

## EUROPEAN COMMISSION

2001

**1. Executive Summary**

1. In 2001, the total number of new cases was 1 036, comprising 284 antitrust cases (under Articles 81, 82 and 86), 335 merger cases, and 417 state aid cases (excluding complaints). Comparable figures for 2000 were a total of 1 211 new cases, comprising 297 antitrust cases, 345 merger cases, and 569 state aid cases.<sup>1</sup> The decrease in the overall number of new cases therefore represents an overall trend due to a slight decrease in the field of antitrust, the first decrease in merger cases in several years and a significant drop in the number of state aid cases. The slight reduction in the number of new antitrust cases is confirmation that the effects on notifications in the past two years (sharp downward trend since 1999) of the issuing of guidelines on horizontal and vertical agreements are being maintained. The number of complaints, which has fluctuated widely over previous years, remained fairly stable this year (116 in 2001 against 112 in 2000). The total number of cases closed was 1 204, comprising 378 antitrust cases, 346 merger cases, and 480 state aid cases (excluding complaints). Comparable figures for 2000 were 1 230 cases closed, comprising 400 antitrust cases, 355 merger cases and 475 state aid cases.<sup>2</sup>

2. In 2001, a series of cartel decisions highlighted the sustained effort by the Commission to tackle flagrantly anticompetitive behaviour by undertakings in a wide range of sectors. These decisions provide evidence of the direct impact of competition policy on consumer welfare, as do this year's decisions concerning the car industry. In addition, opening up markets where a competitive environment is not yet fully established, while at the same time guaranteeing a level playing field and safeguarding the provision of services of general interest, remained high on the Commission's agenda.

3. The Commission's action in the merger field is being carried on against a background of globalisation and an increasing complexity of cases. Multi-jurisdictional aspects raised by global mergers increasingly require intensive international co-operation in different forums, such as the International Competition Network (ICN), and under bilateral agreements. In order to ensure that the European merger control system is properly equipped to deal with the challenges raised by these global mergers as well as the challenges that the enlargement of the European Union will bring, the Commission is undertaking a thorough review of the EC merger regulation. A consultation document (green paper) covering jurisdictional, procedural and substantive issues was published in December.

**2 Changes to competition laws and policies****2.1 Summary of new legal provisions****2.1.1 New mandate of the hearing officers**

4. On 23 May, the Commission adopted a decision on the terms of reference of hearing officers in

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<sup>1</sup> *The figure for state aid in 2000 was revised after the 2000 Competition Report was published.*

<sup>2</sup> *The figure for antitrust in 2000 was revised after the 2000 Competition Report was published.*

certain competition proceedings.<sup>3</sup> This new "mandate of the hearing officers", which replaces the previous terms of reference dating from 1994,<sup>4</sup> follows the Commission's decision last year to enhance this function. It aims to reinforce the independence and authority of the hearing officer, to strengthen his role in EC merger and antitrust proceedings and to enhance the objectivity and quality of the Commission's competition proceedings and the resulting decisions. In particular, the transparency of the appointment of hearing officers has been increased by publishing these appointments in the Official Journal, while any interruption or termination of appointment or transfer requires a reasoned decision by the Commission, also published in the Official Journal. The hearing officer may present observations to the Commissioner on any matter arising out of any Commission competition proceeding. More specifically, the hearing officer's final report, produced on the basis of the draft decision submitted to the Advisory Committee, must now systematically be attached to the draft decision submitted to the Commission so that the latter is fully aware of all relevant information on the course of the competition proceeding and on enforcement of the right to be heard. In order to enhance the transparency of proceedings, the final report must also be communicated to the addressees of the decision together with the decision itself as well as to Member States and be published in the Official Journal with the decision. The new mandate also extends the role of the hearing officer as regards commitments for remedies proposed by the parties in relation to any proceeding initiated by the Commission under merger or antitrust control. The hearing officer can report on the objectivity of any enquiry which may have been conducted in order to assess the competition impact of the proposed commitments. The new mandate also addresses the hearing officer's powers with regard to granting or denying confidentiality when information is disclosed by publication in the Official Journal. This applies in particular to the published versions of Commission decisions on merger and antitrust cases.

### **3 Other relevant measures including guidelines**

#### **3.1 The revised Notice on leniency**

5. In line with the general thinking behind the modernisation exercise, namely the need to refocus its activities on the most serious infringements of Community law, the Commission adopted in 2001 new draft rules aimed at better detection and eradication of price-fixing and other cartels. The leniency notice was revised, after five years of implementation, with a view to further increasing its effectiveness and maximising the Commission's ability to detect and successfully prosecute cartels. The draft new notice published on 21 July<sup>5</sup> addressed these issues in more precise terms and prepared the ground for the adoption of a new notice on immunity from fines and reduction of fines in 2002. Up to now, the leniency notice has been applied in 16 final Commission decisions: Extra-alloy surcharge,<sup>6</sup> British Sugar,<sup>7</sup> Pre-insulated pipes,<sup>8</sup> Greek ferries,<sup>9</sup> Seamless steel tubes,<sup>10</sup> Lysine,<sup>11</sup> SAS Maersk Air,<sup>12</sup> Graphite electrodes,<sup>13</sup>

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<sup>3</sup> *Decision of 23.5. 2001 on the terms of reference of hearing officers in certain competition proceedings (OJ L 162, 19.6.2001).*

<sup>4</sup> *Decision of 12.12.1994 on the terms of reference of hearing officers in competition procedures before the Commission (OJ L 330, 21.12.1994).*

<sup>5</sup> *Draft Commission notice on immunity from fines and reduction of fines in cartel cases (OJ C 205, 21.7.2001).*

<sup>6</sup> *OJ L 100, 1.4.1998.*

<sup>7</sup> *OJ L 76, 22.3.1999.*

<sup>8</sup> *OJ L 24, 30.1.1999.*

<sup>9</sup> *OJ L 109, 27.4.1999.*

<sup>10</sup> *Not published.*

Sodium gluconate,<sup>14</sup> Vitamins,<sup>15</sup> Belgian breweries,<sup>16</sup> Luxembourg breweries,<sup>17</sup> Citric acid,<sup>18</sup> German banks,<sup>19</sup> Zinc phosphate<sup>20</sup> and Carbonless paper.<sup>21</sup>

### 3.2 *The new Notice on de minimis*

6. On 20 December, the Commission adopted a new notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the EC Treaty (“de minimis notice”).<sup>22</sup> The new notice replaces the previous notice of 1997.<sup>23</sup> By defining more clearly and comprehensively when agreements between companies are not prohibited by the Treaty, the notice will reduce the compliance burden for companies, especially smaller companies. At the same time, the Commission will be better able to avoid examining cases which have no interest from a competition policy point of view and will thus be able to concentrate on more important cases. The new notice reflects an economics-based approach and has the following key features: i) the de minimis thresholds are raised to 10% market share for agreements between competitors and to 15% for agreements between non-competitors, ii) it specifies for the first time a market share threshold for networks of agreements producing a cumulative anticompetitive effect (5% for markets where such parallel networks of similar agreements exist), iii) it contains the same list of hardcore restrictions as the horizontal and vertical block exemption regulations, and iv) states that agreements between small and medium-sized enterprises are in general de minimis.

### 3.3 *The new Notice on “ancillary restraints”*

7. The Commission adopted a notice on restrictions directly related and necessary to concentrations (so-called “ancillary restraints”),<sup>24</sup> which replaces a previous notice dating from 1990. Ancillary restraints are contractual agreements directly related to and necessary for the transaction which companies frequently enter into in the context of mergers. Common examples of such ancillary restraints are non-compete clauses, licence agreements, or purchase and supply agreements. The new policy announces an important change of policy in the field of merger control. The Commission will no longer assess ancillary restraints entered into by parties in its merger decisions, thereby ending an 11-year-old practice. Under the previous

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<sup>11</sup> OJ L 152, 7.6.2001.

