

THE EUROPEAN COMMISSION

Summary

Enforcement of EU law

1. The Commission adopted a number of decisions that demonstrate its determination to enforce EU law strictly. Thus, it prohibited an agreement concerning the exchange of information (Wirtschaftsvereinigung Stahl), exempted agreements after amendment (Unisource/Uniworld), imposed fines for abuse of a dominant position (Irish Sugar), prohibited a merger (Blokker/Toys'r Us), conditionally authorised seven other mergers (including Boeing/McDonnell Douglas), and adopted three decisions relating to incompatibility with Article 90.

Modernisation of competition policy

2. The Commission has embarked on a thorough overhaul of EU competition law. Some examples suffice to give an illustration: a revision of the merger control regulation, extending the Commission's competence; a new notice on agreements of minor importance, designed to lighten the burden of notification on firms; a notice on the definition of relevant market, designed to increase the transparency of Community practice in this area; policy deliberations concerning vertical restrictions on competition and horizontal agreements, on completion of which the Commission will put forward concrete proposals in 1998.

International co-operation

3. Initiatives to enhance international co-operation were taken in a number of areas, including assistance to the countries of central and eastern Europe with a view to their future membership of the EU, the strengthening of links with US competition authorities, the furthering of relations with the countries of Latin America, and on-going work within the WTO with the aim of creating a multilateral framework for competition.

I. Main developments in competition policy

1.1. New legislation

1.1.1 The Amsterdam Treaty

4. The Amsterdam Treaty contains a number of provisions that directly concern EU competition policy, including a new Article 7D (of the Treaty of Rome) on services of general economic interest accompanied by a declaration, a protocol on public service broadcasting, a declaration on public credit institutions in Germany and a new Article 227.2 on ultraperipheral regions.

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1.1.2 Merger control

5. Without changing the thresholds set out in Council Regulation (EEC) No 4064/89 on the control of concentrations, Council Regulation (EEC) No. 1310/97¹ created a new category of concentrations falling within the scope of EU competence. Concentrations are deemed to have a Community dimension when they fulfil all of the following four criteria: (i) the aggregate world-wide turnover of all the undertakings concerned exceeds ECU 2.5 billion, and (ii) the aggregate turnover of all the undertakings concerned exceeds ECU 100 million in each of at least three Member States. In addition, in order to include transactions whose effects extend beyond the borders of a single Member State, the regulation provides (iii) that the individual turnover of at least two of the undertakings concerned exceeds ECU 25 million in each of the same three Member States, and (iv) that the individual turnover in the European Union of at least two of the undertakings concerned exceeds ECU 100 million.

6. These measures will make it possible to take better account of the economic realities, to give firms greater legal certainty and to increase administrative efficiency by extending the “one-stop shopping” principle.

1.1.3 Adaptation and improvement of other legislation

7. Regulation (EEC) No 3384/94 on notifications, time limits and hearings, and the annexed notification form known as form CO have been revised with the aim of achieving three objectives: making the changes that had become essential since the amendments to Regulation (EEC) No 4064/89; making the improvements regarded as desirable in the light of experience in carrying out merger controls; and clarifying and specifying certain purely formal and linguistic matters. For the same reasons, the four explanatory notices, relating to the definition of concentration, the undertakings concerned, joint ventures and the calculation of turnover, were also revised in depth.

8. The Commission also simplified the merger control procedure by bringing certain rules falling within the scope of Article 66 of the ECSC Treaty into line with those of Regulation (EEC) No 4064/89².

1.1.4 Telecommunications

9. Three new harmonisation directives were adopted by the European Parliament and the Council in 1997: directive 97/13/EEC of 10 April 1997 on general authorisations and individual licences³, directive 97/33/EEC of 30 June 1997 on interconnection and financing the universal service⁴ and directive 97/51/EEC of 6 October 1997 amending directives 90/387/EEC (ONP framework) and 92/44/EEC (leased lines) with a view to adapting them to a competitive environment in the telecommunications sector⁵. Member States should have transposed the three directives by 31 December 1997 at the latest.

1.1.5 Postal services

10. On 15 December 1997⁶, the European Parliament and the Council adopted a harmonisation directive for the postal sector. The purpose of the directive is to introduce common rules for developing the postal sector and improving service quality and for the gradual and controlled opening up of markets.

1.2. Notices and guidelines

1.2.1 Revision of the “de minimis” notice

11. In 1970, in order to reduce red tape, especially with regard to the notification of agreements, the Commission adopted a notice on agreements of minor importance⁷, meaning agreements which have no significant effect on competition or intra-Community trade and therefore do not fall within the scope of Article 85, paragraph 1 of the Treaty of Rome. The measure was revised in 1977⁸, 1986⁹ and 1994¹⁰. It became apparent, however, that the system did not satisfactorily meet firms’ needs. Agreements of minor importance continued to be notified to the Commission, increasing the workload of merger control staff to no purpose and hampering efficiency. For that reason, on 15 October 1997 the Commission adopted a new notice on the subject¹¹. The main difference compared with the earlier versions of 1986 and 1994 concerns the thresholds beneath which Article 85 is not applied. Two changes were made on this point: the turnover criterion was removed, and a distinction was drawn between horizontal and vertical agreements with regard to the thresholds for market share (for horizontal agreements, the market share threshold remained 5%; for vertical agreements, it was raised to 10%).

1.2.2 Notice on co-operation between Community and national competition authorities

12. On 10 October 1997, the Commission, wishing to further encourage decentralisation of the application of Community competition law, adopted a notice setting out the conditions for co-operation between national competition authorities and the Commission in handling cases falling within the scope of Articles 85 and 86 of the EC Treaty¹².

