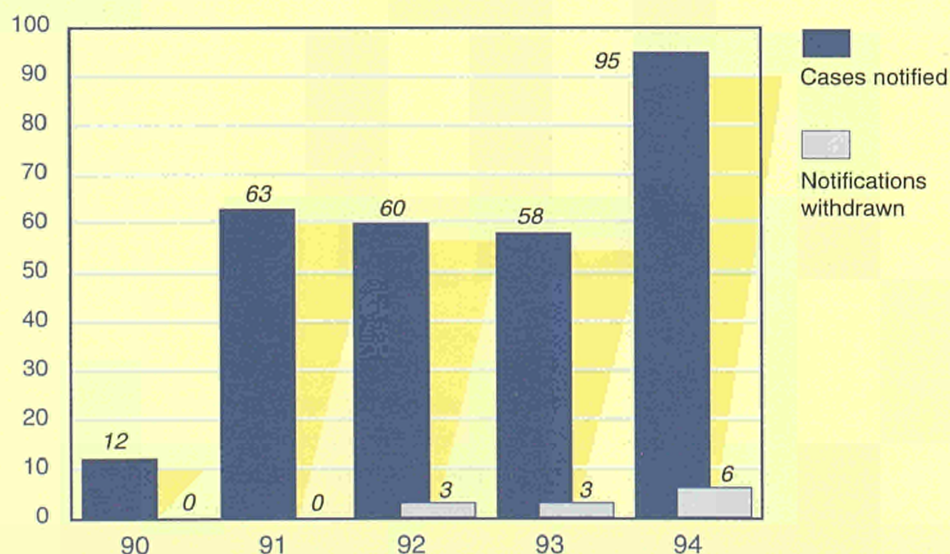
Included in 1994 were the fifth anniversary of the adoption of the Merger Regulation and the completion of the fourth year of its operation. The Merger Regulation was adopted by the Council in 1989 with the objective of ensuring a single 'one-stop-shop', and efficient control of important mergers, acquisitions, and certain joint ventures that are likely to have effects in more than one Member State. The Regulation provides for two stages of investigation. A one-month initial investigation takes place to assess whether a notified operation raises serious doubts as to its compatibility with the common market. If it does not raise such doubts, it is cleared at the end of this initial period. If, on the other hand, serious doubts exist, an in-depth investigation takes place over a further maximum period of four months. Both stages are limited in time, with legal deadlines for the Commission's decision. The Commission encourages notifying parties to provide information ahead of notification so that it can, where possible, reduce the amount of information needed to be supplied.

A large increase in the number of cases notified to the Commission under the Merger Regulation took place in 1994. Notifications rose from 58 in 1993 to 95 in 1994 – an increase of 64%.

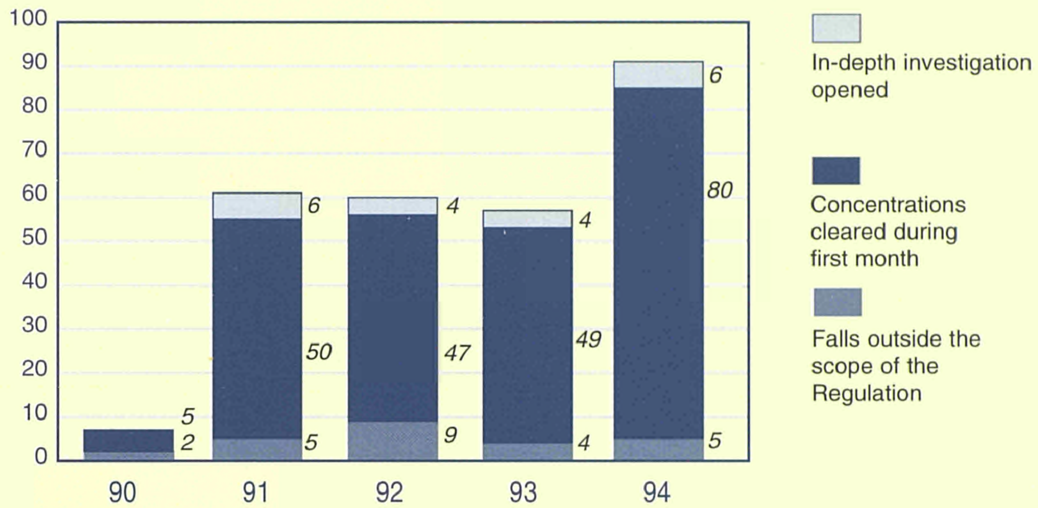
The year saw the completion of five in-depth investigations into operations that had raised serious doubts as to their compatibility with the common market. Of these five, one was prohibited – the MSG Media Service operation in the German pay-television market – while two more were substantially modified before approval and the remaining two were approved. This was the largest number of decisions following a full five-month investigation since 1991. There were six decisions to start in-depth investigations in 1994 compared with four in 1993.