<sup>12</sup> Cases COMP/D2/37.444 and COMP/D2/37.386 (OJ L 265, 5.10.2001).

<sup>13</sup> Case COMP/36.490; press release IP/01/1010, 18.7.2001.

<sup>14</sup> Case COMP/36.756; press release IP/01/1355, 20.10.2001.

<sup>15</sup> Case COMP/37.512; press release IP/01/1625, 21.11.2001.

<sup>16</sup> Case COMP/37.614; press release IP/01/1739, 5.12.2001.

<sup>17</sup> Case COMP/37.800; press release IP/01/1740, 5.12.2001.

<sup>18</sup> Case COMP/36.604; press release IP/01/1743, 5.12.2001.

<sup>19</sup> Case COMP/37.919; press release IP/01/1796, 11.12.2001.

<sup>20</sup> Case COMP/37.027; press release IP/01/1797, 11.12.2001.

<sup>21</sup> Case COMP/36.212; press release IP/01/1892, 20.12.2001.

<sup>22</sup> OJ C 368, 22.12.2001. The new notice is also available on the Internet at the following address: <http://europa.eu.int/comm/competition/antitrust/deminimis/>:

<sup>23</sup> OJ C 372, 9.12.1997.

<sup>24</sup> OJ C 188, 4.7.2001.

policy such clauses would automatically benefit from the effect of the clearance decision if the Commission found them directly related to and necessary for the transaction. Instead, now companies and their lawyers will have to assess whether any such restraints can be covered by the merger decision or by a relevant block exemption, or whether they might fall under Article 81. The notice provides guidance to the legal and business communities, based on past Commission practice and experience in this field. It is in line, moreover, with the ongoing modernisation of the European Union's competition policy.

### **3.4 *The Communication on risk capital***

8. An important development in state aid in 2001, showing how state aid rules may need to be adapted to new market situations, was the adoption by the Commission of a new communication on state aid and risk capital,<sup>25</sup> together with the assessment by the Commission of several measures designed to promote the provision of risk capital in different Member States. The communication was prepared as a response to a number of factors, in particular the concern to stimulate risk capital markets in the Community and the difficulty of assessing certain measures with this objective, proposed by Member States, under existing state aid rules, particularly when there is no direct link between the grant of aid and a specific set of eligible costs for investment or research and development. Depending on the design of risk capital measures, they may grant aid to economic operators at one or more different “levels”, by providing a benefit to investors (by enabling them to make risk capital investments on more favourable terms) and/or to the enterprises invested in. The communication sets out certain criteria against which the Commission will assess these measures, as well as giving a non-exhaustive list of forms of aid measures which could meet these criteria.

## **4 Proposals for new legislation and guidance**

### **4.1 *Regulation implementing Articles 81 and 82 of the EC Treaty***

9. As reported last year, on 27.09.2000, the Commission adopted its proposal for a regulation introducing a new system for implementing Articles 81 and 82 of the EC Treaty.<sup>26</sup> The European Parliament adopted, by 409 votes to 54, its opinion on the proposed regulation on 6 September.<sup>27</sup> The amendments proposed by Parliament aim among other things at deleting the clause concerning a registration system for certain types of agreement (Article 4(2)), harmonising the regime of fines (Article 5), ensuring the proportionality of the remedies of a behavioural or structural nature (Article 7(1)) and clearly defining public interest in the context of Commission decisions based on Article 10. On 14-15 May and 5 December, under the Swedish and Belgian Presidencies respectively, the Council held a substantive debate on the Commission's proposal. Although provisional agreement was reached on some of the aspects of the proposed regulation, it was concluded that discussions on the principles and modalities of the envisaged reform needed to be continued in the Council working group. As guidance for further progress in the working group, the Council debated in particular the general principles underlying the functioning of the network of competition authorities, inviting the Commission to lay these principles down in a common declaration. The Council also subscribed to the objective of Article 3 of the Commission's proposal so as

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<sup>25</sup> OJ C 235, 21.8.2001.

<sup>26</sup> COM(2000) 582 (OJ C 365 E, 19.12.2000).

<sup>27</sup> *The European Parliament legislative resolution (R5-0444/2001) has not yet been published in the Official Journal, but can be found on <http://www3.europarl.eu.int/omk/omnsapir.so/pv2?APP=PV2&PRG=CALEND&FILE=010906&TPV=DEF&LANGUE=EN>.*

to ensure a level playing field for agreements affecting trade between Member States, but it urged the working group to discuss further the effect of such a provision on specific national rules.

#### **4.2 *The Green Paper on the Review of the Merger Regulation***

10. The Commission adopted on 11 December a Green Paper on the Review of the Merger Regulation and aims to propose an amended merger regulation in the second half of 2002, once the comments to this paper have been received and analysed. The green paper touches upon both jurisdictional, substantive and procedural issues. The main amendments suggested are the following:

- amend Article 1(3) and introduce automatic Community competence over cases subject to multiple filing requirements in three or more Member States. The turnover thresholds currently in Article 1(3) would be removed;
- simplify the requirements for referrals, thereby adding transparency and facilitating a proper work-sharing between the Commission and the Member States. The main amendment related to the referral instruments concerns Article 9(2) and would remove the obligation to show that a transaction will lead to a threat that a dominant position in a distinct market in the Member State will be created or strengthened;
- amend current provisions on multiple transactions;
- debate the virtues of the dominance test as the substantive test set out in the merger regulation compared with the test of “substantial lessening of competition” which is used in other jurisdictions, such as the USA, Canada and Australia. The green paper calls for a discussion of the advantages and drawbacks of both tests, as well as of the proper role of efficiencies in merger assessment. It should be pointed out, however, that definite conclusions on this issue are not to be expected within the time available for the current merger regulation review;
- debate possible means of further procedural simplification for cases that do not raise competitive concerns;
- introduce a “stop-the-clock” provision, applicable at the parties’ request, in order to provide more time for all involved to consider remedies to the transaction suggested by the parties.

#### **4.3 *The Directive on energy and gas markets***

11. An important development in 2001 was the Commission’s proposal for a new directive calling for the completion of the European electricity and gas markets.<sup>28</sup> The proposal, which was submitted to the Council and the European Parliament in March 2001 following a public hearing of market participants in autumn 2000, consists of quantitative and qualitative elements. As regards the “quantitative elements”, the proposal envisages a market opening for all commercial electricity consumers by 2003, for all commercial gas consumers by 2004 and for all other users – including private households - by 2005. As regards the “qualitative elements”, the proposal envisages, in the first place, a reinforcement of the unbundling rules. Given that a large number of companies in the electricity and gas sectors are vertically integrated, i.e. active in transmission and supply (in addition to electricity generation or gas storage), there

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<sup>28</sup> COM(2001) 125 final, 13.3.2001.

is a risk that the transmission branch of a company might grant favourable treatment to its related supply branch to the detriment of third parties requesting third party access. In order to address this issue, the Commission proposed in its directive that vertically integrated companies be required to carry out a legal unbundling of the respective business units. The proposal also provides for certain accompanying measures in order to ensure that there is no undue flow of information between the unbundled business units. Finally, it was proposed that the reinforced unbundling rules should also be extended to large distribution companies. The Commission proposes also to make it obligatory for Member States to create independent regulators at national level and to adopt a regulated third party access regime (as opposed to a negotiated third party access regime, which is another option under the existing directives).

#### **4.4 The amendments to the Postal Directive**

12. On 15 October, the Council approved a common position of the Member States on a text aimed at amending the existing postal directive. The main changes introduced by the text approved by the Council are:

13. A further opening of the market, with a staged reduction in the reserved area as of 1 January 2003 and as of 1 January 2006.<sup>29</sup>

- The possibility, by means of a Commission proposal to be approved by the European Parliament and the Council, of the completion of the internal postal market in 2009.<sup>30</sup>
- The liberalisation of outgoing cross-border mail except for those Member States where it needs to be part of the reserved services in order to ensure the provision of the universal service.
- The prohibition of cross-subsidisation of universal services outside the reserved area out of revenues from services in the reserved area unless it is strictly necessary in order to fulfil specific universal service obligations imposed in the competitive area.
- The application of the principles of transparency and non-discrimination whenever universal service providers apply special tariffs.

