

## Executive Summary

1. 1998 was the last year before the Union changed over to the single currency. The Commission sought to consolidate the operation of the single market, by improving market structures and taking firm action against anticompetitive practices, so as to provide a sound and healthy basis for economic and monetary union. It took decisive steps towards the modernisation of Community competition law. Thus at the end of September it issued a communication on the application of the Community competition rules to vertical restraints. At the end of November the new procedural regulation for state aid secured agreement in principle from the Council, and this cleared the way for its adoption in March 1999. Throughout the year the Commission sought to strengthen links with competition authorities outside the Union; the international dimension has now become a constant in its work.

2. There was intense supervisory activity once again in 1998, in all the Commission's spheres of responsibility. The total number of new cases was 1 198, comprising 509 under Articles 81, 82 or 86, 245 mergers<sup>1</sup> and 444 state aid cases; this total was down substantially compared to 1997, by 134, owing to a drop in the number of state aid cases. In conventional antitrust cases the number of notifications is tending to stabilise, which is an encouraging development, and is no doubt partly the result of the new *de minimis* notice. The number of complaints lodged with the Commission continues to be high. The explosion in merger notifications which the Commission had expected as a result of the revision of the Merger Regulation (Regulation No 4064/89), and more especially the new powers which that regulation gives to the Commission in respect of cross-border transactions, did not in fact materialise; but the total number of transactions notified under the regulation nevertheless rose by 36 percent, or 5 points more than in 1997, when the corresponding figure was 31 percent. This increase has to be seen against the background of the current international environment, which tends to encourage mergers, and of the girding-up of markets for economic and monetary union. The total number of new state aid cases over the year showed a spectacular fall by comparison with 1997, down 32 percent, taking it lower than it has been in the last three years. The number of cases terminated was 1 279, comprising 581 under Articles 81 and 82, 238 mergers and 460 state aid measures; this is an increase of 119 cases closed by comparison with last year.

3. The communication from the Commission on the application of the Community competition rules to vertical restraints, which was approved on 30 September, is in many ways a major innovation in the Commission's approach to antitrust policy. It breaks with a method which was differentiated by industry and category of agreement, and had become extremely complex. It is based on the economic analysis of the effects of vertical restraints; exemption is to depend on the market power of the firms involved. Simplification of procedures, realistic analysis and greater involvement of courts and competition authorities in the Member States are the fundamental principles of the Commission's new approach, and will continue to guide it in the months ahead.

4. As regards State Aids, in 1998 the Commission pressed forward with the measures it had launched in autumn 1996 for the reorientation and modernisation of state aid monitoring. The aim of the initiative is to improve transparency and legal certainty by simplifying and clarifying the procedural rules, and to improve the efficiency of the state aid monitoring system for less significant cases. Given the high number of aid measures the Commission has to assess, it must inevitably concentrate on major cases involving large amounts of aid or new legal issues. This necessity is underlined notably by the growing number of individual ad hoc aid measures, where intensities are often very high.

5. As an important step in the exercise of modernising state aid monitoring, the Commission proposed a procedural regulation. This regulation clearly defines the procedural steps to be observed by the Commission and Member States in the application of Article 88 of the Treaty, notably concerning time limits, injunctions, and recovery of incompatible aid. Further, the Council formally adopted the proposal

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for a regulation enabling the Commission to exempt certain categories of horizontal state aid from the notification requirement. Exemption regulations of this kind should simplify procedures by relieving the Commission of the assessment of numerous aid cases where there is no major risk of competition being distorted.

6. Another component in the policy of consolidation of the single market is the continuing process of liberalisation in the network industries which were formerly public monopolies. The opening-up of the sectors associated with the information society or the production and distribution of energy is vital to the competitiveness of European industry and the dynamism of the single market. It provides an incentive for the development of technological innovation, and promotes the creation of new, stable and durable employment.

7. Telecommunications moved over to full liberalisation on 1 January, and the Commission was particularly active in this sphere. In the first few months of the year the Commission supplemented the body of aids to interpretation by adopting a notice on the status of voice communication on the Internet and a notice on the application of the competition rules to access agreements in the telecommunications sector. In this latter notice the Commission among other things said it wanted to see most cases dealt with by the regulatory authorities in the Member States and, if need be, by the national competition authorities, and to have to intervene itself only where necessary.

### **I. Changes to competition laws and policies**

#### **1. Summary of new legal provisions**

##### ***a) Review of procedural anti-trust regulations***

8. The Commission has a general objective of modernising and simplifying its procedures for investigating competition cases and making them more user-friendly. As part of that process, on 22 December it adopted two regulations to streamline the legislative framework. Both regulations enter into force on 1 February 1999 and replace five existing Commission regulations.

*Reg. No 2842/98 on hearings*<sup>2</sup>

9. The new regulation (which replaced Regulation No 99/63) sets out how the Commission will safeguard the right of the various parties involved in competition cases to be heard. Parties entitled to submit comments under the regulation will in future also be able to do so in writing without prejudice to the possibility of an oral hearing. To make the provisions clearer and more user-friendly, the regulation is divided into different chapters according to the status of the party.<sup>3</sup>

10. To facilitate the handling of individual cases by the Commission departments, and to avoid unnecessary delays, the Commission is not obliged to take account of written comments from the addressees of a statement of objections received after the date by which they must make their views known. The addressees of a statement of objections must also indicate, by a date set by the Commission, any parts of its objections which, in their view, contain business secrets or other confidential material. The regulation also refers to the role of the Hearing Officer in the hearing procedure, and to the right of access to the file without, however, pre-empting the Commission's further intentions in this field.

11. The regulation makes provision for parties to have access to the non-confidential version of the objections and simplifies the way in which the time limit for submissions by the parties to the Commission is calculated.

*Reg. No 2843/98 on notifications in the transport sector<sup>4</sup>*

12. In 1994 the Commission modernised the rules for notifying restrictive agreements in sectors other than transport by adopting Regulation (EC) No 3385/94 and Form A/B.<sup>5</sup> Commission Regulation (EC) No 2843/98 and the new Form TR (Annex I to the regulation) have introduced similar rules for companies which wish to notify restrictive agreements in the transport sector. Form TR specifies the information that must be provided by companies when applying for exemption under the three transport regulations and for negative clearance under Regulation (EEC) No 3975/87. It has replaced the previous Form II (transport by rail, road and inland waterway), Form MAR (maritime transport) and Form AER (air transport). Form TR(B) (Annex II to the regulation) has replaced Form III for crisis cartels notified under Article 14(1) of Regulation (EEC) No 1017/68.

13. The regulation differs, however, from Regulation (EEC) No 3385/94 in that references to Regulation No 17 are replaced by references to the three transport regulations (EEC) No 1017/68, (EEC) No 4056/86 and (EEC) No 3975/87. The regulation provides that where an application is wrongly made under one of the transport regulations it can be examined under another regulation, as applicable. Furthermore, provision is made for the notification of awards at arbitration and recommendations by conciliators, and also for applications and notifications under the competition rules of the EEA Agreement to be made in one of the official languages of the EFTA States as well.

**b) *Opening up the Community natural gas market***

14. As regards the energy markets, the Member States approved the Directive opening up the Community market in natural gas at the Council meeting on energy on 11 May<sup>6</sup>; this completed the process of liberalising the energy sector, which began with the directive on the single market in electricity. The new directive establishes common rules for the transmission, distribution, supply and storage of natural gas; it lays down rules on access to the market, the operation of systems, and the criteria and procedures applicable to the granting of authorisations for the construction and operation of natural gas facilities.