The proportion of cases which were cleared after one month remained broadly unchanged – 88% of cases compared with 86% in 1993 – despite the considerable increase in cases. The number of decisions declaring the operation not to be subject to the Merger Regulation was less than in previous years at 5%. This was probably due to

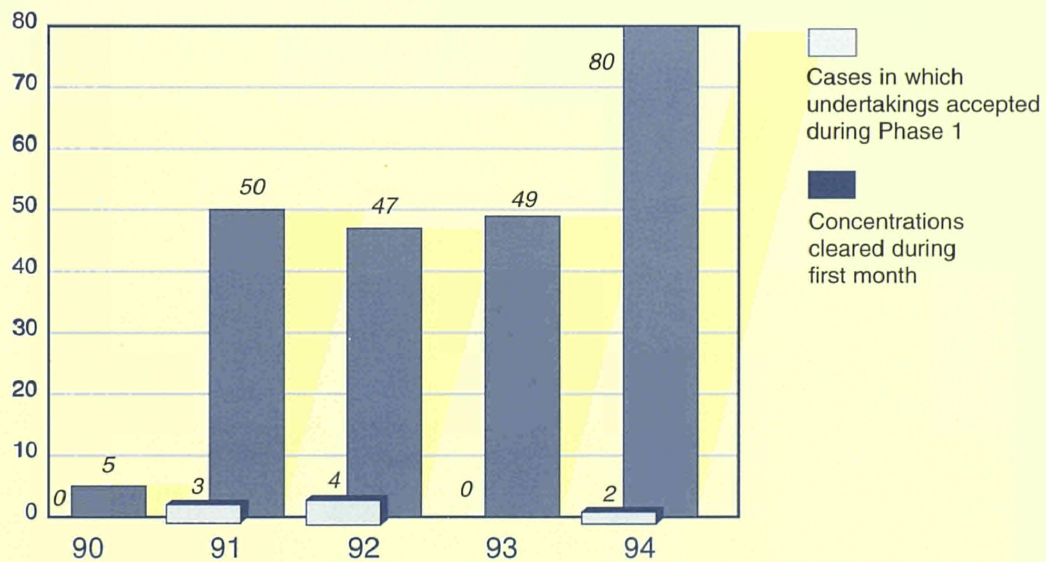
Graph 7
Notifications



Graph 8
Cases cleared after one month



Graph 9
Cases in which undertakings accepted during Phase 1



the fact that after four years' operation of the Merger Regulation companies have a better knowledge of its jurisdictional rules and how the Commission applies them.

The range of sectors covered by the decisions was diverse and the Commission considered a number of both industrial and consumer product markets during the year. Of

the decisions adopted after the initial one-month period, 57% were in industrial sectors, 18% in consumer goods and 25% in services. Heavy engineering and chemicals (including fibres) generated a significant number of cases, accounting for over a quarter of the total. Banking and insurance was another active area.

For the first time, the Commission declared two notifications incomplete until further information had been supplied by the notifying parties. In three cases clearance decisions were adopted without the need for an in-depth investigation only after the parties undertook to modify their operation to resolve competition problems identified by the Commission. In two of these cases (*Unilever/Ortiz Miko* and *Tractebel/Distrigaz*) the parties abandoned the original operation and withdrew their notification. In both cases a restructured deal was notified and subsequently cleared by the Commission. Furthermore, in two cases (*Unilever/Ortiz Miko* and *Elf Atochem/Rütgers*), the Commission accepted undertakings from the parties in order to remove any competition problems.