#### **4.5 The Guidelines on telecommunications**

14. On 25 March the Commission adopted "draft guidelines on market analysis and the calculation of significant market power"<sup>31</sup> with a view to formal adoption of the proposed directive on a new regulatory framework for electronic communications services and networks. The draft guidelines should help the

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<sup>29</sup> *In particular, as of 2003 the non-reserved area will include letters weighing more than 100g; as of 2006 the non-reserved area will include letters weighing more than 50g; the weight limits will not apply if the price is equal to or more than three times the public tariff for an item of correspondence in the first weight step of the fastest category.*

<sup>30</sup> *In 2006, the Commission will carry out a study evaluating, for each Member State, the impact on universal service of the completion of the internal postal market in 2009. On the basis of this study the Commission will submit a report to Parliament and the Council accompanied by a proposal confirming, if appropriate, the date of 2009 for the full completion of the internal postal market or determining any other step in the light of the study's conclusions.*

<sup>31</sup> *COM(2001) 175 final, 28.3.2001.*

Council and the European Parliament to approve the new definition of market power proposed in the framework directive (Article 13). The draft guidelines are based on the case law of the Court of First Instance and the Court of Justice in the competition sphere and on the Commission's own decision-making practice in defining the relevant market and in applying the concept of single and collective dominant position, in particular with regard to electronic communications markets.

## 5. Enforcement of competition laws and policies

### 5.1 Action against anticompetitive practices

#### 5.1.1 Summary of activities and statistics

15. The slight decline in closed antitrust cases in 2001 relates to the increased focus on (resource-intensive) cartel cases. On the other hand, the number of cases closed (378) largely exceeds the number of new cases (284) and further reduces the backlog. The priority given to tackling cartel cases resulted in 2001 in a large increase in the number of cases handled. The Commission adopted 10 negative formal decisions in the Graphite electrodes, Sodium gluconate, SAS/Maersk, Vitamins, German banks, Citric acid, Belgian breweries, Luxembourg breweries, Zinc phosphate and Carbonless paper cases and closed by way of settlement five cases of cartels in the banking sector connected with the introduction of the euro. It adopted statements of objections in several other cases, including Plasterboard and GFU.<sup>32</sup>

#### 5.1.2 Description of significant cases

##### 5.1.2.1 Cartels

###### Graphite electrodes<sup>33</sup>

16. On 18 July, the Commission fined Germany's SGL Carbon AG, UCAR International of the United States and six other companies a total of EUR 218.8 million for fixing the prices and sharing the market for graphite electrodes. Following an extensive investigation which started in 1997, the Commission found that the companies had participated in a worldwide cartel during most of the 1990s. Graphite electrodes are ceramic-moulded columns of graphite used primarily in the production of steel in electric arc furnaces, also referred to as "mini-mills". With regard to the leniency notice, it is important to note that this is the first time the Commission has granted a substantial reduction in a fine (70%). Showa Denko benefited from this reduction, having been the first company to cooperate and provide conclusive evidence of the cartel to the Commission.

###### SAS/Maersk<sup>34</sup>

17. Again on 18 July, the Commission decided to fine Scandinavian airlines SAS and Maersk Air EUR 39.375 million and EUR 13.125 million respectively for operating a secret market-sharing

<sup>32</sup> Press releases MEMO/01/149, 24.4.2001 and IP/01/830, 13.6.2001.

<sup>33</sup> Case COMP/36.490; press release IP/01/1010, 18.7.2001.

<sup>34</sup> Cases COMP/D2/37.444 and COMP/D2/37.386 (OJ L 265, 5.10.2001).

agreement.<sup>35</sup> The agreement had led to the monopolisation by SAS of the Copenhagen-Stockholm route to the detriment of over one million passengers who use that route every year, and to the sharing of other routes to and from Denmark. SAS and Maersk Air had notified a cooperation agreement, which related mainly to code sharing and frequent-flyer programmes. In the course of the preliminary enquiry it transpired that, coinciding with the entry into force of the co-operation agreement, Maersk Air had withdrawn from the Copenhagen-Stockholm route, where it had until then been competing with SAS. It also transpired that, at the same time, SAS had stopped flying on the Copenhagen-Venice route and Maersk Air had started operations on that route and, finally, that SAS had withdrawn from the Billund-Frankfurt route, leaving Maersk Air - its previous competitor on the route - as the only carrier. These entries and withdrawals, which were not notified, formed part of a wider market-sharing agreement which included an overall non-compete clause covering the parties' future operations on international routes to and from Denmark and on Danish domestic routes. The market sharing was discovered as a result of on-site inspections. The inspections were carried out in June 2000, in close co-operation with the national competition authorities in Denmark and Sweden. As a result of the decision, competition between SAS and Maersk Air, the two largest airlines operating to and from Denmark, was restored to the benefit of consumers.

#### Sodium gluconate<sup>36</sup>

18. On 2 October, the Commission fined Archer Daniels Midland Company Inc., Akzo Nobel NV, Avebe BA, Fujisawa Pharmaceutical Company Ltd, Jungbunzlauer AG and Roquette Frères SA a total of EUR 57.53 million for fixing the price and sharing the market for sodium gluconate. It characterised the companies' behaviour as a "very serious" infringement of the Community and EEA competition rules. Following an investigation which started in 1997, the Commission established that the companies had participated in a worldwide cartel between 1987 and 1995. The cartel agreements were implemented through detailed sales monitoring, the holding of regular multi- and bilateral meetings, and the enforcement of a compensation scheme. Throughout the period, the Commission gathered evidence of over 25 cartel meetings. Sodium gluconate is a chemical used to clean metal and glass, with applications such as bottle washing, utensil cleaning and paint removal, and as a food additive, together with various other chemical applications. The Commission granted for the first time a very substantial reduction in the fine pursuant to Section B of the leniency notice. Fujisawa benefited from a reduction of 80% on the ground that it was the first to adduce conclusive evidence of the cartel's existence, before the Commission had undertaken any investigation ordered by decision. The Commission did not grant Fujisawa a 100% reduction in its fine, as it could have done under Section B, as the company did not approach the Commission until after it had received a request for information. This reluctance to come forward spontaneously and before any investigatory measure was taken into account.

#### Vitamins<sup>37</sup>

19. On 21 November, the Commission adopted a decision under Article 81 of the EC Treaty and Article 53 of the EEA Agreement finding that 13 manufacturers of vitamins A, E, B1, B2, B5, B6, C, D3, H, folic acid, beta carotene and carotinoids had participated in cartels for each of these products resulting in a total of 12 separate infringements. The Commission fined eight companies a total of EUR 855.23 million for fixing the prices of eight different products and allocating sales quotas in respect thereof. The

<sup>35</sup> SAS lodged an appeal against the decision before the Court of First Instance on 3 October (Case T-241/01), contesting the amount of the fine.

<sup>36</sup> Case COMP/36.756; press release IP/01/1355, 20.10.2001.

<sup>37</sup> Case COMP/37.512; press release IP/01/1635, 21.11.2001.

limitation period for fines in competition cases<sup>38</sup> was applicable to the infringements affecting vitamins B1, B6, H and folic acid; the Commission therefore did not fine companies for their involvement in these cartels. Each agreement was a very serious infringement of the Community competition rules and as such justified the overall high level of fines imposed. A striking feature of this complex of infringements was the central role played by Hoffmann-La Roche and BASF, the two main vitamin producers, in virtually each and every cartel, whilst other players were involved in only a limited number of vitamin products. The participants in each of the cartels fixed prices for the different vitamin products, allocated sales quotas, agreed on and implemented price increases and issued price announcements in accordance with their agreements. They also set up machinery to monitor and enforce their agreements and participated in regular meetings to implement their plans. The modus operandi of the different cartels was essentially the same. Given the continuity and similarity of method, the Commission considered it appropriate to treat in one and the same proceeding and decision the complex of agreements covering the different vitamins.

