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REPORT FROM THE COMMISSION

Report on Competition Policy 2004
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Introduction by the Director-General for Competition

In 2004 the work of the Directorate-General for Competition (DG Competition) was affected by major changes: enlargement of the EU to 25 members, the modernization of competition rules, the arrival in November of a new Commission, and the internal reorganization of the DG as a consequence of modernization. These developments are reflected in the general objectives of the Commission’s competition policy for 2005 and subsequent years, which are based on the Commission’s Annual Policy Strategy (APS) decision for 2005 and the political priorities established by the new Commission. The 2004 Annual Competition Report therefore provides the appropriate occasion to set out for a wider public the direction that the will be taken by the Commission’s work in the competition policy field in the medium term.

The interaction of competition policy and other Commission policies

In its APS 2005 decision, which was welcomed by the European Parliament and the Council, the Commission highlighted an upturn in growth as the central policy objective, striving to improve the competitiveness of the European model while maintaining prosperity, employment, cohesion and environmental protection. The accession of ten new Member States has added a further geographical dimension to the goal of improving economic growth in the internal market. The key objective on the political agenda of the new Commission is to reinvigorate the Lisbon process launched by the European Council in 2000, the overall aim of which is to make the EU the most dynamic and competitive knowledge-based economy in the world. The Commission will take into account the recommendations made by the High Level Group chaired by Mr Wim Kok regarding the attainment of the Lisbon objectives.

In support of the competitiveness framework laid down in APS 2005, the Commission will make progress with its ambitious legislative review process in the competition policy field, with special reference to state aid, and will pursue the modernization of antitrust rules and the substantial merger control reforms started in 2004. In this context, the Commission intends to promote proactive enforcement of competition rules across the EU.

Together with the rigorous application of competition policy, the screening of European legislation in various economic sectors, such as liberalized network industries and financial services, in order to gauge its competitive impact, can have a very positive influence on the competitiveness and growth of the European economy and on the functioning of the internal market, reinforcing the interests and confidence of consumers.

Among the priority policy areas identified in the Kok report as being key to the achievement of the Lisbon objectives, competition policy can make important contributions in three respects:

Promoting the knowledge-based society. Strong competitive pressure provides powerful incentives for companies to continuously engage in innovation and research and development (R&D). By strengthening the incentives for innovation while focusing on those restrictions that can seriously hinder competition, competition policy can contribute to making the EU
economies more dynamic and thus help to deliver the Lisbon objectives. In particular, state aid policy may contribute to the knowledge-based society by better targeting the resources available for public support in fields such as research and development, innovation and training.

**Fostering the internal market.** Twelve years after its completion on paper, the internal market has not yet realized its full potential. One reason is that there is no automatic link between removal of barriers to cross-border trade and effective competition. Both the regulatory framework and its enforcement have to create an environment which actually induces and favours competition, new entry and innovation. Both competition enforcement and advocacy can contribute to better functioning of the internal market, particularly in sectors which are key to the Lisbon agenda, because they concern essential inputs for the European economy. Open and competitive European markets will make European companies more competitive internationally, to the benefit of European consumers and European employment. The very enforcement of competition rules, which is intended to remove the major obstacles to market competition, helps to create sound conditions for growth.

**Promoting a favorable business climate.** Competition policy can make a significant contribution to creating conditions that are favourable to business. State aid rules play an important role in the efforts to increase the availability of risk capital for start-ups and small and medium-sized enterprises. Also, international competition policy helps develop global coherence and the predictability that business needs. Finally, competition principles can allow screening of new and existing regulatory frameworks in other important policy areas, so as to ensure that regulation does not unnecessarily curb competition. Competition advocacy can thus help shape EU and national regulatory frameworks to promote a regime favorable to competition and competitiveness.

**General competition policy objectives**

**Enforcement priorities: focusing enforcement actions on the most harmful anticompetitive practices for the European economy.** The new Antitrust and Merger Regulations will allow DG Competition to better prioritise its enforcement activity, in order to focus on the most harmful practices and mergers in terms of impact on consumer welfare.

In the antitrust field, Regulation No 1/2003 has created a new enforcement system in which the Commission and Member States are all competent to fully apply EU competition rules. To that end, the Commission and the 25 Member States have created a European Competition Network (ECN) in which DG Competition plays a central role. This creates substantial potential for more effective and proactive enforcement of the EU competition rules. However, it will require a better surveillance of markets in order to identify those practices which are likely to create the greatest harm to competition and the consumer. The new Regulation was also the first step in strengthening private enforcement before national courts by giving the latter the power to also apply Article 81(3). Enforcement will continue to concentrate on cartels, abuses of dominant positions, incompatible state aid and enforcement of competition rules in recently liberalised and other regulated sectors of the economy.

In the field of merger control, the new Regulation has enhanced the possibilities for referring cases from Member States to the Commission and vice versa, which should help the Commission to focus its enforcement activities on cases that have a clear cross-border impact. Moreover, the new substantive test of “significant impediment to effective competition” has made it clear that all anticompetitive mergers are covered by the new Regulation.
In the state aid field, DG Competition will focus more particularly on the enforcement of negative decisions and the reimbursement on incompatible state aid. Moreover, improved international cooperation, both bilateral and multilateral, will continue to be crucial to guaranteeing the effectiveness of European competition policy in combating anticompetitive practices with international scope.

**Enhancing competitiveness within the EU by helping to shape the regulatory framework.** Regulation, at both Community and national level, may unnecessarily and unintentionally hold back competition and curb the potential of the internal market. In certain sectors, such as the liberalised network industries, and in particular in the energy sector, there is a need to promote a regulatory framework creating the conditions for market entry and promoting competition. Competition advocacy and policy screening should therefore be used to influence national and EU legislation in order to ensure that safeguarding competitive markets is given due consideration.

Competition rules on monitoring state aid should be reviewed to ensure that they take more account of the specific market failures affecting the level of EU investment in R&D and access to risk capital, on the one hand, and the persistence of disparities in regional development, on the other. Adaptation of the regulatory regime for monitoring state aid will provide a direct contribution to the Commission’s efforts to favour innovation.

**Focusing action on key sectors for the internal market and the Lisbon agenda.** Emphasis should be put on removing obstacles to competition in the recently liberalised sectors as well as certain other regulated sectors, notably telecommunications, postal services, energy and transport. These sectors provide essential inputs to many other economic sectors and are of key importance for Europe’s competitiveness. Opening up the possibilities for an increased number of service providers to compete should lead to wider choice, better quality and lower prices for consumers. The evolution of the telecommunications sector in the last ten years is a good example of the benefits of liberalisation.

The recently liberalised sectors are, however, affected by various distortions of competition, ranging from harmful commercial behaviour on the part of the undertakings concerned to inadequate regulation or even state aid. Due consideration should be given to the fact that these sectors may be characterised by public service obligations, as regards the provision of services of general economic interest (SGEI), which must be fulfilled. Nevertheless, the Commission has to ensure that subsidies granted for the functioning of these public services do not exceed what is needed. Moreover, it is necessary to be more explicit in identifying which problems are most appropriately solved through the application of competition law. In this regard it is important to strive for an integrated sectoral regulatory and enforcement policy.

A number of other sectors that are important for the global competitiveness of Europe's economy feature considerable self-regulation or a mix of self-regulation and regulation by the State. This is the case in particular of financial services. Creating an efficient and liquid capital market is one of the key objectives of the Financial Services Action Plan. A number of internal market policy initiatives, culminating in the new Investment Services Directive, were launched during the last Commission’s term of office to remove barriers to cross-border securities trading and facilitate competition between investment firms. Competition policy constitutes an important complement to this liberalisation process. In addition, retail financial services play a major role in the everyday life of European Union citizens. These services
must be provided under competitive conditions, which mean that the individual consumer has a larger choice of products and services of a higher quality at the best possible price.

**Box 1: The Chief Competition Economist at DG Competition in 2004**

The Chief Economist Team (CET) is a separate unit directly reporting to the Director-General. It has 10 members, all of whom have a PhD in industrial economics. The tasks and role of the CET can be described as follows:

- guidance on methodological issues of economics and econometrics in the application of EU competition rules
- general guidance in individual competition cases from their early stages
- detailed guidance in the most important competition cases involving complex economic issues, in particular those requiring sophisticated quantitative analysis; this could include the secondment of a member of the CET to work in the case team
- contribution to the development of general policy instruments with an economic content.

**Contribution to cases and guidelines**

In 2004, the CET was involved in a total of 33 cases (11 mergers, 15 antitrust, and 7 state aid cases). In addition, the CET has made significant contributions to guidelines and general policy issues.

Cases are selected in agreement with the Director-General on the basis of the need for more sophisticated economic analysis, in particular quantitative analysis. In such cases, a member of the CET is placed on the case team, having access to all information and participating in all meetings with outside experts and parties. Within the case team the members seconded from the CET have specific and independent status and report directly to the Chief Competition Economist on the line they take. Given the importance of shaping the economic analysis of a case, the CET tends to become involved as early as possible.

The CET also attends the oral hearing and participates in the internal review panel debates.

**The Chief Competition Economist attends the weekly meeting with the Commissioner. In addition, he provides written advice in all cases where he has been involved.**

**Contribution to the development of economic expertise in the DG**

The Chief Competition Economist contributes to the overall debate on economic issues throughout DG Competition organising training, seminars and discussions. In addition, he maintains and strengthens links with the academic world. He has restructured the Economic Advisory Group for Competition Policy (EAGCP). The EAGCP is a group of leading academics working in the area of industrial economics. An important function of the EAGCP is to provide an independent opinion on broad policy issues. The EAGCP is organised in three subgroups: mergers, antitrust and state aid.
Message from the Hearing Officer

The Commission created the post of Hearing Officer in order to entrust the conduct of administrative proceedings in antitrust and merger cases to an independent person experienced in competition matters with the integrity necessary to contribute to objectivity, transparency and efficiency of those proceedings. The Hearing Officers’ mandate sets out a number of mechanisms by which this function is to be performed. This includes, inter alia, the obligation to produce a final report on every draft decision submitted to the college of Commissioners stating whether the right to be heard has been respected. As a result, the two Hearing Officers are formally involved in all cases where a formal procedure is initiated and terminated in this manner. Since May 2004, this has included so-called “commitment decisions” under Article 9 of Regulation No 1/2003, the first of which was the DFB case decided in January 2005. Exceptionally, the Hearing Officers may also be approached before a formal procedure is initiated, for example where confidentiality issues arise in relation to information to be included in a statement of objections, or in relation to the published version of a decision. Taken together, the Hearing Officers were thus formally involved in some 40 cases in the course of 2004. Some key elements of these experiences are set out below.

Ensuring the right to be heard through granting appropriate access to the file

Taking account of the information providers’ legitimate interest in the protection of confidential information, the public interest in the competition rules being respected and the rights of defence of the addressees of a statement of objections, the Hearing Officers have taken a number of decisions by which they have granted or refused parties access to documents in the case file.

Amongst such decisions in 2004 consideration was given to the access rights of parties receiving a so-called “letter of facts” by which they were informed of additional information to be taken into account in the final decision. The Microsoft and Clearstream decisions are examples of cases where, in such circumstances, the parties were granted access to further information.

Ensuring protection of the undertakings’ business secrets and legitimate interest in confidentiality

In case of disagreement between the relevant Commission department and the parties concerned, decisions on the protection of the companies’ business secrets and legitimate interest in confidentiality fall to the Hearing Officers to decide. This interest has to be balanced against the parties’ interests in disclosure or, where the issue concerns the publication of a decision, against the public interest in informing the legal and business community of the outcome of the proceedings.

In the Belgian Architects Association case, the danger of retaliation led the Hearing Officers to refuse access to a document in the file which would have allowed the parties to identify the informant.

In 2004, most decisions of the Hearing Officers on the disclosure of potentially confidential information concerned the lawfulness of publication of the Commission’s final decisions. These decisions helped to establish a number of principles which will be applied in future cases.
Firstly, in accordance with the case law, any request for confidentiality is required to substantiate why the disclosure of the supposedly confidential information could seriously harm the company. Secondly, the risk of private litigation induced by the publication of information is not in itself a valid defence. Damages warranted further to a breach of competition law would constitute the rightful and desirable consequences of this anticompetitive behaviour. Thirdly, it is not for the Hearing Officers to decide whether it is indispensable to publish parts of the final decisions to ensure their proper understanding. The relevance of a piece of information for the comprehensive understanding of the decision will only be examined if the passage in question constitutes confidential information.

In addition, in the course of 2004 a procedure to be applied before taking legally binding decisions on the disclosure of confidential information was introduced with a view to avoiding legal disputes wherever possible. The Hearing Officers may in the first place propose a preliminary view. Only if this proposal is contested within a given time period will the Hearing Officers proceed to a binding decision which can be challenged before the Court of First Instance. In many cases, this new practice has helped to avoid so-called “Akzo procedures”. In the course of the latter, the Hearing Officers take a formal and binding decision on behalf of the Commission to disclose potentially confidential information, decision which is subject to review by the Court of First Instance.

Organisation and conduct of oral hearings

Oral hearings provide the parties with the opportunity to supplement their written reply to the Commission’s competition concerns by presenting the main issues orally before a wide audience with the opportunity to respond to questions and engage in direct discussion with relevant Commission departments and representatives from the Member States. It may also be a unique occasion for the complainants or other third parties involved in the procedure to listen to and comment directly on the points addressed. This was indeed the situation in the Microsoft case where, after five years’ investigation and written procedure including three statements of objections, written responses and written observations from numerous third parties, representatives of all parties involved sat together for the first time and for three days presented their own views and commented on others for the benefit of all concerned.

It is the Hearing Officers’ experience that the presentations made in the oral hearing together with the questions raised invariably leads to a better understanding of the issues involved. Therefore, the Hearing Officers’ task of organising and conducting oral hearings in antitrust and merger proceedings is significant in view of their importance in the context of the overall procedure. The organisation itself is carried out in close contact with the parties concerned. In terms of participation, the competition authorities of the Member States and all associated Commission departments are invited. The Hearing Officers established a requirement that the director responsible for investigating the case should attend the oral hearing, a point that was confirmed by the Commissioner.

1 According to Case T-353/94 Postbank NV, paragraph 87, business secrets are “information of which not only disclosure to the public but also mere transmission to a person other than the one that provided the information may seriously harm the latter’s interests”.

2 Article 30 of Regulation No 1/2003 and Article 21 of Regulation No 17/62 stipulate that the Commission only needs to take account of “the legitimate interest of undertakings in the protection of their business secrets”.
During the hearing new documents may be admitted by the Hearing Officers, at the request of the relevant Commission department, the parties or third parties concerned. The new legislation introduced in the course of 2004 in both merger and antitrust cases explicitly provides for questions to be asked by all parties concerned under the authority of the Hearing Officers. Although it continues to be used on an experimental basis, this new practice has provided for additional interaction.

In some instances, such as the Choline chloride case, the Hearing Officers accepted that fresh evidence could be admitted to the procedure at the oral hearing. As the final reports published in 2004 illustrate, subsequent to some oral hearings, such as in the Sony/BMG merger case, changes in the approach to cases have taken place.

In addition, oral hearings raise the Hearing Officers’ awareness of the critical aspects of a case and allow them to become more actively engaged in the subsequent stages of the procedure, potentially by making observations on the further progress of the proceeding in accordance with their Mandate.

Acting as advisor to the Commissioner for competition policy

The Hearing Officers’ primary duty is to ensure that the parties’ rights of defence are respected and that due process is achieved for all parties concerned. However, in the framework of their interim report, or more generally when they report to the Commissioner, with special reference to the content of the hearing, the Hearing Officers may make use of their ability to alert the Commissioner on a substantive issue raised by the case where they consider this would enhance the quality of the final decision. In 2004, the Hearing Officers worked towards clearer drafting of final decisions. They made observations in a number of cases, and notably cartel cases, which helped improve the decision-making process and ultimately the quality of the final decisions.

The Hearing Officers also discussed a number of policy issues with the Directorate-General for Competition. Such discussions included, *inter alia*, the revision of the Commission’s notice on access to the file, adapting the rules on statements under the Commission’s leniency programme to the discovery rules of foreign jurisdictions whilst respecting the right to access to the file, and the Hearing Officers’ role as potential mediators in disputes between DG Competition and companies over whether a document is covered by legal privilege.
I – Antitrust – Articles 81, 82 and 86 EC

A - LEGISLATIVE AND INTERPRETATIVE RULES

1. ANTITRUST MODERNISATION: IMPLEMENTING REGULATION 773/2004, GUIDELINES AND NOTICES

1. On 1 May, the new enforcement system for Articles 81 and 82 of the Treaty entered into force and Regulation 17/62 was repealed. In order to complement Regulation 1/2003\(^3\) and following extensive consultations, the Commission adopted the “Modernisation Package” consisting of a new Commission Regulation on details of its antitrust procedures as well as six new Commission notices aimed at providing guidance on a range of aspects that are of particular significance under the new enforcement system. This package consists of the following elements:

*Implementing Regulation*\(^4\)

2. The Implementing Regulation contains detailed rules regarding, in particular, the initiation of proceedings, oral statements, complaints, hearings of parties, access to the file and the handling of confidential information in antitrust procedures conducted by the Commission.

*Network notice*\(^5\)

3. This notice establishes the main pillars of cooperation between the Commission and the competition authorities of the Member States within the European Competition Network (ECN). The notice sets out the principles for sharing case work between the members of the network. In this respect the notice follows the joint statement of the Council and the Commission\(^6\) which was issued on the day when Regulation 1/2003 was adopted. Particular arrangements have been found for the interface between exchanges of information between authorities pursuant to Article 11(2) and (3) and Article 12 of Regulation 1/2003 and the operation of leniency programmes. National authorities of the Member States\(^7\) have signed a statement in which they declare that they will abide by the principles set out in the Commission notice.

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\(^4\) Commission Regulation 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty (OJ L 123, 27.4.2004).

\(^5\) Commission Notice on cooperation within the network of competition authorities (OJ C 101).

\(^6\) Available from the Council register at http://register.consilium.eu.int (document No 15435/02 ADD 1).

\(^7\) A list of national authorities which have signed the Statement regarding the Commission Notice on Cooperation within the Network of Competition Authorities can be found on the Commission’s website.
Notice on cooperation with national courts

4. The notice is intended to serve as a practical tool for national judges who apply Articles 81 and 82 in conformity with Regulation 1/2003. It assembles the relevant case law of the Court of Justice, thus clarifying the procedural context in which national judges are operating. Particular attention is given to the situation in which the national court deals with a case in parallel with or subsequent to the Commission. Furthermore, Regulation 1/2003 establishes an express legal basis for international judges to ask the Commission for an opinion or for information it holds, and provides for the possibility for the Commission, under certain conditions, to submit written and oral observations to the national courts. The notice explains the functioning of those cooperation mechanisms.

Notice on complaints

5. This notice starts by giving general information on the different roles of competition authorities and courts and invites potential complainants to make an informed choice about whether to approach the Commission, a national competition authority or a national court in the light of the guidance given. The largest part of the notice contains explanations on the Commission’s assessment of complaints in the antitrust field and the procedures applicable. The notice also includes an indicative deadline of four months, within which the Commission endeavours to inform complainants whether or not it intends to conduct a full investigation on a complaint.

Notice on guidance letters

6. Regulation 1/2003 pursues the objective that the Commission should refocus its enforcement action on the detection of serious infringements. The abolition of the notification system is a crucial element in this context. However, it also seems reasonable that in a limited number of cases, where a genuinely novel question concerning Article 81 or 82 arises, the Commission may, subject to its other enforcement priorities, provide guidance to undertakings in writing (guidance letter). The notice provides details about this instrument.

Notice on effect on trade

7. The effect on trade concept is a jurisdictional criterion, which determines the reach of Article 81 and 82. It also determines the scope of application of Article 3 of Regulation 1/2003. Against this background, Member States expressed a strong desire for an interpretative notice on this concept. The notice describes the current case law and does not in any way seek to limit the jurisdictional reach of Articles 81

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8 Commission Notice on the cooperation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC (OJ C 101, 27.4.2004).
9 Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty (OJ C 101, 27.4.2004).
10 Commission Notice on informal guidance relating to novel questions concerning Articles 81 and 82 of the EC Treaty that arise in individual cases (guidance letters) (OJ C 101, 27.4.2004).
and 82. It also sets out a quantitative threshold which the Commission, in its own proceedings, will consider to be a rebuttable presumption when the aggregate annual Community turnover of the undertakings concerned in the products covered by the agreement does not exceed EUR 40 million and the (aggregate) market share of the parties on any relevant market within the Community affected by the agreement does not exceed 5%.

*Guidelines on Article 81(3)*

8. The power for the courts and competition authorities of the Member States to apply Article 81(3) is one of the main pillars of the modernisation reform. The notice develops a framework for the application of Article 81(3) and provides guidance on the application of each of the four cumulative conditions contained in this Treaty provision. The notice lists various types of efficiencies that may constitute objective economic benefits within the meaning of the first condition. It also explains the notion of consumers and the requirement that they must receive a fair share of the efficiency gains resulting from the agreement. The anticompetitive aspects of the agreement are analysed under Article 81(1) and the procompetitive elements are analysed and balanced against the anticompetitive elements under Article 81(3).

**2. TECHNOLOGY TRANSFER BLOCK EXEMPTION REGULATION AND GUIDELINES**

9. As part of the fundamental reform of EU antitrust enforcement rules, the Commission adopted on 7 April new rules in the form of a new Commission block exemption regulation, Regulation (EC) No 772/2004 (the TTBER)\(^{13}\), and a set of guidelines\(^{14}\) concerning the licensing of patents, know-how and software copyright. As of 1 May 2004 licensing agreements benefit from an improved safe harbour, saving many agreements from individual scrutiny. The new rules facilitate licensing and reduce the regulatory burden for companies, while ensuring effective control of licensing between companies holding a significant degree of market power. The new rules should contribute to the dissemination of technology within the EU and thereby contribute to the Lisbon objectives.

10. The new rules benefited from an extensive consultation exercise\(^{15}\) in which stakeholders showed keen interest and submitted detailed and high quality input. They replace Regulation 240/96\(^{16}\), which has been criticised for its narrow scope and its formalistic character. The new rules are firmly aligned on the Commission’s new

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15 Over 70 submissions were received from industry and trade associations, law and IP societies, individual law firms, national authorities, individual companies, universities and consultants.
generation of block exemption regulations and have the following general characteristics:

- The TTBER contains only a black list\textsuperscript{17}: anything that is not explicitly excluded from the block exemption is now exempted. This leaves companies more freedom to devise their licensing agreements according to their commercial needs.

- The scope of the new rules covers all types of technology transfer agreements for the production of goods or services: not only patent and know-how licensing, but also designs and software copyright licensing. Where the Commission does not have the powers to adopt a block exemption regulation\textsuperscript{18}, as in the case of patent pools and copyright licensing in general, the guidelines give clear guidance as to future enforcement policy;

- The new rules clearly distinguish licensing between competitors (which is more likely to harm competition) from licensing between non-competitors. In particular, the applicable hardcore lists differ;

- The TTBER provides the safe harbour only below certain market share thresholds, namely a cumulative 20\% for licensing agreements between competitors and 30\% each for agreements between non-competitors. Market shares need to be calculated both for the relevant affected product market(s) and the technology market\textsuperscript{19};

- A licence agreement cannot benefit from the block exemption if it contains a so-called hardcore restriction of competition;

- Some restrictions do not qualify for the block exemption while the remainder of the agreement can continue to benefit from the block exemption\textsuperscript{20}.

11. The hardcore list in Article 4 of the TTBER specifies the restraints which mean that the entire agreement cannot benefit from the block exemption and for which individual application of Article 81(3) is also unlikely\textsuperscript{21}.

12. For licensing between competitors, (a) price fixing, (b) output limitation, (c) allocation of markets or customers, (d) restricting the licensee to exploit his own

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\textsuperscript{17} The previous 1996 Regulation contained white and grey lists.

\textsuperscript{18} Council Regulation No 19/65/EEC, the enabling Regulation, only allows adoption of block exemption Regulations for transfer of technology agreements between two parties and concerning industrial property rights.

\textsuperscript{19} The market share on the technology market is also based on the product market in that it is defined in terms of the market share of products produced with the licensed technology. For the market share calculation, sales value data for the preceding calendar year are normally to be used. A two-year grace period is provided for in case the relevant threshold is exceeded.

\textsuperscript{20} This concerns in particular obligations on the licensee to exclusively grant back or assign severable improvements to or new applications of the licensed technology and no-challenge clauses.

\textsuperscript{21} The TTBER now covers a number of commonly used restrictions such as: field of use restrictions, active and passive sale restrictions between licensor and licensee to protect their exclusive territories, and captive use restrictions.
technology and (e) restricting the parties to carry out R&D (unless indispensable to prevent disclosure of licensed know-how) are hardcore restrictions, while for licensing between non-competitors the hardcore restrictions are (a) vertical price fixing, (b) restriction of the licensee’s passive sales and (c) restriction of the licensee’s active and passive sales inside a selective distribution system. For both licensing between competitors and non-competitors Article 4 contains specific exceptions to the hardcore lists.

13. The guidelines make it clear that there is no presumption of illegality outside the safe harbour of the block exemption provided that the agreement does not contain a hardcore restriction. In particular, there is no presumption that Article 81(1) applies merely because the market share thresholds are exceeded. Individual assessment based on the principles described in the guidelines is required.

14. In order to promote predictability beyond the application of the TTBER and to confine detailed analysis to cases that are likely to present real competition concerns, the Commission has created a second safe harbour within the guidelines. It takes the view that outside the area of hardcore restrictions Article 81 is unlikely to be infringed where there are four or more independently controlled technologies - in addition to the technologies controlled by the parties to the agreement - that may be substitutable for the licensed technology at a comparable cost to the user.

15. The guidelines not only provide a general framework for analysing licence agreements, but also contain specific sections on the application of Article 81 to various types of licensing restraints, in particular royalty obligations, exclusive licensing and sales restrictions, output restrictions, field of use restrictions, captive use restrictions, tying and bundling and non-compete obligations. They also contain a section on the assessment of technology pools.

3. TRANSPORT BLOCK EXEMPTION REGULATIONS

3.1 Maritime transport


16. The Commission made considerable progress in its review of Regulation 4056/86, an exercise that was launched in March 2003. Regulation 4056/86 applies the EU competition rules to maritime transport and one of the main issues of the review is whether the conditions for exemption under Article 81(3) of the Treaty for price fixing and capacity regulation by liner shipping conferences is still justified.

17. On the basis of a thorough consultation process (36 submissions were received in response to a consultation paper and a public hearing was held) the Commission discussed on 28 May in an informal meeting with competition and transport authorities from the Member States the outcome of the review process so far. This

22 i.e., arrangements whereby two or more parties assemble a package of technology which is licensed not only to contributors to the pool but also to third parties.
resulted in the adoption, on 13 October, of a White Paper\textsuperscript{23}, in which the Commission concluded that there is no conclusive economic evidence that the assumptions on which the block exemption was justified at the time of its adoption in 1986 are, in the present market circumstances and on the basis of the four cumulative conditions of Article 81(3) of the Treaty, still justified. On that basis, the Commission considered proposing to repeal the present block exemption for liner shipping conferences. In its White Paper the Commission however left the door open to possible alternatives to the present liner conference system on routes to and from the EU. Suppliers of liner shipping services, represented by the European Liners Affairs Association (ELAA), have already put forward concrete ideas about such a framework. However, before adopting its position on those ideas, the Commission has invited interested third parties to submit their comments, as well as to provide alternative options.


18. Commission Regulation (EC) No 823/2000 on the application of Article 81(3) of the Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies (consortia) provides a block exemption in relation to consortium agreements in maritime transport. The objective of a consortium agreement between two or more vessel operating companies which provide international liner shipping services is to bring about cooperation in the joint operation of a maritime transport service so as to improve the productivity and quality of the liner shipping service, and to encourage greater utilisation of the containers and the more efficient use of vessel capacity.

19. Given that this Regulation expires on 25 April 2005, the Commission launched a public consultation\textsuperscript{24} in June on the various policy options for future legislation in this area and in particular to seek the views of the industry, Member States and other interested third parties. This consultation took place against the background of the ongoing review of block exemption for agreements between liner conferences contained in Regulation 4056/86. On 23 December, the Commission published a preliminary draft Regulation amending Commission Regulation (EC) 823/2000, inviting interested parties to send their comments\textsuperscript{25}.

3.2 Air transport

Extension of competition enforcement powers in international air transport - Amendments to Regulations 3975/87 and 3976/87

20. On 26 February, the Council adopted Regulation (EC) No 411/2004\textsuperscript{26} amending two existing Regulations in the air transport sector\textsuperscript{27} and Regulation (EC) No 1/2003. In


\textsuperscript{24} For the consultation document and replies received by the Commission, see: http://europa.eu.int/comm/competition/antitrust/others/#consult_823


\textsuperscript{26} OJ L 68, 6.3.2004. See also press release IP/04/272.
essence, Regulation 1/2003 will thus apply also to air transport between the European Community and third countries. Furthermore, the scope of the Council Regulation enabling the Commission to issue block exemption Regulations on certain listed air transport activities (affecting also long-haul routes) is broadened. Until the adoption of this Regulation, the Commission lacked effective enforcement powers in this field of air transport between the EU and third countries, although there was no doubt that the competition rules applied also to these routes. The application of Regulation 1/2003 to all air transport, irrespective of the routes involved, finally brings air transport under the general framework of antitrust enforcement. Regulation 411/2004 entered into force on 1 May, together with the modernisation package.

Review of Council Regulation (EEC) No 1617/93

21. The central element of Commission Regulation (EEC) No 1617/93, which expires on 30 June 2005, is the exemption currently in place for IATA Tariff Conferences in respect of intra-EU routes. This year, the Commission embarked on the revision of Regulation 1617/93 and published a consultation paper on 30 June inviting comments and evidence from governments, industry and consumers on essential issues relating to the assessment under Article 81(3) EC of these Tariff Conferences.

22. A total of 52 responses were received and analysed by the Commission. That analysis showed a need for further in-depth exploration of certain issues. To that end, a discussion paper was prepared with a view to ensuring transparent decision making and enabling public authorities and the industry to submit a final round of comments.

4. REVIEW OF PROCEDURAL RULES: NEW ACCESS TO FILE NOTICE

23. Access to the file is an important procedural step and safeguard for the rights of defence in all contentious antitrust and merger cases. When the Commission has issued a statement of objection (SO), access to the file enables the addressees to acquaint themselves with the evidence in the Commission’s file with a view to effectively expressing their views on the conclusions reached by the Commission in the SO. In order to enhance transparency and clarity of the Commission’s


28 See Joined Cases 209-213/84 Nouvelles Frontières [1986] ECR 1425. Previously, the assessment of international airline alliances obliged the Commission to procedurally separate intra-Community from third-country routes, which led to an unsatisfactory patchwork scenario.

29 Regulation No 1/2003 (antitrust), Regulation No 139/2004 (mergers) and the respective implementing Regulations (Regulations No 773/2004 and No 802/2004) provide that access to the file must be arranged in all cases involving decisions on the basis of Articles 7, 8, 23 and 24(2) of Regulation No 1/2003 and Articles 6(3), 7(3), 8(2) to (6), 14 and 15 of the Merger Regulation.
procedure in processing requests for access to the file\textsuperscript{30}, the Commission embarked on a revision of the current access to file notice dating from 1997\textsuperscript{31}. Following the experience gained in applying the 1997 notice, the revision takes account of developments both in Commission practice\textsuperscript{32} and in recent case law\textsuperscript{33}. The review also seeks to ensure that the access to file rules are compatible with the modernised antitrust and merger rules, as well as the current Mandate of the Hearing Officers\textsuperscript{34}.

24. After discussion with Member States, the Commission published on 21 October a draft notice on the rules for access to the Commission file in antitrust and merger proceedings\textsuperscript{35} and launched a public consultation on the draft. Some 20 contributions were submitted in reply to this consultation, mostly by legal practitioners, but also by consumer and trade union associations.

25. The key features of the draft are:

- a distinction between the right to access to the file (of addressees of an SO) and the access to certain documents provided for (for complainants in antitrust proceedings and for other involved parties in merger proceedings)

\textsuperscript{30} The right of access to the file in antitrust and merger proceedings is distinct from the general right of access to documents under Regulation No 1049/2001, which is subject to different criteria and pursues a different purpose.


\textsuperscript{32} Commission practice has evolved owing to new and unprecedented situations, such as very high numbers of parties involved in proceedings, but also with a view to enhancing efficiency in the provision of access to the file through new technological means.

\textsuperscript{33} Notably in the “cement cartel” case before the Court of First Instance: judgment in Joined Cases T-25/95 etc. Cimenteries CBR SA and Others [2000] ECR II-491.


• a definition of what constitutes the “Commission file” and a clear distinction between accessible and non-accessible documents

• a distinction between antitrust and merger proceedings as to the moment when access to the file is granted

• a description of procedures for treatment of confidential information and for implementing access to the file, as well as of the procedure for resolution of disagreements on confidentiality claims, including the role of the Hearing Officer.
B – APPLICATION OF ARTICLES 81, 82 AND 86

1. ABUSE OF DOMINANT POSITIONS (ARTICLE 82 EC)

1.1 Decisions

**CEWAL**

26. On 30 April, the Commission adopted a decision imposing a fine of EUR 3.4 million on Compagnie Maritime Belge (“CMB”), a Belgian shipping company. The fine was imposed because of CMB’s role in the abusive behaviour committed by the liner conference Associated Central West Africa Lines (Cewal), of which CMB was a member, at the end of the 1980s\(^{36}\).

27. A previous decision\(^ {37}\), whereby the Commission had already imposed fines on four Cewal members, including CMB, had been partly annulled by the Court of Justice (ECJ) with respect to the fines\(^ {38}\). The ECJ considered that the Commission had made a procedural error by failing to indicate clearly in the statement of objections which preceded the decision that it intended to impose fines on the individual members of Cewal.

28. In order not to let the infringements go unpunished (the appeal against the findings of the infringements had been rejected by both the CFI and the ECJ), the Commission adopted a new decision imposing a fine on CMB following a fresh procedure in line with the ECJ’s findings\(^ {39}\). This decision is entirely based on the substantive findings of the original decision.

29. The calculation of the fine is based on an assessment of the impact of the offending conduct by CMB as compared with the involvement of other members of Cewal. A lower fine than in the original decision was imposed, as certain aggravating circumstances prevailing at the time of that decision were no longer taken into account.

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\(^{36}\) Cewal existed between the beginning of the 1970s and the mid-1990s. It was made up of shipping companies operating a regular liner service between the ports of Zaïre and Angola and those of the North Sea, with the exception of the United Kingdom. Cewal's secretariat was in Antwerp.

\(^{37}\) Commission Decision 93/82/EEC of 23 December 1992 relating to a proceeding pursuant to Articles 85 (IV/32.448 and IV/32.450: Cewal, Cowac and Ukwal) and 86 (IV/32.448 and IV/32.450: Cewal) of the EEC Treaty (OJ L 34, 10.2.1993). The original fine of ECU 9.6 million imposed on CMB by the Commission was reduced by the Court of First Instance to 8.64 million by judgment in Joined Cases T-24/93, T-25/93, T-26/93 and T-28/93 CMB and Others [1996] ECR II-1201.


\(^{39}\) Regulation 2988/74 concerning limitation periods in proceedings relating to transport and competition contains an interruptable limitation period of five years and an overall limitation period of ten years for the imposition of a fine. These limitation periods had not expired as they had been suspended during the court proceedings.
Clearstream

30. On 2 June, the Commission adopted a decision finding that Clearstream Banking AG and its parent company Clearstream International SA (“Clearstream”) infringed Article 82 EC by refusing to supply cross-border securities clearing and settlement services to Euroclear Bank SA (“Euroclear Bank”) and by applying discriminatory prices to the detriment of this customer.

31. Clearstream Banking AG is Germany’s only Wertpapiersammelbank (Central Securities Depository). The Commission considered that during the reference period concerned, 1997 to end 2001, Clearstream held a dominant position for providing cross-border clearing and settlement services to intermediaries situated in other Member States.

32. The refusal to supply concerned registered shares issued under German law. While competition law recognises the freedom of companies to freely choose their trading partners, companies in a dominant position have a special responsibility. In the present case, Clearstream’s behaviour qualified as refusal to supply because:
   – Clearstream Banking AG is the only final custodian of German securities kept in collective safe custody, which is the only significant form of custody today for securities traded. New entry into this activity is unrealistic for the foreseeable future. Therefore, Clearstream Banking AG can be regarded as an unavoidable trading partner;
   – Euroclear Bank could not duplicate the services that it was requesting; and
   – Clearstream’s behaviour had the effect of impairing Euroclear Bank’s ability to provide efficient cross-border clearing and settlement services to clients in the single market.

33. Euroclear Bank obtained the services it was seeking in November 2001, more than two years after it requested them. During the entire period Clearstream Banking AG denied Euroclear Bank clearing and settlement services for registered shares. The dilatory behaviour of Clearstream vis-à-vis Euroclear Bank contrasts with the usual

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40 COMP/38.096.
41 Securities clearing and settlement are necessary steps for a securities trade to be completed. Clearing is the process by which the contractual obligations of the buyer and the seller are established. Settlement is the transfer of securities from the seller to the buyer and the transfer of funds from the buyer to the seller.
42 Central Securities Depositories hold securities and enable securities transactions to be processed through book entry. In its home country, the Central Securities Depository provides processing services for trades involving those securities that it holds in final custody. It can also offer processing services as an intermediary in cross-border clearing and settlement, where the primary deposit of securities is in another country.
43 The most widely internationally-traded German shares (blue chip shares such as Daimler Chrysler, Siemens, Allianz, Deutsche Post, Deutsche Telekom, Deutsche Bank, Lufthansa and others) are registered shares, as opposed to bearer shares.
period of not more than four months within which other comparable customers were supplied with clearing and settlement services.

34. As regards price discrimination, the Commission found that, between January 1997 and January 2002, Clearstream charged, for equivalent services, a higher per transaction price to Euroclear Bank than to other securities depositaries outside Germany. The Commission examined in detail the content of the services and the costs of providing them in order to establish whether the price difference could be justified, and concluded that this was not the case.

35. The Commission decided not to impose fines. Among other things, the Commission took into account the fact that there is no Community case law or jurisprudence dealing with the competition analysis of clearing and settlement. In addition, there is a wide-ranging debate on clearing and settlement within different institutions and fora in order to better define the role of the different protagonists in the industry.

Microsoft

36. On 24 March, the Commission adopted a prohibition decision with fines against Microsoft Corporation (“Microsoft”) in pursuance of Article 82 EC\(^44\). This decision concluded that Microsoft had abused its dominant position in the PC operating system market\(^45\) in two ways.

(1) Refusal to supply interoperability information

37. Microsoft withheld from competitors in the work group server operating system market information necessary for their products to fully interoperate with Microsoft’s dominant PC operating system, Windows. While Microsoft had previously disclosed this type of interoperability information when it entered the work group server operating system market, it then adopted a policy of refusing to make such disclosure to its competitors, thereby disrupting previous levels of supply. In 1998, Microsoft turned down a formal request by Sun for such interoperability information. On the basis of an extensive market enquiry, the Commission concluded that the information in question was indispensable to compete in the work group server operating system market and that, by withholding it, Microsoft had been able to establish a dominant position, and risked eliminating all remaining competition in that market. The Commission further concluded that Microsoft’s refusal to supply limited technical development, to the detriment of consumers: if competitors had access to the information withheld, they would be able to provide consumers with new and enhanced products without copying Microsoft’s own offering.

(2) Tying of Windows Media Player with Windows

38. Microsoft harmed competition in the streaming media player market by tying with its dominant Windows PC operating system a separate product - its Windows Media

\(^44\) Case COMP/37,792 available at: http://europa.eu.int/comm/competition/antitrust/cases/decisions/37792/en.pdf

\(^45\) Microsoft held around 95% of this market.
Player. This tying practice conferred upon Windows Media Player the same ubiquitous presence as Windows, which artificially induced content providers and software developers to rely on Windows Media technology, and did not allow rival streaming media players to compete on the merits of their own products. The Decision shows that Microsoft has achieved a distinct lead over its competitors since it started its tying strategy in mid-1999.

39. The Commission concluded that Microsoft’s abusive behaviour constituted a very serious infringement of EU competition rules and imposed on Microsoft a fine of EUR 497.196 million\(^{46}\).

40. In order to put an end to the infringement, the Commission required Microsoft to take the following main remedial actions:

- to disclose the relevant interoperability information and allow its use for the development of compatible work group server operating systems products (“the interoperability remedy”);

- to make available a version of the Windows PC operating system which does not include Windows Media Player (“the untying remedy”). PC manufacturers and consumers can thus obtain Windows with the media player of their choice;

- in addition, Microsoft had to submit a proposal for the establishment of a monitoring mechanism in the form of a monitoring trustee. Microsoft submitted such a proposal.

41. Microsoft submitted an application for annulment of the decision before the Court of First Instance (“CFI”)\(^ {47}\), as well as an application for interim measures seeking the suspension of the interoperability remedy and the untying remedy pending the outcome of its application for annulment\(^ {48}\). The Commission decided not to seek to enforce these remedies pending the order of the President of the CFI concerning Microsoft’s application for interim measures\(^ {49}\). On 22 December, the President dismissed Microsoft’s application for interim measure in its entirety\(^ {50}\).

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\(^{46}\) This fine amounted to 1.62% of Microsoft’s worldwide turnover in the last available business year.

\(^{47}\) Case T-201/04.

\(^{48}\) Case T-201/04R.

\(^{49}\) Hearings on the application for interim measures were held on 30 September 2004 and 1 October 2004.

\(^{50}\) See below under Section I.C.
Box 2: Application of EU competition rules to mobile and broadband Internet services

In 2004, competition in the electronic communications sector intensified and growth was strong in some market segments. In the enlarged EU of 25 Member States, the sector’s two key drivers of growth were fixed broadband services and mobile services. Growth in the broadband sector overtook growth in the mobile sector.

As regards antitrust activities, the Commission focused on these two segments of major importance. In the context of the new regulatory framework for electronic communications, which has been in force since 25 July 2003, competition policy continues to play a prominent role in bringing sector regulation more closely into line with competition law principles.

In the context of broadband Internet access services, the Commission’s action regarding a presumed margin squeeze led Deutsche Telekom - the incumbent operator of fixed lines in Germany - to reduce its line sharing fees significantly. In the light of these tariff reductions, the Commission was in a position to close its investigation into the alleged abuse of Deutsche Telekom’s dominant position on the market for the provision of broadband access to its fixed telecommunications network. The Commission accepted Deutsche Telekom's commitments to bring the margin squeeze to an end on a lasting basis from 1 April 2004.

As regards mobile communications, the Commission issued two statements of objections on 26 July concerning international roaming in the United Kingdom. The objections relate to the rates that O2 and Vodafone charged other mobile network operators for international roaming at wholesale level. On the basis of its investigation, the Commission considered that both had charged unfair and excessive prices, Vodafone between 1997 and at least September 2003 and O2 between 1998 and at least September 2003. Finally, as far as international mobile roaming services are concerned, the Commission is also looking at the competitive effects resulting from the recent creation of strategic mobile alliances (such as “Freemove” or “Starmap”).

1.2 Other case developments and rejections of complaints

Interbrew (abuse)

On 30 April, the Commission closed the Article 82 investigations that it had started in 1999 on its own initiative into the behaviour of Interbrew NV (now Inbev NV) towards Belgian beer wholesalers, after Interbrew made a number of commitments. Interbrew has in particular undertaken to amend its rebates systems and its

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51 See the Commission’s 10th Implementation Report [Add reference, once the Report is available]
52 Fee which competitors have to pay to Deutsche Telekom for shared access to its local loops.
53 Press release IP/04/281.
54 Press release IP/04/994.
partnership and commercial agreements with wholesalers in such a way that rival suppliers are no longer prevented from competing effectively with Interbrew in Belgium.

43. Interbrew first agreed to make its standardised volume rebate system entirely transparent to all wholesalers rather than just providing them with the rebate rate corresponding to the volume range in which their own purchases for the various types of beer fall and the rates corresponding to the volume ranges situated just above and just below that range. Another rebate system, specifically designed for wholesalers who are prepared to sell the various types of Interbrew beer in their own tied retail outlets, will also be amended in such a way that the rebates will no longer increase with the number of the wholesaler’s tied outlets but represent a fixed amount per hectolitre of a particular type of beer, whatever the number of tied outlets.

44. Under Interbrew’s partnership agreements, Interbrew will no longer have access to the wholesalers’ confidential business data and it will no longer have the right to block a competitor’s bid for the purchase of the wholesaler’s business and to make its own bid instead (abolition of the “right of first refusal”). Finally, regarding the commercial agreements by which Interbrew grants wholesalers a number of incentives such as financial support or gadgets mainly in return for promotional activities, Interbrew has accepted to (a) abolish any product exclusivity requirement, (b) make the eligibility criteria fully transparent and (c) make it clear that the same incentives are open to all wholesalers without exception.

Scandlines v Port of Helsingborg\(^56\) and Sundbusserne v Port of Helsingborg\(^57\)

45. On 23 July, the Commission took two decisions\(^58\) rejecting two complaints lodged by ferry operators - Scandlines Sverige AB and Sundbusserne AS - against the Port of Helsingborg in Sweden. These two parallel complaints related to alleged abuses within the meaning of Article 82 EC involving excessive port fees charged by the port of Helsingborg for services provided to ferry operators active on the Helsingborg–Elsinore route between Sweden and Denmark.