**c) *Improving the efficiency of state aid monitoring***

15. In 1998 the Commission simplified the procedural framework for the monitoring of state aid. It used Article 89 (ex Article 94) for the first time since the Treaty entered into force. This article provides that the Council, on a proposal from the Commission, may make any appropriate regulations for reviewing state aid. Following proposals for two such regulations the Council adopted on 7 May a regulation enabling the Commission to block-exempt certain categories of horizontal, or cross-industry aid from the notification requirement, and on March 1999 a procedural regulation. Further, in June the Council adopted a regulation laying down new rules on aid to shipbuilding<sup>7</sup>.

*Block exemptions for state aid*

16. On 7 May the Council adopted a regulation<sup>8</sup> which forms the legal basis on which the Commission, by adopting regulations, may exempt en bloc certain types of horizontal state aid measures from the notification requirement. Aid for SMEs, R&D, environmental protection and employment and

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training, together with regional aid schemes may thus be declared exempt. In addition, the Commission may adopt a regulation in connection with the *de minimis* rule. The Commission has started to prepare the block exemptions.

### *Procedural regulation*

17. The most important legislative effort in the area of state aid policy in 1998 was the codification of the rules on the Commission's procedures for monitoring state aid. The new rules<sup>9</sup> seek to codify the various aspects of the procedure for reviewing aid, while strengthening the Commission's monitoring powers where appropriate. The regulation codifies the various procedures already in use which are based on Commission practice and on the case-law of the Court of Justice. In addition to providing legal certainty, the regulation will make the rules more accessible and give this area of policy a higher profile. The regulation will also enable the Commission to intensify its monitoring of aid in certain respects; it gives the Commission new powers which should better equip it in its work to combat unlawful aid and aid misuse.

## **2. Other relevant measures including guidelines**

### **a) *Notice on access agreements***

18. On 31 March, after carrying out a wide-ranging consultation of interested parties, the Commission adopted a notice on the application of the competition rules to access agreements in the telecommunications sector.<sup>10</sup> The purpose of the notice is threefold. First, to set out access principles stemming from Community competition law in order to create greater market certainty and more stable conditions for investment and commercial initiative in the telecoms and multimedia sectors. Second, to define the relationship between competition law and sector-specific legislation adopted for harmonisation purposes under the Article 95 framework. And third, to explain how the competition rules will be applied in the sectors involved in the provision of new services.

### **b) *Notice concerning the status of voice communications on the Internet***

19. On 7 January the Commission adopted a notice concerning the status of voice communications on the Internet pursuant to Directive 90/388/EEC.<sup>11</sup> The Commission's position is that such communications do not at present constitute voice telephony within the meaning of the Community directives, since they do not yet satisfy all the criteria laid down in the definition of this service (they must be the subject of a commercial offer and the service must be provided for the public to and from public switched-network termination points). This service may, therefore, be subjected by Member States not to individual licensing procedures but, at the most, to declaration procedures.

### **c) *"Best Practice Guidelines" on incomplete merger notifications***

20. The total number of notifications concerning merger cases which have been declared incomplete by the Commission (pursuant to Article 4 of the Implementing Regulation) remains small, but has undergone a certain increase in recent years. In order to reduce the number of incomplete notifications "Best Practice Guidelines" have been drafted and published on the Directorate-General for Competition website on the Internet.<sup>12</sup> The guidelines cover such aspects as prenotification, timing issues, the desirability of adopting a prudent approach to market definition and identification (e.g. where there is

scope for debate over geographic market definition, providing market data on a national basis as well as a wider one such as the EU as a whole) and the important contribution that can be made by the attendance at prenotification meetings of representatives from the notifying parties who possess a detailed understanding of the commercial activities and markets involved. If followed, they will minimise the chances that a notification is declared incomplete, as well as the need for further information from the parties after the notification is made; although the Commission of course remains free to proceed with such declarations where appropriate.

**c) *Notice on State aid contained in tax systems***

21. The Commission's adopted on 11 November a notice on the application of the state aid rules in the field of direct business taxation<sup>13</sup>. On the basis of this notice, the Commission will assess or reassess, case by case, all specific tax schemes in the Member States. The notice sets out the circumstances in which tax measures fall under the state aid rules and outlines the procedural consequences of their doing so. The document indicates that, to fall under the state aid rules, a tax benefit must be specific in the sense of benefiting certain enterprises or the production of certain goods. The tax benefit may be provided in various forms, including lower rates of taxation, tax deductions, accelerated depreciation and tax debt cancellation. Under the notice, a tax benefit will be regarded as specific where it derives from an exception to the generally applicable tax rules, unless this exception is justified by the nature of or rationale for the system, or from a discretionary practice on the part of the tax authorities. Tax rules that are, for example, aimed at a certain region, a certain sector or a certain function within an enterprise (such as financial services) will be regarded as specific under the state aid rules. In the *Irish corporation tax cases*,<sup>14</sup> the Commission made clear that it no longer considers the preferential treatment of manufacturing over services to be a general measure.

**3. Proposals for new legislation**

**a) *The new approach regarding vertical restraints***

22. On 30 September the Commission adopted a communication on the application of the Community competition rules to vertical restraints<sup>15</sup> setting out its proposals for reform in this field. The Commission also adopted two proposals for Council regulations amending, respectively, Council Regulation No 19/65/EEC of 2 March 1965, with a view to granting the Commission the necessary legislative powers to implement the proposed new policy, and Council Regulation No 17 of 6 February 1962, with a view to extending the waiver from notification provided for in Article 4(2) to all vertical agreements. Following the adoption of the Council regulations<sup>16</sup>, the Commission intends to enact a new type of block exemption regulation for vertical restraints, complemented by a set of guidelines. New competition rules for the distribution of goods and services should be in place for the year 2000.

23. In its communication, the Commission recommends a shift from the current policy relying on form-based requirements with sector-specific rules to a system based on economic effects covering virtually all sectors of distribution<sup>17</sup>. It proposes to achieve this by means of one wide-ranging block exemption regulation that covers all vertical restraints concerning intermediate and final goods and services except for a limited number of hardcore restraints. It is based mainly on a "black list" approach, i.e. defining what is not exempt under the block exemption instead of defining what is exempt. This removes the straitjacket effect, a structural flaw inherent in any system which attempts to identify the clauses which are exempt. The principal objective of such a wide-ranging and flexible block exemption regulation is to grant companies which lack market power a safe harbour within which it is no longer necessary for them to assess the validity of their agreements in the light of the EC competition rules. In

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order to preserve competition and to limit the benefit of this exemption to companies which do not have significant market power, the future block exemption regulation will make use of market share caps to link the exemption to market power.

24. Companies with market shares above the thresholds of the block exemption will not be covered by the safe harbour. It must, however, be stressed that, even in such circumstances, their vertical agreements will not be subject to any presumption of illegality. The market share threshold will serve only to distinguish those agreements which are presumed to be legal from those that may require individual examination. To assist companies in carrying out such an examination, the Commission intends to issue a set of guidelines basically covering two issues: the application of Articles 81(1) and 81(3) above the market share threshold and the Commission's policy on withdrawal of the benefit of the block exemption, particularly in cumulative effect cases. In most cases, these guidelines should allow companies to make their own assessment under Articles 81(1) and 81(3). The objective is to reduce enforcement costs for industry and to eliminate, as far as possible, notifications of agreements that do not give rise to any serious competition problem.