#### Citric acid<sup>39</sup>

20. On 5 December, the Commission decided to fine five citric acid producers a total of EUR 135.22 million. The Commission's investigation revealed that the five producers had participated, between 1991 and 1995, in a secret cartel of worldwide scope which had enabled them to fix the price and share the market for citric acid. The cartel was a very serious infringement of Article 81 of the EC Treaty and Article 53 of the EEA Agreement, which justified the size of the fines.

#### Belgian breweries<sup>40</sup>

21. On 5 December, the Commission fined five companies a total of EUR 91.655 million for participating in two separate secret cartels on the Belgian beer market. The first cartel involved Interbrew on the one hand and Alken-Maes and Danone (Alken-Maes's parent company at the time) on the other. Interbrew and Alken-Maes/Danone, Nos 1 and 2 on the market, had agreed on a general non-aggression pact, the allocation of customers in the "horeca" (hotels, cafés and restaurants) or "on-trade" sector, price fixing in the retail or "off-trade" sector, the limitation of investments and advertising in the horeca sector, a new tariff structure (horeca and retail) and a detailed monthly information exchange system concerning sales volumes (horeca and retail). The cartel lasted from 1993 until 1998. The CEOs and other senior management of the companies involved met regularly to initiate and monitor these agreements. The Commission considered the infringement to be "very serious". In setting the amount of the fine, it also took into account the fact that Danone had committed similar infringements of Article 81 in the past.<sup>41</sup>

22. The second cartel concerned private-label beer in Belgium. This is beer which supermarkets order from brewers but sell under their own label. Between October 1997 and July 1998, Interbrew, Alken-Maes, Haacht and Martens met four times to discuss the private-label beer market in Belgium in general and their prices and customers in particular. During these meetings, the four brewers also exchanged business information. This cartel was considered to be a "serious" infringement.

#### Luxembourg breweries<sup>42</sup>

<sup>38</sup> Council Regulation (EEC) No 2988/74 of 26 November 1974 concerning limitation periods in proceedings and the enforcement of sanctions under the rules of the European Economic Community relating to transport and competition.

<sup>39</sup> Case COMP/36.604; press release IP/01/1743, 5.12.2001.

<sup>40</sup> Case COMP/37.614; press release IP/01/1739, 5.12.2001.

<sup>41</sup> Commission decision of 23.7.1984 (Flat glass) and Commission decision of 15.5.1974 (Flat glass).

<sup>42</sup> Case COMP/37.800; press release IP/01/1740, 5.12.2001.

23. On 5 December, the Commission fined three Luxembourg brewers - Brasserie Bofferding, Brasserie Battin and Brasserie de Wiltz - a total of EUR 448 000 for their participation in a market-sharing agreement in the Luxembourg “horeca” (hotels, restaurants and cafés) or “on-trade” sector. A fourth brewer, Brasserie de Luxembourg, an Interbrew subsidiary, was not fined because it had revealed the cartel to the Commission and fulfilled all the other conditions of Section B of the leniency notice. The brewers had agreed in writing to respect each other’s exclusive purchasing arrangements (“beer ties”) with horeca customers, as well as measures to restrict the entry of foreign brewers into the Luxembourg horeca sector. The agreement remained in force from 1985 until 2000. It was held to be a “serious” infringement.

Zinc phosphate<sup>43</sup>

24. On 11 December, the Commission fined six producers or former producers of zinc phosphate a total of EUR 11.95 million. The Commission's investigation had revealed that the six producers had participated, between 1994 and 1998, in a cartel covering the whole of the European Economic Area which had enabled them to fix prices and divide up their 90% share of the market in zinc phosphate, an anticorrosion mineral pigment used in the manufacture of industrial paints. The cartel was by its very nature a very serious infringement of Article 81 of the EC Treaty and Article 53 of the EEA Agreement.

Settlements concerning bank charges for the exchange of euro zone currencies and German banks<sup>44</sup>

25. Shortly after the creation of the euro on 1 January 1999, the Commission (Directorate-General for the Internal Market) received complaints that exchange commissions for euro zone currency notes and coins remained high. The Commission carried out several surprise inspections at various banks and sent requests for information to most euro zone banks. It gathered evidence which suggested that certain national groups of banks may have colluded to maintain exchange charges at certain levels in order to minimise losses caused by the introduction of the euro. On this basis, the Commission started proceedings in 2000 against a large number of banks and bureaux de change in seven Member States (Austria, Belgium, Finland, Germany, Ireland, the Netherlands and Portugal). However, several banks took the initiative in presenting unilateral proposals to the Commission to the effect that they would (i) significantly reduce their charges for exchanging in-currency banknotes, and (ii) abolish all such charges by October 2001 at the latest, at least for buying transactions by account holders. Taking into account the exceptional circumstance of the disappearance of the market concerned, and the immediate benefit to consumers as a result of these proposals which implied a deviation from the alleged collusive behaviour, the Commission decided to end the cartel proceedings against more than fifty banks in Belgium, Finland, Ireland, the Netherlands and Portugal and against some banks in Germany.<sup>45</sup>

26. On 12 December, the Commission fined five German banks a total of EUR 100.8 million for concluding an agreement on a commission of about 3% for the buying and selling of euro zone banknotes during the three-year transitional period beginning on 1 January 1999.

Carbonless paper<sup>46</sup>

27. On 20 December, the Commission decided to fine 10 carbonless paper producers a total of EUR

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<sup>43</sup> Case COMP/37.027; press release IP/01/1797, 11.12.2001.

<sup>44</sup> Case COMP/37.919; press release IP/01/1796, 11.12.2001.

<sup>45</sup> Press release IP/01/1159, 31.7.2001.

<sup>46</sup> Case COMP/36.212; press release IP/01/1892, 20.12.2001.

313.69 million. In the course of its investigations, the Commission discovered that the producers had participated, between 1992 and 1995, in a secret, Europe-wide cartel aimed at improving the participants' profitability through collective price increases. This conduct was by its very nature a very serious infringement of Article 81 of the EC Treaty and Article 53 of the EEA Agreement, which justified the size of the fines, notably that of EUR 184.27 million imposed on Arjo Wiggins Appleton, the market leader and instigator of the cartel. Sappi was granted total immunity in respect of its participation in the cartel because, as the first company to cooperate with the Commission, it supplied conclusive evidence of wrongdoing.

#### 5.1.2.2 Undertakings in a dominant position

##### Deutsche Post AG I <sup>47</sup>

28. On 20 March, the Commission concluded its investigation into Deutsche Post AG (DPAG) and adopted a decision finding that DPAG had abused its dominant position by granting fidelity rebates and engaging in predatory pricing in the market for business parcel services. DPAG was fined EUR 24 million in respect of the foreclosure resulting from its long-standing scheme of fidelity rebates. No fine was imposed in relation to predatory pricing given that the economic cost concepts used to identify predation were not sufficiently developed at the time. Following a complaint by United Parcel Service in 1994 claiming that DPAG was using revenues from the letter mail monopoly to finance below-cost selling in the open market for business parcel services, the Commission decided that any service provided by the beneficiary of a monopoly in open competition has to cover at least the additional or incremental cost incurred in branching out into the competitive sector. Any cost coverage below this level is to be considered predatory pricing. The investigation revealed that DPAG, for a period of five years, did not cover the costs incremental to providing the mail-order delivery service. DPAG has undertaken to create a separate company ("Newco") to supply business parcel services which will be free to procure the "inputs" necessary for its services either from DPAG (at market prices) or from third parties or to produce these inputs itself. In addition, DPAG has undertaken that all inputs it supplies to Newco will be supplied to Newco's competitors at the same price and under the same conditions. This is the first formal Commission abuse decision in the postal sector.