Operations notified under the Merger Regulation are suspended for at least the first three weeks of the period following notification and sometimes longer so that the Commission does not have to order a divesture should an operation be prohibited. The number of cases where the suspension period was extended was much higher than in previous years, reflecting the fact that a number of difficult cases were treated where it was none the less possible to approve the operation during the first month.

Interface with the Member States

Under the Merger Regulation, a Member State may request the Commission to refer a notified case to the national competition authority in the State concerned where it is dealt with under the national merger control rules rather than the Merger Regulation. This is an exception to the 'one-stop-shop' principle under the Regulation but conforms with the principle of subsidiarity where a Member State can clearly show that a merger poses a threat to one or more markets within its territory. This situation arose in the *Holdercim/Cedest* case in 1994 where the Commission agreed to a request from the French authorities to refer part of the transaction which involved ready-mixed concrete and would result in large market shares in several local geographic markets all within France. By contrast, the Commission did not refer the *MSG Media Service* case to the German authorities, deciding instead to carry out an in-depth investigation of the case itself on the basis that the effects of this transaction would inevitably extend beyond Germany.

In addition, while the Merger Regulation gives the Commission sole jurisdiction over mergers which fall under the Merger Regulation, it allows Member States to act separately to protect other legitimate interests. These legitimate interests include freedom of the press. This provision was applied in the *Newspaper publishing* case where Italian, Spanish and UK groups jointly bid to acquire control over the publishers of the *Independent,* a UK daily newspaper. The Commission assessed the competition aspects of the operation and approved it. The UK authorities also examined it under the terms of the national newspaper merger legislation to protect the accurate presentation of news and the free expression of opinions.

Article 223 of the Treaty of Rome permits Member States to take measures to protect their essential security interests. This provision had been invoked in the past in the context of the Merger Regulation, and the Commission has accepted on one occasion that an operation which concerned only military products need not be notified. This year saw the first operation where both military and civilian aspects of a concentration were assessed when the UK-based warship and submarine manufacturer VSEL was the subject of competing take-over bids by British

Aerospace and GEC. VSEL's activities included a residual amount of manufacturing of oil and gas equipment by a subsidiary company. The acquisition of these activities was assessed by the Commission. The military aspects of the bids were not notified under the Merger Regulation and were assessed by the United Kingdom authorities under the Fair Trading Act. The Monopolies and Mergers Commission subsequently carried out an in-depth investigation into both bids.

Decisions following in-depth investigations

Privatization of AST: The sale of AST took place as part of the privatization of the Italian State holding group Ilva. This privatization had been the subject of a State aid decision which required the privatization to be completed by the end of 1994. The purchaser was a German/Italian consortium including Krupp and Thyssen from Germany and Riva, Falck and Tadfin from Italy. The product market was the production of stainless steel flat products and electric sheet and the geographic market was Western Europe. Krupp and Thyssen had already merged their stainless steel business and, following the acquisition of AST, the combined market share for stainless steel flat products was between 35 and 45%. The next largest competitor, Ugine, had a market share between 15 and 25% and there were five other competitors with market shares between 5 and 20%. As prices were declining and overcapacity existed in the market, it was not considered the operation would create a position of either single or oligopolistic dominance. The other markets concerned did not raise any competition concerns and the operation was approved.

Dalmine/Mannesmann/Vallourec: This operation took place in the seamless stainless steel tubes sector and involved the formation of a joint venture containing the businesses in the above sector of Mannesmann, Ilva and Usinor. The joint venture (DMV) had a combined market share of about 35% as did its principal competitor Sandvik. There were two other smaller competitors in the West European market. The Commission investigated whether the operation would create a position of oligopolistic dominance either on its own or with Sandvik. Following the investigation, it was concluded that though these market shares could have led to a joint dominant position the presence of Japanese suppliers already in existence and the emergence of East European producers who were developing the capability to supply products of comparable quality to compete with those in Western Europe would prevent this. Consequently, the operation was authorized without conditions.