### *Market share threshold(s)*

25. A choice will have to be made between systems based on one or two thresholds. In a two-threshold system, the first and main market share figure would be 20 percent. Below this it would be assumed that vertical restraints had no significant net negative effects and therefore all vertical restraints and their combinations, with the exception of hardcore restraints, would be exempt. Above the 20 percent threshold, there would be room to exempt certain vertical restraints up to a higher level of 40 percent. This second threshold would cover vertical restraints that, on the basis of economic thinking or past policy experience, lead to less serious restrictions of competition (e.g. exclusive distribution, exclusive purchasing, non-exclusive types of arrangement such as quantity forcing on the buyer or supplier, agreements between SMEs).

26. In a one-threshold system all vertical restraints and their combinations, with the exception of hardcore restraints, would be automatically exempted up to the level of a single market share ceiling. The level of such a ceiling has not been proposed, but it would have to be below 40 percent, the level at which single market dominance may start. It is likely to be in the 25-35 percent range. The advantage of a single-threshold system lies in its simplicity, there being no necessity to define specific vertical restraints other than hardcore restraints.

### *Hardcore restraints*

27. These are restrictions which always fall outside the block exemption regulation. They include agreements concerning minimum and fixed resale price maintenance and agreements resulting in absolute territorial protection. In addition, the Commission proposes to make wider provision for arbitrage by both intermediaries and final consumers and therefore to blacklist, more generally, resale restrictions in so far as these restrictions result from factors within the parties' control. However, the exact content of the hardcore list is still subject to further discussions. Maximum and recommended resale prices, provided that they do not amount to fixed resale prices, would as a general rule be deemed to fall outside the scope of Article 81(1).

*No sector-specific rules*

28. It has been decided to propose one wide-ranging block exemption regulation instead of different regulations for specific forms of vertical restraints or sectors. Different forms of vertical restraints with similar effects will thus be treated in a similar way, preventing unjustified differentiation between forms or sectors. This avoids, as far as possible, a policy bias in the choices companies make concerning distribution formats. The company's choice should be based on commercial merit and not, as under the current system, on unjustified differences in exemptability. It is expected that the regulation will cover selective distribution, including quantitative selective distribution, franchising, etc. For reasons of coherence and unity of policy, it is proposed that sector-specific rules for beer and petrol be withdrawn as the continuation of a special regime for these sectors is not justified on economic or legal grounds. In so far as sector-specific treatment is justified, this will be done by means of guidelines. It should be noted that the block exemption regulation on car distribution, which expires in 2002, is not covered by the current proposal.

*Withdrawal of the benefit of the block exemption*

29. The Commission intends to maintain the withdrawal mechanism for the rare cases where a serious competition problem may arise below the market share threshold(s). The withdrawal mechanism would in particular be applied in cumulative effect cases. In order to ensure effective supervision of markets and greater decentralisation in the application of the Community competition rules, it is proposed that not only the Commission but also national authorities be empowered to withdraw the benefit of the block exemption in future.

*The proposed Council regulations*

These proposed regulations provide for two major changes:

*(a) Extension of the Commission's powers under Council Regulation No 19/65*

30. The proposed Council regulation extends the scope of Articles 1(1)(a) and 1(2)(b) of Council Regulation No 19/65 in order to enable the Commission to cover, by block exemption regulation, all types of agreement concluded between two or more firms, each operating at a different stage of the economic process, in respect of the supply and/or purchase of goods for resale or processing or in respect of the marketing of services (i.e. vertical agreements). Furthermore, in order to ensure greater decentralisation in the application of the Community competition rules, it is proposed to amend Article 7 of Regulation No 19/65 so as to provide that, where the effects of vertical agreements are felt in a Member State which possesses all the characteristics of a distinct market, the competent national authority may withdraw the benefit of the block exemption in its territory and adopt a decision for the purpose of eliminating those effects. Finally, in order to ensure effective control of the effects of parallel networks of similar agreements on a given market, it is proposed to amend Article 7 to allow the block exemption regulation to establish the conditions under which such networks of agreements are excluded from its application.

*(b) Relaxation of the notification procedure in Regulation No 17*

31. The proposal is designed to extend the scope of Article 4(2) of Regulation No 17 with a view to granting dispensation from the prior notification requirement in respect of all vertical agreements. The practical advantage of the proposed amendment is to enable the Commission, even in cases of late notification, to consider whether the agreements in question satisfy the conditions of Article 81(3) and, if

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so, to adopt an exemption decision taking effect on the date on which the agreement was entered into. In this way the legal certainty afforded to firms would be strengthened without jeopardising the enforcement of Article 81(1) in respect of anticompetitive agreements.

### ***b) Review of the policy on horizontal agreements***

32. In 1997<sup>18</sup> the Commission's departments decided to begin assessing the policy on horizontal agreements. The fact-finding exercise carried out that year revealed that the existing notices and block exemption regulations in this field<sup>19</sup> were not much used, were partly outdated and entailed a number of notifications, and should therefore be reviewed. The Commission's departments took the view that this exercise should be seen as an important complement to the project on vertical restraints.

33. In 1998 the Commission's departments intensified their thinking on the review of the policy on horizontal agreements. Various initial conclusions were reached. The review of the current rules should take on board the need to update and improve the existing provisions in terms of both clarity and coherence. In many respects, the body of law and regulations on horizontal agreements appears to be incomplete. The aim is therefore to make it more efficient and transparent in the light of the criticisms expressed by companies in the survey. In this review exercise, the Commission's departments should propose the adoption of an approach which focuses systematically on economic analysis, in line with the way in which the vertical restraints exercise was tackled. They should propose following a course probably involving the drawing-up of guidelines, accompanied, as necessary, by revised block exemption regulations for certain types of agreement. A consultation paper for discussion with Member States and other interested parties would be made available in 1999.

## **II. Enforcement of competition laws and policies**

### **1. Action against anticompetitive practices**

#### ***a) Summary of activities and statistics***

34. As regards Articles 81 and 82, the situation in 1998 was virtually identical to that in 1997. The number of new cases recorded in 1998 was 509, as against 499 the previous year (447 in 1996), and therefore seems to have stabilised. The number of notifications has also tailed off, although it remains high. The situation is similar as regards complaints and proceedings initiated by the Commission.

35. The stabilisation in the number of notifications, which fell from 221 in 1997 to 216 in 1998, can probably be attributed partly to the provisions which the Commission adopted last year, particularly the notice on agreements of minor importance. The Commission invoked this notice on only about ten occasions in the course of the year. It will probably have encouraged a number of firms not to notify agreements of minor importance and, had it not existed, the number of notifications might well have been higher. Nevertheless, the results for the first year of implementation (a decrease of 0.2 percent) are still insufficient.

36. As regards complaints, the number of which was slightly higher than in the previous year (192, as against 177 in 1997), the Commission observes that, whereas some of them are of manifest Community relevance and have given rise to major decisions like the one on Greek ferries, many of the complaints it receives are not. The number of Commission decisions rejecting a complaint because it was not of manifest interest to the Community is revealing. The *Automec* precedent, which enables the Commission to reject

complaints of this type, is useful but probably insufficient. What is needed is an instrument to facilitate the rejection procedure.

37. The number of cases instituted by the Commission on its own initiative was the same in 1998 as the previous year (101). Most concern a specific sector, telecommunications, for which full liberalisation came into effect on 1 January. Hence close scrutiny by the Commission is necessary.