##### Duales System Deutschland (DSD) <sup>48</sup>

29. On 20 April, the Commission decided that DSD, the company which created the "Green Dot" trademark, had abused its dominant position in the market for organising the collection and recycling of sales packaging in Germany. DSD is the only undertaking to operate a comprehensive packaging take-back and recycling service in Germany. The Commission objected to a provision in the trademark agreement between DSD and its customers obliging the latter to pay fees corresponding to the volume of packaging bearing the Green Dot trademark, rather than to the volume of packaging for which DSD was actually providing its take-back and recycling services. The provision infringed Article 82 as it forced consumers to pay for services not actually rendered and prevented market entry by competitors.

##### Michelin <sup>49</sup>

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<sup>47</sup> Case COMP/35.141 (OJ L 125, 5.5.2001).

<sup>48</sup> Case COMP/34.493; press release IP/01/584, 20.4.2001.

## EUROPEAN COMMISSION

30. On 20 June, the Commission decided to fine French tyre maker Michelin EUR 19.76 million for abusing its dominant position in the French market for retread and replacement tyres for heavy vehicles. The Commission's investigation established that, between 1990 and 1998, Michelin operated a complex system of rebates, bonuses and commercial agreements which had the effect of tying dealers to Michelin as their supplier and thus of artificially barring Michelin's competitors from the market. The heavy penalty reflected the seriousness and duration of the infringement and a previous, similar infringement by Michelin.

### IMS Health <sup>50</sup>

31. On 3 July, the Commission imposed interim measures on IMS Health (United States), the world leader in the collection of data on pharmaceutical sales and prescriptions, ordering it to license its "1860 brick structure", which segments Germany into 1 860 sales zones or "bricks". The Commission considered that IMS's refusal to grant a licence for the use of the structure, which, in the Commission's view, has become a de facto standard in the German pharmaceutical industry, constituted a prima facie abuse of a dominant position. The refusal prevented potential new entry to the pharmaceutical sales data market and was likely to cause serious and irreparable damage to IMS's current competitors NDC Health (United States) and AzyX Geopharma Services (Belgium). The President of the Court of First Instance, seized by IMS with an application for interim relief, suspended the operation of the Commission decision on 26 October pending a final judgment in proceedings for annulment.<sup>51</sup> NDC Health lodged an appeal against the order of the President of the Court of First Instance on 12 December.

### Deutsche Post AG II <sup>52</sup>

32. On 25 July, the Commission, following up a complaint filed by the UK Post Office, decided that Deutsche Post AG<sup>53</sup> ("DPAG") had abused its dominant position in the German letter market by intercepting, surcharging and delaying incoming international mail which it erroneously classified as circumvented domestic mail (so-called A-B-A remail). The Commission also decided that DPAG's abusive behaviour justified the imposition of a fine, which, owing to the legal uncertainty that prevailed at the time of the infringement, was set at the "symbolic" amount of EUR 1 000. The Commission found that DPAG had abused its dominant position in the German market for the delivery of international mail - thereby infringing Article 82 of the EC Treaty - in four ways: (i) discriminating between different customers, (ii) refusing to provide its delivery service, (iii) charging an excessive price for the service offered and (iv) limiting the development of the German market for the delivery of international mail and of the UK market for international mail bound for Germany. During the course of the proceedings, DPAG had given an undertaking to the effect that it would no longer intercept, surcharge or delay international mail of the type to which the case related.

### De Post/La Poste (Belgium) <sup>54</sup>

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<sup>49</sup> Case COMP/36.041; press release IP/01/873, 20.6.2001.

<sup>50</sup> Case COMP/38.044 IMS Health/NDC, decision of 3.7.2001 (OJ L 59, 28.2.2002).

<sup>51</sup> Case T-184/01 R. The President found that the abusive nature of IMS's conduct could not be considered unambiguous under current competition rules, that there was a risk that IMS would suffer serious and irreparable harm if it were forced to grant a licence to its competitors, and that the balance of interests in this case favoured suspension of the decision.

<sup>52</sup> Case COMP/36.915 (OJ L 331, 15.12.2001).

<sup>53</sup> Press release IP/01/1068, 25.7.2001.

<sup>54</sup> Case COMP/37.859 (OJ L 61, 2.3.2002); press release IP/01/1738, 5.12.2001.

33. On 5 December, the Commission decided that the Belgian postal operator De Post/La Poste had abused its dominant position by making a preferential tariff in the general letter mail service subject to acceptance of a supplementary contract covering a new business-to-business (“B2B”) mail service. This new service competes with the “document exchange” B2B service provided in Belgium by Hays plc, a private operator in postal services based in the United Kingdom. As La Poste exploited the financial resources of the monopoly it enjoys in general letter mail in order to leverage its dominant position there into the separate and distinct market for B2B services, the Commission imposed a fine of EUR 2.5 million. In April 2000, Hays had lodged a complaint with the Commission alleging that La Poste was trying to eliminate the Hays document exchange network, which it had been operating in Belgium since 1982. Hays could not compete with the tariff reduction offered by La Poste in the monopoly area and as a result was losing most of its traditional clients in Belgium, namely the insurance companies.

### 5.1.2.3 Developments in specific sectors

#### (a) Packaging waste sector

34. In implementing the European Community environmental legislation, Member States set targets for the recovery and recycling of packaging waste in accordance with the polluter pays principle. The national laws and regulations of each country set out the framework for the industry, which then establishes various systems for the collection and recycling of sales packaging. In so-called comprehensive systems, such as those which the Commission has recently analysed, there are contractual relations between the system operator and producers/distributors of packaged goods, the collectors and the guarantee/recycling companies. Overall, the Commission seeks to act in the consumer’s interest. Its aim is to ensure that the new markets created in this sector are open to competition, while maintaining high levels of environmental protection. At the same time, services must be delivered which offer the best possible value. In 2001, the Commission adopted several formal decisions and issued comfort letters (two decisions in the Duales System Deutschland case,<sup>55</sup> one decision in the Eco Emballages case,<sup>56</sup> and comfort letters in the Pro Europe,<sup>57</sup> Returpack-PET,<sup>58</sup> Returpack Aluminium<sup>59</sup> and Returglas<sup>60</sup> cases) laying down the basic competition principles such systems must comply with. These may be summarised as follows:

- A choice for companies: The Commission believes that companies required to recover and recycle waste should have a choice between several systems or other compliance solutions. The idea here is that companies must be free not to contract with the dominant system or to do so only with a partial amount of their packaging. In view of the very strong market position of the systems already in existence, it is of the utmost importance for the emergence of competition that there be unrestricted market access for alternative service providers. A further aim is to ensure that the development of new types of activity in packaging recovery is possible, and thus to remove obstacles to self-management and other individual

<sup>55</sup> Case COMP/D3/34.493, decision of 20.4.2001 (OJ L 166, 26.6.2001); decision of 17.9.2001 (OJ L 319, 4.12.2001).

<sup>56</sup> Case COMP/D3/34.950, decision of 15.6.2001 (OJ L 233, 31.8.2001).

<sup>57</sup> Case COMP/D3/38.051.

<sup>58</sup> Cases COMP/D3/35.656 and COMP/D3/37.224.

<sup>59</sup> Case COMP/D3/35.658.

<sup>60</sup> Case COMP/D3/35.669.

compliance solutions. The Commission therefore does not accept abusive market behaviour which would consolidate the dominant position of the incumbent operator.

- No unjustified exclusivity arrangements: When the Commission assesses restrictions of competition in the packaging waste recovery sector, it considers among other things the scope and duration of contracts. It is critical in general towards all kinds of exclusive arrangement lacking solid and convincing economic justification.
- Unrestricted access to the collections infrastructure: One of the characteristics of the market for the collection and sorting of packaging waste at households is that duplication of the existing collection infrastructure is in practice often very difficult. It would be inconvenient for households to use different bins for different collection systems for the same material and this would not be an economically viable solution. The Commission therefore considers the sharing of collection facilities by collectors to be a precondition for the occurrence of competition in practice.
- Free marketing of secondary material: Collected and sorted packaging material can be reused as a secondary raw material for various new products. The marketing of secondary material by collectors should also be as free as possible while making sure that materials will find an appropriate reprocessing channel.