1.2.3 Notice on the definition of relevant market

13. On 15 October 1997, the Commission adopted a notice on the definition of relevant market for the purposes of Community competition law¹³, in particular Regulations No 17¹⁴ and No 4064/89¹⁵. The notice, which seeks to treat the question from a practical standpoint, draws on the Commission’s previous case law. It aims to give a clear and coherent exposition of the economic principles on which the Commission bases its approach to the definition of the relevant markets.

1.2.4 Guidelines for setting fines

14. On 3 December 1997, the Commission issued guidelines for setting fines. The method for calculating the amount of fines now involves setting a basic amount, assessed according to the gravity and duration of the infringement, which may be increased or reduced if there are aggravating or mitigating circumstances.

1.3 Proposed new legislation

1.3.1 Revision of the policy relating to vertical restrictions

15. The Commission is revising its policy relating to vertical restrictions, materialised by the publication of a Green Paper, adopted on 22 January 1997¹⁶. This consultation document has fostered a wide-ranging debate on the effects of vertical restrictions and the need to revise the Commission’s

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existing legislation and practice in the matter. The Commission should be able to make a proposal in 1998.

1.3.2 Revision of the policy relating to horizontal agreements

16. The Commission decided in 1997 to review its policy relating to horizontal agreements. Should the need be felt, the Commission is resolved to revise and adapt existing legislation and practices, in particular block exemption regulations relating to research and development agreements and specialisation agreements, the validity of which was extended for three years¹⁷, with a view to possible revision.

1.3.3 Directive proposal pursuant to Article 90, paragraph 3, concerning the legal separation between cable and telecommunications activities

17. On 16 December 1997, the Commission approved a directive proposal pursuant to Article 90, paragraph 3, designed to prevent previous telecommunications monopolies from delaying the emergence of new, more sophisticated communications services provided via the cable network and thus hindering technological progress at the users' expense.

1.3.4 Notice on Internet telephony

18. On 2 May 1997, the Commission published, for consultation, a notice concerning the application of directive 90/388/EEC to Internet telephony. The Commission's position is that such services cannot at the present time be regarded as voice telephony because a certain number of conditions are not yet met, though in view of technological advances they could be met in the near future. If that were the case, the Commission would reconsider its position. The Commission is planning to adopt a final version of its notice in early 1998, taking into account the many observations received.

1.3.5 Directive proposal concerning common rules for the internal gas market

19. On 8 December 1997, the "Energy" Council came to a political agreement on the directive proposal concerning the opening-up of the Community natural gas market. The Commission is satisfied with the conclusion of the agreement. The directive establishes common rules for the transport, distribution, supply and storage of natural gas; it regulates market access and the operation of networks and sets out criteria and procedures for the granting of authorisations to transport, distribute, supply and store natural gas.

20. As regards the organisation of access to networks, Member States may choose between two options: negotiated access or regulated access. Both must be applied according to objective, transparent and non-discriminatory criteria. In theory, "upstream" gas pipelines must also be open, though under terms and conditions to be set by the Member States.

1.3.6 Application of competition rules to air links between the Community and third countries

21. The globalisation of air transport markets has led to the proliferation of alliances between airlines relating to links between EU Member States and third countries. In order to adapt its competition policy instruments to this situation, on 16 May 1997 the Commission adopted a memorandum containing

two proposals for Council regulations on the application of competition rules to air transport, especially links between the Community and third countries¹⁸. The first proposal concerns extension of the scope of Council Regulation (EEC) No. 3975/87¹⁹, which covers air transport between airports within the Community, to air links between Community and third country airports. The second proposal authorises the Commission to grant block exemptions for certain agreements restricting competition on such external links.

II. Enforcement of competition law and policy

2.1. Abuse of dominant position, cartels

2.1.2. Undertakings in a dominant position

2.1.2.1 Irish Sugar plc

22. The Commission imposed a fine of ECU 8.8 million on Irish Sugar plc. The company, Ireland's only sugar processor, with a 90% share of the market, was found to have abused a dominant position in connection not only with its repeated attempts to hinder competition from small Irish sugar packers but also with its attempts to limit competition from imports from France and Northern Ireland. For example, Irish Sugar offered discriminatory prices or discounts to the customers of a French sugar importer and discriminatory discounts to industrial customers exporting some of their production to other Member States. These practices led to the erection of artificial barriers between Member States and disturbed the fluidity of the market.

2.1.2.2 Belgacom

23. A positive outcome was reached in 1997 in the Belgacom case, referred to the Commission in a complaint for abuse of dominant position filed by ITT Promedia NV in 1995. ITT Promedia NV, the Belgian subsidiary of ITT World Directories Company, an American publisher of telephone directories, accused Belgacom, the Belgian telecommunications operator, of charging discriminatory and excessive prices for access to data on subscribers to its voice telephony services. The Commission considered that, insofar as publishers of directories were dependent on telecommunications operators, access to data should be non-discriminatory and based on prices calculated according to the operator's own costs. After intervention by the Commission, Belgacom agreed to change its prices.

2.1.2.3 SWIFT

24. On 24 March 1997, the Commission initiated a formal procedure against SWIFT, a co-operative owned by 2000 banks which manages an international telecommunications network offering specialist data transmission and processing to financial institutions located all over the world. Following a complaint from La Poste, a French public enterprise which had been refused access to the network, the Commission, in a statement of objections, considered that SWIFT had infringed the provisions of Article 86. The Commission argued that SWIFT had a dominant position of a monopolistic type since it was the only international network to transmit payment messages and the only network to provide connections for banks anywhere in the world and had abused its dominant position by imposing unjustified admission

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criteria. The case was ultimately settled after SWIFT had given a formal undertaking to grant full access to all entities fulfilling European Monetary Institute criteria for admission to domestic payment systems²⁰.