38. The number of cases closed in 1998 was 581 (the corresponding figures for 1997 and 1996 were 517 and 388 respectively). The number of formal decisions grew substantially, rising from 27 in 1997 to 42 in 1998. Of special significance, apart from decisions rejecting complaints and non-opposition decisions in the transport field, were 11 formal decisions based on Articles 81(1) and 82, most of which were coupled with fines. This increase in the number of cases closed reflects a commitment on the Commission's part to speed up the handling of antitrust cases. However, this improvement cannot conceal the slow processing of certain cases. On the basis of the 11 formal decisions referred to above, the average length of proceedings was four years and 10 months, the shortest duration being two years and one month and the longest eight years. The length of proceedings was essentially due to complex procedures which entailed delays. For that reason the Commission reviewed a number of procedural regulations during the year, including Regulation No 99/63/EEC on hearings, with a view to streamlining and speeding up the processing of cases. This streamlining is an ongoing process.

**b) Description of significant cases**

*Cartels*

39. During 1998 the Commission demonstrated its firm commitment by its strong action against secret agreements between companies. Final decisions were issued in no less than four cases during the year, and additional sets of proceedings have been instituted. The Commission imposed fines totalling ECU 178.83 million on the companies involved in these four cases, reflecting its determination to take vigorous action to combat anticompetitive practices of this type.

40. Pursuant to Article 65 of the ECSC Treaty, the Commission prohibited a price-fixing agreement in the steel sector. Six producers of stainless-steel flat products, accounting for more than 80 percent of European production of stainless-steel finished products, had decided on a concerted increase in stainless steel prices by changing the method for calculating the "alloy surcharge". The Commission decided to fine the members of the cartel a total of ECU 27.3 million.<sup>20</sup>

41. The Commission also prohibited an agreement between four sugar producers. British Sugar, Tate & Lyle, Napier Brown and James Budgett, which together controlled 90 percent of the white granulated sugar market in the United Kingdom, had developed a collaborative strategy of higher pricing for that product on the industrial and retail markets. Fines totalling ECU 50.2 million were imposed on the participating companies, including ECU 39.6 million on British Sugar<sup>21</sup>.

42. The Commission also took action on an agreement between producers of district heating pipes which was characterised by the variety of competition restrictions involved: price fixing, market sharing and bid rigging. The cartel began in Denmark and soon extended throughout the Union, thus cartelising the whole of the European market. The Commission imposed fines totalling ECU 92.21 million on the ten companies involved, including ECU 70 million on ABB. A particularly aggravating factor was that the cartel continued for nine months after the Commission had discovered its existence<sup>22</sup>.

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43. Lastly, the Commission prohibited a price-fixing agreement between seven ferry companies operating services between Greece and Italy. Investigations at the offices of five Greek operators and one Italian operator revealed overwhelming evidence of an agreement in the form of regular meetings and exchanges of correspondence involving the collective readjustment of prices for passengers and vehicles. The fine of ECU 9.12 million is relatively light given the seriousness of the infringement: the Commission took account of the fact that it had had a fairly limited impact on the market.

44. The Commission concluded from the above proceedings that its notice of 10 July 1996 was beginning to bear fruit.<sup>23</sup> The notice, which provides for fines to be reduced or even waived for firms which denounce cartels in which they have taken part, was applied in the sugar case.

45. With a view to detecting and combating cartels more effectively, the Commission has decided to reorganise part of its Directorate-General for Competition and to set up a unit within its ambit specialising in proceedings of that type. This demonstrates that the Commission has placed its anti-cartel policy among the items at the top of its agenda. Using the limited resources at its disposal, the Directorate-General has assigned about fifteen case-handlers to this new unit, which should eventually comprise about twenty officials with significant experience in investigations of this type. By carrying out this reorganisation the Commission is again sending an important signal to companies engaged in these practices, which are particularly harmful to consumers and to the European economy in general.

### *Opening-up of markets*

46. 1998 was a year in which the Commission clearly demonstrated its determination to promote the opening-up of markets, a prime example of this being the *Volkswagen* case. Since 1995 the Commission had received numerous complaints from European consumers, particularly from Germany and Austria, who had been confronted with various difficulties when attempting to buy new Volkswagen and Audi cars in Italy. These consumers wanted to benefit from the price differentials between their Member State and Italy, where prices were particularly advantageous. Following a series of inspections at the offices of Volkswagen AG, Audi AG and Autogerma SpA, which is a subsidiary of Volkswagen and the official importer for both makes in Italy, and at the offices of a number of Italian dealers, the Commission concluded that Europe's largest motor-manufacturing group had been pursuing a market-partitioning policy in the Union for about ten years. Volkswagen AG had systematically forced its dealers in Italy to refuse to sell Volkswagen and Audi cars to foreign buyers, especially from Germany and Austria. The Commission fined Volkswagen ECU 102 million, the largest fine ever imposed on a single company.

47. The case of *Amministrazione Autonoma dei Monopoli dello Stato (AAMS)* provided a further indication of the Commission's determination to open up national markets, in this particular instance by means of Article 82. AAMS, an Italian cigarette producer and distributor which had a dominant position on the Italian market for the wholesale distribution of cigarettes, imposed on foreign producers wholesale distribution contracts containing numerous restrictive clauses which limited the access of foreign cigarettes to the Italian market and favoured its own production. The Commission fined AAMS ECU 6 million and ordered it to put an end to the infringements.

### *Undertakings in a dominant position*

48. The number of formal decisions pursuant to Article 82 has increased steadily over the last two years. In 1998 the Commission concluded six cases<sup>24</sup> under that article.

49. Two cases concerned the airports at Frankfurt and Paris, which are operated by companies in a dominant position. The abuses identified by the Commission concerned groundhandling and self-handling services, which were liberalised under a directive adopted in 1996. In addition to the direct anticompetitive effects on the suppliers involved, the Commission showed that there were repercussions on non-domestic airlines, with market partitioning occurring as a result. The abuses also slowed down the liberalisation of groundhandling services.

50. The *Frankfurt Airport* case concerns groundhandling. Following complaints from several airlines, the Commission found that the operator of the German airport (Flughafen Frankfurt/Main AG (FAG)) had abused its dominant position as operator by prohibiting airlines from providing self-handling services and by denying access to any independent providers of groundhandling services, thus creating on the related but separate groundhandling market a monopoly situation of which it was the beneficiary. The Commission therefore ordered FAG to bring its monopoly to an end.<sup>25</sup> It also found that the long-term contracts (three to ten years) that FAG had awarded to its best customers were contrary to Community law in that they effectively closed the groundhandling-services market to new entrants or made it less attractive to them, thus reinforcing its dominant position. FAG agreed to amend the contracts in question by granting contracting parties an annual right of withdrawal.

51. In the *Alpha Flight Services/Aéroports de Paris (ADP)* case, the Commission found that the operator of the two Paris airports had abused its dominant position as operator by imposing discriminatory commercial fees on suppliers or airlines providing groundhandling or self-handling services such as catering, cleaning and freight handling. ADP charged different levels of fees to the two third-party suppliers, AFS, the plaintiff, and OAT, a subsidiary of Air France. In addition, the fee charged by ADP to airlines providing catering services for passengers via specialist subsidiaries was either zero or less than that charged to companies providing similar catering services for third parties. There was no objective justification for the differences, which distorted competition between suppliers since some benefited from lower operating costs. The Commission therefore ordered Aéroports de Paris to bring its fee arrangements to an end.

52. The Commission also invoked Article 82 in another case involving the transport sector. This was the *TACA (Trans-Atlantic Conference Agreement)* case, in which the Commission fined the members of the liner conference ECU 273 million.<sup>26</sup>

53. In the *IRE/Nordion* and *Van den Bergh Foods* cases, both involving very different markets, the Commission devoted a great deal of attention to the effects of contracts concluded by companies in a dominant position and containing exclusivity clauses: such clauses may make the other parties involved so dependent on the dominant company that the residual competitors' ability to counter its dominant position is severely restricted.