(b) Air transport alliances

British Midland/Lufthansa/SAS <sup>61</sup>

35. On 1 March 2000, British Midland International, Lufthansa and SAS notified a joint venture agreement under which they agreed to coordinate their services within the EEA to and from London Heathrow and Manchester International airports. The Commission investigated this agreement in close cooperation with the UK competition authorities. On 12 June 2001, after the parties had given a number of undertakings, the Commission informed them that they were being granted a six-year exemption for their joint venture agreement pursuant to Article 5(3) of Regulation (EEC) No 3975/87. The JVA provides that Lufthansa is granted the exclusive right to operate flights on almost all routes between London and Manchester on the one hand and German airports on the other. Similarly, SAS is granted the exclusive right for the traffic between London/Manchester and Scandinavian countries. This restriction was found to be problematic for the London-Frankfurt market, which, with 2.1 million O&D passengers in 1999, is one of the busiest in Europe. The Commission concluded that British Midland's withdrawal from the London-Frankfurt route represented an appreciable restriction of competition on both the market for non-time-sensitive (leisure) passengers and the market for time-sensitive (business) customers. In its analysis under Article 81(3), the Commission came to the conclusion that, in terms of efficiency gains and competition, the overall effect of the agreement is positive. It leads to a reorganisation and expansion of the parties' existing networks, and allows Lufthansa and SAS to compete for domestic UK traffic as well as for traffic between the UK and Ireland and to carry passengers from any point in the STAR network to regional destinations in the UK. It leads furthermore to an increase in network competition. As a result of the agreement, British Midland was able to start providing new services between London and Barcelona, Lisbon, Madrid, Milan and Rome. With a view to addressing the Commission's competition concerns, the parties submitted a number of commitments, in particular to make slots available at Frankfurt airport, thereby allowing the entrant to operate four daily frequencies. The Commission carried out a market test to ascertain that the slots would actually be taken up by competitors.

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<sup>61</sup> Case COMP/37.812, public notice of 14.3.2001 (OJ C 83, 14.3.2001).

## (c) Motor vehicle distribution

Volkswagen<sup>62</sup>

36. The Commission adopted a decision fining Volkswagen EUR 30.96 million for resale price maintenance in Germany for the new VW Passat. Volkswagen had sent circular letters in 1996 and 1997 to its German dealers telling them not to sell this model at prices below the recommended list price. Unlike the previous decision against Volkswagen, this second decision does not concern measures aimed at hindering cross-border sales. Resale price maintenance is, however, a hardcore restriction. This is the first decision on resale price maintenance in the car sector.

DaimlerChrysler<sup>63</sup>

37. Following the receipt of complaints from consumers, the Commission opened an own-initiative proceeding against DaimlerChrysler. On 10 October, it adopted a decision fining DaimlerChrysler EUR 71.825 million for several infringements of Article 81 of the EC Treaty. The first infringement consisted of obstacles to parallel trade in Germany agreed between DaimlerChrysler and the members of its German distribution network. The application of Article 81 to these restrictions between DaimlerChrysler and its German agents resulted from the fact that these agents bear a considerable commercial risk linked to their activity.<sup>64</sup> The second infringement consisted of the restriction of sales to independent leasing companies in Germany and Spain. Lastly, DaimlerChrysler participated in a price-fixing agreement in Belgium aimed at reducing rebates granted to consumers.

## (d) Information society

## Microsoft

38. On 30 August, the Commission sent a statement of objections to the US software company Microsoft Corp. (“Microsoft”)<sup>65</sup> concerning several infringements of Article 82. This statement of objections extended and supplemented a previous statement issued in August 2000 following a complaint from the US company Sun Microsystems Inc.<sup>66</sup> According to the statement of objections of 2001, Microsoft violates EC competition rules by leveraging its dominant position in the markets for personal computer operating systems and low-end server operating systems. The Commission considers that Microsoft has been withholding “interface information” from competing software vendors, i.e. information needed to allow the vendors’ server software to interoperate with Microsoft’s “Windows” PC and server

<sup>62</sup> Case COMP/36.693 Volkswagen, Commission decision of 29.6.2001 (OJ L 262, 2.10.2001).

<sup>63</sup> Case COMP/36.264 DaimlerChrysler; press release IP/01/1394, 10.10.2001.

<sup>64</sup> According to the guidelines on vertical restraints (OJ C 291, 13.10.2000), the only relevant criterion for determining whether Article 81(1) applies to the activity of commercial agents is whether or not the agent has to bear a risk linked to the sale of goods or services he is involved in. In this case, rebates granted by agents were taken off their commission and agents bore responsibilities with regard to transport; they also bought demonstration vehicles - a significant proportion of the total number of cars sold - and financed spare part stocks. The contract obliged them to supply warranty services (without being fully reimbursed) and after-sales services at their own risk.

<sup>65</sup> Case COMP/37.792; press release IP/01/1232, 30.8.2001.

<sup>66</sup> Case COMP/37.245, which is now dealt with jointly with Case COMP/37.792 under case number COMP/37.792.

software. Microsoft has also applied a policy of discriminatory and selective disclosure of interface information. In the Commission's view, Microsoft thus engages in a leveraging strategy which is based on denying competitors' server software the opportunity to compete on the merits with its Windows software. Indeed, on account of the widespread usage of Windows in information technology networks, interoperability with Windows has an important influence on customers' purchasing decisions. Furthermore, the Commission believes that Microsoft abuses its dominant position by means of its licensing policy for Windows 2000. As a result of Microsoft's all-inclusive licence, customers have to pay for a full package of services even if they would prefer to obtain some services from competing server providers. Thus customers who are already using Windows and who want to buy competing services would have to pay double licensing fees. This policy will consequently drive consumers towards Microsoft server products, thereby reducing their choice for competing software and foreclosing competition. Finally, with respect to Microsoft's Media Player (a "streaming media" software program allowing for fast transmission via the Internet and for playback on PCs of audio and video files), the Commission takes the view that the tying of the Media Player with the Windows PC operating system distorts competition on the merits. Given consumers' tendency to use the pre-installed configuration on their desktop, this tying forecloses other vendors of "streaming media" software. The Commission takes note of the fact that the United States Court of Appeals ruled on 28 June that Microsoft violated section 2 of the Sherman Act by employing anticompetitive means to maintain a monopoly in the operating systems market. The Commission is closely following the outcome of this case and notes that the US Department of Justice and several states agreed on a proposed final judgment settling the case whereas other states continue the litigation. Though any outcome of the US case might affect some of the practices investigated by the Commission, the US and EC cases do not address the same facts and are thus complementary.

## 5.2 *Mergers and acquisitions*

### 5.2.1 *Summary of activities and statistics*

39. The slight slowdown in mergers and alliances coming under Commission scrutiny in 2001 appears to reflect the general worsening of economic conditions in the industrialised world and the business community's changed perception of the success of recent M&A activity. For the first time since 1993, the number of mergers notified to the Commission fell, from 345 in 2000 to 335 in 2001, but the level is still much higher than in 1999. Whilst there was a pause in 2001 in the upward trend in the overall number of merger notifications, merger cases are becoming increasingly complex and markets more concentrated. In particular, the number of opened cases requiring in-depth investigation has increased more rapidly than the overall number of cases (phase II decisions: 2001 up 17% on 2000 and 100% on 1999).

40. The Commission took 339 final decisions (against 345 in 2000), 20 of which followed in-depth investigations (five prohibitions, five clearances without conditions and 10 conditional clearance decisions) and 13 of which were conditional clearances at the end of an initial investigation ("phase I"). The Commission cleared 312 cases in phase I. In all, 140 decisions (45%) of the first-phase clearance decisions were taken in accordance with the simplified procedures introduced in September 2000. In addition, the Commission took seven referral decisions pursuant to Article 9 of the merger regulation and opened in-depth investigations in 22 cases, three of which were outstanding at year's end.<sup>67</sup>

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<sup>67</sup> COMP/M.2495 – *Haniel/Fels*; COMP/M.2547 – *Bayer/Aventis Crop Science*; and COMP/M.2568 – *Haniel/Ytong*.