46. After extensive investigation, the Commission came to the conclusion that the available evidence was insufficient to demonstrate to the requisite legal standard that the prices at issue were excessive. The decisions point to more general difficulties in applying Article 82 EC to excessive pricing cases, particularly in cases where no useful benchmarks are available. Given that existing case law on this issue is rather limited\(^59\), the decisions may provide useful guidance when determining the economic value of a service and whether a price is excessive/unfair and thus constitutes an abuse of a dominant position within the meaning of Article 82 EC.

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\(^56\) COMP/A.36.568.
\(^57\) COMP/A.36.570.
\(^58\) Non-confidential versions of the decisions were published on DG Competition’s website.
\(^59\) The decisions are based on the test developed by the Court of Justice in Case 27/76 United Brands v Commission [1978] ECR 207.
47. The Commission has informed the defendants that MCI withdrew its complaint on 21 October, and that the Commission does not envisage further action in this case. A statement of objections had been issued on 22 March 2002 alleging that KPN Mobile had refused to supply direct interconnection to independent operators and had engaged in a margin squeeze between its wholesale mobile termination rates and the retail prices for mobile virtual private network (MVPN) services. In deciding not to continue the case ex officio the Commission took into account the fact that action by the Dutch regulator OPTA had in the meantime prompted a reasonable direct interconnection offer by KPN Mobile. The wholesale mobile interconnection rates in the Netherlands had also decreased and the OPTA was in the process of further analysing the markets for termination on individual mobile networks in the Netherlands in the context of the new regulatory framework for electronic communications introduced in the Netherlands in spring 2004. Finally, the Commission had come to the conclusion in its investigation that in the specific context of the MVPN services the existence of a margin squeeze under Article 82 EC could not be properly established.

48. In November, B2 Bredband AB (B2) withdrew its complaint against TeliaSonera AB, the incumbent telecommunications operator in Sweden. The Commission subsequently closed its case. In December 2003, the Commission had addressed a statement of objections to TeliaSonera, alleging that the company had abused its dominant position by engaging in predatory pricing when it bid for a major contract for the construction and operation of a fibre-optic broadband network for the provision of high-speed Internet access in Malmö. The Commission argued that TeliaSonera’s bid for that contract was intentionally set below cost and did not allow the operator to recover the investments and expenses derived from the provision of infrastructures and services contained in the contract and that by setting such a low price, TeliaSonera prevented the development of alternative infrastructure and the entry of competing service providers. However, additional investigation following the issue of the statement of objections led the Commission to the conclusion that it could not be established with sufficient certainty that TeliaSonera held a dominant position in the relevant markets at the time when the bid was submitted.

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60 COMP/37.704 – KPN Mobile Termination Rates.
61 COMP/37.663 – TeliaSonera AB – Broadband services.
2. Cartels

Box 3: Overview of enforcement against hardcore cartels

During 2004, the Commission maintained its emphasis on anti-cartel activity established during the previous three years by issuing another 6 decisions against unlawful horizontal agreements, involving some 30 companies. These cases were: copper plumbing tubes, sodium gluconate, French beer, raw tobacco in Spain, hard haberdashery - needles and choline chloride. Fines totalling over EUR 390 million were imposed in these decisions.

In the course of the year there were a number of developments in the fight against cartels. Three aspects are in particular worth mentioning, namely developments in the field of leniency, the consequences for anti-cartel enforcement of the introduction of Regulation 1/2003 and the clarification of the rules governing legal privilege.

Leniency

The leniency notice of 2002 continued to be an important enforcement tool. The high number of cases generated by the 2002 leniency notice demonstrates that it is extremely effective, and even more so than the 1996 leniency notice. The majority of cases now reaching decision stage are dealt with under the 2002 notice.

Regulation (EC) No 1/2003

The entry into force of Regulation 1/2003 in May notably reinforced the Commission’s powers of investigation. Three key aspects are worth highlighting. First, the Regulation extends the Commission’s powers of search to include premises other than business premises, including the private residences of staff members of an undertaking, on reasonable suspicion that business records are being kept at such premises. Such action can be carried out only with prior authorisation by the national judicial authority of the Member State concerned. Second, the Commission’s search powers are strengthened by its ability to seal business premises for the time necessary to conduct the inspection. Third, the Commission has been granted express powers to interview any natural or legal person, who consents to be interviewed, for the purpose of an investigation.

Legal privilege

Following an appeal by the Commission, the President of the Court of Justice annulled by order of 27 September the (partial) suspension of the operation of a Commission decision rejecting a claim of legal privilege which had previously been ordered by the President of the Court of First Instance in the case. An envelope containing some of the documents seized in the inspection but which the parties claimed to be covered by legal privilege and which had been retained in the Registry of the Court of First Instance was returned to the Commission. The ECJ noted the Commission’s commitment not to disclose the documents under dispute to third parties until the conclusion of the main proceedings. As the novel approach put forward by the parties in regard to the scope of legal privilege has not been confirmed by the Courts, the Commission continues to handle inspections as before on the basis of the established case law, which in the Commission’s view remains valid and appropriate.
Copper plumbing tubes

On 3 September, the Commission adopted a decision finding that the leading European copper plumbing tubes producers, Boliden AB (together with its former subsidiaries Boliden Fabrication AB and Boliden Cuivre & Zinc SA), Halcor SA, HME Nederland BV, IMI plc (together with its (former) subsidiaries IMI Kynoch Ltd. and IMI Yorkshire Copper Tube Ltd.), KM Europa Metal AG (together with its wholly-owned subsidiaries Europa Metalli SpA and Tréfimétaux SA), Mueller Industries, Inc. (together with its subsidiaries WTC Holding Company, Inc., Mueller Europe Ltd., DENO Holding Company, Inc. and DENO Acquisition EURL), Outokumpu Oyj (together with its wholly-owned subsidiary Outokumpu Copper Products Oy) and Wieland Werke AG (together with its subsidiaries Austria Buntmetall AG and Buntmetall Amstetten Ges.m.b.H.), had breached European Community competition rules by colluding to fix prices and share markets in the EEA market for copper plumbing tubes. Following an investigation which started in 2001, the Commission established that the infringement lasted from mid-1988 to early 2001.

The relevant product is used primarily for water, oil, gas and heating installations in the construction industry. The main customers for plumbing tubes are distributors, wholesalers and retailers that sell the plumbing tubes to installers and other end consumers. The aggregated market value of plain (EUR 970.1 million) and plastic-coated (EUR 180.9 million) copper plumbing tubes amounts to EUR 1 151 million (EEA in 2000).

The total amount of fines imposed on the undertakings in this case was some EUR 222.3 million. With the exception of HME Nederland BV, all the addressees of the decision cooperated with the Commission in its investigation under the 1996 leniency notice. The Commission granted immunity from fines to the Mueller group, a 50% reduction of the fine to Outokumpu, 35% to the KME group and the Wieland group, 15% to Halcor and 10% to the IMI group and the Boliden group for their cooperation. The highest fine was imposed on the companies of the KME group, totalling EUR 67.08 million. The Wieland group received a fine of EUR 27.8411 million, the IMI group EUR 44.98 million, Outokumpu EUR 36.14 million, Boliden EUR 32.6 million, Halcor EUR 9.16 million and HME EUR 4.49 million.

See below for summaries of the individual decisions.
Notice on immunity from fines and reduction of fines in cartel cases (OJ C 45, 19.2.2002).
The application for leniency must have reached the Commission after 19 February 2002 for the new notice to apply.
See above point 1.
Article 21 of the Regulation.
Article 20 of the Regulation.
Article 19 of the Regulation.
Case C-7/04 P (R). For more details, see below under court cases.
Joined Cases T-125/03 R and T-253/03 R Akzo Nobel Chemicals Ltd and Akcros. See also 2003 Competition Report, point 33.
The main case on this question was pending before the Court at the end of the year.
COMP/38.069.
Outokumpu and KME were rewarded by a mitigating factor for their cooperation outside the 1996 leniency notice. Outokumpu was the first undertaking to disclose the whole duration of the cartel extending over more than 12 years, KME the first to disclose decisive evidence with respect to cooperation concerning plastic-coated copper plumbing tubes. On the other hand, Outokumpu was penalised by an aggravating factor for a repeat infringement, since it had been an addressee of another Commission decision condemning a cartel in the stainless steel sector in 1990, and received an increase for deterrence.

Sodium gluconate\textsuperscript{74}

52. On 29 September, the Commission fined four companies of the Jungbunzlauer Group EUR 19.04 million for their part in fixing the price and sharing the market for sodium gluconate, a chemical mainly used to clean metal and glass.

53. The decision supplements a first decision adopted in 2001\textsuperscript{75} which established that six undertakings, including one company of the Jungbunzlauer Group, operated a secret cartel from 1987 until 1995. As to the company of the Jungbunzlauer Group, the decision adopted in 2001 was withdrawn in 2002 on account of a factual mistake in the grounds of the decision regarding its liability for the infringement.

54. The parties to the sodium gluconate cartel accounted for almost the whole of worldwide production. The infringement was very serious and Jungbunzlauer infringed the Community competition rules for seven years. In defining the amount of the fine, the Commission took into account the limited size of the sodium gluconate market. Moreover, Jungbunzlauer received a 20\% reduction in its fine because it cooperated with the Commission under the 1996 leniency notice.

French beer\textsuperscript{76}

55. On 29 September, the Commission adopted a prohibition decision with fines on the basis of Article 81(1) EC against two brewery groups, Brasseries Kronenbourg and its then parent company, Groupe Danone, on the one hand and Heineken France (formerly Soebera) and its parent company Heineken NV on the other, for entering into an “armistice” agreement with the aim of balancing the away-from-home\textsuperscript{77} sector in France between the two groups and putting an end to an acquisition war regarding drinks wholesalers between the two groups. The agreement was, however, never implemented.

56. Overall, the infringement was considered to be serious. The Commission imposed a fine of EUR 1 million on Heineken France and Heineken NV. A fine of EUR 1.5 million was imposed on Groupe Danone and Brasseries Kronenbourg, the aggravating circumstance of a repeat infringement having been taken into account in determining this fine.

\textsuperscript{74} COMP/36.756.

\textsuperscript{75} See 2001 Competition Report, point 48.

\textsuperscript{76} COMP/37.750 - Brasseries Kronenbourg, Brasseries Heineken.

\textsuperscript{77} i.e. hotels, restaurants and cafes.
57. On 20 October, the Commission imposed fines totalling EUR 20 million on four Spanish raw tobacco processors (Cetarsa, Agroexpansión, World Wide Tobacco España and Taes) as well as on an Italian processor (Deltafina) for entering into an anticompetitive agreement aimed at fixing the maximum average price they would pay to raw tobacco producers in Spain as well as the quantities of raw tobacco they would buy. The cartel lasted from 1996 to 2001. As of 1998, the processors put in place a sophisticated enforcement and monitoring system. As of 1999, they also agreed between themselves the price ranges for raw tobacco they would then negotiate with the producer representatives for inclusion in the standard cultivation contracts, which provide a framework for the establishment of the final price of raw tobacco at the moment of delivery. The parent companies of Agroexpansión and WWTE were considered jointly and severally liable for their subsidiaries’ behaviour.

58. In the same decision, the Commission also prohibited a cartel involving the associations representing the raw tobacco producers (ASAJA, UPA, COAG and CCAE). The Commission found that they colluded during the same period on the price ranges and minimum prices of raw tobacco they would then collectively negotiate with the processors when discussing the standard cultivation contracts and imposed on them a symbolic fine of EUR 1 000 each to take account of the role played by the national regulatory framework on their behaviour. This circumstance was also taken into account as a mitigating circumstance in determining the processors’ fines.

59. The Commission found in the Decision it adopted on 26 October that three undertakings and their respective subsidiaries, namely William Prym GmbH & Co. KG and Prym Consumer GmbH & Co. KG, Coats Holdings Ltd and J & P Coats Ltd, and Entaco Ltd and Entaco Group Ltd, had entered into a series of written, formally bilateral, agreements between 10 September 1994 and 31 December 1999, amounting in practice to a tripartite agreement under which those undertakings shared or contributed to sharing product markets (for hard haberdashery products) and geographic markets (for needles). In addition, the undertakings participated in bilateral or trilateral meetings between 10 May 1993 and 8 November 2001.

60. The Commission based its decision in particular on the existence of inter-conditional clauses contained in the above-mentioned series of agreements. These clauses were renewed over time.

61. The Commission identified three relevant product markets: (i) the European market for hand sewing and craft needles (including special needles), in which the product and geographic market sharing took place, (ii) the European market in “other sewing and knitting products including pins, knitting pins/knitting needles” and (iii) the

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78 COMP/38.238.
European market for other hard haberdashery products including zips and other fasteners, in both of which the product market sharing only took place from 10 September 1994 to 13 March 1997.

62. The infringement was very serious by nature given that it concerned product and geographic market sharing between different markets. The product market sharing agreements intervened at different market levels, i.e. manufacturing and distribution (at both the wholesale and retail levels) as Coats was mainly a distributor of needles but competed at the retail level with Prym and Entaco with its retailer’s needle brand “Milward”.

63. Under the 1996 leniency notice, the Commission granted Entaco full exemption from the fine that would otherwise have been imposed for having informed the Commission of the existence of the market sharing agreements and providing decisive evidence without which they might not have been established. Coats and Prym, jointly and severally liable with their respective subsidiaries, each received a fine of EUR 30 million.

Choline chloride\(^{80}\)

64. On 9 December, the Commission adopted a decision finding against Akzo Nobel NV, Akzo Nobel Nederland BV, Akzo Nobel Chemicals International BV, Akzo Nobel Chemicals BV and Akzo Nobel Functional Chemicals BV, jointly and severally, Chinook Group Limited Partnership and Chinook Group Limited, jointly and severally, BASF AG, Bioproducts Incorporated, DuCoa LP and UCB SA.

65. These undertakings infringed the European competition rules by participating in a cartel in the choline chloride industry. As far as the EEA is concerned, the choline chloride cartel operated at two different, but closely related levels, the global level and the European level. At the global level, all producers subject to this proceeding participated in anticompetitive activities concerning the EEA between June 1992 and April 1994. These activities included the setting and raising of worldwide prices, the allocation of worldwide markets, the control of distributors and converters and the exchange of commercially sensitive information.

66. The North American producers did not participate in a series of further anticompetitive meetings held strictly among the European producers in order to coordinate their behaviour on the European market. These meetings took place in the period between March 1994 and October 1998. Activities included the setting and raising of prices (both for the EEA as a whole, for particular national markets and for individual customers), the allocation of individual customers among the participating undertakings, the allocation of market shares for each undertaking on the EEA market as a whole, the control of distributors and converters and the exchange of commercially sensitive information.

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\(^{80}\) COMP/37,533.
The size of the worldwide market for choline chloride, mainly used in the animal feed industry, was estimated at EUR 183.7 million in 1997, the last full year of the infringement, the EEA accounting for EUR 52.6 million. During the period under investigation, the producers involved in the infringement controlled more than 80% of the world market. The European producers concerned controlled close to 80% of the EEA area.

The North American producers ended their participation in the infringement at the end of the global meeting which took place between 14 and 20 April 1994. The first action taken by the Commission to investigate the infringement was on 26 May 1999. As this took place more than five years after the North American producers had ended their participation in the infringement, no fines were imposed on the North American producers, Bioproducts, Chinook and DuCoa.


3. OTHER AGREEMENTS AND CONCERTED PRACTICES

3.1 Commission decisions

Air France/Alitalia

On 7 April, the Commission approved the alliance between Air France and Alitalia, subject to substantive undertakings from the parties. The conditions imposed in the decision aim to reduce entry barriers and offer new entrants a real chance to establish themselves as credible competitors. The Commission identified seven overlap routes where the combination of the forces of Air France and Alitalia would eliminate or significantly reduce competition. These are Paris-Milan, Paris-Rome, Paris-Venice, Paris-Florence, Paris-Bologna, Paris-Naples and Milan-Lyon, where, prior to the alliance, Air France and Alitalia were the two main competitors. After the companies agreed in particular to surrender a sufficient number of take-off and landing slots at airports and to grant various other remedies to restore effective competition on these routes, the Commission was in a position to clear this transaction.

Topps

On 26 May, the Commission adopted a decision imposing a fine of EUR 1.59 million on The Topps Company Inc and its European subsidiaries, Topps Europe Ltd, Topps International Ltd, Topps UK Ltd and Topps Italia SRL (“Topps”) for

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81 COMP/38.284.
82 This decision has been challenged before the Court of First Instance by a third party (Case T-300/04).
83 COMP/37.980 - Souris Bleue – Topps.
in infringing Article 81(1) of the Treaty. The Topps group produces collectible products such as stickers or trading cards featuring soccer players or cartoon characters.

72. The Commission found that Topps entered into a series of agreements and concerted practices with several of its intermediaries in the United Kingdom, Italy, Finland, Germany, France and Spain with the object of restricting parallel imports of Pokémon collectibles. Pokémon is the name for a whole range of characters originally developed for the Nintendo ‘Game Boy’ videogame but also used, under a licence, by Topps to illustrate collectible products like stickers or trading cards. In 2000, there was a huge demand for such Pokémon collectibles while prices between Member States differed significantly. Families in high-price countries like Finland had to pay more than twice as much for the same Pokémon stickers as families in Portugal.

73. Such restrictions on parallel trade have been unequivocally condemned by the Commission and the Community Courts many times in the past. They constitute very serious violations of Article 81(1) EC jeopardising a fundamental principle of the internal market. Through the measures described above, Topps prevented distributors and ultimately consumers from benefiting from the significant price differences existing between Member States.

74. The decision was addressed to all four European Topps subsidiaries which participated in the anticompetitive agreements and concerted practices and to the ultimate US parent company in view of its decisive influence on the conduct of its wholly owned subsidiaries. The decision was not addressed to Topps’s intermediaries because their responsibility for the infringement was less significant. In fixing the amount of the fine, the Commission considered the infringement committed by Topps, in spite of its very serious nature, as serious mainly because the evidence in the Commission file did not show that that the restrictions on parallel imports were applied systematically to all intermediaries.
Box 4: Rights management markets in the EU

The development of a strong presence of the diversity of European music and European culture in the new Europe-wide online markets is of vital concern in the overall context of the Lisbon objectives. This means that a new dynamism is needed in marketing European music rights to the users of the rights who can expand European presence in those media while maintaining suitable conditions for the development of local content. As regards the application of competition rules to rights management services, anticompetitive restrictions in the sector, as well as competitive incentives for the efficient provision of such services, require special attention.

The Commission has given some guidance in this area in its IFPI decision 85. Some of the principles reflected in that decision have been proven in the meantime in implementation and are now also applied quite generally when EU-wide licences for webcasting of music are issued by the members of IFPI concerning the rights they hold.

As regards the so-called “Santiago agreement” 86 concerning the management of copyright for music via the Internet, the Commission has issued a formal statement of objections to the current agreement, pointing the collective rights management companies involved to the competition concerns raised by this agreement, notably market partitioning due to an economic residence restriction.

A communication issued in April sets out the future governance principles the Commission proposes for the sector. 88 From a competition perspective, the following issues are particularly important:

– The creation of new EU-wide one-stop-shop arrangements that are required for gaining efficiencies for EU-wide and global rights licensing in the new music markets in the European Union should not be hampered by territorial restrictions.

– Under competition law, the Commission will look favourably at one–stop-shop agreements and the related reciprocal agreements between collective rights management systems.

– However, the Commission cannot allow past restrictions to be perpetuated where they are no longer indispensable.

– Rights owners must be able to determine themselves the proper mix between individual rights management and collective management of their music rights.

– Arrangements must not bundle unnecessarily rights management offerings. Individual administration of rights must be allowed to develop. Bearing the viability of collective management systems in mind, rights owners should have the option of using new digital rights management techniques to manage rights individually.

On 24 June, the Commission condemned the recommended minimum fee scale operated by the Belgian Architects’ Association.

The minimum fee scale was adopted by the National Council of the Belgian Architects’ Association in 1967, and was amended several times thereafter. Its most recent amendment, in June 2002, described it as a “guideline” (indicatif/leidraad). The scale laid down the minimum fees due to an architect for services performed in independent practice in Belgium.

The Commission considered that the decision adopting the fee scale was an independent act of a prescriptive character for which the Association, acting as an association of undertakings, was wholly responsible. Furthermore, the Commission concluded that the Association intended to coordinate its members’ behaviour in the market through its decisions laying down and amending the scale. The Commission also found that the scale was applied at least to some extent.

The evidence indicating that the scale sought to restrict competition included the intentionally rule-making tone of the title and of the recitals in the preamble, the fact that for 18 years the Association drew up and circulated a standard contract in which the only option for determining fees was a reference to the scale, and the fact that the Association went far beyond merely circulating information to its members, to clients and to the courts.

Although a decision fixing or recommending minimum fees is by nature a very serious infringement, the Commission classified the infringement overall as serious in the light of the circumstances that the fee scale had probably not been applied universally by all architects and that the geographic scope of the decision was limited to one Member State.

In imposing a fine of EUR 100 000, the Commission regarded as a mitigating circumstance the fact that reasonable doubt may have existed on the part of the Association as to whether its fee scale did indeed constitute an infringement before the Commission adopted its CNSD decision in 1993\(^9\). Furthermore, the Commission’s policy, set out in its Report of 9 February 2004, is to encourage the national regulatory authorities and professional bodies to revise and amend their restrictive rules, and give them the opportunity to do so. The amount of the fine also

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86 COMP/38.126 – Santiago.
87 Press release IP/04/586.
89 COMP/38.549.
reflects a gradual approach\(^{91}\) by the Commission in fining anticompetitive practices in the professions.


gaz de France\(^{92}\)

81. On 26 October, the Commission adopted two decisions concerning two contracts concluded by Gaz de France (GDF) in 1997, one with the Italian gas company ENI, the other with the Italian electricity company ENEL. The subject of the contract between GDF and ENI was the transport by GDF over French territory to the Swiss border of natural gas acquired by ENI in northern Europe. The contract contained a clause requiring ENI to market the gas exclusively “downstream of the redelivery point”, that is after leaving France. The GDF-ENEL contract concerned the swap of liquefied natural gas acquired by ENEL in Nigeria and contained a clause requiring ENEL to use the gas in Italy.

82. The Commission concluded that the two clauses restricted the territory in which the parties could use the gas and were designed to partition national markets by preventing consumers of natural gas established in France from obtaining supplies from ENEL and ENI. They therefore constituted a restriction of competition within the meaning of Article 81 EC and a considerable obstacle to the creation of a truly competitive and Europe-wide gas market.

83. These two decisions are all the more important in view of the liberalisation process that has started in the European gas sector in recent years, the benefits of which are only slowly materialising. Territorial restrictions are one of the key elements in a set of practices which perpetuate the partitioning of the European market and contribute to a lack of fluidity in the sector. Taking account of the specificities of the European gas sector and the circumstances of the case, the Commission decided, nevertheless, not to impose fines.

3.2 Other case developments

premium content for media markets

84. The Commission continues to give high priority to competition over premium content as a driver for innovation in the media markets with a view to contributing to the knowledge-based society. One important set of cases concerns rights for sport events, where the Commission has taken a balanced line: fighting the concentrative and restrictive effects of a marketing policy relying on broad and exclusive deals by a single seller on the one hand while taking into account possible efficiencies associated with the aggregation of content on the other.

85. In the Bundesliga case, which concerns joint marketing of the media exploitation rights in respect of matches in the German first and second national football divisions

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\(^{91}\) In its first decision concerning tariffs of professional bodies, in 1993, the Commission condemned fixed tariffs without imposing a fine. In 1996, the Commission took a decision concerning the recommended tariffs of the association of Dutch forwarding agents, imposing a symbolic fine of EUR 1 000.

\(^{92}\) COMP/38.662 - GDF-ENEL, GDF-ENI.
for men, the Commission considered that the exclusive selling of the commercial broadcasting rights by the league association could restrict competition between the clubs and companies in the first and second divisions.

86. Following notification of a preliminary assessment earlier in 2004, the league association offered commitments which were market-tested\(^93\) in September\(^94\).

87. The Commission also further pursued its procedure with regard to the *English Premier League* (FAPL)\(^95\) by publishing a communication on the commitments offered by FAPL\(^96\). The ongoing proceedings concerning the *Eurovision system* continued with a fact-finding investigation concerning several aspects of the joint purchasing and sharing of sport programmes, including the rights for the 2010/2012 Olympic Games, by public broadcasters – members of EBU. EBU’s proposals and suggestions to ensure that the Eurovision system is compatible with the EU competition rules will need to follow the Courts’ guidance in the case\(^97\).

88. On 26 October, the Commission announced the closure of its investigation\(^98\) into the so-called Most Favoured Nation (MFN\(^99\)) clauses found in the contracts of Hollywood film studios with pay television companies, except with regard to two studios.

89. MFN clauses featured in most of the “Output deals” between the Hollywood film studios and the European pay-TV broadcasters. Output deals are common in the Hollywood film industry, where the studios typically agree to sell to broadcasters their entire film production for a given period of years. The MFN clauses gave the studios the right to enjoy the most favourable terms agreed between a pay-TV company and any one of them.

90. According to the Commission’s preliminary assessment, the cumulative effect of MFN clauses was an alignment of the prices paid to the studios as any increase agreed with one studio triggered a right to a parallel price increase for the other studios. The Commission considers that such a way of setting prices is at odds with the basic principle of price competition.

91. Without admitting a violation of competition law, the studios in regard of which investigations were closed decided to waive the MFN clauses in their existing agreements. Insofar as they do not deviate from this new behaviour, further action is not envisaged against them. The investigation remains open in respect of NPB Universal and Paramount Pictures Corp. Inc., which have not followed suit.

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\(^{94}\) A decision under Article 9 of Regulation 1/2003 was adopted in January 2005.


\(^{97}\) See below under court cases.


\(^{99}\) The term actually refers to the most favoured supplier principle used in the agreements.
3.3 Sector inquiries

"Sector inquiry into the sale of sports rights for use over 3G networks"\footnote{Press release IP/04/134, 30.1.2004.}

92. Third generation mobile technology (3G) is now being rapidly deployed around the world, with customer growth at a rate faster than that experienced by GSM at the same point in its development.

93. The Commission stepped up its efforts to prevent anticompetitive behaviour that could hamper the development of this key emerging market.

94. The Commission has identified several types of behaviour by established players that could restrict access to key sports content by new media operators, such as refusals to supply, the bundling of TV rights with new media/UMTS rights, embargoes favouring TV coverage over new types of coverage or the purchase of new media/UMTS rights on an exclusive basis by established players.

95. To fully appraise the specifics of the market, and tackle the existing and potential problems relating to content access for 3G, the Commission initiated on 30 January a sector inquiry into the sale of sports rights for use over 3G networks, jointly with the EFTA Surveillance Authority.

96. The first, exploratory, phase was completed in August. It allowed for information gathering on the status of 3G deployment, including the sale of 3G rights to mobile operators, and provided an overview of the type of restrictions imposed on 3G sports rights. Information requests were addressed to a number of, mostly large, television channels, mobile operators and content owners.

97. The second phase launched in September extends the inquiry to a wider range of players in the market, but also includes follow-up questionnaires to players addressed in the first phase. This phase should provide detailed information on the contracts affecting 3G sports rights provision.
Box 5: Motor vehicle distribution and repair

During 2004, the Commission continued to monitor the implementation of Regulation 1400/2002 and to provide assistance to interested parties as to its interpretation. Over this period, it has been possible to observe some emerging trends. In particular, car prices have on average been rising more slowly than prices for other goods and, at the same time, have shown clear signs of increased convergence across the EU. Consolidation in the dealer networks has continued, but many dealers whose contracts were terminated as a result of network reorganisations have been able to take advantage of the block exemption and remain on the market as authorised repairers. There have also been new investments in improved distribution and repair facilities. It is clear, however, that such developments can provide no more than a preliminary indication as regards the effects of the new block exemption, the market effects of which can only be fully assessed over the longer term.

In line with its duty to monitor the operation of Regulation 1400/2002 on a regular basis, the Commission carried out an in-depth monitoring exercise of the systems put in place by car and truck manufacturers to allow independent operators to access repair-related technical information. Moreover, it continued to monitor car price developments across the EU, issuing two reports in February and July. The latter of these covered the first six months following the entry into force of the new Regulation, and for the first time contains data covering all 25 Member States (see below for details).

Furthermore, over the period covered by this report, the Commission refocused its enforcement activities on certain cases that raise important competition issues. These include problems concerning authorised and independent repairers’ access to OEM’s and competing spare parts, the possible existence of artificial barriers to entry to the authorised repair networks, as well as alleged restrictions on dealers’ ability to sell motor vehicles of competing makes. While these issues are still being examined within the framework of ongoing investigations, the Commission stated its position in a case concerning Porsche’s distribution and servicing agreements, in which it clarified the application of the *de minimis* rule in the context of the implementation of Regulation 1400/2002 (see below).

The entry into force of Regulation 1/2003 and the resulting empowerment of Member State courts and competition authorities has also provided an opportunity for the competition authorities to make full use of respective knowledge in the motor vehicle sector and to exploit cooperation mechanisms set up within the ambit of the ECN. In this regard, on 19 October, the Commission hosted a workshop at which representatives of national competition authorities met to exchange experiences and to discuss the implementation of Regulation 1400/2002.

Access to technical information

In October, the Commission published a study on access to technical information by independent operators in the car sector. The study, which IKA (University of Aachen) carried out at the Commission’s request, looked at how manufacturers have complied with the Regulation in terms of providing technical information to garages, tool manufacturers and publishers. All these types of operator have an important role to play in ensuring healthy competition in car repair, particularly as advances in technology are making even the most basic repairs increasingly complex. The study shows that technical information for almost all models launched within the last ten years is available, either via the Internet, on CD/DVD...
and/or on paper. The quality of information provision is, however, often quite unsatisfactory as the information is difficult to find or may only be available in large, costly packages. The content is also often insufficient, with some manufacturers holding back a great deal of information that is vital, for example, to diagnostic-tool manufacturers. Lastly, publishers of technical information, whose products are greatly valued by independent repairers, have trouble obtaining the information they need.

Positive trends as regards car price differentials

In March and July, the Commission published reports on car price differentials within the European Union. From a competition perspective, the last two issues, based on November and May data respectively, revealed a rather satisfactory trend towards price convergence within the euro area. While July 2003’s issue of the Report showed that for one third of models, price differentials exceeded 20% across the euro area, the proportion fell to nearly one quarter of the models in the latest issue. Moreover, it is worth noting that this convergence is taking place against a general background of relative price stability in the EU. Compared with July 2003, the price index for cars in the EU in July 2004 has increased by only 0.6% compared to 2.3% for headline inflation. For the first time, last July’s issue of the Car Price Report includes prices in the ten new Member States, which do not appear to be very different from those in the EU-15: some models are cheaper in some new Member States, but others are not. Compared with July 2003, the price index for cars in July 2004 significantly increased in Poland (+8.4%) and Latvia (+4.1%) but decreased in Estonia (-6.8%), Lithuania (-4.9%) and the Czech Republic (-3.3%).

Porsche distribution and after sales service agreements

On 30 April, the Commission closed proceedings in respect of the new standard importer, dealer and authorised repairer agreements that Porsche had notified. The carmaker agreed to modify these agreements, which are used across the EU and EEA, so as to ensure that they no longer contain any of the “hardcore restrictions” set out in Article 4 of Regulation 1400/2002. In particular, the amended distribution agreements no longer restrict the ability of Porsche dealers to subcontract the provision of after-sales services to any authorised Porsche service centre, while Porsche service centres are no longer obliged to sell new cars.

The Commission decided not to pursue its investigation further as regards other provisions of Porsche’s distribution agreements, since it appeared that Porsche had a share of less than 5% on all national markets in the EU for the sale of high-end sports cars and sport utility vehicles. It is to be recalled that the de minimis notice explains that a supplier that operates a distribution system in a market where almost all operators use the same type of restrictive agreements does not significantly contribute to the cumulative effect if its market share does not exceed 5% and if the agreements do not contain hardcore restrictions.

As regards after-sales agreements, Porsche has accepted that it may not come within the scope of the block exemption if it uses quantitative selective distribution for its network of authorised Porsche service centres, since its network’s share of the market for the repair of Porsche cars is above 30%, and the de minimis notice clearly does not apply. The use of purely qualitative selection opens the network to qualified operators who wish to run an authorised Porsche service centre, and to that end Porsche agreed to make the relevant qualitative criteria available to any interested repairer.
4. STATE MEASURES (PUBLIC UNDERTAKINGS/UNDERTAKINGS WITH EXCLUSIVE AND SPECIAL RIGHTS)

4.1 Decisions

Restrictions on mail preparation\textsuperscript{101}

98. On 20 October, the Commission adopted a decision based on Article 86 regarding certain provisions of Germany’s postal regulatory framework which bar commercial mail preparation firms from earning discounts for handing over pre-sorted letters at Deutsche Post AG’s (DPAG) sorting centres. Based on a complaint filed by BdKEP, a German association of postal service providers, the Commission found that the contested provisions of the German Postal Law induce DPAG to abuse its dominant position, thereby infringing Article 82, in two ways. First, the provisions prompt DPAG to extend its market power from the (reserved) market for upstream basic postal services into the (liberalised) market for mail preparation services. Secondly, they induce DPAG to discriminate between, on the one hand, bulk mailers who have access to the downstream sorting centres and the related discounts and, on the other, commercial providers of such services who do not have access to these discounts. This places a major competitive disadvantage on these firms and prevents the German mail preparation market from developing its potential.

99. Mail preparation involves the making up of postal items (printing, enveloping, labelling, franking), collecting, placing them in mailbags or containers complying with certain standards, bundling and sorting them to a greater or lesser degree by destination and delivering them to access points operated by the universal service provider. In this market, the possibility of procuring downstream access discounts, i.e. savings on postage, for clients is a key selling argument.

100. DPAG has the exclusive right to clear, sort, transport and deliver letters weighing less than 100 grams (the so-called reserved area). The provision of mail preparation services, including the pre-sorting of the mail and its transport from the sender’s premises to a chosen access point to the incumbent’s network, does not fall within the ambit of the reserved area of the Postal Directive.\textsuperscript{102}

101. The Commission found that the German Government failed to demonstrate that barring commercial providers from the discounts mentioned above was justified on the basis of Article 86(2) and recalled that, as established in its 1998 notice on the application of the competition rules to the postal sector\textsuperscript{103}, commercial mail

\textsuperscript{101} COMP/38.745, not yet published in the Official Journal.
\textsuperscript{103} Notice from the Commission on the application of the competition rules to the postal sector and on the assessment of certain state measures relating to postal services (OJ C 39, 6.2.1998).
preparation firms should be able to choose freely from amongst available access points to the public postal network on a non-discriminatory basis.\footnote{Both Germany and DPAG have appealed against this decision: Cases T-490/04 and T-493/04.}

4.2 Rejections of complaints

\textit{UFEX}\footnote{COMP/38.663 - UFEX.}

102. On 19 November, the Commission adopted a decision rejecting the complaint filed by l’Union Française de l’Express and three of its members, DHL, FedEx and Crie against the French Republic, La Poste and Chronopost, owing to the lack of Community interest in further pursuing the investigation. The rejection concerns the complainants’ allegations that La Poste had abusively sought to extend its dominance from the reserved market in ordinary postal services to the market in express mail services in France, in which its affiliate Chronopost is active, thereby infringing Articles 86 and 82. The alleged abuse involved cross-subsidisation at the time Chronopost was launched (1986) and thereafter, consisting in providing commercial and logistic assistance to Chronopost at unduly low costs, thereby enabling the latter to apply abusively low prices aimed at ousting competitors. The re-examination of the complaint was made following the complainants’ request in September 2000 after a series of judgments by the Court of Justice and the Court of First Instance had annulled a first rejection decision taken in December 1994. In relation to the lack of Community interest in further investigating the case, the new rejection decision notes, among other grounds, that the practices complained of - which have not in any event been duly established - were brought to an end more than ten years ago and that, since then, no lasting anticompetitive effects attributable to them had been apparent in the relevant market.
C – ECN: OVERVIEW OF COOPERATION

1. GENERAL OVERVIEW

The setting-up of the ECN

103. One of the key objectives of Regulation 1/2003 and of the Modernisation Package was greater involvement of national public enforcers in the application of EU competition rules. In order to ensure consistent application of Articles 81 and 82 in a system of parallel competences, mechanisms for cooperation between the authorities were created. Articles 11 and 12 of Regulation No 1/2003 and the network notice are the main pillars underpinning the functioning of the system and cooperation within the European Competition Network (ECN).

104. The ECN is composed of the national competition authorities (NCAs) designated pursuant to Article 35 of Regulation 1/2003 and the Commission. In 2003 already, cooperation started within the ECN: working groups had been set up to discuss certain key aspects of the network notice and general issues linked to the transition to the new enforcement system had been examined in that forum. In addition, 14 subgroups were set up for the purpose of discussing sector-specific issues. 2004 was the first year in which the ECN was fully operational and was involved in individual cases of applying the EU competition rules. Sophisticated IT support systems were set up before 1 May in order to provide all members with the possibility of following cases dealt with within the network and of exchanging information.

Case allocation

105. In order to allow efficient allocation of cases, authorities within the network inform each other before or just after the first formal investigative measure in all cases involving the application of Article 81 or 82. In 2004, a total of 298 cases were submitted to the network: 99 by the Commission and 199 by the NCAs.

106. As expected, re-allocation of cases notified to the network was extremely rare (less than 1% of the cases). Cases remain normally with the authority which started to investigate them.

107. In some instances, bilateral discussions took place between the Commission and an NCA and resulted in the latter agreeing to deal with a complaint originally lodged with the Commission. In one instance, re-allocation occurred at a later stage when the Commission opened proceedings in order to accept commitments for the whole of the Community although some NCAs were acting on the case.

106 See above section I.A.I.
Mutual assistance in fact-finding

108. Regulation 1/2003 provides the network members with tools allowing them to assist each other by carrying out investigative measures on behalf of another authority (Article 22) and, more generally, by exchanging information (Article 12). From the very first days of application of Regulation 1/2003, Article 22 was used by several authorities: inspections were carried out at the request of several NCAs and the information gathered was transmitted pursuant to Article 12. In total, Article 22 was used 11 times in 8 months.

109. Furthermore, network members make regular use of the possibility of exchanging information under Article 12. In at least two instances, information was exchanged in leniency cases with the consent of the leniency applicant.

Consistent application of EU law

110. According to Article 11(4) of Regulation 1/2003, NCAs have to inform the Commission at the latest 30 days before adopting negative decisions. In the period after 1 May, the Commission was informed of 33 competition cases where an NCA envisaged adopting a decision pursuant to Article 81 and/or Article 82. Of these cases 18 related to Article 81, 13 to Article 82 and 2 to both articles. In some of these cases, DG Competition provided the NCA with comments. In none of these cases did the Commission open proceedings with the effect of relieving an NCA of its competence under Article 11(6) of Regulation No 1/2003.

General convergence of national laws

111. Finally, 2004 saw the substantial overhaul of a number of national laws. Almost all of these changes resulted in a higher degree of convergence between national systems and Regulation 1/2003. In all, 20 Member States abolished or are planning to abolish their national notification system, and 17 have fully or partially convergent leniency programmes. These developments contribute greatly to simplification of compliance for business and to better functioning of the system.

2. APPLICATION OF EU COMPETITION RULES BY NATIONAL COURTS IN THE EU: REPORT ON THE IMPLEMENTATION OF ARTICLE 15 OF REGULATION 1/2003

Requests for an opinion

112. Article 15(1) of Regulation 1/2003 gives national judges the option of asking the Commission for information in its possession or for an opinion on questions concerning application of the EU competition rules. In 2004 the Commission received 9 requests for an opinion; 6 requests came from Spanish courts and all dealt with a similar type of distribution agreement in the energy sector, which mainly raised questions as to the distinction between agent and retailer within the meaning of EU competition law and contained both clauses relating to the setting of a
maximum fuel retail price and non-compete clauses for fuel that might result in foreclosure of the market. The Commission’s replies to these 6 requests were largely based on its preliminary assessment in the Repsol CPP case\textsuperscript{108}.

113. Belgian competition law requires the Belgian courts to make a reference to the Brussels Court of Appeal for a preliminary ruling whenever they have doubts as to the application of the competition rules. In early December, the Brussels Court of Appeal forwarded three such references to the Commission as requests for an opinion. The requests raised issues concerning the simultaneous application of Articles 81 and 82 EC, the scope of Article 82(c) EC, Commission block exemption Regulation 2790/1999 (on vertical agreements) and the accompanying guidelines and the \textit{de minimis} notice.

\textit{A public database for judgments of national courts}

114. Article 15(2) of Regulation 1/2003 requires the EU Member States to forward to the Commission a copy of any written judgment issued by national courts deciding on the application of Article 81 or 82 EC. The Commission received 36 judgments rendered since May 2004, which were put on the website of DG Competition to the extent that the transmitting authority did not class them as confidential\textsuperscript{109}. The overwhelming majority of those judgments (29) resulted from private enforcement action, in most cases aimed at the annulment of an agreement on the ground of its incompatibility with the EU competition rules.

\textit{The submission of observations by the Commission and by national competition authorities}

115. Article 15(3) of Regulation 1/2003 allows the Commission and NCAs to submit observations to national courts on issues relating to the application of EU competition rules. The Commission has so far not used this possibility, but the Belgian, French and German competition authorities have. It should be noted, though, that already before 1 May 2004 these competition authorities had the power to submit observations to their national courts under their national law.

\textit{Financing the training of national judges in EU competition law}

116. Since 2002, the Commission cofinances projects aimed at training national judges in EU competition law. In 2004, the Commission cofinanced 4 training projects\textsuperscript{110} and launched a call for proposals which resulted in the conclusion of another 10

\textsuperscript{108} See point 6 of the Article 27(4) notice (OJ C 258, 20.10.2004).
\textsuperscript{109} The non-confidential versions of the national judgments can be found at: http://europa.eu.int/comm/competition/antitrust/national_courts/index_en.html
\textsuperscript{110} Further details on the cofinanced projects can be found on DG Competition’s website: http://europa.eu.int/comm/dgs/competition/proposals2/table_of_projects_co_financed_out_of_3rd_call.pdf
contracts, committing more than EUR 400 000, for the training of over 700 national judges from all 25 EU Member States in 2005\textsuperscript{111}.

3. **ENERGY**

117. In 2004, the Commission established an ECN Energy Subgroup. Its aim is to provide a forum to discuss key issues and develop a common approach to the application of EU competition rules in the energy markets and to encourage monitoring of competition in the EU energy markets. The intention is for the Energy Subgroup to have both technical meetings and high level meetings to which regulators may be invited.

118. In September a High Level Energy Day was organised for the heads of national competition authorities. National energy regulators were also invited. The meeting focused on two issues: the role of competition authorities and regulators in tackling anticompetitive behaviour; and how to tackle remaining market entry barriers.

119. The first technical meeting of the Energy Subgroup took place in December. In addition to discussing the Subgroup’s future work programme, it focused on two topics: long-term contracts in the downstream gas sector and sector inquiries in the energy sector. It was agreed that the Energy Subgroup should focus on competition in the gas and electricity sectors, without totally excluding discussion of other energy markets (e.g. petrol). A paper prepared by DG Competition on long-term contracts in the downstream gas sector was discussed. A paper on sector inquiries was circulated by DG Competition and there was an interesting exchange of experience with the national competition authorities on sector inquiries in the gas and electricity sectors.

4. **TRANSPORT**

*ECA Air Traffic Working Group*

120. The ECA (European competition authorities) set up an Air Traffic Working Group during the plenary meeting in Athens in April 2002 in order to improve cooperation between them with regard to their dealings with the airline industry and seek to enhance competition in this sector. The ECA considers that competition between airlines is influenced by some specific features of the airline industry, in particular its network character. On 13 May, the working group published a “report on mergers and alliances in civil aviation\textsuperscript{112},” which provides an overview of the current enforcement practices of the ECA concerning market definition, competition assessment and remedies.

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\textsuperscript{111} The calls for proposals for this training programme can be found on DG Competition’s website. For the 2005 call, see: http://europa.eu.int/comm/dgs/competition/proposals2/20040316_call/call_en.pdf

\textsuperscript{112} The report is available at: http://europa.eu.int/comm/competition/publications/eca/report_air_traffic.pdf
Railways

121. The Railways Subgroup met for a second time on 29 June and discussed outputs from the market survey undertaken jointly by DG Competition and the NCAs into barriers to effective competition in the rail freight transport sector. It was noted that, while extremely comprehensive, the information had been provided by market players on an informal basis and would need to be verified. The Subgroup also discussed a draft paper on best practice in relations between the NCAs and the rail regulatory bodies (the establishment of the latter being a requirement of the first package of railway directives), in preparation for a joint meeting between the two groups in due course.

5. Financial services

122. In the financial services sector, ECN subgroups were active during 2004 in the areas of payment cards, insurance and securities.

123. The ECN Subgroup for Payment Card Networks met for the first time in Brussels on 17 June. The main purpose of the meeting was for the Commission to present to national competition authorities the results of its market studies on credit and debit card payments in Europe. On this basis there was a discussion on specific cases and also on methodological issues and industry developments. This kind of active coordination aims at establishing a common knowledge base and a common understanding of competition issues on card payments. Several representatives of national competition authorities (Denmark, Poland and the UK) presented their current investigations regarding interchange fee agreements of payment card networks active in their countries. The competition authorities of the Netherlands, Finland and Italy presented their cases regarding domestic debit card networks. Several delegates pointed out that the level of interchange in debit card schemes is linked to the level of competition in the acquiring and issuing market. Also, in a number of EU countries local banks are considering leaving an existing domestic payment card network in order to join an international payment card scheme, which will provide them with additional revenues from interchange fees. In Member States where the two international payment card networks Visa and MasterCard have established themselves as the local debit card networks, interchange is prevalent and it is set at a high level. The discussion showed that there is a need for coordinated competition enforcement in this sector throughout Europe.