54. Nordion, a Canadian company operating on the world market for the production and sale of molybdenum 99, a base product for radiopharmaceuticals used in nuclear medicine, concluded exclusive, long-term supply agreements with its customers, with the result that the main competitor, the Belgian company IRE, which was the complainant in this case, was prevented from developing and ultimately even from maintaining its presence on the market. This situation also made the entry of potential new competitors impossible. After receiving a statement of objections charging it with abusing its dominant position, Nordion undertook to renounce the exclusivity clauses in its contracts. The Commission then decided to terminate the proceedings.<sup>27</sup>

55. Van den Bergh Foods, a Unilever subsidiary, holds more than 85 percent of the Irish ice cream market. The company has an extensive network of freezer cabinets which are provided to retailers free of charge on condition that they are used exclusively for the storage of Unilever's products. The Commission

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found that, in the circumstances of the Irish market, the provision of cabinets on exclusive terms constituted a real barrier to market entry for Unilever's competitors. Given the reluctance of Irish retailers to replace Unilever cabinets, or to install additional ones, 40 percent of retail outlets in Ireland offered Unilever products only. By virtue of its dominant position on this market, Unilever had been able to encourage retailers to enter into exclusive arrangements with it. The Commission took the view that this practice constituted an abuse of a dominant position and issued a decision condemning Unilever.<sup>28</sup>

### *The TACA case*

56. The highlight of 1998 as regards maritime transport was the *TACA (Trans-Atlantic Conference Agreement)* case. This culminated in a Commission decision finding an infringement of Article 81 read in conjunction with Article 82.

57. The TACA agreement superseded the Trans-Atlantic Agreement, which was prohibited in 1994. It has seventeen parties representing more than 60 percent of the market for maritime transport services between northern Europe and the United States. The TACA parties notified the Commission of their agreement in 1994 with a view to securing an exemption. The Commission found that several of the agreement's clauses were caught by Article 81(1). These concerned price fixing for maritime transport services between Europe and the United States, price fixing for inland transport services supplied within the territory of the Community, agreement on the terms and conditions under which they entered into service contracts with shippers and the fixing of prices paid to freight forwarders. The first of the agreements fell within the scope of the block exemption for liner conferences.<sup>29</sup> The Commission refused to grant individual exemption for the remaining three agreements.

58. The impact of these competition restrictions was heightened by the behaviour of the parties to the TACA, which is in a joint dominant position on the market, insofar as they abused that situation by encouraging two potential market entrants to join the agreement, thus eliminating competition. The Commission noted that, between 1994 and 1996, two major Asian shipping companies entered the transatlantic market and eventually signed up to the TACA. During the same period, none of the parties to the TACA left the conference to act as an independent shipping company. In that context, the European Shippers' Council estimated that, between 1993 and 1995, the TAA, then the TACA, imposed overall price increases of more than 80 percent.

59. In the decision, the Commission noted that the parties to the TACA were in a joint dominant position on the market for containerised cargo between northern Europe and the United States, and that they had abused this dominant position by restricting the availability to customers of service contracts with individual shipping lines and by dissuading potential competitors from entering the market. As regards the latter point, the TACA had encouraged two of its potential competitors to join the organisation by offering them incentives. Thus, liner shipping companies which were not parties to the agreement were induced to sign up to it by being authorised to charge lower prices than the traditional members. The dual-rate service contract arrangements established by the liner conference had therefore restricted competition on the part of independent shipping companies. In addition, the founding members of the TACA had agreed, for certain contracts, not to engage in competition with shipping companies which did not form part of the first circle. In view of the significance of the potential competition on the market for liner shipping services, this infringement was regarded as especially serious. The Commission imposed a fine of ECU 273 million on the fifteen TACA parties, half of which are non-European companies.

60. This case does not call into question the Commission's policy with regard to traditional liner conferences. The Commission takes the view that the behaviour of the TACA parties deviated from the conduct authorised by the block exemption.

## 2. Mergers and acquisitions

### a) *Summary of activities and statistics*

61. The “merger wave” that can be traced back to at least the beginning of 1997 continued through 1998 and showed no sign of abating by the end of the year. The number and nature of the cases examined by the Commission in 1998 naturally reflects this trend in merger activity. To remain effective and efficient, Community merger control will have to continue to adapt rapidly to the significant challenges posed by changes in the economic environment on the one hand, and legal and policy developments on the other, all within the context of a desire to minimise regulatory costs, delays and uncertainties.

62. Against this background, therefore, it is unsurprising that the first keynote of the year has been a continuation of the significant upward trend in the number of mergers examined by the Commission. This has grown by substantially more than 10 percent in each of the last four years. This year, the annual total number of notifications received under the Merger Regulation<sup>30</sup> exceeded 200 for the first time. The year’s total of 235 represents an increase of 36 percent on last year’s, a rate of growth equal to last year’s record level and well above the rate for any other year. Similarly for decisions. The year’s total of 238 “final” decisions is also by a large margin the highest ever, and shows an increase of over 66 percent on last year, reflecting the continuing very high rate of growth.

63. Nor has the complexity of the Commission’s caseload reduced. The year’s total of 12 decisions to open more detailed investigations (“phase II proceedings” - Article 6(1)(c) of the Merger Regulation) remains stable, though slightly below last year’s as a proportion of the total caseload. There were also slightly fewer cases decided at phase II. That should not, however, be taken as an indication that the proportion of large-scale mergers which have potentially serious anticompetitive effects on trade in the Community is declining. Account needs also to be taken of the significant number of cases where the Commission’s new powers to accept formal remedies in the first stage of investigation (Article 6(1)(b) as amended) have been used – twelve in all, over the nine months since the powers were introduced. In addition, there have been several cases, including some (e.g. *KPMG/Ernst & Young*,<sup>31</sup> *Wienerberger/Cremer und Breuer*,<sup>32</sup> *Wolters Kluwer/Reed Elsevier*<sup>33</sup> and *LHZ/Carl Zeiss*)<sup>34</sup> where the phase II investigation was already under way, where the parties decided to abandon their merger plans ahead of a potentially adverse final decision.

64. 1998 also saw the first imposition by the Commission of a financial penalty on an enterprise for failure to notify a concentration in time.<sup>35</sup>

65. Changes to the thresholds for cases qualifying for investigation, and to the way in which certain joint ventures are treated under the regulation, were also introduced in 1998. Overall, the impact of these changes is relatively small compared with that of the other factors mentioned, but they have none the less increased the number of cases dealt with under the regulation, and one of the joint-venture cases (*BT/AT&T*)<sup>36</sup> has been the subject of a decision to open phase II proceedings.

b) *Summary of significant cases*

*Joint/collective dominance: from platinum to potash*

66. The most significant development in the Commission's approach to this subject was the delivery, in March, of the judgement of the ECJ in the *Kali und Salz* case. The judgement dealt with various procedural and substantive points, and concluded that the Commission's (1993) decision to allow the merger, but subject to certain undertakings, should be annulled. It was, however, also notable as the first instance in which the ECJ had had to examine the Commission's approach to the analysis of oligopoly ("collective dominance") as opposed to the more classical dominance by a single firm (or, at most, two firms). In the Court's view, to establish collective dominance in a merger situation the Commission needed to establish that the notified operation would lead to a significant reduction in competition between the parties to the merger and one or more third parties by giving them collectively the ability, as a result of the existence of "correlative factors" amongst them, to adopt a common policy on the market(s) concerned and to act substantially independently of other competitors, customers and consumers. These correlative factors need not, it appears, include structural links, in the strict sense of cross-shareholdings, contracts etc. between the alleged dominant firms, although where such links are cited, it is necessary to show how they would lead to the elimination of competition between the firms concerned. But whatever factors are employed should at the least provide, as well as support for the existence of a typical oligopoly market structure and trading conditions, convincing evidence of the existence among the firms concerned of a common interest in not competing actively against each other. This common interest might be demonstrated by an analysis of factors such as the degree of symmetry of the market shares, production capacities and cost structures of the alleged dominant firms. The Commission considered all these factors, to some extent, in its original decision. The Court, however, found that they had not been sufficiently well established to properly motivate the decision, and accordingly annulled it. It was then necessary for the Commission to re-examine the case in the light of the judgement<sup>37</sup>.