### 5.2.2 Summary of significant cases

41. Despite the slightly lower total number of notifications, there were five prohibition decisions,<sup>68</sup> the highest number of prohibitions in a single year so far. In addition, five notifications were withdrawn by the notifying parties in phase II (partly as a result of the Commission's competition concerns and partly for unrelated reasons). All five prohibition decisions were taken on the basis of the creation (four cases) or strengthening (one case) of a single-dominance position. Potential collective dominance was at the centre of five of this year's phase II cases. In MAN/Auwärter<sup>69</sup> and in two cases analysed jointly, UPM Kymmene/Haindl<sup>70</sup> and Norske Skog/Parenco/Walsum,<sup>71</sup> the in-depth investigations led to unconditional clearance of the transactions. In two other cases examined in parallel, BP/E.ON<sup>72</sup> and Shell/DEA,<sup>73</sup> the Commission cleared the transactions subject to commitments that were offered by the parties to address the concerns of collective dominance on the market for ethylene on the pipeline network ARG+, which links Belgium, Germany and the Netherlands.

#### SCA/Metsä Tissue<sup>74</sup>

42. The case concerned the proposed takeover by SCA Mölnlycke Holding BV, controlled by Sweden's Svenska Cellulosa AB, of its Finnish competitor Metsä Tissue Corp. Both companies are active in the production of tissue paper products, such as toilet paper, kitchen towels, handkerchiefs and napkins, in a number of EEA countries. The Commission defined the relevant geographic markets as national because the market investigation found that suppliers could charge customers (supermarkets) different prices in different countries (price discrimination) and because of the presence of significant transport costs. However, in doing so, the Commission did not consider each national market in isolation, but took account of all actual and potential imports into each country in question. For example, the competition analysis for the Swedish market involved identification of all plants, in whatever country, that can supply Swedish supermarkets with tissue products at competitive cost, the number of such credible competitors left after the merger, their production capacity and brand ownership. By taking into account all existing and potential competitors for tissue products, the Commission concluded that market shares in certain national markets that would, in isolation, appear high created no competition problems in this specific case. Conversely, the investigation found that no potential competitors with sufficient production capacity existed to challenge the parties' very high market shares (up to 90%) in Denmark, Finland, Norway and Sweden, which eventually led the Commission to prohibit the transaction. In Finland, the competition concerns were due primarily to the removal of a potential competitor.

#### EdF/EnBW<sup>75</sup> (258-259-306)

43. In this case the Commission authorised, subject to conditions, the acquisition of joint control of German electricity company Energie Baden-Württemberg AG (EnBW) by Electricité de France (EdF) and Zweckverband Oberschwäbische Elektrizitätswerke (OEW), an association of nine south-west German

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<sup>68</sup> In accordance with Article 8(3) of the merger regulation.

<sup>69</sup> COMP/M.2201, 26.6.2001.

<sup>70</sup> COMP/M.2498, 21.11.2001.

<sup>71</sup> COMP/M.2499, 21.11.2001.

<sup>72</sup> COMP/M.2533, 6.9.2001.

<sup>73</sup> COMP/M.2389, 23.8.2001.

<sup>74</sup> COMP/2097, 31.1.2001.

<sup>75</sup> COMP/M.1853, 7.2.2001.

districts. The investigation concluded that EdF enjoyed a dominant position on the French market for the supply of eligible customers, with a market share of approximately 90%. Besides EdF, there are three other electricity producers active in France, CNR, Société Nationale d'Electricité Thermique (SNET) and Harpen AG, which belongs to the RWE group. The three, however, account for only a small share of electricity generation and supply their production mainly to EdF. EnBW was considered one of the most likely potential competitors in the French market and would be one of the strategically best-placed companies to enter the market for the supply of eligible customers. EnBW's supply area is in the south-west of Germany and has a long common border with France. Two of the four Franco-German interconnectors are in the EnBW supply area. By acquiring EnBW, EdF would also increase its potential for retaliation in Germany and would thus become less exposed to competition in France. There were two relatively standard elements to the remedies package<sup>76</sup> and an innovative third element. This third element of the EdF remedy sought to address the competition concerns that had arisen in relation to so-called "eligible" customers in France, i.e., those whose electricity supply is open to competition. To resolve these concerns, EdF undertook to provide competitors with access to generation capacity located in France in the form of virtual power plants (5 000 MW) and back-to-back agreements to existing co-generation power purchase agreements with a maximum of 1 000 MW. In this respect, it has to be borne in mind that a divestiture of power plants could not be envisaged as an appropriate solution, for economic reasons in general (it was very unlikely that newcomers would have taken the risk of acquiring such a plant) and for legal reasons in the particular case of nuclear plants. According to the terms of the commitments, the contracts for the virtual power plants will be awarded through an open, non-discriminatory public auction open to utilities and energy traders alike. It is envisaged that these arrangements for access to generation capacity will remain in place for a period of five years and that they may be terminated only on the basis of a reasoned request by EdF. It is anticipated that in that period the electricity market in France will have developed so as to allow sufficient alternative supply sources to be made available.

#### GE/Honeywell<sup>77</sup>

44. On 3 July, the Commission declared the proposed merger between the US companies General Electric (GE) and Honeywell incompatible with the common market. The merger affected two categories of industrial sector, namely aerospace products (jet engines, avionics, non-avionics and engine starters) and industrial systems (small marine gas turbines). The Commission considered the horizontal and exclusionary effects of the merger stemming from the complementary products and services that the merged entity would be able to offer to a common customer base. In particular, the Commission considered that the merger would enable the leveraging of market power with a view to foreclosing competition in those markets. An important factor in the Commission's assessment was the transfer of GE's dominance in jet engines for large commercial and large regional aircraft, its financial strength and its vertical integration into aircraft purchasing, financing and leasing to Honeywell's leading market positions in corporate jet engines, avionics and non-avionics products. The proposed merger would have led to the creation of dominant positions on several markets as a result of the combination of Honeywell's leading positions on these markets with GE's financial strength and vertical integration into aircraft purchasing, financing, leasing and aftermarket services as described above. In addition, given the parties' dominant and/or leading positions in their respective markets, and the wide combination of complementary

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<sup>76</sup> Firstly, EdF undertook to renounce the exercise of its voting rights in CNR, an electricity producer active in France, and to withdraw its representative from the CNR board of directors; EdF will also no longer be involved in CNR's commercial policy and market conduct. This commitment will ensure that CNR is in a position to become an active competitive force in the electricity sector in France. Secondly, EnBW will divest its 24% co-controlling shareholding in WATT, which will restore the status quo ante in Switzerland.

<sup>77</sup> COMP/M.2220, 3.7.2001.

products that it could have offered, these effects would have further been compounded by the merged entity's financial and technical ability as well as economic incentive to carry out exclusionary practices such as packaged offers at strategically determined prices, including predatory pricing, in order to progressively foreclose their competitors on specific markets or market segments. This would have occurred as a result of, inter alia, the ability of the merged entity to cross-subsidise discounts across the products composing the package deal. Rival avionics and non-avionics manufacturers would consequently have been deprived of future revenue streams generated by the sales of the original equipment and spare parts. Future internally generated financial means are key to this industry, as they are needed to fund development expenditures for future products, foster innovation and enable possible leapfrogging. By being progressively marginalised, as a result of the integration of Honeywell into GE, Honeywell's competitors would have been deprived of a vital source of revenue and seen their ability to invest for the future and develop the next generation of aircraft systems substantially reduced/eliminated, to the detriment of innovation, competition and thus consumer welfare.