2.1.2.4 Digital Equipment Corporation

25. The Commission initiated a procedure against Digital Equipment Corporation for infringement of Article 86²¹. It considered that Digital had abused its dominant position by applying a commercial policy characterised by discriminatory practices and tied selling with the aim of hindering the ability of independent service providers to compete against Digital on markets for hardware maintenance and other services for Digital computers. After being informed of the objections and disputing them, Digital proposed formal undertakings to change its commercial and pricing policy.

2.1.3 *Information society*

2.1.3.1 Alliances between operators

26. On 29 October 1997, the Commission approved the creation of Unisource and Uniworld, two international alliances between telecommunications operators²². Unisource is a consortium whose members are the Swedish, Dutch and Swiss telecom operators (Telia, PTT Telecom and Swiss Telecom respectively). Uniworld is a joint venture between Unisource and AT&T. The consortia were created in response to a dual concern: achieving critical size and establishing a broad geographical presence which, in this sector of activity, implies partnership with an American player. The agreements setting up the alliances were reviewed from the standpoint of Article 85 and authorised by way of a five-year individual exemption, following changes to the agreements and under certain conditions relating to the consortia's structure and conduct.

2.1.3.2 Mobile communications

27. In 1997, the Commission approved an agreement concluded between mobile phone operators using the GSM standard, which had formed an international association with over two hundred members. The purpose of the agreement was to develop a non-compulsory standard form designed to facilitate bilateral negotiations between operators wishing to conclude roaming agreements. Such agreements are necessary in order to co-ordinate GSM networks and allow subscribers to use their mobile phones to the maximum wherever they may be.

2.1.3.3 Telecommunications charges

28. The Commission investigated the charges for third party access to the infrastructure of Deutsche Telekom AG (DT), the German telecommunications operator. The investigation produced two findings in particular: first, DT was not able to prove that its charges were cost-oriented; second, price levels were 100% higher than those on comparable competitive markets. Although the Commission is not and does not wish to be a price regulatory authority, it asked DT to adapt its prices to the real economic situation so as to ensure that its pricing practices would not be deemed an abuse of dominant position. DT ultimately agreed to reduce its network access charges, in particular to providers of business services, by 38% for

access to local networks and by 78% for access to trunk networks. The Commission then decided to shelve the procedure.

2.1.3.4 Information technology

29. Santa Cruz took over AT&T's activities relating to the UNIX system for high-capacity microcomputers. In doing so, it also succeeded to an agreement between Microsoft and AT&T concluded ten years earlier which provided that Microsoft would produce a single version of the UNIX system (both partners produced the system at the time). Under the terms of the agreement, the parties were required to design any new version of the UNIX system on the basis of Microsoft's primitive version and to make it compatible with software developed by Microsoft and AT&T before 1987. This meant that Santa Cruz would have to use Microsoft's obsolete technology for any new product. However, Santa Cruz and Microsoft are competitors on this particular market for UNIX systems. Such provisions were thus regarded as restricting competition insofar as they hindered a competitor's capacity to innovate. After receiving the Commission's statement of objections, Microsoft unilaterally and irrevocably decided to release Santa Cruz from its contractual obligations relating to utilisation of the primitive version of the UNIX system. Consequently, Santa Cruz decided to withdraw its complaint.

2.1.4. *Transport sector*

2.1.4.1 Maritime transport

30. On 31 October 1996, P&O and Stena notified the creation of a joint venture, P&O Stena Line, for their cross-Channel ferry services. As the transaction did not constitute a concentration within the meaning of Regulation No 4064/89 on the control of concentrations, it therefore fell within the scope of Article 85. However, the French and British authorities considered that the transaction constituted a merger within the meaning of their respective legislation and as such had been notified. Three parallel procedures had thus been initiated. The Commission's concern was to ensure frank co-operation with the national authorities and to avoid contradictory decisions.

31. On 10 June 1997, the Commission sent the parties a letter expressing serious doubts as to the compatibility of the transaction with Community competition law. In a nutshell, the risk of an oligopolistic dominant position between the new joint enterprise and its chief rival, Eurotunnel, on the cross-channel passenger transport market could not be ruled out. After examining and discussing the situation with the national authorities concerned, and conditional on conclusion of the procedure under way, the Commission announced its intention of granting P&O Stena Line an individual exemption for a limited period.

2.1.4.2 Air transport

32. The Commission continued to review concurrently several alliances between European and American airlines²³, namely British Airways and American Airlines, Lufthansa and United Airlines, SAS and United Airlines, Swissair/Sabena/Austrian Airlines and Delta Air Lines, and KLM and Northwest.

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2.1.5 *Energy*

33. In the electricity sector, the Commission continued to monitor compliance with the objective of the liberalisation directive by ensuring that firms with dominant positions on their domestic markets, especially those which had previously had monopolies, did not abuse them in order to close the markets. In doing so, the Commission sought to take a measured and responsible attitude so as to ensure that the necessary security of supply continued to be guaranteed.

34. This was the case with Electrabel: new articles of association linking Electrabel to local authorities established partnerships lasting 20 to 30 years and gave Electrabel an exclusive right to supply communes with electricity for resale to final consumers for the same period. Such provisions would therefore have held back changes on the Belgian electricity market for a very long time. Under these circumstances, users would not have been able to benefit from the advantages resulting from the introduction of competition into the sector.

35. For that reason the Commission considered initiating a procedure on the grounds of Articles 85 and 86 with a view to prohibiting the new articles of association. After consultation with the parties in the case and proposed amendments to the articles of association, the Commission suspended its investigation. Under the new articles of association, the exclusive right in favour of Electrabel will become void from 2011, and from 2006 the exclusive right will concern only 75% of the needs of each mixed intercommunal electricity distribution company. In addition, in order to facilitate a change of supplier, from 2011 Electrabel will not oppose the dissolution of a mixed intercommunal company, provided that it is fairly compensated.