Procter & Gamble (P&G)/VP Schickedanz (VPS): The proposed acquisition of the German company VPS (which manufactured a range of paper products) by P&G required the Commission to carry out a detailed analysis of the feminine hygiene sector in the Community and to decide, in particular, that sanitary pads and tampons should be assessed as separate product markets which are national in character. This, in turn, led to the finding that the combination of P&G's 'Always' brand and the VPS brand, 'Camelia' would have created a dominant position in the German and Spanish markets for sanitary pads. At a late stage in the proceedings, however, P&G offered to divest the Camelia-branded business within a limited period following the acquisition of VPS. Undertakings given to this effect enabled the Commission ultimately to clear the transaction as a whole. Pursuant to the undertakings given to the Commission, the Camelia business was sold to Kimberly-Clark shortly after the Commission's decisions.

The *Shell/Montecatini* case was also resolved by means of undertakings given by the parties to the Commission. The operation itself involved the creation of a joint venture to which Shell Petroleum (holding company of the Royal Dutch Shell group) and Montedison (belonging to the former Ferruzzi group) would transfer all their worldwide

interests in polyolefins, a family of thermoplastics including polyethylene (PE) and polypropylene (PP). After investigation, the Commission concluded that the joint venture raised serious competition concerns which centred, in particular, on the market for the development and licensing of PP technology. This was, in fact, the first time under the Merger Regulation that a separate market for technology was defined by the Commission. The Commission's prime concern stemmed from the fact that following the operation Shell would have ultimate control over the two main and currently competing PP technologies worldwide, namely, 'Unipol', owned by a subsidiary of Shell in partnership with Union Carbide Corporation, and 'Spheripol', owned by Montedison. To resolve this issue, the parties agreed to transfer Montedison's Spheripol technology business to a separate company in which Shell had no influence and which would therefore remain in competition with Unipol. They also volunteered that Montedison would withdraw from a PP joint venture, which alleviated other concerns raised by the Commission in relation to the market for the production and sale of PP itself. As a result, the Commission was finally able to clear the case. The United States antitrust authorities have also had concurrent jurisdiction over this case and have proposed clearing it on a similar basis to the Commission.

By contrast, in the *MSG Media Service* case, undertakings proffered by the parties were not sufficient to change the Commission's analysis that the establishment of a joint venture between Bertelsmann, Deutsche Bundespost Telekom and the Kirch group would have sealed the German pay-television market from foreign competition, thereby leaving the parties to dominate the German-language market. The essential purpose of the MSG joint venture was to develop the future market for decoders and administrative and technical services for pay-television operators in Germany, in particular for Premiere – the only current pay-television channel in Germany – owned by Kirch and Bertelsmann with Canal Plus. In the Commission's view, the extensive media activities of Kirch/Bertelsmann and those of Deutsche Telekom, as the owner of most of the cable network in Germany, made each of these parties the most likely individual entrants into this market. Competition from other sources, therefore, was unlikely and, in any event, MSG would be able to limit competition from other service providers. In addition, through the joint venture, Kirch and Bertelsmann could control competition on the pay-television market in Germany, while Deutsche Telekom would be in a position to reinforce its dominance on the cable network market. The Commission thus prohibited the establishment of this joint venture under the Merger Regulation to ensure, in particular, that future markets in the multimedia sector would remain open to competition. This is the first time that the Commission has assessed an operation in a market concerning an entirely new product, which therefore required the Commission to pay particular attention to any potential foreclosure effects of the operation in question.

Increased transparency and efficiency in implementing the Merger Regulation

Following extensive consultation with representatives of industry, the legal profession and national authorities, the Commission adopted a series of measures designed to reduce the reporting burden for certain notifiable operations and also to render Community merger control more transparent and user-friendly for all concerned. These measures follow on from the Commission's 1993 report to the Council on the implementation of the Merger Regulation in which the Commission undertook a number of commitments before any formal revision of this Regulation.

A major change for companies is the introduction of a short-form notification option available for notifiable joint ventures whose turnover and/or assets are below ECU 100 million. This option is included in a new

form CO which has also been modified in the light of the Commission's experience since the Merger Regulation came into force. The value of prenotification discussions with the Commission is expressly reaffirmed in the new form since this will generally enable the Commission to limit the amount of information required to be notified in individual cases. In addition to the form itself, the Commission has also taken the opportunity to improve the procedural Regulation implementing the Merger Regulation which deals with matters relating to notifications, time-limits and hearings.