67. Since the decision, the Commission has been reviewing its approach to oligopoly in merger cases, and this work is continuing. Many aspects require further consideration; for example, the assessment of cost structures. However, the oligopoly issue was examined in some detail in two other phase II cases in 1998 – the accountancy case *Price Waterhouse/Coopers & Lybrand*<sup>38</sup> and the Scandinavian paper and board case *Enso/Stora*.<sup>39</sup>

68. In *Price Waterhouse/Coopers & Lybrand*, the relevant product market, for auditing and accountancy services to large firms, was found to be highly concentrated, although there was not found to be a single dominant firm. Combined market share post-merger would be below 40 percent in any Member State and four other competitors would remain. To analyse the oligopoly aspects of the case, the Commission based its approach on the criteria used previously in, among others, the *Gencor/Lonrho* case of 1996,<sup>40</sup> which also appear to have been broadly accepted by the Court in *Kali und Salz*. Essentially, these are that collective dominance is more likely to arise in heavily concentrated markets where there are in addition features likely to further restrict competitive behaviour – such as homogeneous products, transparent pricing, high entry barriers, mature technology, static or falling demand, links between suppliers, absence of countervailing buyer power, etc. In these conditions there are likely to be incentives for suppliers to engage in parallel pricing and other oligopolistic behaviour. The Commission found that several of these characteristics were present. For example, demand was static, innovation unlikely, and prices relatively transparent (in some countries, audit fees had to be published in the audited company's accounts). However, it was considered that the number of remaining competitors post-merger was relatively large to support an effective oligopoly – the larger the number of participants, the harder it becomes to maintain and, if necessary, enforce coherence of competitive behaviour among them. Customers did not consider that oligopolistic behaviour was already occurring before the merger, and there

was evidence that customers were willing and able to move their business between suppliers in order to obtain improved terms, notwithstanding the long-term nature of most audit relationships.

69. In the absence of the merger between KPMG and Ernst & Young (which was abandoned earlier in the year after the Commission decided to open a phase II investigation) there was no risk of a joint dominant position arising between the two largest firms. Moreover, the market shares of the competitors would all be substantially less than that of the merged firm, and they also varied considerably between the different (national) geographic markets. This implied substantially asymmetrical cost structures, which would further increase the difficulty of sustaining anticompetitive parallel behaviour. To secure coherence across a large part of the market, it would be necessary for the merged firm to ensure parallel behaviour on the part of several of these smaller competitors, rather than just one or two of them. Accordingly the Commission decided to clear this merger.

70. In *Enso/Stora*, the oligopoly issue concerned the markets for newsprint and magazine paper. The merging parties – Enso of Finland and Stora of Sweden, together constituting the largest integrated paper and board group in the world – were two of only six significant suppliers of newsprint (accounting together for around three quarters of total capacity) in the EEA market. The combined group would become the largest of these. The market structure in magazine paper was only slightly less concentrated. The Commission's detailed investigation found that these markets displayed many of the characteristics of an anticompetitive oligopoly – low demand growth, concentrated supply side, homogeneous products, mature technology, high entry barriers, similar cost structures. The merger would significantly increase the level of concentration in both markets. However, the Commission also found that other key oligopoly characteristics were not present: in particular, there was no market transparency – information on prices and quantities supplied was not readily available to competitors, and indeed there were secret discounts. Moreover there was evidence that customers – principally, large publishing groups – could exercise a measure of countervailing power. Accordingly the Commission concluded that this aspect of the merger would not lead to the creation or strengthening of a dominant position which would significantly impede competition in the common market or a substantial part of it.

#### *Dominance through vertical links: the "pay-TV" cases*

71. The two, linked, German digital pay-TV cases - *Bertelsmann/Kirch/Premiere* and *Deutsche Telekom/Betaresearch* –, gave rise to concerns over the creation of dominance through vertical market links, rather than the traditional horizontal overlaps. In order to supply a complete “package” of digital pay-TV services to consumers, various elements are needed – notably, “set-top box” technology (to decode the programmes being sold and to record details for charging purposes), broadcasting facilities, access to cable and/or satellite networks, and programming content. The proposed operations would have brought together leading suppliers of all these elements to the German market. They involved the development of Premiere as a joint digital pay-TV channel and marketing platform. Premiere would use Kirch's current digital TV activities and its “d-box” technology (the set-top decoder box that is required for digital reception), together with the related technical services (provided by Deutsche Telekom) and content (from an existing joint venture involving Bertelsmann and Kirch CLT-UFA).

72. These concentrations would, it was considered, create or strengthen dominant market positions in the key areas. Premiere would have achieved a dominant position on the market for pay-TV in Germany (and the rest of the German-speaking area of Europe). Currently, it is one of only two providers of pay-TV in Germany. The combination of this already strong position, giving access to a large base of subscribers, plus the important programme resources of Kirch and CLT-UFA would, the Commission found, have prevented the development of an alternative broadcasting and marketing platform by other firms, since the merged entity would be able to determine the conditions on which other broadcasters could enter the pay-

TV market. Similarly, in regard to technical pay-TV services, the parties would have become, permanently, the dominant supplier of these services for satellite TV, and the only supplier of them for cable pay-TV. All digital pay-TV providers in the area currently use the Betaresearch-access technology and the related d-box decoder, which employs a proprietary encryption/decryption system. An alternative technology was not considered likely to be developed, so other service providers would have to obtain a licence for it from Betaresearch; again creating the ability for the merged entity to foreclose this market to competitors. As regards cable networks, Deutsche Telekom already had the largest share of subscribers. The operation would have made it harder for other cable network operators to compete. The merged entities would have been able to act independently of competitors in all the major aspects of the supply of digital pay-TV and associated services, and in the absence of adequate remedies, prohibition was the only alternative.

*Divestiture of internet activities: new features of a classical remedy*

73. In *WorldCom/MCI*,<sup>41</sup> foreclosure of another relatively new product area – the Internet – was the main issue. Here, a satisfactory solution was found, involving the divestment of MCI’s Internet activities to a new entrant. This divestment was at the time the largest ever to result from antitrust action. After a full investigation the Commission found that both parties to this very large merger, covering a wide range of telecommunications activities, were significant suppliers of “universal connectivity” – the ability to offer access throughout the Internet without having to pay others to complete the connections. They would together become dominant on that market, with the ability to dictate terms to competitors needing this important service. Another significant feature of this case was that, like a growing number of others, it involved a carefully co-ordinated assessment and negotiation of remedies with the US competition authorities, in this instance the Department of Justice (DoJ). In *WorldCom/MCI*, the remedy adopted – divestment of the overlap in the market of concern – was not itself a novel one. However, the undertaking also contained some additional provisions, designed to ensure the effectiveness of the divestment and to coordinate the process with the US authorities who were also examining the operation. It was important to ensure that the divestment was made to a new entrant, rather than to an existing player; otherwise customer choice would still be substantially reduced. In addition, there were requirements designed to prevent the merging parties from setting up a new business which competed with the one divested (and which, given the parties’ overall strength, could rapidly have neutralised it) and to provide the buyer of the divested business with the services necessary to operate it effectively. These included servicing/maintenance of the acquired network, and unrestricted access to the remaining WorldCom/MCI network through so-called “peering” arrangements.