2.1.6 *Financial sector*²⁴

36. The Commission intends to ensure that Monetary Union is implemented in compliance with the principles of competition contained in the Treaty of Rome. Thus, it has set out its preliminary views on the applicability of Article 85 to the TARGET payment system created by the European Monetary Institute and the national central banks. The TARGET system, which will come into operation at the beginning of Stage III of Economic and Monetary Union and will be managed by the European System of Central Banks, is likely to concern three categories of payment: payments directly related to monetary policy that involve the European System of Central Banks; interbank payments (arbitrage transactions); and payments involving bank customers, be they corporations or private individuals.

37. As regards the first category, it was considered that Article 85, paragraph 1 did not apply insofar as the parties involved were not firms. The second and third categories did fall within the scope of Article 85, however, since the parties involved are economic operators; moreover, other private payment systems are also present on the market. The first question mark concerned the planned uniform end-to-end price for payments made via TARGET, intended for all the agents involved in the transaction; here, the Commission acknowledged that the system helped to create an effective instrument for managing cross-border arbitrage transactions and was likely to increase the security of the money market within the euro zone. The second question mark concerned the level of the uniform end-to-end price. The European Monetary Institute was reminded that the charges should cover all costs, including handling costs. The Institute undertook to inform the Commission of all subsequent developments.

2.2 *Mergers*

2.2.1 *Definition of the market*

38. A number of criteria are used to define product markets in the convenience goods sector, especially markets for foodstuffs. Consumers' tastes and preferences, for example, are often decisive factors in determining whether products are substitutable from a demand standpoint. In this respect, consumption habits are influenced not only by the physical properties and generic characteristics of a product but also by brand awareness, from which, as a counterpart, a firm may draw its competitive strength. On the basis of these considerations the Commission had the task, in three cases, of defining distinct markets for alcoholic or non-alcoholic beverages, reviewing a set of factors influencing substitutability between different product groups according to the characteristics of demand on the market in question. The three cases were The Coca-Cola Company/Carlsberg, Coca-Cola Enterprises/Amalgamated Beverages GB and Guinness/Grand Metropolitan.

2.2.2 *Assessment of dominant position*

2.2.2.1 Dominant position in global terms

39. In a context of globalisation, the growing number of business concentrations involving very large firms operating on global markets is likely to have significant effects within the common market. Some of these transactions, taking place on global markets with few competitors and high barriers to entry, raise a serious risk of creating or strengthening a dominant position.

40. Applying the merger control regulation to this type of transaction may involve extra-territorial aspects, especially when the firms are established outside the common borders of the European Union and the transaction (merger, acquisition or creation of a joint enterprise) also takes place outside the European Union. Leaving aside the triggering of the notification requirement when the turnover thresholds laid down in the regulation are crossed, the critical factor for the attribution of competence lies in the transaction's operational scope within the common market. There is little doubt as to competence in cases where the reference geographical market is defined on a global scale, since the European Union represents a substantial proportion of the world market. In such cases, competence is based on the transaction's effects on the conditions of competition in the common market. Even when the reference market is not defined on a global scale, however, the Commission may base its competence to review a concentration between firms having neither their registered office nor subsidiaries nor establishments in the European Union on the transaction's effects on the conditions of competition in the common market.

41. In this context the Boeing/McDonnell Douglas case, resulting in the creation of the world's largest aviation firm, led the Commission to undertake an in-depth investigation because of its impact on competition. After the merger, the firm had over 60% of the world market for large commercial aircraft with more than 100 seats, a highly concentrated market since only one competitor, Airbus, remained after the merger. As Boeing already dominated the market, the strengthening of its position resulted from a range of factors, including an immediate increase in market share and larger order books. Other vital factors also helped to strengthen Boeing's dominant position. Amongst them, the Commission chiefly noted the possibility of applying leverage to users of McDonnell Douglas aircraft, the increased possibility for concluding exclusive long-term supply agreements with airlines, the combination of patent portfolios and the advantages, in terms of technological spin-offs, derived from the public funding of R&D programmes in the firm's defence and space activities.

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42. Given the absence of any other potential entrant (no other aircraft manufacturer was interested in acquiring the businesses concerned), Boeing offered undertakings concerning mainly the lifting of exclusive agreements, the ring-fencing of MDC's commercial aircraft activities, and third party access to patents. The firm is also to submit an annual report to the Commission on publicly funded R&D projects. As this set of measures was deemed sufficient to remedy the effects on competition, the Commission decided to give the transaction conditional authorisation.

2.2.2.2 Effects of closing the market

43. The Commission's investigations in the BT/MCI case relating to the merger of British Telecommunications and MCI Communications Corporation showed that the merger was liable to create or strengthen a dominant position on the market in international voice telephony services between the United Kingdom and the United States of America. The risk arose from the relative shortage of transmission resources on the UK/US transatlantic cable link in a context of strongly rising demand, likely to lead to a bottleneck.

44. The Commission considered that cable and satellite were not substitutable as regards the provision of telecommunication services designed to provide transatlantic links. As BT and MCI had substantial cable capacity, their aggregate capacity to carry traffic on end-to-end links further increased their power. Consequently, the parties would have benefited from specific advantages, especially as regards international payments. No other competitor on the UK/US link would have enjoyed similar advantages. In addition, the new entity would have been in a position to oppose competition from other operators. In response to the Commission's objections, the parties put forward undertakings which mainly involved making capacity available on transatlantic cables and offering to sell the associated half-circuits to other operators on request.