Another important commitment undertaken by the Commission in its 1993 report was to carry out a revision of its notice on the distinction between concentrative and cooperative joint ventures. The Commission's policy on this difficult, but important, jurisdictional issue has developed considerably through its case-law since the Regulation came into force, and the notice adopted in 1990 no longer accurately reflected the Commission's practice. As a result, a new notice has now been adopted which takes account of this case-law and seeks to clarify the principles upon which the distinction between concentrative and cooperative joint ventures is made, while also seeking to reduce, as far as possible, the need to analyse matters of substance for jurisdictional purposes.

The package of measures is completed by the adoption of three new notices dealing with the other main aspects of jurisdiction which determine when and how the Merger Regulation may come into play. The guidance provided in these notices (concerning the notion of a concentration, the notion of undertakings concerned and calculation of turnover) essentially confirms the practice developed by the Commission over the last four years both in the formal decisions adopted under the Merger Regulation and in the confidential guidance given in prenotification discussions.

Monitoring and evaluation

The Commission has commissioned outside economic consultants to conduct two 'post-impact studies' to evaluate the development of markets in industries in which decisions with undertakings have been adopted, specifically, in the mineral water market in France and Europe and in the European nylon fibres market (following the *Nestlé/Perrier* and *Du Pont/ICI* decisions, respectively). These studies should be especially valuable in helping the Commission to gauge the success of the earliest efforts in framing remedies and provide guidance for future assessments.

Organization within the Merger Task Force

At the end of the year, the scope of activities of the Merger Task Force was enlarged by the addition of mergers falling within the scope of the European Coal and Steel Community (ECSC). As a result, the administration of mergers falling under both EC and ECSC jurisdiction (so-called mixed cases) will be made easier for all concerned.

European Economic Area

The Agreement on the European Economic Area, which entered into force on 1 January 1994, represents the most ambitious agreement ever concluded with third countries. Effectively, it extends the single market to all the members of EFTA and assures, for the sectors covered, the same degree of economic integration as within the Community itself. As a result, it was decided to implement fully within the EEA the same competition rules and policy as apply within the Community, necessitating the creation of structures and procedures identical, or at least parallel, to those of the Community.

Central and East European countries

The evolution of the economies of the Central and East European countries towards market economy systems continued in 1994. Effective competition policy is an essential element in achieving a successful transition and is also a prerequisite for a reduction in trade policy measures, as effective competition policy will erode the economic basis for such measures.

The Europe and Interim Agreements concluded with the Central and East European countries contain substantive competition rules which are essentially those of the EC Treaty.

The cooperation procedures implemented for the rules relating to undertakings cover three types of situation: where both competition authorities have jurisdiction in the same case; where only one authority is competent but where its decisions may affect the important interests of the party whose authority is not concerned; and where a case falls outside the scope of either competition authority's responsibilities (as, for example, where only the competition authority of a Member State is competent); these rules are in the process of being approved by the Association Councils.

The definition of the implementing rules on State aid and their enforcement is a major task for the near future. The Agreements already contain a general prohibition on the granting of State aid while at the same time allowing for the application of the Article 92(3)(a) derogation.

In the area of competition policy, considerable progress has already been made in approximating the relevant national legislation, in line with the political priorities of the EU's pre-accession strategy, although much work remains to be done.

At the European Council meeting in Essen, the Commission was specifically charged with developing a training programme for the Central and East European countries drawing both on its own experience and that of the Member States, in order to facilitate the enforcement of competition policies.

Baltic States and new independent States

The negotiation of free trade agreements with the Baltic States was concluded in 1994. These agreements contain similar competition rules to those of the Europe Agreements concluded with the Central and East European countries.

A less stringent set of competition rules was included in the Partnership and Cooperation Agreement concluded with Russia in June, reflecting the different nature of the links established between it and the European Union. Similar agreements were signed with Ukraine, Kazakhstan and Kyrgyzstan in 1994, and others were recently signed with Moldova and initialled with Belarus.

Mediterranean countries

Negotiations are also under way for agreements with certain Mediterranean countries,

in many respects following the model of the agreements concluded with the Central and East European countries.