### **III. International Activities**

#### **1. Enlargement**

74. With a view to further completing the legal framework for relations between the Community and the ten associated countries of central and eastern Europe (CEECs) in the field of competition, two sets of Implementing Rules have been negotiated with the CEECs. The first concerns the implementation of the competition provisions of the Europe Agreements applicable to undertakings. The second relates to the rules concerning state aid.

75. Implementing Rules for the competition provisions applicable to undertakings have already been adopted for five CEECs, namely the Czech Republic,<sup>42</sup> Poland,<sup>43</sup> the Slovak Republic,<sup>44</sup> Hungary<sup>45</sup> and Bulgaria.<sup>46</sup> The Commission has presented its proposal to the Council for Implementing Rules for the three Baltic States and Romania. The wording of the Implementing Rules is basically the same for all of the associated countries. They contain mainly procedural-type rules, i.e. rules regarding competence to

deal with cases, procedures for notification of cases to the other party, consultation, comity and the exchange of information.

76. On 24 June the EU-Czech Association Council approved Implementing Rules for state aid in the Czech Republic. It is the first associated country where such rules are now formally in force in the field of state aid. The Implementing Rules constitute a two-pillar system of state aid control. On the Community side, the Commission assesses the compatibility of state aid granted by EU Member States on the basis of the Community state aid rules. On the side of the Czech Republic, the Czech national monitoring authority is to monitor and review existing and new public aid granted by its country, on the basis of the same criteria as arise from the application of the Community state aid rules. The Implementing Rules include procedures for consultation and problem solving, rules on transparency (i.e. the Czech Republic is to draw up and thereafter update an inventory of its aid programmes and individual aid awards), and rules on mutual exchange of information.

## **2. Accession negotiations**

77. Following the opening of the Intergovernmental Conference on 30 March the screening exercise started on 3 April with the first multilateral meeting involving all of the candidate countries. On 9-19 October, six candidate countries, namely the Czech Republic, Estonia, Hungary, Poland, Slovenia and Cyprus, participated in the screening of the competition chapter, i.e. the analytical examination of the *acquis* in the competition field. The objective of the exercise was to inform the applicants fully about the Community *acquis* and to identify, within each applicant country, possible substantive problems that could arise during the accession negotiations. On 11 May a multilateral screening meeting on competition policy took place with five other countries, namely Bulgaria, Latvia, Lithuania, Romania and Slovakia. The screening of the Article 86 Directives, in particular in the field of telecommunications, took place on 28 April-7 May for the first six countries, and on 23 June for the other five countries, as part of the screening of the entire telecommunications chapter.

## **3. Bilateral cooperation**

### **a) *United States: the 1998 EC/US Positive Comity Agreement*<sup>47</sup>**

78. The 1998 EU-US Positive Comity Agreement, was signed in Washington and entered into force on 4 June. It spells out more clearly the circumstances in which a request for positive comity will normally be made and the manner in which such requests should be treated. In contrast to the 1991 Agreement, the EU rules on merger control are in principle not within the scope of the 1998 Agreement, due to EC and US merger legislation, which would not allow a deferral or suspension of action as envisaged by the Agreement.

### **b) *Mediterranean countries***

79. Agreements have already been concluded with Tunisia, Israel, Jordan and the Palestinian Authority. Others are being negotiated with Algeria, Lebanon, Egypt and Syria. The provisions on competition contain clear commitments aimed at bringing the competition policies of the countries concerned into line with the Community arrangements. A first conference bringing together representatives of the Community and of the national competition authorities of the Member States and of the Mediterranean countries was held this year in Tunis. Only Tunisia and Algeria have asked for

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technical assistance. As regards Tunisia, a preliminary report identifying a technical assistance programme was drawn up in September. It is being studied by the Tunisian authorities.

80. A Commission communication<sup>48</sup> on “the Euro-Mediterranean partnership and the single market” proposes, among other things, cross-sector action in the competition field to promote cooperation and technical assistance.

### *c) Latin America*

81. Ever since there has been a comprehensive framework of agreements with the countries of Latin America, the Commission's strategy has been one of strengthening relations with groups of countries (Mercosur, the Andean Community and the Central American isthmus). In this connection, specific cooperation actions have been initiated, namely compilation of the competition laws of the countries of Latin America and the Caribbean, the drawing-up of a list of competition authorities and institutions to facilitate contact between those responsible for implementing competition policy and the business community, and publication of a *Boletín Latinoamericano de Competencia*, which is distributed through the Internet.<sup>49</sup>

### *d) Russia, Ukraine and the other NIS*

82. The Partnership and Cooperation Agreements (PCAs) which the EU has concluded with Russia, Ukraine, Moldova and most of the other former Soviet Republics contain – to a greater or lesser extent - a commitment by these countries to move towards an approximation of their competition and state aid legislation with that of the Community. Although progress is slow, the joint Committees established under the PCAs with Russia and Ukraine are expected to set up subcommittees during the first half of 1999 to deal with competition and state aid. A number of TACIS projects, with the task of providing relevant expertise, are also being undertaken.

## **4. WTO: Trade and competition policy**

83. The European Community has taken the initiative of putting competition on the international agenda. The Commission communication of June 1996 inspired the Singapore ministerial meeting to set up a WTO working group on the interaction between trade and competition policy. Under the guidance of its chairman, Professor Jenny, the group has attracted a remarkably high degree of interest and participation. This is reflected in the large number of submissions presented by WTO members and in the quality and openness of the discussions held on the different items on its agenda. Particularly noteworthy has been the active participation of developing countries, many of which have made presentations on their experiences relating to the introduction and enforcement of competition law. The group has been remarkably free of ideological controversies or North/South divisions. Differences of opinion about the scope of the group's mandate have not prevented a substantive discussion of the various issues raised by members.

84. The discussions have been essentially analytical in nature. The points on which there appears to be a large degree of consensus include:

- the need to proceed in parallel with a process of trade liberalisation, elimination of unnecessary regulations and a strengthening of competition law and policy;

- the importance, from the development point of view, of adopting a competition policy as part of the process of market-oriented reform;
- the increasing importance of international cooperation to address effectively the interaction between trade and competition policies.

85. The group has also made considerable progress in identifying those elements of competition law and policy which may be of particular relevance for the multilateral trading system. These include (a) the type of anticompetitive practices subject to competition law disciplines; (b) the extent of sectoral or regulatory derogations from the application of competition law; and (c) mechanisms for enforcement, including the role of administrative authorities and the courts.

86. There is a general recognition that certain types of anticompetitive practices by business can create barriers to entry or otherwise upset the equality of competitive opportunities. It is also generally acknowledged that competition and trade can be significantly affected by regulatory policies, the activities of enterprises with exclusive or special rights, and by a wide array of trade policy measures.

87. The work in the group was confined to an educational process and the group will continue this exploratory work into 1999. The WTO will also have to answer the question whether there is a political will among its members to go ahead and open negotiations in 1999 on the establishment of a multilateral framework of competition rules.

#### **IV. Outlook for 1999**

##### **1. Legislative and regulatory activities**

88. The coming year will see the Commission giving further thought to refocusing its departments' efforts on cases of manifest interest to the Community. Despite the hopes founded on the new provisions on vertical restraints, the ineffectiveness of the first refocusing measures adopted in 1997 will induce the Commission to take fresh steps to ensure that its legal instruments and resources are geared more closely to present needs and the challenges ahead.