2.2.2.3 Referrals back to Member States

45. The SEHB/VIAG/PE-BEWAG case, relating to the privatisation of the Berlin electricity supplier Bewag, was the only example in 1997 where an entire case notified to the Commission was referred back to the national authorities concerned. The decision was taken on an application from the Bundeskartellamt, arguing that the participation of PreussenElektra, the other electricity supplier, threatened to strengthen a dominant position in the supply of electricity to Berlin and the Berlin area. In the new Länder, PreussenElektra controls certain regional electricity suppliers whose markets surround the zone supplied by Bewag. As these separate markets do not constitute a substantial part of the common market, the Commission decided to refer the case back to the Bundeskartellamt. Partial referrals back to national authorities were also made in a number of other cases, such as the take-over bid in France from Promodes, a mass retailer, for its competitor Casino.

2.2.2.4 Fully active joint ventures

46. In applying merger controls, a distinction used to be drawn according to whether a joint venture was concentrative or co-operative. This distinction was ended when the amendments to the merger control regulation came into force. Now, the only criterion for applying the merger control regulation to this type of transaction is whether or not the enterprise is fully active.

47. The chief criteria for determining whether a joint venture is fully active relate to whether the joint venture has at its disposal all the necessary resources in terms of funding, staff, tangible and intangible assets. It was on those grounds that Fuel Logistic, a joint subsidiary for the transport of nuclear materials created by RSB Logistic Projektspedition and AO Techsnabexport in Germany (RSB/Tenex/Fuel Logistic) was deemed not to constitute a business concentration, since it did not have at its disposal the necessary assets, such as special transport material, specialised staff, suitable premises, etc. that would have enabled it to provide its services on the market. Moreover, Fuel Logistic was intended to provide its services mainly to one of its two parent companies and to act as an auxiliary enterprise of RSB.

III. Judgements of the Community Courts

1.1 *Diego Cali and Figli Srl v Servizi Ecologici Porto de Genova SpA.*²⁵

48. The Court of Justice held that Article 86 should be construed as not applying to the antipollution monitoring activity of a private organisation given such an assignment by the public authorities in the port of a Member State, even if the users of the port had to pay fees to finance the activity.

1.2 *V.GB*²⁶

49. In a judgement of 14 May 1997, the Court of First Instance considered a set of agreements between five Dutch wholesalers and VBA, a co-operative. Under the terms of these so-called Cultra agreements, the wholesalers undertook to purchase flowers exclusively from VBA's members, for subsequent resale to retailers. Assessing whether the agreements complied with Article 85.1 of the Treaty of Rome, the Court held that the obligation of exclusivity concerned only five wholesalers and was not binding on Dutch retailers and that hence the theory of cumulative effect did not apply. Consequently, it concluded that the exclusivity obligation did not contribute significantly to any compartmentalisation of the Dutch market.

1.3 *Syd-Consult*²⁷

50. The Court of Justice, once again asked to rule on whether a non-hermetic automobile distribution network could be relied upon as against third parties, extended the interpretation of the Cartier judgement²⁸ to Article 85.3 of the Treaty and to the block exemption regulations. The Cartier judgement held that the hermetic nature of a network was not a condition of validity with regard to Article 85.1 of the Treaty.

1.4 *Tiercé Ladbroke SA*²⁹

51. The Court confirmed the definition of relevant market adopted by the Commission in a case involving televised horse races in Belgium. The case concerned an agreement between MPI and DSV giving DSV an exclusive right to exploit the television pictures and sound commentary of French horse races in Germany in particular. Ladbroke had asked DSV for the right to broadcast the sound and pictures in Belgium; DSV had refused on the grounds that it was prohibited from granting such a right because of the exclusive agreement. The Commission had considered that the product market in question concerned

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sound and pictures in general and not French sound and pictures, since in the Commission's interpretation the latter were substitutable for the sound and pictures of other races, a conclusion it arrived at after observing the conditions of competition on the German market. The Court upheld this position. Concerning the definition of the geographical market in question, the Court considered that the conditions of competition on the market for sound and pictures should be assessed from a demand standpoint. Demand originated with betting shops, which wanted to transmit the sound and pictures to the consumers, i.e., the punters. Thus, the way in which the market operated downstream from the sound and pictures was determined by the way in which the principal betting market operated.

1.5 *AssiDomän Kraft Products AB*³⁰

52. In a judgement of 10 July 1997, the Court ruled on whether the effects of its annulment³¹ of the "wood pulp" decision³² could apply to firms that had not brought an action for annulment. Answering in the affirmative, the Court found that the Commission was therefore required to review the legality of the wood pulp decision under the terms of Article 176 and, on the basis of its review, to assess whether the fines paid by firms that had not applied for the decision to be set aside should be reimbursed.

1.6 *GT-Link A/S (harbour duties)*³³

53. The Court of Justice found that the fact that a public enterprise owning a commercial port exempted its own ferry services from harbour duties could constitute an abuse prohibited by the provisions of Articles 90.1 and 86. Such would be the case, for example, if the public enterprise did not allocate in its accounts a sum equivalent to the amount of the dues payable under normal circumstances to the part of its activity relating to the operation of ferry services.

1.7 *Deutsche Bahn AG (rail transport)*³⁴

54. The Court of First Instance upheld the Commission's decision according to which Deutsche Bahn AG had abused its dominant position by causing significantly higher transport prices to be charged for transport between German locations and a Belgian or Dutch port than for transport between German locations and German ports.

1.8 *SCK and FNK v Commission (Dutch cranes)*³⁵

55. The Court upheld the "Dutch cranes" decision against SCK's certification system for seriously hindering access by third parties to the Dutch market. In particular, the system excluded firms established in other Member States. The Commission had based its decision on the system's lack of openness and on the failure to accept equivalent guarantees from other systems.