A customs union with Turkey is also being negotiated. Given that customs restrictions and trade measures would be abolished, it is important to ensure that trade is not distorted through the actions of undertakings themselves or through State measures, as, for example, the granting of State aid or exclusive rights to undertakings. Hence, a full set of competition rules is included in the proposed agreement.

North America

During 1994, the European Court of Justice delivered its judgment on the legality of the Commission's conclusion of the Agreement with the Government of the United States of America on the application of the competition rules. The Court overturned the conclusion of the Agreement, taking the view that it was a matter falling within the Council's competence.

The Agreement remains valid under international law. However, steps had to be taken to remedy the defect under Community law. On 12 October, the Commission adopted a communication to the Council proposing that the Council approve and conclude the Agreement in its original form on behalf of the European Community. The Commission's conclusion remains valid for the European Coal and Steel Community. At the close of the year, the Council was considering the communication with a view to taking a positive decision early in 1995.

The Commission also put forward a proposal to the Council in 1994 to authorize the opening of bilateral negotiations with Canada regarding the conclusion of a Cooperation Agreement in the area of competition. A decision in this regard is expected in January and negotiations will commence as soon as possible thereafter.

Pacific countries

A successful second seminar on EU/Japan competition policy was held in September, organized jointly by the Japanese Fair Trade Commission (JFTC) and DG IV. Discussions at a very high level took place on two particular topics, 'Deregulation and enforcement' and 'Vertical restraints and competition policy'.

The presence in Brussels of a high-level delegation from the JFTC afforded the opportunity to pursue bilateral contacts on areas of common interest.

During 1994, relations with Australia and New Zealand were further pursued and exchanges took place, in particular regarding the rich experience of these two countries in the area of deregulation.

Multilateral organizations

DG IV participated in the work of relevant multilateral organizations, in particular the OECD's Committee on Competition Law and Policy and Unctad's Intergovernmental Group of Experts on Restrictive Commercial Practices.

The successful conclusion of the Uruguay Round and its consequences, in particular for competition policy, were evaluated during 1994. A Commission paper on competition rules at the international level was discussed at a meeting of the Council's Article 113 Committee on Commercial Policy and received the broad support of the Member States. In the light of this, Commissioner Van Miert established a group, comprising recognized authorities in the field assisted by officials of the European Commission, to discuss the prospects for closer international cooperation between competition authorities.

The group will draw on the experience of the European Union in negotiating and adminis-

tering multilateral and bilateral international trade agreements with supplementary competition rules and also in the unilateral application of EU competition law to anticompetitive practices in formulating the 'building blocks' for negotiations on the creation of a structure permitting the application of competition rules to global activities. The group will conclude its work and publish a report in 1995.

European Commission
European Community competition policy — 1994
Luxembourg: Office for Official Publications of the European Communities
1995 — 47 pp. — 21.0 x 29.7 cm
ISBN 92-827-0265-0

Venta • Salg • Verkauf • Πωλήσεις • Sales • Vente • Vendita • Verkoop • Venda • Myynti • Försäljning

BELGIQUE / BELGIË

Moniteur belge/ Belgisch Staatsblad
Rue de Louvain 42/Leuvenseweg 42
B-1000 Bruxelles/B-1000 Brussel
Tél. (02) 512 00 26
Fax (02) 511 01 84

Jean De Lannoy
Avenue du Roi 202/Koningslaan 202
B-1060 Bruxelles/B-1060 Brussel
Tél. (02) 538 51 69
Fax (02) 538 08 41

Autres distributeurs/
Overige verkooppunten:

Librairie européenne/ Europese boekhandel
Rue de la Loi 244/Wetstraat 244
B-1040 Bruxelles/B-1040 Brussel
Tél. (02) 231 04 35
Fax (02) 735 08 60

Document delivery:

Credoc
Rue de la Montagne 34/Bergstraat 34
Boîte 11/Bus 11
B-1000 Bruxelles/B-1000 Brussel
Tél. (02) 511 69 41
Fax (02) 513 31 95

DANMARK

J. H. Schultz Information A/S
Herstedvang 10-12
DK-2620 Albertslund
Tlf. 43 63 23 00
Fax (Sales) 43 63 19 69
Fax (Management) 43 63 19 49