89. The Commission will have to implement the new arrangements regarding vertical restraints of competition. Regulation No 19/65 and Article 4(2) of Regulation No 17 were amended in June 1999. The Commission will have to draft the new exemption regulation and guidelines on vertical restraints, which will probably not be ready for adoption before 2000.

90. The process of modernising Community competition law is set to continue and the Commission is considering proposing a review of Regulation No 17, which lays down detailed rules for the application of Articles 81 and 82 of the Treaty. The proposal should be the high point of the modernisation exercise.

91. After a record year for fines, the Commission is considering reviewing in the light of the experience gained some of the provisions of the guidelines on setting fines so as to correct certain aspects deemed not to accord with the objectives pursued.

92. In the merger control field, the Commission is contemplating adopting a new notice on ancillary restraints inasmuch as the existing one dates back to 1990 and is no longer entirely consistent with current practice. A notice on remedies making it possible to remove the Commission's doubts about the compatibility of a notified operation with the common market is also to be adopted next year.

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93. The Commission will continue its work on drawing up Community instruments in the state aid field, in particular notices designed to increase transparency and simplify the monitoring of cases of minor importance. It thus intends to adopt two block exemption regulations, one on small and medium-sized enterprises and the other on training aid. The guidelines on employment aid are to be reviewed in 1999. 1999 should also see the formal adoption of the procedural regulation following the reaching of agreement on it in principle at the Council meeting of industry ministers on 16 November.

### **2. Supervisory activities**

94. The Commission intends to redouble its efforts in 1999 to promote competition in the European Community so as to ensure the successful introduction of the euro. This will involve, among other things, waging a campaign against the emergence of cartelisation phenomena which might be seen in some old-established industries as a means of putting off the evil day when cost cutting and restructuring have to be carried out following the inevitable boost to competition caused by the euro's introduction. The Commission will therefore attach particular importance to the formation and operation of its anti-cartel unit, which already has a number of cases in its in-tray. It will nevertheless remain vigilant in its other areas of activity, including that of the monitoring of abuses of dominant positions. It even intends adding to its corpus of decisions in such new sectors as the environment, sport and the professions, where major cases are in the pipeline. Important decisions are awaited in the financial, data processing and air transport sectors.

**NOTES**

1. Including 10 ECSC decisions.
2. Commission Regulation (EC) No 2842/98 of 22 December 1998 on the hearing of parties in certain proceedings under *Articles 85 and 86* of the EC Treaty, OJ L 354, 30.12.1998.
3. Chapter II: Hearing of parties to which the Commission has addressed objections; Chapter III: Hearing of applicants and complainants; and Chapter IV: Hearing of other third parties.
4. Commission Regulation (EC) No 2843/98 of 22 December 1998 on the form, content and other details of applications and notifications provided for in Council Regulations (EEC) No 1017/68, (EEC) No 4056/86 and (EEC) No 3975/87 applying the rules on competition to the transport sector, OJ L 354, 30.12.1998.
5. Commission Regulation (EC) No 3385/94 of 21 December 1994 on the form, content and other details of applications and notifications provided for in Council Regulation No 17 (OJ L 377, 31.12.1994).
6. Directive 98/30/EC of the European Parliament and of the Council of 22 June 1998 concerning common rules for the internal market in natural gas, OJ L 204, 21.07.1998, p. 1.
7. OJ L 202, 18.7.1998.
8. Council Regulation (EC) No 994/98 of 7 May 1998 on the application of *Articles 92 and 93* of the Treaty to certain categories of horizontal state aid (OJ L 142, 14.5.1998).
9. Council Regulation (EC) No 659/99 of 22 March 1999 laying down detailed rules for the application of Art. 93 EC [now Art. 88] OJ 83/1 of 27.3.99.
10. OJ C 265, 22.8.1998.
11. Bull. 1/2 –1998, point 1.3.55; OJ C 95, 30.3.1998.
12. Under “Mergers – Other documents” on the DG IV website - <http://europa.eu.int/comm/dg04>.
13. OJ C 384, 10.12.1998.
14. Cases E/1/98 and E/2/98 (OJ C 395, 18.12.1998).
15. COM(1998) 544 final.
16. The rules proposed in 1998 were only adopted in June 1999 therefore this issue is presented under section I.3. More on the adopted rules and first experiences on their application will be part of the 1999 Report. The complete reference to the new rules on verticals is: Council Regulation (EC) No 1216/1999 of 10 June 1999 amending Regulation No 17: first Regulation implementing Articles 81 and 82 of the Treaty, OJ L 148, 15.6.1999, p. 5; and Council Regulation (EC) No 1215/1999 of 10 June 1999 amending Regulation No 19/65/EEC on the application of Article 81(3) of the Treaty to certain categories of agreements and concerted practices, OJ L 148, 15.6.1999, p. 1.
17. The block exemption regulation on car distribution, which expires in 2002, is not covered by the current proposal.
18. 1997 Competition Report, points 46 and 47.

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19. Block exemption regulations concerning specialisation and R&D agreements and notices on cooperation between companies (1968) and co-operative joint ventures (1993).
20. OJ L 100, 1.4.1998.
21. OJ L 284, 19.10.1998
22. OJ L 24, 30.01.1999
23. OJ C 207, 18.7.1996; 1996 Competition Report, points 34 and 35.
24. Including the AMMS case discussed under point 47 below.
25. Decision 98/190/EC of 14 January 1998 (OJ L 72, 11.3.1998).
26. Since the TACA case also involved application of Article 81 see the comments on this case in section on "Other important cases", points 56-60 below.
27. Proceedings were also instituted against IRE/Nordion in Japan, with the result that the Commission cooperated with the Japanese authorities (JFTC).
28. The Commission also took the view that the exclusivity condition constituted a restriction of competition which infringed Article 81.
29. Council Regulation (EEC) No 4056/86 of 22 December 1986 laying down detailed rules for the application of *Articles 85 and 86* of the Treaty to maritime transport (OJ L 378, 31.12.1986).
30. Council Regulation (EEC) No 4064/89 (OJ L 395, 30.12.1989), as amended by Council Regulation (EC) No 1310/97 (OJ L 180, 9.7.1997).
31. Case No IV/M.1044.
32. Case No IV/M.1047.
33. Case No IV/M.1040.
34. Case No IV/M.1246.
35. Case No IV/M.970, *Samsung/Ast.*
36. Case No JV.15.
37. The merger was declared compatible by decision of 09/07/1998 (Case No IV/M.308 - KALI + SALZ/MDK/TREUHAND), OJ C 275, 03.09.1998, p. 3.
38. Case No IV/M.1016.
39. Case No IV/M.1225.
40. Case No IV/M.619.
41. Case No IV/M.1069.
42. Decision No 1/96 of the Association Council of 30 January 1996 (OJ L 31, 9.2.1996).

43. Decision No 1/96 of the Association Council of 16 July 1996 (OJ L 208, 17.8.1996).
44. Decision No 1/96 of the Association Council of 15 August 1996 (OJ L 295, 20.11.1996).
45. Decision No 2/96 of the Association Council of 6 November 1996 (OJ L 295, 20.11.1996).
46. Decision No 2/97 of the Association Council of 7 October 1997 (OJ L 15, 21.1.1998).
47. 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).
48. COM(1998) 538 final of 23 September 1998.
49. These documents are available on the Internet at the following address: <http://europa.eu.int/comm/dg04/interna/other.htm>.