124. The second meeting of the ECN Subgroup on Insurance took place in Brussels on 27 October. During this second meeting, it became clear that insurance intermediaries and broker commissions are a focal point for market analysis carried out by a number of authorities in the network and a range of possible competition issues arise from these investigations.

125. The securities experts’ network met for the second time in June. Despite the complexity of the subject, numbers of participants have been high and contributions to the debates very active. The aim of the meeting was, first, to establish a mutual understanding amongst all national authorities regarding securities trading, clearing and settlement in EU 25 and, secondly, to have an exchange of views on competition and regulatory activities in the securities sector.
The Commission gathered feedback from national authorities with the aim of improving future meetings and contacts among the competition authorities.
D – SELECTED COURT CASES

Adalat

127. On 6 January\textsuperscript{113}, the Court of Justice (ECJ) delivered its judgment on the two appeals, one of which was brought by the Commission, against the judgment\textsuperscript{114} of the Court of First Instance (CFI) in the *Adalat* case. The CFI had annulled the Commission decision\textsuperscript{115} finding an infringement of Article 81 EC in the form of export bans in the contractual relationship between Bayer and its dealers. The CFI had in this context held that the Commission had not established to the requisite legal standards that the dealers had agreed to Bayer’s commercial policy and that in the absence of an agreement Article 81 was not applicable to such conduct. Confirming that, on the basis of the evidence adduced by the Commission, a concurrence of wills had not been established, the ECJ clarified the notion of agreement under Article 81 EC. It should be noted, however, that the ECJ explicitly makes clear that neither the possible application of other aspects of Article 81 EC, nor Article 82 EC, nor any other possible definitions of the relevant market were issues in those proceedings.

Cement cartel

128. By judgment of 7 January\textsuperscript{116}, the ECJ reduced on appeal the fine imposed on one of the appellants by the Commission\textsuperscript{117} for its involvement in the cement cartel. The ECJ considered that in order to establish the turnover for the purposes of calculating the fine, the turnover of Ciments français SA subsidiaries could not be taken into account, as it took control of the subsidiary in question only after its involvement in the infringement at issue. The ECJ dismissed the remainder of the appeals, largely upholding the judgment of the Court of First Instance\textsuperscript{118}.

Postal services: Asempre

129. By judgment of 11 March\textsuperscript{119}, the ECJ issued a preliminary ruling providing interpretation of Directive 97/67/EC\textsuperscript{120} on the common rules for the development of the internal market of Community postal services and the improvement of quality of

\textsuperscript{113} Joined Cases C-2/01 P Bundesverband der Arzneimittel-Importeure eV and Commission v Bayer and C-3/01 P Commission v Bayer, not yet reported.
\textsuperscript{115} Decision of 10 January 1996 in Case COMP/34.279 Adalat. This case concerned restrictions on parallel imports of pharmaceuticals and is named after the product manufactured by Bayer to which the proceedings related.
\textsuperscript{116} Joined Cases C-204/00 P Aalborg Portland A/S, C-205/00 P Irish Cement Ltd, C-211/00 P Ciments français SA, C-213/00 P Italcementi - Fabbriche Riunite Cemento SpA, C-217/00 P Buzzi Unicem SpA and C-219/00 Cementir - Cementerie del Tirreno SpA, not yet reported.
\textsuperscript{117} Decision of 30 November 1994 in Cases COMP/33.126 and COMP/33.322 - Cement.
\textsuperscript{118} Judgment in Joined Cases T-25/95, T-26/95, T-30/95 to T-32/95, T-34/95 to T-39/95, T-42/95 to T-46/95, T-48/95, T-50/95 to T-65/95, T-68/95 to T-71/95, T-87/95, T-88/95, T-103/95 and T-104/95 Cimenteries CBR and Others [2000] ECR II-491.
\textsuperscript{119} Case C-240/02 Asempre and Others, not yet reported.
\textsuperscript{120} OJ L 15, 21.1.1998.
service. The ECJ clarified that Article 7 of the Directive does not permit Member States to extend the services reserved for the universal service provider by making self-provision\textsuperscript{121} subject to any of the following conditions:

- that the receiver must be the same person as the sender;
- that the services must not be provided to third parties in the course of commercial or business activity of the service provider;
- that the services must not be provided by the mailbag system or other similar methods; and
- that such operations must not disrupt the services reserved to the universal service provider.

Furthermore, it transpires from this ruling that money order services (payments through the public postal network to natural or legal persons) fall outside the scope of Directive 97/67.

Graphite electrodes cartel

In a judgment handed down on 29 April\textsuperscript{122}, the Court of First Instance (CFI) reduced the fines imposed by the Commission\textsuperscript{123} on the participants in the graphite electrodes cartel. The CFI found that the Commission had not determined in a coherent way the categories which it used for the calculation of fines under the Commission guidelines on fines\textsuperscript{124} and the CFI used its full jurisdiction to create a new category and to modify the starting amount of the calculation in respect of some companies. Other reductions related mainly to the question of the degree of cooperation by the companies which the Commission should have acknowledged in the form of reductions in the fine. In the CFI’s view certain evidence provided by the parties was covered by privilege against self-incrimination and should thus have been considered a voluntary contribution by the parties.

The CFI also confirmed, however, that undertakings which in the course of the administrative procedure explicitly admit the substantive truth of the facts which the Commission alleged against them (in the statement of objections) and are granted a reduced fine by the Commission in return are in principle estopped from disputing these facts before the CFI and have to reckon with an increase in the fines by the CFI. Furthermore, the CFI confirmed that the Commission may sanction a cartel which has given rise to concurrent sanctions in non-EU jurisdictions and the

\textsuperscript{121} Self-provision consists (according to Recital 21 of the Directive) in the provision of postal services by the natural or legal person who is the originator of the mail, or collection and routing of these items by a third party acting solely on behalf of that person.

\textsuperscript{122} Joined Cases T-236/01 Tokai Carbon Co. Ltd, T-239/01 SGL Carbon AG, T-244/01 Nippon Carbon Co. Ltd, T-245/01 Showa Denko KK, T-246/01 GrafTech International Ltd, T-251/01 SEC Corp and T-252/01 The Carbide/Graphite Group, Inc., not yet reported.

\textsuperscript{123} Decision of 18 July 2001 in Case COMP/36.490 - Graphite electrodes.

Commission is not obliged to take such sanctions into account in determining the fines it imposes.\(^{125}\)

**Seamless steel tubes cartel**

133. In its judgments of 8 July\(^{126}\), the CFI reduced the fines imposed by the Commission\(^{127}\) on the participants in the seamless steel tubes cartel to take account of the shorter duration of the infringement, finding that the Commission had not established the entire duration on which – amongst other elements - it had based the fines. In this context the CFI held that in the particular circumstances of the case, it was for the Commission to adduce evidence of the exact end of the EU-Japan voluntary restraint agreements which the Commission had taken into account to determine the duration of the infringement. As regards the Japanese companies involved, the CFI also reduced the fines in view of the lesser gravity of their involvement in the cartel, given that they had not participated in one leg of the infringement (concerning supply contracts for Corus). For the remainder, the CFI rejected all applications for annulment of the Commission decision.

**Legal privilege: Akzo & Akros**

134. On 27 September\(^{128}\), the President of the Court of Justice upheld the Commission’s appeal against an interim order of the President of the Court of First Instance which had suspended the operation of a Commission decision refusing claims of legal privilege made by the parties, but had already dismissed the interim measures against the inspection decision which the parties had also sought in these parallel proceedings\(^{129}\).

135. The case concerns documents seized during an inspection ordered by Commission decision\(^{130}\). The issues involved in this ongoing dispute – the main case was still pending at the end of 2004 - are the scope and the beneficiaries of legal privilege. The President of the ECJ annulled the suspension, holding that there was no urgency to keep any of the documents from the Commission.

136. The order of the President of the CFI had indicated that the established case law on legal privilege may need to be reconsidered and had raised a number of questions in

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\(^{125}\) The judgment has been appealed by the Commission (Case C-301/04 P) and several other parties, namely SGL (Case C-308/04 P), Showa Denko (Case 289/04 P) and SEC Corporation (Case C-307/04 P), decided by order of 24/11/2004.

\(^{126}\) Cases T-44/00 Mannesmannröhren-Werke AG, T-48/00 Corus UK Ltd, T-50/00 Dalmine SpA and Joined Cases T-67/00, T-68/00, T-71/00 and T-78/00 JFE Engineering Corp., Nippon Steel Corp., JFE Steel Corp. and Sumitomo Metal Industries Ltd, not yet reported.

\(^{127}\) Decision of 8 December 1999 in Case COMP/35.860 B - Seamless steel tubes.

\(^{128}\) Case C-7/04 P(R) Commission v Akzo Nobel Chemicals and Akros Chemicals, not yet reported.

\(^{129}\) Order of 30 October 2003 in Joined Cases T-125/03 R and T-253/03 R Akzo Nobel Chemicals Ltd and Akros.

\(^{130}\) The parties claimed five documents to be legally privileged. Commission inspectors considered that for two of them no position could be taken on the spot and placed them in a sealed envelope, which was taken back to the Commission. The other three documents were considered not to be covered by legal privilege under established case law and were copied and placed in the file. After the inspection, the Commission formally rejected the parties’ claims by decision.
this respect: whether the scope of legal privilege should be extended to documents in preparation, information gathering and summary documents intended to seek legal advice; whether allowing the Commission to copy such documents might cause irremediable impairment to the rights of defence; and whether the beneficiaries of legal privilege should encompass certain categories of lawyers employed within companies. Given the far-reaching negative implications of such a change for day-to-day enforcement work in antitrust cases, the Commission considered it necessary to appeal this order with a view to obtaining legal certainty as regards applicability of the established case law.

**German banks**

137. In its judgments\(^{131}\) of 14 October, the CFI annulled the decision\(^{132}\) by which the Commission had found that a number of German banks had been involved in a price cartel concerning bank charges for exchanging euro-zone currencies in the period leading up to the introduction of the euro as the single currency of the euro zone. The CFI found that the Commission decision had been based on insufficient evidence.

**Anti-doping rules**

138. In the doped swimmers case\(^ {133}\), the CFI decided on 30 September\(^ {134}\) that the anti-doping rules of the International Olympic Committee are pure sporting rules without economic considerations. These anti-doping rules are intimately linked to sport as such, and thus do not come within the scope of the Treaty provisions on the economic freedoms and in particular Articles 49, 81 and 82. This is the first judgment where the Court has ruled on whether sporting rules are subject to the Treaty provisions on competition. It confirms the Commission’s policy in the field of sports.

**Eurovision**

139. On 4 October, the ECJ dismissed\(^ {135}\) the EBU’s appeal against the judgment of 8 October 2002\(^ {136}\) whereby the Court of First Instance had found that the third party access regime of the Eurovision system did not fulfil the condition of Article 81(3)(b) EC and had annulled the respective Commission exemption decision\(^ {137}\).

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131 Cases T-44/02 Dresdner Bank AG, T-54/02 Vereins und Westbank AG, T-56/02 Bayrische Hypo- und Vereinsbank AG, T-60/02 Deutsche Verkehrsbank AG, T-61/02 Commerzbank AG, not yet reported.
133 COMP/38.158 - Meca Medina and Majcen against the International Olympic Committee, http://europa.eu.int/comm/competition/antitrust/cases/index/by_nr_76.html#i38_158
135 Case C-470/02.
136 Case T-185/00.
140. On 22 December, the President of the CFI dismissed\textsuperscript{138} in its entirety Microsoft’s application to have the operation of the remedies imposed in the March 2004 decision in the Microsoft case\textsuperscript{139} suspended. In this decision the Commission condemned Microsoft’s refusal to supply interoperability information and the tying of Windows and Windows Media Player. In addition to a fine, the Commission imposed measures to put an end to the anticompetitive practices highlighted in the decision.

141. The President considered that the arguments which Microsoft put forward on the substance could not, in the interim-relief proceedings, be regarded as prima facie unfounded. However, the President held that Microsoft had not shown that it might suffer serious and irreparable damage as a result of the implementation of the decision, and a suspension of the decision’s remedies was not therefore justified. The President found that disclosure of information previously kept secret does not necessarily entail serious and irreparable damage and that such damage was not demonstrated in the present case. He also considered that in respect of the untying remedy Microsoft had not demonstrated specifically that it might suffer serious and irreparable damage owing to interference with its business policy or to injury to its reputation.

\textsuperscript{138} Cases T-201/04 (main action) and T-201/04 R (interim measures).
\textsuperscript{139} See above point 36.
1. **Figure 1**

New cases

- **Cases opened on Commission's own initiative**
- **Complaints**
- **Notifications** (In 2004, only 3 notifications were received)
Figure 2
Cases closed

<table>
<thead>
<tr>
<th>Year</th>
<th>Informal Procedure</th>
<th>Formal Decisions</th>
</tr>
</thead>
<tbody>
<tr>
<td>1999</td>
<td>514</td>
<td>68</td>
</tr>
<tr>
<td>2000</td>
<td>362</td>
<td>38</td>
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<td>2001</td>
<td>324</td>
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<td>2002</td>
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<td>33</td>
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<tr>
<td>2003</td>
<td>295</td>
<td>24</td>
</tr>
<tr>
<td>2004</td>
<td>363</td>
<td>319</td>
</tr>
</tbody>
</table>

Legend:
- Informal procedure
- Formal decisions
Figure 3
Changes in the number of pending cases at the year end

- New Cases
- Cases closed
- Pending cases up to 31 December of each year
II – Merger control

Introduction

142. The year was marked by an increase in the number of mergers and acquisitions notified to the Commission compared with 2003. This was the first such increase since 1999. In total 249 notifications were made, representing an increase of 17% over the previous year. The number of final decisions also increased slightly from 231 in 2003 to 242 in 2004. Of the final decisions adopted in the period, 64% were adopted under the new Regulation which came into force on 1 May and 57% were adopted under the simplified procedure. Of the 232 final decisions adopted at the end of Phase I investigations, 220 were clearance decisions without undertakings. In the remaining 12 cases the parties submitted undertakings that removed the Commission’s serious doubts regarding competition.

143. There was no change as compared with 2003 in the number of cases giving rise to serious doubts as to their effect on competition and hence requiring an in-depth (Phase II) investigation, with 8 such investigations being opened in 2004. Of the 7 Phase II investigations completed in 2004, 6 transactions were finally approved and one resulted in a prohibition. In 4 cases approval was granted on the basis of undertakings that removed the original competition problems and in 2 cases the transaction was approved unconditionally.

144. The Commission also adopted 3 referral decisions during the year. Two of these cases were referred in their entirety and one partially. In 2004, the Commission received 19 reasoned submissions requesting that a concentration without a Community dimension should be examined by the Commission (pursuant to Article 4(5)). The Commission also received two reasoned requests that a concentration with a Community dimension should be referred - in whole or in part - to a Member State (pursuant to Article 4(4)) \(^{140}\).

\(^{140}\) For further details on the first year of application of these new provisions see Box 6 on the streamlined referrals system.
A – LEGISLATIVE AND INTERPRETATIVE RULES

1. Recast Merger Regulation, New Notices and Amended Implementing Regulation

1.1. New Merger Regulation: Regulation 139/2004

145. The recast Merger Regulation\textsuperscript{141} was formally adopted on 20 January and became applicable on 1 May. Following the adoption of this new Merger Regulation, related and other modifications to the Implementing Regulation were adopted on 1 May. Corresponding changes were also made to the notice on a simplified procedure as well as to the notice on ancillary restraints. To provide guidance on the application and interpretation of the new rules in the Merger Regulation concerning the referral of cases, the Commission also adopted a new notice on case allocation. Finally, new merger guidelines were adopted providing guidance on the assessment of horizontal mergers.

1.2. Revised Implementing Regulation

146. The revised Implementing Regulation (new IR) contains primarily measures needed to reflect the changes made in the new Merger Regulation. However, the Commission also took the opportunity to make improvements to the clarity of the text, as well as to the efficiency and fairness of the process. The new IR was adopted in April following public consultation by the Commission and entered into force on 1 May\textsuperscript{142}.

New referral mechanism

147. The new Merger Regulation introduces the possibility for notifying parties to request at the pre-notification stage that a concentration be referred either from the Commission to the Member State (Article 4(4)) or from three or more Member States to the Commission (Article 4(5)). In order for the case to be referred at the pre-notification stage, the notifying parties must make a reasoned submission to the Commission. With a view to processing and simplifying these submissions, the new IR introduces a reasoned submission form (Form RS) which sets out the information which this submission should contain.

New forms for notification - Form CO and Short Form CO

148. In addition to revised procedural rules, revisions have been made to the Form CO and a new Short Form CO has been introduced.


149. The New Form CO reflects changes made to the new Merger Regulation and also focuses on certain competition issues raised within the analytical framework of the new Commission notice on the assessment of horizontal mergers (the new merger guidelines). The main innovations involve a requirement to provide an executive summary specifying the markets in which the transaction will have an impact and the strategic and economic rationale for the transaction (Section 1); a new section drawing attention to the fact that a proposed concentration may be subject to Community and/or national rules governing the provision of certain information regarding the proposed transaction vis-à-vis the notifying parties’ employees and their representatives (Section 1.7); and a requirement to specify the value of the transaction (Section 3).

150. Further amendments concern: the type of supporting documentation needed (Section 5); the categories of information required in relation to non-affected markets (Section 6); the threshold for the requirement to provide information in relation to competitors in affected markets, which was lowered from 10% to 5%; a new obligation for companies to provide information on the HHI levels in affected markets; the type of information required in relation to general market conditions (Section 8) and additional information requirements on foreseeable future developments such as, for example, pipeline products, plans to expand capacity and plans to enter markets. A new section on information relating to efficiencies (Section 9) has been introduced. The section specifies that submitting information on efficiencies is voluntary and that parties are not required to offer any justification for not completing this section. The section on ancillary restrictions has been removed in line with the new provision in the Merger Regulation to the effect that the Commission will not normally deal with such issues. Finally, it is now provided that the certification of the completeness and accuracy of the notification is to be made by the notifying parties, instead of by their legal representatives.

151. Enlargement also made it necessary to require the notifying parties to provide a further 10 copies of each notification to be submitted to the Commission in order for a notification to be considered complete\(^{143}\).

**New time limits**

152. The new IR also contains amendments to the provisions on the calculation of time limits, which should be calculated, in line with the wording in the new Merger Regulation, on the basis of working days rather than months. The new Article 7 provides that time periods shall begin on the working day following the event to which the relevant provision refers. Article 8 contains simplified rules for the calculation of the expiry of the various time limits.

153. Article 19(1) provides that the deadline for the submission of commitments in Phase I should be 20 working days, and Article 19(2) provides that the deadline for the submission of commitments in Phase II should be 65 working days from the date of initiation of proceedings. Where the deadline for the adoption of an Article 8(2)

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\(^{143}\) Bringing the total number to one original and 35 copies of the Form CO.
decision is extended at the request of the parties pursuant to Article 10(3), the deadline for the submission of commitments should also be extended by the same number of working days. For example: if the 90 working day deadline is extended by 10 working days, the deadline of 65 working days for the submission of commitments is extended to 75 working days.

154. Article 9 of the new IR introduces the possibility of suspending certain time limits. The time limit concerning referral and final decisions in Articles 9(4), 10(1) and 10(3) of the new Merger Regulation may be suspended in circumstances for which the parties are responsible where the Commission first has to make a request for information by decision (or has to take an inspection decision (Article 13(4)).

Right to be heard

155. The new IR contains new provisions on the right to be heard, essentially expanding the category of natural or legal persons who have such rights to consumer associations in cases where the proposed concentration concerns products or services used by final consumers.

Confidential information

156. The new IR also introduces an obligation on persons who make known their views pursuant to its Articles 12, 13 or 16 or who supply information pursuant to Article 11 of the new Merger Regulation to clearly identify any material which they consider to be confidential. Such persons should also provide an explanation as to why they consider the information to be confidential and should provide a separate non-confidential version by the date set by the Commission.

157. Notifying parties are also required, pursuant to Article 18(3) of the new IR, to identify the business secrets or other confidential information in the documents or parts of documents which they have produced. They should also identify the undertakings with regard to which such documents are to be considered confidential. This requirement to identify confidential information also applies to any part of a statement of objections, case summary or a decision adopted by the Commission which in the view of the parties contains business secrets. As in the case of third parties, notifying parties are required to provide an explanation for their claim of confidentiality and to provide a non-confidential version of the relevant document.

Additional amendments

158. Article 3 provides that the language of the original proceeding shall also be the language of “any subsequent proceedings relating to the same concentration”. The aim of this measure is to ensure that any proceedings relating to one and the same concentration are dealt with in the same language. This would be the case, for example, where a matter has to be re-examined following a ruling of the Court of Justice, or where proceedings are brought pursuant to Article 14 of the new Merger Regulation for submission of incorrect information in a notification.

159. Article 5 has been amended to clarify which information should be included in the category of information which “must be communicated to the Commission without delay” after notification. Such information includes not only, as previously, “material
changes in the facts contained in the notification”, but also “new information coming to light subsequent to the notification which the parties know or ought to know and which would have had to be notified if known at the time of notification”.

New Short Form CO

160. A Short Form CO has been introduced for the notification of concentrations that are unlikely to raise competition concerns. This form has been aligned as closely as possible with the revised Commission notice on a simplified procedure. The use of the Short Form CO is envisaged where:

(a) a joint venture has no or negligible economic activity in the European Economic Area;

(b) none of the parties to the concentration is engaged in business activities in the same relevant product and geographic market (no horizontal overlap), or in a market which is upstream or downstream of a market in which another party to the concentration is engaged (no vertical relationship);

(c) the parties combined market shares are less than 15% for horizontal overlaps or less than 25% (combined or individual) for vertical relationships; or

(d) a party acquires sole control over an undertaking it previously controlled jointly.

161. In line with the notice on a simplified procedure, certain types of concentration have been identified where a notification using the Short Form would not be appropriate, even though the formal conditions may be fulfilled. Such a situation may arise where, for instance, it is difficult to define the relevant markets; where one party is a new entrant or an important patent holder; where it is not possible to adequately determine the parties’ market shares; where there are high entry barriers, with a high degree of concentration or known competition problems; where an issue of coordination under Article 2(4) of the new Merger Regulation arises; where a Member State or a third party expresses substantiated concerns within certain deadlines; and where at least two parties to the concentration are present in closely related neighbouring markets. Similarly, a full Form CO notification may be required in the case of a party acquiring sole control of a joint venture in which it currently holds joint control, where the acquiring party and the joint venture, together, have a strong market position, or where the joint venture and the acquiring party have strong positions in vertically related markets.

162. Safeguards have been added to ensure that, should it emerge that the concentration does not qualify for notification under the Short Form but has already been notified, the Commission may then require full or partial notification under Form CO. Such a situation may arise where the conditions for using the Short Form are not met; where a full or partial notification under Form CO appears to be necessary for an adequate

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144 Point (d) has been added to the category of cases that qualify for Short Form notification. See below under “Notice on a simplified procedure”.
investigation of possible competition concerns; where incorrect or misleading information has been submitted; and/or where a Member State or a third party expresses substantiated competition concerns about the notified concentration. It should be emphasised that responsibility for providing correct and complete information rests with the notifying parties. These and other issues relating to the appropriateness of using the Short Form notification should be dealt with during the pre-notification contacts.

163. As to the information required in the Short Form CO itself, this has been kept short while, at the same time, ensuring that all relevant information is submitted in order to allow the Commission to verify that the proposed concentration is appropriate for notification using the Short Form CO. Short Form CO requires information on so-called “reportable markets”, which can be horizontal or vertical markets. Following the principle that is already in the notice on a simplified procedure, it is spelled out in the Short Form CO that data on the basis of all plausible alternative market definitions must be provided.

164. The information required on the reportable markets is limited to information concerning the total market size, the notifying parties’ sales data and market shares. This information is limited to last year’s financial data only. In the case of horizontal and vertical relationships, market shares of the three largest competitors must be provided. This basic information will allow the Commission to ensure that the concentration is one for which a Short Form notification is appropriate. Furthermore, the section seeking information on possible cooperative effects under Article 2(4) of the new Merger Regulation has been retained in the Short Form CO.

165. In line with the full Form CO, a provision concerning the need to inform employees and their representatives has been added. Finally, a provision has been added in line with the full Form CO requiring notifying parties to provide an executive summary of the concentration.

1.3. Revised notice on a simplified procedure

166. The revised notice on a simplified procedure replaces the previous notice from 2000. The revision consisted in one substantive amendment - the inclusion of a new category of concentrations involving a change from joint to sole control – and other minor textual changes.

167. The inclusion of this new category is motivated by the Commission’s experience which has shown that changes from joint control by two or more companies to sole control by one company do not usually give rise to competition concerns. This is because the withdrawal of one or several controlling undertakings will inevitably reduce the number of undertakings concerned. It may also lead to little or no change in the behaviour of the joint venture in the market. It will thus not normally result in a strengthening of the combined market position of the remaining undertakings concerned, i.e., the sole controlling parent and the former joint venture, as compared with the situation prior to withdrawal.

168. In exceptional circumstances, the change from joint to sole control might raise competition concerns. A particular competition concern could arise in circumstances where the former joint venture is integrated into the group or network of its
remaining shareholder and the disciplining constraints exercised by the diverging incentives of the other controlling shareholders are removed, thereby enhancing the remaining shareholder’s market position. The safeguards and exclusions section of the notice describes scenarios in which changes from joint to sole control may give rise to competition concerns and stipulates that, in such cases, the Commission may refrain from applying the simplified procedure and launch an investigation and/or adopt a full decision. As an additional safeguard the Commission may refrain from applying the simplified procedure in cases where neither the Commission nor the competent authorities of Member States have reviewed the prior acquisition of joint control of the joint venture in question. The notice also indicates (point 17) that the Commission will endeavour to issue a decision as soon as practicable following expiry of the 15 working day period during which Member States may request referral pursuant to Article 9 of the new Merger Regulation. This is the earliest point at which adoption of a decision is legally possible.

169. In view of changes to the Commission’s policy concerning ancillary restrictions, the notice states that the procedure is not suited to cases in which the undertakings concerned request an express assessment of ancillary restrictions.

**Box 6: The streamlined referral system under the new Merger Regulation**

*Rationale for a streamlined referral system*

The overall purpose of the new streamlined referral system is to put in place a more rational corrective mechanism of case allocation between the Commission and Member States based on subsidiarity, by ensuring that the authority or authorities best placed to carry out a particular merger investigation should deal with the case. This system aims in particular at tackling the problem of “multiple filing”, i.e. notification to various competition authorities within the EU, while preserving the major assets of EU merger control, that is one-stop-shop, expediency, legal certainty and administrative efficiency. To this end, the rules governing the referral system in the new Merger Regulation (Articles 4(4), 4(5), 9 and 22) have been simplified and rendered more flexible. A key aspect of the reform is that referrals from the Commission to Member States and vice versa can now occur before a formal filing has been made in any EU jurisdiction, based on a voluntary request submitted by the merging companies.

*The notice on case allocation*

In view of the novelty of the referral procedures set out in the new Merger Regulation, these amendments have been complemented by a new notice on the principles, criteria and methodology upon which referral decisions should be based.

The notice first spells out the guiding principles upon which the mechanism of reallocation of cases between the Commission and Member states is founded, namely subsidiarity, one-stop-shop and legal certainty. Subsidiarity implies that in principle jurisdiction should be re-attributed to the competition agency that is best placed for dealing with a merger, having regard to the impact on competition of the case as well as the investigative tools and expertise available to the agency. The case for referring a merger to the most appropriate authority is particularly compelling where it appears that a particular transaction may have a significant impact on competition and thus may deserve careful scrutiny. One-stop-shop secures the handling of a merger by a single competition agency, thus increasing administrative
efficiency and avoiding duplication and fragmentation of enforcement effort by multiple authorities. Based on this principle, fragmentation of cases should be avoided where possible. Legal certainty requires that pre-filing referrals should in principle be confined to those cases where it is relatively straightforward to establish, from the outset, the scope of the geographic market and/or the existence of a possible competitive impact, so as to be able to promptly decide upon such requests.

With respect to Community mergers eligible for referrals to Member States, the notice indicates that, in considering whether to refer a case, regard should be had to the particular characteristics of the case, the particular expertise available to the agency as well as the probable location of any possible impact on competition. Finally, the notice stipulates that consideration may also be given to the administrative implications of a proposed referral.

Moreover, the notice catalogues the legal criteria that must be fulfilled in order for referrals to be possible, and sets out the other factors which may be taken into consideration when referrals are decided upon. Based on the above, the notice identifies those categories of cases which are the best candidates for referral, namely:

(i) as regards referrals from the Commission to Member states: concentrations with a Community dimension which are likely to affect competition in markets that have a national or narrower than national scope, and whose effects are likely to be confined to, or have their main economic impact in, a single Member State;

(ii) as regards referrals from Member States to the Commission: (a) cases where the market/s in which there may be a potential impact on competition is/are wider than national in geographic scope, or where some of the potentially affected markets are wider than national and the main economic impact of the concentration is connected to such markets; (b) cases that give rise to potential competition concerns in a series of national or narrower than national markets located in a number of different countries in the EU, and in circumstances where coherent treatment (regarding the investigation but also regarding possible remedies) of the case would be desirable.

Finally, the notice provides practical guidance regarding the mechanics of the referral system, by specifying the various steps required for a case to be referred from the Commission to Member States and vice versa, and clarifying a number of concepts relevant in the context of pre-notification referrals under Article 4(4) and (5) of the new Merger Regulation (triggering events for the request, information to be provided by the requesting parties, time frame within which the requests are treated).

In this section of the notice, guidance is also provided on the role of the network formed by the Commission and the Member States, whose purpose is securing timely exchange of information as well as dialogue and cooperation between its members.

As to the implications of the reform, first it is expected that the number of cases subject to re-allocation between the Commission and national competition authorities should increase as the requirements for referrals have been simplified. Second, pre-filing referrals – at least with respect to referrals to the Commission - should over time displace post-filing referrals.

Based on the number of requests which have been filed since the application of the new rules, it appears that the new system of pre-filing referral to the Commission is a significant success. Of the 14 requests for referrals to the Commission under Article 4(5) of the Merger
Regulation for which the procedure has been completed, only two have been vetoed by Member States. The great majority of the requests concerned genuine cross-border cases. These transactions, apart from being notifiable to a large number of Member states, had effects on competition beyond the territory of one Member State, by affecting either clearly EEA-wide markets or a number of national markets. In these cases, the Commission is better placed to deal with such transactions. Businesses clearly recognize the advantage of having their case dealt with by the Commission in order to avoid multiple filing requirements, to benefit from a coordinated investigation and, where applicable, from coherent remedies. Only a small number of cases concerned “pure” multiple filing transactions with no tangible effect on cross-border competition.

As regards referrals of mergers with a Community dimension to Member States during the pre-notification phase (Article 4(4)) of the Merger Regulation, so far only two requests have been submitted. This is in line with expectations that such requests for reallocation to a Member State would be limited in number.

### 1.4. New notice on ancillary restraints

170. The existing notice on ancillary restraints was revised to take account of the new Merger Regulation, which provides that a decision declaring a concentration compatible with the common market “shall be deemed to cover restrictions directly related and necessary to the implementation of the concentration”\(^{145}\). Accordingly, the parties to a transaction have to assess themselves whether a clause can be regarded as ancillary to a merger or not.

171. However, in specific circumstances, the Commission retains a residual function and should at the request of the undertakings concerned, expressly assess the ancillary nature of such restrictions if a case presents “novel and unresolved questions giving rise to genuine uncertainty” defined as questions “not covered by the relevant Commission notice in force or a published Commission decision.”

172. The new notice provides guidance on the interpretation of the notion of “ancillary restrictions” to facilitate the parties' self-assessment and improve legal certainty. It contains clear-cut guidance, for example on maximum periods for which restrictions can be accepted, and also covers the vast majority of clauses that, in the Commission’s experience, are claimed to be ancillary to concentrations.

173. The new notice considers non-competition clauses to be ancillary restrictions for up to three years if both know-how and goodwill are included, and for two years if only goodwill is transferred. It also clarifies the rules on the geographical scope of restrictions and on non-solicitation and confidentiality clauses. For licence agreements, the notice still requires no time limit but sets out clear rules for territorial limitations and agreements which protect the licensor only. The maximum period for purchase and supply obligations has been extended from three to five years given the vertical character of these restrictions.

\(^{145}\) See Article 6(1)(b), second subparagraph; Article 8(1), second subparagraph and (2), third subparagraph.
In contrast to the previous notice, which stipulated a three-year time limit for non-competition clauses in joint ventures, the new notice allows such clauses for the lifetime of a joint venture. This is because the need for non-competition clauses in joint ventures is not generally limited to a transitional period.

1.5. Notice on the assessment of horizontal mergers

Following a wide consultation process, the Commission adopted in January guidelines on the assessment of horizontal mergers (horizontal merger guidelines) under the new Merger Regulation which complement the new Merger Regulation and became applicable together with it. The horizontal merger guidelines set out the analytical approach the Commission takes in assessing the likely competitive impact of mergers between competing firms (so-called horizontal mergers) and reflect the re-wording of the substantive test for the competitive assessment of mergers in the new Merger Regulation\textsuperscript{146}.

The guidelines make it clear that mergers and acquisitions will only be prohibited to the extent that they enhance the market power of companies in a manner which is likely to have adverse consequences for consumers, notably in the form of higher prices, poorer quality products, or reduced choice. In this regard, the guidelines explain that mergers may result in significant harm to competition in two broad ways, either because the concentration eliminates an important source of competition from the market ("non-coordinated effects"), or because it makes anticompetitive coordination between the remaining firms more likely ("coordinated effects").

The guidelines explain the circumstances in which the Commission may identify competition concerns, but also provide clear quantitative indications as to when the Commission is unlikely to intervene, for example, when a merger results in market concentration levels below certain specified levels, as measured by the firms' market share or by the so-called "HHI index"\textsuperscript{147}.

The guidelines also set out the factors that may mitigate an initial concern that a merger is likely to harm competition. This may, for example, be the case where other

\textsuperscript{146} Article 2(3) of the new Merger Regulation provides that “a concentration which would significantly impede effective competition, in particular as a result of the creation or strengthening of a dominant position, shall be declared incompatible with the common market”.

\textsuperscript{147} The HHI, or Herfindahl-Hirschman Index, is an internationally recognised measure of market concentration. The HHI is calculated by summing the squares of the individual market shares of all the firms in the market. The index gives proportionately greater weight to the market shares of the larger firms, in line with their relative importance in the competitive process.
firms are likely to enter the market in which the merging companies are operating. Account will likewise be taken of the fact that customers of the merging firms may enjoy significant "buyer power" such that they can easily resort to alternative suppliers.

179. Finally, the guidelines specify that the Commission will carefully consider, in its overall assessment of the likely competitive impact of a merger, any substantiated claim made by the parties that the merger will result in efficiency gains. For such efficiencies to be taken into account, they must benefit consumers, they must only be attainable via the merger, they must be likely to be realised and they must be verifiable.
B – COMMISSION CASES

1. **DECISIONS TAKEN UNDER ARTICLE 8**

*Lagardère/Natexis/VUP*[^148]

180. On 7 January, the Commission authorized the proposed acquisition of Editis (formerly called Vivendi Universal Publishing, or VUP) by the Lagardère group subject to the divestment of around 60% of its assets. Before the transaction, Editis was the leader in the publishing, marketing and distribution of French-language books and Hachette Livre, the publishing arm of Lagardère, was the second player in the sector.

181. The case, which was notified on 14 April 2003, resulted in a number of decisions by the Commission: Article 6(1)(c) (opening of second phase proceedings) on 5 June 2003, Article 9 (refusal to refer the case to the French authorities) on 23 July 2003[^149], two Article 11(5) decisions (suspending the procedure) and the final Article 8(2) decision on 7 January 2004. In this case there were numerous complaints from associations of book readers, retailers, wholesalers, publishers, authors and illustrators.

182. The Commission's investigation and analysis revealed that the acquisition of the entire Editis publishing business, as planned in the transaction initially notified to the Commission, would have produced a heavily dominant group with a turnover at least seven times that of its nearest rival in the French-speaking countries of the European Union. In reply to the Commission's objections, Lagardère agreed to divest almost all of Editis with the exception of certain assets (Larousse, Dunod, Dalloz and the Anaya group) accounting for around 40% of the worldwide turnover of the company, while only less than 25% of Editis in the French-speaking regions of the EU (i.e. the relevant markets) was retained.

183. The French-speaking publishing sector is characterised by different players: (i) the more vertically integrated, Hachette Livre and Editis, active over the entire book chain; (ii) four medium-sized groups, Gallimard, Flammarion, Seuil and Albin Michel, partly vertically integrated; and (iii) many small publishers usually only active in the production part and relying on larger companies for their marketing and distribution. Against that background, the Commission found that competition between publishers essentially occurred at two levels of the book chain: first, at the level of access to the “raw material” (i.e. publishing rights), and second, at the level of access to the “market” (i.e. resellers’ shelves).

184. Following its detailed review of the proposed transaction, the Commission identified a number of competition problems that would result from the combination of Editis

[^148]: COMP/M.2978.
[^149]: See the 2003 Competition Report.
and Hachette Livre, the two leading market players with the highest level of vertical integration. The original transaction would have created or strengthened dominant positions of the new entity along the whole of the book chain and notably in the more industrialised part of the publishing business: marketing, distribution and pocket format publishing. The new entity would have controlled access both to well-known authors, whose sales are the lifeblood of publishers, and to sales outlets, which cannot absorb, let alone promote, more than a limited proportion of the works published each year.

185. Given the scope of the competition problems raised by the combination of Hachette Livre and Editis, the case could only be cleared subject to very substantial remedies. Such remedies not only had to provide solutions for markets (publishing rights, marketing and distribution services, sale of books) in which the merger would bring together the two leading players, but they also had to address the numerous vertical and conglomerate links between these markets.

186. Lagardère consequently committed itself to divesting all assets of Editis except the publishing house Larousse, which is mainly active in reference books, the professional and academic publishers Dalloz and Dunod as well as the Spanish publishing group Anaya, which is active mainly in schoolbooks and general literature in Spain and Latin America.

187. On 3 August, the Commission decided to approve the French company Wendel Investissements as the purchaser of all the assets of Editis divested in accordance with the remedies in the clearance decision.

\textit{Sony/BMG}\textsuperscript{150}

188. The SonyBMG joint venture combines Sony and Bertelsmann’s recorded music businesses worldwide, except for Japan. It comprises only so-called “artist and repertoire” (A&R) activities, i.e. the discovery and development of performing artists (singers), and the marketing and sale of records. By contrast, SonyBMG will not be active in the manufacturing and the physical distribution (logistics) of records. Likewise, Sony and Bertelsmann’s music publishing businesses are not integrated into the joint venture.

189. The Commission examined the competitive impact of the proposed concentration on the markets for recorded music, licences for online music, and online music distribution. As both parent companies remain active as music publishers, the Commission also inquired whether the joint venture would result in the coordination of Sony and Bertelsmann’s competitive behaviour in the music publishing market. Since the creation of the SonyBMG joint venture was notified on 9 January, the Commission assessed the case under the substantial test of Council Regulation (EEC) 4064/89\textsuperscript{151}.

\textsuperscript{150} COMP/M.3333.
\textsuperscript{151} See Article 26(2) of Council Regulation (EC) No 139/2004.
190. In the record industry the five “majors”, namely Universal, Sony, EMI, Warner and Bertelsmann (BMG), all have a worldwide presence and account together for approximately 80% of the market, both in Europe and worldwide. In the EEA, the rest of the market is composed of a large number of “independents” with mostly national activities and low market shares. Following the merger, Universal and SonyBMG will both have market shares of approximately 25%, ahead of EMI and Warner.

191. The Commission’s investigation focused on the question whether the concentration would strengthen or create a position of collective dominance in the national markets for recorded music. The analysis was conducted in line with the criteria laid down by the European Courts, in particular in the Court of First Instance’s Airtours judgment of 2002. According to the CFI, the Commission must prove the likelihood of a common understanding among the companies and the markets must be sufficiently transparent to permit monitoring of respect of the common understanding by the companies involved. In addition, there must be a deterrent mechanism in case of deviation, and customers and competitors should not be able to jeopardise the results expected from the coordination.

192. The Commission found some indications for the possible use of wholesale prices (“published prices to dealers” - PPDs) as focal points and a certain parallelism in the price development of the five majors. However, these findings were not sufficient to establish by themselves price coordination. The Commission therefore also analysed the development of the majors’ discounts and found that certain discounts were not fully transparent and were difficult to monitor. In addition, market transparency was reduced by the largely differentiated music content, in spite of a certain homogeneity in the format, pricing and marketing of records. On balance, the Commission therefore concluded that there was not sufficiently strong evidence to establish an existing collective dominant position of the five majors in the markets for recorded music.

193. As to the possible creation of a collective dominant position in the markets for recorded music, there was insufficient evidence to prove that the reduction from five to four majors in itself would alter the market structure substantially enough. Similarly, the Commission did not find sufficient evidence that the proposed transaction would strengthen or create a position of collective dominance in the wholesale market for licences for online music. The Commission also looked at the vertical relationships between the joint venture and its parent companies but concluded that the proposed transaction would not lead to a dominant position, either in the retail market for online music distribution where Sony is active or in the recorded music markets in those countries where Bertelsmann is a broadcaster. With respect to possible spillover effects pursuant to Article 2(4) of the Merger Regulation, the Commission found that a coordination of Sony and BMG’s

competitive behaviour in the music publishing markets was unlikely. On the basis of these findings, the Commission approved the merger on 19 July.

AREVA/Urenco/ETC JV\textsuperscript{154}

194. AREVA, the French nuclear group, and Urenco, a company set up by the governments of the UK, the Netherlands and Germany, are the main European providers of uranium enrichment services which are needed to produce fuel for nuclear power plants. By this transaction, AREVA acquires joint control over Enrichment Technology Company (ETC), Urenco’s subsidiary active in the development and manufacturing of centrifuges used to enrich uranium. Centrifuge technology offers significant advantages over the older gas diffusion technology currently used by AREVA. ETC is to supply both its parents and third parties with centrifuge equipment.

195. The operation was jointly referred to the Commission by France, Sweden and Germany in April. The Commission’s investigation identified competition concerns in the downstream market for enriched uranium. The Commission was concerned that the proposed concentration could lead to the creation of a joint dominant position in the European Union, in particular given that ETC could be used by AREVA and Urenco to coordinate, through the exercise of their respective veto rights, their capacity developments.

196. The case was also of interest in view of the detailed efficiency claims laid down by the parties. These related to the substantial cost savings that AREVA would achieve by being able to adopt the modern centrifuge technology of Urenco. The Commission had doubts on the merger specificity of these claims. However, for the purpose of the decision, the Commission’s concerns were removed by the commitments proposed by the parties.

197. By these commitments, submitted at an early stage in Phase II, AREVA and Urenco first undertook to remove their respective veto rights in relation to future capacity expansions. Secondly, the flow of commercially sensitive information between ETC and its parents will be prevented by a series of measures which will be closely monitored. Thirdly, the parties have committed themselves to supplying the European Supply Agency (ESA) with additional information, which will enable ESA to more closely monitor the provision and pricing of enriched uranium and to respond, if necessary.

Sonoco/Ahlstrom/JV\textsuperscript{155}

198. In May, the Commission received a notification of a proposed concentration by which two major players of the coreboard and cores industry, Sonoco (USA) and Ahlstrom (Finland), intend to create a joint venture which will group together their European activities.

\begin{footnotesize}
\begin{enumerate}
\item[154] COMP/M.3099.
\item[155] COMP/M.3431.
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Cores are tubes produced from coreboard, in turn produced mainly from recycled paper. Cores are used as the base around which various products, such as paper, film and yarn are wound. Among cores, high-end paper mill cores are high quality products used by the printing industry to roll magazine paper. Low-value cores are standard products used across all industries.

The Commission’s in-depth investigation identified concerns in the markets for high-end paper-mill cores in the whole of Scandinavia and for low-value cores in Norway and Sweden, where the joint venture would have high market shares and where the significant competitive pressure exerted by Sonoco on the market leader Ahlstrom would be lost. To remedy these concerns, the parties proposed to divest Ahlstrom’s sole Norwegian cores manufacturing facility in Sveberg. They also offered not to implement the merger before a buyer is found.

The Commission approved the concentration on this basis, since it considered that this divestiture will allow for the entry of a new supplier in Scandinavia and will also remove the main part of the parties’ overlap in the affected Scandinavian countries. Indeed, in late October, the Commission approved the acquisition of Sveberg by Abzac, a French core manufacturer which has significant activities in Continental Europe, but which was absent from the Scandinavian markets.

Continental/Phoenix

The acquisition of Phoenix AG, Hamburg, by the German undertaking Continental AG concerned a transaction between two rubber companies which mainly serve the automotive industry. It was approved by the Commission subject to divestiture commitments. In view of the parties’ dominant position in the markets for air springs for commercial vehicles and for heavy steel cord conveyor belts, the approval was only possible after the Commission had received commitments which could eliminate the identified competition problems.