DEUTSCHLAND

Bundesanzeiger Verlag
Breite Straße 78-80
Postfach 10 05 34
D-50445 Köln
Tel. (02 21) 20 29-0
Fax (02 21) 2 02 92 78

GREECE/ΕΛΛΑΔΑ

G.C. Eleftheroudakis SA
International Bookstore
Nikis Street 4
GR-10563 Athens
Tel. (01) 322 63 23
Telex 219410 ELEF
Fax 323 98 21

ESPAÑA

Boletín Oficial del Estado
Trafalgar, 27-29
E-28071 Madrid
Tel. (91) 538 22 95
Fax (91) 538 23 49

Mundi-Prensa Libros, SA
Castelló, 37
E-28001 Madrid
Tel. (91) 431 33 99 (Libros)
431 32 22 (Suscripciones)
435 36 37 (Dirección)
Télex 49370-MPLI-E
Fax (91) 575 39 98

Sucursal:

Librería Internacional AEDOS
Consejo de Ciento, 391
E-08009 Barcelona
Tel. (93) 488 34 92
Fax (93) 487 76 59

Librería de la Generalitat de Catalunya
Rambla dels Estudis, 118 (Palau Moja)
E-08002 Barcelona
Tel. (93) 302 68 35
Tel. (93) 302 64 62
Fax (93) 302 12 99

FRANCE

Journal officiel
Service des publications des Communautés européennes
26, rue Desaix
F-75727 Paris Cedex 15
Tél. (1) 40 58 77 01/31
Fax (1) 40 58 77 00

IRELAND

Government Supplies Agency
4-5 Harcourt Road
Dublin 2
Tel. (1) 66 13 111
Fax (1) 47 80 645

ITALIA

Licosa SpA
Via Duca di Calabria 1/1
Casella postale 552
I-50125 Firenze
Tel. (055) 64 54 15
Fax 64 12 57
Telex 570466 LICOSA I

GRAND-DUCHÉ DE LUXEMBOURG

Messageries du livre
5, rue Raiffeisen
L-2411 Luxembourg
Tél. 40 10 20
Fax 49 06 61

NEDERLAND

SDU Servicecentrum Uitgeverijen
Postbus 20014
2500 EA 's-Gravenhage
Tel. (070) 37 89 880
Fax (070) 37 89 783

ÖSTERREICH

Manz'sche Verlags- und Universitätsbuchhandlung
Kohlmarkt 16
A-1014 Wien
Tel. (1) 531 610
Telex 112 500 BOX A
Fax (1) 531 61-181

Document delivery:

Wirtschaftskammer
Wiedner Hauptstraße
A-1045 Wien
Tel. (0222) 50105-4356
Fax (0222) 50206-297

PORTUGAL

Imprensa Nacional
Casa da Moeda, EP
Rua D. Francisco Manuel de Melo, 5
P-1092 Lisboa Codex
Tel. (01) 387 30 02/385 83 25
Fax (01) 384 01 32

Distribuidora de Livros Bertrand, Ld.ª

Grupo Bertrand, SA
Rua das Terras dos Vales, 4-A
Apartado 37
P-2700 Amadora Codex
Tel. (01) 49 59 050
Telex 15798 BERDIS
Fax 49 60 255

SUOMI/FINLAND

Akateeminen Kirjakauppa
Keskuskatu 1
PO Box 218
FIN-00381 Helsinki
Tel. (0) 121 41
Fax (0) 121 44 41

SVERIGE

BTJ AB
Traktorvägen 13
S-22100 Lund
Tel. (046) 18 00 00
Fax (046) 18 01 25
30 79 47

UNITED KINGDOM

HMSO Books (Agency section)
HMSO Publications Centre
51 Nine Elms Lane
London SW8 5DR
Tel. (0171) 873 9090
Fax (0171) 873 8463
Telex 29 71 138

ICELAND

BOKABUD LARUSAR BLÖNDAL
Skólavördustíg, 2
IS-101 Reykjavik
Tel. 11 56 50
Fax 12 55 60

NORGE

Narvesen Info Center
Bertrand Narvesens vei 2
Postboks 6125 Etterstad
N-0602 Oslo 6
Tel. (22) 57 33 00
Fax (22) 68 19 01