1.9 *Commission v Netherlands*³⁶, *Commission v Italy*³⁷, *Commission v France*³⁸, *Commission v Spain*³⁹ (exclusive rights to import and export gas and electricity)

56. In the context of a procedure for breach of Article 169, the Court was asked to rule on whether statutory monopolies on the import and export of gas and electricity complied with the provisions of the Treaty.

57. After accepting the Commission's argument that such a monopoly was contrary to Article 37⁴⁰, the Court responded to the Member States' arguments that such a monopoly could be justified on the grounds of Article 90.2. The Court accepted these arguments: "Having regard to the scope of paragraphs 1 and 2 of Article 90 and to their combined effect [...] paragraph 2 may be relied upon to justify the grant by a Member State, to an undertaking entrusted with the operation of services of general economic interest, of exclusive rights which are contrary to, in particular, Article 37 of the Treaty"⁴¹.

2.0 Commission and French Republic v Ladbroke Racing Ltd⁴²

58. The Court of Justice set aside a judgement of the Court of First Instance based on the premise that the lawfulness, in terms of Articles 85 and 86 of the Treaty, of conduct of undertakings complying with national legislation, and the action which should be taken against them, depended on whether that legislation was compatible with the Treaty.

59. On the contrary, the Court ruled that the compatibility of national legislation with the Treaty rules on competition could not be regarded as decisive in the context of an examination of the applicability of Articles 85 and 86.

60. While recalling that Articles 85 and 86 of the Treaty applied only to anticompetitive conduct engaged in by undertakings on their own initiative, the Court ruled that, although it was true that the assessment of the conduct of undertakings in the light of Articles 85 and 86 of the Treaty required a prior evaluation of the national legislation, the sole purpose of that evaluation was to determine what effect that legislation may have on such conduct. The evaluation should therefore be directed solely to ascertaining whether that legislation prevents undertakings from engaging in autonomous conduct which prevents, restricts or distorts competition:

- if anticompetitive behaviour is required of undertakings by national legislation or if the latter creates a legal framework which itself eliminates any possibility of competitive activity on their part, Articles 85 and 86 do not apply. In such a situation, the restriction of competition is not attributable, as those provisions implicitly require, to the autonomous conduct of the undertakings;
- Articles 85 and 86 may apply, however, if it is found that the national legislation does not preclude undertakings from engaging in autonomous conduct which prevents, restricts or distorts competition.

2.1 Job Centre (placement of workers)⁴³

61. Confirming its Höfner case law, the Court of Justice considered that a Member State which prohibits any activity as an intermediary or negotiator between demand and supply on the employment market not carried on by placement agencies infringes Article 90.1 of the Treaty when it creates a situation in which public placement agencies cannot avoid infringing Article 86 of the Treaty.

62. In the case in question, the breach of Articles 86b and 90.1 resulted in particular from the fact that public placement agencies are manifestly unable to satisfy demand on the employment market for all types of activity.

4.1 *Central and Eastern European Countries*

4.1.1 *The Sofia Conference*

63. The annual conference between the competition authorities of the associated countries (Poland, Czech Republic, Hungary, Slovakia, Slovenia, Bulgaria, Romania, Lithuania, Latvia and Estonia) and the Commission took place on 12 and 13 May 1997 at Sofia in Bulgaria. The results of the conference are contained in a joint declaration which reviews progress on the adoption by the Associated States of the broad principles of EU competition law.

64. Some of the States have tightened up their national competition law. Hungary and Romania, for example, introduced new competition laws which came into force on 1 January and 1 February 1997 respectively.

65. Broadly speaking, the Sofia conference confirmed that the competition authorities in most Associated States were fully operational and were handling a growing number of cases involving breaches of the rules laid down in Articles 85, 86 and 90. This explained their request for further assistance from the Commission. A definite need was felt for training that was less theoretical and directed more towards the practical application of competition rules. The Commission said that it was willing to respond along these lines.

66. The situation with regard to the control of State aids, however, was much less satisfactory. Significant delays in the introduction of legislation and the setting up of supervisory authorities were apparent in most Associated States. In addition, such authorities, where they existed, faced numerous difficulties. One of the main obstacles was the lack of transparency in the institutions responsible for granting aids, making it impossible to draw up an accurate inventory of such aids. Reforms were under way in most Associated States, with the Commission's full backing. Lastly, the Commission undertook, with the help of the Associated States, to draft guidelines on state aids that would take account of the particular situation of the economies in transition.

4.1.2 *Enforcement measures*

67. Measures to enforce competition rules regarding state aids in the Czech Republic had been agreed in principle in the EU Council working group. These measures, due to be adopted by the Association Council in 1998, were based on the broad principle that state aids are incompatible with the operation of markets. However, some aids may be granted exceptional treatment on the basis of the Article 92 criteria.

4.1.3 *Expansion and competition policy*

68. On 15 July 1997, the Commission adopted a set of documents relating to the accession of ten Associated States to the European Union. Two documents are particularly relevant from a competition standpoint: the Commission's opinion and the impact study.

69. In its opinion, the Commission noted that from an antitrust standpoint most of the Associated States fulfilled the requirements of convergence of legislation. It welcomed the establishment of competition authorities, theoretically independent of government authorities. However, the Commission

voiced certain reservations regarding these authorities' enforcement of competition rules, due to a lack of practical experience, fragmented controls and the lack of a genuine competition culture. As regards State aids, the opinion noted shortcomings in all Associated States, especially with regard to transparency in the granting of aids and the effectiveness of supervisory authorities.