#### Schneider/Legrand <sup>78</sup>

45. Following a detailed investigation, the Commission in October prohibited the merger of Schneider Electric and Legrand, the two main French manufacturers of electrical equipment. The merger would have considerably weakened the operation of the market in a number of countries, particularly in France, where the rivalry between the two companies was the mainstay of competition. The effects of the merger on competition related primarily to low-voltage electrical equipment, i.e., all the systems used for electricity distribution and the control of electrical circuits in homes, offices or factories. Such equipment covers many different types of product, ranging from electrical distribution boards and sockets and switches to cable trays. There were substantial overlaps between the activities of Schneider and Legrand in the markets for electrical switchboards (distribution boards and final panelboards, together with their components, where the combined market share would have been between 40% and 70% depending on the country), wiring accessories (in particular, sockets and switches and fixing and connecting equipment, where combined market shares ranged from 40% to 90%), and certain products for industrial use (industrial pushbuttons and low-voltage transformers) or for more specific applications (for example, emergency lighting). In France, the merger gave rise to particularly serious problems over virtually the whole range of products concerned and would, in most cases, have resulted in the strengthening of a dominant position. Schneider and Legrand are by far the largest players on the French market, and the Commission's investigation demonstrated clearly that there was little prospect of any significant development in the activity of foreign competitors in the short and medium term. Furthermore, dominant market positions would have been created in Denmark, Greece, Italy, Portugal, Spain and the United Kingdom. In an attempt to remedy these competition problems, Schneider submitted an initial series of undertakings to the Commission on 14 September, the deadline for presenting undertakings. However, it became evident, following the market investigation carried out by the Commission, that these initial undertakings were not such as to restore the conditions of effective competition. After the deadline has passed, the Commission can only accept "last minute" undertakings if it can be established immediately and without any possible doubt that they would restore the conditions of competition. Schneider submitted new undertakings on 24 September, but they left serious doubts as to the competitive capacity of the entities to be sold off, notably as regards access to distribution in France and the economic risks associated with the actual separation of these entities from the rest of the group to which they belonged. Furthermore, Schneider's proposals did not provide any effective solution as regards a number of geographic markets and/or product markets on which competition problems had been identified. This left the Commission no other option but to prohibit the transaction.

#### TetraLaval/Sidel <sup>79</sup>

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<sup>78</sup> COMP/M.2282, 10.10.2001.

46. The Commission undertook a detailed investigation of this proposed concentration in the packaging sector between Tetra Laval (Tetra), the world leader in carton packaging and carton packaging equipment, and Sidel, the world leader in PET (plastic) packaging equipment. The concentration, which was a public bid in the Paris Bourse, was notified to the Commission on 18 May. In the light of the results of its investigation the Commission decided, on 30 October, to prohibit the proposed merger. The grounds for the Commission's decision were, briefly, that the merger would create a market structure which would (a) enable Tetra to strengthen its dominant position in carton packaging by eliminating the biggest competitor in a neighbouring market, PET packaging equipment, and (b) enable Tetra to leverage its dominant position in carton packaging in order to acquire a dominant position in PET packaging equipment. As a result, the merger would have increased concentration in the packaging sector, raised barriers to entry and reduced competition to the detriment of consumers.

UPM-Kymmene/Haindl<sup>80</sup> and Norske Skog/Parenco/Walsum<sup>81</sup>

47. On 20 June 2000, the Commission received a notification of the Finnish pulp and paper company UPM-Kymmene's proposed takeover of its German rival Haindl and of a second concentration which concerned the resale of two of the six Haindl paper mills to the Norwegian paper manufacturer Norske Skog. The markets analysed in this investigation were the markets for newsprint and wood-containing magazine paper (the "paper market"). The focus of the Commission's investigation was the question whether these two transactions would result in the creation of a collective dominant position in the markets for newsprint and paper. These were among the first cases where the Commission investigated the potential creation of collective dominance by four firms. Despite finding a number of characteristics that increased the likelihood that the deals would create collective dominant positions by four and three firms respectively, a number of factors were found which the Commission concluded would, on balance, outweigh these risks. The two transactions were therefore both cleared.

## **6. Contribution to the formulation of other policies**

48. The Directorate General for Competition contributes to the elaboration of all major policies within the scope of activity of the European Commission. Issues on which it has been consulted in 2001 include the Growth and Employment Initiative, the proposed rules for the approval for motor vehicles, the economic analysis and policy implications regarding the impact of the e-economy on European enterprises, the 2001 Innovation Scoreboard, the proposals for a revision of the regulations on pharmaceuticals, the horizontal assessment of the market performance of network industries providing services of general interest, the report on the functioning of product and capital markets, the interpretation of community law on public tenders and the possibility to integrate environmental considerations, and the report on the European Space Policy.

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<sup>79</sup> COMP/M.2416, 30.10.2001.

<sup>80</sup> COMP/M. 2498, 21.11.2001.

<sup>81</sup> COMP/M. 2499, 21.11.2001.

## 7. Resources

### 7.1 Resources overall (current numbers and change over previous year):

1. Annual budget 2001: € 68 million<sup>82</sup>
2. Number of employees (person-years):

	<u>7/2002</u>
⇒ mainly economic orientation	94
⇒ mainly legal orientation	180
⇒ other (mathematics, engineering, ...)	67
⇒ thereof with supplementary degrees	(210)
⇒ support staff	26
⇒ TOTAL	605

### 7.2 Human resources (person-years) applied to:

1. Enforcement against anticompetitive practices: 205
2. Merger review and enforcement : 116
3. Control of State aid : 132
4. General operational support and co-ordination : 85
5. Administrative support : 67

### 7.3 Period covered by the above information: 07/2001-07/2002 (except where otherwise specified)

## 8. Reports and studies on competition policy issues

49. On 20 December, the Commission adopted a report<sup>83</sup> evaluating the functioning of Regulation (EC) No 240/96,<sup>84</sup> the technology transfer block exemption (hereinafter called the "TTBE"). The report

<sup>82</sup> Estimate. No individualised budget allocation for DG COMP in the EC Budget

<sup>83</sup> Commission evaluation report on the transfer of technology block exemption Regulation No 240/96, COM(2001) 786 final, 20.12.2001. The report is also available on the Internet at the following address: [http://europa.eu.int/comm/competition/antitrust/technology\\_transfer/](http://europa.eu.int/comm/competition/antitrust/technology_transfer/)

<sup>84</sup> Commission Regulation (EC) No 240/96 on the application of Article 81(3) of the Treaty to certain categories of technology transfer agreements (OJ L 31, 9.12.1996).

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provides a critical analysis of the application of and policy approach underpinning the TTBE. It stresses in particular the need to adapt the TTBE to ensure consistency with the new Commission block exemptions for distribution agreements,<sup>85</sup> specialisation agreements and R&D agreements,<sup>86</sup> which follow a more economics-based approach.

50. On 28 November, the Commission adopted the 7<sup>th</sup> report examining the state of implementation by EU Member States of the current regulatory framework for telecommunications. The key conclusion of the report is that the telecom services sector is buoyant and that the national regulatory authorities are continuing to make progress with liberalisation. Competition between operators is bringing prices down overall. Incumbents' long-distance calls are down 11% in price since last year and down 45% since 1998 for a three-minute call in Europe, and by 14% since last year and 47% since 1998 for a ten-minute call. The average level of Internet penetration in EU households was around 36% in June 2001. On the other hand, a number of regulatory bottlenecks remain and these will have to be removed rapidly if there is to be continued growth in the telecommunications markets. The key issues are local loop unbundling, lengthy delivery times and absence of cost orientation for leased lines, particularly at the speeds required for broadband and e-commerce rollout, persisting tariff distortions and price squeezes in certain instances and, finally, the full functioning of carrier selection and pre-selection.

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<sup>85</sup> *Commission Regulation (EC) No 2790/1999 (OJ L 336, 29.12.1999).*

<sup>86</sup> *Commission Regulations (EC) Nos 2658/2000 and 2659/2000 (OJ L 304, 5.12.2000).*