By the transaction, Continental, a producer of tyres, brake systems and technical rubber products, acquired sole control over Phoenix AG, also active in the production of technical rubber products (e.g. suspension systems, anti-vibration systems, hoses and conveyor belts). Phoenix jointly controls Vibracoustic GmbH & Co KG, Germany, through which it distributes air springs for trucks and cars.

The acquisition would have led to significant overlaps in various markets for technical rubber products, in particular in the markets for air springs and for steel cord conveyor belts. Air springs are used as suspension parts in commercial vehicles, cars and rail vehicles. Heavy steel cord conveyor belts are used for the transport of heavy goods over long distances, in particular in the field of lignite mining.

The merger was notified to the Commission by Continental in May. Having identified potential competition concerns in the markets for air springs for

156 COMP/M.3436.
commercial vehicles, cars and rail vehicles as well as for heavy steel cord conveyor belts and for filter belts, the Commission started an in-depth investigation on 29 June.

206. The Commission’s extensive market investigation confirmed its concerns in the markets for air springs for commercial vehicles (sold to original equipment manufacturers and suppliers – “OEM/OES”) and for heavy steel cord conveyor belts. Indeed, the acquisition combined the two leading players in these two markets and would have led to a combined market share in both markets of well above 60%, with only a few smaller remaining competitors. Furthermore, the Commission has found evidence of significant barriers to enter both markets, mainly because the production and distribution of air springs and conveyor belts involves specific production and customer know-how. Accordingly, new suppliers have to undergo a lengthy qualification procedure before they can even be considered potential suppliers.

207. In order to eliminate the Commission’s competition concerns, Continental committed itself to divesting Phoenix’s 50% co-controlling stake in the joint venture Vibracoustic to the only other shareholder, Freudenberg (Germany).

208. In addition, Continental committed itself to causing Phoenix to completely divest its production of air springs for commercial vehicles (OEM/OES), located in a plant in Hungary. These two commitments remove entirely the overlap of the parties’ activities in the field of air springs for commercial vehicles (OEM/OES).

209. Continental also committed itself to selling a production line for wide steel cord conveyor belts to its competitor Sempertrans. This divesture will enable Sempertrans to compete over the full range of steel cord conveyor belts with the merged entity, thereby eliminating the competition concerns in the field of steel cord conveyor belts.

210. On 9 December, the Commission decided to prohibit the proposed acquisition of joint control over Gás de Portugal (GDP), the incumbent gas company in Portugal, by Energias de Portugal (EDP), the incumbent electricity company in Portugal, and ENI, an Italian energy company. After an in-depth investigation, the Commission concluded that the deal would strengthen EDP’s dominant position in the electricity wholesale and retail markets in Portugal and GDP’s dominant position in Portuguese gas markets. The concentration would thus significantly reduce or pre-empt the effects of liberalisation of the electricity and gas markets in Portugal, and increase prices for domestic and industrial customers. Remedies proposed by EDP and ENI were insufficient to eliminate the competition concerns.

211. EDP, generates, distributes and supplies electricity in Portugal. Through its Spanish affiliates (Hidrocantabrico and Naturcorp), EDP also has substantial electricity and gas activities in Spain. ENI is an Italian company active internationally at all levels of the energy supply and distribution chain.

157 COMP/M.3440.
GDP is active at all levels of the gas chain in Portugal. It has exclusive rights for import, storage, transportation and wholesale supply of natural gas and controls five of the six Portuguese local gas distribution companies (the sixth, Portgás, being controlled by EDP).

On 9 July, EDP and ENI notified a concentration concerning the acquisition of joint control over GDP, previously controlled by the Portuguese State and ENI. The former Merger Regulation was applicable in this case, as the underlying binding agreement predated the entry into force of the new Merger Regulation. The notified concentration was part of a wider operation including the transfer of the gas transmission network, owned by GDP, to REN, the Portuguese electricity grid operator within a given time frame. The transfer of the network constituted a different concentration, which fell under the competence of the Portuguese authorities.

Relevant product markets

The Commission identified the following relevant product markets affected by the operation. In electricity: wholesale supply of electricity, balancing power and ancillary services, retail supply of electricity to large industrial customers and retail supply of electricity to small customers. In gas: supply of gas to power producers, supply of gas to local distribution companies (LDCs), supply of gas to large industrial customers and supply of gas to small customers.

Since mid-2004, all electricity markets have been fully open to competition. As for the gas markets, owing to its status of emerging market, Portugal will continue to benefit from a derogation from the liberalisation calendar established by the second gas Directive (2003/55/EC). Therefore, the opening to competition of Portuguese gas markets will start at the latest by 2007 and be completed by 2010. The Portuguese Government indicated that it may start the liberalisation process earlier.

Geographic markets

The Commission came to the conclusion that all relevant markets were at most national in scope.

The parties had argued that the electricity wholesale market would soon be Iberian in scope, in particular owing to the impending launch of an Iberian electricity trading system (MIBEL). However, the Commission found that MIBEL has been postponed several times over the past years: many important regulatory barriers have still to be removed before MIBEL can actually start; competitive conditions between Spain and Portugal are likely to remain significantly different even after the launch of MIBEL; irrespective of the establishment of MIBEL, the projected level of interconnections between Spain and Portugal will remain limited and it was not possible to conclude that effective integration of the two markets would take place in a time frame relevant for the assessment of the merger. As a result, the Commission concluded that the electricity wholesale market was, and in the years ahead would remain, national in scope.

The parties have not challenged the finding that the other markets in which competition issues have been identified are national in scope.
Strengthening of EDP’s dominant position in the Portuguese electricity markets

219. The Commission came to the conclusion that EDP holds a dominant position in all the Portuguese electricity markets mentioned above. In particular, EDP holds 70% of generation capacity in Portugal and is the largest importer of electricity; EDP holds close to 100% of the distribution of electricity in Portugal; competitors’ gas-fired power plant (CCGT\textsuperscript{158}) projects are uncertain and EDP has influence over one of them (Tejo Energia); and imports will remain insufficient to challenge EDP’s dominance.

220. The merger would have strengthened EDP’s dominant position as a result of both horizontal and vertical effects. As for the horizontal effects (all electricity markets), without the merger GDP would have been very likely to build a CCGT in Portugal and become one of the main competitors in the electricity markets, considering in particular that having access to competitive gas supplies confers a significant advantage in electricity as CCGTs now constitute the most common way of generating new power and that GDP could rely on its brand and gas customer base, to which it could offer a joint supply of gas and electricity (dual fuel offer).

221. As for the non-horizontal effects (wholesale electricity market), the proposed concentration would have given the merged entity privileged and preferential access to proprietary information about its competitors’ costs, conferring on it a significant advantage; access to Portuguese gas resources and infrastructure; and the ability and the incentive to control gas prices and raise its rivals’ costs.

Strengthening of GDP’s dominant position in the Portuguese gas markets

222. The Commission came to the conclusion that, owing to its current position of legal monopolist, GDP holds a dominant position in most markets. GDP’s dominant position in these markets would have been strengthened by the proposed operation, allowing the merged entity to impede further the competition being introduced as a result of the liberalisation process. This is essentially for the following reasons:

223. As regards the supply of gas to CCGTs and LDCs, the notified operation would have foreclosed all the gas demand which was not controlled by GDP so far, namely the short-term requirements of the CCGTs owned or participated in by EDP and the gas demand of the LDC Portgás.

224. As regards the supply of gas to large industrial customers and small customers, EDP would have been the most likely entrant in these markets, once they are liberalised, considering in particular that EDP operates a CCGT for the production of electricity, which confers a strong incentive to enter the gas supply markets, that it could rely on its electricity customers (EDP controls close to 100% of electricity distribution in Portugal), to whom it could offer a joint supply of gas and electricity (dual-fuel), and that it could also rely on the experience, the reputation and the customer base of the gas LDC Portgás. The importance of entering the gas markets is also evidenced by

\textsuperscript{158} Combined cycle gas turbine.
EDP’s recent acquisition of the second-largest gas player in Spain (Naturcorp). This significant potential competition would be lost after the merger.

Remedies proposed by the parties

225. On 28 October and 17 November, the parties submitted remedies in order to address the above-described competition concerns. They proposed *inter alia* to divest an LDC (Setgás), to transfer gas infrastructures and import capacities to REN, the electricity network operator, and to lease power production equivalent to one third of the production of EDP’s gas-fired power plant. The Commission market-tested these remedies and came to the conclusion that they fell far short of solving all competition issues. For instance, the Commission noted that Setgás accounts for only 8% of the gas retail market while the LDC controlled by EDP, Portgás, accounts for as much as about 30%; although the transfer of the gas infrastructure to REN (ownership unbundling) would have been a positive move, no sufficient available capacity for third parties’ imports was guaranteed; the proposed lease of power production in EDP’s gas-fired power plant represented only 4% of generation capacity in Portugal and would have created a high degree of dependence on the part of the lessee upon EDP. Such lessee would not have had either the ability or the incentive to exert a strong competitive constraint on EDP.

226. Some time after the deadline for submitting remedies, the parties proposed revised commitments which, however, failed to address the competition concerns resulting from the operation in a straightforward manner.

Conclusion

227. As a result, the Commission had no choice but to prohibit the proposed operation since it would have strengthened both EDP’s and GDP’s dominant position respectively in the electricity and gas markets in Portugal. The operation would have pre-empted the positive effects of the ongoing or impending liberalisation of the electricity and gas markets in Portugal, resulting in higher prices for both industry and domestic consumers and in a loss of competitiveness for the Portuguese economy. It would have discouraged the entry of foreign competitors into the Portuguese energy markets and the development of cross-border competition and would thereby have impeded further the creation of competitive pan-Iberian energy markets and, in the longer term, of energy markets integrated at European level.

2. **DECISIONS TAKEN UNDER ARTICLE 6(1)(b) AND 6(2)**

*Hoechst/Rhône-Poulenc*\(^\text{159}\)

228. On 9 August 1999, the Commission cleared the Hoechst AG and Rhône-Poulenc SA concentration resulting in the creation of Aventis, subject to commitments to remove a number of competition concerns. The commitments included the divestiture of a

\(^{159}\) COMP/M.1378.
stake in chemical company Rhodia which eliminated the concerns originating from the horizontal overlaps with the activities of Aventis’s subsidiary Wacker Chemie.

229. At the time of the merger, Rhône-Poulenc owned 67.3% of Rhodia and by 2003 had managed to sell most of its stake but nevertheless remained the largest shareholder, with legal ownership of some 15% of the shares and an economic interest in a further 10%. In view of the continuing deterioration in Rhodia’s financial health and the urgent need to remove uncertainty because of the imminent financial restructuring of the company, the Commission agreed - by its decision of 30 January 2004 - to replace the original Rhodia commitment with another one whereby Aventis would instead divest its indirectly held 49% stake in Wacker-Chemie.

GE/Amersham160

230. On 21 January, the Commission decided to clear the proposed acquisition by the US company General Electric Company (GE) of the UK diagnostic pharmaceuticals and biosciences company Amersham Plc.

231. Amersham makes diagnostic pharmaceuticals that are used to enable diagnostic equipment, such as scanners, to image the body's health status and also produces biopharmaceuticals. GE is a diversified industrial company active in various manufacturing, technology and services businesses, including medical systems. GE Medical Systems specialises in medical diagnostic imaging technology.

232. The proposed acquisition did not lead to horizontal overlaps. But as the products of GE and Amersham in the medical sector are complementary and hospitals need to purchase both the hardware and the pharmaceuticals for some imaging applications, the Commission focused its analysis on any possible conglomerate effects arising from the merger. The Commission was concerned, in particular, that GE could have incentives to offer bundles of products, at better prices than the sum of the individual products or by designing its products in such a way that Amersham's products would work better with GE than with rival equipment (technical tying).

233. However, the market investigation showed that such a scenario was unlikely. This was because neither GE nor Amersham held dominant positions in their respective products in Europe. Furthermore, both customers and a number of competitors agreed that the markets concerned enjoyed strong competition with viable equipment manufacturers such as Philips, Siemens and Toshiba, and strong pharmaceuticals makers such as Schering, Bristol Myers Squibb, Tyco/Mallinckrodt and Bracco. The Commission therefore concluded that these players were unlikely to be foreclosed from the market or to become marginalised. The technical tying concerns were also dismissed as the Commission ascertained that there was perfect interoperability between the different existing equipment and pharmaceutical products and that such interoperability was unlikely to be reduced when new products came to market.

Air Liquide/Messer161

160 COMP/M.3304.
234. On 15 March, the combination of French concern Air Liquide and Germany’s Messer group was cleared subject to conditions. Messer Group had activities in Germany, the United Kingdom and the United States. The Commission was concerned that the acquisition would result in higher prices for gas customers - particularly in Germany. However significant divestments were offered which rendered regulatory clearance possible without the need for an in-depth investigation.

235. Air Liquide and the Messer Group produce and distribute industrial and medical gases (such as oxygen, nitrogen or argon) as well as connected services. The deal gave Air Liquide - the world leader in the industrial gases sector - a long-sought foothold in the United Kingdom, where there were no overlaps. Nevertheless, it would have also created competition concerns in the already concentrated Europe-wide tonnage gas market serving typically petrochemical and steel companies and in the market for electronic speciality gases. On a national level, it furthermore raised duopoly concerns in Germany (together with Linde AG) for gases supplied in bulk and cylinders for industrial and medical use.

236. To address the Commission’s concerns, Air Liquide committed itself to divesting significant parts of its or Messer’s activities in Germany. These divestments included parts of Messer’s pipeline networks and several tonnage plants, liquefiers for air gases and filling centres for cylinders as well as the related customer bases. Air Liquide also committed itself to divesting Messer’s participation in its joint venture with Nippon Sanso, a company which produces ESGs.

Sanofi Synthelabo/Aventis\textsuperscript{162}

237. In January, pharmaceutical company Sanofi-Synthélabo SA announced a takeover bid for Aventis SA which the Commission approved subject to conditions. Both companies were based in France. Aventis was itself the result of a merger between Hoechst and Rhône-Poulenc which was cleared in August 1999, subject to conditions. This combination would have created one of the largest pharmaceutical companies in the world and raised some competitive concerns in the markets where their activities overlapped. It appeared that competition might be reduced to the detriment of patients suffering from thrombosis, colorectal cancer and insomnia.

238. All the overlapping areas were to do with medicinal products for human use. Such products were used for the treatment of heart failure, poor arterial circulation, ear, nose and throat infections, insomnia, with the most overlaps occurring in markets for heparins and heparoids (in 11 EU countries) and colorectal cancer treatment (in seven EU countries). Affected areas also included sales of vitamins, muscle relaxants and antibiotics. To allay the Commission’s doubts, Sanofi either sold the related business or granted licences for it across 14 EU countries with most overlaps occurring in France.

\textsuperscript{161} COMP/M.3314, \textsuperscript{162} COMP/M.3354.
239. The Commission also granted regulatory clearance to the proposed merger between Securicor and Group 4 Falck after the companies resolved concerns about reduced competition in some security service markets in Luxembourg, the Netherlands and the United Kingdom. The Anglo-Danish merger would create the second largest security company in the world after Securitas of Sweden.

240. Group 4 Falck, a Danish company, and Securicor, a company based in the United Kingdom, are active providing private security services. They both offer a wide range of activities such as cash transportation, guarding services, alarm systems and justice services (e.g. management and transport of prisoners). All assets of the parties were to be merged into a new company named Group 4 Securicor, with the exception of Group 4 Falck’s justice activities (which were to be sold to a third company before the completion of the merger).

241. Group 4 Falck is active in 80 countries and Securicor in 50. Combined, they would become a close competitor to the world market leader, Sweden-based Securitas. Because of the different regulatory framework in each country, the provision of security services is on a national or regional level. Consequently, the merger was analysed country by country. However, despite the merged companies’ global reach, their activities only overlapped in six European Union countries: France, Germany, Ireland, Luxembourg, the Netherlands and the United Kingdom.

242. The Commission’s investigation identified competition concerns in three geographical areas: cash transportation, manned guarding and alarm monitoring & response services in Luxembourg; manned guarding services in the Netherlands and cash transportation services in Scotland. Addressing the Commission’s concerns, Group 4 Falck and Securicor divested Securicor’s security business in Luxembourg, Group 4 Falck’s manned guarding business in the Netherlands and their cash transportation activities in Scotland.

Owens-Illinois/BSN Glasspack

243. The Commission approved the acquisition of the French glass container manufacturer BSN Glasspack SA by its US-based competitor Owens-Illinois Inc. The glass containers produced by the merging firms are used to package products such as soft drinks, wine, mineral water, olive oil, ketchup and other food products.

244. Owens-Illinois is an international manufacturer of glass containers, machinery for manufacturing glass containers, and plastic containers and associated equipment. In the European Union it has glass manufacturing operations in Finland, Italy, Spain and the United Kingdom. BSN manufactures and sells glass containers for beverages and food and has production facilities in France, Belgium, Germany, the Netherlands and Spain. The two companies’ European plant networks were largely

163 COMP/M.3396.
164 COMP/M.3397.
complementary. However, Owens-Illinois and BSN Glasspack are direct competitors in two regional markets comprising North-Eastern Spain/South-Western France and South-Eastern France/Northern Italy. Glass containers are bulky products but they are typically delivered within a range of 300-400 km from the production plant and the delivery area of a plant can thus encompass regions on both sides of a national frontier.

245. The transaction, as originally notified, would have led to high market shares in the regions concerned and would have removed an important competitor in what are already highly concentrated markets. Besides the merging partners, the only other major player in these regions is French company St. Gobain, the other competitors in the affected regions being rather small. Therefore, in these areas, the effect would have been to reduce the number of significant suppliers from three to two.

246. In order to alleviate the Commission’s concerns, Owens-Illinois offered to divest a production plant to an independent, viable competitor in each of the two affected regions, in Milan in Italy and in Barcelona in Spain.

247. The deal did not raise any concerns in the rest of the EEA as the two partners’ sales activities either do not overlap or, where they do, the merged entity will face competition from a number of large competitors, including St. Gobain, Rexam, Ardagh, Weigand and Allied Glass.

GIMD/Socpress

248. On 16 June, the Commission authorised the proposed acquisition of Socpresse by the Marcel Dassault Industrial Group (GIMD), subject to conditions.

249. GIMD is a French group with interests mainly in aeronautics, computing, wine growing and magazines. Titles published by GIMD include Valeurs Actuelles, Le Journal des Finances, Finances Magazine and Le Spectacle du Monde. Socpresse is also a French company producing national and regional daily newspapers, magazines and specialist publications. It is the parent company of Figaro Holding, which produces the daily Le Figaro and Figaro Magazine, and the Groupe L’Express—L’Expansion, which publishes a large number of magazines, including L’Express, L’Expansion, La Vie Financière and Mieux Vivre Votre Argent.

250. The Commission’s inquiries indicated that the GIMD/Socpresse group would control a significantly larger number of economic and financial magazines than its competitors, which would have put it in a privileged position, particularly as regards advertisers wishing to reach financial readers. It would have been able to dominate the market using the powerful Socpresse agency, which sells advertising space in over 80 magazines and daily newspapers.

251. The operation therefore raised competition concerns in France in the markets for the sale of advertising in economic and financial magazines, as neither competitors nor purchasers of advertising space (advertisers) would have been able to provide a

165 COMP/M.3420.
counterweight to the combined power of Socpresse/GIMD, which would have enjoyed market shares of almost 50%. Generally speaking, advertisers negotiate individually with publishers or their agencies and do not therefore enjoy any real buyer power.

252. To resolve the competition concerns and hence avoid an in-depth investigation, GIMD offered to dispose of the economic and financial magazine *La Vie Financière*, published by the Express-Expansion Group, which, given the quality and reputation of the publication, the Commission felt was enough to dispel its doubts. However, in order to ensure that most of the journalists working on *La Vie Financière* stay with the magazine after it is sold and do not exercise their right to leave under the clause de cession provided for by French industrial legislation for holders of a press card, the Commission will try to ensure that the purchaser of the publication has sufficient credibility in the publishing sector to ensure the continuity of the title and effective long-term competition in the market.

*Syngenta CP/Advanta*\(^{166}\) and *Fox Paine/Advanta*\(^{167}\)

253. On 17 August, the Commission authorised, subject to conditions, the proposed acquisition of Dutch-based seed producer Advanta BV by Swiss-based Syngenta Crop Protection AG. Syngenta Crop Protection AG is a subsidiary of Syngenta AG which, like Advanta BV, is active in the breeding, production, processing and sale of various kinds of seeds.

254. The Commission’s market investigation pointed to serious competition concerns in a number of national seed markets within the EU. These were sugar beet seeds in Belgium, Finland, France, the Netherlands, Portugal, Spain, Austria, Ireland and Italy, maize seeds in Denmark, the Netherlands and the United Kingdom, sunflower seeds in Hungary and Spain as well as the French market for spring barley seeds and the UK market for vining pea seeds (a type of pea seed).

255. The operation would have created a very strong market leader, often twice or more the size of the next competitor. In the market for sugar beet seeds, the proposed operation would also have brought together two of the three major European sugar beet seed breeders, which are also the main suppliers of sugar beet seeds in Europe.

256. In order to remove the Commission’s concerns, Syngenta offered to divest Advanta’s whole European seed business to an independent purchaser, thereby removing entirely the overlap of the parties’ operations in all relevant markets within the European Union.

257. A few days later, on 20 August, the Commission approved the proposed acquisition by Fox Paine, a US manager of investment funds, of Advanta’s worldwide activities in seeds for sugar beet, oilseed rape, sorghum, sunflower, grasses as well as the maize and cereals businesses outside North America. On the basis of this transaction,

\(^{166}\) COMP/M.3465.
\(^{167}\) COMP/M.3506.
the commitments given by Syngenta in the Syngenta/Advanta concentration were fulfilled.

258. The Commission’s review of the Fox Paine/Advanta transaction showed that Fox Paine has interests in several sectors, including a majority holding in US seed producer Seminis, which develops, grows and sells fruit and vegetable seeds including in Europe. The activities of Seminis and Advanta overlapped in the markets for vining pea seeds and onion seeds, but the market investigation did not reveal any particular competition concern as the parties would continue to face competition from other important players.

Cytec/UCB Surface Specialties168

259. On 17 December, the Commission cleared, subject to commitments, the proposed acquisition of UCB’s Surface Specialties (Surface Specialties) business by Cytec Industries Inc. (Cytec) of the US.

260. Cytec produces specialty chemicals and materials, including mining and water treatment chemicals, coating chemicals, adhesives and composite materials and building block chemicals. Surface Specialties, part of the Belgian chemicals and pharmaceutical company UCB, produces coating chemicals, adhesives and chemicals used for graphic arts applications.

261. The Commission’s market investigation identified serious competition concerns resulting from the combination of the merging parties’ activities in the markets for amino resins used as crosslinkers in industrial liquid coatings and for use as adhesion promoters for reinforced rubber. Cytec was able to remove these concerns by offering to divest Surface Specialties’ Fechenheim plant (Germany), which accounts for almost all of Surface Specialties’ European production.

262. The Commission also verified whether the combination of Cytec, an important supplier for acrylamide, with Surface Specialties, which uses acrylamide as an input for its production of adhesives and resin additives, could foreclose acrylamide supplies for third parties. The market investigation did not confirm these concerns, since Cytec faces credible competitors for the supply of acrylamide and Surface Specialties’ total needs appear to account for only a marginal part of Cytec’s output.

Box 7: A first step in the consolidation of European aviation - the Air France/KLM merger and the Air France/Alitalia alliance

Introduction

The last three years have been particularly productive for Community law in the field of aviation. The “Open Skies” judgments169 in 2002 and the legislative effort launched by the

168 COMP/M.3558.
169 Judgments of 5.11.2002 in Cases C-475, 471, 467, 469, 476, 472, 468 and 466/98 against Austria, Belgium, Denmark, Finland, Germany, Luxembourg, Sweden and the United Kingdom, respectively.
Commission in previous years\(^{170}\) created the legal basis for the development of a truly internal market for the civil aviation industry. It was then the turn of European airline companies to respond to this new legal environment and create EU-wide players, putting an end to the fragmentation of the European aviation industry\(^{171}\). Since 2002, Air France and KLM have been the first European carriers to seize this opportunity.

In 2004, the Commission had to ensure that this consolidation process takes place in full compliance with the competition rules. Air France (“AF”) and KLM announced their merger in the second half of 2003 and it was cleared by the Commission on 11 February\(^{172}\). Soon


\(^{171}\) According to the Commission in paragraph 47 of its communication on the consequences of the Court judgments of 5.11.2002 for European air transport policy (COM/2002/0649 final), non-EU airlines, particularly in the USA, are much bigger than their European counterparts in terms of passenger numbers, number of hubs they operate and their aircraft fleets. Consolidation would be therefore needed to be able to compete globally with these airlines.

\(^{172}\) COMP/M 3280 – Air France/KLM. This decision has been challenged before the Court of First Instance by a third party (Case T-177/04).

\(^{173}\) COMP/38.248 – Air France/Alitalia. This decision has been challenged before the Court of First Instance by a third party (Case T-300/04).

\(^{174}\) Regulations (EC) Nos 2407, 2408 and 2409/92.

\(^{175}\) Some previous decisions on mergers between Community carriers are: decision of 5.10.1992 in Case IV/M.616 Air France/Sabena, and decision of 11.8.1999 in Case COMP/JV.19 KLM/Alitalia.

\(^{176}\) On 5.6.2003, the Commission proposed and obtained from the Council a mandate to negotiate, together with the Member States, a comprehensive air services agreement with the US and a horizontal mandate for negotiations with third countries in all areas which fall under exclusive Community competence. The Commission states in the above-mentioned communication of 5.11.2002 on the consequences of the Court judgments for European air transport policy that “the negotiation of Community clauses will permit Community airlines to expand their international operations from airports in other Member States, as well as pave the way for greater commercial integration between airlines in different Member States”.

\(^{177}\) Recital 23 to Regulation 4064/89.

\(^{178}\) This Agreement was notified under Regulation 4064/89 on 18.12.2003.

\(^{179}\) See point 37 of the Air France/Alitalia decision.


\(^{181}\) Time-sensitive passengers have a high opportunity cost of travel time, and as a result they are less willing to substitute non-stop for indirect flights, they are not flexible in terms of time of departure/arrival and they need to have the option of changing their reservation at short notice.

\(^{182}\) At the time the AF/AZ decision was taken (under Regulation (EC) 3975/87) the Commission only had enforcement powers for intra-Community routes.

\(^{183}\) This approach was first taken in the United Airlines/US Airway decision.

\(^{184}\) Where the use of divestiture is difficult or impossible, “the change in the market structure resulting from a proposed concentration can lead to major barriers or impediments to entry into the relevant market. Such barriers might arise from control over infrastructure, in particular networks .... In such circumstances, remedies may aim at facilitating market entry by ensuring that competitors will have access to the necessary infrastructure ….” Cf. paragraph 28 of the Commission notice on remedies acceptable under Council Regulation (EEC) No 4064/89 and under Commission Regulation (EC) No 447/98 (OJ C 68, 2.3.2001).

\(^{185}\) See judgment in Case T-102/96 Gencor [1999] ECR II-753.
after the AF/KLM decision, on 7 April, AF was granted an exemption under Article 81(3) EC for its more traditional alliance with Alitalia (“AZ”). The parallelism in terms of time and players between the two cases provides a good opportunity to compare the treatment of aviation cases under Article 81 and the Merger Regulation (“ECMR”).

Legal context of the two operations and the new trends in the European aviation industry

In order to cover a greater number of destinations and improve capacity utilization at lower cost, larger airlines are establishing hub-and-spoke systems and concentrating traffic on their respective hubs. This objective is further ensured through the conclusion of agreements with other airlines which can take the form of a strategic alliance (e.g. AF/AZ) or of a merger (e.g. AF/KLM). Compared with alliances, mergers allow a better rationalisation and integration of the network structure of the merging carriers. However, mergers in the EU between carriers of different nationalities used to be difficult owing to the system of bilateral international agreements regulating traffic rights between States.

Pursuant to the International Convention on Aviation of 7 December 1947 (Chicago Convention), each sovereign State has the competence to grant traffic rights over its airspace. On this basis, traffic rights were granted to carriers from third countries through bilateral agreements, whereby the two signing States often grant traffic rights only to carriers having the nationality of those States (“nationality clause”). Although the EU had completed the internal market in aviation by 1997 allowing Community carriers to compete within the European market, international flights to/from the EU were and are still subject to many restrictions, including the nationality clause. Therefore, if a Belgian carrier is acquired by a British airline and hence loses its Belgian nationality, the former risks losing its rights to fly to/from Belgium to third countries as the third country could question its nationality and the attached traffic rights. The risk of losing these traffic rights was sometimes considered too important and hence compromised the commercial viability of a merger. This is one of the reasons why a successful trans-EU merger project among Community carriers has rarely taken place, until, that is, the AF/KLM case. In that legal context, European carriers preferred to use strategic alliances.

The “Open Skies” judgments changed this legal landscape. The Court of Justice ruled that those Member States which had undertaken commitments with the United States were not entitled to do so and had breached the exclusive competence of the Community in a number of areas. Moreover, the Court ruled that the negotiation of bilateral agreements by Member States on behalf of their national carriers while excluding other Community carriers constitutes an infringement of the freedom of establishment provided for in Article 43 EC. As a result, the nationality clauses contained in bilateral agreements with third countries need to be replaced by a “Community clause”. The modification of existing bilateral agreements and the recognition by third countries of the Community clause are necessary to ensure that air transport services are operated on a sound legal basis. The commercial risk mentioned above will then disappear and mergers between Community carriers will be more likely to take place.

Description of the two transactions

The concept of concentration covers “only operations bringing about a lasting change in the structure of the undertakings concerned”. The Framework Agreement of 16 October 2003 signed between AF and KLM provides that two previously independent carriers will merge to become ultimately a single operator in the market (under the name Air France-
KLM). Former shareholders of AF will hold 81% of Air France-KLM shares and the minority shareholders of KLM the remaining 19%. Although the best way to benefit fully from synergy effects would be a full merger, the gradual acceptance of the principle of the “Community carrier” concept by third States requires a cautious and progressive approach. Initially, AF will acquire extensive veto rights over KLM, which will keep its Dutch nationality. In a second phase, the integration between AF and KLM will be enhanced and the merged entity might ultimately operate as a single carrier. The acquisition of key veto rights by AF over KLM from the outset implies that the notified transaction constituted a concentration within the meaning of Article 3(1)(b) of the ECMR.

Under their extensive alliance, AF and AZ agree to coordinate their operational and commercial policies on a number of routes (i.e. initially the France-Italy bundle of routes), through extensive use of code-sharing, network coordination and route cooperation, share prices and a common sales policy. However, unlike the AF/KLM case, AF and AZ remain two distinct and independent entities in the market. The alliance does not create a new entity either de jure or de facto, nor has it altered the structure of the undertakings concerned, particularly as regards control. Furthermore, the alliance has no independent access to the market as all dealings with customers will continue to take place through AF and AZ. The alliance clearly does not constitute a concentration but a coordination agreement within the scope of Article 81 EC179. Nevertheless, the alliance provides for the possibility of a future merger between the parties.

**Market definition and assessment of the two transactions**

The substantive assessments of the two cases are similar. Firstly, the Commission defined the relevant markets in line with its well established point-of-origin/point-of-destination pair ("O&D") approach confirmed by case law180. Although the AF/KLM decision largely discussed the importance of network competition from the demand viewpoint, both decisions conclude that, from the customer's perspective, every O&D should be considered a separate market as customers require a transport service between two points. Secondly, in order to assess the exact scope of an O&D, the Commission assessed the substitutability between airports within a certain catchment area. In this regard, the Commission considered that the two main airports of Paris, Milan, Rome and New York were substitutable. Thirdly, as in previous aviation decisions, the Commission distinguishes between "time-sensitive" and "non-time-sensitive" customers181. Fourthly, in both cases, the routes on which the parties' activities actually overlapped or on which they were potential competitors were considered to be relevant markets.

Notwithstanding these similarities, as a result of the different nature and scope of the two transactions, the investigation in the AF/KLM case was wider. It included the assessment of international routes182 and the impact of AF’s and KLM’s partnerships with other carriers. On long-haul routes, the Commission considered that indirect flights compete with direct flights under certain conditions, for instance, where the connection time does not exceed 150 minutes183. The assessment in the AF/KLM case also took into consideration the presence - on each relevant route - of partners of the merging parties (e.g. members of AF’s Skyteam alliance or of NorthWest, KLM’s American ally). The strong economic and commercial relationship and the extensive alliance between AF and AZ led the Commission to conclude that, post-merger, AZ will no longer have an incentive to compete with KLM in the Italian/Dutch bundle of routes and these routes were therefore included in the competitive assessment of the merger. Finally, the AF/KLM decision also assessed other related markets.
such as cargo transport and maintenance.

The Commission found competition concerns on seven routes in the AF/AZ case, and nine intra-Community routes and five inter-continental routes in the AF/KLM case. These are routes on which the parties have a high combined market share and barriers to entry are high, basically owing to airport congestion in at least one of the two points of O&D.

**Similarities and differences between the remedies applied**

Competition problems deriving from alliances and concentrations in the aviation sector, and therefore the remedies applied, are similar. By definition, competition concerns in this sector do not usually arise from restrictions on physical capacity requiring the divestiture of a given business (e.g. aeroplanes or subsidiaries), but rather from barriers to entry, namely access to airport slots\(^{184}\). In this regard the parties agreed to put slots at the disposal of competitors in both cases so that the latter might be able to operate flights on the routes where the Commission found competition concerns. These remedies were accompanied by other measures (frequency freeze and the obligation to enter into agreements concerning the frequent-flyer programme, interlining and inter-modal transport services, etc.).

However, remedies should also reflect the particularities derived from the different nature of an alliance and a concentration. A cooperative alliance does not represent a permanent change in the market and an Article 81(3) decision is granted for an initial period of six years, subject to review after that period. By contrast, a concentration (and hence a merger decision) has a lasting impact on the structure of the companies and the market. That is why structural remedies are particularly important in merger cases, given that they are able to ensure such a permanent effect by their very nature\(^{185}\).

In this sense, the AF/KLM decision constitutes an innovative shift towards a more permanent or “structural” approach to traditional slot remedies. Firstly, the slot surrender obligation applies for an unlimited duration. Secondly, slots already released by the parties and which are no longer used by an entrant on a particular city pair will be handed back to the slot pool at the airport, in cases where the obligation to release slots no longer exists. Thirdly, a “crown jewel” approach was chosen for the Amsterdam-Paris route, which competitors found particularly difficult to enter as it links AF’s and KLM’s respective hubs. Under certain conditions and once it has operated on this city pair for at least three years, an entrant on this city pair could even obtain the grandfather rights for the slots offered by the merging parties.

With regard to remedies concerning long-haul routes, specific to the AF/KLM case, the Commission’s assumption that indirect flights represent a competitive constraint for direct flights needed to be ensured. To that end, the French and Dutch national authorities declared that they would refrain from any intervention into the price setting of indirect services on a large number of routes (so-called “sixth freedom”) and that they would ensure that third carriers have the right to stopover in Amsterdam or Paris in order to offer destinations outside the EU (fifth freedom). These declarations are part of the AF/KLM decision.
3. **Referrals**

*Kabel Deutschland/ish*[^186]

263. On 20 April, the Commission received a notification of the proposed acquisition of the undertakings ish GmbH & Co KG, Germany, and ish KS NRW GmbH & Co KG, Germany (the latter two “ish”) by the German undertaking Kabel Deutschland GmbH, Germany (“KDG”).

264. KDG operates the former broadband cable network of Deutsche Telekom AG in all of Germany apart from the Länder of Hessen, Baden-Württemberg and North Rhine-Westphalia. In the last-mentioned Land, ish is the operator of the broadband cable network. Both companies offer, in their respective network areas, the transmission of broadcast signals (TV and radio) as well as Internet access. Apart from the acquisition of ish, KDG further planned to buy also the two remaining regional broadband cable system operators in Germany, namely iesy Hessen and Kabel Baden-Württemberg. Contrary to the KDG/ish merger, these two concentrations fell within the competence of the national competition authority, the German Federal Cartel Office (FCO).

265. On 14 May, the FCO submitted to the Commission a request for referral according to which the merger could lead to the strengthening of dominant positions in several markets in Germany. In the market for the feeding-in of broadcast signals, where broadcasters demand the transmission of their signals via the broadband cable, such a strengthening could - according to the FCO - result from the increase of reach that follows the combination of the two networks. Moreover, in the market for services for digital pay-TV, the market for delivery of signals from the regional broadband cable to the in-house cable systems and the market for the supply of signals to end customers, competition could in the view of the FCO be further impeded if ish were eliminated as competitor to KDG, which was considered already dominant in some regional markets.

266. The Commission came to the conclusion that the conditions for a referral to the Federal Cartel Office were met, given the national scope of the markets affected by the transaction. It believed that the FCO was best placed to analyse the preliminary competition concerns, as this required the examination of local markets and specific national circumstances. Moreover, all three proposed acquisitions by KDG – i.e. the acquisitions of ish, iesy Hessen and Kabel Baden-Württemberg – raised similar questions and should therefore be examined uniformly by a single competition authority. The Commission therefore decided on 7 June to refer the case to the FCO.

*Accor/Barrière/Colony*[^187]

267. On 4 June, the Commission decided to refer to the French competition authorities part of the proposed joint venture in the casinos sector between Accor, the Barrière-Desseigne family group and Colony. This partial referral concerned the assessment

[^186]: COMP/M.3271.
[^187]: COMP/M.3373.
of the competitive impact of the transaction on the casino management markets in two French regions, Côte d’Azur and Basque and Landes Coasts. On the same day, the Commission cleared the operation as regards the remaining product and geographic markets.

268. The Commission’s investigation showed that the market for the operation of casinos had a local geographic dimension that can be defined either based on a relevant geographical commercial area of an hour’s drive or a local population area. Based on this definition, the transaction would have raised competition problems in the two above-mentioned French regions. The Commission therefore concluded that the French authorities were best placed to assess the effects of the operation on these local markets and decided to refer their competitive assessment back to France.

269. The other aspects of the transaction involved the acquisition of casino licences and the hotel markets and were authorised as the Commission concluded that there was no risk to competition raised by the transaction in these markets.

270. On 28 July, the French competition authorities cleared the transaction subject to remedies in the two referred markets. These remedies consist of the divestment by the parties of two casinos, one on the Côte d’Azur and a second one in the Basque and Landes Coasts.

4. Notifications withdrawn

INA/AIG/SNFA

271. On 22 September, the German bearings manufacturer INA Holding Schaeffler KG (“INA”) and the US insurance group AIG notified to the Commission the joint acquisition of the French producer of precision bearings SNFA. INA and SNFA are specialised in the production of precision anti-friction bearings. AIG is an international insurance group without any activities in the bearings industry. Precision bearings are mainly used in applications that require a very high degree of accuracy, in particular in the machine tool industry and in the aerospace sector.

272. On 23 October 2003, the Commission had opened an in-depth inquiry into the proposed transaction owing to concerns that the elimination of competition between the first and second-largest suppliers of precision machine tool bearings in Western Europe would give INA a dominant position. The Commission’s preliminary view based on the market investigation was that the transaction would significantly reduce competition in the market for machine tool angular contact ball bearings (ACBBs) in Western Europe as it would have brought together the two largest players and the strongest overall in terms of quality, reliability, innovation and breadth of portfolio. None of the remaining competitors, whether the Swedish supplier SKF or the Japanese company NSK, or other smaller players, would have been able to exert a sufficient and effective competitive pressure on INA. The Commission also found that customers would be unlikely to exert a sufficient check on INA’s pricing

188 COMP/M.3093.
strategy since most machine tool and spindle manufacturers are small businesses with limited bargaining power.

273. In view of its strong concerns the Commission decided to send a statement of objections to INA and AIG on 19 December 2003. A final decision, however, was not issued, since the parties abandoned the transaction in January 2004.

*RWA/AMI*189

274. On 11 October, the Austrian companies RWA Raiffeisen-Ware Austria AG ("RWA") and AMI Agro Linz Melamine International GmbH ("AMI") gave up the planned creation of the joint venture Inter-Fert Düngemittel GmbH ("Inter-Fert") and withdrew the corresponding notification with the Commission. The establishment of the joint venture would have united the leading Austrian producer of fertilizers AMI with the most important agricultural wholesale organization in Austria, RWA.

275. In a decision of 29 September the Commission had initiated the second phase of the proceedings, since the preliminary examination of the intended merger found that the creation of the joint venture would strengthen the dominant position of RWA in the wholesale market for fertilizers in Austria. In neighbouring Bavaria, the Commission also identified competition concerns regarding the trade in fertilizers.

276. The Commission’s preliminary conclusion was that RWA alone had market shares in a range of 55% to 65% in the markets for certain types of fertiliser individually or all fertilizers together and that the operation would have removed AMI as an important competitor in the Austrian wholesale market. Furthermore, the dominant position of RWA would have been strengthened following the merger with AMI by the resulting vertical integration. There was a risk that the transaction would have led to foreclosure. The transaction might also have strengthened the dominant position of BayWa, a parent company of RWA, in the Bavarian retail markets for fertilizers where it has a market share of about 70% and could have resulted in the foreclosure of BayWa’s competitors. This would have led to a strengthening of BayWa’s dominant position in the Bavarian retail markets for fertilizers and a significant impediment of competition in a substantial part of the common market.

277. In order to eliminate the competition concerns with regard to Austria and Bavaria, the parties proposed commitments which, however, were not considered sufficient to eliminate the competition concerns for the affected markets in Austria and Bavaria. This was confirmed when the commitments were market tested. After the parties were notified of the Commission’s institution of second phase proceedings they withdrew their notification.

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189 COMP/M.3423.
C – SELECTED COURT CASES

Portuguese Republic v Commission (Cimpor)

278. On 22 June, the Court of Justice (ECJ) gave judgment\textsuperscript{190} for the Commission in a case related to the Commission Decision of 22 November 2000 adopted under Article 21(3) of the Merger Regulation\textsuperscript{191} in the context of the examination of a notified concentration in the Secil/Holderbank/Cimpor case\textsuperscript{192}. In the Article 21(3) decision (“the decision”), the Commission called on the Portuguese Government to take the necessary measures to comply with Community law and to withdraw two decisions (\textit{despachos} of 5 July 2000 and 11 August 2000) which that Government had taken to oppose, on the basis of national privatisation legislation, the proposed concentration, which had been notified to the Commission and had a Community dimension.

279. In the decision and in its defence before the Court, the Commission argued that the structure of Article 21 is built on the balance between, on the one hand, the Member State being under an obligation to communicate to the Commission in advance “any other public interest” and to withhold from adopting measures to protect such interests, and, on the other hand, the Commission being under an obligation to assess and take a decision on the compatibility of the claimed interest with the general principles and other provisions of Community law within a one-month deadline. The Commission held that Article 21(3) would be deprived of all its effect if, as a result of the absence of communication, the Commission was not entitled to assess whether a measure adopted by a Member State was justified by one of the interests expressly considered to be legitimate by Article 21(3). Member States could easily avoid the scrutiny of the Commission by not communicating such measures.

280. The Commission therefore considered that Article 21 should be interpreted as meaning that, irrespective of whether a measure is communicated, the Commission is entitled to adopt a decision assessing whether a measure not covered by one of the three grounds mentioned in Article 21 should be recognised as compatible with the Treaty.

281. The Commission stated that the arguments underlying the two decisions taken by the Portuguese Government opposing the concentration are encapsulated in the text of the second decision, according to which it is necessary "to protect development of the shareholding structures in companies undergoing privatisation with a view to reinforcing the corporate capacity and the efficiency of the national production apparatus in a way that is consistent with the economic policy guidelines in Portugal"\textsuperscript{193}.

\textsuperscript{190} Case C-42/01 Portuguese Republic v Commission, not yet reported.
\textsuperscript{192} COMP/M.2054.
\textsuperscript{193} Objective of Decree-Law No 380/93.
282. The Commission held that this objective is not one of the interests (public security, plurality of the media and prudential rules) regarded as intrinsically legitimate for the purposes of the second paragraph of Article 21(3) of the Merger Regulation. By adopting the decisions declining to authorise the acquisition of more than 10% of the shares in Cimpor, the Portuguese Republic, in the Commission’s view, in effect prohibited the acquisition and thereby raised barriers to the freedom of establishment and free movement of capital enshrined in the Treaty, which could not be considered warranted under any essential grounds of public interest recognised in the case law of the ECJ. In any event, the Portuguese Government had not advanced any such grounds. The interest underlying the two decisions of the Portuguese Minister of Finance, which were not notified to the Commission contrary to Article 21(3) of the Merger Regulation, was thus found incompatible with Community law194.

283. Consequently, one of the essential questions for the Commission in these proceedings was whether the Commission had the competence to adopt an Article 21(3) decision under these circumstances or whether it should have reverted to an infringement procedure under Article 226 of the Treaty. The Commission maintained that Article 21(3) should be interpreted as covering a situation where the Member State has not communicated to the Commission the public interest, other than public security, plurality of the media or prudential rules, it intends to protect prior to taking the measures.

284. The ECJ agreed with the Commission that the Commission has the competence to rule by decision as to the compatibility of those interests with the general principles and other provisions of Community law, irrespective of whether or not those interests have been communicated to it. If, in the absence of any communication by the Member State concerned, the sole option open to the Commission were to bring an action for failure to fulfil obligations under Article 226 of the Treaty, it would be impossible to obtain a Community decision within the short time limits laid down by the Merger Regulation. This would in turn increase the risk of national measures already taken irretrievably prejudicing a merger with a Community dimension and rendering the Commission’s review under Article 21(3) ineffective by giving the Member States the possibility of circumventing the controls laid down by that provision.