70. In its impact study, the Commission emphasised the practical difficulties for supervisory authorities that an enlarged Union with 25 countries and 21 languages would be bound to raise. Despite efforts to decentralise and expedite procedures, it was self-evident that the accession of the Associated States would generate considerable manpower needs, even if procedural rules were simplified. Moreover, from a legal standpoint, expansion was a challenge for the decentralisation policy of the Commission, which would be under an obligation to ensure that EU competition law was applied uniformly throughout the Union. Although it was encouraging for the future that the legislation of Associated States was to be brought into line with Community legislation, the enforcement authorities were far from having the necessary experience to enforce competition law effectively, raising certain fears at the Commission. Lastly, enlargement would have a profound effect on EU policy on regional public aids. Already almost 50% of the Union's population lived in regions admissible for regional aid under Article 92.3 a) and c), a proportion that was regarded as a ceiling. Given that standards of living were generally lower in the Associated States, their accession would increase the overall proportion of the population living in assisted regions. In addition, as the average standard of living in the Union would automatically fall, some regions currently admissible under Article 92.3 a) could find themselves excluded.

4.2. *North America*

4.2.1 *United States of America*

4.2.1.1 Implementation of the co-operation agreement⁴⁴

71. On 4 July 1997, the Commission adopted the second report on implementation of the agreement concluded in 1991 between the European Communities and the United States government concerning enforcement of their competition rules, covering the period 1 July 1996 to 31 December 1996⁴⁵. The report supplemented the first report on implementation of the agreement, which covered the period from 10 April 1995 to 30 June 1996⁴⁶.

72. The third report covers the period from 1 January 1997 to 31 December 1997. Co-operation between the Commission and its counterparts in the United States had been positive during the period and had contributed to the effective resolution of a number of cases.

73. The agreement continued to provide a useful and important framework for co-operation between the Commission and the United States. The advantages of this co-operation, which had been described in the first and second reports, continued to be felt on both sides of the Atlantic. They were of benefit not only to the competition authorities but also to the companies concerned, insofar as finding compatible solutions was in everybody's interest.

74. The Boeing/MDD merger had been the subject of close co-operation between the Commission and the US Federal Trade Commission. The case was especially important not only because of the economic and political issues at stake but also because the Commission and the FTC had arrived at

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diverging conclusions. The Commission was concerned for the competitive situation on the market for large commercial jet aircraft, while the FTC had decided not to oppose the merger.

75. Co-operation proved to be particularly close and fruitful in the Guinness/Grand Metropolitan case. Commission staff and their American counterparts were in frequent contact throughout their respective investigations. The FTC sent observers to the public hearings held during the procedure initiated under the merger control regulation. Although Commission and FTC staff use different definitions for product markets and geographical markets in their assessments, their contacts enabled them to gain a better understanding of each other's reasoning and to refine their assessments as a result. With regard to the measures to be taken, the parties were willing, once negotiations had reached a certain point, to allow discussions on the subject between the staff responsible. This resulted in a co-ordination that might not have been possible otherwise, and in particular made it possible to ensure that the measures finally taken in each country were consistent as regards both scope and timing.

76. The Commission also co-operated with the US Department of Justice on a certain number of alliances between European and US airlines. US Department of Justice representatives attended the hearings which took place on 3 and 4 February 1997 in the British Airways/American Airlines case.

4.2.1.2 The draft European/American agreement on active courtesy

77. On 18 June 1997, the Commission adopted a proposed agreement between the European Communities and the United States government on application of the "active courtesy" principle in competition matters. This principle states that if one of the parties to the agreement is affected by an anticompetitive practice engaged in on the territory of the other party, it may ask that party to take appropriate measures⁴⁷. The agreement was signed on 4 June 1998.

78. The new agreement is based on the positive results of the co-operation between EU and US competition authorities introduced by the 1991 agreement, Article V of which provided for application of the active courtesy principle. The new agreement strengthens this co-operation by setting out the circumstances in which the partners may invoke the active courtesy principle. In particular, the agreement provides that one of the contracting parties may postpone or suspend its control of anticompetitive practices that principally affect the territory of the other party if that party is willing to take action. The agreement, unlike the first, does not concern concentrations, since neither EU nor US law would allow the postponement or suspension of public action.

79. The new agreement on the rules of active courtesy is an important step forward in relations with the United States, since the US and the EU have now undertaken to co-operate in the enforcement of antitrust legislation rather than seeking to apply their respective antitrust legislation extraterritorially.

4.2.2 *The co-operation agreement with Canada*

80. A draft agreement between the European Communities and the Canadian government on application of their respective competition legislation was finalised in July 1997 and is currently being discussed within the institutions of the European Union. The agreement must be adopted by a joint decision of the Council and the Commission after consulting the European Parliament.

81. The co-operation agreement has been made necessary by the growing number of cases involving the contracting parties' competition authorities. Its aim is to avoid contradictory decisions, especially with

regard to solutions to identified competition problems. The draft agreement is very similar to the 1991 agreement between the European Communities and the United States.

4.3 WTO

4.3.1 Trade and competition

82. On 11 December 1996, the Singapore Conference decided to “establish a working group to study issues [...] relating to the interaction between trade and competition policy, including anticompetitive practices, in order to identify any areas that may merit further consideration in the WTO framework”.

83. Professor Jenny, vice-chairman of the French Competition Council, was chosen by consensus to chair the working group, which met three times in 1997 and has decided to meet at least four times in 1998 before submitting its report to the General Council as provided for in its terms of reference.

84. Positive results have been recorded from the outset. The group first adopted a timetable, enabling it to structure its work and make progress on substantive issues without any major problems. Discussions, which, in accordance with the working group’s terms of reference, have taken place in co-ordination with UNCTAD, have shown that most countries are convinced that competition rules are useful. At the most, some countries have argued for a gradual approach taking local circumstances into account, emphasising the social effects of the introduction of a competition policy.