SCHWEIZ/SUISSE/SVIZZERA

OSEC
Stampfenbachstraße 85
CH-8035 Zürich
Tel. (01) 365 54 49
Fax (01) 365 54 11

BĂLGARIJA

Europress Klassica BK Ltd
66, bd Vitosha
1463 Sofia
Tel./Fax (2) 52 74 75

ČESKÁ REPUBLIKA

NIS ČR
Havelkova 22
130 00 Praha 3
Tel./Fax (2) 24 22 94 33

HRVATSKA (CROATIE)

Mediatrade
P. Hatza 1
4100 Zagreb
Tel. (041) 43 03 92
Fax (041) 45 45 22

MAGYARORSZÁG

Euro-Info-Service
Honvéd Europá Ház
Margitsziget
H-1138 Budapest
Tel./Fax (1) 111 60 61, (1) 111 62 16

POLSKA

Business Foundation
ul. Krucza 38/42
00-512 Warszawa
Tel. (2) 621 99 93, 628 28 82
International Fax&Phone (0-39) 12 00 77

ROMÂNIA

Euromedia
65, Strada Dionisie Lupu
RO-70184 Bucuresti
Tel./Fax 1-31 29 646

RUSSIA

CCEC
9,60-letiya Oktyabrya Avenue
117312 Moscow
Tel./Fax (095) 135 52 27

SLOVAKIA

Slovak Technical Library
Nàm. slobody 19
812 23 Bratislava 1
Tel. (7) 52 204 52
Fax : (7) 52 957 85

CYPRUS

Cyprus Chamber of Commerce and Industry
Chamber Building
38 Grivas Dhigenis Ave
3 Deligiorgis Street
PO Box 1455
Nicosia
Tel. (2) 44 95 00, 46 23 12
Fax (2) 45 86 30

MALTA

Miller Distributors Ltd
PO Box 25
Malta International Airport LQA 05 Malta
Tel. 66 44 88
Fax 67 67 99

TÜRKIYE

Pres AS
Istiklal Caddesi 469
80050 Tünel-Istanbul
Tel. (1) 520 92 96, 528 55 66
Fax (1) 520 64 57

ISRAEL

ROY International
31, Habarzel Street
69710 Tel Aviv
Tel. (3) 49 78 02
Fax (3) 49 78 12

EGYPT/
MIDDLE EAST

Middle East Observer
41 Sherif St.
Cairo
Tel/Fax (2) 393 97 32

UNITED STATES OF AMERICA/
CANADA

UNIPUB
4611-F Assembly Drive
Lanham, MD 20706-4391
Tel. Toll Free (800) 274 48 88
Fax (301) 459 00 56

CANADA

Subscriptions only
Uniquement abonnements

Renouf Publishing Co. Ltd
1294 Algoma Road
Ottawa, Ontario K1B 3W8
Tel. (613) 741 43 33
Fax (613) 741 54 39

AUSTRALIA

Hunter Publications
58A Gipps Street
Collingwood
Victoria 3066
Tel. (3) 417 53 61
Fax (3) 419 71 54

JAPAN

Procurement Services Int. (PSI-Japan)
Koru Dome Postal Code 102
Tokyo Kojimachi Post Office
Tel. (03) 32 34 69 21
Fax (03) 32 34 69 15

Sub-agent

Kinokuniya Company Ltd Journal Department
PO Box 55 Chitose
Tokyo 156
Tel. (03) 34 39-0124

SOUTH-EAST ASIA

Legal Library Services Ltd
Orchard
PO Box 0523
Singapore 9123
Tel. 243 24 98
Fax 243 24 79

SOUTH AFRICA

Safto
5th Floor, Export House
Cnr Maude & West Streets
Sandton 2146
Tel. (011) 883-3737
Fax (011) 883-6569

ANDERE LÄNDER
OTHER COUNTRIES
AUTRES PAYS

Office des publications officielles des Communautés européennes
2, rue Mercier
L-2985 Luxembourg
Tél. 29 29-1
Télex PUBOF LU 1324 b
Fax 48 85 73, 48 68 17

4/95

01

08

CV-88-95-202-EN-C

OFFICE FOR OFFICIAL PUBLICATIONS
OF THE EUROPEAN COMMUNITIES

L-2985 Luxembourg

ISBN 92-827-0265-0