285. The Commission’s task in identifying the interests protected by the national measures may be made more uncertain and complex if these interests have not been communicated to it, but the Commission always has the possibility of asking the

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194 It should be noted that, during the proceedings, on 4 June 2002, the Court of Justice delivered its judgment in Case C-367/98. In that action, the Commission challenged on the basis of internal market rules, inter alia, Portuguese Law No 11/90 (framework law on privatisation) as well as Decree Law No 380/93 (prior authorisation). The Court found that the Portuguese rules provided for a manifestly discriminatory treatment of investors from other Member States with the effect of restricting free movement of capital. As to the argument based on the need to safeguard the financial interests of the Portuguese Republic, the Court emphasised that it was settled case law that such economic grounds, put forward in support of a prior authorisation procedure, cannot serve as justification for restrictions on freedom of movement. By adopting and maintaining in force, in particular, Law No 11/90 and Decree Law No 380/93, the Portuguese Republic had failed to fulfil its obligations under Article 73b (now Article 56) of the Treaty.
Member State concerned for information. The Court acknowledges that in this case the Commission also did so. In such cases, the Commission inevitably first needs to examine whether those measures are justified by one of the interests specified in the second subparagraph of Article 21(3) of the Merger Regulation (public security/plurality of media/prudential rules). The Court thus concluded that, in adopting the contested decision, the Commission did not encroach on the jurisdiction of the ECJ or national courts and did not infringe Article 21(1) of the Merger Regulation, Article 220 of the Treaty and Article 226 of the Treaty, nor did it commit any misuse of procedure.

286. In this judgment, the Court clearly emphasised the precise allocation of competencies between the national and Community authorities and interventions that can be made by the national and by the Community authorities with a view to efficient merger control respecting sound administration, legal certainty and the legitimate interests of the undertakings concerned. Most importantly, the Court recognises Article 21(3) as being a *lex specialis* taking priority over an action for failure to fulfil obligations under Article 226 of the Treaty.

*MCI v Commission*

287. On 28 September, the Court of First Instance (CFI) delivered a judgment annulling on procedural grounds the Commission decision of 28 June 2000 (“the decision”) in the *MCI/Sprint case* following an appeal by MCI. In the decision, the Commission had prohibited the merger between MCI, formerly MCI WorldCom, and Sprint, both US-based, global communications companies, on the ground that it would lead to the creation or strengthening of a dominant position in the global market for the provision of top-level or universal Internet connectivity.

288. The judgment does not deal with matters of competition assessment, but is limited to questions regarding admissibility, the interest in bringing proceedings and the power of the Commission to adopt the decision.

289. As regards admissibility, the judgment introduces a novel element as to the interest to be shown by the applicant in the annulment of the contested measure. Doubts could be raised as to MCI’s interest mainly on the ground that it claimed to have abandoned the merger even before adoption of the decision. Whereas in previous cases the Court had required that the abandonment of the transaction be directly attributable to the contested decision, in the present case it considers it sufficient that the Commission adopted a decision addressed to MCI which is the only existing legal obstacle to carrying out the transaction should the parties wish to merge under the same conditions.

290. In substance, MCI claimed that the Commission lacked the competence to adopt the decision on 28 June 2000, when the notifying parties had formally withdrawn their notification on 27 June by a letter saying: “The parties no longer propose to

195 Case T-310/00 MCI v Commission, not yet reported.
196 COMP/M.1741.
implement the proposed merger in the form presented in the notification. In so far as the parties decide to merge their activities in a modified form in the future, the parties will make such modifications as appropriate under the applicable merger laws.” The Commission substantiated its competence by explaining in the decision that the letter of 27 June 2000 did not amount to a formal abandoning of the merger agreement of 4 October 1999 that was the object of the notification and by referring to the parties’ press releases of 27 June 2000, stating that they still hoped that a sensible conclusion to the merger could be reached.

291. The Court acknowledges that the parties’ letter did not concern the abandonment, as a matter of principle, of any idea of a merger between Worldcom and Sprint, but only the abandonment of the proposed merger as agreed between the parties in the merger agreement of 4 October 1999 and as notified to the Commission. The Court considers that the parties’ statement of 27 June 2000 could only be interpreted as entailing the lapsing of the merger agreement notified under the Merger Regulation. The abandonment of the proposed transaction “in the form presented in the notification” would necessarily affect the effectiveness, if not the validity, of the merger agreement itself.

292. The Court concludes that the Commission lacked the competence to adopt the decision as the parties, by letter of 27 June, had abandoned the agreement and not only withdrawn the notification. It further states that the Commission could not base its competence on its subjective view of the intentions of the parties to pursue a merger and points out that, if the Commission had doubts as to the meaning of the letter, it could have asked for formal proof that the merger agreement had really been abandoned by means of a request pursuant to Article 11 of the Merger Regulation.
Figure 4
Number of final decisions adopted each year since 1998 and number of notifications

- Final decisions
- Notifications
- Final decisions (Art. 66 ECSC Treaty)
Figure 5
Breakdown by type of operation (1995-2004)

- Acquisition of majority: 45%
- Joint venture/control: 42%
- Takeover bid: 7%
- Others: 6%
III – SECTOR DEVELOPMENTS

A - LIBERALISED SECTORS

1. ENERGY

293. As regards the energy sector, the creation of truly competitive energy markets will benefit energy consumers and the competitiveness of the European economy. In 2004, the Commission continued to work in cooperation with national competition authorities and energy regulators in order to improve the conditions for competition and for new market entry. In particular, the Commission established an ECN Energy Subgroup and liaised regularly with Energy Regulators197.

294. As far as the legislative process is concerned, 2004 was the year in which the Directives adopted by the Commission in 2003 in order to accelerate the completion of the internal gas and electricity markets were to be transposed by the Member States. Regrettably, most Member States did not respect this deadline. The legislative process advanced also at Community level and significant progress was made with the adoption of the Council common position for a Regulation on conditions for access to the gas transmission networks. The Regulation will tackle some remaining barriers to the completion of the internal market, in particular regarding trade in gas.

295. The liberalisation process was supported – as in previous years – by the application of competition rules in a number of important cases. In the Gaz de France case198 the Commission confirmed by formal decision that territorial restriction clauses infringe Article 81 EC. Such clauses, traditionally included in gas supply and transportation/service contracts prevent customers from obtaining gas supplies from operators established in other Member States and constitute a sizeable obstacle to the creation of a genuinely competitive and integrated gas market at European level.

296. On 30 April, the Commission decided to close its investigation in the Marathon case199 as regards the remaining two suppliers, the French company Gaz de France and the German company Ruhrgas200, after settling the case in 2001 and 2003 with the German companies BEB201 and Thyssengas202, and the Dutch company Gasunie203. The Marathon case concerned the alleged refusal by five gas companies to grant the Norwegian subsidiary of the US energy company Marathon access to their respective gas networks. The commitments offered by Gaz de France and

197 See above section I.C.3.
198 See above point 81.
199 COMP/36.246.
200 IP/04/573.
201 IP/03/1129.
202 IP/01/1641.
203 IP/03/547.
Ruhrgas improved third-party access to their networks and allowed customers to fully benefit from the opening of the gas markets in France and Germany.

297. In particular, Ruhrgas undertook to introduce a new entry/exit regime, which makes it possible to book gas transport capacities separately at entry and exit points (rather than having to book capacity over a fictitious contractual path between the point where the gas is injected into the transport system and the point where it is withdrawn). Gaz de France, which had already implemented an entry/exit system, and Ruhrgas further undertook to gradually reduce the number of balancing and tariff zones in their respective networks, which will reduce the cost of transport related to the crossing of several zones. Gaz de France also undertook to implement a gas release programme over three years in the south of France, in order to allow the development of competition without waiting for the completion in mid-2007 of planned new infrastructure facilitating the access of competing gas to this area. In addition to these main commitments, Gaz de France and Ruhrgas undertook to take a number of other measures to improve transparency, the handling of access requests and congestion management.

298. In the merger field, the Commission decided to block the envisaged acquisition of joint control over Gás de Portugal (GDP), the incumbent gas company in Portugal, by Energias de Portugal (EDP), the incumbent electricity company in Portugal, and ENI, an Italian energy company. This operation would have strengthened EDP's dominant position in their respective markets (electricity wholesale and retail markets and gas markets in Portugal) as a result of both horizontal and vertical effects. In particular, it would have removed GDP's potential competition in the electricity markets as well as EDP's most likely entry in the gas markets. Moreover, the concentration would have made electricity producers using gas as a fuel highly dependent on their main competitor, i.e. EDP, for their gas supplies. Lastly, the operation would have foreclosed a significant part of gas demand, currently controlled by EDP. The concentration would thus have discouraged cross-border competition and pre-empted the effectiveness of the liberalisation of the electricity and gas markets in Portugal. This would have resulted in higher prices for gas and electricity for both domestic customers and industry. The remedies proposed by EDP and ENI being insufficient to address the competition issues identified, the Commission had no choice but to prohibit the proposed merger.

299. Last but not least, the Commission issued a letter of formal notice to Greece in a case concerning the Greek lignite mining and electricity generation and supply markets. Greece grants to the incumbent electricity producer exclusive mining rights to extract lignite without compensation. This privileged access to lignite, the cheapest energy source for electricity generation in Greece, enables the electricity incumbent to maintain its dominant position on the electricity generation and supply markets by preventing market entry of potential competitors. In the Commission’s view, Greece infringes Articles 86(1) and 82 EC by maintaining these rights.

2. ELECTRONIC COMMUNICATIONS

300. One of the fundamental changes introduced by the new regulatory framework for electronic communication services is that national regulatory authorities (NRAs) are obliged to define relevant electronic communication markets in accordance with the
principles of competition law. They must carry out an analysis of the relevant markets and determine whether those markets are effectively competitive, meaning that there is no undertaking with significant market power (SMP, equivalent to the competition concept of dominance) on that market. If a market is not effectively competitive, NRAs must impose at least one specific regulatory obligation among those set out in the Access or the Universal Service Directives. Conversely, if a market is effectively competitive, NRAs may not maintain or introduce any specific regulatory obligations.

301. Following the market analysis procedure, NRAs must notify to the Commission draft regulatory measures concerning the definition of the relevant markets, the finding or non-finding of SMP and the regulatory remedies proposed, if any. The Commission may either issue comments, which NRAs must take utmost account of, or request the NRA to withdraw the draft measure if the market definition and/or the determination of SMP is incompatible with Community law. In 2004, the Commission's departments received 89 such notifications and closed 90 cases. In three cases, the Commission requested the NRA to withdraw the draft measure concerned.

302. In the joint cases FI/2003/0024 and FI/2003/0027, concerning the publicly available international telephone services provided at a fixed location for residential and non-residential customers in Finland, the Commission found that the Finnish NRA, Ficora, did not provide sufficient evidence and did not take into account existing regulation in the market when reaching the conclusion that there were no operators with SMP on these markets. The Commission contested Ficora's finding, according to which, despite the high market shares (above 50%) of TeliaSonera, the latter did not have SMP as a result of low barriers to entry, the large number of undertakings providing international telephone services and the fact that subscribers could easily acquire international telephone services from operators other than the one providing the subscriber connection. In the Commission’s view, Ficora did not provide market data related to several factors which are relevant to the assessment of market power, such as the cost structure and the distribution and sales network of the undertakings on the market. Furthermore, Ficora’s assessment of the degree of market power of the undertakings in the markets did not take appropriately into account the existence of regulatory remedies and their impact on the perceived level of competition in the market, thereby considerably undermining its conclusions. In particular, Ficora’s claims that barriers to entry into these markets were low and that there were several undertakings providing international telephone services, and the resulting conclusion of a lack of SMP relied on existing regulation, such as carrier selection, carrier-pre-selection and the obligation to interconnect. The Commission pointed out that a key principle of market analysis was to assess whether effective competition was or was not entirely or primarily a result of regulation in place, and whether the status of competition in the defined market was likely to be different in the absence of such regulation.

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303. In case FI/2004/0082\textsuperscript{205}, concerning the market for access and call origination on public mobile telephone networks in Finland, the Commission concluded that the draft measure notified by Ficora lacked the evidence to support the conclusion that TeliaSonera had significant market power in the Finnish market for access and call origination on public mobile telephone networks. Although TeliaSonera had a market share in excess of 60\%, there were two other mobile network operators on the supply side, and in addition to the network operators more than ten service providers on the demand side of the market. Service providers have been able to conclude wholesale agreements, including mobile virtual network operator agreements, on a commercial basis – without any regulatory obligation for mobile network operators to provide access – with all mobile network operators in the relevant market. The Commission found that in addition to the apparent dynamics resulting from the (downstream) retail market, mobile network operators were competing for and were able to conclude agreements with different service providers due to their ability to provide flexible offers or types of services that were not provided by other mobile network operators. Furthermore, Ficora did not provide convincing evidence that the switching costs would significantly hinder the ability of a service provider to change its wholesale provider.

304. Finally, in case AT/2004/0090\textsuperscript{206}, concerning the Austrian market for transit services in the fixed public network, the Commission did not agree with the Austrian NRA’s conclusion that operators providing transit services for themselves were part of the transit market, and that therefore the market share of Telekom Austria was below 50\% and consequently it did not have SMP. In particular, the Austrian NRA did not substantiate to a sufficient extent its finding that network operators purchasing transit services could promptly shift to self-provision in response to price change, in the light of the high investments and the substantial planning and time associated with network roll-out. Furthermore, the Commission found that insufficient evidence was provided as to the ability and willingness of these operators to begin actually supplying the commercial transit market on a systematic basis, and that therefore self-provision fell outside the scope of the relevant market, leaving Telekom Austria with a market share of about 90\%.

3. TRANSPORT

3.1 Air transport

EU/US Open Aviation Area negotiations

305. Following the Open Skies court cases, the EU and the US entered into negotiations with a view to establishing an open aviation area between these two major trading partners. In June, a comprehensive draft agreement which would have resolved several legal issues and paved the way towards the full liberalisation of air services


between the EU and the US was submitted to the Transport Ministers of the EU. However, the Council considered that further progress was needed particularly in terms of market access for European carriers in the United States. The competition part of the draft agreement aims at achieving greater regulatory convergence of EU and US rules and practices and better cooperation between the Commission and the US Department of Transportation (Dot), following largely the principles provided for in the 1991 EC/US competition cooperation agreement between the Commission and the Department of Justice. The EU-US Summit in June in Ireland asked the negotiators to continue their efforts on this important agreement that will expand opportunities not only for airlines, but also for airports, tourism, business links and cargo transport. Technical contacts took place between the Commission and its US counterparts during the second half of the year.

3.2 Railways

306. On 3 March, the Commission tabled proposals for a third railway package, including measures to open up the market for cross-border passenger services with effect from 2010. This would include the right for a train operator to pick up and set down passengers at any station along the line of route, including between stations located in the same Member State (cabotage). While a Member State would be permitted to limit this right of access for origins and destinations already covered by a public service contract, this limitation would have to be strictly proportionate to the need to maintain the economic equilibrium of the contracted service. Also with effect from 2010, the concept of "international grouping" would be abolished. The package was considered by Parliament on 23 November. At the end of the year, it was awaiting its first reading in plenary.

307. On 29 April, the second railway package was finally adopted following conciliation. The main stumbling block was market opening for rail freight transport services. It was agreed that all EU rail freight markets, including cabotage, would be fully open by no later than 1 January 2007.

4. Financial Services

308. The creation of an integrated and efficient European market for financial services is an important and ambitious objective pursued in the Lisbon process and through the Financial Services Action Plan. Competition and internal market policies are complementary tools for achieving this aim. In particular, DG Competition has been active in promoting the liberalisation and proper functioning of securities markets, including trading, clearing and settlement.

309. Without improvements, the margin between investors' returns and the cost of finance for issuers will be higher than it need be. Competition enforcement and advocacy therefore have beneficial effects such as better allocation of financial resources to the benefit both of investors and of the public at large, as the return on investments influences, for example, the amount of pensions.

310. The cost of processing securities trades in the EU is substantially higher than in the US. In the US, the cost of settling an equity transaction has been calculated at EUR 0.10, while the cost of settling a standard cross-border trade in Europe can be
EUR 35 or more. Since 2001 high-level groups and expert groups, such as the Lamfalussy group of wise men and the Giovannini group, have identified cross-border clearing and settlement, and in particular issues related to access and pricing, as the main source of inefficiencies for the proper functioning of European securities markets. The first decision in this area was adopted on 2 June in the Clearstream case (referred to above in section I.B.1).

311. The Commission published a study entitled “An overview of current arrangements in securities trading, clearing and settlement in EU 25”. The study describes the infrastructures and arrangements in place in each country as well as at pan-European level, where such exists. This study confirmed that exclusive arrangements - whereby trades in a given exchange must be cleared and settled in pre-determined companies - are widespread throughout the EU. The findings of the study have been disseminated for public comment and were discussed with national authorities.

312. Work is proceeding with DG Internal Market on payment systems as well as on securities markets.
1. **LIBERAL PROFESSIONS**

   *Introduction*

313. Liberal professions are occupations requiring special training in the liberal arts or sciences. This sector is usually characterised by a high level of regulation, in the form of either state regulation or self-regulation by professional bodies. The work of the Commission so far has concentrated on a limited number of professions, namely lawyers, notaries, accountants, architects, engineers and pharmacists.

314. Professional services, meaning in this context services provided by liberal professions, have an important role to play in improving the competitiveness of the European economy. They are inputs for the economy and business, and their quality and competitiveness have substantial spillover effects. The Italian Antitrust Authority has estimated that in Italy 6% of exporting firms' costs on average are due to professional services. Thus, greater variety in prices and quality, as well as greater innovation in professional services could go a long way to improve the competitiveness of European enterprises and foster GDP growth in the EU. For these reasons the modernization of professional services should be seen as part of the Lisbon agenda.

315. Professional services are also important because of their direct impact on consumers. For the foreseeable future, competition for professional services will continue to take place mainly at local level. Greater choice of services available and prices empowers users to choose the combination of price and quality which best suits their needs.

   *Commission report on competition in professional services*

316. On 9 February, the Commission adopted a report on competition in professional services207. The main purpose of this report is to set out the Commission’s thinking on the scope for reforming or modernising specific professional rules.

317. In this report the five main categories of potentially restrictive regulation in the EU professions are identified: (i) price fixing, (ii) recommended prices, (iii) advertising regulations, (iv) entry requirements and reserved rights, and (v) regulations governing business structure and multidisciplinary practices.

318. On the one hand, the report concludes that a significant body of empirical research shows the negative effects that excessive or outdated restrictive regulations may have for consumers. Indeed, such regulations may eliminate or limit competition between service providers and thus reduce the incentives for professionals to work cost-efficiently, at lower prices, to increase quality or to offer innovative services.

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On the other hand, the report acknowledges that there are essentially three reasons why some regulation of professional services may be necessary: first, asymmetry of information between customers and service providers: a defining feature of professional services is that they require practitioners to display a high level of technical knowledge which consumers may not have; second, externalities, as these services might have an impact on third parties; and third, certain professional services are deemed to produce ‘public goods’ that are of value for society in general. Proponents of restrictive regulations argue, therefore, that such regulations are designed to maintain the quality of professional services and to protect consumers from malpractice.

While the Commission acknowledges that some regulation in this sector is justified, it believes that in some cases more procompetitive mechanisms can and should be used instead of certain traditional restrictive rules.

As far as the application of EU competition rules is concerned, the report distinguishes between the potential liability of professional bodies and that of the Member States.

When a professional body regulates the economic behaviour of its members, the regulations it adopts are decisions of associations of undertakings within the meaning of Article 81 EC. However, regulations which are objectively necessary to guarantee the proper practice of the profession, as organised in the Member State concerned, fall outside the scope of the prohibition contained in that article.

State regulation which imposes or favours anticompetitive conduct or reinforces its effects, infringes Articles 3(1)(g), 10(2) and 81 EC. Where a State delegates its policy-making power to a professional association without sufficient safeguards - that is, without clearly indicating the public interest objectives to be respected, without retaining the power to take the decisions of last resort and without monitoring implementation - the Member State can also be held liable for any resulting infringement.

Ultimately, in the Commission’s view, in all scrutiny of professional regulation a proportionality test should be applied. Rules must be objectively necessary to attain a clearly articulated and legitimate public interest objective and they must be the mechanism least restrictive of competition to achieve that objective. Such rules serve the interests of users and professionals alike.

The Commission's report invites all involved to make a joint effort to reform or eliminate those rules which are unjustified. Regulatory authorities in the Member States and professional bodies are invited to review existing rules taking into consideration whether those rules are necessary for the public interest, whether they are proportionate and whether they are justified. The report also highlights the need to put in place mechanisms which are procompetitive and lead to greater transparency in order to strengthen consumer empowerment.

326. From an enforcement perspective it is clear that, since May, national competition authorities and national courts have had a more prominent role to play in assessing the legality of rules and regulations in the professions. To the extent that competition restrictions have their centre of gravity in one Member State, administrative enforcement of the EU competition rules in the liberal professions will then mainly be the task of the relevant national competition authority. The Commission will, however, also continue to carry out casework where appropriate. Coherent application of Articles 81 and 82 will be ensured through coordination in the European Competition Network of competition authorities.

The way forward: competition advocacy

327. Following the indications in the report, the Commission has invited the European professional bodies of lawyers, notaries, accountants, tax consultants, architects, and pharmacists to bilateral meetings to discuss the justification for the existing professional rules. These meetings enable the Commission to clarify which restrictions appear to be excessive and might need to be eliminated or justified. They provide an opportunity for the European professional bodies to explain their understanding of the public interest objectives in their domain and to come to an agreement with the Commission on more procompetitive mechanisms to achieve those objectives. The European professional bodies should then relay the Commission’s concerns to the relevant national professional organisations.

328. More generally, DG Competition has also embarked on a dissemination process by keeping an open door for professional organisations that want to discuss directly with the Commission's departments. National competition authorities are encouraged to do the same, in particular when those requesting meetings are national organisations.

329. Experience of past modernisation efforts in the field of professional services in some Member States shows that a simple elimination of anticompetitive mechanisms may not be enough to bring about more competition in this sector. Consequently DG Competition and DG Health and Consumer Protection have liaised with consumer organisations to obtain their views on the restrictions the Commission has identified and on the ways the professions might best be organised and take account of consumers' interests.

330. It has been agreed that there is a need for procompetitive accompanying mechanisms which increase transparency and enhance consumer empowerment. Such mechanisms could include, for instance, active monitoring by consumer associations, collection and publication of survey-based historical data by independent organisations or public announcements of the abolition of tariffs.

331. The Commission's report has raised the debate in various Member States and has already led some professional bodies to reconsider existing regulatory arrangements and improve information to users.

332. In some Member States there is also some movement in the legislative field. The Commission has tried to disseminate widely the message of the report on competition in professional services to the regulatory authorities in the Member States. The latter were invited to a meeting of the European Competition Network Subgroup on Liberal Professions on 14 October. The meeting discussed in greater
depth the characteristics of demand in the markets for professional services and how to assess the public interest.

333. These developments concern the new Member States as well. The national competition authorities of some of these have been particularly active in this sector. The Commission has also extended the fact-finding concerning the rules and regulations affecting liberal professions to the new Member States\(^{209}\).


\[^{209}\text{http://europa.eu.int/comm/competition/liberalization/conference/stocktaking_exercise_en.html}\]
IV – State aid control

A – LEGISLATIVE AND INTERPRETATIVE RULES

1. REGULATIONS, GUIDELINES AND COMMUNICATIONS

335. The reform of state aid control continued, with a view to significantly streamlining working methods and accelerating decision-making procedures.

336. The reform is geared to improving cooperation with Member States by encouraging greater dialogue and exchange of information. It aims to raise awareness of state aid issues in national, regional and local authorities and national judiciaries. At the same time, efforts to situate state aid control in the broad context of Community policies, in particular the Lisbon agenda, have been increased.

337. The reform process should result in light, predictable and transparent procedures and economically sound and legally robust criteria for the assessment of state aid measures. This should make state aid control after enlargement easier and enable the Commission to cope with the expected substantial increase in state aid measures in an enlarged Union. The legislative measures adopted or prepared in 2004 for this purpose are presented below.

1.1. Procedural rules

338. On 21 April, the Commission adopted a set of rules implementing and clarifying Regulation (EC) No 659/99\(^{210}\) (the procedural Regulation), which sets out the procedure to be followed in state aid cases. Based on Article 27 of the procedural Regulation, Regulation (EC) No 794/2004\(^ {211}\) (the implementing Regulation) concerns the form and content of notifications and annual reports, as well as other details such as time limits and their calculation and the establishment of the interest rate for the recovery of unlawfully granted aid.

339. The key objective of the new implementing Regulation is to streamline and simplify the procedures for notification and reporting by Member States while enhancing transparency and legal certainty. Through comprehensive notification forms, Member States are given clearer indications as to the type of information the Commission needs in order properly to assess the different aid measures. A standardised format must be used for annual reports to be submitted by the Member States. These improvements should accelerate the assessment and review process, since they will help avoid supplementary requests for information to the Member State in the course of state aid procedures.


A new compulsory notification form improves the efficiency of the Commission’s assessment of planned state aid measures. The form contains a set of questions drafted along the lines of existing state aid frameworks and guidelines.

These notification forms are contained in Annexes I and II to the implementing Regulation and consist of:

- a general information part to be completed for every case;
- a simplified notification form for the notification of the changes to existing aid measures mentioned in Article 4(2) of the implementing Regulation. The information provided on this form allows the Commission to monitor existing aid under Article 88(1) EC. Changes of a purely formal or administrative nature and increases in the original budget of an authorised aid scheme below 20% are not considered to be alterations to existing aid and therefore do not require notification;
- summary information sheets to give Member States precise indications on the information needed when notifying planned aid measures which might be covered by frameworks or guidelines. The summary information sheets do not alter frameworks or guidelines in any way, but only translate them into specific questions to facilitate handling of the notification.

Article 3 of the implementing Regulation specifies the mailing route from Member States to the Commission and vice versa. The Secretariat-General serves as a single entry point for initial contacts while state aid control is a shared responsibility of several Directorates-General in the Commission (DGs for competition, transport, agriculture and fisheries) and ensures that notifications are allocated to the competent DG. Once this allocation has been made, all further correspondence is exchanged between the notifying Member State and the Director-General of the competent DG.

Article 3 also introduces rules for the transmission of notifications to remedy certain shortcomings of the past. Compulsory electronic transmission of notifications is provided for as of 1 January 2006. This relatively remote date has been set in order to allow both Member States and the Commission to create safe technical conditions for such transmission. For transmissions prior to that date, Article 3(5) specifies that faxes should be sent to the number indicated by the receiving party and that the date of the fax is regarded as the notification date only if the original paper document is received within ten days of the fax communication.

The changes specified in Article 4(2) are (a) increases in the budget of an authorised aid scheme exceeding 20%, (b) prolongation of an authorized scheme for up to six years and (c) the tightening of the criteria for the application of the scheme, a reduction of aid intensity or a reduction of eligible expenses. The tightening of criteria needs to be notified (although it tends to enhance the goal of a reduction of state aid reiterated by several European Councils), because even if it may lead to an overall decrease in state aid, it may in individual cases change the character of the aid measure in question and reduce the incentive character of the aid.

Conditions for secure and correct transmission as such, but also for confidential treatment of the information transmitted. By the end of the year preparation of electronic forms was well under way, with a pilot phase envisaged for mid-2005.
344. Article 5 provides how annual reports on existing aid schemes should be structured. The implementing Regulation contains specific annexes for annual reports in the areas of agriculture and fisheries. The date for transmission of annual reports by Member States has been advanced (to no later than 30 June each year) to allow the composition of the state aid scoreboard (see below under “Transparency”) and a meaningful analysis of the situation in time for the European Councils concerned. In some areas, such as fiscal aid, availability of exact figures depends on the recipient’s tax declaration. Therefore, estimates are accepted in justified cases provided that exact figures are communicated at the very latest in the following reporting exercise.

345. Article 8 clarifies the rules for calculation of time limits\(^\text{214}\). Requests for extension of time limits must be duly substantiated and in writing and made at least two days before the original deadline expires. They must be sent to the address designated by the party setting the time limit.

346. Chapter V of the implementing Regulation lays down the method of fixing the interest rate and applying interest in recovery cases. As regards recovery of illegal aid, Article 11 provides that compound interest will be applied in order to ensure full neutralization\(^\text{215}\) of the financial advantages resulting from unlawfully paid aid. The approach chosen is in line with a recent Commission communication\(^\text{216}\) on the subject. The interest rate will be calculated on the basis of the interbank swap rate and where no such rate or similar reference instrument exists in a Member State, the Commission will fix the applicable rate in close cooperation with the Member State concerned. This possibility will be of relevance mainly for new Member States.

347. While the implementing Regulation itself is set for review within four years, its annexes will be continually amended in line with the parallel legislative process of reviewing guidelines and frameworks or adopting new regulations applicable to state aid measures in particular sectors.

348. It should be noted that this Regulation applies as well to the agricultural sector. To facilitate the use by Member States of the notification forms and their transmission to the Commission, the forms relating to the agricultural sector are published at the following address:


The Regulation also introduces a new, simplified format for the annual reports on state aid in agriculture. The format is also available at the above-mentioned address.


\(^\text{215}\) Recovery should restore the situation existing before the illegal aid. The Commission communication of 8 May 2003 makes clear that the effect of unlawful aid is to provide the recipient with funding on conditions similar to those of a medium-term non-interest-bearing loan.

\(^\text{216}\) Commission communication on the interest rates to be applied when aid granted unlawfully is being recovered (OJ C 110, 8.5.2003).
1.2. Research and development

349. On 25 February, the Commission adopted Regulation (EC) No 364/2004 which amends Regulation (EC) No 70/2001 to extend the scope of the block exemption for SMEs to include aid for research and development\(^{217}\).

350. Aid for research and development can contribute to economic growth, strengthening competitiveness and boosting employment. Such aid for SMEs is of the utmost importance, because one of the structural disadvantages of SMEs is that it is difficult for them to gain access to new technological developments and to technology transfer.

351. The Commission assumed that the Community framework for state aid for research and development\(^{218}\) would encourage SMEs to conduct more research and development, since in general they spend only a small percentage of their turnover on these activities. In the light of the framework's application, the Commission decided to exempt R&D aid for SMEs from prior notification.

352. The framework still applies to this type of state aid as regards both the question whether certain measures constitute state aid within the meaning of Article 87(1) EC and the ceiling below which aid may be exempted.

353. To promote dissemination of research results, SMEs may receive state aid for the costs of obtaining and validating patents and other industrial property rights resulting from research and development activities. For such aid to be exempted, it is not necessary for the research which led to the rights actually to have been supported by state aid: it is sufficient that the activity would have qualified for research and development aid. Aid for technical feasibility studies preparatory to the industrial research and precompetitive development stages is also exempted under certain conditions.

354. Furthermore, Regulation No 364/2004 introduces into the SME block exemption regulation the same definitions for “fundamental” research, “industrial research” and “precompetitive development” as in the corresponding Community framework and aligns the definition of SME with the SME recommendation\(^{219}\). It also includes provisions on aid intensity depending on whether or not the region in which an SME is established or the sector in which it is active qualifies for regional aid.

355. Aid which does not comply with the conditions of the block exemption Regulation – including the adapted thresholds for large individual aid grants - has to be notified and will be assessed according to the Community framework for state aid for research and development.

\(^{218}\) OJ C 45, 17.2.1996.
1.3. **Training aid**


1.4. **Rescue and restructuring**

357. Following a thorough review of the 1999 rescue and restructuring guidelines[^223], the Commission adopted on 7 July new Community guidelines on state aid for rescuing and restructuring firms in difficulty[^224] aiming at a closer scrutiny of state aid for rescue and restructuring, as prompted by the conclusions of the European Councils of Stockholm in 2001 and Barcelona in 2002, which requested a reduction of the overall amount of state aid and its redirection towards horizontal objectives.

358. The exit of inefficient firms is a normal part of the operation of the market. It should not be the norm that a company which gets into difficulties is rescued by the State. Such aid is among the most distortive forms of state aid and has given rise to highly controversial state aid cases in the past. Hence, the general principle of the prohibition of state aid as laid down in the Treaty should remain the rule, and derogation from the rule should be limited.

359. The new guidelines therefore introduce somewhat stricter rules as regards rescue and restructuring aid, since this category is considered the most critical one. The Commission is well aware, though, of the social implications of situations where companies, whether through their own fault or not, get into difficulties which might result in this kind of aid[^225].

360. The "one time, last time" principle has been reinforced, and the question has been addressed of the circumstances in which aid granted to an ailing firm has to be taken into account when the company becomes bankrupt and is taken over by another company.

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[^224]: Communication from the Commission — Community guidelines on state aid for rescuing and restructuring firms in difficulty (OJ C 244, 1.10.2004).
[^225]: The provision of rescue or restructuring aid to firms in difficulty may be justified, for instance, by social or regional policy considerations, by the need to take into account the beneficial role played by small and medium-sized enterprises (SMEs) in the economy or, exceptionally, by the desirability of maintaining a competitive market structure when the demise of firms could lead to a monopoly or to a tight oligopolistic situation. On the other hand, it would not be justified to keep a firm artificially alive in a sector with long-term structural overcapacity or when it can only survive as a result of repeated state interventions.
A newly created company is not eligible for rescue and restructuring aid and is regarded as such for three years following the start of operations in the relevant field of activity.

Contrary to the previous guidelines, which made a strict and problematic distinction between rescue aid and restructuring aid, the new guidelines allow aid for urgent structural measures to be included in the amount to keep the firm in business during the period for which rescue aid is granted. Member States are given the opportunity to opt for a simplified procedure for the approval of rescue aid. The passage from rescue to restructuring aid is thus easier to determine: once a restructuring plan has been established and is being implemented, all further aid will be considered restructuring aid.

The requirement of a substantial contribution to the restructuring process from the recipient has been reinforced and clarified. The two-fold purpose of this own contribution is to demonstrate that the markets believe in the feasibility of a return to viability of the restructuring company within a reasonable time and to guarantee that the aid is limited to the minimum required to restore viability, while limiting the distortion of competition. To this end the Commission will also request compensatory measures to minimise the effect on competitors.

The new Commission guidelines on state aid for rescuing and restructuring firms in difficulty are applicable from 10 October 2004 until 9 October 2009.

They entail significant simplifications as to the rules applicable to agriculture:

- In future, the rules on restructuring aid for companies processing and marketing agricultural products will be exactly the same as for other sectors. This will enable Member States to have consistent restructuring regimes for SMEs operating in all sectors. The earlier principle that even small enterprises have to offer a quid pro quo for receiving restructuring aid is abandoned. The one time, last time principle will apply for ten years instead of five.

- Some special rules are maintained only for farmers. They are first of all simplified by allowing Member States in all cases (and not only where restructuring is limited to small agricultural enterprises) to implement capacity reductions at sector level rather than at the level of the farm receiving restructuring aid.

- It is made clear that capacity closures have to be permanent (and not only for five years). Open farmland may be brought back into production after 15 years.

- Minimum capacity closure requirements are simplified.

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226 Under the 1999 guidelines, simultaneous grants of rescue and restructuring aid were impossible, although such a possibility is desirable in some cases in order to introduce certain restructuring measures early on in the process.
• Where capacity closure is done at sector level, this must be achieved within a year of granting the aid. To ensure that closure is not circumvented, the Member State must undertake not to grant investment aid for increasing capacities for five years.

• The de minimis threshold below which no capacity closure is required is simplified and reformulated. As long as restructuring aid is not granted for more than 1% of the production capacity of a given sector over any consecutive 12-month period, no capacity closures will be required.

366. Notifications of rescue and restructuring aid registered prior to 10 October 2004 will be examined in the light of the criteria in force at the time of notification. However, the compatibility of aid granted without Commission authorisation will be examined on the basis of the new guidelines if some or all of the aid is granted after their publication in the Official Journal, i.e. 1 October 2004.

2. SHIPBUILDING

367. Following distortion of competition on the world market, the Commission and the Korean Government had signed an agreement on 22 June 2000 with the aim of restoring fair and transparent competitive conditions on that market. This agreement was not properly implemented by the Korean Government. In 2002, the Council adopted a temporary defensive mechanism (TDM)227 as an exceptional and temporary measure, and the Commission decided to initiate dispute settlement proceedings228 requesting consultations according to WTO rules. The consultations did not reach any satisfactory solution. The Community therefore requested the WTO dispute settlement body to set up a panel over the unfair Korean shipbuilding practices. In the meantime, since the TDM was about to expire on 31 March 2004, the Council extended the mechanism until 31 March 2005229.

*TDM schemes*

368. In 2003, five Member States (Germany, Denmark, the Netherlands, France and Spain) had adopted national aid schemes based on the 2002 TDM Regulation, which were subjected to approval by the Commission. These schemes expired on 31 March. In 2004, the Commission approved under the amended TDM an extension of the Dutch230, French231 and Spanish232 schemes until 31 March 2005, as well as a new scheme designed by Italy233.

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The schemes provide for direct operating aid to shipyards of up to 6% of the contract value before aid for the production of containers, product tankers, chemical tankers and liquefied natural gas carriers. To qualify for this limited support, shipyards must have concluded the final shipbuilding contracts by 31 March 2005.

### 3. AGRICULTURE: POLICY DEVELOPMENTS AND LEGISLATIVE INITIATIVES IN 2004

**De minimis Regulation**

On 6 October, the Commission adopted Regulation (EC) N° 1860/2004 on the application of Articles 87 and 88 of the EC Treaty to *de minimis* aid in the agriculture and fisheries sectors\(^{234}\). The Regulation exempts national aid of up to EUR 3,000 per farmer or fisherman over three years from the requirement of prior notification. The initiative will be a useful tool to help farmers in crisis. To avoid distortions of competition, Member States granting such aid will have to respect an overall ceiling over three years that is roughly equal to 0.3% of agricultural or fisheries output. Member States may grant aid fulfilling all the conditions of the Regulation without prior approval by the Commission. But they will have to keep registers to show both ceilings have been respected.

If all Member States fully avail themselves of this possibility, this would amount to an average amount of *de minimis* aid of approximately EUR 317 million per year for agriculture and approximately EUR 27 million per year for fisheries, for the whole of the EU. To offer more flexibility to Member States, the Regulation sets out amounts to be respected over a period of three years (and not per year). The amounts that each Member State may grant per three-year period have been calculated by the Commission and are set out in an Annex. The three-year periods are mobile, so that for each new grant of *de minimis* aid, the total amount of such aid granted during the previous three years needs to be determined.

Member States may grant *de minimis* aid in any way they like. However, the Regulation sets out a few limitations in order to avoid distortions: no export aid may be granted; aid may not be linked to price or quantity of products put on the market, nor may it be made contingent upon the use of domestic products.

The new Regulation will apply from 1 January 2005 to the end of 2008.

However, before the adoption of the Regulation - and in view of the reduced amount of aid per recipient, the method of granting and the overall level of aid granted - the Commission already applied the *de minimis* approach to agriculture in the following cases:

- Aid for milk producers (Parmalat) - France\(^{235}\). On 14 July, the Commission decided that aid of some EUR 200,000 for approximately 120 milk producers that have not been paid for their deliveries to Parmalat was *de minimis* and therefore


not covered by Article 87(1) EC. The aid intensity was in no case more than EUR 2 000 per producer. The aid was granted through partially taking over the interest and capital payments for outstanding loans, up to 10% of the annuity and never more than EUR 2 000 per recipient.

- **Urgent provisions for agriculture (Parmalat) – Italy**\(^{236}\). On 14 July, the Commission decided that aid of approximately EUR 995 per recipient (overall amount EUR 1.327 million per year and a total of EUR 3.98 million) is *de minimis* and therefore not covered by Article 87(1) EC. The aid was granted through a 12-month suspension of social security payments for farmers who have been supplying Parmalat without having been paid for the delivered milk. The Commission also concluded that a subsidiary guarantee for credits offered to these farmers through a special bank guarantee fund did not contain state aid because the guarantee was offered in line with market principles.

- **Aid to producer organisations – Spain**\(^ {237}\). On 7 May the Commission adopted a final decision finding that state aid which Spain intended to grant to olive oil producer organisations in Extremadura was not state aid within the meaning of Article 87(1) EC. The aid is granted to finance the costs of applying for the Community support for olive oil producers and amounts to approximately EUR 12 per application. The decision found that the producers’ organisations, the recipients of the aid, carry on their activity for the benefit of olive oil producers. The aid therefore allows members’ contributions to the organisation receiving aid to be reduced or even cancelled out. For this reason, the real beneficiaries of the aid are the producers, who benefit from lower annual contributions. As the total budget for the scheme aid is EUR 120 200 per year and the number of producers who benefit from the scheme is reported to be 11 500, the amount of aid per recipient per year is EUR 10.4.

- **Compensation for the drought in 2003 – France**\(^ {238}\). On 20 October, the Commission decided not to raise any objections to state aid to farmers hit by the drought in 2003. The subsidy element in the taking over of interest on outstanding loans (EUR 20 million) was considered *de minimis*\(^ {239}\).

- **Aid for the BSE crisis - Italy**\(^ {240}\). On 1 December, the Commission retroactively authorised Italy to grant state aid for the costs of compulsory destruction of specific risk materials and the storage of low-risk material, as well as income aid for the beef producers sector to counter the effects of the 2001 BSE crisis. Income aid to the downstream sector covered by the decision amounts to around EUR 103.25/per holding and was considered *de minimis*\(^ {241}\).

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\(^{236}\) N 33/A/2004.  
\(^{237}\) C 50/02 (ex N 371/2001).  
\(^{238}\) NN 154/2003.  
\(^{239}\) For details see below under “Cases”.  
\(^{240}\) NN 151/2002 (ex N 113/B/2001).  
\(^{241}\) For details see below under “Cases”.  

Block exemption Regulation

375. The new Commission Regulation (EC) No 1/2004 granting exemption for certain types of state aid awarded to small and medium-sized agricultural enterprises\(^\text{242}\) entered into force on 24 January. Member States are no longer required to notify these aid measures to the Commission in advance for approval.

376. Under Articles 3 and 19 of the Regulation, for individual aid or an aid scheme to be exempted, Member States must "at the latest 10 working days before the entry into force of an aid scheme, or the granting of individual aid outside any scheme, exempted by this Regulation, … forward to the Commission, with a view to its publication in the Official Journal of the European Union, a summary of the information regarding such aid scheme or individual aid in the form laid down in Annex I."

377. In accordance with this procedure, Member States have already communicated to the Commission's departments summaries of around 70 different measures which the Commission has published on the Internet\(^\text{243}\).

Application of existing guidelines: Promotion and advertising of quality products

378. The Commission decided several state aid cases related to the promotion and advertising of agricultural products. These cases enabled the Commission:

- to clarify and develop the application of the guidelines on the advertising of agricultural products to quality labels and the establishment of criteria for the qualification of what can be considered a "quality product" by referring to the conditions of Article 24b(3) of Regulation (EC) No 1257/1999 as amended by Regulation (EC) No 1783/2003\(^\text{244}\);

- to set the limits for the granting of state aid for so-called “joint promotions”, e.g. the limits for a direct linkage between a marketing organisation and individual companies. (Within the meaning of point 29 of the advertising guidelines, advertising activities which are jointly financed through public funds and one or more particular firms must be considered to be incompatible with the rules due to the fact that the target group - e.g. the consumer - may not be able to tell whether an advertising measure for one or more particular firms is part of a publicly supported campaign or not)\(^\text{245}\);


\(^{243}\) See: http://europa.eu.int/comm/agriculture/stateaid/exemption/index_en.htm

\(^{244}\) NN 34/A/2000 Quality programmes and quality labels AMA Biosiegel and AMA Gütesiegel - Austria, N 195/2003 MLC quality beef and sheepmeat advertising and NN 196/2003 MLC quality pigmeat advertising - United Kingdom.

\(^{245}\) N 571/02 CMA promotion fund law – Germany.


– to confirm its position on aid for labels referring to the origin of products\textsuperscript{246} and on certain general requirements of the guidelines\textsuperscript{247}.

4. **FISHERIES**

379. On 1 November, a new set of rules on state aid to the fisheries sector came into force. These rules bring state aid policy into line with the reformed common fisheries policy, adopted in December 2002. The new rules provide for a block exemption for certain types of aid, which will no longer have to be notified to and approved by the Commission before Member States can implement them. State aid in the fisheries sector which does not fall within the block exemption Regulation\textsuperscript{248} will still have to be notified to the Commission. Such state aid will be subject to new guidelines for the examination of state aid to fisheries and aquaculture\textsuperscript{249}, which also entered into force on 1 November.

380. The measures covered by the block exemption relate to aid unlikely to threaten conservation or distort competition in a manner not in line with the common interest and which therefore has never given rise to investigation procedures by the Commission. The aid concerned has to comply strictly with the criteria set out in the block exemption Regulation, which are identical to those governing the allocation of EU funds under the Financial Instrument for Fisheries Guidance (FIFG).

381. The block exemption will apply to aid granted to small and medium-sized enterprises (SMEs) for amounts below EUR 1 million or to aid designed to finance measures with a maximum eligible amount of EUR 2 million.

382. To ensure proper allocation of such aid, monitoring will take place through simplified ex ante information of the Commission on the aid to be granted, published on the Internet and in the *Official Journal*, and ex post reporting obligations.