V. New reports and studies on competition policy issues

XXVI Report on Competition Policy (1996): available on request from the Information Unit

XXVII Report on Competition Policy (1997): available on request from the Information Unit

EC Competition Policy Newsletter (end 1997, February 1998 and June 1998)

Notice from the Commission on agreements of minor importance (OJ C 372 of 9.12.1997)

Notice on co-operation between national competition authorities and the Commission in handling cases falling within the scope of Articles 85 and 86 of the EC Treaty (OJ C 313 of 15.10.1997, p.3)

Notice from the Commission on the definition of relevant market for the purposes of Community competition law (OJ C 372 of 9.12.1997, p. 5)

Competition law in the European Communities. Volume IIIA: international rules (situation at 31 December 1996). Catalogue n° CM-89-95-858

Guidelines for calculating fines imposed pursuant to Article 15.2 of Regulation No. 17 and Article 65.5 of the ECSC Treaty (OJ C 9 of 14.1.1998, p. 3).

NOTES

1. OJ L 180 of 9.7.1997, p. 1.
2. Notice from the Commission on the alignment of procedures for treating concentrations under the terms of the ECSC and EC Treaties.
3. OJ L 117 of 7.5.1997, p. 15.
4. OJ L 199 of 26.7.1997, p. 32.
5. OJ L 295 of 29.10.1997, p. 23.
6. OJ L 15 of 21.1.1998, p. 14.
7. Notice from the Commission on agreements of minor importance (OJ C 64 of 2.6.1970).
8. Notice from the Commission on agreements of minor importance (OJ C 313 of 29.12.1977).
9. Notice from the Commission on agreements of minor importance (OJ C 231 of 12.9.1986).
10. Notice from the Commission on agreements of minor importance (revised) (OJ C.368 of 23.12.1994).
11. Notice from the Commission on agreements of minor importance(OJ.C. 372 of 9.12.1997).
12. Notice on co-operation between the Commission and the competition authorities of the Member States for the treatment of cases under Articles 85 and 86 of the EC Treaty (OJ C 313 of 15.10.1997, p.3).
13. Notice from the Commission on the definition of the relevant market for the purposes of Community competition law (OJ C 372 of 9.12.1997, p. 5).
14. Council Regulation n° 17 of 6 February 1962 (OJ 13 of 21.2.1962, p. 204/62).
15. Council Regulation (EEC) n° 4064/89 of 21 December 1989 (OJ L 395 of 30.12.1989, p.1, corrected in OJ L 257 of 21.9.1990, p.13) and Commission Regulation (EEC) n° 2367/90 of 25 July 1990 (OJ L 219 of 14.8.1990), amended by Commission Regulation (EEC) n° 3666/93 of 15 December 1993 (OJ L 336 of 31.12.1993).
16. COM(96) 721.
17. OJ L 306 of 11.11.1997.
18. COM(97) 218 final and OJ C 165 of 31.5.1997, p. 13 - 15.
19. Council Regulation n°3975/87 (OJ L 374 of 31.12.1987, p.1) amended by Regulation n° 2410/92 (OJ L 240 of 24.8.1992, p.18).
20. Case n° IV/36.120-La Poste v SWIFT + GUF (OJ C 335 of 6.11.1997, p.3).
21. The Commission has also raised the question of whether some of Digital's distribution agreements are compatible with Article 85 of the Treaty.

22. XXVIth Report on Competition Policy, point 68.
23. XXVIth Report on Competition Policy, points 99 - 101.
24. See section on undertakings in a dominant position, where there is a commentary on the SWIFT case.
25. CJEC, 18 March 1997, case C-343/95.
26. CFI, 14 May 1997, case T-77/94, VGB.
27. CJEC, 5 June 1997, case C-41/96.
28. CJEC, 13 January 1994, case C-376/92, rec. I, p.15
29. CFI, 12 June 1997, case T-504/93
30. CFI, 10 July 1997, case T-227/95
31. CJEC 31 March 1993, cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85, rec. p.I-1307, *Ahlström Osaakeyhtiö et al v Commission*.
32. Commission Decision n° 85/202/EEC of 19 December 1984 on a procedure for application of Article 85 of the EC Treaty (IV. 29.725 – Wood pulp, OJ 1985, L 85, p.1).
33. CJEC, 17 July 1997, case C-242/95.
34. CFI, 21 October 1997, case T-229/94.
35. CFI, 22 October 1997, cases T-213/95 and T-18/96.
36. CJEC, 23 October 1997, case C-147/94
37. CJEC, 23 October 1997, case C-158/94
38. CJEC, 23 October 1997, case C-159/94
39. CJEC, 23 October 1997, case C-160/94
40. This provision states that “Member States shall progressively adjust any State monopolies of a commercial character so as to ensure that when the transitional period has ended no discrimination regarding the conditions under which goods are procured and marketed exists between nationals of Member States”.
41. Cf. e.g. case C-159/94, n° 49.
42. CJEC, 11 November 1997, cases C-359/95 P and C-379/95 P
43. CJEC, 11 November 1997, case C55/96
44. Agreement between the Government of the United States of America and the Commission of the European Communities on application of their competition legislation (OJ L 95 of 27.4.1995, pp.45-50 corrected by OJ L 131 of 15.6.1995, p. 38).
45. COM(97) 346final, see XXVIth Report on Competition Policy, p. 340-346.

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46. Adopted on 8 October 1996, COM(96) 479 final, see XXVth Report on Competition Policy, p. 325-339.
47. COM(97) 233 final.