5. **COAL AND TRANSPORT**

*Coal*

383. The enlargement of the Union increased the number of coal-producing countries from three (Germany, the United Kingdom and Spain) to seven, adding Poland, the Czech Republic, Slovakia and Hungary. Despite the recent dramatic increase in the spot market price for coal, large parts of Europe's coal industry remain uncompetitive.

\begin{itemize}
\item \textsuperscript{246} N 195/2003 MLC quality beef and sheepmeat advertising and Case N 196/2003 MLC quality pigmeat advertising - United Kingdom.
\item \textsuperscript{247} N 175/03 Meat and Livestock Commission generic meat advertising scheme - UK and C 78/2003 (ex NN 36/98, ex N 610/97) Advertising of Sicilian products (Article 4 Regional Law 27/1997) - Italy (Sicily).
\item \textsuperscript{249} OJ C 229, 14.9.2004.
\end{itemize}
without heavy state subsidies. Germany, Poland and Hungary notified their restructuring plans for the coming years to the Commission. The Commission has opened the formal procedure regarding the restructuring plan for the Spanish coal industry.

Transport

384. The Commission maintained a favourable approach towards public funding that promotes environmentally friendly modes of transport in order to achieve a reduction in road transport. The railways are therefore considered to be a key element in the Community’s common transport policy, which seeks to develop a sustainable transport system by shifting the balance between different modes of transport. Revitalising the railways is one of the major objectives. Rail transport has, once again, to be made competitive enough to remain one of the leading players in the transport system in an enlarged Europe. Opening up the railway market is crucial to revitalising the railways. By 2008, the entire European freight network, both internationally and nationally, will have been opened up completely. The arrival of new railway companies must make the sector more competitive and encourage national companies to restructure.

385. The established practice was applied in the combined transport sector. In particular, the Commission authorised various aid schemes which aim to offset the additional costs of combined transport.

386. As regards road transport, the restructuring plans of large companies were examined.

387. In the maritime sector, the new Community guidelines on state aid to maritime transport were applied for the first time. The Commission ensured in particular that Member States accept the appropriate measures proposed in these guidelines.

388. In air transport, the year saw an important decision of the Commission in the Ryanair-Charleroi case. The Commission recognised that limited amounts of state aid may be justified to ensure better use of secondary airports with a view to creating new transport links providing regional benefits and reducing air congestion. It will be followed by guidelines on the financing of airports and the start-up of new routes; these should clarify the potential for regional airports to expand in the market while respecting Community rules.

6. Public services/services of general (economic) interest

389. The importance to Member States of public services is highlighted by the recent wide public discussion of all aspects of such services, including the way in which they should be provided, as well as by the fact that the draft constitution for the EU explicitly mentions them.

As regards competition policy, the Commission dealt with the question of how far compensation for services of general economic interest (SGEIs) could distort competition from a state aid perspective. Following the Altmark judgment concerning the description of compensation as state aid, the Commission drew up a set of three proposals with a view to putting the criteria set out by the ECJ into practice:

**Community framework for public service compensation**

A Community framework for state aid in the form of public service compensation clarifies the criteria according to which the Commission intends to assess public service compensation by Member States under the state aid rules.

The ECJ indicated that such compensation does not constitute state aid if, among other conditions, the amount has been fixed under a genuine and effective competitive tendering procedure or on the basis of the costs which a well-run, medium-sized undertaking would encounter in providing such services. In this way, the effectiveness of providing SGEIs should increase without jeopardising their operation. Otherwise, the compensation constitutes state aid and needs to be notified. Such notified aid could be declared compatible with the Treaty under Article 86(2) EC provided that it is necessary for the operation of an SGEI and does not affect the development of trade to an extent contrary to the interests of the Community.

In accordance with Article 86 EC and the corresponding case law, Member States have a wide margin of discretion in defining SGEIs. As regards the assessment under state aid rules, however, it is necessary for undertakings providing an SGEI to have been specifically entrusted with this task by the Member State concerned. Accordingly, a public service assignment is required in order to define the respective obligations of the undertaking and of the State (national, regional or local authority). This assignment must specify:

- the precise nature of the public service obligation
- the undertaking(s) and the territory concerned
- any exclusive rights assigned to the undertakings
- the calculation and review of the compensation, including a reasonable profit
- the arrangements for repaying overcompensation and for any intervention by the State in the event of undercompensation.

The draft framework contains detailed rules on the components which might be included in the calculation of the compensation and makes clear that any compensation granted to an undertaking for the provision of public services should be notified to the Commission before being disbursed.

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251 Case C-280/00. See points 621 et seq. of the 2003 Competition Report.
Exemption decision

395. A proposed decision under Article 86 EC would exempt certain compensatory measures from the requirement of prior notification. This would be the case with compensation below certain thresholds, as well as with compensation granted for specific public services, notably hospitals and social housing, but also for maritime links to islands granted in accordance with sectoral rules and with an annual traffic not exceeding 100,000 passengers.

396. The proposed exemption is based on the assumption that the risk of distorting competition through compensation disbursed to such services is negligible or non-existent.

397. Under this proposal, Member States would be obliged - as is usual with exemption Regulations – to meet Commission safeguards in respect of all information necessary to assess the compatibility of the compensation with the state aid rules. However, such information would only have to be provided in response to a written request from the Commission.

Amendment of the Transparency Directive

398. The third element concerns the amendment of the Transparency Directive. This seeks to make clear that, even where compensation for the provision of public services does not constitute state aid, the undertakings concerned must maintain separate accounts when they carry out activities outside the scope of SGEIs. Such separate accounts are necessary in order to identify the amounts imputable to SGEIs and to calculate the correct amount of compensation.

399. These three draft documents were published for public consultation and discussed with the other institutions with a view to adopting them in the near future. They will allow the Commission to fulfil its task of ensuring that SGEIs can operate properly within the EU and receive state compensation only to the extent necessary for their provision. On the other hand, the administrative burden of checking that over-compensation does not distort competition on the markets is kept to a minimum.

7. Transparency

400. The information on all existing state aid measures gathered annually from Member States, together with suitable economic indicators that describe the state aid situation in the EU, form the basis for the state aid scoreboard launched in July 2001. Two editions of the scoreboard are produced every year.

253 See http://europa.eu.int/comm/competition/state_aid/others/
254 The scoreboard replaces the state aid surveys, which were discontinued after the ninth survey in 2001. The online scoreboard available on DG Competition's website includes a series of key indicators and statistical tables in addition to the information provided in the paper version.
401. So far the spring update of the scoreboard has covered data for the period t-2, i.e. 2002 data in 2004. As part of the new annual reporting arrangements, the Commission and Member States have pledged to reduce this time-lag, with the result that 2004 data should be published in the autumn 2005 update. Thus the autumn scoreboard will each year include the latest data, while the spring scoreboard will provide more analytical coverage of a selected topic. Previous scoreboards have included features on aid to assisted regions, rescue and restructuring aid, R&D aid and SME aid.

402. The autumn 2004 update of the scoreboard was adopted on 16 November. The main focus of this update is the state aid situation in the ten new Member States in the four years prior to accession (2000-2003). Part Two includes a review of the steps taken by Member States to implement the Lisbon agenda and follow up subsequent Council conclusions on state aid. More specifically, this comprises reduction of aid, redirection of aid towards horizontal objectives and assessing the effectiveness of aid. The final part, as in all scoreboard updates, includes a summary of the efforts undertaken by the Commission to simplify and modernise state aid control.

255 http://europa.eu.int/comm/competition/state_aid/scoreboard/analytical_section.html. French and German versions of the executive summary are available. See also press release IP/04/1356.
1. **LIBERALISED MARKETS**

*Belgium: Transfer of first pillar pension obligations from Belgacom to the Belgian State*

403. In October 2003, the Belgian authorities informed the Commission about an agreement between Belgacom, the Belgian State and the private shareholders to transfer the so-called "first pillar" pension obligations towards the company’s civil servants from Belgacom to the Belgian State (“first pillar” pensions are those which are normally provided for under the general social security system of each State.)

404. In the context of the establishment of Belgacom as a limited liability company in 1992, Belgacom was obliged to administer and finance the “first pillar” pension rights of former civil servants (this meant that pensions were actually paid by the company to former civil servants and that the company had to ensure the full financing of acquired and future pension rights). The notified agreement implied that, as of 1 January 2004, Belgacom was relieved of the burden resulting from the special pension regime applicable to civil servants. In return, the Belgian State received a one-off payment from Belgacom amounting to EUR 5 billion as well as yearly continuous contributions guaranteeing the financing of future pension obligations.

405. In its decision of 21 January, the Commission concluded that the transfer was financially neutral because Belgacom, in exchange for transferring its pension obligations to the Belgian State, pays the latter an amount corresponding to the net present value of the obligations taken over by the Belgian State. Therefore, the Commission considered that this transaction did not give Belgacom an advantage beyond that which would have been available under normal market conditions and accordingly no state aid was involved.

*Aid granted by France to the Coopérative d’exportation du livre français (Celf)*

406. On 20 April, the Commission approved the aid granted by France between 1980 and 2001 to the Coopérative d’exportation du livre français (Celf). The Commission considered that the aid to Celf for processing small orders of French-language books, although granted unlawfully, was however compatible with the common market under Article 87(3)(d) of the Treaty in that it is proportional to the cultural objective pursued. The Commission found that the aid did not affect trade and competition in the Community to an extent contrary to the common interest. The purpose of the aid was to maintain the non-profitable activity of Celf. Celf had to accept any type of order from booksellers (not final consumers) established abroad in non-French-speaking areas, irrespective of the amount of the order, profitability and destination.

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As part of the aid, it received an operating grant intended to offset the extra cost of handling orders below FRF 500 (i.e. approximately EUR 76). This decision took into proper consideration the ruling of the Court of First Instance of 28 February 2002 which partially annulled an older Commission decision of 10 June 1998 on the ground that the Commission should have distinguished the export agency market from that for the export of French-language books in general.

Modification of UMTS licence fee, France

407. In October 2002, the Commission received a complaint against the French Government's decision to reduce the UMTS licence fees originally payable by Orange and SFR.

408. The Commission considered that in the current state of Community law it is for the Member States to lay down the conditions for awarding UMTS licences, provided that they fulfil the conditions laid down in Directive 97/13/EC, namely that the procedures and the criteria used are objective, transparent and non-discriminatory.

409. In the case at issue, the Commission noted that the French Government applied to all operators the same conditions for the granting of UMTS licences (duration, fee, technical conditions) and that these conditions were objective and not discriminatory. Since the Government did not discriminate between operators, Orange and SFR were not given any benefits. The Commission therefore decided on 20 July that no state aid was involved and rejected the complaint.

Stranded costs

410. Within the framework of the progressive completion of the internal electricity market, the Commission approved two new cases of state aid for compensation of stranded costs, in Italy and Portugal. Stranded costs are the costs which were incurred by electricity market incumbents when the sector was not liberalised and which liberalisation makes it difficult, if not impossible, to repay.

411. The Commission now has a well-established practice in the field of stranded costs compensation. In July 2001 it adopted a communication that spelled out the methodology that it would use to assess such aid. It applied this methodology to stranded costs compensation in Austria, Belgium, Greece, the Netherlands and Spain.

412. In Italy, the decision covers in particular two aspects: the costs for power generation plants built before 1997; and the costs linked to a “take-or-pay” contract for Nigerian gas, signed by ENEL in 1992, for the part used to produce electricity. The part concerning power generation plants will only cover the period from 2000-2003, after which generators will no longer be entitled to received compensation for their stranded costs. The total compensation granted will be at most EUR 850 million. It

260 N 161/04.
will be granted to ENEL and the companies that have inherited ENEL’s stranded assets.

413. The part concerning costs linked to the “take-or-pay” contract is intended to compensate for the costs incurred by ENEL because the company could not process the gas in Italy, as was originally planned. It will cover the costs of relocating gas processing outside Italy until 2009. The compensation will be at most EUR 1.465 billion. However, compensation will be granted solely for the gas used for electricity generation purposes.

414. The Portuguese case was slightly different from the Italian and from other previous cases. The Portuguese captive market was originally structured around a series of long-term contracts between the state-owned network operator and three electricity generation groups instead of a general law setting out the price rules for the electricity sector, as in Member States whose cases had been previously analysed by the Commission. Portugal abolished these long-term contracts and replaced them with state compensation.

415. Since, in accordance with the Commission methodology, stranded costs compensation has to be kept to the “minimum necessary”, the Commission had to check that, even in this particular situation, compensation would not involve more than the repayment of initial investments, including where necessary a reasonable profit margin. The ability of groups to offset losses from certain plants against profits from others was also taken into account. The Commission ensured that a proper mechanism for regularly adapting compensation was introduced to prevent any overcompensation, even where competition did not evolve as expected.

2. RESCUE AND RESTRUCTURING AID

*Alstom*262

416. On 7 July, the Commission adopted a conditional decision authorising a EUR 3 billion restructuring aid package to Alstom, in the form of guarantees, investment in capital increases, and, for a smaller part, loans. The conditions laid down by the decision are based on the rescue and restructuring guidelines for firms in difficulties. These guidelines set forth three main conditions for restructuring aid to be authorised.

417. Firstly, the aid and the joint restructuring plan must lead to restoration of long-term viability without further state intervention. The Commission found that the latest version of the financial and operational restructuring plans submitted by France should allow the company to survive and become competitive again. The decision requests that the operational plan, which includes plant closures, lay-offs and reorganisation, be complied with in full. In addition, supplementary efforts were requested in the marine sector and the conclusion of industrial partnerships covering

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a significant part of the company’s activities was required in order to strengthen the long-term viability and prospects of the company.

418. Secondly, the state aid has to be limited to the minimum necessary. The Commission found that this condition is satisfied since the restructuring plan authorised by the Commission’s decision is based on a very substantial financial contribution from financial institutions, private investors and the company itself. Moreover, the aid is limited in time because, in the first place, new state guarantees can only be issued over a two-year period following the adoption of the decision; and in the second place, the State is required to sell, within four years, its entire shareholding in Alstom resulting from the capital increases mentioned above.

419. Thirdly, distortions of competition have to be limited to the minimum necessary. In order to fulfil this criterion, the decision requires the following measures to restore the competitive situation and compensate competitors: (i) some divestments on top of the substantial ones already carried out by Alstom in 2003, (ii) setting up a joint venture and industrial partnerships covering certain existing activities, (iii) control on pricing policy and acquisitions of companies during four years, (iv) divesting the State’s shareholding in the company, and (v) adopting measures to foster the opening of the French rolling-stock market.

420. Over the next four years, the Commission will monitor compliance with this decision.

421. On 14 July, the Commission approved restructuring aid granted to MobilCom. The approval of the aid was linked to the condition that MobilCom and its affiliates must halt their online direct sales of MobilCom mobile telephony contracts for seven months in order to offset the distortions of competition caused by the aid.

422. MobilCom is a German mobile phone service provider. It ran into difficulties in 2002. Germany granted a first deficiency guarantee for a loan of EUR 50 million in September 2002 to provide immediate liquidity to the company. This aid was approved as rescue aid in January 2003 and was not part of the final conditional decision adopted in July 2004.

423. In order to ensure further funding, which was needed to finance the requisite reorganisation measures in this segment, Germany and the Land of Schleswig-Holstein granted another 80% deficiency guarantee for a loan amounting to EUR 112 million in November 2002. The Commission considered that this measure constituted restructuring aid.

424. The main competition problem perceived by the Commission was that thanks to the guarantee MobilCom could restructure its activities rapidly. In this context, the aid

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264 OJ C 80, 3.4.2003; see also OJ C 210, 5.9.2003.
265 Not yet published.
was not only used to restructure the company physically but also to reorient its marketing strategy and to focus on more profitable customer segments in its core business. The aid thus had a particularly damaging effect on competitors as they too have to target their business strategies at more profitable customer groups.

425. The solution adopted in the end was to approve the aid but subject to conditions. The Commission deemed in this particular case the compensatory measure which aims at a compensation in the field where the aid produced its undue effects, namely in the field of the marketability of services, to be the most suitable measure to counterbalance the distortions of competition. MobilCom was therefore obliged to suspend the Internet offer of some services during a defined period of time.

\textit{Bankgesellschaft Berlin AG}

426. On 18 February\textsuperscript{266}, the Commission approved restructuring aid for the Bankgesellschaft Berlin AG group (“BGB”) worth almost EUR 10 billion\textsuperscript{267}. This aid package could only be authorised in exchange for significant reductions of the bank’s market presence in order to mitigate the distorting effect on competition of this large volume of aid. After long and extensive negotiations, the German authorities finally offered a variety of divestiture commitments which significantly modified the restructuring plan originally submitted. These commitments include the undertakings to divest Berliner Bank, one of BGB’s two retail brands, to hive-off the real-estate services subsidiaries which were the main cause of the crisis and, finally, to sell BGB by the end of 2007. The restructuring plan also provides for a series of other measures such as the divestment of Berlin-based Weberbank and the sale or closure of national and foreign branches and subsidiaries. Moreover, it is intended to divest the real-estate financing subsidiary BerlinHyp in the context of the overall divestment of BGB, either separately or together with the rest of BGB.

427. In total, the above-described divestments, closures and other measures will reduce BGB’s balance sheet total from roughly EUR 189 billion in 2001 to about EUR 124 billion in 2006/2007 when the restructuring period and divestiture measures will be completed. This reduction is not only adequate in view of the very high aid amount but also in line with the Commission’s practice regarding restructuring aid for banks.\textsuperscript{268} The divestment of Berliner Bank, however, remained a contested issue between the Commission and the German authorities until the final stage of the investigation. In view of BGB’s leading position in Berlin, the Commission had to insist on this measure in order to effectively mitigate the distorting effect of the very

\textsuperscript{267} This includes, first, EUR 1.8 billion capital injected by the Land of Berlin in 2001, second, the provision of the guarantees to cover BGB’s risks from the old real-estate services business with an economic value of EUR 6.1 billion (the theoretical maximum amount of nominally EUR 21.6 billion is based on legal provisions and supervisory rules but is unrealistic under pessimistic assumptions) and third, a repayment agreement between the Land of Berlin and BGB regarding a potential recovery order up to EUR 1.8 billion following a Commission decision on the then still open proceeding concerning a capital transfer to Landesbank Berlin, part of the BGB group since 1994, forming part of the group C48/2002 (on 20.10.2004, the Commission decided that an aid amount of EUR 810 million had to be recovered from Germany; see p. 454 ss of this Report).
\textsuperscript{268} Crédit Lyonnais, OJ L 221, 8.8.1998.
high aid amount on competition in the field of retail banking in Berlin. Moreover, the repayment agreement supporting BGB in case of a then non-decided but possible recovery order in the Landesbank Berlin proceeding was an additional aid measure that had to be taken into account for the compensatory measures. The divestiture of Berliner Bank will reduce BGB’s market share in the individual segments of the Berlin retail business by roughly one third to one sixth as a result of the sale.

428. The Commission also had to analyse the question of the long-term viability of BGB in conjunction with the forthcoming abolition of the existing state guarantees (Anstaltslast & Gewährträgerhaftung). This question had to be re-examined with the help of external consultants when the first procedure to divest the Land’s shares in BGB failed in March 2003. Finally, the Commission concluded that the restructuring measures already carried out and those planned for the future are reasonable, logical and fundamentally appropriate in order to enable BGB to restore its viability.

_France Télécom_

429. In December 2002, the French authorities notified to the Commission measures intended to bring France Télécom (FT) out of its financial crisis. These measures included in particular the setting up by ERAP (a public body) of a shareholders’ advance of EUR 9 billion in the form of a credit facility. This advance was part of the restructuring plan called “Ambition 2005”, which was presented by the new management of the undertaking on 4 December 2002. In view of doubts as to the compatibility of the measures notified with the rules on state aid, the Commission initiated, in January 2003, a formal investigation concerning the shareholders’ loan project. The formal investigation covered also a business tax scheme (taxe professionnelle) applicable to FT. On 2 August 2004, the Commission closed its investigation of both aspects.

_The business tax scheme (“taxe professionnelle”)_

430. The tax scheme in question involves state aid which is incompatible with the EC Treaty and must be recovered.

431. Between 1994 and 2002, FT enjoyed special conditions concerning local taxes. The Commission considered that, by not levying the full amount of business tax during this period, the State offered an advantage to FT which amounts to a state aid measure. In accordance with the Court of Justice’s case law, the Commission dismissed the argument raised by the French authorities that such aid could be considered as being “compensated” by other charges to which FT was subject in other respects. According to information provided by the French authorities, the estimated savings for FT linked with this specific business tax scheme are between EUR 800 million and EUR 1.1 billion. The exact amount of the aid will be determined by the Commission in cooperation with the French authorities, during the recovery procedure.

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269 See 2003 Competition Report, points 526 et seq.
The shareholder’s advance

432. The factual context is a key element of the Commission’s assessment: in previous years, FT had accumulated a substantial debt (EUR 63 billion at the end of 2001) and in 2002 the market anticipated that FT would have difficulties refinancing this debt. In July 2002, while the rating of FT was at the threshold of a further downgrade to junk status, the Government publicly declared its intention to support the company. Any downgrade of FT to junk status would have had serious consequences for the company. The State publicly confirmed its support for the undertaking in September, October and December 2002 and the rating never reached junk status. On this last occasion, a press release of the Ministry for Economic Affairs announced that FT was going to issue new shares and anticipated the state participation in the shares issue by offering the said shareholder’s advance.

433. The shareholder’s advance offered to FT in December 2002 contains aid components. The offer of the shareholder’s advance significantly improved the operator’s financial situation. This benefit was provided using state resources as it created a potential supplementary liability for those resources. The State made a firm offer and simply by signing the shareholders’ loan contract FT could secure the right to payment of the EUR 9 billion.

434. The offer of the shareholder’s advance cannot be seen in isolation but must be viewed against the backdrop of government statements from July to December 2002. The statements created expectations and confidence on the financial markets and helped maintain FT’s investment rating. If the statements had not been made, no reasonable investor would have offered a shareholder’s advance in these circumstances and assumed alone a very large financial risk.

435. The Commission did, however, recognise that it was not able to overcome the difficulties in identifying precisely the economic effects of the aid in question and thus quantifying the amount to be recovered. Ordering recovery in such a situation may constitute a violation of the right of defence of the Member State. Moreover, the Commission noted that this was the first time that aid resulted from events predating the notification of the aid itself. Since France notified this measure, an economic operator may have legitimately expected the State to abide by its obligation under the Treaty. Therefore, ordering recovery in such a situation may constitute a violation of the principle of legitimate expectation. Having taken all this into account the Commission did not order the recovery of the aid.

Bull

436. On 16 March, the Commission decided to initiate the procedure provided for in Article 88(2) with respect to new restructuring aid in favour of Bull. Bull produces computer servers and is active in the related services markets. The notified aid amounts to EUR 517 million and is equal to the rescue aid granted in 2002 with

273 C 10/04 (ex N 94/04).
cumulated interest. Depending on actual profits, some EUR 50 to 60 million would devolve to the French authorities on the basis of a clause in the aid contract. In its decision of 1 December, the Commission considered that, in the particular circumstances of the case, the aid did not infringe the “one time, last time” principle, and took note that it would be paid only after reimbursement of the earlier rescue aid.

*Lloyd Werft Bremerhaven GmbH*\(^{274}\)

437. On 8 September, the Commission decided not to raise any objections to rescue aid granted by Germany to the German shipyard Lloyd Werft Bremerhaven GmbH.

438. The company had filed for insolvency after a customer refused to pay the last instalment for conversion work on a cruise ship. The ship had sunk on 14 January in the company’s yard after a heavy storm. In order to continue operations, the company needed a bridging loan of EUR 10 million. The loan was provided in April in equal parts by one public and two private financial institutions, whereas the private loans were partially backed by a public guarantee.

439. The Commission accepted under point 23 of the 1999 rescue and restructuring guidelines that the loan be provided for a period of 6 months and reimbursed over an additional period not exceeding 12 months after payment of the last instalment to the company. The Commission agreed to this duration in view of the fact that the loan was solely intended to make good the negative consequences of an external event and seemed not to be meant as a liquidity injection into a company that would be in difficulty in the absence of the storm. In particular, the Commission took account of an undertaking by the German Government to report on the financial situation of the company. The aid was paid back within 6 months.

*Spanish public shipyards*\(^{275}\)

440. On 12 May, the Commission decided that aid provided to the Spanish public shipyards was not in line with the EU rules on state aid. The Commission established that, in 1999 and 2000, the state holding company Sociedad Estatal de Participaciones Industriales (SEPI) granted aid worth EUR 500 million to the public civil shipyards that are today all owned by IZAR. The aid took the form of a capital injection of EUR 252.4 million in 2000, loans amounting to EUR 192.1 million and a purchase price of EUR 55.9 million above market value when SEPI purchased three shipyards in 1999. The Commission concluded that the above measures constituted further state aid which, after the approval of a final restructuring package in 1997, could no longer be approved under the EU shipbuilding aid rules. As the loans of EUR 192.1 million have already been paid back by IZAR, the sum to be recovered from IZAR amounts to EUR 308.3 million, plus interest.

441. On 20 October, the Commission took another decision, which established that SEPI had in 2000 granted a further EUR 556 million to the public civil shipyards.

\(^{274}\) NN 37/04 (ex N 106/04), decision of 8.9.2004.

\(^{275}\) C 40/00.
442. The aid took the form of a capital injection of EUR 1 477 million to IZAR in 2000. The part of the capital injection not considered to be state aid (EUR 921 million) was used to cover social costs and other costs linked to the past and recent military activities of IZAR and its predecessor Bazán. Funds for military activities are in principle not covered by the EU state aid rules. The EUR 556 million aid provided to IZAR’s civil activities was not in line with the EU state aid rules and the Commission therefore concluded that this amount also has to be recovered from IZAR.

Dutch matching aid

443. In 2003, the Netherlands had notified plans to grant aid in support of six shipbuilding contracts to four Dutch shipyards. The purpose of the aid was to match illegal and incompatible aid allegedly offered by another Member State to shipyards in that country which competed for the shipbuilding contracts.

444. On 30 June the Commission decided that the Netherlands could not grant this aid. The Commission stressed that the principle that a Member State should not act on its own to counter the effects of unlawful aid from another Member State has been clearly established by the Court of Justice. Specifically, the Court has held that it is not possible to justify an aid measure on the ground that other Member States grant illegal aid.

445. The Commission furthermore concluded that matching alleged illegal aid from another EU Member State was contrary to the general principles of the EC Treaty. The Commission also had doubts concerning the alleged evidence that the aid in the other Member State was available.

Huta Częstochowa SA

446. On 19 May, the Commission took its first decision outside the interim procedure to launch an in-depth probe into possible aid granted to a company in a new Member State. The company concerned is the Polish steel producer Huta Częstochowa SA. The Polish State is contemplating financial measures with a view to restructuring the company. The Commission is now seeking clarification whether and, if so, what kind of restructuring aid has been and/or will be granted to the company.

Box 8: Restructuring aid and the concept of “new company”

In two negative decisions of 20 April and 22 September concerning French ship repair companies, the Commission applied recital 7 of the Community guidelines on state aid for rescuing and restructuring firms in difficulty, which excludes newly established companies from eligibility for rescue and restructuring aid.

276 C 66/03.
The rationale of this provision is to exclude companies which, although they might encounter start-up problems, are not firms in difficulty as described by the guidelines. The decisions make clear that the finding that the companies are newly established has to be characterised on both legal and economic grounds.

In the cases at hand, both companies were new legal entities, had taken over the assets and employees of previous ship repairers, and had started their operation free of debt and obligations related to previous activities. Thus, they were to be considered new economic entities, which should have been created only if viable in existing market conditions. On the basis of this analysis, the Commission concluded that restructuring aid for the two companies was incompatible with the common market.

The Commission, however, approved part of the aid as regional investment aid and as training aid. As for the remaining aid, the Commission ordered recovery.

Spanish and German ship-financing schemes

447. In March and July respectively, the Commission approved the Spanish and German ship-financing schemes. These schemes were considered to be in compliance with the OECD’s Arrangement on Officially Supported Export Credits. In accordance with this Arrangement, the interest charged to shipowners is based on the relevant commercial interest reference rate. The systems do not cover the buyer’s credit risk.

Amendments to Hellenic Shipyards’ investment plan

448. On 23 April, the Commission decided to initiate the formal investigation procedure under Article 88(2) EC with regard to a number of amendments to the restructuring plan of Hellenic Shipyards. In 1997, following the approval of Hellenic Shipyards’ debt write-off under Council Regulation 1013/97, which provided for aid to certain shipyards under restructuring, the Commission had approved investment aid aimed at the restructuring of the shipyard on the basis of an investment plan submitted to the Commission pursuant to the 7th Shipbuilding Directive. Subsequent amendments to this investment plan were not notified to the Commission. Therefore, the Greek authorities failed to respect the terms of the 7th Shipbuilding Directive under which the Commission authorised the investment plan in 1997, which provides that the Commission must be notified of any amendment to an existing aid measure covered by the Directive. They also failed to observe the conditions of the guidelines on rescuing and restructuring firms in difficulty which allow the amendment to a restructuring plan upon notification and subject to certain conditions.

284 Article 11(1).
In opening the formal investigation procedure, the Commission also expressed serious doubts that the conditions under which the aid was approved in its 1997 decision had been met and that no new aid had been granted for the investment plan. Such aid would not be compatible with the common market in view of the “one time, last time” principle and the express requirement of Council Regulation 1013/97 which prohibits aid for all shipyards which benefited from its provisions.

Aid to Hellenic Shipyards

On 20 October, the Commission adopted a negative decision closing the formal investigation procedure of Article 88(2) opened in 2002 with regard to two measures for aid to Hellenic Shipyards.

The decision orders the Greek authorities to repeal provisions 5(20) and 6(4) of Law 2941/2001, which provide respectively that the State should cover future retirement costs of Hellenic Shipyards’ employees and that Hellenic Shipyards was relieved from any tax or other duty obligation with respect to reserves which are tax free by law, special reserves and amounts for the increase of share capital, so long as these were used to set off losses of previous years. The Commission found these measures to be incompatible with the Treaty, as they constitute operating aid not provided for by Council Regulation (EC) No 1540/98 of 29 June 1998 establishing new rules on aid to shipbuilding, which was in force at the time when they were adopted. The Greek authorities were also ordered to recover any aid that may have already been granted under these provisions.

Postabank/Erste Bank Hungary Rt

The Republic of Hungary notified to the Commission in 2003 and 2004 a series of measures in favour of Postabank és Takaékpénztár (Postabank) under the so-called interim mechanism procedure provided for in Annex IV.3 of the Act of Accession. The notified measures were adopted by the Hungarian authorities over the period from 1995 to 2003 to assist the restructuring of Postabank and to facilitate its privatisation. The Commission opened the formal investigation on 20 October 2004. Postabank was eventually privatised in October 2003 when the Government sold its 99.9% stake to Erste Bank of Austria. On 1 September 2004 Postabank was merged with Erste Bank’s Hungarian subsidiary.

The Commission has cleared a series of restructuring measures granted in the past by the Hungarian authorities in favour of Postabank, but it has opened formal investigation proceedings regarding so-called “indemnity for unknown claims” that the bank, which was sold to Erste Bank in 2003, may have to face since May, when Hungary became a member of the European Union. The “indemnity for unknown claims” may lead to further claims beyond what was clearly defined by the date of accession. At this stage, the Commission believes that the scope and amount of

285 C 40/02.
286 C 40/02 (ex N 513/01) Aid to Hellenic Shipyards (OJ C 186, 6.8.2002).
financial support provided to Postabank in the future cannot be determined. The Commission is assessing the “indemnity for unknown claims” under the EU’s guidelines for rescue and restructuring aid\(^{289}\).

*German Landesbanken*

454. On 20 October, the Commission concluded its long-standing investigations into the transfer of public assets in the early 1990s to seven German Landesbanken by ordering Germany to recover about EUR 3 billion plus interest.

455. At the beginning of the 1990s, the German state governments (*Länder*), which partly or fully own the banks, transferred public housing and other assets to increase the capital base of the banks. The main reason for these transfers was the introduction of the Own Funds and Solvency Directives requiring German public banks to take up large amounts of new capital in order to maintain their level of activities.


457. In 1999, the Commission adopted a first negative decision concerning the transfer to WestLB. In 2003, the Court of First Instance annulled the decision taking the view that the Commission had not sufficiently explained its calculations but confirming the substance of the decision.

458. The Commission’s assessment showed that the remuneration agreed by the *Länder* in return for the transfer of assets was very low (on average less than 1%) and did not correspond to the normal return that a private investor would have expected for a comparable, non-cash investment (which has been estimated at some 6-7% after tax, except for Landesbank Hessen-Thüringen where the interest rate for a different instrument - silent participation - is substantially lower).


\(^{290}\) In brackets, dates of capital transfer.
3. REGIONAL AID

Aid to Spanish steel producer Siderúrgica Añón SA

On 14 June, the Commission issued a final negative decision against several financial measures in favour of Spanish steel producer Siderúrgica Añón SA. The measures concerned a subsidy amounting to approximately EUR 2 million, an interest-free loan amounting to approximately EUR 2 million, a subsidisation by 25 basis points of the interest rate as well as the formalisation fee of a loan in the order of EUR 10 million, a guarantee on 30% of the very same loan for a premium beyond market conditions, and a provision of capital amounting to about EUR 2 million.

The Commission considered that the latter provision of equity must, from an economic point of view, be treated as equivalent to a subordinated participating loan and that the given return on investment did not correspond to the normal interest rates paid for such a loan. The Commission concluded that all the measures constituted state aid. Although the company is considered a medium-sized enterprise and investment aid for medium-sized enterprises can, even in the steel sector, be exempted, this does not apply to large individual aid grants such as the present one.

Transport aid to the motor vehicle industry in outermost and low population density regions

On 8 September, the Commission issued a no-objection decision allowing the grant of aid to Volvo in connection with the transport of truck cabins produced in the Volvo plant in Umeå, a region qualifying as a low population density area in the north of Sweden.

Until 31 December 2002, the Community framework for state aid to the motor vehicle industry expressly prohibited the grant of transport aid to this industry qualifying as a sensitive sector. Since the expiry of the framework on 1 January 2003, the Volvo case was the first notification concerning transport aid to a manufacturer of motor vehicles. The aid was allowed because there is no industry-specific rule in force any more which would prohibit or otherwise limit the grant of transport aid in regions qualifying as outermost regions or low population density regions within the meaning of the guidelines on national regional aid.

The multisectoral framework, prolongation of existing regional aid maps

In 2004, all acceding States submitted, under the interim procedure for existing aid referred to in Annex IV, paragraph 3, subparagraph 1(c) to the Accession Treaty, the prolongation of their existing regional aid maps for the period from 1 May 2004 to 31 December 2006. Among other things, the new Member States have been requested to ensure compliance with the reduced regional aid ceilings for aid to large

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investment projects as provided for by the 2002 multisectoral framework. The Commission has examined these measures and has issued a decision not to raise any objections for all new Member States. In effect, virtually the entire territory of each new Member State is eligible for Article 87(3)(a) status, the only exceptions being the territory of Cyprus and the capital cities of Prague and Bratislava.

465. In June, the French authorities notified, under the individual notification requirement provided for by the 2002 multisectoral framework on regional aid for large investment projects, a EUR 48 million aid payment for an investment project by the Total France. The project is aimed at fundamentally changing the production process at the refinery in Gonfreville l’Orcher and represents a total investment of EUR 547 million. It will ensure the long-term viability of the plant, which represents 1 000 jobs and will create 60 new jobs.

466. Gonfreville l’Orcher is located in a French region eligible for regional aid, and the notified aid is being granted by the local authorities in accordance with an aid scheme authorised by the Commission. In regions eligible for regional aid, the Commission considers compatible with the common market aid measures supporting investments related to the setting-up of a new establishment, the extension of an existing establishment, or the starting-up of an activity involving a fundamental change in the product or production process.

467. According to the 2002 multisectoral framework, Member States have to notify individual aid exceeding a certain threshold which depends on the standard regional aid ceiling applicable in the region concerned. In order to assess the compatibility of the aid measure with the common market, the Commission has to examine whether distortion effects of the aid on competition are not greater than its positive effects on regional development. In this context, the Commission noted that the proposed aid intensity of 4.9% is lower than the maximum aid intensity of 8.4% that can be approved under the multisectoral framework rules for large-scale investment projects of this size, that the EEA market share of the recipient for the products concerned does not exceed 25%, and that the investment will not increase EEA-wide production capacity by more than 5%. The Commission thus found the aid to be compatible with the common market. This case was the first Commission decision under the 2002 multisectoral framework.

West Cumbria UK

468. On 4 August, the Commission approved an increase in the aid intensity ceiling from 10% NGE to 20% NGE in the UK regional aid map for two job opportunity zones, zones 22 and 23, which constitute West Cumbria, as being compatible with the EC
Treaty. The adjustment takes effect upon the entry into force of the Commission’s decision and is valid until 31 December 2006.

In the initial regional aid map zones 22 and 23 are so-called 10% zones pursuant to point 4.8 of the regional aid guidelines. Paragraph 5.6. of the guidelines on national regional aid allows the Commission to approve adjustments to existing regional aid maps during their period of validity if it can be shown that socio-economic conditions have changed significantly. If such an adjustment is sought in relation to the aid intensities for so-called c-regions, the Member State has to demonstrate that the socio-economic indicators that have been chosen by the Member State in order to select c-regions have deteriorated on a national basis.

The GDP and unemployment data available confirmed a significant deterioration in the socio-economic situation of the two job opportunity zones concerned.

Molise region

On 8 September, the Commission approved amendments proposed by the Italian authorities to the regional aid map with regard to the Molise region. Pursuant to the Commission’s decision of 2000 on the Italian regional aid map for 2000-2006, certain areas of the Molise region are eligible for Article 87(3)(c) EC Treaty status with an aid intensity of 20% NGE, plus 10 percentage points gross for small and medium-sized enterprises (SMEs). The amendments concern the inclusion of certain previously non-assisted areas of the Molise region in the Italian regional aid map. This inclusion is offset by the exclusion of other currently eligible areas of the Molise region having the same population. The second amendment relates to the increase in aid intensity with respect to SMEs only in the eligible c-areas of the Molise region. This increase respects the ceiling of aid intensity laid down in Commission Regulation (EC) No 70/2001 on state aid to SMEs, i.e. 30% net in the case of Article 87(3)(a) regions. These amendments were found to be justified owing to the significant deterioration in socio-economic conditions (increase in unemployment rate, overall reduction in economic activity, decrease of per capita GDP/PPS) in the respective areas of the Molise region, which were also affected by two successive natural disasters within a short space of time (earthquake in October 2002 and floods in January 2003). The Commission thus considered the amendments to be in line with the guidelines on national regional aid and, therefore, to be compatible with the EC Treaty. The adjustment takes effect upon the entry into force of the Commission’s decision and is valid until 31 December 2006.

Northern Ireland Venture scheme

On 20 October, the Commission closed the formal investigation procedure opened in November 2003 and approved the “Invest Northern Ireland Venture 2003”

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298 OJ C 74, 10.3.1998.
scheme\textsuperscript{301}. The scheme seeks to promote risk capital financing for SMEs in Northern Ireland. It builds upon an umbrella scheme for risk capital financing to SMEs in the United Kingdom, the “Small and Medium Enterprises Venture Capital and Loan Fund (SMEVCLF)”, a measure that was approved by the Commission in 2003. However, it deviates from the latter in one important respect by offering the possibility for SMEs to receive risk capital amounts of up to UKL 1.5 million (EUR 2.2 million). This new element – as the initially approved SMEVCLF scheme provides for maximum amounts of EUR 750 000 for Article 87(3)(c) areas like Northern Ireland – was justified by the UK by means of a market study. This study shows that there is a gap in the provision of risk capital in the UKL 250 000 to UKL 1.5 million range. In November 2003 the Commission had opened the formal investigation procedure in order to enable interested parties to comment on the UK proposal. All comments were favourable and confirmed the need for and proportionality of the measure. In view of the positive elements of the scheme, the Commission concluded that the “Invest Northern Ireland 2003” scheme fulfils the conditions set out in the Commission communication on state aid and risk capital\textsuperscript{302}. It has therefore found the measure to be compatible with the common market.

\textit{Tremonti bis}

473. On 20 October, the Commission ruled that an aid scheme resulting from the extension of the period of validity to 2002 of an Italian law of 2001 (Law No 383/2001, “Tremonti bis”) benefiting firms carrying out investment in municipalities affected by natural disasters in 2002 is incompatible with the state aid rules of the EC Treaty\textsuperscript{303}.

474. Aid to make good the damage caused by natural disasters or exceptional occurrences is compatible with the common market (Article 87(2)(b) of the EC Treaty). Since the Commission had doubts regarding the guarantees aimed at ensuring that only victims of the disasters would be compensated and that the amount of aid would not exceed the damage, it launched a formal investigation procedure on 17 September 2003. However, the detailed investigation failed to dispel these doubts. There was no connection between the aid mechanisms established by the scheme and the damage actually suffered. The amount of the aid depended on the volume of investment made during a certain period, the amount of investments made over the previous years and the existence of taxable income. This being so, even in cases where the recipient actually had suffered damage as a result of these natural disasters, the amount of aid could exceed the cost of the damage.

475. However, the Commission acknowledged that certain individual aid payments granted on the basis of the scheme could meet the conditions for compatibility even if the scheme is declared illegal.

476. Since the extension of Law No 383/2001 was not notified prior to the granting of the aid and as the Commission declared the aid scheme as such incompatible with the

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\textsuperscript{301} C 72/2003 (ex-N 134/2003).
\textsuperscript{303} C 57/2003 (ex-NN 58/2003).
\end{flushleft}
internal market, Italy will have to take all necessary measures to recover the aid from recipients, except those certain individual aid payments granted on the basis of the scheme which meet the conditions for compatibility under Article 87(2)(b) of the EC Treaty.

4. **NON-AID DECISION**

*Belgian sectoral funds*

477. In Belgium, in numerous areas of activity, the social partners, on the basis of a voluntary decision, provide for a contribution by employers in the sector to the financing of certain social actions according to the needs of the sector (mainly for training workers in the sector), and include the contribution rate in their sectoral collective agreement. The collective agreements concluded at the level of the areas of activity (and, consequently, the contributions which are envisaged) are made compulsory by royal decree for all companies belonging to the sector. The thus created social sectoral funds are financed completely out of contributions from companies in the areas of activity concerned and entirely self-manage the money collected. All the companies contributing to a fund can benefit from the programmes part-financed by that fund.

478. The Commission concentrated on the question whether this system includes elements of state aid\(^\text{304}\). In deciding on the existence or otherwise of state aid, it based its assessment on the four cumulative criteria which the Court of Justice laid down in its judgment in *Pearle*\(^\text{305}\), in which the absence of state resources and of imputability to the State was noted. Applied to the case in question, these four criteria are as follows:

(2) the actions financed by the sectoral funds are entirely decided on by the social partners in the sector and not by the State;

(3) financing comes 100% from contributions from companies in the sector: the State does not part-finance the funds (If the State did part-finance certain actions of the funds, this co-financing on the part of the State – and it alone - would be characterised as a state resource);

(4) the financing methods and rates are also determined by the social partners in the sector;

(5) there is no intervention by the State in the use of the collected resources.

(6) These four conditions being satisfied in the case of the Belgian sectoral funds, the Commission noted – by analogy with the *Pearle* judgment - the absence of state resources and of imputability to the State and, consequently, the absence of state aid.

\(^{304}\) NN 136/03.

\(^{305}\) Judgment of 15.7.2004 in Case C-345/02 Pearle BV, Hans Prijs Optiek Franchise BV and Rinck Opticiëns BV v Hoofdbedrijfschap Ambachten, not yet reported.
In the Commission decision based on the *Pearle* case law it is important to note certain limits to the concepts of state resources and of imputability to the State.

5. **Fiscal aid**

*Fiscal aid scheme for the restaurant sector*

479. On 1 December, the Commission decided not to raise any objections to a scheme involving employment aid to the HCR (hotels, cafes and restaurants) sector in France.\(^{306}\)

480. In order to improve working and remuneration conditions in the sector, the French authorities negotiated an agreement with the relevant employees’ and employers’ organisations which provides *inter alia* for pay rises and additional paid holidays. One peculiarity of the HCR sector is that the minimum legal wage is below the minimum legal wage for other areas of economic activity.

481. To offset the additional costs to be borne by employers, the French authorities decided to award monthly grants to companies whose employees are paid at least as much as the minimum legal wage applicable in other sectors of activity. The measure is in place for a period of 18 months from 1 July 2004 to 31 December 2005.

482. In the absence of any Community legal basis containing explicit provisions for exempting such cases, an assessment directly based on Article 87(3)(c) of the Treaty proved necessary. Thus, the Commission had to weigh the contribution of the aid towards the EU common interest against its impact on trading conditions and competition in the common market.

483. The promotion of employment and the enhancement of working conditions clearly constitute priority objectives of EU common interest that are solidly embedded in the Treaty and in the European employment strategy. With regard to the impact of the scheme on trading conditions and competition, the Commission found that this would be quite limited for a number of reasons, notably because restaurant services are essentially a local, non tradable activity and because the costs incurred by employers exceed the amount of state support and, unlike the aid, are of a perennial nature. The Commission therefore concluded that the measure was compatible with the common market.

484. This decision is in keeping with overall Commission state aid policy and, in particular, with the objective of redirecting aid towards horizontal objectives of common interest which has been recognised by successive European Councils.

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Fiscal EIGs

485. On 14 December, the Commission decided to launch a formal investigation to establish whether the French tax scheme for "fiscal EIGs" is compatible with the Community rules on state aid.

486. Article 39 C of the French General Tax Code (CGI) stipulates that the tax-deductible depreciation of assets leased by an economic interest grouping (EIG) may not exceed the amount charged for the leasing operation. However, Article 39 CA of the CGI\(^{307}\) provides for an exception to this rule. Under this article, financing operations of significant economic and social interest are not subject to the depreciation restriction. The existence of a significant economic and social interest is assessed by the Minister for the Budget, who then grants approval to the company making the investment.

487. Several other conditions have to be met in order to be able to benefit from the removal of the upper limit on depreciation. The leased asset has to be depreciable over eight years at least. The procurement price has to correspond to the market price. The end-user must be a company which uses the asset as part of its day-to-day activities and which must have the right to purchase the asset outright at the end of the leasing/purchase agreement. The eligible assets, with the exception of ships, have to be acquired as new goods:

- The EIG tax being a fiscally transparent instrument, it is the members constituting the EIG who benefit directly from the removal of the upper limit on depreciation. However, the arrangement provides expressly that two thirds of the advantage thus obtained must be passed on to the end-user in the form of a reduction in the leasing charge or in the price of the option to buy. Moreover, the resale of the asset to the end-user is exempted from capital gains tax.

- The EIG, which is generally made up of financial institutions, purchases the asset to be financed and leases it to the end-user. Since the decreasing depreciation and the financial charges borne by the EIG are concentrated on the first few years of the leasing operation, the results of the EIG show an exceptional loss during this period and become positive only during a later period when the amount of the leasing charges collected exceeds total costs. Owing to their being subject to the tax arrangements applicable to partnerships, EIGs can deduct the losses thus posted during the first few years of the operation from the taxable profits earned by their members from their current activities. This enables the EIG’s members to reduce the amount of their taxable income.

488. The Commission considered in its opening decision that the arrangement constituted incompatible aid. It considered that both the members of the fiscal EIG and the users of the assets leased to them by the EIG benefited from selective advantages within

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\(^{307}\) Exemption under Article 39 CA of the CGI was introduced by Article 77 of Law No 98-546 of 2 July 1998, which sets up a depreciation system for the benefit of certain companies approved by the Minister for the Budget.
the framework of this arrangement. The Commission stressed in particular that the arrangement applied mainly to the maritime transport sector. Interested third parties and in particular the beneficiaries of the arrangement and persons having been able to receive approval within the framework of the arrangement were invited to submit their comments.

Fiscal incentives for participation in fairs

489. On 22 September, the Commission decided that special tax incentives for companies taking part in trade fairs abroad (available under Article 1(1)(b) of the 2004 Italian budget law) are incompatible with the common market. Article 1(1)(b) provides for a double exclusion of the expenses directly incurred in 2004 by undertakings with respect to their participation in trade fairs abroad from their taxable income for corporation tax purposes in Italy. This income exclusion derogates from the normal rules because it constitutes an additional deduction with respect to the ordinary deduction of business expenses allowed by the Italian tax code. The decision follows an in-depth investigation opened in March 2004.

490. The Commission considered that the scheme distorts competition because it provides a tax advantage aimed at improving the trading conditions of Italian companies operating overseas. It appeared, therefore, that only a limited group of beneficiaries being engaged in export related activities could benefit from it, and therefore it constituted aid directly affecting cross-border competition and trade, including trade with other Member States. Italy is requested to recover the aid illegally paid to the beneficiaries, except for that part of the aid which concerns 50% of the costs arising from the first participation by an SME in a particular fair or exhibition with respect to a new market.

Real estate tax exemption

491. On 1 December, the Commission partially approved a scheme that temporarily exempts housing companies from real estate transfer tax in the case of mergers involving property in the new German Länder. According to the current regional aid map (2000-2006) for Germany, the major parts of Brandenburg, Mecklenburg-Western Pomerania, Saxony, Saxony-Anhalt and Thuringia are assisted areas pursuant to Article 87(3)(a), whereas the labour market region of Berlin (including Berlin and surrounding parts of Brandenburg) qualifies for assistance under Article 87(3)(c) of the EC Treaty. A considerable population decrease due to low birth rates and massive out-migration, a high vacancy rate accompanied by significant losses due to foregone rents and uncertainty due to pending actions for restitution distinguish the real estate market in the new Länder. The exemption from real estate transfer tax is intended to enable housing companies to join forces in order to deal with these multiple challenges.

492. For those parts of the measure that are restricted to 87(3)(a) areas, the Commission has concluded that the measure can be approved in view of the particular handicaps, the limited degree of distortion of competition, the limited time frame, and the expected positive effects of the measure on the housing market and socio-economic development. For the labour market region of Berlin, where vacancy rates and depopulation are less pronounced and the typical amounts of aid involved are higher, the Commission opened the formal investigation procedure in order to collect information from other interested parties\textsuperscript{310}.

6. **RESEARCH AND DEVELOPMENT AID**

*Hydrogen Research Programme: Micro CHP and CELCO projects*

493. On 30 November, the Commission approved, under the R&D guidelines\textsuperscript{311}, two “ad hoc” aid projects\textsuperscript{312} designed to support as many research projects, named “development of a fuel cell micro CHP unit” and “development of a fuel cell-based on-board auxiliary power unit (APU) and propulsion system for pleasure craft”.

494. Both took place within the framework of “Hydrogen Piemonte System (SPH2)”, a regional research programme started and carried on by the Piedmont region of Italy, which was inspired by the work of the high-level group – at Community level – on “hydrogen energy and fuel cells”\textsuperscript{313}.

495. The projects aim to develop the findings of fundamental research on the hydrogen carrier and may be broken down into the following main areas: fuel cell development for both stationary and transport applications, hydrogen production development from both renewable and grey sources - notably in relation to the CO\textsubscript{2} sequestration issue - and hydrogen storage and distribution. Only the industrial phase of research was involved, according to Italy, thus resulting in a 50% aid intensity being allowed.

496. Hydrogen and fuel cells are firmly established as strategic technologies to meet the conflicting demands of increased energy supply and security, whilst maintaining cost-competitiveness, reducing climate change, and improving air quality. Unfortunately the resulting benefits will only start to really flow after public incentives and private effort is applied to stimulate and develop the main markets, as the European roadmap for hydrogen and fuel cells is indeed still far from the market.

\textsuperscript{310} C 40/2004.

\textsuperscript{311} Community framework for state aid for research and development, published in OJ C 45, 17.2.1996 (hereinafter also referred to as “the framework”), as last validated and extended by Commission communication 2002/C111/03 (OJ C 111, 8.5.2002).

\textsuperscript{312} Notified in April 2004 as N184a-184b/2004.

\textsuperscript{313} The High Level Group for Hydrogen and Fuel Cells Technologies was set up in October 2002 by the Vice-President of the European Commission, Loyola de Palacio, Commissioner for Energy and Transport, and Mr Philippe Busquin, Commissioner for Research. The Group was invited to formulate a collective vision on the contribution that hydrogen and fuel cells could make to the realization of sustainable energy systems in the future. It is composed of 19 stakeholders representing the research community, industry, public authorities and end-users.
Hence the Commission considered that the notified projects, both being of a medium-to long-term research and technological development nature, fell under the definition of industrial research and cleared them pursuant to point 5.3 of the framework.

**R&D aid to Bell Laboratories in Dublin**

On 1 October, the Commission decided not to raise any objections to aid granted by the Irish authorities to Bell Laboratories on the ground that it is compatible with the EC Treaty. Individual aid awards are made under the R&D Capability Grant scheme, which was recognised by the Commission as being an existing aid scheme and which was approved for use under the current 2000-2006 Productive Sector Operational Programme.

The recipient, Bell Laboratories (BLRI), is part of Lucent Technologies – a global leader in the telecommunications sector. The objective of the aid is the establishment in Dublin of a world-class research centre in the area of value-chain-driven research into next-generation telecommunications systems. The centre will contribute significantly to the research capability of the European Community as a whole in the area of computer- and telecommunications-related technologies, in keeping with the Lisbon objective of making Europe the leading knowledge-based economy in the world. The project will be developed over five years and will receive, through a non-reimbursable grant, a total aid amount of EUR 21.66 million on total eligible expenditure of EUR 43.32 million. It will also involve a considerable amount of cooperation with universities via a consortium of university researchers led by Trinity College Dublin.

The Commission considered the measure as falling under the scope of Article 87(1) of the EC Treaty; however, the conclusion of the compatibility assessment was favourable based on the following facts:

(a) the projects are limited to industrial research and pre-competitive development activities, defined in accordance with Annex I to the R&D framework;

(b) the eligible costs are in line with Annex II to the R&D framework;

(c) the aid intensity, limited to 50%, is in line with points 5.3, 5.5, 5.10.2 and 5.10.3 of the R&D framework; and

(d) there is a clear incentive effect in the project proposed, as required by point 6.2 of the R&D framework.

Consequently, the Commission decided to consider the aid granted to be compatible with the EC Treaty under its Article 87(3)(c).

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Participation in the capital increase of OCAS

502. On 20 October, the Commission authorized the Flemish Region to participate in the capital increase of OCAS, an R&D unit of Arcelor which plans to transform itself into a more autonomous and profitable company in the market for R&D services. Belgium had notified this project for the sake of legal certainty. Indeed, it considered that the project seemed profitable enough to attract the investment of private companies. In this respect, it noted that Arcelor, the current shareholder of OCAS, was also participating in the capital increase for the same amount. After a detailed analysis of the case, DG Competition came to the conclusion that the profit outlook was not precise and high enough to consider the return expected sufficient to compensate for the high risk of the project. It noted that certain provisions of the deal appeared too favourable to Arcelor. After finding that there was potential aid in favour of Arcelor, DG Competition came to the conclusion that it could be authorised on the basis of the R&D guidelines. Indeed, the public support clearly incites Arcelor to undertake additional research compared with research normally undertaken and the aid intensity will remain below the level authorised for industrial research.

Schiefergruben Magog

503. On 6 October, the Commission launched a formal investigation into state aid to Schiefergruben Magog, a German slate producer. The case originated with a complaint which the Commission received from a German competitor of Schiefergruben Magog.

504. In 2002 and 2003 Schiefergruben Magog had received a grant from the regional authorities amounting to around EUR 0.7 million to support the development of a new technology for cutting roofing slate. Germany argued that the grant did not constitute state aid as it did not confer an advantage on the company: the aim of the project was to develop an innovative technology for the treatment of roofing slate in order to reduce health risks to employees and the investment was not profitable for the company. Germany furthermore argued that trade between Member States was not affected as Schiefergruben Magog produced special high-quality roofing slate, which for historical reasons was produced only in Germany.

505. In its decision opening the formal investigation, the Commission considered that the grant did confer an advantage on Schiefergruben Magog. According to the company’s own website, the project was intended to automate the cutting process, which would allow the company to produce high-quality slate at lower cost and would thus increase the company’s competitiveness. The Commission was also of the opinion that trade between Member States was affected and that the grant consequently constituted state aid. The Commission doubted whether the aid could be found compatible on the basis of the SME block exemption regulation or the

Community framework on research & development or any other exemptions provided for in Article 87(2) and (3) of the Treaty.

7. **ENVIRONMENTAL AID**

*Aid to Akzo Nobel for minimising chlorine transport*\(^{318}\)

506. On 16 June, the Commission approved under Article 87(3)(c) EC a EUR 32.5 million grant to Akzo Nobel in connection with the relocation of two plants producing chlorine and mono-chloro acetic acid. The relocation will significantly reduce the need for chlorine transport.

*Aid for an ethylene pipeline between Stade and Teutschental*\(^{319}\) and *for a propylene pipeline from Rotterdam via Antwerp to the Ruhr area*\(^{320}\)

507. According to the guidelines for national regional aid, the investment cost of those parts of a pipeline located in assisted areas may be eligible for aid. This was the case with an ethylene pipeline owned and operated by DOW Olefinverbund GmbH for which the Commission, on 8 September, approved a EUR 13.6 million aid award.

508. This was not the case with a propylene pipeline from Rotterdam, via Antwerp, to Cologne and the German Ruhr area since it is largely outside assisted areas. Nevertheless, on 16 June, the Commission approved EUR 27 million in subsidies to be granted by the German, Dutch and Belgian authorities in support of this pipeline. The beneficiary is the European Pipeline Company, in which the major propylene producers concerned participate. Unlike the ethylene pipeline mentioned above, this pipeline will be operated in accordance with the principles of "open access/common carrier" and "low profit".

509. The support for this propylene pipeline falls within the definition of state aid and should not be considered support for general infrastructure. The Commission recognised, however, the environmental, safety and industrial advantages of the project. Having verified whether the aid was proportional and limited to the minimum necessary, and whether undue distortion of competition had been avoided, it considered that the aid was compatible with the common market. As neither the guidelines on aid for the protection of the environment nor the guidelines on national regional aid were applicable, the Commission based its decision directly on Article 87(3)(c) of the Treaty.

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317 This aid intensity is in line with the guidelines on aid for the protection of the environment (OJ C 37, 3.2.2001), which, however, does not cover aid to increase the safety of citizens.
318 N 304/03.
319 N 598/03.
320 C 67/03, C 68/03 and C 69/03.
On 8 September, the Commission approved EUR 23.5 million in environmental aid to Stora Enso’s paper mills in Langerbrugge, Belgium. The aided investments aim at reducing energy consumption in newsprint production, producing energy by combusting de-inking sludge in a combined heat and power installation, and transporting waste paper and finished product by rail instead of truck.

Further aid for increasing the use of recycled fibre in paper production, another EUR 11.5 million, was not approved. The Commission found that it fell outside the scope of point 29 of the guidelines on aid for environmental protection, since the investments do not reduce the waste generated by Stora Enso’s own production and sales but rather paper sold by any paper producer. The Commission considers that, by analogy with point 29 of the guidelines, such investment aid for recycling may be supported up to 30% of the eligible cost only if it complies with the following additional criteria: (i) the investment projects should be innovative and go beyond “state of the art”, (ii) the aid should not indirectly relieve the companies that produced the waste from a burden that should be included in their budget under Community law, and (iii) conditions should be imposed to ensure that materials are recycled that otherwise would end up as waste, considering that aid for investments that merely increase competition for the materials to be recycled cannot be authorised.

State aid aspects of the implementation of the emission trading scheme

The emission trading scheme (ETS), introduced by Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003, plays a major role in the Commission’s climate change policy. It aims to help EU Member States to achieve compliance with their commitments under the Kyoto Protocol by using a market-based instrument which helps achieve emissions reductions at least cost.

The ETS is the first international trading system for CO₂ emissions in the world. It will cover a total of more than 12 000 installations in the EU-25 (combustion plants, oil refineries, coke ovens, iron and steel plants, and factories making cement, glass, lime, bricks, ceramics, pulp and paper) accounting for close to half of Europe’s emissions of CO₂.

A cornerstone of the implementation of the ETS are the so-called national allocation plans (NAPs). These plans establish the total number of emission allowances Member States plan to allocate for the 2005-2007 trading period and the methods of allocating them to the different sectors or installations involved.

The emission trading directive requires the Commission to assess compliance of these plans with Article 10 of the ETS directive and with eleven criteria established

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321 C 73/03.
322 OJ C 37, 3.2.2001.
in Annex III thereof. The Commission may refuse a plan in whole or in part within three months of its notification if the plan is found incompliant. By the end of 2004, the Commission had taken decisions on 21 NAPs.\(^{324}\)

Assessment of the NAPs

516. Criterion 5 of Annex III to the ETS directive requires that a national allocation plan “shall not discriminate between companies or sectors in such a way as to unduly favour certain undertakings or activities in accordance with the requirements of the Treaty, in particular Articles 87 and 88 thereof”.

517. In its guidance document, the Commission stated that “the normal state aid rules will apply”.

518. Article 10 of the directive obliges Member States for the first trading period from 2005 until 2007 to allocate at least 95% of the allowances free of charge. This allows Member States to sell up to a maximum of 5% of the allowances. So far, Member States have made little use of this possibility. Only Denmark has decided to auction 5% of the allowances. Some other Member States envisage auctioning unused allowances from the new entrants reserve at the end of the trading period or auctioning a very limited number of allowances to cover the administrative costs of the implementation of the scheme. To the extent that a Member State does not use its possibility to sell allowances at the market price, the measure appears to be imputable to the Member States and to entail the use of state resources.

519. The measure may also contain state resources and be imputable to the Member State where a Member State allows banking of allowances from the first to the second trading period. Until now, all Member States with the exception of France have excluded banking.

520. With the exception of Denmark, the Commission therefore could not rule out the possibility that the NAPs involved state aid pursuant to Article 87(1) of the Treaty. The Commission assessed further whether any potential aid was consistent with, and seemed to be necessary to achieve, the overall environmental objective of the ETS directive.

521. The Commission sought contacts with Member States in particular where an NAP seemed to contain one of the following features:

522. Where a Member State allocates a total number of allowances which is not consistent with projected emissions or where it is inconsistent with its path to Kyoto (Criteria 1 and 2 in Annex III to the directive) and the beneficiaries do not deliver a sufficient

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\(^{324}\) On 7 July, the Commission decided on the NAPs of Denmark, Ireland, the Netherlands, Slovenia and Sweden; on 20 October, decisions were taken on the NAPs of Belgium, Estonia, Latvia, Luxembourg, the Slovak Republic and Portugal; in late December, decisions were taken on the NAPs of Cyprus, Hungary, Lithuania, Malta and Spain. The communications regarding these decisions are accessible at http://europa.eu.int/scadplus/leg/en/lvb/l28012.htm. The decisions are accessible at http://www.europa.eu.int/comm/environment/climat/emission_plans.htm
environmental counterpart, such overallocation might entail potential aid (where the beneficiaries receive more than realistically projected emissions, as the aid would then not have an incentive effect to change behaviour); where a plan leads to discrimination between trading sectors or installations, e.g. by using unjustified different allocation methods for different sectors or applying an allocation method differently to certain undertakings; and where new entrants receive unjustified different treatment vis-à-vis incumbents.

523. When assessing the NAPs, the Commission encountered a limited number of such situations. So far, most of the potential threats to undistorted competition were able to be resolved in discussion with the Member State concerned. In several cases, Member States reduced the total number of allowances in order to comply with Criteria 1, 2 and 5 of the ETS directive. In some cases, Member States abandoned reserves established for specific sectors. The use of different allocation methods for specific sectors appeared to be justified in many cases. The Commission therefore concluded for most NAPs that, based on the information provided by the Member States, it considered that any potential aid was likely to be compatible with the common market if it were assessed in accordance with Article 88(3) of the Treaty.

524. It should be noted that the Commission has until now screened all NAPs in the context of the ETS directive in order to identify obvious problems of state aid that is likely to be incompatible. The Commission has not so far taken any formal state aid decision on a national allocation plan.

8. ENLARGEMENT

Existing aid in the new Member States

525. The Accession Treaty provides that the following aid measures are to be regarded as existing aid within the meaning of Article 88(1) of the EC Treaty from the date of accession:

- aid measures put into effect before 10 December 1994;
- aid measures listed in an appendix to the Accession Treaty (the “Treaty list”);
- aid measures which, prior to the date of accession, were assessed by the state aid authority of the new Member State and found to be compatible with the acquis, and to which the Commission did not raise any objection on the ground of serious doubts as to the compatibility of the measure with the common market (the “interim procedure”).

526. All measures which constitute state aid and which do not fulfil the conditions set out above are regarded as new aid upon accession for the purposes of applying Article 88(3) of the EC Treaty.

527. Under the interim procedure, new Member States had the option to submit measures between the beginning of 2003 and the date of accession. Overall, 559 measures were submitted, of which 201 in 2003 and 358 in 2004. By the end of 2004, 323 measures (58% of the total) had been proposed as existing aid, of which 76 in 2003 and 247 in 2004. During the course of 2004, the Commission initiated the formal
investigation procedure with regard to 3 measures. Overall, 207 measures (37% of the total) were either withdrawn by the new Member States or the subject of a Commission decision considering that they were not applicable after accession. By the end of 2004, the remaining 26 measures were still under assessment.

Aid to the banking sector in the new Member States

528. In the 1990s, the economies of some new Member States underwent structural change. Public authorities intervened in various instances. To ensure that these interventions were assessed, the Treaties of Accession granted the Commission powers to assess the compatibility of measures that constituted aid which, although granted in the past, extended beyond the date of accession of these countries.

529. Following notification, the Commission reviewed aid granted for the restructuring of the banking system in several new Member States (the Czech Republic, Hungary and the Slovak Republic). In 2004, the Commission adopted 16 decisions declaring that the measures were “not applicable after accession”. This means that the measures in question were granted in their entirety before the accession date without the potential of additional aid being granted after accession, and thus the Commission was neither required nor empowered to assess such measures. However, in two cases, the Czech Agrobanka Praha\(^{325}\) and the Hungarian Postabank\(^{326}\), the Commission decided to open proceedings as it found that some of the measures that were “applicable after accession” constituted state aid on which it had serious doubts as to their compatibility with the common market.

Reduction of a tax concession granted by Slovakia to US Steel Košice

530. In the accession negotiations Slovakia was granted a transitional exemption from the EU state aid rules, under which Slovakia could continue to grant tax aid to US Steel Košice after accession until the end of fiscal year 2009.

531. In order to compensate for the company’s competitive advantage resulting from the tax exemption, as from 2002 a cap for production and as from the date of accession also a cap for sales were established. A half-yearly reporting obligation is also imposed on Slovakia by Annex XIV to the Act of Accession. The first report submitted by Slovakia showed that the production caps were not respected in 2002 and 2003. In order to counterbalance the effect of the overproduction the Slovak government proposed a significant reduction in state aid granted to US Steel and asked the Commission for a revision of the conditions for granting the transitional period.

532. The Commission decided on 22 September\(^{327}\) on appropriate measures to remedy the situation. Under this decision, the total aid amount that can be granted to US Steel Košice until 2009, in the form of a corporate income tax exemption, is reduced from USD 500 million to USD 430 million. Additionally, the beneficiary is required to

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\(^{327}\) SK 5/04.
make a tax payment of USD 32 million to the Slovak Government, paid in two equal instalments during 2004 and 2005. US Steel Košice must respect the production cap from 1 January 2004 and the sales caps as from 1 May 2004. US Steel Košice is also required to respect the condition that it must not extend its range of groups of finished products existing on 13 December 2002 and must continue to meet the terms of the privatisation contract.

533. On 25 October, the Slovak Government accepted the Commission proposal for appropriate measures and confirmed that US Steel Kosice had paid the first tax instalment of SKK 525 488 000 (USD 16 million).

Restructuring aid to a steel producer in the Czech Republic

534. On 14 December, the Commission decided to launch an in-depth probe into possible state aid to Třinecké železáry a.s. (TZ), a producer of steel in the Czech Republic. The Commission will investigate whether certain state measures could constitute disguised restructuring aid. Restructuring state aid may be granted to the Czech steel industry only under the national restructuring programme accepted by the EU in Protocol No 2 to the Act of Accession and only to companies included in it. TZ is not one of these companies and so is not eligible for restructuring aid. The Commission considers that the aid granted for environmental and R&D projects is compatible with the relevant EU state aid rules. However, it has doubts as to the compatibility of the aid granted for closure and training projects. The Commission will also investigate whether the price paid by the Czech Government for the shares which it acquired from TZ was the market price.

9. SHIPBUILDING

Fincantieri

535. According to the 1998 Shipbuilding Regulation, the last delivery date for a ship to qualify for contract-related operating aid was 31 December 2003. Ships delivered later would not, in principle, be eligible for such aid. Nevertheless, the Commission may grant an extension of this limit when justified by delays resulting from unexpected or exceptional circumstances, external to the shipbuilding company.

536. On 20 October, the Commission took a decision, following a notification from Italy, concerning the delivery limit for five cruise ships produced by Fincantieri, an Italian shipbuilding group. Italy argued that the reason for the delays was that the shipowner requested deliveries to be postponed owing to the terrorist attacks on 11 September 2001.

537. In its decision the Commission on the one hand approved the extension of the delivery limit for four of the ships, since the argument put forward by Italy was

330 N 347/03.
considered to be covered by the exceptions foreseen in the Shipbuilding Regulation and since Fincantieri had the technical capacity to deliver the ships by the end of 2003. However, the Commission decided to initiate a formal investigation concerning one of the ships, since it had doubts that Fincantieri ever had the technical capacity to deliver that ship by 31 December 2003.

*Kvaerner Warnow Werft*\(^{331}\)

538. After the unification of Germany, the former East German shipyards received exceptionally large amounts of state aid for their restructuring. Between 1993 and 1995, in the context of the privatisation and restructuring of the eastern German shipyard Warnow Werft (now Kvaerner Warnow Werft, KWW), the Commission approved aid totalling EUR 639.4 million. It was the understanding that this would include operating aid amounting to EUR 382.1 million, of which EUR 230.8 million would be used to cover losses resulting from specific shipbuilding contracts.

539. Following reports of a EUR 200 million loan from Kvaerner Warnow Werft to its parent company, the Commission suspected that the shipyard had received more aid than necessary to offset losses from certain shipbuilding contracts. It opened an investigation and examined whether an amount of EUR 60.9 million should be recovered from the recipient.

540. In its final decision the Commission concluded that Kvaerner Warnow Werft had indeed received a larger amount of aid than necessary to compensate for losses from certain shipbuilding contracts. However, during the investigation Kvaerner Warnow Werft was able to prove the existence of additional costs which could be attributed to the shipbuilding contracts and which resulted in increased losses. Taking into account further comments and clarifications from the German Government and the company that Kvaerner did not receive all non-cash operating aid, the Commission ordered the recovery of EUR 13 million, which was considered to be the resulting excess aid.

*Capacity limitations for certain shipyards in eastern Germany, Spain and Greece*

541. During 1992 and 1997, the five shipyards in eastern Germany underwent radical restructuring. To compensate for the distortive effects of the restructuring aid on competition, Germany was required to reduce overall shipbuilding capacity in eastern Germany by 40%. Since 1995 the Commission had monitored the yards’ compliance with the capacity limitation as a production limitation, in the sense of limiting their output.

542. However, in its judgment of 29 April concerning Kvaerner Warnow Werft the Court of Justice ruled that the Commission was wrong in interpreting the capacity limitation as a limitation of actual production. The capacity limitation, in the light of the Commission decisions adopted between 1993 and 1995 authorising the aid, had to be understood as a technical limitation of the production facilities. As long as the

production facilities of the yard as described in the Commission decisions authorising the aid were not changed, Kvaerner Warnow Werft could produce beyond its technical capacity.

543. Taking into account the reasoning of the Court and in the interests of consistency and equal treatment, the Commission decided to consider the capacity limitations of certain German, Spanish and Greek shipyards as merely technical limitations in so far as the decisions were based on Council Directive 90/684 as amended. However, the monitoring of technical capacity limitations will continue in the light of the individual provisions for the shipyards concerned until the date specified in each of the decisions on restructuring aid332.

10. AGRICULTURE

544. The Commission received 252 notifications of planned state aid measures to be granted in the agricultural and agri-industrial sector. The Commission also started the examination of 13 aid measures which had not been previously notified under Article 88(3) EC. No review of existing aid measures pursuant to Article 88(1) EC was commenced or concluded. Overall, the Commission raised no objections to 212 measures. Several of these measures were approved after the Member States concerned either amended them or undertook to amend them in order to bring them into line with Community state aid rules. The Commission started the procedure laid down in Article 88(2) EC in respect of 8 cases, where the measures concerned raised serious doubts of incompatibility with the common market. The Commission closed the Article 88(2) procedure in respect of 14 cases. In 10 of these a negative final decision was taken, some of which ordered recovery. The following overview is a selection of cases which raised the most interesting issues in terms of state aid policy in the agricultural and agri-industrial sector in 2004.

FINLAND

Article 141 of the Treaty of Accession

545. On 16 March, the Commission decided to authorise the special support package notified by Finland under Article 141 of the Treaty of Accession. The decision is the formal outcome of lengthy discussions and negotiations at the highest level, throughout the year 2003. The decision authorises Finland to grant between 2004 and 2007 special income support to farmers in southern Finland, to the tune of approximately EUR 420 million, plus additional income aid in the form of incentive top-ups to existing agri-environmental programmes in southern Finland to the tune of EUR 225 million for the same period. The condition for granting the income aid is the implementation of aid measures to promote investments, setting-up of young farmers and business counselling to farmers.

546. On 19 February, the Commission adopted a positive final decision\(^{333}\) declaring compatible with the Treaty aid for investments for environmental protection granted in France before 2000. A proceeding had been opened because France had granted up to 60% investment aid at a time when it was only possible to grant 35%. The rate of 35% had also been authorised in a decision which France had not respected by granting more aid. However, since 2000 the Commission had increased the maximum aid rate allowed. This higher aid rate has been confirmed in Article 4 of the exemption Regulation 1/2004, which applies retroactively to aid granted before its entry into force. On this legal basis, the aid was declared compatible.

*Slaughter tax*

547. On 30 March, the Commission decided\(^{334}\) not to raise any objections to state aid amounting to some EUR 156 million for the year 2004 (and similar amounts thereafter) for the removal and destruction of fallen stock at farm level. The aid intensity is up to 100%. The aid is in line with the TSE guidelines and the duration of the scheme is unlimited. As far as the financing of the removal of slaughterhouse waste is concerned, the decision finds that an amount of some EUR 91 million is non-aid, the reason being that since slaughterhouses pay more through the new slaughter tax (*taxe d’abattage*) imposed per tonne of waste than they get back in terms of benefits through free picking up of the waste they do not derive any financial advantage.

*Compensation for 2003 drought*

548. On 20 October, the Commission decided not to raise any objections to state aid amounting to some EUR 664 million for farmers hit by the drought in 2003\(^{335}\). Compensation was paid through a combination of cash grants (EUR 339 million), subsidised “disaster” loans (EUR 20 million), taking over of interest on outstanding loans (EUR 20 million), consolidation loans (EUR 20 million to support loans of EUR 225 million), postponement of payments due of direct taxes and VAT (without charging additional interest for the delay), cancellation of these taxes, non-payment of land tax, and postponement of social security contributions. The subsidy element contained in the taking over of interest on outstanding loans was considered *de minimis*. The aid intensity was up to 100% of damage and the duration varied depending on the type of aid.

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335 NN 154/2003.
Rendering tax

On 14 December, the Commission adopted a mixed positive and negative final decision with recovery on the French rendering tax (taxe d’équarrissage)336. From 1997 to 2003, France levied a sales tax on sales of both French meat and meat from other Member States. The tax financed free removal of slaughterhouse waste and fallen stock. The tax first went into a special fund reserved for financing this aid. After the Commission had initiated infringement proceedings, considering the tax on meat from other Member States discriminatory, France moved the tax proceeds into the general budget and financed the aid from the general budget for the years 2001 and 2002.

The aid measures financed between 1997 and 2002 and amounting to a total of EUR 829 million are in principle compatible with the state aid rules. However, because of the discriminatory financing from 1997 until 2000, aid amounting to around EUR 400 million would have had to be found incompatible with Community law. But reimbursement of the aid by farmers would not necessarily repair the discrimination against meat from other Member States caused by the tax levied at supermarket level. Therefore, on the condition that France reimburses the tax levied on meat from other Member States, the Commission decided to declare the aid compatible. France has submitted an undertaking in this respect.

As to the years 2001 and 2002, for aid amounting to a further EUR 400 million, the Commission came to the conclusion that the link between the tax and the aid had been disrupted since the tax was allocated to the general budget337 and the revenue from the tax did not correspond to the cost of the public rendering service. The decision thus altogether covers the years 1997 to 2002. For the year 2003, a decision will still have to be taken. Furthermore, aid granted to small meat sellers via an exemption from the tax in question is found incompatible and will have to be recovered.

GERMANY

Aid for machinery rings

By means of two final decisions taken on 19 May and 14 December - a conditional decision338 and a partly negative decision with recovery339 - the Commission decided to conclude its formal investigation into the support granted for machinery rings in Bavaria.

Both decisions clarify Commission policy on state aid granted in connection with machinery rings, which are self-help organisations of farmers whose “core activities” include the management of farm relief and machinery-sharing between farmers.

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337 The Commission recognised that by allocating the revenue from the tax to the general budget France had put an end to the discriminatory taxation, and closed the infringement proceedings.
338 C 9/A/2003 - Germany (Bavaria).
339 C 9/B/2003 - Germany (Bavaria).
Complaints received by the Commission pointed to possible cross-subsidisation of other commercial (“non-core”) activities of the rings. The Commission recognises, in principle, the positive role played by machinery rings in the agricultural sector, as they allow farmers to improve their efficiency by sharing costly machinery.

554. In its decision C9/A/2004, the Commission therefore cleared aid (worth EUR 19.6 million over 6 years) benefitting farmers in the form of subsidised services on the basis of point 14 of the Agricultural Guidelines. Such aid is degressive and does not exceed 50% of the relevant costs. The Commission notes, however, that permanent public support amounting to 100% of such costs, which tend to be recurrent for farmers, might constitute incompatible operating aid. The Commission requires Germany to introduce in its scheme the obligation for the machinery rings to pass on the full amount of aid to farmers, and to either prohibit “non-core activities” of machinery rings, or to limit the exercise of “non-core activities” to legally independent subsidiaries of the machinery rings and thus prevent cross-subsidisation.

555. In its decision concerning past (unlawful) aid (C9/B/2003), the Commission found that the amounts of aid received by individual recipients (approximately EUR 50 per farmer) were too small to distort competition. However, the Commission also came to the conclusion that the Bavarian system for granting such aid did not effectively preclude the grant of pure operating aid to the machinery rings themselves, or the cross-subsidisation of other commercial activities carried out by the machinery rings. The Commission therefore concluded that any aid for which no evidence can be produced that it benefited only farmers is incompatible and should be recovered.

GREECE

Bad weather compensation programme - RAGBY

556. On 20 April, the Commission adopted a decision not to raise any objections to state aid totalling some EUR 60 million to compensate farmers and fishermen for losses caused by disasters (landslides, floods), bad weather (frost, rain, storm, drought) and diseases between March 2002 and March 2003. The aid intensity is 50-80% of losses, or for certain crops lump-sum payments may be made per 1 000 m². The measure has a duration of 5 years (aid being payable in various stages).

ITALY

Risk capital for agricultural SMEs

557. On 3 February, the Commission decided not to raise any objections to the granting of risk capital from public funds amounting to some EUR 5 million per year until 2005. The objective is to set up a fund to promote the access of agricultural SMEs to risk capital in the form of the acquisition of minority shareholdings, participatory loans and participation in other risk capital funds. The measure contains several state aid elements which were found compatible with state aid rules. For example, the

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public fund renounces profits going above a certain profit margin, in favour of private investors. This is one of the measures to attract private investors. The duration of the measure is 10 years.

**Blue tongue compensation**

558. On 16 March, the Commission adopted a negative final decision concerning state aid totalling some EUR 2.6 million to compensate processing companies in the region of Sardinia for alleged losses due to blue tongue disease. Aid to compensate farmers for their losses had been authorised in parallel with the decision to open proceedings in respect of the processing sector. Since the aid had not been paid out, no recovery order was necessary. The aid was found incompatible because:

- The state aid rules allow compensation only to primary producers. Losses in turnover are part of normal business risk, and may be caused by various factors.
- The link between the losses and blue tongue had not been shown. There was a drought in Sardinia at the same time that may also have led to reductions in turnover; certain cooperatives may have had less raw material delivered (and hence suffered losses) for reasons other than blue tongue.

**AIMA - poultry sector**

559. On 19 May, the Commission adopted a negative final decision declaring state aid amounting to some EUR 10.3 million incompatible with the Treaty. Since the aid had not been paid out, no recovery order was necessary. The aid was supposed to compensate poultry producers in Italy for alleged losses due to the 1999 dioxin scare in Belgium.

560. Italy had claimed that the dioxin scare in Belgium caused a media scare in Italy, with a resulting drop in the consumption of poultry meat in Italy. Consequently, Italy had proposed to compensate its own poultry producers, arguing that the dioxin scandal should be considered an “extraordinary event” not only in Belgium but also in Italy. Under state aid rules, the only way to authorise such aid would be to consider the effects of the dioxin scare an “extraordinary event”. However, the Commission had expressed serious doubts concerning this approach for the Italian market. The information received after opening proceedings did not dispel these doubts.

**Rescue aid in favour of Parmalat suppliers**

561. On 14 July, the Commission adopted a decision not to raise objections to one–off aid amounting to some EUR 1 million for milk producers in Lombardy who are in financial difficulties because they have not been paid for milk delivered to the Parmalat group. The rescue aid consists in a guarantee, in line with the conditions of the guidelines for rescue and restructuring aid. Italy proposed average calculation

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342 C 5/2001 (ex N 775/2000) - Italy (Sardinia).
343 C 59/2001 (ex N 797/1999).
344 N 75/2004 – Italy (Lombardy).
methods for establishing when a typical dairy farmer can be considered in difficulty and therefore qualifies for aid. Certain farmers will be excluded because they are considered sufficiently well-off not to be in difficulties. As regards aid intensity, the maximum value of the guarantee eligible under the present scheme is EUR 500 000 for individual companies and EUR 5 million for cooperatives.

*Regional intervention for the development of Confidi in the agricultural sector*

562. On 10 May, the Commission approved aid\(^{345}\) amounting to EUR 1 032 913.80 for guarantees and EUR 516 456.90 for technical assistance in favour of Confidi, which are cooperatives made up of undertakings in the agricultural sector and associations thereof that manage guarantee funds. Aid is granted, for a period of five years, with a view to:

- providing subsidiary guarantees to farmers or cooperatives, provided that the guarantees are linked to operations financed by a regional/national aid scheme approved by the Commission and that the combined aid does not exceed the thresholds set in the Commission decisions approving the aid;

- providing consultancy services to all farmers operating in a particular region.

563. The cash grant equivalent of the aid for subsidiary guarantees is calculated in the same way as for subsidised loans, i.e. as the difference between market loan rates and the actual loan concluded with the bank, following the existence of the guarantee, minus the amount paid by the beneficiary.

*Aid for the BSE crisis: Law 49/2001 - Articles other than Article 7a*

564. On 1 December, the Commission retroactively authorised\(^{346}\) Italy to grant state aid amounting to approximately EUR 169 million for the costs of compulsory destruction of specific risk materials and the storage of low-risk material as well as income aid for beef producers to counter the effects of the 2001 BSE crisis. The measures approved are part of Italian Law 49/2001, partially approved by the Commission at the time when the 2001 BSE crisis occurred.

565. Income aid to beef producers, granted via suspension and extension of tax deadlines and social security obligations, is authorised under Article 87(2)(b) EC. Income aid to the downstream sector (slaughtering undertakings, wholesale and retail traders of meat) covered by the decision amounts to around EUR 103.25 per holding and is considered to be *de minimis* aid and therefore not caught by the state aid prohibition.

\(^{345}\) N 536/2003 - Italy (Campania).

Avian flu measures

566. On 8 September, the Commission adopted a decision not to raise any objections to around EUR 11.3 million in state aid towards the cost of combating avian flu\(^{347}\). The measure is a modification of the measure approved as N 700/2000. The announced aid intensity is up to 100% and the duration of the measure is until 1 January 2010.

Foot and mouth disease measures

567. On 8 September, the Commission decided not to raise any objections to state aid amounting to some EUR 2.7 million towards the cost of combating foot and mouth disease\(^{348}\). The measure is a modification of the measure approved as N 700/2000. The aid intensity is up to 100% and the measure is to last until 1 January 2010.

11. Fisheries

568. The Commission authorised certain aid measures granted by France (in the form of reductions in social security contributions and other charges) following the oil pollution caused by the shipwreck of the Erika in December 1999 and a violent storm just afterwards. It considered the aid justified as far as the fish farmers on the Atlantic coast particularly affected by the events were concerned but for other fish farmers, and also for fishermen, it found them incompatible with the common market and the aid will have to be recovered.

569. The Commission also authorised certain fishery aid measures granted in Corsica between 1986 and 1999, but those for vessel construction and vessel modernisation with an increase in power granted between 1 January 1997 and 28 October 1998 were found incompatible with the common market and must also be recovered. New aid for purchasing second-hand vessels was, however, authorised.

12. Coal and Transport

Coal

570. The year was marked by the end of coal production in France and by the enlargement of the Union, which increased the number of coal-producing countries from three (Germany, the United Kingdom, Spain) to seven, adding Poland, the Czech Republic, Slovakia and Hungary. Owing to unfavourable geological conditions, many EU mines are not competitive against imported coal.

\(^{347}\) N 429/2003.
\(^{348}\) N 431/2003.
It has to be recalled that since 24 July 2002 a new framework has applied to state aid granted in the coal sector, following the expiry of the ECSC Treaty on 23 July 2002. This regime is based on a minimal production of coal in order to strengthen the EU’s security of energy supply. State aid to the coal industry will also support the restructuring of this sector, taking into account the social and regional repercussions of the reduction in activity.

With regard to Spain, the Commission initiated an in-depth investigation concerning the restructuring plan and aid for the coal industry for the year 2003. On 19 May 2004 the Commission authorised aid to the German coal industry for the year 2004.

Transport

Rail transport

On 6 October, the Commission authorised Germany to support its railway infrastructure. The approved aid scheme concerns guidelines on funding for the construction, extension and reactivation of private railway sidings. A private siding is a railway track owned by a business undertaking and used to dispatch and/or receive freight as part of its commercial activities. This railway track must connect directly or indirectly with the network of a public railway infrastructure. The aid scheme should contribute to securing growth in this sector and support shifting the balance from road to rail transport.

Combined transport

A favourable approach was taken towards an Italian scheme for the Region of Friuli-Venezia Giulia which is to grant subsidies to firms offering combined transport services by rail to or from the Region. These subsidies will be limited to offsetting the differences between the external costs of road and combined transport. The scheme will make it possible to reduce the price of combined transport services in order to compete with road transport under similar market conditions.

The Commission approved another Italian regional scheme (Sicily) designed to promote for a three-year period road/sea combined transport services between Sicilian and other Italian and Community ports. The scheme will grant an “environmental bonus” to small and medium-sized road transport companies when shipping individual heavy goods vehicles of more than 12 tonnes or semi-trailers. In the light of the specific geographic and economic situation of Sicily, the difficulties

353 N 335/03 - Italy – Aid for the setting up of rolling-motorways services. Decision of 3.3.2004.
in organising the intermodal transport market and the experimental character of the measure, the Commission considered it to be compatible with the Treaty.

576. In April, the Commission decided not to raise any objections to an aid scheme\(^{355}\) intended to encourage the modal shift of freight from road to water by granting aid to new/existing coastal, short sea or inland waterway services provided that they avoid lorry journeys and that they generate environmental benefits within the UK. This new scheme complements the existing Freight Facilities Grant (FFG) scheme\(^{356}\). Grants will be limited to not more than 30% of the total operating cost for a maximum of three years, after which the project must be viable.

577. Finally, the Commission authorised a Belgian aid scheme\(^{357}\) which intends to guarantee access to the Port of Antwerp through inland waterway during the reconstruction works on the Antwerp Ring\(^{358}\). The scheme will bear the additional costs for the loading and unloading of containers on inland vessels so as not to discourage inland waterway traffic to and from the Port of Antwerp during the works.

Road transport

578. In July, the Commission approved investment aid for the retrofitting of particulate filters on lorries registered in Denmark\(^{359}\).

579. On 20 October, the Commission closed the formal investigation\(^{360}\) into alleged incorrect application of a previous positive Commission decision concerning the restructuring of the company Sernam, a subsidiary of the French railway company SNCF carrying out road and rail transport as well as freight forwarding, by adopting a conditional, partly positive and partly negative decision with a recovery order.

580. The Commission proceeded with the investigation of the restructuring plan of the Belgian company, ABX Logistics, involved in freight forwarding mainly in the road transport as well as in the maritime and air transport sectors.

581. The Commission is currently examining the possible state aid effects of a reimbursement scheme which is linked to the introduction of a toll for heavy goods vehicles on German highways\(^{361}\).

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358 The motorway around Antwerp consists of four lanes in each direction. During the works, the number of lanes will be reduced to two in each direction.
361 C 54/2003 - Germany.
Waterways

Inland waterways

582. The Commission cleared two aid schemes intended to encourage the development of inland waterway transport in France and Belgium (Wallonia)\textsuperscript{362} through modernisation of the fleet and promotion and renewal of the inland waterway transport profession.

583. The Walloon aid scheme also provides for aid to operators of scheduled container combined transport services using inland waterways and operating from a terminal linked to a waterway located in Wallonia. The grant is calculated on the basis of the number of containers transshipped to or from the waterway. The aid is intended to encourage the development of inland waterway combined transport services, to and from Wallonia, vis-à-vis road transport, which accounts for nearly all container transport in the region.

Maritime transport

584. The Commission approved several extensions or amendments to existing schemes in Italy\textsuperscript{363}, Germany\textsuperscript{364}, Denmark\textsuperscript{365} and Finland\textsuperscript{366}. It also cleared a tonnage-based flat-rate tax scheme\textsuperscript{367}, whereby Italy became the eleventh Member State to introduce such a scheme, also referred to as Tonnage Tax.

585. The Commission gave the go-ahead to the aid scheme adopted by Italy for companies in the Tirrenia group\textsuperscript{368}, which will remain in force until 2008 on the basis of public service agreements. The Commission took the view that the grants paid to companies in the Tirrenia group to ensure the operation of services between mainland Italy and its islands constitute compensation for the imposition of public service obligations. On the other hand, the Commission declared that compensation granted on certain international maritime routes was incompatible with Community law, on the ground that there was no real need for public services, and called for it to be recovered from the recipient.


\textsuperscript{366} N 70/04 - Continuation of the existing scheme for the international shipping register and extension of its scope to passenger vessels plying between Finland and other Member States. Decision of 1.12.2004.

\textsuperscript{367} N 114/2004.

\textsuperscript{368} C 64/1999 - Italy - Tirrenia group. Decision of 16.3.2004.
586. The Commission closed on 30 June\textsuperscript{369} the formal investigation procedure it had opened on 19 March 2003\textsuperscript{370} in respect of a package of Belgian tax measures in favour of the merchant marine, refusing some of the measures examined, namely the tax reduction for more recent vessels, the transfer of tax credits to within the scope of the company subject to flat-rate taxation and the eligibility of activities not intrinsically related to maritime transport, such as the sale of goods or services not intended for consumption on board and the sale of luxury goods or passenger excursions, and betting and casinos. The other measures examined were accepted.

587. Lastly, as far as France is concerned, the Commission amended on 14 December its decision of 30 January 2002\textsuperscript{371} authorising an aid scheme for the setting up of new short sea shipping services, in order to take full account of the new Community rules in this sector.

\textbf{Air transport}

588. On 12 February, the Commission took a decision concerning advantages granted by the Walloon Region\textsuperscript{372} and the publicly-owned Brussels South Charleroi Airport (BSCA) to the airline Ryanair in connection with its establishment at Charleroi. The Commission concluded that no private operator in the same circumstances as BSCA would have granted the same advantages. Since the market private investor principle had not been adhered to in this case, the advantages granted to Ryanair constituted state aid which could distort competition.

589. The Commission took the view, however, that the aid granted to Ryanair at Charleroi could be compatible with the common market in the context of transport policy, insofar as it permits the development and improved use of secondary airport infrastructure which is currently underused and represents a cost to the community as a whole. Certain types of aid were authorised by the Commission in this decision, in particular aid which permits genuine development of new routes under clearly defined conditions. The decision also indicated that certain forms of aid cannot be authorised; the Commission aims to guarantee that the advantages granted at a particular airport are not discriminatory and are surrounded by greater transparency.

590. This decision is of significance for the future of air transport, especially as it relates to the use of regional or secondary airports. At the time of the decision the Commission also announced that it would draw up guidelines dealing with the issues of state aid to low cost airlines, start-up aid for new routes and the public financing of airports: “Community guidelines on financing of airports and start-up aid to airlines departing from regional airports”.

591. On 16 March, the Commission decided to open a state aid investigation in respect of Greece\textsuperscript{373}, expressing doubts about the establishment and privatisation of a company

\textsuperscript{369} Final decision not yet published.
\textsuperscript{371} C 65/200, OJ L 196, 25.7.2002.
\textsuperscript{373} OJ C 192, 28.7.2004.
called Olympic Airlines (NOA) - which took over the aviation activities of Olympic Airways – as well as a number of other measures. The Commission also called into question the non-recovery by the Greek State of illegal and incompatible aid after the December 2002 decision, the non-payment by the company of tax debt in 2003, the provision of an advance (over EUR 130 million) by the Greek State to fund the restructuring and privatisation of the company, and the non-payment by the company of the airport modernisation tax (Spatosimo) charged to passengers.

592. Significant among the other decisions taken during 2004 in the area of air transport was the decision of 20 July by which the Commission authorised rescue aid for the Italian airline Alitalia 374. The aid consists of an EUR 400 million bridging loan at short-term market rates which must be repaid on expiry to enable arrangements to be worked out for the possible restructuring of the company without additional state aid.

593. Finally, the Commission authorised on 14 December the first phase of the reprivatisation of the ground handling division of TAP 375. Portugalia, a private Portuguese airline, was to merge its ground handling business into that of TAP and in return would acquire 6% of the shares in the new ground handling company. The Commission held that this series of transactions did not constitute state aid as no state resources were to be put at the disposal of TAP and because the purchaser Portugalia paid a market price for the shareholding involved.

13. PUBLIC BROADCASTING, BROADBAND, FILM INDUSTRY

Licence fee schemes

594. Italian public broadcaster RAI is charged with a public service, namely public service broadcasting. A licence fee serves to finance the provision of this public service. This licence fee constitutes existing aid because it existed before the Treaty of Rome entered into force and its essential features have remained unaltered since then.

595. In the course of an existing aid procedure aimed at ensuring the ongoing compatibility of the licence fee financing scheme of RAI 376, the Commission’s departments proposed improvements to the Italian authorities. These proposals should ensure that the licence fee scheme is transparent and contains safeguards against excessive compensation. On 23 June, the Italian authorities accepted all the improvements indicated by the Commission’s departments.

596. Similar procedures concerning Portuguese 377 and French broadcasters 378 started and negotiations on appropriate measures are ongoing.

375 NN 63/2004 - Portugal - Reprivatisation of SPDH (TAP).
377 CP 114/04 RTP.
State financing of TV2 Denmark and ad hoc state financing of public broadcasting organisations in the Netherlands

597. In line with its communication on the application of state aid rules to public service broadcasting and its decisions in this sector in 2003, in 2004 the Commission continued its state aid investigations into the state financing of public service broadcasting organisations. In the first nine months of 2004, the Commission started investigations into the financing of the Dutch public broadcasting system and adopted a final decision on the financing of the Danish public service broadcaster TV2/Danmark (TV2).

598. On 3 February, the Commission initiated an in-depth investigation into the ad hoc financing of Dutch public service broadcasters. The Commission’s preliminary conclusions are that the ad hoc measures granted to the Dutch public service broadcasters constitute state aid under Article 87(1) EC and that it doubts whether the measures are compatible under Article 86(2) EC. The Commission has estimated that, from 1992 onwards, the Dutch State has provided the public service broadcasters with more funding (EUR 110 million) than necessary to finance the public service.

599. On 19 May, the Commission closed its in-depth investigation into the state financing of the Danish public service broadcaster TV2, ordering TV2 to reimburse approximately EUR 84.4 million plus interest in incompatible state aid. The formal investigation covered the period 1995-2002. The Commission’s assessment considered whether the state aid financing that TV2 had received for fulfilling its public service task was compatible under Article 86(2) EC. In its decision the Commission calculated firstly whether the state compensation was proportionate to the net cost TV2 had to bear in fulfilling its public service obligation. The Commission found that TV2 had been overcompensated by DKK 628.2 (EUR 84.4) million. As a second step, the Commission analysed TV2’s behaviour in the television advertising market. According to the Broadcasting Communication, where a public service broadcaster has not aimed to maximise revenues generated by the public service activity, the need for public funding will be unduly increased. This would distort competition beyond what is necessary for the fulfilment of the public service task. Although television advertising prices in Denmark are rather low, the Commission’s investigation did not produce evidence that TV2 had chosen not to maximise its advertising revenues. In addition, the Commission’s investigation revealed that the Danish State, as owner of TV2, did not behave like a market investor in the period 1995-2002 when it decided to leave the annual amounts of excess compensation in TV2. Although the Danish State claimed afterwards that the surplus was necessary to build up equity, it did not follow the strategy of a private investor because the Danish State did not, before reinvesting the excess compensation into TV2, determine what the appropriate level of equity capital

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382 See Chapter 4.5 of the 2003 Competition Report.
should be for such a TV broadcaster and what financial performance it expected to achieve with its equity. On the contrary, the Danish State limited itself to letting the overcompensation accumulate in the company. The Commission therefore found that the amount of EUR 84.4 million was incompatible with the EC Treaty.

**DVB-T Germany**

600. In order to promote the terrestrial Digital Video Broadcasting project, the media authority in Berlin-Brandenburg has compensated private broadcasters for so-called “switchover costs”. The private broadcasters were granted a subsidy in order to induce them to switch from analogue terrestrial to digital terrestrial television. The new terrestrial digital television network is operated by T-Systems, a subsidiary of Deutsche Telekom AG (DTAG). The Commission has examined this compensation in response to a complaint. It feels that the compensation payments may amount to state aid, both to the private broadcasters as well as to T-Systems, the operator of the DVB-T network. On 14 July the Commission therefore decided to open a formal investigation.

601. On the same date and based on several complaints, the Commission opened a formal investigation procedure into the financing of digital terrestrial television (DVB-T) in Sweden, since it cannot be excluded that the financing of the digital terrestrial television network involves state aid.

**Broadband**

602. The Commission approved a series of projects involving public support for broadband build-out. The development of the information society is a crucial aspect of the Lisbon agenda and the Commission accepted that the deployment of broadband needs to be encouraged, especially in less-favoured areas. The Commission departments assessed under what conditions such projects could be compatible with the EU rules on state aid. The decisions provide guidance on how to design public support that is compatible with the competition rules.

603. In the Pyrenées-Atlantiques project, the French State envisaged supporting the establishment of an open infrastructure to serve the general public in a geographic area where there was either no broadband at all or coverage was deemed unsatisfactory, with a sole provider delivering the service. The Commission noted that the project will be limited to the provision of infrastructure and “access” to operators, but will not directly offer services to end users. The Commission accepted that the project could fulfil the definition of services of general economic interest in

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383 C 25/04 (ex NN 36/04).
the broadband field. In addition, since the project met the criteria established by the Court of Justice in its *Altmark* judgment, the measure did not constitute aid.

604. The projects in Scotland, the East Midlands and Lincolnshire in the UK involve the provision of end-to-end services beyond the mere provision of infrastructure enabling access. The Commission considered that while aid was present, it did not distort competition to an extent contrary to the common interest given the multitude of safeguards which ensure that only the minimum aid necessary is given. In those cases the aid was deemed compatible in accordance with Article 87(3)(c) EC.

*Cinematographic and audiovisual sector*

605. On the basis of Article 87(3)(d) EC and the co-called “Cinema Communications”, the Commission approved various aid measures supporting the production of films in the Member States, *inter alia* the supporting of film and TV productions in the German Länder and the Belgium tax shelter. In the framework of these decisions the Commission has shown its commitment to take cultural aspects into account and to respect and promote the diversity of cultures.

389 N 41/04.
1. **INTRODUCTION**

606. In 2004, the Commission stepped up its efforts to monitor the implementation of state aid decisions. To that end, DG Competition had created in the second half of 2003 a new unit which was given the mandate “to develop a coherent and systematic approach to the monitoring and enforcement of state aid decisions that fall within the remit of DG Competition”. During the first full year of its existence, the Enforcement Unit concentrated its resources on the effective implementation of recovery decisions, this being essential for the credibility of the Commission’s state aid control activity.

607. On 21 April, the Commission adopted Regulation (EC) No 794/2004 391 implementing Council Regulation (EC) No 659/1999 392. Chapter V clarifies the rules regarding the interest rate applicable to the recovery of illegal aid and sets out in greater detail the method for determining the recovery interest rates and the way in which recovery interest should be calculated.

608. In 2004, the Commission adopted 22 new state aid recovery decisions. 19 recovery cases were closed. As a result, the stock of pending recovery decisions that fall within the remit of DG Competition increased to 93 at the end of the year (up from 90 at the end of 2003).

609. More than two thirds of all pending recovery cases relate to aid measures granted by only two Member States (44 cases regarding Germany and 20 cases regarding Spain) 393. At the other end of the spectrum, there are sixteen Member States that do not have a single pending recovery case at the moment. Almost two thirds of the pending recovery cases concern individual aid measures, the remainder aid schemes. In almost half of the pending recovery cases concerning individual aid, the beneficiary concerned is insolvent. Yet this does not necessarily imply that, in these cases, the aid no longer has any distortive effect. In fact, in almost two thirds of these cases, the undertaking concerned is still continuing its economic activity, often under the supervision of an insolvency administrator appointed by the court.

610. The information available on 31 December 2004 indicates that the total amount of aid to be recovered is equal to at least EUR 9.7 billion. This is significant as it represents about 35% of the total amount of state aid granted in the Community in

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393 The relatively high number of German recovery cases can be attributed to some extent to the transitional problems following German unification. As regards the Spanish recovery cases, more than half relate to tax aid measures in the Basque Country.
2002. A large proportion of this aid is due to a limited number of recently adopted recovery decisions, concerning the German Landesbanken, France Télécom and EDF. For more than 24 pending recovery cases, however, the Member State concerned has not yet been able to submit reliable information on the aid amount involved. The availability of information on amounts to be recovered is particularly limited in the case of aid schemes, especially tax or quasi-tax aid measures, and aid measures involving guarantees.

611. In the course of 2004, the Commission ensured close and consistent administrative follow-up of all pending recovery decisions to ensure their effective implementation. Where the Commission considered that a particular Member State had not taken all the necessary measures available in its respective legal system to implement the decision, it commenced legal action under either Article 88(2) or Article 228(2) of the Treaty. It took such action in the cases of Crédit Mutuel, Kimberley Clark and the publicly owned shipyards.

612. Member States play an important role in the enforcement of EU state aid rules, being required to implement the recovery decisions and allowing for court actions by competitors according to national law. The Commission therefore launched a study on the enforcement of EU state aid policy at national level. The purpose of the study is to identify the strengths and weaknesses of national recovery procedures and develop a detailed understanding of the possibilities for actions by competitors in national courts. The results of the study should be available by the end of 2005.

2. **INDIVIDUAL CASES**

**Scott Kimberly Clark**

613. In October, the Commission found that France had not complied with the recovery decision of 12 July 2000 on aid granted to Scott Paper and therefore decided to refer the matter to the Court of Justice of the European Communities directly in accordance with Article 88(2) of the Treaty. The recovery decision of 12 July 2000 is currently being challenged by the recipient and by the French local...
The Commission considered that it was necessary to refer the case to the Court for a number of reasons. The main reason is that the national authorities and the national judge have agreed to suspend proceedings in the national court until the Court of First Instance has issued its judgment on the case. This is contrary to Article 242 of the Treaty, which provides that an appeal before the European Court does not have any suspensory effect. Furthermore, there are no provisional measures available under French law to ensure that the aid is withdrawn from Scott during the proceedings before national courts. Finally, the Commission considered that France had not acted in conformity with its obligation to cooperate with the Commission, as it had not provided any new information on the recovery since July 2003.

**Spanish shipyards**

On 26 June 2003, the Court of Justice of the European Communities found against Spain for its failure to implement the Commission’s recovery decision of 26 October 1999 regarding aid granted to the publicly owned shipyards. In October 2004 the Commission noted that Spain had still not complied with the recovery decision of 26 October 1999, and the aid had not actually been reimbursed. The Commission therefore considered that Spain had not complied with the judgment of the Court of Justice of 26 June 2003 and decided to pursue the matter in accordance with Article 228(2) of the Treaty. The Commission accordingly decided on 13 October to send a letter of formal notice to Spain, setting out the facts and its assessment of the case and asking the Member State to submit its observations on the matter. The letter was duly sent on 18 October. The Spanish authorities submitted their observations on the letter on 21 December.

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403 CFI Cases T-366/00 and T-369/00.
404 Case C03/1999 (OJ L 37, 12.2.2000).
D – SELECTED COURT CASES

Joined cases

616. The Court of Justice (ECJ) had to decide on an appeal against a Court of First Instance (CFI) judgment brought by the Spanish region Territorio Histórico de Álava and the company Ramondín Cápsulas SA., both of which had brought a complaint before the Court of First Instance against a Commission decision finding that a certain form of preferential tax treatment constituted state aid, which was moreover incompatible with the internal market, since the tax advantage granted was beyond the ceiling of 25% nge for regional aid in that geographic area.

617. The Commission had therefore ordered the repayment of these aid amounts, a decision which the complainants challenged in the CFI on grounds of misuse of power by the Commission.

618. The appellant argued that the Commission had misused its exclusive powers to control state aid for the purpose of achieving tax harmonisation which was otherwise difficult to persuade Member States to agree on. The ECJ rejected this argument on the ground that no evidence had been provided that the Commission’s objective in classing the measure as state aid was to achieve tax harmonisation.

619. The Court also rejected the appellants’ plea that the tax measures were excluded from the scope of the rules on state aid as they were introduced before the Ecofin Council meeting on 1 December 1997 and the Commission notice of 10 December 1998 on the application of state aid rules to measures relating to direct business taxation. Since this plea was not brought before the CFI, but only introduced in the appellate proceeding, the Court rejected it as inadmissible.

Greece v Commission (Greek cooperatives)

620. In its ruling of 29 April, the ECJ fully upheld a negative final Commission decision concerning the recovery of state aid totalling approximately EUR 763 million (amount calculated by Greece in 2000) given to various loss-making cooperatives, including the dairy AGNO. In this case of aid payment without Commission authorisation, the Court considered that recovery (including interest) taking place 7 years after payment was legal and did not run counter to legitimate expectations. The Court also confirmed that even where the aid was notified and the Commission did not react within two months, the fact that the aid was granted by the Member State without informing the Commission about the payment (so-called “Lorenz” information) meant that the aid was rightly classified as non-notified.

406  C-186/02 P and C-188/02 P Ramodín SA, Ramodín Cápsulas SA (C 186/02 P) and Territorio Histórico de Álava - Diputación Foral de Álava (C 188/02 P) v Commission.
407  C-278/00.
Netherlands v Commission (MINAS)

621. In its ruling of 29 April\textsuperscript{408}, the ECJ fully upheld a negative final Commission decision concerning aid granted to glasshouses and certain other horticultural producers via an exemption from a “nitrates tax” (MINAS). The Court notably held that:

• it was for the Member State to show that a tax differentiation for certain companies was justified by the nature and general scheme of the system;

• the argument that the MINAS system was not intended to generate tax revenue did not suffice to exclude the exemption at issue outright from classification as aid. It was not disputed that the exemption led to a loss of resources which ought to be paid into the state budget.

Commission v Council

622. In a ruling of 29 June\textsuperscript{409}, the ECJ clarified and strengthened the Commission’s powers in the field of state aid control. On 25 November 1999 and 4 October 2000, the Commission had taken two negative final decisions concerning state aid that Portugal had illegally granted to pig farmers to compensate them for low prices. These decisions required Portugal to recover the aid from the farmers. Portugal did not contest the decisions before the ECJ. Instead, much later, it asked the Council to authorise new state aid corresponding to the amount of aid to be recovered under the Commission decisions – so that the farmers would not have to repay. On 21 January 2002, the Council used its special powers under Article 88(2) EC to unanimously authorise state aid in exceptional circumstances. The Commission challenged the Council decision, considering that it constituted a circumvention of the Commission decision and an abuse of power by the Council and that it would create legal uncertainty if the Council could at any time repeal a Commission decision that had entered into force.

623. By its ruling of 29 June, the ECJ fully upheld the Commission’s position and annulled the Council decision. The ECJ held that once the Commission has taken a negative final decision on state aid, the Member State no longer has the right to bring the matter before the Council; nor does the Council have the power anymore to approve this aid. Exceptional circumstances cannot be invoked at this stage.

624. Where the Commission opens formal investigation proceedings, a Member State must involve the Council before the Commission takes its final decision. In that case, the Commission proceedings are suspended for three months. If the Council unanimously takes a decision within those three months, the Commission may not continue. If the Council does not take a decision within three months, the Commission continues with its examination. (In the present case, the Council had taken its decision long after the Commission had taken a final decision.)

\textsuperscript{408} C-159/01.
\textsuperscript{409} C-110/02.
The ECJ also confirmed that the Council may not adopt a decision to authorise new state aid that “compensates” companies for the recovery of aid that the Commission has declared incompatible in a final decision. The Council cannot block or annul the full effect of a Commission negative final decision ordering recovery (contrary to what the Council had done in the present case).

To ensure legal certainty, it is essential that contradictory decisions by the Commission and the Council concerning the same aid are avoided.

In its ruling of 15 July\textsuperscript{410}, the ECJ held that bye-laws adopted by a trade association governed by public law for the purpose of funding an advertising campaign organised for the benefit of its members and decided on by them, through resources levied from those members and compulsorily earmarked for the funding of that campaign, do not constitute an integral part of an aid measure falling within the concept of state aid under Article 87(1) EC. Such funding was carried out by means of resources which the trade association, governed by public law, never had the power to dispose of freely.

**Statistics**

![Figure 6](image_url)

Trend in the number of aid cases registered (other than in agriculture, fisheries, transport and coal) between 1999 and 2004

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\textsuperscript{410} C-345/02.
Figure 7
Trend in the number of decisions taken by the Commission (other than in agriculture, fisheries, transport and coal) between 1999 and 2004
Figure 8
Number of decisions by Member State in 2004 (other than in agriculture, fisheries, transport and coal)
V – INTERNATIONAL ACTIVITIES

A - Enlargement and Western Balkans

628. The date of 1 May 2004 marked the enlargement of the European Union by ten new Member States. This smooth accession reflects the successful alignment of the competition regimes in these countries over several years with the EU competition regime. This process included establishing a legislative framework for antitrust/merger and state aid control, setting up competition and state aid authorities with sufficient administrative capacity and ensuring effective enforcement of these rules.

629. The competition authorities of the ten new Member States have been fully integrated into the European Competition Network, in which they participated as observers prior to accession. In the run-up to accession, the Commission reviewed the state aid measures which these countries continued to notify in accordance with the existing aid mechanism in the Accession Treaty. Any aid measures applicable after accession which are considered to be state aid and are not included in the existing aid list are deemed to constitute new aid. The Commission also checked possible problem areas identified in its Comprehensive Monitoring Report.

630. The Commission also pursued very actively the negotiations of the competition chapters with Bulgaria and Romania, which were concluded in December and will be followed up by an intensive assessment and support exercise in advance of the accession to the EU of these two countries in 2007.

631. In October, the Commission presented its report and recommendation on Turkey’s progress towards accession with a view to the December 2004 European Council decision on the opening of accession negotiations with Turkey. As part of this process, the Commission will have to provide a further assessment of the competition and state aid regime once it is introduced in Turkey.

632. In the case of Croatia, the Commission assessed that country’s competition policy as part of the opinion it adopted in March on Croatia's application for membership and has strengthened its cooperation with the Croatian Competition Agency.

633. The Commission has been active in assisting the development of sound competition regimes in all Western Balkan countries. This included help in drafting competition and state aid laws, advice in setting up the necessary institutions for the enforcement of these rules and promoting a competition discipline. In conjunction with the TAIEX Office of DG Enlargement, DG Competition also organised two 2-day training seminars for officials from the Western Balkans, one on state aid in October and the other on antitrust in November.
B - Neighbourhood policy

634. In the context of the European Neighbourhood Policy initiative, action plans were negotiated in 2004 with Israel, Jordan, Moldova, Morocco, the Palestinian Authority, Tunisia and Ukraine. All of the action plans except that with the Palestinian Authority include a section on competition policy.

635. The competition action points relate to antitrust and state aid (except for Israel, where there are no antitrust action points, given the advanced level of antitrust enforcement in Israel). For antitrust, the purpose of the action points is to strengthen the enforcement of the competition laws and the capacity and independence of the competition authority; for state aid, the aim is to proceed towards harmonising the definitions used in the EU and partner countries and improving mutual transparency in state aid.
C – Bilateral cooperation

1. INTRODUCTION

636. The Commission cooperates on a bilateral basis with numerous competition authorities, particularly those of the Community's major trading partners. The European Union has dedicated cooperation agreements in competition matters with the United States, Canada and Japan.

637. The principal elements of these dedicated agreements are the provision of mutual information on, and coordination of, enforcement activities and the exchange of non-confidential information. Under the agreements one party may request the other to take enforcement action (positive comity) and one party may take into account the important interests of the other party in the course of its enforcement activities (traditional comity).

638. The European Union has also concluded several free trade agreements such as the EuroMed Agreements and agreements with certain Latin American countries, which usually contain basic provisions concerning cooperation on competition matters. Cooperation between the Commission and the competition authorities of OECD member states is carried out on the basis of a recommendation adopted by the OECD in 1995.

2. AGREEMENTS WITH THE US, CANADA AND JAPAN

United States

639. Cooperation with the US competition authorities is based on dedicated competition cooperation agreements411.

640. During 2004 the Commission continued its close cooperation with the Antitrust Division of the US Department of Justice (DoJ) and the US Federal Trade Commission (FTC). Contacts between Commission officials and their counterparts at the two US agencies were frequent and intense. These contacts range from cooperation in individual cases to more general competition-policy related matters. Case-related contacts usually take the form of regular telephone calls, e-mails, exchanges of documents and other communications between the case teams. This

411 The Agreement between the Government of the United States of America and the Commission of the European Communities regarding the application of their competition laws was concluded on 23.9.1991. By a joint decision of the Council and the European Commission of 10.4.1995 the Agreement was approved and declared applicable from the date it was signed by the European Commission (OJ L 95, 27.4.1995). On 4.6.1998 the positive comity agreement, which strengthens the positive comity provisions of the 1991 Agreement, entered into force (Agreement between the European Communities and the Government of the United States of America on the application of positive comity principles in the enforcement of their competition laws (OJ L 173, 18.6.1998)).
cooperation continues to be of considerable benefit to both sides, in terms of enhancing their respective enforcement activities, avoiding unnecessary conflicts or inconsistencies between enforcement activities and improving understanding of each other's competition-policy regimes.

641. Cooperation in merger control with the US antitrust agencies continued at a high level of intensity during 2004. The 2002 EU-US best practices on cooperation in reviewing mergers provide a useful framework for cooperation, in particular by indicating critical points in the procedure where cooperation could be especially useful. In practice, cooperation on cases is very pragmatic and flexible, adapted to the case and the issues involved.

642. In 2004, there were numerous merger cases with an impact on both sides of the Atlantic, which involved a considerable degree of practical cooperation and exchanges of views between the respective EU and US case teams. In that year, cases involving substantial cooperation included: Oracle/Peoplesoft, Sony/BMG, Air France/KLM, Sanofi/Aventis, Sygenta/Advanta, Air Liquide/Messer, Agfa/Lastra, Magna/NVC and Microsoft/Time Warner/Contentguard.

643. As in previous years, the Commission’s experience demonstrates that cooperation and coordination on mergers are most useful on issues related to the design, negotiation and implementation of remedies to any competition problems identified by the agencies. Concertation helps to reduce potential inconsistencies of approach, to the mutual benefit of the merging parties and of the agencies themselves.

644. In recent years, cooperation on merger control policy more generally has been established in the context of the so-called EU-US Working Group on Mergers, a standing forum for inter-agency policy discussion. The objective of the Working Group is to improve understanding of each other’s policies and practices and to enhance the consistency of merger control on both sides of the Atlantic.

645. In addition to case-related cooperation on mergers, regular informal contacts were maintained between the agencies regarding issues of merger control policy, including fruitful exchanges of views on a number of topics. During 2004, these contacts dealt with the Commission’s package of merger control reforms, the Commission’s study on the effectiveness of its remedies policy and ongoing internal reflections on the approach to assessing non-horizontal mergers, on which the Commission intends to circulate guidelines.

646. During the year, there were also frequent contacts in a number of non-merger cases. Bilateral cooperation between the Commission and the US DoJ was particularly intense in cartel cases: numerous contacts took place between officials of the Commission’s cartel units and their counterparts at the DoJ. The exchanges of information on particular cases were most frequent but discussions also took in policy issues. Many of the case-related contacts took place as a result of simultaneous applications for immunity in the US and the EU. Furthermore, in a number of instances, coordinated enforcement actions took place in the US and the EU, in which the agencies tried to ensure that the time lapse between the start of the respective actions was as short as possible. The working group on intellectual property rights met by video conference at the beginning of 2004.
On 28 September, Commissioner Mario Monti met the heads of the US antitrust agencies, Deborah Majoras, Chairman of the Federal Trade Commission, and Hew Pate, Assistant Attorney General, for the annual bilateral EU/US meeting in Brussels.

The Commission made 54 formal notifications during the year while it received 28 formal notifications from the US authorities during the same period.

**Canada**

Cooperation with the Canadian Competition Bureau is based on the EU/Canada Competition Cooperation Agreement signed in 1999. Contacts between the Commission and the Bureau, its Canadian interlocutor, have been frequent and fruitful. Discussions have concerned both case-related issues and more general policy issues. Case-related contacts covered all areas of competition law enforcement, though these contacts most usually involved merger and cartel investigations.

Contact between the agencies usually takes the form of regular telephone calls, e-mails, and conference calls between case teams. For cartel cases, this also includes the coordination of investigations.

The Commission and the Canadian Competition Bureau also continued their dialogue on general competition issues of common concern. In this connection, two meetings were held in Brussels, one on 9 February focusing on merger policy and the other on 16 February focusing on cooperation in cartel investigations. A further meeting was held on 11 October in Paris on the assessment of efficiencies in merger control.

There were two formal notifications by the Commission during the year while the Commission received seven formal notifications from the Canadian authorities during the same period.

**Japan**

Cooperation with the Japan Fair Trade Commission is based on the 2003 Cooperation Agreement. Contacts with the Japan Fair Trade Commission increased considerably in the course of 2004 and dealt with both case-related issues and more general policy issues.

In addition to numerous contacts on individual cases, the European Commission and the Japan Fair Trade Commission continued their ongoing dialogue on general competition issues of common concern. In this connection, two meetings were held in Brussels in 2004, one on 25 February focusing on merger policy and the other on 9 March focusing on cooperation in cartel investigations.

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412 Agreement between the European Communities and the Government of Canada regarding the application of the competition laws (OJ L 175, 10.7.1999). The Agreement was signed at the EU/Canada Summit in Bonn on 17.6.1999 and entered into force at signature.

The annual bilateral meeting between the European Commission and the Japan Fair Trade Commission was held on 16 September in Brussels. The parties discussed recent policy developments and further prospects of bilateral cooperation. The European Commission also took a keen interest in the ongoing reform of Japanese competition law.

There were four formal notifications made by the European Commission during the year while the European Commission received no formal notifications from the Japanese authorities during the same period.

3. **COOPERATION WITH OTHER COUNTRIES AND REGIONS**

**Australia**

During 2004 the Commission engaged in cooperation with the competition authorities of a number of other OECD countries, most notably Australia. These contacts covered both case-related and more competition-policy related issues.

**China**

On 6 May, Commissioner Mario Monti and Bo Xilai, Minister of Commerce of the People’s Republic of China, signed Terms of Reference of a structured dialogue on competition policy between the European Union and China. This is the first such competition dialogue initiated by China with third countries. The primary objective of the dialogue is to establish a forum for consultation and transparency between China and the EU in this area and to enhance the EU’s technical and capacity-building assistance to China in competition policy. The initiation of this dialogue is very timely as China is in the process of drafting a fully fledged competition law.

Following the Terms of Reference, the dialogue will include: (i) exchanges of views on current situations, experiences and new developments in legislation and enforcement of antitrust policies; (ii) exchanges of views on merger legislation and enforcement; (iii) exchanges of experiences on setting up competition authorities, as well as their competition advocacy role; (iv) exchanges of views on multilateral competition initiatives, with a particular focus on combating hard-core cartels; (v) exchanges of views on the liberalisation of public utility sectors and state interventions in the market process; (vi) exchanges of experiences on raising companies and public’s awareness of competition and anti-monopoly laws; and (vii) cooperation to enhance the EU’s technical and capacity-building assistance to China.

Since signing of the Terms of Reference, the Commission has held a series of meetings with Chinese officials involved in drafting the new competition law. It has also given presentations to delegations from Beijing and submitted observations on drafts of the forthcoming Chinese competition law.

**European Free Trade Area**

During the course of the year the Commission also continued its close cooperation with the ESA (EFTA Surveillance Authority) in enforcing the Agreement on the European Economic Area.
Korea

662. On 28 October, Commissioner Mario Monti and Chul-Kyu Kang, Chairman of the Fair Trade Commission of the Republic of Korea, signed a Memorandum of Understanding setting terms of reference for bilateral EU-Korea competition dialogue with the primary objective of establishing a permanent forum for consultation, transparency and exchange of experiences and views between the European Commission and the Fair Trade Commission. Collaboration between these competition authorities is excellent and they often share common views in multilateral competition settings like the International Competition Network (ICN) and the OECD. Korea is one of the more active participants in these forums and in April it hosted the ICN Annual Conference in Seoul. In these multilateral contexts, the two authorities have regularly exchanged views on competition issues of common interest. The Memorandum of Understanding establishes a formal basis for this dialogue.

663. In outline, the Memorandum of Understanding provides for: (i) annual consultation meetings; (ii) information exchange on major concerns between the agencies; (iii) exchange of expert studies; (iv) notification of enforcement activities that may affect important interests of the other agency; (v) exchange of materials on current situations, experiences and new developments in legislation and the implementation of competition policy; and (vi) exchange of views on multilateral competition initiatives, with particular reference to combating international hardcore cartels. Cooperation between the agencies is subject to the respective laws of each party, in particular those protecting confidential information.

Latin America

664. The year 2004 saw an increase in contacts with competition authorities in Brazil and Mexico. These included conference calls between case teams working on the same global mergers to compare and discuss the approaches taken towards assessing the mergers and the types of remedies being considered.

665. In the Andean region, the Commission continued its three-year project to improve and harmonise Bolivian, Colombian, Ecuadorian, Peruvian and Venezuelan legislation on competition and support the institutions responsible for monitoring and applying it.
D – MULTILATERAL COOPERATION

1. INTERNATIONAL COMPETITION NETWORK

666. The International Competition Network (ICN), of which the Commission is a founding member, has continued to make rapid progress. It is now widely recognized as a leading multilateral forum for the discussion of international competition policy. The ICN seeks to facilitate international cooperation and to formulate proposals for procedural and substantive convergence. By the end of 2004, ICN membership had grown to 86 competition agencies from 77 jurisdictions. It thus encompasses the vast majority of the world’s existing authorities from both developed and developing economies. The ICN also invites advisers from academia, the business community, consumer groups and the legal profession to contribute to its work projects. Since September 2004 the head of the German competition authority, Dr Ulf Böge, has chaired the ICN’s governing body, the Steering Group.

667. In April, the ICN held its third annual conference in Seoul at the invitation of the Korea Fair Trade Commission. In Seoul, ICN member agencies decided to set up a new Cartel Working Group and asked the European Commission to chair this project together with the Hungarian competition authority.

668. The ICN Seoul conference also discussed a report prepared by the ICN Working Group on Anti-trust Enforcement in the Regulated Sectors, which reviews the limits and constraints that competition agencies typically face when they intervene in regulated sectors. The report also placed special emphasis on the working arrangements between competition and regulatory authorities.

ICN Cartel Working Group

669. The ICN Cartel Working Group addresses the challenges of repression of cartels at national and international levels. To this end, it reviews the necessity and benefits of combating cartels with a view to reaching an international consensus on the justification for intervention in such cases. Moreover, it discusses the most effective enforcement tools.

670. As a forum for these discussions, two conferences were organised by the ICN Cartel Working Group in Sydney in November. Firstly, drawing on the experiences of the former International Cartel Workshop, enforcers were able to share know-how and develop their investigative skills in the detection of cartels at the first ICN Cartel Workshop. Secondly, at a special Leniency Workshop, a number of legal and practical issues arising out of parallel applications for immunity from fines in several

414 More information on the ICN is available on its web site: http://www.internationalcompetitionnetwork.org
jurisdictions were discussed by representatives from more than 30 competition authorities. The materials from these events will be made public on the ICN web site.

ICN Merger Investigative Techniques Workshop

671. The Merger Investigative Techniques Subgroup held its second workshop on 20 and 21 October this year. The workshop was hosted by the European Commission and allowed 130 staff lawyers and economists from 49 antitrust authorities to meet in Brussels to work through a hypothetical merger case in the soya-milk sector. The private sector was represented by 16 non-governmental advisors (NGAs) from international law firms with extensive experience in cross-border merger control proceedings.

672. One aim of the workshop was to provide a forum for officials of national competition authorities to exchange their experiences with the tools and techniques relevant to merger control investigations. Another objective was to hear the private sector’s opinions on the process and to create a fruitful dialogue between agency officials and the private sector.

673. Participants worked on a hypothetical case file on a merger between the two most successful soya milk producers in the country.

674. The event simulated as closely as possible the key steps of a real merger control investigation. The role of the private sector advisers was to represent the merging parties and to present their clients’ transactions as a “clear no-problem case” in order to raise the necessary scepticism among participants and prompt them to launch their investigation. In the breakout groups, participants developed an investigation plan, discussed document requests from the merging parties, analysed different types of economic and econometric evidence and lastly worked on information requests addressed to third parties and on the issue of respondent bias.

ICN Mergers Working Group - Notification and Procedures Sub-group

675. The Commission was actively involved in the work of this sub-group during 2004. In the early part of the year, the sub-group prepared a set of four detailed recommended practices covering the following areas: (1) confidentiality; (2) procedural fairness; (3) conduct of merger investigations; and (4) interagency cooperation. These were endorsed by the ICN membership in plenary session on the occasion of the ICN Annual Conference in Seoul in April, following an interactive presentation of their content and detailed discussion in breakout sessions. The four new practices bring to eleven the number of recommended practices adopted by the ICN, on the basis of drafts produced by this sub-group. The seven others concern: (1) sufficient nexus between the transaction's effects and the reviewing jurisdiction; (2) clear and objective notification thresholds; (3) flexibility in the timing of merger notification; (4) merger review periods; (5) requirements for initial notification; (6) conduct of merger investigations; and (7) transparency.

676. Since Seoul, the sub-group has been working on two new recommended practices on merger remedies and on agency enforcement powers, resources and independence, which will be presented to the next annual conference, scheduled to take place in Bonn in June 2005. In addition, the sub-group is working on several new projects:
the development of a model form or forms for use by merging parties and competition agencies governing waivers of confidentiality protection for materials submitted in connection with merger reviews; the gathering of data on impediments to jurisdictions’ ability to implement the recommended practices and preparation of a report identifying challenges agencies face in adopting the practices and techniques to help surmount impediments; the preparation of a study on filing fees in merger control; and the possible promulgation of recommended practices for merging parties, based on exploratory work by three members (EU Commission, South Africa and Canada). The sub-group continues to monitor reform efforts and to provide support to ICN members considering changes to legislation, regulations, and agency practices, as well as working with non-members developing new merger review legislation.

ICN Mergers Working Group – Analytical Framework Sub-group

677. At the Annual Conference in Seoul, the chair of the sub-group (the UK Office of Fair Trading) presented the finalised study on merger guidelines in 12 jurisdictions (including the EU) prepared by a consortium of law firms. Since Seoul, the UK OFT and Irish Competition Authority have been co-steering two projects: (1) the drawing up of a checklist of key questions which merger guidelines ought to address; and (2) a study of various types of remedies accepted in merger proceedings worldwide, with a view to assessing their effectiveness in dealing with different competition concerns. The Commission is involved in both of these projects as part of a consultative group.

ICN Workshop on Capacity Building

678. On behalf of another ICN project that is primarily concerned with the challenges faced by younger competition agencies, the Commission organised the ICN Workshop on Capacity Building in Paris in February 2004. This event brought together for the first time a large number of competition agencies with representatives of the community of donor institutions which fund technical assistance projects in the competition field.

679. The objective of the Workshop was to enhance the mutual understanding and working arrangements between the bodies that provide funds for technical assistance projects in the competition field and the agencies that receive this support. One of the main conclusions of the event was that agencies seeking funds are often well advised to approach donor bodies’ representations in their own countries.

2. OECD

680. The Commission continued to participate actively and contribute to the work of the OECD Competition Committee. The Commission participated in all competition-related OECD roundtables, acted as Russia’s examiner in the peer review of Russian competition policy and participated actively in the reviews of the competition

416 A report on the main conclusions reached at this Workshop is available at http://www.internationalcompetitionnetwork.org/capacitytbuild_sg2_seoul.pdf
policies of Mexico and Japan. It also attended other competition-related OECD meetings such as the Global Forum on Competition and the joint sessions of the Competition Committee with the Committees on Consumer Policy and Trade.

681. In 2004 three Competition Committee meetings were held in February, June and October. In the first meeting, a roundtable discussed competition and regulation in water supply, reaching a consensus that scope existed for increasing competition in the wholesale market and the supply of industrial consumers. The Competition Committee also heard the views of representatives of the International Bar Association, the American Bar Association, the International Chamber of Commerce and the Business and Industry Advisory Committee to the OECD concerning the exchange of information among competition enforcers in international cartel investigations. The February meeting also agreed to launch the drafting of a new OECD Recommendation on merger review. The draft for the new Recommendation has been completed and will be submitted for the final approval of the Competition Committee in February 2005.

682. The second Competition Committee meeting held four roundtables. At the first roundtable, the interface between competition and agriculture was discussed, focusing on abuses of buying power and joint selling in domestic agriculture sectors. The most significant anticompetitive effects of joint-selling organisations are likely to arise from efforts to reduce output and raise prices. Such efforts are likely to harm consumers and damage the broader public interest. The second roundtable focused on the interaction between intellectual property rights and antitrust rules with a focus on biotechnology. The authorities are endeavouring to arrive at a better balance between the protection of incentives to innovate and intervention against licensing agreements that restrict competition. During the third roundtable OECD members discussed how to ensure a level playing field when the public sector engages in private commercial activities. In the EU system the analysis is based on the principle that national governments should not grant or maintain any measure to public undertakings which conflicts with the competition rules, while recognising the importance of the provision of services of general interest. The fourth roundtable discussed the economic evidence typically used in merger cases and the best ways to present economic evidence for non-economists.

683. The third Competition Committee meeting held roundtables on predatory foreclosure and private enforcement. On both issues there are differences in approach among the OECD member countries and the discussions helped to improve understanding of the different legal systems. The second roundtable heard that some member countries have initiatives to facilitate private enforcement and are focusing on the need to avoid over-deterrence, which can have a strong chilling effect on innovation. The Committee working parties discussed competition in professions in the medical sector, structural separation and the need to raise awareness of the harm caused by cartels. The discussion on the medical professions focused on those changes to professional regulation that could foster competition. A specific concern in various jurisdictions was the issue of market access, in particular concerning paramedics. In the cartel discussion, agencies shared views on the great importance of increasing awareness of competition rules and cartels among procurement agencies.

684. During 2004 the Commission presented 11 written submissions to the Competition Committee covering the following discussion topics in OECD roundtables:
• competition and regulation in water supply
• competition and regulation in agriculture
• regulating market activities by public sector – competitive neutrality
• competition in the health professions
• experiences with structural separation in the railway sector
• experiences with structural separation in postal services
• raising awareness of the harm caused by cartels
• identifying and tackling dysfunctional markets (with DG SANCO)
• cross-border enforcement cooperation (with DG SANCO)
• predatory foreclosure
• private antitrust enforcement.
VI – Outlook for 2005

1. Antitrust

685. Concerning cartels, the functioning of the leniency notice, including the procedures for handling corporate statements, will be reviewed. Enforcement action against hardcore cartels remains a priority.

686. Intervention against abuse of dominant positions also remains a priority. Enforcement in the pharmaceutical sector will address other restrictive practices. Investigations of anticompetitive behaviour will include international mobile telecommunications services, media markets and the car sector, high-speed Internet access, the conduct of incumbent postal operators in non-reserved markets and passenger air travel alliances. Enforcement in the railways sector, in close cooperation with NCAs, will be stepped up. Financial markets, such as banking and security trading, and the energy sector will receive heightened attention.

687. Sectoral enquiries and other market monitoring tools will be used more proactively than in the past and will focus on the pharmaceutical sector, new media and electricity markets and consumer banking and insurance.

688. Legislative activity will focus on transport: a Commission proposal abolishing the block exemption for the maritime sector, an amended block exemption for liner shipping consortia and an amended regulation concerning agreements and concerted practices in the air transport sector will be presented. Furthermore, procedural rules, such as a new access-to-file notice, and policy projects, such as a green paper on private enforcement, are envisaged. The Commission will also continue its policy review relating to abuses of dominant positions.

2. Mergers

689. In the merger field, the review of the Commission’s remedies policy will be a priority. Furthermore, the remaining technical guidelines will be updated.

690. Enforcement work is expected to remain at roughly the same level as in 2004.

3. State Aid

691. In terms of legislative activity, a consultation document on the future of state aid control is envisaged, as well as adoption of guidance on services of general economic interest and an exemption for small-scale services of general interest. A draft single consolidated block exemption regulation for state aid is envisaged. The establishment of criteria for the treatment of recovery cases is also on the agenda.

692. Furthermore, the Regional Aid Guidelines, the Research & Development Guidelines and the Communication on risk capital will be reviewed. A communication on state aid and Innovation will review the system of State aid control and identify the need
for changes. A review summarising the experience with environmental State aid is also foreseen.

693. State aid control will focus on the recent framework for rescue and restructuring, aid notified under the multi-sectoral framework and investigations of off-shore and inter-group fiscal aid. Cases relating to transitional measures in the steel and shipbuilding sectors in the new Member States and to stranded cost in the energy sector in the EU 25 should be finalized. In addition, priority will be given to cases dealing with financing of postal public service operations and broadband and aid to telecommunications companies and broadcasting.

4. INTERNATIONAL ACTIVITIES

694. DG Competition's work with the candidate countries and the other Western Balkan countries will continue in 2005.

695. Negotiations on action plans with a second wave of Neighbourhood Policy partner countries (Armenia, Azerbaijan, Egypt, Georgia and Lebanon) will begin in 2005.

696. The Commission is keen to maintain the EU-US Working Group on Mergers and it is envisaged that it will form a forum for discussions in 2005.

697. The International Competition Network annual conference will be held in Bonn on 6-8 June 2005. Of particular importance to the Commission will be the results of the working group on cartels, which the Commission co-chairs.

698. In 2005 EU competition policy will for the first time be subject to a fully fledged OECD peer review, which will assess the effectiveness of EU competition policy and its implementation.

699. Within the framework of the formal EU-China bilateral competition dialogue, the Commission will continue to assist China in drafting its competition law.
Annex – Cases discussed in the Report

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